

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF ALABAMA – SOUTHERN DIVISION

In re:

BIRMINGHAM COAL & COKE  
COMPANY, INC.,

Debtor.

CASE NO. 15-02075

(Jointly administered with Case Nos. 15-02077  
and 15-02078)<sup>1</sup>

CHAPTER 11

JUDGE TAMARA O. MITCHELL

**MOTION FOR ENTRY OF ORDER AUTHORIZING AND APPROVING THE SALE  
OF DEBTORS' EQUIPMENT, FREE AND CLEAR OF ALL LIENS, CLAIMS, AND  
ENCUMBRANCES OUTSIDE THE ORDINARY COURSE OF BUSINESS THROUGH  
HERITAGE REALTY & AUCTION CO., INC.**

COME now, through undersigned counsel, Birmingham Coal & Coke Company, Inc., Cahaba Contracting & Reclamation, and RAC Mining, LLC (collectively, the “**Debtors**”) as Debtors and Debtor-in-Possession, who file this *Motion For Entry Of Order Authorizing And Approving The Sale Of Debtors' Equipment Free And Clear Of All Liens, Claims, And Encumbrances Outside The Ordinary Course Of Business Through Heritage Realty & Auction Co., Inc.* (this “**Sale Motion**”). In support of the Sale Motion, the Debtors respectfully show the Court as follows:

**I. JURISDICTION AND VENUE**

1. The Court has jurisdiction to consider the Sale Motion pursuant to 28 U.S.C. §§ 157 and 1334. Venue of this proceeding and this Sale Motion is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).

2. The statutory predicate for the relief requested herein is section 363 of title 11 of the United States Code (the “**Bankruptcy Code**”).

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<sup>1</sup> The Debtor in Case No. 15-02077 is CAHABA CONTRACTING AND RECLAMATION, LLC and the Debtor in Case No. 15-02078 is RAC MINING, LLC.

{BH302243.1}

## II. FACTUAL BACKGROUND

3. On May 27, 2015, (the “Petition Date”), Birmingham Coal & Coke Company, Inc., (“BCC”), Cahaba Contracting and Reclamation, LLC (“CCR”), and RAC Mining, LLC (“RAC”), the debtors and debtors in possession (collectively, the “Debtors”) filed their voluntary petitions for relief under Chapter 11 of the Bankruptcy Code (collectively referred to as the “Chapter 11 Case”). The Debtors continue to operate their business and manage their property as debtors-in-possession pursuant to 11 U.S.C. §§ 1107 and 1108. An Official Committee of Unsecured Creditors has been appointed in this Chapter 11 Case.

4. The Debtors are coal mining companies with operations in northwest Alabama.

5. The Debtors have determined that it is in the best interest of the creditors and the estates to auction certain assets to purchasers presenting the highest and best offer at an auction. The Debtors have selected the firm of Heritage Realty & Auction Co., Inc. (“Heritage”) to conduct the auction (the “Auction”). As a result, the Debtors have sought Court approval for the engagement of the Heritage pursuant to the *Application to Employ Auctioneer* (“Application to Employ”), which is filed contemporaneously herewith and incorporated herein by reference.

6. Time is of the essence so the Debtors are seeking approval of the Sale Motion in conjunction with the Application to Employ. By seeking approval of the Application to Employ and the Sale Motion simultaneously, Heritage may begin any marketing and other necessary efforts to prepare the assets for sale.

### A. Assets to be Sold by Heritage.

7. The Debtors have determined that a sale of certain assets (hereinafter referred to as the “Equipment”) will maximize the value of the Debtors’ estates. The Debtors believe that the proposed Auction with Heritage will provide the greatest recovery to the estates and

creditors. A list of the Equipment to be sold by Heritage (the “**Equipment List**”) is contained in Exhibit “A,” attached hereto and incorporated herein by reference.

8. The Auction of the Equipment will be conducted at the discretion and under the sole authority of Heritage in consultation with the Debtors and the Unsecured Creditors Committee. The auction protocol, and certain practices and procedures are set forth in Heritage’s Standard Auction Agreement (“the **Auction Agreement**”) attached hereto as Exhibit “B” and incorporated herein by reference. The Auction will be held in Trussville, Alabama on or about September 10, 2016.

9. Under the terms of the Auction Agreement, Heritage (in consultation with the Debtors and the Unsecured Creditors Committee) will advertise the Equipment in accordance with Heritage’s normal practices, and as otherwise outlined in the Auction Agreement.

10. Heritage will supervise the preparation and organization of the Auction, provide auctioneers and accountants as required for an auction of this type, provide listing catalogs of the lots offered for sale to potential buyers, and provide suitable sites at which to conduct the Auction.

11. Heritage shall be paid a 10 percent (10%) commission based upon the gross sales proceeds of the sold assets. *See* Exh. B, ¶ 7.

12. The Debtors and Heritage have agreed that the Debtors shall be responsible for refurbishing the Equipment, prior to the Auction, to a standard acceptable to Heritage. Should Heritage organize and pay for the refurbishing of any part of the Equipment, Heritage shall be reimbursed for these costs, *provided* Heritage does not proceed with refurbishing without the Debtors’ authorization. Furthermore, the Debtors will reimburse Heritage for the cost of fuel and batteries as Heritage deems necessary for purposes of demonstration and sale of the Equipment.

13. The Equipment will be auctioned and sold to the buyer who presents the highest and best offer. The ultimate purchasers of the Equipment are currently unknown. The Equipment is to be sold and transferred to the buyer(s) presenting the highest and best offer pursuant to section 363 of the Bankruptcy Code, free and clear of all liens, claims, interests and encumbrances, subject to the approval of this Court.

14. At the conclusion of the Auction, Heritage shall execute settlements and, in consultation with the Debtors, prepare and/or execute appropriate bills of sale. Heritage shall collect sales proceeds and remit State and local taxes arising upon the sale of the Equipment at the Auction. Then, after deducting its share of the proceeds (consistent with the terms set out in the Auction Agreement), the remaining proceeds (the "Auction Proceeds") shall be placed with the Debtors' Counsel, Jones Walker, LLP, and held in trust for disbursement according to subsequent order of this Court. The Debtors will file a Motion to Authorize a Proposed Distribution of the Auction Proceeds within five (5) business days after the Auction Proceeds are received by Debtors' Counsel.

15. As stated previously, the Auction is in the best interest of all the creditors and all other parties-in-interest. Heritage is an appropriate auction firm to prepare, conduct and execute this Auction.

### **III. RELIEF REQUESTED**

16. The proposed Auction and sale of the Equipment is outside the scope of the Debtors' ordinary course of business and must be approved by this Court pursuant to section 363 of the Bankruptcy Code. The Debtors request the Court to approve the Application to Employ, as well as the Auction Agreement. The Debtors also request the Court to approve the ultimate sale of the Equipment to the purchaser(s) presenting the highest and best offer at the Auction for each piece of the Equipment.

17. The proposed sale(s) are to be free and clear of any pre- or post-petition liens, with any pre- or post-petition liens or priority claims to attach to the proceeds. For any pieces of the Equipment sold that are collateral to a secured creditor, those proceeds will ultimately be distributed to the respective secured creditor holding a lien on that piece of Equipment less any ad valorem personal property taxes related to that sale and less the expense reimbursement and commissions payable to Heritage. Any proceeds in excess of the statutory lien taxes, claims of secured creditors and commissions or expenses due to Heritage will be distributed to creditors pursuant to any subsequent order of this Court.

18. The Auction and sale of the Equipment is appropriate under 11 U.S.C. § 363.

#### **IV. LEGAL ARGUMENT AND AUTHORITY**

19. Section 363(b)(1) of the Bankruptcy Code provides that, “the Trustee,<sup>2</sup> 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); *see also* Fed. R. Bankr. P. 6004(f)(1) (“All sales not in the ordinary course of business may be by private sale or by public auction.”); *In re Continental Air Lines, Inc.*, 780 F.2d 1223 (5th Cir. 1986) (explaining “there must be some articulated business justification for using, selling, or leasing the property outside the ordinary course of business.”).

##### **A. Sale Of The Assets Outside The Ordinary Course Of Business**

20. Courts have broad discretion to authorize a sale or other disposition of assets under section 363(b) of the Bankruptcy Code. *In re Continental Air Lines, Inc.*, 780 F.2d 1223, 1226 (5th Cir. 1986); *Stephen Indus., Inc. v. McClung*, 789 F.2d 386, 388 (6th Cir. 1986)

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<sup>2</sup> *See In re Hughes*, 704 F.2d 820, 822 (5th Cir. 1983) (“A debtor-in-possession, in his capacity as such, occupies the shoes of a trustee in every way.”).

(authorization to sell or dispose of assets reviewed "under an abuse of discretion standard"). Courts in this circuit employ a flexible, case by case approach. *In re Baldwin United Corp.*, 43 B.R. 905 (Bankr. S.D. Ohio 1984). The key consideration is the court's finding that a "sound business purpose dictates such action." *Stephens Indus.*, 789 F.2d at 390

21. Courts have also required a debtor to establish the following additional elements to sell property outside the ordinary course of business: (a) adequate and reasonable notice has been provided to interested parties, 11 U.S.C. § 363(b); (b) the sale price is a fair and reasonable price, *Lounds v. Boyd (In re Lounds)*, 1998 U.S. Dist. LEXIS 10925 (W.D. Mi. 1998); *In re Lionel Corp.*, 722 F.2d 1063, 1071 (2nd Cir. 1983); *accord Stephens Indus.*, 789 F.2d at 389-90 (quoting and adopting as persuasive the reasoning of *In re Lionel*); and (c) the sale was negotiated in good faith, *In re Embrace Sys. Corp.*, 178 B.R. 112, 126 (Bankr. W.D. Mi. 1994). *Stephens Indus.*, 789 F.2d at 390; *see also 240 N. Brand Partners, Ltd. v. Colony GFP Partners, L. P. (In re 240 N. Brand Partners, Ltd)*, 200 B.R. 653, 659 (9th Cir. B.A.P. 1996) (considering the three factors above and whether a valid business justification exists for the sale).

22. As set forth herein, cause exists with respect to a sale of the Equipment described in the Sale Motion.

#### ***Sound Business Purpose Supports the Sale***

23. Under the circumstances, the proposed transactions through the Heritage auction on September 10, 2016, presents the highest recovery for the Equipment right now.

#### ***Adequate and Reasonable Notice Has Been Provided***

24. The Equipment will be marketed in a manner consistent with Heritage's requirements and recommendations for an auction of this size and scope. The Debtors submit that notice of the Auction will be adequate and proper.

***The Proposed Sale Is For A Reasonable Price***

25. The Equipment will be auctioned and sold to the buyer who offers the highest dollar bid for each piece of Equipment. The Debtors submit that the auction process and each sale is an arms' length negotiation.

***The Proposed Sale Was Negotiated In Good Faith***

26. The proposed sale of Equipment through the proposed auction process will be negotiated in good faith. Section 363(m) of the Bankruptcy Code provides:

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

27. Although the Bankruptcy Code does not define “good faith purchaser,” courts construing section 363(m) of the Bankruptcy Code have stated that “the phrase encompasses one who purchases in ‘good faith’ and for ‘value.’” *In re Abbotts Dairies of Pa., Inc.*, 788 F.2d 143, 147 (3d. Cir. 1986). To constitute lack of good faith, a court must find “fraud or collusion between the purchaser and the seller or the other bidders, or that the purchaser’s actions, constituted ‘an attempt to take grossly unfair advantage of other bidders.’” *255 Park Plaza Assocs. Ltd. P’shp. v. Conn. Gen. Life Ins.*, 100 F.3d 1214 (6th Cir. 1996) (citing *In re Onouli Kona Land Co.*, 846 F.2d 1170, 1173 (9th Cir. 1988)); *see also Miami Ctr. Ltd. P 'ship v. Bank of New York*, 838 F.2d 1547 (11th Cir. 1988). Due to the absence of a bright-line test for good faith, the determination is based on the facts of each case, concentrating on the “integrity of [an actor's] conduct during the sale proceedings.” *In re Pisces Leasing Corp.*, 66 B.R. 671, 673 (E.D.N. Y. 1986).

28. As required by section 363(m) of the Bankruptcy Code, each individual sale of the Equipment between the Debtors and the highest bidder, through the Heritage auction, represents good faith in negotiating each transaction. Each sale negotiated between the Debtors and the purchaser, with Heritage acting as broker, represents the highest and best offer for each piece of Equipment. Accordingly, the Debtors request the Court to find that the purchaser who presents the highest and best offer at the Auction for each piece of Equipment is entitled to the protections of section 363(m) of the Bankruptcy Code.

**B. Sale Of The Assets Free And Clear Of Liens, Claims And Encumbrances**

29. The Debtors propose to sell the Equipment pursuant to section 363(b) and (f) of the Bankruptcy Code which, among other things, authorizes a debtor to sell property outside of the ordinary course of business, free and clear of any interest, lien, claim, encumbrance or security interest of any other party, including, but not limited to, any administrative expense or priority claim asserted in this Chapter 11 Case (collectively, “**Liens**”). Specifically, section 363(f) of the Bankruptcy Code states:

The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if—

- (1) applicable nonbankruptcy 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); *see In re Elliot*, 94 B.R. 343, 345 (E.D. Pa. 1988) (section 363(f) written in disjunctive; court may approve sale “free and clear” provided at least one of the subsections is met); *In re Shary*, 152 B.R. 724, 725 (Bankr. N.D. Ohio 1993).

30. To the extent that any Liens relate to the Equipment pursuant to section 363(f) of the Bankruptcy Code, such assets should be sold free and clear of such Liens. Liens on the Equipment, if any, are capable of being satisfied by money, and should transfer and attach to the net proceeds of the Sale with the same validity, priority, force and effect that the Liens had on the Equipment immediately prior to the closing, subject to further order of this Court and subject to the rights and defenses, if any, of the Debtors and any other parties-in-interest with respect thereto.

31. The Sale satisfies the criterion set forth in section 363(f) of the Bankruptcy Code. The Debtor has provided notice of the Sale to all parties on the limited service list which includes all pre-petition secured creditors, the twenty (20) largest unsecured creditors, the United States Trustee, and those parties requesting notice and therefore all parties who could potentially assert Liens against the Assets. Any holder of an alleged Lien against the Assets could be compelled, in a legal or equitable proceeding, to accept a monetary satisfaction equal to the amount of their claim, or interests in, such assets.

32. Accordingly, the Debtors submit that the sale of the Equipment free and clear of any Liens satisfies the statutory prerequisites of section 363(f) of the Bankruptcy Code.

**V. WAIVE OR REDUCE FOURTEEN DAY STAY PERIODS UNDER RULES 6004(g) & 6006(d) OF FED. R. BANKR. P.**

33. Pursuant to Bankruptcy Rule 6004(g), unless the court orders otherwise, all orders authorizing the sale of property pursuant to section 363 of the Bankruptcy Code are automatically stayed for fourteen (14) days after entry of the order. The purpose of Bankruptcy

Rule 6004(g) is to provide sufficient time for an objecting party to request a stay pending appeal before the order can be implemented. *See* Advisory Comm. Notes to Fed. R. Bankr. P. 6004(g).

34. Although Bankruptcy Rule 6004(g) and the Advisory Committee Notes are silent as to when a court should “order otherwise” and waive or reduce the 14-day stay period *Collier on Bankruptcy* suggests that the 14-day<sup>3</sup> stay period should be eliminated to allow a sale or other transaction to close immediately “where there has been no objection to the procedure.” 10 *Collier on Bankruptcy* ¶ 6004.09 (15th ed. 1999). Furthermore, *Collier on Bankruptcy* provides that if an objection is filed and overruled, and the objecting party informs the court of its intent to appeal, the stay may be reduced to the amount of time necessary to file such appeal. *Id.*

35. To preserve the value of the Equipment and limit the costs of administering and preserving such assets, it is critical that the Debtor close the Sale of the Equipment as soon as possible. Accordingly, the Debtor hereby requests that the Court waive the 14 day stay periods under Bankruptcy Rules 6004(g) and 6006(d) or in the alternative, if an objection to the Sale or an assignment of a contract or lease is filed, reduce the stay period to the minimum time needed by the objecting party to file its appeal to allow the Sale to close.

36. Based upon the foregoing, the Debtors submit the relief requested herein is necessary and appropriate, is in the best interests of the Debtors and estates, and should be granted in all respects.

WHEREFORE, PREMISES CONSIDERED, the Debtors request approval to sell the Equipment through Heritage on or about September 10, 2016, outside the ordinary course of business under the foregoing terms of the Auction Agreement, to the purchaser of Equipment who presents the highest and best offer as required in section 363 and to authorize distribution of

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<sup>3</sup> Formerly ten-day stay.

certain of the proceeds of the transaction, and for such other relief as is appropriate.

Dated this 4th day of August, 2016.

Respectfully Submitted,

/s/ C. Ellis Brazeal III

C. Ellis Brazeal III

**OF COUNSEL:**

C. Ellis Brazeal III

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**ATTORNEYS FOR DEBTORS**

**CERTIFICATE OF SERVICE**

I hereby certify that on the 4th day of August, 2016, the foregoing was filed and served via the Court's electronic case filing and noticing system to all parties registered to receive electronic notice in this matter.

*/s/ C. Ellis Brazeal III*

\_\_\_\_\_  
OF COUNSEL

# Exhibit A

# Equipment List

CO

#	Make	Model	Year	Serial Number	Location	Condition
PU01	Ford	F250	2010	1FTSX2BR5AEA57018	Lynn	Inoperable
PU05	Chevrolet	CK25743	2003	1GCHK231X3F132875		
PU10	Ford	F250	2005	1FTSW21P25EA63495	Gooden Crk2	Inoperable
PU17	Ford	F250	2008	1FTSX21R28EB72168	Lynn	Inoperable
PU34	Chevrolet	Silverado	2014	1GCVKPEH8EZ314439		
RT39	Mack	600	1994	1M2B209C4RMO13769	Lynn	
RT42	Freightliner	1FU4	1999	1FUYDSEB1YLF56076	Posey Mill	
RT43	Mack	RD690S	2002	1M2P264CX2M034115	Posey Mill	
T02	Kenworth	T800	1992	1NKDLB9X7NJ581484	Old Union	
T03	Kenworth	W900B	2002	1NKWXBTX62J885567	Lynn - Landfill	
T05	Mack	R686ST	1988	1M2N179Y2JA009102	Gooden Crk2	needs mechanic
T16	International	Fuel Lube Truck	1978	DF277HHA11796	Gooden Crk2	needs mechanic
T17	Mack	Water Truck	1985	1M1AA13Y0SW054360	Knight	
T18	Volvo	WG64T	1998	4VGJDAMEXWN861211	Gooden Crk2	needs mechanic
T29	Chevrolet	C65	2007	1GBJ6C1347F410826	Lynn - Landfill	
T30	Chevrolet	Kodiak	2008	1GBE5C1958F402096	Lynn	
T37	Ford	DRW SUPER	2003	1FDAF56P73EC02972		
T6	Mack	R7W	1987	1M2AY09C0HM002308	Parted Out	
TR	ECON	24FT TRAILER	1992	42EDPH447N1000255	Lynn	
TR5	Winston	24 3 AXL TRAILER	2006	1W9AG29316H160152	Lynn - Landfill	
	Chevrolet	Tahoe	2007	1GNFK13037R408365	Birmingham	

# Exhibit B

**STANDARD AUCTION AGREEMENT**

This Agreement is made between Birmingham Coal & Coke Company Inc, Case#15-02075-TOM11 ("Seller"), and Heritage Realty & Auction Company, Inc., through their agent David Farmer, ("Liquidator"). Seller hereby employs Liquidator to act as his agent and grants an exclusive right to place signage on and an exclusive right to sell at Sealed Bid, Private Auction or Public Auction ("Sale") to the highest bidder the real and/or personal property ("Property") further described as see attached tentative list

Liquidator hereby agrees to use his professional skill, knowledge and experience to the best advantage of both parties in preparing for and conducting the Sale, but makes no representations or warranties regarding the outcome thereof.

**1. Seller and each person signing this Agreement on behalf of Seller warrant and represent that:**

- (A) Title to the Property to be turned over to Liquidator for sale is now, and at the time of sale will be, free, clear and unencumbered except to the extent disclosed to Liquidator herein.
- (B) Seller shall not sell, dispose of or otherwise withdraw from the Sale any part of the Property or refuse to submit said Property, or any part thereof.
- (C) Seller shall not interfere, prevent or prohibit Liquidator, in any manner, prior to or during the Sale, from carrying out his duties and obligations under this Agreement.
- (D) In the event the Property or the location thereof contains any kind of toxic waste in any form whatsoever, Liquidator shall not be responsible for its containment, storage or removal.
- (E) Each person signing this Agreement on behalf of Seller is duly authorized to do so and that if Seller is a corporation, this employment is authorized by Seller's Board of Directors and stockholders and certified resolutions to that effect will be delivered to Liquidator upon demand.
- (F) In the event the Seller breaches covenants contained herein, the Seller agrees to pay the Liquidator as liquidated damages, all advertising and other expenses incurred, and a commission of Ten Percent (10%) of the Current Market Value of said Property as of the date of this Agreement, as determined by a third party certified appraiser.
- (G) Seller agrees to indemnify, defend and save harmless, Liquidator from and against any and all claims, damages, losses, and action resulting from or arising out of the execution of this Agreement, except, however, such as may be caused by or arise out of the negligence or unauthorized acts of the Liquidator.
- (H) Liquidator assumes no responsibility for loss or damage due to fire, theft, accident, vandalism, or other cause. Seller agrees to maintain insurance for this purpose.

**2. Liquidator is Authorized:**

- (A) To accept, as Seller's agent, cash, checks or other forms of payment for the Property sold and to deposit said funds into the Liquidator's Escrow Account.
- (B) To sell the Property in such lots as Liquidator may determine.

**3. Sale Term:** The effective term for Sales held under this Agreement is 09/10/16 to 09/10/16. At Seller's sole expense, Seller shall place Liquidator in possession of and give reasonable access to all the Property by 08/01/16. If the place of the sale is Seller's place of business, residence or any portion thereof, Seller shall furnish to Liquidator, without charge, full use of the premises to (i) lot up and otherwise prepare the Property for sale, (ii) conduct the Sale, (iii) check out and deliver the Property to the Purchasers thereof, and (iv) for such other purposes which are incidental to the foregoing.

**4. "Absolute":** The Sale shall be an Absolute Sale also known as a Sale Without Reserve. The Property shall be sold to the highest bidder regardless of price. No minimums shall be set on any of the Property. Liquidator may not withdraw the Property from the Sale after the first bid has been received. Seller shall not bid at the Sale nor cause anyone to bid on Seller's behalf.

4. Seller Initials	

**5. Buyers' Premium:** Liquidator reserves the right to charge Purchasers ~~10~~ % Buyers' Premium on each item sold during the Sale. Said Buyer's Premium to be retained by the Liquidator.

**6. Advertising:** Unless otherwise agreed in writing, Liquidator is the only party authorized to advertise this Sale and Seller shall not place or arrange for any advertising without Liquidator's written approval.

**7. Commissions and Expenses:** Liquidator shall be entitled to a commission equivalent to 10 % of the gross proceeds of the Sale (whether Property is sold by Seller, Liquidator or anyone else during the Sale Term or if Liquidator provides a purchaser ready, willing and able to purchase the Property on the terms stated or on any other terms agreed on by Seller), the Buyer's Premium (if any) and to reimbursement for all marketing/sales expenses incurred by Liquidator in preparing for and conducting the Sale including, but not limited to, circulars/brochures, advertising, signage, and any additional costs incurred by the Liquidator on behalf of the Seller in connection with this Agreement. Said marketing/sales expenses are estimated at \$ tbd , \$ 0.00 of which is to be paid in advance and submitted with this Agreement. Liquidator shall also be entitled to reimbursement for all repair/maintenance expenses incurred by the Liquidator on behalf of the Seller. These marketing/sales expenses and repair/maintenance expenses shall not effect the amount of the gross proceeds on which the Liquidator's commission is based. Liquidator is authorized to deduct his commission from the gross proceeds of the Sale before deducting for the aforementioned and other related expenses. Liquidator may deduct from the proceeds of the Sale all funds due him from the terms of this Agreement (including, but not limited to, his commissions, expenses and advances) and all funds required to satisfy the demands of any party claiming a security interest, lien or encumbrance against the Property or the proceeds thereof. It is further agreed by and between the parties to this Agreement that the Liquidator's commission and aforementioned expenses shall be deducted from the proceeds of the Sale and paid to the Liquidator before the payment or satisfaction of any security interest, lien or encumbrance against the Property or the proceeds thereof. If no Sale proceeds are realized, then Seller agrees to pay all said expenses in full within 10 days of invoicing. Liquidator may require a personal or third party guarantee of said expenses.

**8. Final Settlement:** Within thirty (30) days following the completion of the Sale, Liquidator shall transmit to Seller a full accounting of the Sale and all the disbursements and expenses associated therewith, as well as payment for the net proceeds of the Sale.

**9. Security Interest:** Seller grants to Liquidator a security interest in the Property and the proceeds thereof to secure performance of all of Seller's obligations under this Agreement as well as any and all obligations that may now or hereafter be owing by Seller to Liquidator. Liquidator shall have all of the rights and remedies of a secured party in possession of the collateral under the Uniform Commercial Code and other provisions of Alabama law (if applicable) and Seller shall, at Liquidator's request, execute and deliver a financing statement to Liquidator.

**10. Risk of Loss:** Seller shall carry and maintain full fire, extended coverage, vandalism, burglary, theft and liability insurance on the Property until the Property is removed from the premises of the Sale by the Purchasers or until deed is delivered. Seller hereby waives any rights of subrogation against the Liquidator with respect to any of the above mentioned risks.

**11. Additional Provisions** are set forth as follows and are hereby made a part of this Agreement: \_\_\_\_\_  
This agreement is executed subject to Bankruptcy Court approval.

**12. Entire Agreement:** This Agreement contains the entire agreement of the parties relating to the rights granted and the obligations assumed in this instrument. Any oral representations or modifications concerning this Agreement shall be of no force or effect unless contained in a subsequent written modification signed by the party to be charged. Where the meaning of a word in this Agreement so dictates, all references to the plural shall include the singular, all references to any particular gender shall include either or both genders as well as the neuter. This Agreement is entered into in the State of Alabama and shall be construed and interpreted under and in accordance with the laws of the State of Alabama. If suit is instituted against any party hereto for any cause or matter arising from or in connection with any rights or obligations of the parties under this Agreement, the sole jurisdiction and venue for such action shall be in the Superior or Municipal Court of the State of Alabama in and for the County of Jefferson and the prevailing party shall be entitled to recover reasonable attorney's fees.

**This is intended to be a legally binding contract. If you do not understand the legal effect of any part of this contract, seek legal advice before signing.**

  
Liquidator 7/27/16  
(DATE)

\_\_\_\_\_  
Seller (DATE)  
\_\_\_\_\_  
Seller (DATE)

## Brazeal, Ellis

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**From:** Heritage Realty & Auction Co Inc <info@heritagesales.com>  
**Sent:** Wednesday, August 03, 2016 3:14 PM  
**To:** Brazeal, Ellis  
**Cc:** dfarmer@heritagesales.com  
**Subject:** RE: Heritage auction of Birmingham Coal equipment

Everything looks good. Please go ahead and get all filed. Also please submit location addresses and contact people/phone #s so that we can start getting everything rounded up ASAP. Thanks!

Kimberly Battles  
[info@heritagesales.com](mailto:info@heritagesales.com)

Heritage Group Inc  
Heritage Realty & Auction Co Inc  
6877 Gadsden Hwy, Trussville, AL 35173  
Phone: 800.445.4608 or 205.661.0600  
Fax: 205.661.0800  
[www.HeritageSales.com](http://www.HeritageSales.com)

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**From:** Brazeal, Ellis [<mailto:ebrazeal@joneswalker.com>]  
**Sent:** Wednesday, August 03, 2016 2:26 PM  
**To:** [dfarmer@heritagesales.com](mailto:dfarmer@heritagesales.com)  
**Cc:** [info@heritagesales.com](mailto:info@heritagesales.com); Marty Franklin; Eric Hallmark ([ehallmarkcpa@gmail.com](mailto:ehallmarkcpa@gmail.com))  
**Subject:** Heritage auction of Birmingham Coal equipment

David:

Thanks for helping us get this equipment sold. Attached hereto is a list of the equipment to be sold. I've also attached the draft Motion to Sell, along with the draft Application to Employ Auctioneer, and an Affidavit for Heritage.

The Heritage Standard Auction Agreement provides for a 10% Commission, but it also provides for a 10% Buyer's Premium. I don't think I can recommend that Heritage be paid both. So, I've just included the 10% Commission. In other words, Heritage would be paid the 10% Commission, but not the 10% Buyer's Premium.

If Heritage wants the Buyer's Premium as well, please email me and call to discuss.

Let me know if you have any edits to the motions, and I will get them filed today, along with Motions to Expedite.

Regards, Ellis.



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