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7 **UNITED STATES BANKRUPTCY COURT**  
8 **CENTRAL DISTRICT OF CALIFORNIA**  
9 **LOS ANGELES DIVISION**

10 In re

11 STEINY AND COMPANY, INC.,

12 Debtor in Possession.

Case No. 2:16-bk-25619-WB

Chapter 11

**MOTION FOR ENTRY OF ORDER:**

- 13 (I) **AUTHORIZING DEBTOR TO SELL**  
**ASSETS FREE AND CLEAR OF LIENS,**  
**CLAIMS, ENCUMBRANCES AND**  
**INTERESTS;**  
14 (II) **AUTHORIZING ASSUMPTION AND**  
**ASSIGNMENT OF CERTAIN UNEXPIRED**  
**LEASES AND EXECUTORY**  
**CONTRACTS;**  
15 (III) **AUTHORIZING REJECTION OF**  
**CERTAIN EXECUTORY CONTRACTS**  
**AND UNEXPIRED LEASES;**  
16 (IV) **ESTABLISHING BIDDING PROCEDURES**  
**AND APPROVING BREAKUP FEE;**  
17 (V) **GRANTING OTHER AND FURTHER**  
**RELIEF; AND**  
18 **MEMORANDUM OF POINTS AND**  
**AUTHORITIES IN SUPPORT THEREOF**  
19

20 [The Declarations of Susan Steiny, Daniel S. Conway  
21 Jacqueline L. James and Daniel Zupp have been filed  
22 concurrently herewith.]  
23

24 Hearing:

25 Date: May 11, 2017  
26 Time: 10:00 a.m.  
27 Place: Courtroom 1375  
28 255 E. Temple Street  
Los Angeles, CA

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1 Pursuant to 11 U.S.C. §§ 363 and 365, Rules 6004 and 6006 of the Federal Rules of  
2 Bankruptcy Procedure (the “Bankruptcy Rules”), and Local Bankruptcy Rules 6004-1(f), 9013-  
3 1, and the other Bankruptcy Code sections, Bankruptcy Rules and Local Bankruptcy Rules set  
4 forth below, Steiny and Company, Inc. (the “Debtor” and “Seller”), hereby file this motion (the  
5 “Motion” or the “Sale Motion”) seeking the entry of an order of the Court approving the  
6 Debtor’s sale of many of the Debtor’s assets to GA Abell, Inc. dba Precision Electric Company,  
7 a California corporation or a designee (“Buyer”), in accordance with the terms of the “*Asset*  
8 *Purchase Agreement*” (the “APA”)<sup>1</sup> entered into by and between the Debtor/Seller and Buyer, a  
9 copy of which is attached as **Exhibit 1** to the Declaration of Susan Steiny filed concurrently  
10 herewith (the “Steiny Declaration”) and incorporated herein by reference and certain other  
11 related relief. By way of this Motion, the Debtor is also seeking the Court’s approval of the  
12 Debtor’s assumption and assignment to Buyer of the unexpired leases and executory contracts  
13 that Buyer will assume pursuant to the terms of the APA (defined in the APA as the “Assigned  
14 Contracts”) which the Debtor anticipates will include 45 of the Debtor’s non-bonded contracts  
15 with its clients. The Motion seeks court approval of the proposed sale (the “Sale”) to Buyer or to  
16 such qualified and successful overbidder as may be determined at the auction and sale hearing to  
17 take place before the Court and of bidding procedures and of a breakup fee in connection with  
18 potential overbidding, of the payment of its investment banker’s fee and of other relief specified  
19 below and in the attached Memorandum of Points and Authorities (the “Memorandum”).

20 The Debtor is a privately-held electrical contracting and engineering company with  
21 commercial, mass transit, industrial, traffic signal, control and lighting divisions. Since the  
22 business was established over sixty years ago, the Debtor has worked with some of the most  
23 influential builders, developers and owners in the industry, many of whose jobs are now  
24 venerable landmarks in California, including the ARCO Sports Arena in Sacramento, the San  
25 Francisco Airport Airtrain, the Bay Area Rapid Transit System (“BART”), the Red, Blue, and  
26 Gold Line of Metropolitan Transportation Authority (“MTA”) in Los Angeles, Disneyland and  
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28 <sup>1</sup> All capitalized terms not defined herein shall have the same meanings afforded to them as in the APA.

1 the Getty Museum, to name a few. The Debtor's construction staff is one of the most  
2 experienced and highly trained in the industry. The Debtor has approximately 100 current  
3 clients.

4 After suffering intense cash flow problems perpetuation due to overly-aggressive collection  
5 practices by the Debtor's largest unions and/or trust funds, the Debtor filed for Chapter 11  
6 bankruptcy relief on November 28, 2017. However, it soon became apparent that due to the  
7 deterioration in its relationship with its largest unions and/or trust funds, the Debtor would have to  
8 sell its business or cease its operations entirely. Shortly after the bankruptcy case was filed, in  
9 early December 2016, the Debtor engaged Consortium Finance Securities, LLC ("Consortium")  
10 and Craft Partners, LLC ("Craft" together with Consortium are referred to herein as the  
11 "Investment Banker") as its financial advisors and investment banker to seek a buyer for the  
12 Debtor's assets. The Investment Banker aggressively assisted the Debtor in locating opportunities  
13 in order to consummate such a transaction. The Debtor's assets were aggressively marketed for  
14 sale for approximately four months as detailed in the Declaration of Daniel S. Conway (the  
15 "Conway Declaration"). Thus, the Debtor believes that the Debtor's assets to be sold have been  
16 adequately marketed for sale and that the purchase price offered by Buyer represents a fair and  
17 reasonable offer to purchase the assets to be sold under the circumstances of this Chapter 11  
18 case.

19 The APA was the result of extensive negotiations between the Debtor and Buyer. Under  
20 the APA, Buyer has agreed to purchase, among other things: (i) all of the Debtor's executory  
21 contracts and unexpired leased that the Buyer elects to have assigned it by the Debtor subject to  
22 the terms of the APA (the "Assigned Contracts"), but which is currently expected to consist of  
23 45 of the Debtor's non-bonded contracts with its clients and several other types of executory  
24 contracts and unexpired leases, including certain vehicle and equipment leases, (ii) all accounts  
25 receivable related to the Assigned Contracts or other rights to receive payment for services or  
26 products provided by Seller in connection with the Assigned Contracts as of the Closing Date;  
27 (iii) all machinery, plant, vehicles, small tools, equipment, computers, inventory, spare parts,  
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1 fittings, supplies and other tangible personal property of the Debtor; (iv) all of the Debtor's  
2 names, including the name "Steiny and Company",<sup>2</sup> and all trademarks; (v) all of the Debtor's  
3 "Intellectual Property Rights" (as defined in the APA); (vi) all rights under "Governmental  
4 Authorizations, Licenses & Permits" (as defined in the APA); (v) all goodwill; (vii) all operating  
5 data, books and records, including customer lists and information relating to customers and  
6 suppliers; (viii) all other assets, whether tangible or intangible, that are or ever have been used by  
7 Seller in its businesses excluding the Excluded Assets (described below) for the cash purchase  
8 price of \$1.45 million plus the assumption of liability under the Assigned Contracts of  
9 approximately \$1 million.. The assets of the Debtor to be purchased by Buyer are defined as the  
10 "Acquired Assets" and are identified in Section 2.1(e) of the APA. The assets that are excluded  
11 from the proposed sale are referred to in the APA as "Excluded Assets" and are defined in  
12 Section 2.1 (f) of the APA. Buyer will acquire the Acquired Assets "as is," "where is" and "with  
13 all faults" and without any representation or warranty expressed or implied relating to the  
14 condition or value of the Acquired Assets. The sale is also not subject to a financing  
15 contingency. The Debtor urges all parties in interest to read the entire APA and its schedules for  
16 a more complete description of the details of the proposed sale transaction to Buyer.

17 The Debtor is experiencing severe cash flow issues, and as a result, does not have the  
18 ability to continue with the operation of its business over any long-term time span. The Debtor  
19 believes that an expedited sale is in the overwhelming best interests of its creditors and estate.  
20 The failure of the Debtor to consummate an expedited sale of its assets will ultimately result in  
21 the closure of the Debtor's business, which will result in a substantially worse outcome for the  
22 Debtor's creditors and estate than a going concern sale of the Debtor's business, the loss of  
23 employment (with no quick foreseeable replacement employment) for all of the Debtors'  
24 employees, and the negative effect that a forced shut down would have on the Debtor's clients  
25 with open projects.

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28 <sup>2</sup> By this Motion, Steiny also seeks authority to file amendments to its organizational documents and/or to execute whatever other documentation is necessary in order to change its name in order to allow the Buyer to commence using it.

1           The Debtor’s business and its assets have been marketed for sale for a very reasonable  
2 amount of time under the circumstances. Buyer has offered the highest and best consideration to  
3 date for the Debtor’s assets. The proposed sale will be subject to overbidding so that a true  
4 market price can be determined. The Debtor believes that the bidding procedures and the  
5 breakup fee that it have been proposed herein in the event of overbidding are reasonable. Buyer  
6 is an independent third-party buyer with no connection to the Debtor or to any insiders or  
7 affiliates of the Debtor. The Debtor believes that the Buyer is well-qualified and has the  
8 financial wherewithal to consummate the transaction and satisfy the “Post-Closing Contract  
9 Obligations” as described in Section 2.2(a) of the APA. The Debtor will not disburse any of the  
10 sale proceeds other than as requested herein and in accordance with other orders of the Court.

11           Accordingly, for all of these reasons and the others set forth herein and in the annexed  
12 Memorandum of Points and Authorities (the “Memorandum”), the Steiny Declaration and the  
13 Conway Declaration, the James Declaration and the Declaration of Daniel Zupp (the “Zupp  
14 Declaration”), the Debtor respectfully requests that the Court grant this Motion to allow the  
15 Debtor to consummate the Sale to Buyer or to a successful overbidder, and to grant the  
16 additional relief requested in the Memorandum.

17           The Motion is made pursuant to sections 105, 328, 363, 365, 506 and 1107 of title 11 of  
18 the United States Code, sections 101 *et seq.* (the “Bankruptcy Code”), Rules 2002, 6004, and  
19 9013 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), and Rules 6004-1  
20 and 9013-1 of the Local Bankruptcy Rules for the Bankruptcy Court of the Central District of  
21 California (the “Local Rules”), the Memorandum, the Steiny Declaration, the Conway  
22 Declaration, the James Declaration and the Zupp Declaration, the entire record of the Debtor’s  
23 bankruptcy case, the statements, arguments and representations of counsel to be made at the  
24 hearing on the Motion, and any other evidence properly presented to the Court. A more detailed  
25 analysis of the status of this case, the grounds for this Motion and a description of the terms of  
26 the APA are set forth below in the annexed Memorandum.

27           **WHEREFORE**, the Debtor respectfully requests that the Court enter an order:  
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1. finding that notice was good and proper under the circumstances;
2. granting this Motion in its entirety;
3. approving the bidding procedures described in the Memorandum;
4. approving the breakup fee described in the APA and in the Memorandum, to the extent applicable;
5. approving the Sale to the Buyer and/or to its designee (if any) or to a successful overbidder as set forth in the Motion and under the terms of the APA or a successful bidder's APA;
6. approving the Sale free and clear all liens, claims, interests and encumbrances, pursuant to 11 U.S.C. § 363(f);
7. authorizing the Debtor to assume and assign to the Buyer and/or to its designee (if any) or to a successful overbidder those unexpired leases and executory contracts identified by the Buyer as part of the Sale pursuant to 11 U.S.C. § 365;
8. ordering all liens, claims, interests and encumbrances on and against the assets to be sold to be transferred from those assets and to attach to the net proceeds of the sale with the same validity, priority and extent that such liens, claims, encumbrances and interests had against the assets to be sold;
9. authorizing the allowance and payment of the Investment Banker's fee;
10. authorizing the payment of all of necessary and customary taxes and fees required to be paid in connection with the sale, if any;
11. ordering the net proceeds of the sale to remain in an the client trust account pending further order of the Court;
12. finding that the Buyer is a good faith purchaser with the protections of 11 U.S.C. § 363(m);
13. authorizing the Debtor to take all necessary and reasonable steps to consummate the sale, if approved;

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- 14. waiving the 14-day stay periods set forth in Bankruptcy Rules 6004(h) and 6006(d);
- 15. granting such other relief as requested in the Motion and/or Memorandum; and
- 16. granting such other and further relief as the Court deems just and proper under the circumstances.

Dated: April 20, 2017

STEINY AND COMPANY, INC.

By:           /s/ Jacqueline L. James            
Ron Bender  
Jacqueline L. James  
Lindsey L. Smith  
Levene, Neale, Bender, Yoo & Brill L.L.P.  
Attorneys for Chapter 11 Debtor  
and Debtor in Possession

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**MEMORANDUM OF POINTS AND AUTHORITIES**

**I.**

**STATEMENT OF JURISDICTION AND VENUE**

This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This matter relates to the administration of the Debtor’s bankruptcy estate and is accordingly a core proceeding pursuant to 28 U.S.C. § 157(b) (2) (A), (M), (N) and (O). Venue of this case is proper in this Court pursuant to 28 U.S.C. §§ 1408 and 1409. The statutory predicates for the relief requested in this Motion are (i) Sections 105(a) and 363(b), (f) and (m), 365, 506 and 1107 of Title 11 of the United States Code (the “Bankruptcy Code”), (ii) Rules 2002(a)(2), 6004, 6006(a), (c) and (d), 9006, 9007 and 9014 of the Federal Rules of Bankruptcy Procedure, and (iii) Bankruptcy Local Rules 6004-1, 9013-1.

**II.**

**STATEMENT OF FACTS**

**A. Case Background and Description of the Debtor’s Business.**

On November 28, 2016 (the “Petition Date”), Steiny and Company, Inc. (the “Debtor”), the debtor and debtor in possession in the above-captioned chapter 11 bankruptcy case, filed a voluntary petition under Chapter 11 of the Bankruptcy Code. The Debtor continues to operate its business, manage its financial affairs and operate its bankruptcy estate as a debtor in possession pursuant to Sections 1107 and 1108 of the Bankruptcy Code.

The Debtor was established in 1953 by Jack Steiny. The Debtor is a privately-held, family-run electrical contracting and engineering company with commercial, mass transit, industrial, traffic signal, control and lighting divisions. The Debtor is consistently ranked as one of the top 50 electrical contractors in the United States, and in the top 10% among specialty contractors. Since the business was established over sixty years ago, the Debtor has worked with some of the most influential builders, developers and owners in the industry, many of whose jobs are now venerable landmarks in California, including the ARCO Sports Arena in Sacramento, the San Francisco Airport Airtrain, the Bay Area Rapid Transit System (“BART”), the Red,

1 Blue, and Gold Line of Metropolitan Transportation Authority (“MTA”) in Los Angeles,  
2 Disneyland and the Getty Museum, to name a few. The Debtor’s construction staff is one of the  
3 most experienced and highly trained in the industry. The Debtor has approximately 110  
4 employees, many of which are union members. Many managers and field executives have been  
5 with the company for over 20 years. On the Petition  
6 Date, the Debtor has four regional offices, located in Los Angeles, El Cajon, and Baldwin Park  
7 in Southern California and in Vallejo in Northern California. The Debtor has closed all of its  
8 Baldwin Park and Vallejo offices. The Debtor’s construction staff is one of the most  
9 experienced and highly trained in the industry. The Debtor has approximately 100 current  
10 clients.

11 After suffering intense cash flow problems prepetition due to overly-aggressive collection  
12 practices by the Debtor’s largest unions and/or trust funds, the Debtor filed for Chapter 11  
13 bankruptcy relief on November 28, 2017.

14 **B. The Debtor’s Secured Debt**

15 Safeco Insurance Company of America (“Safeco” and with Liberty Mutual Insurance  
16 Company (“Liberty”) referred to herein joint as “Liberty/Safeco”) serve as the Debtor’s bonding  
17 company in connection with most of its bonded projects,<sup>3</sup> each of which guarantees performance  
18 of the contract referred to in each individual bond and payment of certain obligations of the  
19 Debtor with respect to said contract. As partial consideration for the issuance of certain bonds,  
20 the Debtor and certain of the Debtor’s insiders executed a *General Agreement of Indemnity* dated  
21 February 19, 2003 and a written *Amendment to the General Agreement of Indemnity* dated July  
22 21, 2014 (collectively, the “Indemnity Agreement”). In or around April 14, 2016, the Debtor  
23 entered into a *Collateral Pledge, Limited Loan and Trust Account Agreement* and a *Fund*  
24 *Control And Escrow Account Agreement*, in connection with a \$2 million loan, and, thereafter,  
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27 <sup>3</sup> The Debtor also has one or more bonding agreements with Endurance American Surety Company  
28 (“Endurance”), but as reflected in the exhibits to the James Declaration, Endurance does not have seem to have a properly perfected security interest in any of the Debtor’s collateral. The Debtor is also not seeking to sell and/or assign any of its agreements with its contracts that are the subject of bonds with Endurance.

1 several amendments thereto (collectively, the "Loan & Trust Account Agreement").  
2 Liberty/Safeco has indicated that it is owed approximately \$4 million dollars at this time  
3 although the Debtor disagrees with that assertion.

4 As demonstrated in the chart below, Safeco seems to hold a first priority lien against  
5 certain assets and Liberty/Safeco appears to hold a third priority lien against certain other assets.  
6 The Debtor does not believe that Liberty/Safeco will be affected by the sale because, in its  
7 opinion, the Debtor is NOT seeking to sell and/or assign any contracts bonded by Liberty/Safeco  
8 (or Endurance or any other bonding company) to the Buyer or an overbidder, and (2) the Debtor  
9 is not seeking to sell any other assets in which the Debtor currently believes that Liberty/Safeco  
10 have a properly perfected security interest because: (a) the Debtor has completed the  
11 Liberty/Safeco bonded jobs (so none of the equipment, vehicles, etc. to be sold are necessary for  
12 the completion of Liberty and/or Safeco bonded jobs), and (b) to the extent that Liberty/Safeco  
13 (or any other lienholder) claim to have (as a result of a UCC filing or judgment lien) a properly  
14 perfected security interest in a vehicle and/or a piece of equipment that is required to be  
15 registered with the California Department of Motor Vehicles (the "DMV"), the Debtor maintains  
16 that that lienholder's security interest has not been properly perfected absent evidence that the  
17 subject lienholder has registered its lien with the DMV. Thus, based on the foregoing, the  
18 Debtor does not believe that the proposed sale affects Liberty/Safeco and/or Endurance, the  
19 Debtor's other bonding company. Liberty/Safeco may or may not disagree.

20 As described above, and in the Declaration of Jacqueline L. James appended hereto, there  
21 appear to be the following claims based on UCC filings and notice of judgment liens that would  
22 appear to be secured by more than just particular pieces of equipment, and in the case of the  
23 Internal Revenue Service ("IRS"), by all or substantially all of the Debtor's assets, with the  
24 following priority:

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Name	Priority	Lien Type	Collateral	Amount Asserted or Actually Due and Notes
Safeco	1 <sup>st</sup>	UCC Financing Statement filed on January 7, 2016	Safeco's financing statement alleges to cover all of the Debtor's contract rights with respect to projects bonded by Liberty, monies due to the Debtor in connection with any and all of the aforementioned contract rights, all claims, including insurance claims, and causes of actions that the Debtor had, or acquired prior to bankruptcy, against any party with respect to the aforementioned contract rights, and all rights, title and interests in patent, copyright or trade secrets necessary for the completion of any bonded work.	Liberty/Safeco claims to be owed approximately \$4 million. The Debtor believes that the amount owed to Liberty is less.
IRS	2 <sup>nd</sup>	Notice of federal tax lien filed on February 4, 2016	Substantially all, if not all, of the Debtor's assets.	The IRS has asserted that it has a secured claim in this position of \$1.5 million. The Debtor has requested backup for that amount but has not yet received it.
Safeco and Liberty	3 <sup>rd</sup>	UCC Financing Statement filed on April 20, 2016	Safeco and Liberty's financing statement alleges to cover the cash held in trust in connection with that certain <i>Funds Control and Escrow Trust Agreement</i> between Liberty and the Debtor, the Debtor's accounts and rights to payment of money to the extent that such assets relate to projects on which Liberty issued surety bonds on behalf of the Debtor, affirmative claims against project owners for additional compensation, deposit accounts,	See above. In addition, the grant of a security interest in certain assets "to the extent that they relate" to certain projects is unusual. Since the Liberty/Safeco bonded jobs are now complete,

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			tax refunds, life insurance policies, partnership interests, securities, machinery, tools and equipment to the extent that they relate to Liberty-bonded projects, furniture and fixtures to the extent that such assets relate to projects on which Liberty issued surety bonds on behalf of the Debtor, inventory to the extent that such assets related to the projects on which Liberty issued surety bonds on behalf of the Debtor, and proceeds from the aforementioned collateral among other things.	the Debtor believes that there can no longer be any claim to a security interest in any such physical collateral since the equipment, etc. no longer relates or is necessary or required in connection with any such projects.
The Trustees of the Southern California IBEW-NECA Pension Plan (“ <u>IBEW-NECA</u> ”) and others (see exhibit to James Declaration)	4 <sup>th</sup>	Notice of Judgment Lien filed on May 9, 2016	Accounts receivable, chattel paper, equipment [not required to be registered with the DMV], inventory and negotiable documents of title	The Debtor believes that the amount owed under this judgment lien is approximately \$50,000 or less. The Debtor may seek to object to this claim as the Debtor has asserted other affirmative claims against these claimants.
Siemens Industry Inc.	5 <sup>th</sup>	Notice of judgment lien filed on May 16, 2016	Accounts receivable, chattel paper, equipment [not required to be registered with the DMV], inventory and negotiable documents of title	The amount asserted in the notice was \$10,287.73. The Debtor believes that this amount has been satisfied in full.
Wesco Distribution Inc. dba CSC-Vikimatic	6 <sup>th</sup>	Notice of judgment lien filed on June 6, 2016	Accounts receivable, chattel paper, equipment [not required to be registered with the DMV], inventory and negotiable documents of title	The amount asserted in notice was \$40,071.40. The Debtor believes that this amount has been satisfied in full.

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IBEW-NECA and others (see James Declaration)	7 <sup>th</sup>	Notice of judgment lien filed on June 27, 2016.	Accounts receivable, chattel paper, equipment [not required to be registered with the DMV], inventory and negotiable documents of title	The amount asserted in the notice was \$31,261.56. The Debtor may seek to object to this claim as the Debtor has asserted other affirmative claims against these claimants.
IRS	8 <sup>th</sup>	Notice of federal tax lien filed on July 18, 2016	Accounts receivable, chattel paper, equipment (not required to be registered with the DMV), inventory and negotiable documents of title	The amount asserted in the notice was \$32,632.63. The Debtor is awaiting backup as to the amount owed from the IRS.
Quinn Rental Service, Inc.	9 <sup>th</sup>	Notice of judgment lien filed on July 27, 2016	Accounts receivable, chattel paper, equipment (not required to be registered with the DMV), inventory and negotiable documents of title	The amount asserted in the notice was \$16,083.25. The Debtor believes that the amount has been satisfied in full.
IRS	10 <sup>th</sup>	Notice of federal tax lien filed on August 16, 2016	Substantially all, if not all, of the Debtor's assets	The amount asserted in the notice was \$77,041.07. The Debtor is awaiting backup as to the amount owed from the IRS.
IBEW-NECA and others (see James Declaration)	11 <sup>th</sup>	Notice of judgment lien filed on November 4, 2016 (DURING THE PREFERENCE PERIOD)	Accounts receivable, chattel paper, equipment [not required to be registered with the DMV], inventory and negotiable documents of title	The amount asserted in the notice was \$677,230.70. However, since this recording constitutes a preferential transfer, the lien

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				is in bonafide dispute and should be considered avoidable.
Trustees of the Operating Engineers et al. (see James Declaration)	12 <sup>th</sup>	Notice of judgment lien was filed on November 28, 2017 (THE PETITION DATE)	Accounts receivable, chattel paper, equipment [not required to be registered with the DMV], inventory and negotiable documents of title	The amount asserted in the notice was \$59,335.57. However, since this was filed either post-petition, just shortly before the petition was filed, or, at a minimum, on the Petition Date, the filing was either a violation of the automatic stay, and thus void, or a preferential transfer. So, the lien is in bonafide dispute and should be considered void or, at least, avoidable

**IF CREDITORS BELIEVE THAT THEY HAVE TAKEN STEPS TO PERFECT SECURITY INTERESTS BY OTHER MEANS THAT PROVIDE THEM WITH SUPERIOR PRIORITY THAN REFLECTED IN THE ABOVE CHART THEN SUCH CREDITORS SHOULD THUS INFORM THE COURT, THE DEBTOR AND THEIR FELLOW LIENHOLDERS IN THEIR RESPONSE TO THIS MOTION.**

Of all of the foregoing, only the IRS appears to have liens on all or substantially all of the Debtor's assets to be sold to the Buyer. As a result of the filing of various *Notices of Judgment Lien* with the California Secretary of State, the various judgment lienholders in this case may assert liens on the Debtor's accounts receivables and other assets, but it would appear that they

1 do not, as a result of only the filing of their judgment lien notices, have any liens against the  
2 Debtor's vehicles, machinery and/or equipment that are required to be registered with the DMV  
3 absent the production of evidence to the contrary.

4 A substantial portion of the rest of the financing statements filed against the Debtor, such  
5 as by Gelco Corporation dba GE Fleet Services ("GE Fleet"), CNH Capital America LLC  
6 ("CNH"), John Deere Construction and Forestry Company and TCF Equipment Finance, the  
7 assignee of Altec Capital Services, LLC, appear to relate to the recordation of vehicle and/or  
8 equipment leases or to the financing of particular pieces of equipment. The Buyer may be  
9 interested in having such finance and/or lease agreements assigned to it. Thus, all such lessors  
10 and/or lienholders have been provided with notice of this Motion and an opportunity to object.  
11 In addition, the Debtor disputes the validity of the financing statements filed by GE Fleet and  
12 CNH because the Debtor asserts that all amounts related to the transactions referenced in the  
13 financing statements were paid some time ago and those financing statements should have been  
14 terminated long ago. Thus, the Debtor has asked GE Fleet and CNH to terminate those financing  
15 statements immediately. To the extent that the Debtor receives one or more such terminations  
16 prior to the date of the hearing on this Motion, the Debtor will submit them to the Court.  
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20 **C. The Marketing of the Debtor's Assets, the Sale Process and the Investment Banker's**  
21 **Efforts to Consummate a Sale Which Justify the Payment of Its Fee Upon the Closing of a**  
22 **Successful Sale Transaction.**

23 After suffering intense cash flow problems prepetition due to overly-aggressive collection  
24 practices by the Debtor's largest unions and/or trust funds, the Debtor filed for Chapter 11  
25 bankruptcy relief on November 28, 2017. However, it soon became apparent that due to the  
26 deterioration in its relationship with its largest unions and/or trust funds, the Debtor would have to  
27 sell its business or cease its operations entirely. Shortly after the bankruptcy case was filed, on or  
28 about December 13, 2016, the Debtor retained Craft and Consortium Finance Securities, LLC

1 (“Consortium” together with Craft, the “Investment Banker”) to aid the Debtor in connection  
2 with a possible, sale, merger, acquisition, reorganization, financial restructuring or  
3 recapitalization of the Debtor, its business or assets, or any portion thereof, including the  
4 confirmation of a plan of reorganization under Chapter 11 of the Bankruptcy or the sale of  
5 assets under Section 363 of the Bankruptcy Code. Shortly thereafter, the Debtor filed an  
6 application to employ Investment Banker (the “Employment Application”) [Docket No. 64]  
7 upon the terms and conditions set forth in the retention agreement between the parties (the  
8 “Retention Agreement”), a true and correct copy of which is attached hereto as **Exhibit A** to the  
9 Declaration of Daniel S. Conway appended hereto (the “Conway Declaration”). The Court  
10 entered an order approving Investment Banker’s employment on or about January 20, 2017  
11 [Docket No. 142].

12 As described in the Conway Declaration, immediately following Investment Banker’s  
13 retention, Investment Banker began to aggressively assist the Debtor in locating opportunities,  
14 and with the preparation necessary in order to locate and pursue such opportunities. Potential  
15 buyers would require a substantial amount of information in order to be able to fully evaluate a  
16 potential sale transaction. Therefore, Investment Banker:

- 17 a. Created a one-page “teaser” memo to use to solicit interest from potential  
18 buyers;
- 19 b. Created a 10-page Confidential Information Memorandum (“CIM”) to  
20 describe the opportunity for potential buyers;
- 21 c. Prepared a 10-page presentation detailing the hundreds of pieces of rolling  
22 stock and machinery and equipment and tied such detail to an appraisal;
- 23 d. Identified vehicles and equipment that had purchase-money type financing;  
24 established contact with lenders and determined cure and payoff amounts;
- 25 e. Compiled a 7-page employee roster detailing each employee’s  
26 compensation and job function;
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1 f. Compiled a detailed 38-page analysis of the open non-bonded traffic jobs  
2 (contract value, job description, general contractors and vendors, current status, etc.);

3 g. Obtained copies of traffic contracts and uploaded those documents to  
4 DropBox; and

5 h. Prepared a detailed analysis of open traffic jobs to estimate the net cash  
6 flow available to a buyer (which analysis had to be updated several times during the  
7 marketing process as it was constantly changing).

8 Investment Banker also conducted a comprehensive search to identify potential buyers using  
9 a combination of methods including, but not limited to, (i) consultations with management; (ii)  
10 consultations with members of the Official Committee of Unsecured Creditors (the "Committee");  
11 (iii) consultation with construction services groups at leading commercial banks, investment  
12 banks, consulting firms and CPA firms; (iv) review of industry lists, trade association and  
13 industry publications; and (v) database and Internet searches. Using these various methods, I  
14 solicited interest from 58 companies (40 strategic and 18 financial). The Debtor and Investment  
15 Banker believe that the strategic companies contacted represent the vast majority of contractors  
16 that would have a logical or even potential interest in the Debtor. The strategic buyers contacted  
17 included independent operators and, in many cases, subsidiaries or divisions of major  
18 corporations. The financial buyers contacted were principally private equity firms known for  
19 pursuing operational turnaround-type opportunities of lower middle market companies.

20 Out of the group of 40 strategic companies, 10 companies signed a non-disclosure  
21 agreement (the "NDA") and reviewed the CIM and other due diligence materials that  
22 Investment Banker prepared. Out of the group of 18 financial companies, 3 companies signed  
23 the NDA and reviewed the CIM. Of the combined 13 companies that reviewed the CIM, 10  
24 subsequently passed on the opportunity for various reasons, including size, lack of demonstrated  
25 turnaround, uncertainty surrounding certain estimates in the Debtor's job cost accounting, lack  
26 of strategic fit with the proposed acquirer's operations, and other operational and financial  
27 concerns. Three parties offered indications of interest but one subsequently decided not to  
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1 pursue a transaction after doing further onsite due diligence. Of the two remaining parties, one  
2 was only interested in buying the rolling stock and equipment. The GA Abell, Inc. dba  
3 Precision Electric Company (the "Buyer"), on the other hand, who already operates a successful  
4 commercial and industrial electrical contracting company, was willing to purchase the  
5 rolling stock and equipment and the majority of the non-bonded traffic jobs. The Debtor chose  
6 to accept the Buyer's offer to purchase because it believes that it clearly provides more benefit  
7 to the estate than the other offer. After extensive due diligence and arm's length negotiations  
8 conducted in good faith, the Buyer executed an *Asset Purchase Agreement* (the "APA") on  
9 April 4, 2017, which was subsequently executed by the Debtor on April 11, 2017 once the  
10 schedules to the APA were complete. A true and correct copy of the APA is attached as  
11 **Exhibit 1** to the Steiny Declaration.

12 The Debtor is not aware of any fraud or collusion in connection with the sale transaction.

13 At the end of the day, the Buyer made the only binding offer for the Debtor's business (as  
14 opposed to simply its fleet) and has offered the highest price and best overall consideration for the  
15 Acquired Assets. Neither the Debtor nor Investment Banker know of any potential buyers that  
16 are willing to enter into an APA or other more favorable transaction with the Debtor at this  
17 time.

18 Based on all of the foregoing, the Debtor and Investment Banker believe that the Debtor's  
19 assets to be sold have been adequately marketed for sale and that the purchase price offered by  
20 Buyer represents a fair and reasonable offer to purchase the assets to be sold under the  
21 circumstances of this Chapter 11 case, and especially since the Debtor has been experiencing  
22 severe cash flow issues and does not appear to have the ability to continue with the operation of  
23 its business over any long-term time span.

24 As described in the Conway Declaration, during the marketing process, among other  
25 things, Investment Banker attended meetings and conference calls with potential buyers and with  
26 the Committee, assisted potential buyers and the Debtor with coordinating or compiling responses  
27 to due diligence requests, processing NDAs, and coordinating with counsel for potential buyers  
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1 and the Debtor's counsel in order for the Debtor to properly respond to due diligence requests or  
2 information regarding the bankruptcy sale process and in connection with the negotiation of asset  
3 purchase agreements. Moreover, Investment Banker assisted in the sale process by, among other  
4 things, contacting some past and present lenders and/or lessors in an attempt to obtain some UCC  
5 terminations and no-interest letters for obligations that the Buyer may want to pay off, and by  
6 assisting the Debtor with the compiling of a list concerning the amounts necessary to cure the  
7 monetary defaults under the Debtor's executory contracts and unexpired leases to be purchased, or  
8 to be potentially purchased, by the Buyer or an overbidder, and by assisting with other tasks in  
9 connection with the preparation and service of this Motion and the declarations and/or exhibits  
10 thereto.

11 Investment Banker will continue to assist the Debtor throughout the sale approval process,  
12 by communicating with any parties who may be interested in overbid and assisting them with any  
13 due diligence that they may need to conduct prior to determining whether to overbid, and assisting  
14 the Debtor with the analysis of any overbids. Investment Banker will also continue to assist the  
15 Debtor through the closing of a sale transaction as necessary.

16 According to the Retention Agreement, the Investment Banker is to receive a fee upon the  
17 consummation of a successful transaction in an amount of no less than \$250,000 (the "Fee"). See  
18 Retention Agreement at p. 2 paragraph 2 and Employment Application at p. 5 line 16. Since the  
19 Court entered an order approving the terms of Investment Banker's employment, and the  
20 Investment Banker has worked diligently to bring a sale to fruition, the Debtor respectfully  
21 requests that the Fee be allowed and authorized to be paid upon the closing of a sale approved by  
22 this Court to the Buyer or a successful overbidder.

23 In the event that anyone indicates that they would like to overbid on the Debtor's business  
24 and/or assets, Investment Banker will ask them to make a deposit, provide evidence of their  
25 financial wherewithal to bid, and attend the hearing on the Motion.

26 The Buyer is not an insider of the Debtor as such term is defined under section 101(31) of  
27 the Bankruptcy Code. If the sale to Buyer is approved, the Debtor anticipates that the Acquired  
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1 Assets will be sold in a sale transaction that will close as soon as feasible after the hearing on the  
2 Motion and the entry of an order approving the sale. The Debtor believes that the proposed sale to  
3 Buyer, which will be subject to overbidding, is in the overwhelming best interests of its  
4 creditors and estates. The Debtor does not know of any potential buyers that are willing to enter  
5 into an asset purchase agreement or other more favorable transaction with it at this time. The  
6 Debtor is continuing to experience severe cash flow issues and does not have the ability to  
7 continue with the operation of its business over any long-term time span. Thus, the Debtor  
8 believes that the approval of the proposed sale (or of a higher and better bid to the extent that  
9 one is made) is in the overwhelming best interests of its creditors and estate.

10 **D. The APA**

11 The salient terms of the APA are the following:<sup>4</sup>

12 1. The assets to be purchased by Buyer or its designee consist of: (i) all of the  
13 Debtor's executory contracts and unexpired leased that the Buyer elects to have assigned it by  
14 the Debtor subject to the terms of the APA (the "Assigned Contracts"), but which is currently  
15 expected to be comprised of 45 of the Debtor's non-bonded contracts with its clients and several  
16 other types of executory contracts and unexpired leases, including certain vehicle and equipment  
17 leases,<sup>5</sup> (ii) all accounts receivable related to the Assigned Contracts or other rights to receive  
18 payment for services or products provided by Seller in connection with the Assigned Contracts  
19 as of the Closing Date; (iii) all machinery, plant, vehicles, small tools, equipment, computers,  
20 inventory, spare parts, fittings, supplies and other tangible personal property of the Debtor; (iv)  
21 all of the Debtor's names, including the name "Steiny and Company", and all trademarks; (v) all  
22 of the Debtor's "Intellectual Property Rights" (as defined in the APA); (vi) all rights under  
23 "Governmental Authorizations, Licenses & Permits" (as defined in the APA); (v) all goodwill;

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25 <sup>4</sup> In the event that the summaries of the sections of the APA herein are inconsistent with the APA, the APA shall control. Capitalized terms used and not defined in these sections have the meanings set forth in the APA.

26 <sup>5</sup> The Debtor's bonded projects with Liberty and Endurance are all complete, or close to completion. The Debtor  
27 and its bonding companies are simply collecting amounts owed. Therefore, there is no need to sell those jobs and/or  
28 receivables at a discount since the receivables will be used to pay down the Debtor's secured debt and, to the extent provided for in the applicable contracts with the bonding companies, certain surplus amounts may have to be turned over to the estate.

1 (vii) all operating data, books and records, including customer lists and information relating to  
2 customers and suppliers; (viii) all other assets, whether tangible or intangible, that are or ever  
3 have been used by Seller in its businesses excluding the Excluded Assets (described below) for  
4 the cash purchase price of \$1.45 million plus the assumption of liability under the Assigned  
5 Contracts of approximately \$1 million.. The assets of the Debtor to be purchased by Buyer are  
6 defined as the “Acquired Assets” and are identified in Section 2.1(e) of the APA. The assets that  
7 are excluded from the proposed sale are referred to in the APA as “Excluded Assets” and are  
8 defined in Section 2.1 (f) of the APA.

9           2. Buyer will acquire the Acquired Assets “as is,” “where is” and “with all faults”  
10 and without any representation or warranty expressed or implied relating to the condition or  
11 value of the Acquired Assets. Section 2.1(b) of the APA.

12           3. The Debtor will assume and assign to the Buyer and/or its designee the Assigned  
13 Contracts. Section 2.1(a) of the APA. The Buyer will also assume all of the liabilities under the  
14 Assigned Contracts from the date of the closing of the sale forward (the “Closing Date”). Those  
15 liabilities are referred to in the APA and herein as the “Post-Closing Contract Obligations”.  
16 Section 2.2(a) of the APA.

17           4. The Buyer will serve as the initial bidder with respect to the purchase and sale of  
18 the Acquired Assets (the “Stalking Horse Bidder”). The sale will be subject to overbidding.  
19 Section 2.1(d) of the APA.

20           5. The Purchase Price to be paid by the Buyer for the Acquired Assets (the  
21 “Purchase Price”) shall consist of two components: (a) \$1.45 million in cash [the “Cash Purchase  
22 Price”] and (b) those liabilities of the Debtor that Buyer elects to assume, including but not  
23 limited to, the Post-Closing Contract Obligations and the cure amount for each Assigned  
24 Contract to be assumed by the Debtor and assigned to the Buyer (the “Cure Amounts”). Section  
25 2.3 of the APA.

26           6. The Buyer will pay any cure amounts required under the existing contracts and  
27 unexpired leases to be assumed and assigned to it. Section 2.2(b) of the APA.  
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1           7.       The Buyer will have the right to designate any liabilities of the Debtor that the  
2 Buyer wishes to assume in connection with the Sale by identifying them in writing and providing  
3 them to the Debtor within three days prior to the Closing. Section 2.2(d) of the APA.

4           8.       The Buyer shall make a cash deposit of \$145,000.00 (the “Deposit”) via wire  
5 transfer to the Debtor’s bankruptcy counsel Levene, Neale, Bender, Yoo & Brill L.L.P.  
6 (“LNBYB”), which deposit has already been made. LNBYB shall hold the Deposit in a  
7 segregated, interest-bearing trust account. LNBYB shall return the deposit plus all interest  
8 accrued thereon to Buyer if the Bankruptcy Court does not approve the APA and/or if the Buyer  
9 is not declared the winning bidder at the hearing and auction concerning the proposed sale (the  
10 “Auction Sale Hearing” or “Sale Hearing”). Section 2.41 of the APA.

11           9.       The Buyer will deliver the Cash Purchase Price less the Deposit and any accrued  
12 interest, plus the amount that the Debtor believes is owed to the counterparties of executory  
13 contracts and unexpired leases as Cure Amounts (the “Initial Cure Amount”) to LNBYB by wire  
14 transfer by no later than 5 calendar days after the Debtor files this Motion. LNBYB shall hold  
15 the Cash Purchase Price and the Initial Cure Amount in the same segregated interest-bearing  
16 account with the Deposit. LNBYB shall return the Cash Purchase Price and the Initial Cure  
17 Amount plus all interest accrued thereon to Buyer if the Court does not approve the APA and the  
18 Buyer is not declared the winning bidder at the Auction Sale Hearing. Section 2.42(a) of the  
19 APA.

20           10.       To the extent that the Court should determine that the Cure Amount with respect  
21 to one or more particular executory contracts and/or unexpired leases to be assumed and assigned  
22 should be larger than the amount as initially proposed by the Debtor, the Buyer shall have the  
23 option not to have that Contract assigned to it although the Cash Purchase Price will remain the  
24 same. Section 2.4(b) of the APA.

25           11.       If there is overbid of the Purchase Price offered by the Buyer, and, as a result of  
26 such overbid, the Buyer does not end up being the winning bidder or actual buyer of the  
27 Acquired Assets, then Buyer shall receive a breakup fee (the “Breakup Fee”) of \$100,000 with  
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1 such Breakup Fee to be paid directly out of the sale proceeds as a cost of the sale regardless of  
2 the amount of unpaid administrative and/or super-priority claims in the Debtor's bankruptcy  
3 case. APA at Section 2.1(d).

4 12. The Buyer shall not be under any obligation to hire any of the Debtor's employees  
5 following the Closing, although it is the Debtor's understanding that the Buyer may be interested  
6 in hiring quite a few of the Debtor's employees post closing. However, to the extent that any of  
7 the Buyer decides to offer employment to any of the Debtor's employees, such employees shall  
8 be considered terminated employees of the Debtor and new employees of the Buyer and shall not  
9 be entitled to receive from the Buyer for any vacation days, sick days, personal days, paid time  
10 off or other such days that they may have accrued with the Debtor.. The Buyer, as the purchaser  
11 of the Acquired Assets, shall not assume any of the Debtor's employee benefit plans, programs,  
12 policies or practices, whether or not set in writing, or maintained by the Debtor at any time.  
13 Section 5.3 of the APA.

14 13. The Buyer has the right to elect to assume the Debtor's collective bargaining  
15 agreements (the "CBAs"), among other agreements. *See* Section 2.2(d) of the APA. However, as  
16 of the date of the filing of this Motion the Buyer has not designated any of the CBAs for  
17 assumption. To the extent that the Buyer indicates that it will not be asking the Debtor to assume  
18 and assign one or more of the CBAs to it, the Debtor will file a motion(s) seeking to reject the  
19 CBAs. To the extent necessary, the Debtor will also seek the rejection of one or more agreements  
20 under Section 1114 via separate motion(s).

21 14. The Closing will take place, subject to the conditions of APA, on the fifth  
22 business day following the satisfaction and/or waiver of the conditions set forth in Section 2.7 of  
23 the APA, including the entry of a final order of the Court approving the sale and the assumption  
24 and assignment of the Assigned Contracts, among other things. *See* Section 2.7 of the APA.

25 15. Events of termination and related provisions are set forth in Section 7.1 of the  
26 APA.

27 16. The effects of the failure to close are set forth in Section 8 of the APA.  
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1 **E. The Buyer and Adequate Assurance of Future Performance**

2 GA Abell, Inc. ("Abell") conducts business under the name Precision Electric Company  
3 ("Precision"). As described in the Declaration of Daniel Zupp and the exhibits thereto, Precision  
4 was established by Greg Abell in 1984 and is a well respected and financially secure commercial  
5 and industrial electrical contractor with annual revenues of between \$15 and \$50 million. As  
6 described in the Zupp Declaration, if Abell and Zupp create a new corporation for the purpose of  
7 operate the Debtor's business using the Steiny name ("NewCo") and request to have NewCo  
8 designated as the "Buyer," Zupp will serve as NewCo's President and Abell will serve as  
9 NewCo's Secretary/Treasurer. Both Zupp and Abell have over 35 years experience in the  
10 electrical contracting business and bring strong and longstanding relationships with the key  
11 players in the Debtor's industry, including but not limited to general contractors, subcontractors,  
12 and vendors, as well as solid and longstanding relationships with two bonding companies and  
13 with Torrey Pines Bank to the table. As described in the Zupp Declaration, the Buyer (whether  
14 Abell or NewCo) will experienced management, the financial wherewithal (which can be further  
15 demonstrated upon request), and the desire to make Steiny and Company a leader in its industry  
16 again.

17 The Buyer has already made the deposit required in connection with the sale. The Debtor  
18 is confident that the Buyer will be willing and able to honor its other obligations, such as  
19 depositing the remainder of the Cash Purchase Price and the Initial Cure Amounts by the date  
20 required.

21 **F. The Proposed Bidding Procedures and Breakup Fee**

22 1. Stalking Horse Bid. The Buyer has made an initial bid of \$1,450,000 in cash  
23 plus estimated assumption of Post-Closing Contract Obligations (the "Stalking Horse Bid")

24 2. Qualifying Initial Overbid. The qualifying initial overbid (the "Qualifying Initial  
25 Overbid") shall be at least \$1,550,000 in cash.

26 3. Overbid Increments. Subsequent overbids above the Qualifying Initial Overbid  
27 will be in increments of no less than \$50,000.  
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1           4.     Qualifying Overbidder. To be a qualified overbidder and participate in the  
2 auction described below (“Qualified Overbidder”) an interested bidder must meet all of the  
3 following requirements:

4                   a.     Deposit \$155,000 into the Debtor’s bankruptcy counsel’s trust  
5 account via wire transfer by no later than 3:00 p.m. (Pacific Time) on the date  
6 that is two business days before the date of the Sale Hearing, to be held as earnest  
7 money deposit, and which will be fully refundable if the Qualified Overbidder is  
8 not a winning bidder at the Sale; however, the \$155,000 earnest money deposit  
9 will be forfeited if the Qualifying Overbidder is deemed to be the winning bidder  
10 but fails to close on the Sale through no fault of the Debtor;

11                   b.     Submit a clean, signed version and redlined version of its asset  
12 purchase agreement redlined against the Buyer’s APA by no later than 3:00 p.m.  
13 (Pacific Time) on the date that is two business days before the date of the Sale  
14 Hearing, to Debtor’s counsel Jacqueline L. James via email to [jlj@lnbyb.com](mailto:jlj@lnbyb.com) and  
15 to investment banker Daniel S. Conway via email to  
16 [dconway@craftpartnersllc.com](mailto:dconway@craftpartnersllc.com); a Word version of the Buyer’s APA will be  
17 provided by Debtor’s counsel upon request by email to a potential overbidder;

18                   c.     Submit proof of funds sufficient to pay the purchase price for the  
19 Sale 3:00 p.m. (Pacific Time) on the date that is two business days before the  
20 date of the Sale Hearing;

21           5.     Breakup Fee. \$100,000 (the “Breakup Fee”) payable to the Buyer;

22           6.     Auction. The auction will take place in Courtroom 1375 located at 255 E.  
23 Temple Street, Los Angeles, California on the same date and at the same time as the hearing on  
24 this Motion;

25           7.     Hearing on the Sale. Following the auction to be held in the abovementioned  
26 courtroom, the Debtor will request that the Court approve the best overall offer made on the  
27 Debtor’s assets and, thus, the winning bidder as the buyer of the Sale;

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1           8.     Closing. The winning bidder must close by no later than ten (10) calendar days  
2 from the date of the entry of an unstayed sale order without regard to the pendency of an appeal  
3 from the order.

4     **G.     The Process of Determining Cure Amounts**

5           Concurrently with the filing of this Motion the Debtor filed and served the “*Notice to*  
6 *Counterparties to Executory Contracts and Unexpired Leases To Potentially Be Assumed and*  
7 *Assigned and Notice of Cure Amounts*” attached as **Exhibit 2** to the Steiny Declaration (the  
8 “Cure Notice”). The Cure Notice has attached to it a list of the executory contracts and unexpired  
9 leases that the Buyer has either already requested that they be assumed and assigned it (see  
10 Schedule 1 to the APA) or that the Buyer could, potentially, request that they be assumed by the  
11 Debtor and assigned to it, along with a corresponding cure amount for each such contract or  
12 lease. The Cure Notice was served on all non-debtor counterparties to executory contracts and  
13 unexpired leases that could potentially be designated by the Buyer to be assumed and assigned.

14           The Cure Notice provides that if a counterparty disagrees with the proposed Cure  
15 Amount (as defined in the Cure Notice), objects to the proposed assignment to the Buyer or a  
16 potential overbidder, or objects to the Buyer’s ability to provide adequate assurance of future  
17 performance with respect to its contract or lease, the counterparty’s objection must: (a) be in  
18 writing; (b) comply with the applicable provisions of the Bankruptcy Rules and the Local  
19 Bankruptcy Rules; (c) state with specificity the nature of the objection and, if the objection  
20 pertains to the proposed Cure Amount, the alleged correct cure amount, together with supporting  
21 documentation; and (d) be filed with the Bankruptcy Court no later than the deadline set by the  
22 Court for objections to this Motion to be filed.

23           The Cure Notice further provides that any party who fails to timely file an objection to its  
24 Cure Amount listed on **Exhibit A** to the Cure Notice or to the assumption and assignment of its  
25 contract or lease: (a) shall be forever barred from objecting thereto, including (i) making any  
26 demands for additional cure amounts or monetary compensation on account of any alleged  
27 defaults and (ii) asserting that the Buyer or a successful overbidder has not provided adequate  
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1 assurance of future performance as of the date of the Sale Order; and (b) shall be deemed to  
2 consent to the sale of the Acquired Assets and to the assumption and assignment to the Buyer or  
3 a successful overbidder (if any).

4 The Cure Notice also states that any objection to the proposed assumption and  
5 assignment of a contract or lease or related Cure Amount in connection with the sale of the  
6 Acquired Assets that remains unresolved as of the hearing on the sale ( the “Sale Hearing”) shall  
7 be heard at the Sale Hearing (or at a later date as fixed by the Bankruptcy Court); provided,  
8 however, that with respect to any such objection that pertains solely to the Cure Amount, the  
9 Debtor may seek at the Sale Hearing to assume the relevant contract or lease and assign it to the  
10 Buyer or a successful overbidder subject to the requirement that Buyer or successful overbidder  
11 deposit funds equal to the undisputed portion of the applicable Cure Amount pending the  
12 resolution of the dispute by the Bankruptcy Court or agreement of the parties (if such funds have  
13 not already been placed on deposit by the Buyer) and pay any amount owed promptly to the  
14 applicable counterparty upon such resolution.

15 **H. The Request To Assume and Assign the Assigned Contracts**

16 Schedule 1 of the APA identifies certain executory contracts and/or unexpired leases that  
17 the Buyer intended to have assumed by the Debtor and assigned to it at the time that the APA  
18 was executed. However, the Buyer has the option of deciding not to have one or more of those  
19 executory contracts and/or unexpired leases assigned to it, and it has the option of designating  
20 additional executory contracts and/or unexpired leases that it would like to have assigned to it.  
21 For that reason, the Debtor has sought to have cure amounts established in connection with all of  
22 the executory contracts and/or unexpired leases that the Buyer (or a successful overbidder) could  
23 want. Thus, the Debtor believes that it is an appropriate exercise of its business judgment to seek  
24 to assume and assign those executory contracts and unexpired leases that the Buyer has indicated  
25 that it wants or may indicate that it wants in order to facilitate the Debtor’s efforts to maximize  
26 value for its creditors and the estate through the sale transaction. Additionally, the Debtor  
27 submits that the notice provisions and objection deadline for counterparties to raise objections to  
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1 the assumption and assignment of the executory contracts and leases, described herein and which  
2 are set forth in the Cure Notice are adequate to protect the rights of the nondebtor counterparties  
3 to the executory contracts and unexpired leases. The Debtor also requests that any party failing to  
4 object to the proposed transactions be deemed to consent to the treatment of its unexpired lease  
5 under section 365 of the Bankruptcy Code.

6 **I. The Request to Reject the Excluded Contracts**

7 For the reasons described above, once the sale to the Buyer closes, and in the event that  
8 the Buyer (or a successful overbidder) elects not to take assignment of all of the Debtor's  
9 executory contracts and unexpired leases, the Debtor will no longer require the services  
10 described in the executory contracts, the use of real property described in the real property  
11 leases, the use of the personal property described in the personal property leases not to be  
12 assumed and assigned to the Buyer or a successful overbidder (the "Contracts To Be Rejected").  
13 Each day that the Contracts To Be Rejected remain in place will result in potential unnecessary  
14 expenses, including potential administrative expenses to the Debtor's bankruptcy estate.  
15 Rejection of the Contracts To Be Rejected will eliminate the risk of any potential additional  
16 administrative claims related to such contracts and leases thereby preserving the value of the  
17 Debtor's assets and conserve the Debtor's resources and cash. Accordingly, the Debtor submits  
18 that it is reasonable and appropriate for the Court to authorize the rejection of the Contracts To  
19 Be Rejected upon the closing of a sale to the Buyer or a successful overbidder. Once the  
20 rejection becomes effective the Debtor will promptly turn over possession of the personal and  
21 real property leased and cease receiving the services provided under the rejected executory  
22 contracts. For all of the reasons set forth above, the Debtor submits that the rejection of the  
23 Contracts To Be Rejected in accordance with the terms and conditions set forth herein, is in the  
24 best interests of the Debtor's bankruptcy estates and should be approved by the Court.  
25 Notwithstanding the foregoing, the Debtor will file a separate motion or motions to reject those  
26 executory contracts described in Section 1113 and 1114 of the Bankruptcy Code, if necessary.

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**III.**

**DISCUSSION**

**A. The Court Should Authorize the Debtor to Sell the Assets to the Buyer in Accordance with the Terms of the APA.**

Section 363(b) of the Bankruptcy Code provides that a debtor “after notice and a hearing, may use, sell or lease, other than in the ordinary course of business, property of the estate.” To approve a use, sale or lease of property other than in the ordinary course of business, the court must find “some articulated business justification.” *See, e.g., In re Martin (Myers v. Martin)*, 91 F.3d 389, 395 (3d Cir. 1996) citing *In re Schipper (Fulton State Bank v. Schipper)*, 933 F.2d 513, 515 (7th Cir. 1991); *Comm. of Equity SEC Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1070 (2d Cir. 1983); *In re Abbotts Dairies of Pennsylvania, Inc.*, 788 F.2d 143 (3d Cir. 1986) (implicitly adopting the “sound business judgment” test of *Lionel Corp.* and requiring good faith); *In re Delaware and Hudson Ry. Co.*, 124 B.R. 169 (D. Del. 1991) (concluding that the Third Circuit adopted the “sound business judgment” test in the *Abbotts Dairies* decision).

In the Ninth Circuit, "cause" exists for authorizing a sale of estate assets if it is in the best interest of the estate, and a business justification exists for authorizing the sale. *In re Huntington, Ltd.*, 654 F.2d 578 (9th Cir. 1981); *In re Walter*, 83 B.R. 14, 19-20 (9th Cir. B.A.P. 1988). The Ninth Circuit has also held that section 363 allows the sale of substantially all assets of a debtor's bankruptcy estate after notice and a hearing. *In re Qintex Entertainment, Inc.*, 950 F.2d 1492 (9th Cir. 1991).

In determining whether a sale satisfies the business judgment standard, courts have held that: (1) there be a sound business reason for the sale; (2) accurate and reasonable notice of the sale be given to interested persons; (3) the sale yield an adequate price (i.e., one that is fair and reasonable); and (4) the parties to the sale have acted in good faith. *Titusville Country Club v. Pennbank (In re Titusville Country Club)*, 128 B.R. 396, 399 (Bankr. W.D. Pa. 1991); *see also, In re Walter*, 83 B.R. at 19-20. The Debtor submits that its proposed sale of the Acquired Assets to Buyer, subject to overbidding comports with each of the aforementioned criteria, is consistent

1 with the terms of the APA, and demonstrates that the Debtor has exercised sound business  
2 judgment in seeking to proceed with the proposed sale of the Acquired Assets to Buyer, or a  
3 successful overbidder in accordance with the terms of the APA, or a successful overbidder's  
4 APA..

5 **1. Accurate and Reasonable Notice**

6 Bankruptcy Code Section 363(b)(1) provides that the Debtor, "after notice and a hearing,  
7 may use, sell or lease, other than in the ordinary course of business, property of the estate." 11  
8 U.S.C. § 363(b)(1). Section 102(1) of the Bankruptcy Code defines "after notice and a hearing"  
9 as after such notice as is appropriate in the particular circumstances, and such opportunity for  
10 hearing as is appropriate in the particular circumstances. 11 U.S.C. § 102(1)(A).

11 Rule 6004(a) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules")  
12 provides, in pertinent part, that notice of a proposed sale not in the ordinary course of business  
13 must be given pursuant to Bankruptcy Rule 2002(a)(2), (c)(1), (i) and (k), and, if applicable, in  
14 accordance with Bankruptcy Code section 363(b)(2) of the Bankruptcy Code. Fed.R.Bankr.P.  
15 6004(a). Rule 2002(a)(2) requires at least 21 days' notice by mail of a proposed sale of property  
16 of the estate other than in the ordinary course of business, unless the Court for cause shown  
17 shortens the time or directs another method of giving notice. Fed.R.Bankr.P. 2002(a)(2); see  
18 also, Local Bankruptcy Rule 9013-1(d)(2) (notice of motion and motion be served at least 21  
19 days before the hearing on the date specified in the notice.)

20 Bankruptcy Rule 2002(c)(1) requires that the notice of a proposed sale include the date,  
21 time and place of any public sale, the terms and conditions of any private sale, and the time fixed  
22 for filing objections. It also provides that the notice of sale of property is sufficient if it generally  
23 describes the property. Fed.R.Bankr.P. 2002(c)(1). Rule 2002(i) requires that the notice be  
24 mailed to committees elected pursuant to 11 U.S.C. § 705 or appointed pursuant to 11 U.S.C. §  
25 1102. Fed.R.Bankr.P. 2002(i). Rule 2002(k) requires that the notice be given to the United  
26 States Trustee. Fed.R.Bankr.P. 2002(k).

1 Bankruptcy Rule 6004(c) provides that a motion for authority to sell property free and  
2 clear of liens or other interests must be made in accordance with Bankruptcy Rule 9014 and must  
3 be served on the parties who have liens or other interests in the property to be sold.  
4 Fed.R.Bankr.P. 6004(c).

5 In addition, Local Bankruptcy Rule 6004-1(f) requires that an additional copy of the  
6 notice be submitted to the Clerk of the Bankruptcy Court together with a document Form 6004-2  
7 at the time of filing for purposes of publication. L.B.R. 6004-1(f).

8 Bankruptcy Rule 6006(a) provides that a proceeding by a party to assume, reject, or  
9 assign an executory contract or unexpired lease under, other than as part of a plan, is governed  
10 by Bankruptcy Rule 9014. Fed.R.Bankr.P. Rule 6006(a). Bankruptcy Rule 6006(c) provides that  
11 notice of a motion made pursuant to Bankruptcy Rule 6006(a) must be served on the nondebtor  
12 counterparty to lease or contract, other parties as the court may direct and the U.S. Trustee.  
13 Fed.R.Bankr.P. 6006(c).

14 The Debtor has complied with all of the above provisions of the Bankruptcy Code, the  
15 Bankruptcy Rules and the Local Bankruptcy Rules. The Debtor has complied with Bankruptcy  
16 Rules 6004(a) and 2002(a)(2), (c)(1), (i) and (k), and 6006(a) and (c) because the notices that  
17 have been filed contemporaneously herewith, including the date time and place of the sale and  
18 the deadline for objecting thereto, were served on the Debtor's twenty largest unsecured  
19 creditors, the Official Committee of Creditors Holding Unsecured claims, if any, the U.S.  
20 Trustee, all of the Debtor's known creditors, all nondebtor counterparties to the executory  
21 contracts and unexpired leases that are being assumed and assigned, and all parties requesting  
22 special notice. The Debtor also served the Buyer, union representatives or counsel under the  
23 Collective Bargaining Agreements, and potential bidders who might be interested in making an  
24 offer for the Acquired Assets. The Debtor has complied with Rule 6004(c) because the notice  
25 and the Sale Motion were also served upon the parties who have alleged liens, claims,  
26 encumbrances and/or interests in the Acquired Assets (or potentially Acquired Assets). The  
27 Debtor has complied with the requirements of Local Bankruptcy Rule 6004-1(f) because the  
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1 Debtor has filed the Notice and Form 6004-2 with the Clerk of the Bankruptcy Court. Thus, the  
2 Debtor has provided accurate and reasonable notice of the Sale Motion in compliance with the  
3 APA and all applicable Bankruptcy Rules and Local Bankruptcy Rules.

4 **2. Sound Business Purpose**

5 There must be some articulated business justification, other than appeasement of major  
6 creditors, for using, selling or leasing property out of the ordinary course of business before the  
7 bankruptcy court may order such disposition under Section 363(b). *In re Lionel Corp.*, 722 F.2d  
8 at 1070. The Ninth Circuit Bankruptcy Appellate Panel in *Walter v. Sunwest Bank (In re Walter)*,  
9 83 B.R. 14, 19 (9th Cir.B.A.P.1988) adopted a flexible case-by-case test to determine whether  
10 the business purpose for a proposed sale justifies disposition of property of the estate under  
11 Bankruptcy Code section 363(b) as follows:

12 Whether the proffered business justification is sufficient depends on the case. As  
13 the Second Circuit held in *Lionel*, the bankruptcy judge should consider all  
14 salient factors pertaining to the proceeding and, accordingly, act to further the  
15 diverse interests of the Debtor, creditors and equity holders, alike. He might, for  
16 example, look to such relevant facts as the proportionate value of the asset to the  
17 estate as a whole, the amount of elapsed time since the filing, the likelihood that  
18 a plan of reorganization will be proposed and confirmed in the near future, the  
19 effect of the proposed disposition on future plans of reorganization, the proceeds  
20 to be obtained from the disposition vis-a-vis any appraisals of the property,  
21 which of the alternatives of use, sale or lease the proposal envisions and, most  
22 importantly perhaps, whether the asset is increasing or decreasing in value. This  
23 list is not intended to be exclusive, but merely to provide guidance to the  
24 bankruptcy judge.

21 *In Re Walter*, 83 B.R. at 19-20, citing *In re Continental Air Lines, Inc.*, 780 F.2d 1223, 1226 (5th  
22 Cir. 1986).

23 The facts pertaining to the Debtor's proposed sale of the Acquired Assets to the Buyer, or  
24 a successful overbidder, clearly substantiate the Debtor's business decision that such  
25 contemplated sale serves the best interests of the Debtor's estates and its creditors and merits the  
26 approval of the Court.

27 For all of the reasons explained above, the Debtor is not able to continue to operate in the  
28 long-run. As a result, the only way for the Debtor to maximize the value of its assets/business is

1 for the Debtor to consummate an expedited sale of its assets/business. The Debtor has engaged  
2 in a thorough marketing process with the assistance of the Investment Banker. The Debtor is  
3 confident that its proposed asset sale to the Buyer, or to a successful overbidder, is the best  
4 option available to the Debtor to maximize the value of its assets and recovery for the Debtor's  
5 creditors. The approval of the proposed sale will also minimize the disruption of the business,  
6 potentially provide new employment to many of the Debtor's loyal employees, and ensure  
7 continued services to the Debtor's clients. The Debtor, therefore, submits that its proposed sale is  
8 justified by sound business purposes, satisfying the first requirement for a sale under section  
9 363(b) of the Bankruptcy Code.

10 **3. Fair and Reasonable Price**

11 In order to be approved under Section 363(b) of the Bankruptcy Code, the purchase price  
12 must be fair and reasonable. *Coastal Indus., Inc. v. U.S. Internal Revenue Service (In re Coastal*  
13 *Indus., Inc.)*, 63 B.R. 361, 368 (Bankr. N.D. Ohio 1986). Several courts have held that "fair  
14 value" is given for property in a bankruptcy sale when at least 75% of the appraised value of  
15 such property is paid. See *In re Karpe*, 84 B.R. at 933; *In re Abbotts Dairies of Pennsylvania,*  
16 *Inc.*, 788 F.2d 143, 149 (3d Cir. 1986); *Willemain v. Kivitz*, 764 F.2d 1019 (4th Cir. 1985); *In re*  
17 *Snyder*, 74 B.R. 872, 878 (Bankr. E.D. Pa. 1987); *In re The Seychelles, Partnership and Genius*  
18 *Corp. v. Banyan Corp.*, 32 B.R. 708 (N.D. Tex. 1983). However, the Debtor also realizes that  
19 "the Debtor's main responsibility, and the primary concern of the bankruptcy court, is the  
20 maximization of the value of the asset sold." *In re Integrated Resources, Inc.*, 135 B.R. 746, 750  
21 (Bankr. S.D.N.Y. 1992), *aff'd*, 147 B.R. 650 (S.D.N.Y. 1992). "It is a well-established principle  
22 of bankruptcy law that the objective of bankruptcy rules and the [debtor's] duty with respect to  
23 such sales is to obtain the highest price or greatest overall benefit possible for the estate." *In re*  
24 *Atlanta Packaging Products, Inc.*, 99 B.R. 124, 131 (Bankr. N.D. Ga. 1988); see also *In re Wilde*  
25 *Horse Enterprises*, 136 B.R. 830, 841 (Bankr. C.D. Cal. 1991) ("In any sale of estate assets, the  
26 ultimate purpose is to obtain the highest price for the property sold").  
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1 The extensive marketing and sale process undertaken by the Investment Banker and the  
2 Debtor as well as the overbidding procedure suggested herein was specifically designed to  
3 ensure that the highest price possible is obtained for the Acquired Assets. As described above  
4 and in the Conway Declaration, the Acquired Assets were marketed for sale for approximately  
5 four months. The Investment Banker conducted substantial research and solicited  
6 interest from 58 companies (40 strategic and 18 financial). Accordingly, the Debtor believes that  
7 the \$1.45 million cash purchase price combined with the assumption of the Post-Closing  
8 Contract Obligations of approximately \$1 million proposed by the Buyer is fair and reasonable,  
9 and the highest and best price for the Acquired Assets. To the extent that there is overbidding,  
10 the result for the estate can only be improved.

11 **4. Good Faith**

12 When a bankruptcy court authorizes a sale of assets pursuant to Section 363(b)(1), it is  
13 required to make a finding with respect to the “good faith” of the buyer. *In re Abbotts Dairies*,  
14 788 F.2d at 149. Such a procedure ensures that Section 363(b)(1) will not be employed to  
15 circumvent the creditor protections of Chapter 11, and as such, it mirrors the requirement of  
16 Section 1129, that the Bankruptcy Court independently scrutinizes the debtor’s reorganization  
17 plan and makes a finding that it has been proposed in good faith. *Id.* at 150.

18 “Good faith” encompasses fair value, and further speaks to the integrity of the  
19 transaction. *In re Wilde Horse Enterprises*, 136 B.R. at 842. With respect to the debtor’s  
20 conduct in conjunction with the sale, the good faith requirement “focuses principally on the  
21 element of special treatment of the Debtor’s insiders in the sale transaction.” *See In re Industrial*  
22 *Valley Refrig. and Air Cond. Supplies, Inc.*, 77 B.R. 15, 17 (Bankr. E.D. Pa. 1987). With respect  
23 to the buyer’s conduct, this Court should consider whether there is any evidence of “fraud,  
24 collusion between the purchaser and other bidders or the [debtor], or an attempt to take grossly  
25 unfair advantage of other bidders.” *In re Abbotts Dairies*, 788 F.2d at 147, *In re Rock Indus.*  
26 *Mach. Corp.*, 572 F.2d 1195, 1198 (7th Cir. 1978); *In re Wilde Horse Enterprises, Inc.*, 136 B.R.  
27 at 842; *In re Alpha Industries, Inc.*, 84 B.R. 703, 706 (Bankr. D. Mont. 1988). In short, “[l]ack  
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1 of good faith is generally determined by fraudulent conduct during the sale proceedings.” *In re*  
2 *Apex Oil Co.*, 92 B.R. 847, 869 (Bankr. E.D. Mo. 1988), citing *In re Exennium, Inc.*, 715 F.2d  
3 1401, 1404-05 (9th Cir. 1983). See also *In re M Capital Corp.*, 290 B.R. 743 (B.A.P. 9<sup>th</sup> Circuit,  
4 2003).

5 In *In re Filtercorp, Inc.*, 163 F.3d 570 (9th Cir. 1998), the Ninth Circuit set forth the  
6 following test for determining whether a buyer is a good faith purchaser:

7 A good faith buyer “is one who buys ‘in good faith’ and ‘for value.’”  
8 [citations omitted.] [L]ack of good faith is [typically] shown by ‘fraud,  
9 collusion between the purchaser and other bidders or the trustee, or an attempt  
10 to take grossly unfair advantage of other bidders.’” [citations omitted.]

11 *Filtercorp*, 163 F.3d at 577.

12 The Ninth Circuit made clear in *Filtercorp* that this standard for determining good faith is  
13 applicable even when the buyer is an insider.

14 Neither the Buyer nor any of the Buyer’s representatives or affiliates is an “insider” of the  
15 Debtor. The Debtor is not aware of any fraud or collusion in connection with the sale  
16 transaction. The APA was intensively negotiated at arm's length with all parties involved acting  
17 in good faith. Based on the foregoing, the Debtor submits that the Court should find that the  
18 Buyer, or a successful overbidder – who will likely not be an insider either, constitutes a good  
19 faith purchaser entitled to all of the protections afforded by Section 363(m) of the Bankruptcy  
20 Code.

21 **B. The Sale of the Assets Should Be Free and Clear of All Interests, Including Liens,**  
22 **Claims, Interests and Encumbrances Under Bankruptcy Code Section 363(f).**

23 Section 363(f) of the Bankruptcy Code provides, in relevant part, as follows:

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

- 27 (1) applicable non-bankruptcy law permits the sale of such  
28 property free and clear of such interest;  
(2) such entity consents;

- 1 (3) such interest is a lien and the price at which such property  
2 is to be sold is greater than the aggregate value of all liens on such  
property;  
3 (4) Such interest is in bona fide dispute; or  
4 (5) such entity could be compelled, in a legal or equitable  
proceeding, to accept a money satisfaction of such interest.

5 11 U.S.C. § 363(f).

6 Section 363(f) of the Bankruptcy Code was drafted in the disjunctive. Thus, a debtor  
7 need only meet the provisions of one of the five subsections of section 363(f) in order for a sale  
8 of property to be free and clear of all liens, claims and interests. *In re Whittemore*, 37 B.R. 93,  
9 94 (Bankr.D.Or.1984). In addition, courts generally permit the sale of estate assets free and clear  
10 of interests so long as the interests attach to the sale proceeds. *In re Collins*, 180 B.R. 447, 452  
11 (Bankr. E.D. Va. 1995) *citing* H.R.Rep. No. 595, 95th Cong., 1st Sess. 345 (1977), *reprinted in*  
12 1978 U.S.C.C.A.N. 5787; *See* 2 COLLIER ON BANKRUPTCY ¶ 363.07 at p. 363–35 (15th Ed.1995)  
13 (The commonly accepted method for adequate protecting a secured creditor when a sale is  
14 authorized under § 363(f) is to order the liens to attach to the net proceeds of the sale).

15 **1. The Debtor’s Proposed Sale is Permissible Pursuant to Section 363(f)(2) of**  
16 **the Bankruptcy Code.**

17 Section 363(f)(2) of the Bankruptcy Code authorizes a sale to be free and clear of an  
18 interest if the interest holder consents to the sale. However, the “consent” of an entity asserting  
19 an interest in the property sought to be sold, as referenced in Section 363(f)(2) of the Bankruptcy  
20 Code, can be implied if such entity fails to make a timely objection to the sale after receiving  
21 notice of the sale. *In re Eliot*, 94 B.R. 343, 345 (E.D.Pa.1988). In the *Eliot* case, the bankruptcy  
22 court approved the sale by a trustee of certain real property that was subject to a mortgage in  
23 favor of Citibank. Citibank had received notice of the sale, but did not file any timely objection  
24 to the sale. After the sale occurred, Citicorp filed a motion to set aside the sale, which was  
25 handled by the bankruptcy court as an adversary proceeding. The bankruptcy court dismissed  
26 the complaint to set aside the sale, and Citicorp appealed the ruling. The district court affirmed  
27 the dismissal, and, in so doing, stated:  
28

1 ... if any of the five conditions of § 363(f) are met, the Trustee has the  
2 authority to conduct the sale free and clear of all liens. In this case, the  
3 authority for the sale can be found in 11 U.S.C. § 363(f)(2). That section  
4 allows the Trustee to sell the property free and clear of all liens because  
5 Citicorp consented to the sale. *Citicorp consented to the sale by failing to  
6 make any timely objection after receiving notice of the sale.* Citicorp  
7 contends that implied consent is insufficient to satisfy the consent  
8 requirement of § 363(f)(2). I disagree. (emphasis added)

9 In its ruling, the *Eliot* court relied on *In re Gabel*, 61 B.R. 661 (Bankr.W.D. La.1985),  
10 which held that implied consent is sufficient to authorize a sale under § 363(f)(2). *See also, In re*  
11 *Ex-Cel Concrete Company, Inc.*, 178 B.R. 198, 203 (9th Cir.B.A.P.1995) (“The issue here is  
12 whether there was consent or non-opposition by Citicorp.”); *In re Paddlewheels, Inc.*, 2007 WL  
13 1035151 (Bankr.E.D.La.2007) (“The Sale Motion complies with section 363(f) of the  
14 Bankruptcy Code, in that the Trustee either obtained the consent of Whitney to the sale of the  
15 Vessel to the Purchaser or Whitney had no objection to the Sale.”).

16 As set forth above, several parties, including the IRS, have asserted security interests in  
17 the Acquired Assets.. All of the parties that assert an alleged security interest in the Acquired  
18 Assets will receive notice of the proposed sale and will have an opportunity to respond to this  
19 Motion. Moreover, if any other individual or entity believes that it has a security interest in the  
20 Acquired Assets, it will have an opportunity to assert a claim in response to this Motion.  
21 Therefore, based upon the authority set forth above, the Debtor requests that the Court approve  
22 the Debtor’s’ proposed sale of the Acquired Assets free and clear of all liens, claims,  
23 encumbrances and/or interests of any parties who may assert such liens, claims, encumbrances  
24 and/or interests against the Acquired Assets and who do not file a timely objection to the  
25 proposed sale of the Property, by deeming all such parties to have consented to the proposed sale  
26 pursuant to Section 363(f)(2) of the Bankruptcy Code.

27 In addition to the foregoing, the Debtor submits that it has also satisfied at least two more  
28 of the other possible conditions of section 363(f) for a free and clear sale to enable the Debtor to  
deliver the Acquired Assets to the Buyer or to a successful overbidder other than the Buyer free  
and clear of all liens, claims, encumbrances and interests.

1                   **2. The Debtor's Proposed Sale is Permissible Pursuant to Section 363(f)(4).**

2                   Section 363(f)(4) of the Bankruptcy Code permits a sale of assets to be free and clear of  
3 an interest when such interest is in bona fide dispute. To the extent that any creditors assert  
4 disputed claims and oppose the sale free and clear of liens, claims, encumbrances and interests,  
5 the Motion should be granted based on the fact that such claims are in bona fide dispute. Here,  
6 there is a bonafide dispute with respect to all of the Debtor's secured creditors based on: (1) a  
7 disagreement concerning the amount owed, and (2) in the case of certain creditors described  
8 below, a disagreement as to whether their liens should be avoid or are void or invalid.

9                   To satisfy section 363(f)(4), there must be an objective basis for a factual or legal dispute  
10 as to the validity of the interest (or the debt relating to the interest). *In re Kellogg-Taxe*, 2014  
11 WL 1016045, at \*6 (Bankr.C.D.Cal. Mar.17, 2014) (citing *In re Gaylord Grain L.L.C.*, 306 B.R.  
12 624, 627 (B.A.P. 8th Cir. 2004)); *In re Daufuskie Island Props., LLC*, 431 B.R. 626, 645  
13 (Bankr.D.S.C.2010); *see also Higgins v. Vortex Fishing Systems, Inc. (In re Vortex Fishing Sys.,*  
14 *Inc.)*, 277 F.3d 1057, 1062 (9th Cir.2002) (adopting objective test for determining whether claim  
15 supporting involuntary petition is subject to bona fide dispute). “[T]he moving party must  
16 ‘provide some factual grounds to show some objective basis for the dispute.’” *SEC v. Capital*  
17 *Cove Bancorp LLC*, 2015 WL 9701154, at \*7 (C.D.Cal. Oct.13, 2015). The dispute, however,  
18 need not be the subject of a pending or imminent adversary proceeding. *Kellogg-Taxe*, 2014 WL  
19 1016045, at \*6. The court is not required to resolve the underlying dispute as a condition to  
20 authorizing the sale, but must determine that it exists. *Capital Cove Bancorp*, 2015 WL  
21 9701154, at \*7; *Kellogg-Taxe*, 2014 WL 1016045, at \*6.

22                   Here, the Debtor has good cause to dispute all of the liens against the Acquired Assets, to  
23 one extent or another, and for the reasons described in the Statement of Facts section called “The  
24 Debtor's Secured Debt” above, which is incorporated herein by this reference as if set forth in  
25 full. In addition, since the ultimate purchase price cannot be ascertained until overbidding  
26 occurs, the Debtor could potentially have a claim for surcharge in some amount against all of the  
27 aforementioned creditors (and anyone else who asserts a lien, claim, interest and/or encumbrance  
28

1 related to the Acquired Assets). Therefore, based on all of the foregoing, the Debtor can,  
2 therefore, sell its assets free and clear of the liens, claims and interests of the aforementioned  
3 creditors asserting secured claims and the liens, claims, encumbrances and interests of anyone  
4 else who asserts a disputed claim pursuant to Section 363(f)(4) of the Bankruptcy Code.

5 **3. The Debtor's Proposed Sale is Permissible Pursuant to Section 363(f)(5) of**  
6 **the Bankruptcy Code.**

7 Pursuant to 11 U.S.C. §363(f)(5), a trustee may sell property free and clear of any interest  
8 if the holder of that interest “could be compelled, in a legal or equitable proceeding, to accept a  
9 money satisfaction of such interest.” 11 U.S.C. § 363(f)(5). Section 363(f)(5) has generally been  
10 interpreted to mean that if, under applicable law, the holder of the lien or interest could be  
11 compelled to accept payment in exchange for its interest, the trustee (or debtor-in-possession)  
12 may take advantage of that right by replacing the holder's lien or interest with a payment or other  
13 adequate protection. COLLIER ON BANKRUPTCY, ¶ 363.06 [6] (15th ed. rev. 2003).

14 In *Clear Channel Out-door, Inc. v. Knupfer (In re PW, LLC)*, 391 B.R. 25 (9<sup>th</sup> Cir. BAP  
15 2008), the Bankruptcy Appellate Panel for the Ninth Circuit reversed the Bankruptcy Court's  
16 approval of a sale to a senior lender free and clear of the liens of the junior lienholder under §  
17 363(f)(5). In reversing the Bankruptcy Court's decision, the Bankruptcy Appellate Panel found  
18 that Section 363(f)(5) requires that “(1) a proceeding exists or could be brought, in which (2) the  
19 nondebtor could be compelled to accept a money satisfaction of (3) its interest.” *Id.* at 41.  
20 Analyzing the aforementioned factors in reverse order, the Bankruptcy Appellate Panel  
21 concluded that a lien constitutes an “interest” for purposes of Section 363(f)(5). *Id.* With respect  
22 to the second factor, the Bankruptcy Appellate Panel ruled that Section 363(f)(5) refers to those  
23 proceedings in which the creditor “could be compelled to take less than the value of the claim  
24 secured by the interest.” *Id.* In order to approve a sale free and clear under Section 363(f)(5), the  
25 Court must “make a finding of the existence of ... a mechanism [to address extinguishing the  
26 lien or interest without paying such interest in full] and the [debtor in possession] must  
27 demonstrate how satisfaction of the lien ‘could be compelled.’” *Id.* at 45. Finally, the  
28

1 Bankruptcy Appellate Panel held that Section 363(f)(5) requires that there be, “or that there be  
2 the possibility of, some proceeding, either at law or at equity, in which the nondebtor could be  
3 forced to accept money in satisfaction of its interest.” *Id.*

4 Here, all of the factors set forth in *Clear Channel* for a sale free and clear of the claims of  
5 each of the liens, claims, encumbrances and interests alleged against the Acquired Assets’ are  
6 satisfied. Specifically, any party who asserts an “interest” in the Acquired Assets could be  
7 compelled, in a legal or equitable proceeding, to accept a money satisfaction of its interest. The  
8 Bankruptcy Court in *In re Jolan, Inc.*, 403 B.R. 866 (Bankr. W.D. Wash. 2009), analyzed the  
9 Bankruptcy Appellate Panel’s decision in *Clear Channel* and provided that the scope of the  
10 Panel’s ruling in *Clear Channel* should be narrowly construed to the facts of that particular case.  
11 The Court in *Jolan* noted that the appellees defending the sale free and clear in *Clear Channel*  
12 never argued that there were any qualifying “legal or equitable proceedings” beyond  
13 “cramdown” under § 1129 and that the Panel, in turn, exercised its prerogative to limit its ruling  
14 to the arguments presented by the parties. *Id.* at 869-870. Accordingly, the Panel in *Clear*  
15 *Channel* did not address whether any non-contractual mechanisms exist whereby a lienholder  
16 might get less than full payment yet lose the lien. *Id.* at 869-870. The Court in *Jolan*, however,  
17 did address the issues and concluded that there are a number of legal and equitable proceedings  
18 available in Washington State in which a junior lienholder could be compelled to accept a money  
19 satisfaction including, without limitation, “a senior secured party’s disposition of collateral under  
20 the default remedies provided in part VI of Article 9” of Washington’s Uniform Commercial  
21 Code (specifically, RCW 62A.9A-617), and the disposition of real property through “judicial and  
22 nonjudicial foreclosures, which operate to clear junior lienholders’ interests, with their liens  
23 attaching to proceeds in excess of the costs of sale and the obligation or judgment foreclosed.”  
24 *Id.* at 3-4. The Court in *Jolan* also pointed out that the liens of junior lienholders can be  
25 extinguished in connection with federal tax lien sales pursuant to 26 U.S.C. §§ 6335 and 6339(c)  
26 *Id.* at 870.

1           There are legal and equitable proceedings available in California (in addition to  
2 proceedings such as a federal tax lien sale) that parallel the proceedings discussed by the Court in  
3 *Jolan*. A junior lienholder in California can be compelled to accept a money satisfaction upon a  
4 senior secured party's disposition of collateral under the default remedies provided in § 9617 of  
5 California's Commercial Code and a junior lienholder can be forced to accept money for its  
6 interests in connection with a personal property tax sale under California Revenue and Tax Code  
7 section 3691. Therefore, since there legal and equitable proceedings exist by which lienholders  
8 may be compelled to accept money satisfaction under California and federal non-bankruptcy  
9 law, Section 365(f)(5) permits a sale free and clear of liens, claims, encumbrances and interests,  
10 with the liens attaching to the proceeds notwithstanding that those proceeds may be insufficient  
11 to pay liens.

12           Based on the foregoing, the Debtor respectfully submit that any party who asserts a lien  
13 against the Acquired Assets could be compelled, in a legal or equitable proceeding, to accept a  
14 money satisfaction of its interest. Thus, the Court should permit the sale of the Acquired Assets  
15 to the Buyer or a successful overbidder free and clear of all liens, claims, encumbrances and  
16 interests pursuant to section 363(f)(5) of the Bankruptcy Code.

17       **C.    The Debtor's Proposed Sale Should Be Permitted and Any Liens, Claims,**  
18           **Encumbrances and/or Interest Should Be Transferred and Attach to the Net Sale**  
19           **Proceeds.**

20           Courts generally allow free and clear sales as long as the liens, claims and interests on the  
21 assets to be sold are transferred and attach to the proceeds of the sale. *In re Collins*, 180 B.R. at  
22 452 citing H.R.Rep. No. 595, 95th Cong., 1st Sess. 345 (1977), *reprinted in* 1978 U.S.C.C.A.N.  
23 5787; *See* 2 COLLIER ON BANKRUPTCY ¶ 363.07 at p. 363–35 (15th Ed.1995) (The commonly  
24 accepted method for adequately protecting a secured creditor when a sale is authorized under §  
25 363(f) is to order the liens to attach to the proceeds of the sale). Since the liens, claims,  
26 encumbrances and interests are to be transferred from the Acquired Assets and attach to the Net  
27 Proceeds of the sale with the same validity, priority and extent that such liens, claims,  
28

1 encumbrances and interests had against the Acquire Assets, the Debtor's proposed sale of the  
2 Acquired Assets should be approved.

3 **D. The Court Should Authorize the Debtor's Assumption and Assignment of**  
4 **Unexpired Leases and Executory Contracts Pursuant to the Proposed Procedures.**

5 Bankruptcy Code sections 365(a) and 1107(a) authorize a debtor in possession, "subject  
6 to the Court's approval . . . [to] assume or reject any executory contract or unexpired lease of the  
7 debtor." A debtor in possession may assume or reject executory contracts for the benefit of the  
8 estate. *In re Klein Sleep Products, Inc.*, 78 F.3d 18, 25 (2d. Cir.1996); *In re Central Fla. Metal*  
9 *Fabrication, Inc.*, 190 B.R. 119, 124 (Bankr. N.D. Fla. 1995); *In re Gucci*, 193 B.R. 411, 415  
10 (S.D.N.Y.1996). In reviewing a debtor in possession's decision to assume or reject an executory  
11 contract, a bankruptcy court should apply the "business judgment test" to determine whether it  
12 would be beneficial to the estate to assume it. *In re Continental Country Club, Inc.*, 114 B.R.  
13 763, 767 (Bankr.M.D.Fla.1990); *see also In re Gucci*, 193 B.R. at 415. The business judgment  
14 standard requires that the court follow the business judgment of the debtor unless that judgment  
15 is the product of bad faith, whim, or caprice. *In re Prime Motors Inns*, 124 B.R. 378, 381  
16 (Bankr.S.D.Fla.1991), *citing Lubrizol Enterprises v. Richmond Metal Finishers*, 756 F.2d 1043,  
17 1047 (4th Cir.1985), *cert. denied*, 475 U.S. 1057 (1986).

18 Pursuant to Bankruptcy Code section 365(b)(1), assumption of executory contracts and  
19 unexpired leases requires a debtor to: (a) cure any existing defaults under such agreements; (b)  
20 compensate all non-debtor parties to such agreements for any actual pecuniary loss resulting  
21 from the defaults; and (c) provide adequate assurance of future performance under the contract or  
22 lease. 11 U.S.C. § 365(b)(1); *see also In re Bowman*, 194 B.R. 227, 230 (Bankr.D.Ariz.1995), *In*  
23 *re AEG Acquisition Corp.*, 127 B.R. 34, 44 (Bankr.C.D.Cal.1991), *aff'd* 161 B.R. 50 (9th  
24 Cir.B.A.P.1993).

25 Under section 365(f) of the Bankruptcy Code, a debtor, after assuming a contract, may  
26 assign its rights under the contract to a third party. 11 U.S.C. § 365(f); *see also In re Rickel*  
27 *Home Center, Inc.*, 209 F.3d 291, 299 (3d Cir. 2000) ("The Code generally favors free  
28

1 assignability as a means to maximize the value of the debtor's estate."); *Weingarten Nostat, Inc.*  
2 *v. Service Merchandise Company, Inc.*, 396 F.3d 737, 742 (6th Cir. 2005); *see also In re*  
3 *Headquarters Dodge, Inc.*, 13 F.3d 674, 682 (3d Cir. 1994) (noting that the purpose of section  
4 365(f) is to assist the trustee in realizing the full value of the debtor's assets); *In re Crow*  
5 *Winthrop Operating Partnership*, 241 F.3d 1121, 1124 (9th Cir. 2001) (finding that section  
6 365(f) permits the assignment of contracts by debtors notwithstanding de facto anti-assignment  
7 clauses so as to permit debtors from realizing the full value of their assets). Pursuant to section  
8 365(f)(1) of the Bankruptcy Code, a debtor may assign an executory contract or unexpired lease  
9 pursuant to section 365(f)(2) of the Bankruptcy Code notwithstanding any provision in such  
10 executory contract or unexpired lease that prohibits, restricts or conditions the assignment of  
11 such executory contract or unexpired lease.

12 Pursuant to Bankruptcy Code section 365(f)(2) of the Bankruptcy Code, a debtor may  
13 assign its executory contracts and unexpired leases, provided the debtor first assumes such  
14 executory contracts and unexpired leases in accordance with Bankruptcy Code section 365(b)(1),  
15 and provides adequate assurance of future performance by the assignee. Section 365(f)(2)(B)  
16 requires, however, that adequate assurance of future performance by an assignee exist. 11 U.S.C.  
17 § 365(f)(2)(B). The purpose of the adequate assurance requirement is to protect the interests of  
18 the non-debtor party to an assigned contract, as section 365(k) of the Bankruptcy Code relieves a  
19 debtor from liability for any breach of a contract that may occur after an assignment. *Cinicola v.*  
20 *Scharffeberger*, 248 F.3d 110, 120 (3d Cir. 2001). Adequate assurance of future performance is  
21 not required for every term of an executory contract or unexpired lease, but only such terms that  
22 are "material and economically" significant. *In re Fleming Cos., Inc.*, 499 F.3d 300, 305 (3d Cir.  
23 2007). The meaning of "adequate assurance of future performance" depends on the facts and  
24 circumstances of each case, but should be given a "practical, pragmatic construction." *In re*  
25 *DBSI, Inc.*, 405 B.R. 698, 708 (Bankr. D. Del. 2009); *see also In re Decora Indus.*, 2002 U.S.  
26 Dist. LEXIS 27031, at \*23 (D. Del. 2002) ("[A]dequate assurance falls short of an absolute  
27 guarantee of payment."). Adequate assurance may be provided by demonstrating the assignee's  
28

1 financial health and experience in managing the type of enterprise or property assigned. See,  
2 *e.g.*, *In re Bygaph, Inc.*, 56 B.R. 596, 605-06 (Bankr. S.D.N.Y. 1986) (finding that adequate  
3 assurance is present when prospective assignee of lease from debtor has financial resources and  
4 has expressed willingness to devote sufficient funding to business to give it strong likelihood of  
5 success).

6 As noted above, the APA requires the Debtor to assume and assign certain executory  
7 contracts and unexpired leases as identified by the Buyer. Thus, it is an appropriate exercise of  
8 the Debtor's business judgment to seek to assume and assign those executory contracts and  
9 unexpired leases to facilitate the Debtor's efforts to maximize value for their creditors and estate  
10 through the sale transaction. The Debtor proposes that adequate assurance of future performance  
11 has been provided because the Buyer has provided evidence of the substantial experience of its  
12 management in the Debtor's industry and of its financial commitment and wherewithal to honor  
13 the obligations under the Assigned Contracts. (*If individual counterparties to executory*  
14 *contracts have concerns about this requirement and the assumption and assignment of their*  
15 *individual lease or executory contract then they are encouraged to contact the Buyer directly to*  
16 *discuss those concerns before they consider filing an objection to this Motion.*) Additionally, the  
17 Debtor submits that the notice provisions and objection deadline for counterparties to raise  
18 objections to the assumption and assignment of the leases, described herein and which are set  
19 forth in the Cure Notice are adequate to protect the rights of the nondebtor counterparties to the  
20 executory contracts and unexpired leases.

21 The Debtor also requests that any party failing to object to the proposed transactions be  
22 deemed to consent to the treatment of its unexpired lease under section 365 of the Bankruptcy  
23 Code. See *Hargrave v. Twp. of Pemberton (In re Tabone, Inc.)*, 175 B.R. 855, 858 (Bankr.  
24 D.N.J. 1994) (by not objecting to sale motion, creditor deemed to consent); *Pelican Homestead*  
25 *v. Wooten (In re Gabeel)*, 61 B.R. 661, 667 (Bankr. W.D. La. 1985) (same).

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27 ///

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1 **E. The Court Should Approve the Bidding Procedures and Breakup Fee Described**  
2 **Herein.**

3 Bankruptcy Rules 2002 and 6004 govern the scope of the notice to be provided in the  
4 event a debtor elects to sell property of the estate under 11 U.S.C. § 363; however, with respect  
5 to the procedures to be adopted in conducting a sale outside the ordinary course of a debtor's  
6 business, Bankruptcy Rule 6004 provides only that such sale may be by private sale or public  
7 auction, and requires only that the debtor provide an itemized list of the property sold together  
8 with the prices received upon consummation of the sale. FED.R.BANKR.P.6004(f).

9 Neither the Bankruptcy Code nor the Bankruptcy Rules contains specific provisions with  
10 respect to the procedures to be employed by a debtor in conducting a public or private sale.  
11 However, the Bankruptcy Court has the power to establish reasonable sale procedures. *See, e.g.,*  
12 *Doehring v. Crown Corp. (In re Crown Corporation)*, 679 F.2d 774 (9th Cir.1982). As one  
13 Court has stated, “[i]t is a well-established principle of bankruptcy law that the objective of  
14 bankruptcy rules and the [debtor’s] duty with respect to such sales is to obtain the highest price  
15 or greatest overall benefit possible for the estate.” *In re Atlanta Packaging Products, Inc.*, 99  
16 B.R. 124, 131 (Bankr.N.D.Ga.1988). Additionally, courts have long recognized the need for  
17 competitive bidding at hearings on private sales; “[c]ompetitive bidding yields higher offers and  
18 thus benefits the estate. Therefore, the objective is ‘to maximize bidding, not restrict it.’” *Id.*

19 A corollary to these principles is that the court should not “cherry-pick” among  
20 contractual provisions, objecting to select individual portions, if the agreement as a whole is  
21 supported by an articulated business judgment. At least one bankruptcy court has expressly  
22 applied this corollary to a transaction including breakup and overbid provisions in the sale of the  
23 debtor’s business. In *In re Crowthers McCall Pattern, Inc.*, 114 B.R. 877  
24 (Bankr.S.D.N.Y.1990), the court approved a transaction including provisions relating to a  
25 breakup fee and a requirement that overbids be at least \$500,000. In responding to objections to  
26 other provisions of the agreement, the court held that:

1           The Court is not to second guess the inclusion of some  
2           provisions as long as the Agreement as a whole is within  
3           reasonable business judgment, and the subject provisions do  
4           not distort the balance Congress struck in Chapter 11. *Cf. In re*  
5           *Ames Dep't Stores, Inc., Eastern Retailers Service Corp., et al.*,  
6           115 B.R. 34, 37-38 (Bankr.S.D.N.Y.1990) (some contractual  
7           provisions may be justified by the need to attract a prospective  
8           investor.).

9           114 B.R. at 886.

10           The Debtor believes that Bidding Procedures (if approved) could result in obtaining the  
11           highest purchase price possible for the Sale, under the circumstances of this case. Assuming an  
12           adequate marketing effort, an auction and sale process should render the best sale price available  
13           for the Debtor's business and substantially all of its assets.

14           The Breakup Fee is a provision of the APA. In addition, as a whole, the Bidding  
15           Procedures will (i) foster competitive bidding among any serious potential purchasers; (ii)  
16           eliminate from consideration potential purchasers who do not have the financial ability to  
17           consummate the transaction in an expeditious manner; and (iii) ensure that the highest possible  
18           purchase price is obtained for the Sale under these circumstances. The Debtor believes that an  
19           auction of the Debtor's business and substantially all of its assets in accordance with the Bidding  
20           Procedures is in the best interests of the estate.

21           **F. The Investment Banker's Fee Should Be Authorized to Be Paid Following the**  
22           **Closing of a Sale Approved By This Court.**

23           Section 328(a) of the Code provides that:

24           "The trustee, or a committee appointed under [section 1102 of this title](#),  
25           with the court's approval, may employ or authorize the employment of a  
26           professional person under [section 327](#) or [1103](#) of this title, as the case may  
27           be, on any reasonable terms and conditions of employment, including on a  
28           retainer, on an hourly basis, on a fixed or percentage fee basis, or on a  
contingent fee basis. Notwithstanding such terms and conditions, the court  
may allow compensation different from the compensation provided under  
such terms and conditions after the conclusion of such employment, if  
such terms and conditions prove to have been improvident in light of  
developments not capable of being anticipated at the time of the fixing of  
such terms and conditions."

1 According to the Retention Agreement, and as detailed in the Employment Application,  
2 both of which are incorporated herein by this reference, the Investment Banker is entitled to  
3 receive a fee upon the consummation of a successful transaction in an amount of no less than  
4 \$250,000. *See* Docket No. 64 at p. 5 line 16. Since the Court entered an order approving the terms  
5 of the Investment Banker’s employment on or about January 20, 2017 [Docket No. 142], and the  
6 Debtor believes that the Investment Banker has worked diligently to bring a sale to fruition, and  
7 will continue to work diligently through a closing, the Debtor respectfully requests that the  
8 Investment Banker’s Fee be allowed and authorized to be paid upon the closing of a sale approved  
9 by this Court.

10 **G. The Debtor Should Be Authorized To Reject the Excluded Contracts, With the**  
11 **Exception of the Agreements Referenced in Sections 1113 and 1114 of the Code, As of the**  
12 **Closing Date.**

13 Section 365(a) of the Bankruptcy Code authorizes a debtor in possession, “subject to the  
14 Court’s approval, ... [to] assume or reject any executory contract or unexpired lease of the  
15 debtor.” A debtor in possession may assume or reject executory contracts for the benefit of the  
16 estate. *In re Klein Sleep Products, Inc.*, 78 F.3d 18, 25 (2d. Cir. 1996); *In re Central Fla. Metal*  
17 *Fabrication, Inc.*, 190 B.R. 119, 124 (Bankr. N.D.Fla. 1995); *In re Gucci*, 193 B.R. 411, 415  
18 (S.D.N.Y. 1996). In reviewing a debtor in possession’s decision to assume or reject an executory  
19 contract, a bankruptcy court should apply the “business judgment test” to determine whether it  
20 would be beneficial to the estate to assume it. *In re Continental Country Club, Inc.*, 114 B.R.  
21 763, 767 (Bankr. M.D.Fla. 1990); see also *In re Gucci*, supra, 193 B.R. at 415; *NLRB v. Bildisco*  
22 (*In re Bildisco*), 682 F.2d 72, 79 (3d Cir. 1982) (“The usual test for rejection of an executory  
23 contract is simply whether rejection would benefit the estate, the ‘business judgment’ test.”).  
24 The business judgment standard requires that the Court follow the business judgment of the  
25 debtor unless that judgment is the product of bad faith, whim, or caprice. *In re Prime Motors*  
26 *Inns*, 124 B.R. 378, 381 (Bankr. S.D.Fla. 1991), citing *Lubrizol Enterprises v. Richmond Metal*  
27 *Finishers*, 756 F.2d 1043, 1047 (4th Cir. 1985), cert. denied, 475 U.S. 1057, 106 S.Ct. 1285, 89  
28

1 L.Ed.2d 592 (1986); *see also In re Trans World Airlines, Inc.*, 261 B.R. 103, 121 (Bankr. D. Del.  
2 2001).

3 For the reasons described above, once the sale to the Buyer or a successful overbidder  
4 other than the Buyer closes, and in the event that the Buyer (or another bidder) elects not to take  
5 assignment of all of the Debtor's other executory contracts and unexpired leases, the Debtor will  
6 no longer require the services described in the executory contracts, the use of real property  
7 described in the real property leases and/or the use of the personal property described in the  
8 personal property leases not to be assumed and assigned to the Buyer or a successful overbidder  
9 other than the Buyer (previously defined as the "Excluded Contracts"). Each day that the  
10 Excluded Contracts remain in place will result in potential unnecessary expenses, including  
11 potential administrative expenses to the Debtor's bankruptcy estate. Rejection of the Excluded  
12 Contracts (except for the types of agreements referenced in Sections 1113 and 1114 of the Code,  
13 which will be the subject of a different motion or motions) will eliminate the risk of any potential  
14 additional administrative claims related to such contracts and leases thereby preserving the value  
15 of the Debtor's assets and conserve the Debtor's resources and cash. Accordingly, the Debtor's  
16 submit that it is reasonable and appropriate for the Court to authorize the rejection of the  
17 Excluded Contracts (with the exception of the agreements that are the subject of Sections 1113  
18 and 1114 and will be the subject of a separate motion or motions) upon the closing of a sale to  
19 the Buyer or a successful overbidder. Once the rejection becomes effective the Debtor will  
20 promptly turn over possession of the personal and real property leased and will cease receiving  
21 the services provided under the rejected executory contracts.

22 For all of the reasons set forth above, the Debtor submits that rejection of the  
23 aforementioned Excluded Contracts in accordance with the terms and conditions set forth herein,  
24 is in the best interests of the Debtor's bankruptcy estate and should be approved by the Court.

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1 **H. The Court Should Order the Net Proceeds To Remain In A Segregated Account**  
2 **Pending Further Order of the Court.**

3 Although a secured creditor, such as the IRS, may desire to have funds disbursed to it to  
4 pay its secured claim immediately upon closing, the Debtor requests that the Court order the Net  
5 Proceeds to remain in a segregated client trust account pending further order of the Court so that  
6 the Debtor, and any other parties who feel they may have a claim to the Net Proceeds, may have  
7 a fair opportunity to assert such claims.

8 By way of example, Section 506(c) of the Bankruptcy Code provides:

9  
10 "(c) The trustee may recover from property securing an allowed  
11 secured claim the reasonable, necessary expenses and expenses of  
preserving or disposing of, such property to the extent of any  
benefit to the holder of such claim."

12 11 U.S.C. § 506(c). Thus, if a debtor in possession or trustee "expends money to provide for the  
13 reasonable and necessary expenses and expenses of preserving or disposing of a secured  
14 creditor's collateral, the ... debtor in possession is entitled to recover such expenses from the  
15 secured party." In re American Savings and Loan Assoc. v. Gill (In re North County Place,  
16 Ltd.), 92 B.R. 437, 443 (Bankr. C.D. Cal. 1988). To qualify for a surcharge against a secured  
17 creditor's collateral the movant must demonstrate that the expenses and expenses incurred were  
18 1) reasonable, 2) necessary in preserving or disposing of the collateral, and 3) beneficial to the  
19 secured creditor. Central Bank v. Cascade Hydraulics & Utility Service (In re Cascade  
20 Hydraulics & Utility Service), 815 F.2d 546 (9th Cir. 1987); North County Place, supra, 92 B.R.  
21 at 443; Lines v. North Coast Production Credit Association, 893 F.2d 1072 (9th Cir. 1990). The  
22 court is to determine whether or not to allow reimbursement of fees and expenses under Section  
23 506(c) based on the facts of each particular case. In re Chicago Lutheran Hosp. Assoc., 89 B.R.  
24 719 (Bankr. N.D. Ill. 1988); Halverson v. Cameron, 170 B.R. 662 (Bankr. D.Minn. 1992).

25 In this case, the Debtor has had certain expenses, including attorneys' fees, and may have  
26 additional expenses prior to Closing, including payroll and other expenses reasonably-related to  
27 operating its business, that the Debtor has, or is going to have to incur (and may not be able to  
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1 pay prior to the Closing), in order to continue to operate its business through the date of the  
2 closing of the proposed sale. Since the proposed sale directly benefits the IRS, as the IRS  
3 appears to be the senior lender given the assets that are being sold, and the Debtor has incurred  
4 substantial expenses that it believes to be both reasonable and necessary in connection with the  
5 preservation and/or disposal of the subject collateral, the Debtor submits that the Net Proceeds  
6 should not be distributed immediately following the Closing, but should remain in a segregated  
7 account client trust account pending further order of the Court and in order to allow the Debtor,  
8 and potentially others, to ascertain the amount of such claims and file a surcharge motion or an  
9 objection to claim since the amount of such claims cannot be ascertained prior to the date of the  
10 hearing on this Motion.

11 **I. The Debtor Requests that the Court Waive the Fourteen-Day Waiting Periods Set**  
12 **Forth in Bankruptcy Rules 6004(h) and 6006(d).**

13 Bankruptcy Rule 6004(h) provides, among other things, that an order authorizing the use  
14 sale or lease of property . . . is stayed until the expiration of fourteen days after entry of the Court  
15 order, unless the Court orders otherwise. Bankruptcy Rule 6006(d) has a similar provision with  
16 respect to an order approving of a debtor's assumption and assignment of unexpired leases and  
17 executory contracts. The Buyer has indicated that it will be ready to close within days of the  
18 entry of an order of the Court approving the Sale. For all of the reasons set forth above, the  
19 Debtor believes that it is critically important that the Debtor and the Buyer (or a successful  
20 overbidder) be permitted to consummate the Closing as soon after entry of the Sale Order as  
21 possible. Indeed, as previously indicated, failure to close expeditiously could cause irreparable  
22 harm to the Debtor and its creditors because the Debtor is experiencing severe cash flow  
23 problems and cannot continue to operate in the long run. Thus, in order to facilitate the most  
24 expeditious closing possible, the Debtor requests that the Sale Order be effective immediately  
25 upon entry by providing that the fourteen-day waiting periods of Bankruptcy Rule 6004(h) and  
26 6006(d) be waived.

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**IV.**

**CONCLUSION**

WHEREFORE, the Debtor respectfully requests that the Court enter an order:

1. finding that notice was good and proper under the circumstances;
2. granting this Motion in its entirety;
3. approving the Bidding Procedures;
4. approving the Breakup Fee described in the APA;
5. approving the Sale to the Buyer and/or to its designee (if any) or to a successful overbidder as set forth in the Motion and under the terms of the APA or a successful bidder's APA;
6. approving the Sale free and clear all liens, claims, interests and encumbrances, pursuant to 11 U.S.C. § 363(f);
7. authorizing the Debtor to assume and assign to the Buyer and/or to its designee (if any) or to a successful overbidder those unexpired leases and executory contracts identified by the Buyer as part of the Sale pursuant to 11 U.S.C. § 365;
8. ordering all liens, claims, interests and encumbrances on and against the assets to be sold to be transferred from those assets and to attach to the net proceeds of the sale with the same validity, priority and extent that such liens, claims, encumbrances and interests had against the assets to be sold;
9. authorizing the allowance and payment of the Investment Banker's Fee following the Closing;
10. authorizing the payment of all of necessary and customary taxes and fees required to be paid in connection with the sale, if any;
11. ordering the net proceeds of the Sale to remain in an the client trust account pending further order of the Court;
12. finding that the Buyer is a good faith purchaser with the protections of 11 U.S.C. § 363(m);

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- 13. authorizing the Debtor to take all necessary and reasonable steps to consummate the sale, if approved;
- 14. waiving the 14-day stay periods set forth in Bankruptcy Rules 6004(h) and 6006(d);
- 15. granting such other relief as requested in the Motion and/or Memorandum; and
- 16. granting such other and further relief as the Court deems just and proper under the circumstances.

Dated: April 20, 2017

STEINY AND COMPANY, INC.

By:           /s/ Jacqueline L. James          

Ron Bender  
Jacqueline L. James  
Lindsey L. Smith  
Levene, Neale, Bender, Yoo & Brill L.L.P.  
Attorneys for Chapter 11 Debtor and  
Debtor in Possession

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## PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is 10250 Constellation Boulevard, Suite 1700, Los Angeles, CA 90067

A true and correct copy of the foregoing document entitled **MOTION FOR ENTRY OF ORDER: (I) AUTHORIZING DEBTOR TO SELL ASSETS FREE AND CLEAR OF LIENS, CLAIMS, ENCUMBRANCES AND INTERESTS; (II) AUTHORIZING ASSUMPTION AND ASSIGNMENT OF CERTAIN UNEXPIRED LEASES AND EXECUTORY CONTRACTS; (III) AUTHORIZING REJECTION OF CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES; (IV) ESTABLISHING BIDDING PROCEDURES AND APPROVING BREAKUP FEE; (V) GRANTING OTHER AND FURTHER RELIEF; AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** will be served or was served **(a)** on the judge in chambers in the form and manner required by LBR 5005-2(d); and **(b)** in the manner stated below:

1. **TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF)**: Pursuant to controlling General Orders and LBR, the foregoing document will be served by the court via NEF and hyperlink to the document. On **April 21, 2017**, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following persons are on the Electronic Mail Notice List to receive NEF transmission at the email addresses stated below:

- Matthew T Bechtel Bechtel@luch.com, cheryl@luch.com, kimberley@luch.com
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- Robert J Berens rjb@smtldlaw.com, srodriguez@smtldlaw.com
- Scott E Blakeley seb@blakeleyllp.com, ecf@blakeleyllp.com
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**2. SERVED BY UNITED STATES MAIL:** On April 21, 2017, I served the following persons and/or entities at the last known addresses in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States mail, first class, postage prepaid, and addressed as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

Service information continued on attached page

**3. SERVED BY PERSONAL DELIVERY, OVERNIGHT MAIL, FACSIMILE TRANSMISSION OR EMAIL (state method for each person or entity served):** Pursuant to F.R.Civ.P. 5 and/or controlling LBR, April 24, 2017, I served the following persons and/or entities by personal delivery, overnight mail service, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that personal delivery on, or overnight mail to, the judge will be completed no later than 24 hours after the document is filed.

**Served via Attorney Service**

Hon. Julia W. Brand  
United States Bankruptcy Court  
255 E. Temple St, Ste 1382  
Los Angeles, CA 90012

Service information continued on attached page

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

April 21, 2017	Lisa Masse	/s/ Lisa Masse
<i>Date</i>	<i>Type Name</i>	<i>Signature</i>

**Creditors Committee, Secured, OUST**

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Attn: Alvin Mar  
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Los Angeles, CA 90017

Walters Wholesale Electric  
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Karish Electronics  
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Orange, CA 92865

Smithson Electric  
c/o Tom Smithson, President  
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TCF Equipment Finance  
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