

1 **HEFNER, STARK & MAROIS, LLP**
 2 Howard S. Nevins (CA BAR ASSN No. 119366)
 3 Aaron A. Avery (CA BAR ASSN No. 245448)
 4 2150 River Plaza Drive, Suite 450
 5 Sacramento, CA 95833-4136
 6 Telephone: (916) 925-6620
 7 Fax No: (916) 925-1127
 8 Email: hnevins@hsmlaw.com

9 Attorneys for
 10 IRMA C. EDMONDS,
 11 Chapter 11 Trustee

12 **UNITED STATES BANKRUPTCY COURT**
 13 **EASTERN DISTRICT OF CALIFORNIA**
 14 **(Modesto Division)**

15 In re
 16 ELENA DELGADILLO,
 17 Debtor.

18 Case No.: 16-90500-E-11
 19 DC No.: HSM-015
 20 Date: September 28, 2017
 21 Time: 10:30 a.m.
 22 Place: 1200 I Street, Suite 4
 23 Modesto, CA
 24 Judge: Hon. Ronald H. Sargis

25 **TRUSTEE'S MOTION FOR APPROVAL OF SALE OF REAL PROPERTY**
 26 **FREE AND CLEAR OF LIENS, AND TO PAY EXPENSES OF SALE,**
 27 **INCLUDING COMMISSION TO REAL ESTATE AGENT**
 28 **(5319 Bancroft Avenue, Oakland, CA 94601)**

IRMA C. EDMONDS, the duly appointed Chapter 11 Trustee in the pending bankruptcy case of ELENA DELGADILLO (the "Debtor"), Case No. 16-90500-E-11, through her counsel, Hefner, Stark & Marois, LLP ("Counsel"), files this Motion for Approval of Sale of Real Property Free and Clear of Liens, and to Pay Expenses of Sale, Including Commission to Real Estate Agent (the "Motion"), as follows:

1. This case was filed as a voluntary Chapter 11 case on June 9, 2016. The Trustee was appointed Chapter 11 Trustee by order dated on December 21, 2016, and presently serves in that capacity.

2. Jurisdiction for the filing of this Motion exists pursuant to 28 U.S.C. §§ 157 and 1334, 11 U.S.C. §§ 363(f) and 503(b), and the reference to this Court by the District

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1 Court for the Eastern District of California.

2 3. One of the assets of the Estate, and the property that is the subject of this
3 Motion, consists of the Estate's right, title, and interest in and to certain residential real
4 property commonly known as 5319 Bancroft Avenue, Oakland, CA 94601, APN No.
5 40784974 (the "Property").

6 4. After the Trustee's appointment in this case, and based on her investigation
7 of the Property, the Trustee elected to employ Coldwell Banker Residential Brokerage
8 ("Coldwell" or "Firm"), a real estate brokerage firm, and specifically Stephanie Davis of said
9 firm, as her real estate agent (collectively, "Agent"). An application requesting court
10 approval of the employment of the Broker/Agent on behalf of the Estate was filed on
11 May 24, 2017, and the employment was approved by order filed May 27, 2017.

12 5. Pursuant to the efforts of the Agent, the Trustee received an offer to
13 purchase the Property from Thayer Dawson ("Buyer"), subject to court approval and
14 overbidding. The Trustee accepted the offer from the Buyer. The parties' agreement is
15 evidenced by that certain Residential Income Property Purchase Agreement and Joint
16 Escrow Instructions and Addendum No.1 thereto, and Seller Counter Offer No. 1,
17 (collectively, the "Purchase Agreement"). A true and correct copy of the Purchase
18 Agreement is attached as Exhibit "A" to the Exhibits Cover Sheet filed and served with this
19 Motion. The terms of the Purchase Agreement are summarized below.

20 **Relief Requested**

21 6. This Motion seeks approval from the court authorizing the Trustee to:
22 (i) enter into the Purchase Agreement and sell the Property pursuant to the terms thereof,
23 free and clear of liens; (ii) pay the commission to Agent consistent with the approved listing
24 agreement, if the proposed sale is approved and consummated with the proposed Buyer
25 or any successful Qualified Overbidder (as described in the overbidding process below);
26 (iii) pay other customary expenses of closing associated with this sale, including pro rated
27 taxes owing upon the sale; (iv) to retain the sum of \$77,000.00 for the payment of
28 anticipated taxes that may be owed by the estate upon the sale of the Property; (v) pay the

1 residual of the net sale proceeds due to the estate at close of escrow to Sacramento
2 Lopez ("Mr. Lopez"), the holder of a lien arising from an abstract of judgment recorded
3 against the Property (among other properties); and (vi) execute and deliver any other
4 documents and take such other actions as are reasonably required to consummate the
5 proposed sale.

6 Purchase Agreement

7 7. The material terms of the Purchase Agreement are as follows:

8 a. The Purchase Price for the Property is \$370,000.00 ("Purchase Price"
9 or "Sales Proceeds");

10 b. Buyer has deposited the sum of \$6,000.00 (the "Deposit") into escrow.
11 The Deposit is creditable against the Purchase Price and is non-refundable after
12 satisfaction of all of Buyer's conditions to closing, subject to Seller obtaining court approval
13 of this Agreement. If Buyer fails to close the purchase due to default by Buyer, the Deposit
14 shall be non-refundable and shall be retained by the Trustee as liquidated damages for
15 such breach;

16 c. The proposed sale of the Property and the Purchase Agreement are
17 subject to Bankruptcy Court approval through the granting of this Motion;

18 d. Buyer will pay the Purchase Price and close escrow on or before
19 15 days after the filing of the court's order approving this Motion (the "Closing Date").
20 Furthermore, Buyer will pay its allocated costs of the sale, pursuant to the Purchase
21 Agreement, on the Closing Date.

22 e. Seller shall pay its allocated costs of the sale, pursuant to the
23 Purchase Agreement, on the Closing Date.

24 f. Seller shall pay her prorated share of real property taxes and
25 assessments secured against the Property (including the costs to cure any delinquencies
26 related thereto) and utilities related to the Property.

27 g. Seller shall retain a reserve for, or agree to withholding from the sale
28 proceeds, any amounts required to be paid or withheld for state or federal taxes arising

1 from the sale, with such funds being free and clear of liens following the closing of the sale.

2 h. Buyer's obligation to purchase the Property is contingent upon:
3 (1) Buyer's review and approval of title to the Property and of the condition of the Property,
4 and (2) the Buyer obtaining a loan in the amount of \$339,500.00, at an interest rate not to
5 exceed six percent (6%) from an FHA lender to finance the portion of the Purchase Price
6 not being paid in cash. The respective contingency periods are set forth in the Purchase
7 Agreement, with the longest period related to financing requiring satisfaction within twenty-
8 one (21) days after full execution of the Purchase Agreement.

9 i. Buyer shall purchase the Property with tenants in place.

10 j. Buyer will assume EBMUD sewer lateral compliance fees.

11 k. Buyer shall have seventeen (17) days from acceptance of the
12 Purchase Agreement within which to complete all of its investigations and either waive all
13 contingencies or cancel the Purchase Agreement.

14 l. Buyer will acquire the Property in its "AS IS," "WHERE IS," "WITH ALL
15 FAULTS" condition. Trustee is making no representations or warranties, directly or
16 indirectly, with respect to the condition or history of the Property and has no duty to inquire
17 or investigate or provide any disclosures related to the Property. Buyer shall rely solely on
18 its own investigation of the Property in the decision to acquire the Property;

19 m. Title to the Property shall be subject to all liens or encumbrances for
20 real property taxes and/or assessments which are not delinquent as of the close of escrow.

21 n. From the sale proceeds, the Trustee intends to pay at Closing to
22 Sacramento Lopez, a secured creditor with a lien on the Property arising from the
23 recordation of an abstract of judgment, the residual Seller funds after payment of all of the
24 foregoing (Seller closing costs, the broker commission, pro rated taxes and assessments,
25 payment or reserve for taxes arising from the sale, etc.), with Mr. Lopez's lien attaching
26 only to such residual sale proceeds until paid. Other than the Lopez lien, Trustee is not
27 aware of any other secured interests against the Property. If any other monetary liens are
28 discovered to exist against the Property, delivery of title free and clear of such other

1 monetary liens may require the cooperation and consent of any lien holders.

2 o. The Trustee, on behalf of the Estate, will cause this Motion and all
3 papers related thereto to be filed for a hearing on this Motion as soon as possible; and

4 p. The proposed sale to Buyer is subject to overbidding at the hearing on
5 this Motion. If no overbids for the Property are made, or if the Buyer is the highest bidder
6 for the Property at the hearing on the Motion, the Deposit shall be applied to the Purchase
7 Price or the highest price bid by Buyer at the hearing on the Motion, whichever is greater.
8 If a Qualified Overbidder outbids Buyer, Buyer shall remain obligated to buy the Property
9 at the Purchase Price or its highest bid, if the overbidder fails to close and Buyer is the
10 next highest bidder on the Property. If a Qualified Overbidder outbids Buyer and closes
11 its purchase of the Property, then the Purchase Agreement shall terminate and the Deposit
12 shall be returned to Buyer.

13 Fair Price for Property

14 8. The Trustee has concluded that the Purchase Price of \$370,000.00 is a fair
15 and reasonable price for the Property. This conclusion is based primarily on the Trustee's
16 review with her Agent of property values for similarly situated properties in the area, and
17 the results of the Agent's marketing of the Property to date. The Trustee notes that the
18 Property was initially listed at \$400,000.00, and that a purchase agreement was previously
19 entered into between the Trustee and another party for the sale of the Property at a
20 purchase price of \$390,000.00. However, that sale fell through due to a negative pest
21 control report highlighting corrective work of approximately \$20,000.00 to perform. The
22 Purchase Price of \$370,000.00 proposed in this Motion reflects the cost of such corrective
23 work.

24 9. In light of (i) the apparent value and condition of the Property; and (ii) Buyer's
25 willingness to accept the Property "as is," without warranties, etc., the Trustee has
26 concluded that the Purchase Price of \$370,000.00, and the other terms of the sale, are fair
27 and reasonable and in the best interests of the estate and its creditors. The overbidding
28 aspect of this Motion is designed to elicit higher offers from interested parties.

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1 **Anticipated Tax Consequences from the Sale**
 2 10. The Trustee has determined, after consulting with the estate's CPA herein,
 3 that the estate will incur federal and state tax liability on the proposed sale. The precise
 4 amount of that liability cannot presently be determined due to certain variables being either
 5 unknown or changeable. Among these is the possibility that the federal and/or state tax
 6 laws may change while this case proceeds. Moreover, the amount of the administrative
 7 expenses in this case is not yet known. In addition to certain assumptions in those
 8 respects, the Trustee and her CPA have also been required to assume certain facts as to
 9 the Debtor's initial purchase of the Property and her activities thereon since that date.
 10 Based on the CPA's assumptions, however, the Trustee believes the taxes on the
 11 proposed sale will not exceed \$77,000.00 (federal and state combined). Should the
 12 purchase price increase through overbidding, the Trustee proposes to reserve an
 13 additional 30% of the incremental overbid.

14 **Anticipated Net Proceeds to Estate from Proposed Sale**
 15 11. While the proposed sale will not generate funds in excess of the total of the
 16 outstanding secured real property taxes, closing costs, commission, the taxes arising from
 17 the sale, and the sizable Lopez lien, the sale will result in the further substantial pay-down
 18 of the Lopez claim. Payment of these sums, especially partial pay-down on the Lopez lien,
 19 will move the Trustee one step closer to concluding her administration in this case.
 20 Accordingly, the estate and its creditors will be well served by the proposed sale.

21 **Sale Free and Clear of the Lopez Lien Based on Consent**
 22 12. As noted above, the Trustee seeks an order authorizing the sale of the
 23 Property free and clear of the lien of Sacramento Lopez, based on Mr. Lopez's consent.
 24 The Trustee anticipates that Mr. Lopez will express that consent through a prompt filing
 25 with this court following his review of this Motion and related papers, to the effect that
 26 Mr. Lopez's lien shall attach solely to the residual net sale proceeds due to him at Closing,
 27 and not to the \$77,000.00 tax reserve proposed to be retained by the Trustee following
 28 close of escrow. Alternatively, Mr. Lopez may indicate such consent at the hearing as he

1 did through counsel in connection with the Trustee's sale motion designated HSM-010.
2 The Trustee's Memorandum accompanying this Motion further addresses this issue.

3 **Proposed Terms for Overbidding**

4 13. The Trustee proposes that any persons or entities wishing to bid on the
5 Property be required to first become a qualified overbidder (a "Qualified Overbidder") in the
6 manner set forth below, prior to the commencement of the hearing on the Motion.

7 14. Any person or entity wishing to become a Qualified Overbidder must deliver
8 to the Trustee a non-refundable deposit in the amount of \$6,000.00 (the "Overbidder
9 Deposit"), in the form of a cashier's check or money order made payable to Irma C.
10 Edmonds, Chapter 11 Trustee of the Elena Delgadillo Bankruptcy Estate," which will be
11 applied to the purchase price for the Property if the Qualified Overbidder is the successful
12 purchaser following the hearing on the Motion, and demonstrate to the Trustee the ability
13 to close escrow within fifteen (15) calendar days of the court's order approving this Motion.
14 Such financial showing shall include, without limitation, either overbidder qualification for
15 financing acceptable to Trustee and sufficient to pay the Purchase Price for the Property,
16 or proof of the ability of the overbidder to fund payment of the Purchase Price in cash. The
17 Overbidder Deposit and showing of financial ability to perform shall be delivered to the
18 Trustee no later than the commencement of the hearing on this Motion.

19 15. Prior to the hearing, a Qualified Overbidder may obtain permission from the
20 Trustee to inspect the Property in order to investigate the Property and waive all
21 contingencies to its purchase thereof, including property and title review and approval.
22 Any such inspection shall be subject to the Qualified Overbidder (i) delivering the Deposit
23 and showing of financial ability to perform as provided above and (ii) executing a form of
24 purchase and sale agreement on the same terms as Purchase Agreement entered into by
25 Buyer. By submitting an overbid at the sale hearing, any Qualified Overbidder shall be
26 deemed to have conclusively waived any and all contingencies to the purchase of the
27 Property, except for court approval of the sale to such Qualified Overbidder as the highest
28 bidder thereon.

1 16. If a Qualified Overbidder is not successful at the hearing, the Overbidder
 2 Deposit shall be returned to such Qualified Overbidder upon the entry of the order
 3 confirming the successful bidder for the Property. If a Qualified Overbidder is approved as
 4 the high bidder but fails to consummate the sale or otherwise breaches its covenants to
 5 the Trustee and the estate, its Overbidder Deposit shall be retained and administered as
 6 an asset of the estate.

7 17. The Trustee proposes that the initial overbid be \$372,000.00 and subsequent
 8 overbids, if any, be in increments of not less than \$1,000.00. The high bidder must
 9 purchase the Property on terms identical to, or more favorable than those set forth in the
 10 Purchase Agreement, subject to any modifications ordered by the court, and with all
 11 contingencies to such purchase in the Purchase Agreement deemed waived by the bidder
 12 due to its election to participate in the auction thereon. If the Buyer is the high bidder, it
 13 shall pay the greater of its high bid or \$370,000.00 for the Property. In the event a
 14 Qualified Overbidder outbids the Buyer, Buyer’s offer to purchase the Property pursuant to
 15 the terms of the Purchase Agreement shall be maintained, for a period of 30 days after the
 16 conclusion of the hearing on this Motion, as a back-up offer (with the Purchase Price
 17 based on the highest bid made by Buyer at the hearing on the Motion). Any such back-up
 18 offer shall become effective upon the overbidder’s failure to close in accordance with the
 19 terms of the Purchase Agreement, as may be modified by the court, so long as Buyer’s
 20 Purchase Price is the next highest bid for the Property. In any event, the Purchase
 21 Agreement shall terminate and the Deposit shall be returned to Buyer upon close of
 22 escrow for the sale of the Property by any successful Qualified Overbidder.

23 **Authorization to Pay Commission to Agent**

24 18. The Trustee required the professional services of Agent to act as the estate's
 25 agent to market and sell the Property. By separate application, the Trustee sought
 26 approval by the Court to employ the Agent on behalf of the estate pursuant to the terms of
 27 a listing agreement filed therewith (the "Listing Agreement").

28 19. The Listing Agreement provides for the Agent to receive a commission of six

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1 percent (6%) of the sales price of the Property. Based on her experience as a trustee in
2 this district, the Trustee believes such a commission is within the range of customary and
3 reasonable fees charged and paid in the area for professional brokerage services in
4 connection with residential real estate such as the Property. In consideration of the
5 Agent's efforts to market the Property and obtain Buyer's offer to purchase the Property,
6 and consistent with the terms of the court-approved Listing Agreement, the Trustee seeks
7 authorization to pay the commission to Agent, upon closing of escrow, from the sales
8 proceeds.

9 20. The Trustee is informed and believes that Agent is disinterested within the
10 meaning of the Bankruptcy Code for purposes of this engagement. In particular, as
11 described in the Purchase Agreement, the Agent represents only the Trustee in this
12 transaction and the Buyer is represented by another agent, Jaynelle Belle of Watermark
13 Properties. The Trustee understands that, if payment of the commission to the Agent is
14 approved by the court, the Agent will be sharing half of the commission with Ms. Jordan at
15 closing as a cooperating agent on this transaction.

16 21. The Trustee believes that Agent has carried and continues to carry out her
17 responsibilities under the Listing Agreement, that the payment of the commission is for
18 reasonable services, necessarily incurred for the benefit of the estate, and that the
19 commission should be paid from escrow pursuant to the Listing Agreement, on a final
20 basis.

21 **WHEREFORE**, the Trustee respectfully requests the court enter an order
22 authorizing her to: (1) sell the Property to the Buyer on the terms and conditions set forth
23 above and in the Purchase Agreement, or alternatively to the successful Qualified
24 Overbidder at the hearing on the Motion on the terms set forth in the Purchase Agreement
25 and subject to any modifications ordered by the court; (2) sell the Property on an "as is"
26 "where is" "with all faults" basis, with no representations or warranties, express or implied,
27 with respect to the Property; (3) pay the commission to Broker / Agent required under the
28 Listing Agreement approved by separate motion upon the closing of the sale of the

1 Property; (4) pay the reasonable and necessary costs and expenses of closing through
 2 escrow, including the estate's pro-rata share of real property taxes and assessments
 3 secured against the Property and the amount of all delinquent taxes secured against the
 4 Property, upon the closing of the sale from the sale proceeds thereof; (5) pay at Closing to
 5 Sacramento Lopez, on account of his abstract of judgment lien, the residual Seller funds
 6 after payment of all required Seller closing costs, the broker commission, pro rated taxes
 7 and assessments, and the \$77,000.00 reserve for taxes arising from the sale, with
 8 Mr. Lopez's lien attaching only to such residual sale proceeds until paid; and (6) sign any
 9 and all documents that may be appropriate and/or necessary to consummate the sale.

10 Dated: August 24, 2017

HEFNER, STARK & MAROIS, LLP

11
12 By



Howard S. Nevins, Attorneys for
IRMA C. EDMONDS, Chapter 11 Trustee

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