

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF SOUTH CAROLINA

IN RE:	)	CHAPTER 11
	)	
Keowee Falls Investment Group, LLC,	)	CASE NO. 12-01399-JW
	)	
Debtor.	)	
_____	)	

**MOTION FOR ENTRY OF AN ORDER (i) ESTABLISHING BIDDING PROCEDURES IN CONNECTION WITH SOLICITATION OF OFFERS FOR SALE OF SUBSTANTIALLY ALL OF THE DEBTOR’S ASSETS FREE AND CLEAR OF ALL LIENS, CLAIMS AND ENCUMBRANCES; (ii) APPROVING FORM, MANNER, SCOPE AND SUBSTANCE OF NOTICE FOR PROPOSED SALE OF THE DEBTOR’S ASSETS; AND (iii) ESTABLISHING TIME AND DATE OF AUCTION, FINAL HEARING AND OBJECTION DEADLINES**

Keowee Falls Investment Group, LLC (or the “Debtor”) hereby moves the Court, pursuant to 11 U.S.C. §§105 and 363, and Fed. R. Bankr. P. 6004 and 6006, for entry of an order, substantially similar to the proposed Order attached hereto as Exhibit “A” (“Proposed Bidding Procedure Order”), (i) establishing bidding procedures in connection with the solicitation of offers for proposed sale of substantially all of the Debtor’s assets free and clear of all liens, claims and encumbrances; (ii) approving the form, manner, scope and substance of notice for the proposed sale of the Debtor’s assets; and (iii) establishing the time and date of the auction and hearing to authorize the sale of the subject assets, and other relief (the “Motion”). Concurrent with the filing of this Motion, the Debtor will file a motion for entry of an order: (i) approving the sale of substantially all of the Debtor’s assets free and clear of all liens, claims and encumbrances; and (ii) waiving the fourteen (14) day stay imposed by Fed. R. Bankr. P. 6004(h) and 6006(d) (the “Sale Motion”). In support of this Motion, the Debtor respectfully shows as follows:

### **JURISDICTION AND VENUE**

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §1334 and Local Civil Rule 83.IX.01, D.S.C. This Motion is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(A).
2. Venue is proper in this Court pursuant to 28 U.S.C. §§1408 and 1409.
3. The statutory bases for the relief requested herein are §§105(a), 363, 365, 1107(a) and 1108 of title 11 of the United States Code (“Bankruptcy Code”) and Rules 2002, 6004 and 6006 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”).

### **PROCEDURAL HISTORY**

4. On March 2, 2012 (the “Petition Date”), the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code, thereby commencing the above captioned bankruptcy case (the “Chapter 11 Case”).
5. Since the Petition Date, the Debtor has continued to operate and manage its business as debtor-in-possession pursuant to Bankruptcy Code §§1107(a) and 1108.
6. No trustee or examiner has been appointed in the Chapter 11 Case. No Committee of Unsecured Creditors has been appointed to serve in this Chapter 11 Case.

**BACKGROUND OF KEOWEE FALLS INVESTMENT GROUP, LLC**

7. The Cliffs at Keowee Falls South sits on over 2,500 acres of land. (KFIG is owned by The Cliffs Communities, Inc. (“CCI”) and is one of the Cliffs Development Companies or (“DevCos”).
8. Of the 950 total lots scheduled to be platted in The Cliffs at Keowee Falls South Community, 565 have been platted, and of those platted lots, nearly seventy-five (75%) per cent have been sold as of the Petition Date.
9. Amenities located within the KFIG project include a Jack Nicklaus-designed 18-hole course, a clubhouse and restaurant that sit atop the mountain, and hiking trails (The amenities are not included in the subject sale.)

**SALE OF THE KFIG ASSETS**

10. Both prior to and after the Petition Date, the Debtor has undertaken a marketing effort to sell the subject property. In order to consummate a sale, the Debtor has filed the Bidding Procedures Motion seeking authority to establish a procedure for the Debtor to market and sell the sale assets. In connection with the sale process, the Debtor requests that the Court enter an order approving the sale of the subject property to the highest and best bidder (the “Successful Bidder”) at an auction to be conducted in accordance with procedures requested in the Bidding Procedures Motion. The Debtor believes that the terms and procedures proposed for the sale of the sale assets are reasonable, consistent with transactions of the type contemplated in this Motion, and will ensure that the Debtor realizes the maximum possible value for the sale assets.

10. The sale process envisioned by the Debtor is designed to maximize the potential return to the estate by inviting the broadest possible spectrum of bids over an appropriate period of time in light of the Debtor's current financial situation. The Debtor believes that the terms proposed for the sale of the sale assets are reasonable, consistent with transactions of the type contemplated in this Motion, and will ensure that the Debtor realizes the maximum possible value for the sale assets.

### **RELIEF REQUESTED**

11. By this Motion, the Debtor seeks entry of an order pursuant to 11 U.S.C. §§105(a) and 363, and Fed. R. Bankr. P. 2002, 6004 and 6006, in substantially the form of the Proposed Bidding Procedure Order (i) establishing bidding procedures in connection with the solicitation of offers for proposed sale of the sale assets of the Debtor; (ii) approving the form, manner, scope and substance of notice for the proposed sale of the sale assets; and (iii) establishing the time and date of the auction, objection deadlines and hearing to authorize the sale of the sale assets free and clear of liens, claims and encumbrances and other relief.

### **THE SALE PROCEDURES**

12. To ensure that the Debtor receives the maximum value for the sale assets, the Debtor requests that this Court approve the following procedures (the "Sale Procedures") as provided in the Proposed Order Establishing Bidding

Procedures and Sale Free and Clear of Liens:

- ◆ **Qualified Bid.** A proposal (each such proposal, a “Bid”) received from a potential purchaser (“Potential Purchaser”) is a “Qualified Bid” if it:
- (i) is received by the Bid Deadline (as defined below);
  - (ii) is accompanied by a proposed purchase and sale agreement on the same terms<sup>1</sup> and conditions as the APA<sup>2</sup> executed between Worthington-Hyde Partners-II, L.P. (“**Worthington Hyde**” or “**Stalking Horse**”) and the Debtor, attached as Exhibit A to the motion filed seeking approval of the Sale pursuant to which the Potential Purchaser agrees to be bound in order to consummate the sale without further contingency other than the entry of an order of the Bankruptcy Court approving the sale;
  - (iii) is in cash;
  - (iv) is not subject to any contingencies, due diligence or financing conditions or board or other approval;
  - (v) is accompanied by a certified or bank check, payable to the Debtor’s counsel, as escrow agent, a good faith deposit of \$250,000.00 (the “**Deposit**”);
  - (vi) includes written evidence of an unconditional commitment for financing (by a creditworthy bank or financial institution that shall provide such financing without alteration of conditions or delay) or other evidence of ability, as determined in the reasonable business judgment of the Debtor, to consummate the transaction; and
  - (vii) fully discloses the identity of each entity or person that will be bidding for the sale assets or otherwise participating in connection with such bid, and the complete terms of any such participation.

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<sup>1</sup>Except that the Bid from a Potential Purchaser must be an **all cash bid** as provided in section (iii).

<sup>2</sup>All defined terms terms, unless otherwise indicated, shall have the meanings as set forth in the Asset Purchase Agreement executed between Debtor and Worthington Hyde.

- ◆ **Minimum Bid above Initial Bid.** \$17,175,000.00.
- ◆ **Rejection of Bids.** Debtor reserves the right to reject any Bid or Qualified Bid that the Debtor determines is (i) inadequate or insufficient; (ii) not in conformity with the requirements of the Bankruptcy Code or these Sales Procedures; or (iii) contrary to the best interests of the Debtor, its estate and creditors.
- ◆ **Bid Deadline.** A Potential Bidder that desires to make a Bid must deliver written copies of its offer, to (i) the Debtor, 3598 Hwy 11, Travelers Rest, South Carolina 29690, Attn: James B. Anthony, email: [janthony.cliffs@gmail.com](mailto:janthony.cliffs@gmail.com) / Fax (864) \_\_\_\_\_; (ii) Debtor's counsel, Levy Law Firm, LLC, 2300 Wayne Street, Columbia, South Carolina, 29201, Attn: R. Geoffrey Levy, Esq., Fax: (803) 799-5245, Email: [glevy@levylawfirm.org](mailto:glevy@levylawfirm.org), and (iii) counsel for WH, Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C. Attn: E. Franklin Childress, Jr., Fax: (901) 577-0845/email: [fchildress@bakerdonelson.com](mailto:fchildress@bakerdonelson.com). so that the Bid is actually received by 5:00 p.m. prevailing Eastern Time on August 24, 2012 ("**Bid Deadline**").
- ◆ **Auction Procedure.** The Debtor shall conduct an auction on August 27, 2012 at 10 a.m. (prevailing Eastern Time) (the "**Auction Date**") at the **J. Bratton Davis United States Bankruptcy Court, 1100 Laurel Street, Columbia, South Carolina 29201** (the "**Auction**"). Only WH and any Potential Purchasers who have timely submitted Qualified Bids shall be entitled to make any bids at the Auction. Except for any bid by WH, no Bids shall be considered by the Debtor from a Potential Purchaser unless such Potential Purchaser has submitted a Qualified Bid.
- ◆ **Credit Bid.** Worthington-Hyde shall be deemed to be a Potential Purchaser and its Bid of \$17,125,000.00 as provided in the APA (the "**Initial Bid**") shall be deemed to be a Qualified Bid. Notwithstanding any other provisions of these procedures, Worthington-Hyde shall be entitled: (i) to participate in the Auction without submitting any additional bid, deposit, notice or other document; and (ii) to exercise its credit bid rights under §363(k) of the Bankruptcy Code at the Auction.
- ◆ **Opening Bid.** The Auction will commence with the announcement of the highest or best offer as determined by the Debtor. Such Bid shall be designated the "**Opening Bid**". The Opening Bid shall be in an amount of at least \$50,000.00 above the Initial Bid. The Qualified Bids of all

other Potential Purchasers thereafter wishing to bid shall follow in the prescribed increments over the Opening Bid.

- ◆ **Minimum Overbid.** Each Bid at the Auction must be made in increments of at least [\$50,000.00] more than the prior bid.
- ◆ **Successful Bidder.** At the conclusion of the Auction, the Debtor shall identify the highest and best Bid (the “**Successful Bid**”) and the Qualified Bidder making such Bid (the “**Successful Bidder**”).
- ◆ **All Bids to Remain Open.** Notwithstanding the Debtor’s acceptance of another Qualified Bid as the Successful Bid or Successful Back-up Bid, all Qualified Bids shall remain open and irrevocable until the Closing so that they may be accepted and consummated without further Order of the Court in the event a sale to a Successful Bidder or Successful Back-up Bidder either is not approved by the Court or is not consummated on the date required for Closing.
- ◆ **Return of Deposit.** All Deposits shall be maintained in Debtor’s counsel’s escrow account, and shall be subject to the jurisdiction of the Court. Within three (3) business days after the closing, the Debtor shall return to each Potential Purchaser that submitted a Deposit that is not the Successful Bidder or the Successful Back-up Bidder its Deposit. The Debtor shall return the Deposit submitted by the Successful Back-up Bidder within three (3) business days of closing of the Sale to the Successful Bidder.
- ◆ **No Representations or Warranties.** The sale assets shall be purchased on an “as is, where is” basis, with no representations or warranties (express or implied) of any kind or nature whatsoever, other than a representation and warranty as to title to the real estate and such other customary and usual representations and warranties.
- ◆ **Closing.** The closing shall take place at the offices of Levy Law Firm, LLC, 2300 Wayne Street, Columbia, South Carolina, 29201, within twenty-four (24) hours after the entry of the Sale Order (as defined below), or such other date as the parties may agree, but not later than August 31, 2012. If the Successful Bidder is unable to close the sale within the time required for the Closing, the Successful Bidder shall forfeit its Deposit, and Debtor shall close the sale of the sale assets to the Successful Back-up Bidder without the necessity of obtaining another order from this Court.

- ◆ **Sale Subject to Court Approval.** The sale contemplated herein shall be subject to the entry of an order by the Bankruptcy Court: (i) approving the sale and transfer of the sale assets to the winning bidder, free and clear of any and all liens, claims and encumbrances of any kind or nature whatsoever to the extent permitted by law (other than permitted liens agreed to by the parties), with any and all valid liens, claims and encumbrances attaching to the sales proceeds at closing; and (ii) containing a finding that the purchaser is a good faith purchaser pursuant to §363(m) (the “**Sale Order**”). The Sale Order shall provide that the proceeds from the sale of the sale assets shall be immediately paid to WH to the extent of its allowed secured claim.
  
- ◆ **Assumption of Liabilities.** The purchaser shall not be obligated to assume or be responsible for any of the Debtor’s liabilities or obligations existing as of the closing, excluding only those liabilities and obligations of the Debtor which the Successful Purchaser specifically agrees in writing and in its sole discretion to assume.
  
- ◆ **Sale Hearing.** A sale hearing shall be held on August 28, 2012 at \_\_\_\_\_.m. (prevailing Eastern Time) (the “**Sale Hearing**”) at which the Debtor will seek entry of an Order, among other things, authorizing and approving the sale of the sale assets to the Successful Bidder as determined by the Court in accordance with the Bidding Procedures, pursuant to the terms and conditions set forth in the Successful Bid, *provided*, nothing contained herein shall prevent or impede the exercise of WH’s rights under §363(k) of the Bankruptcy Code or otherwise to bid-in its secured claim or object to the Sale in the event the purchase price is less than the Prepetition Indebtedness (as defined in the APA). All Potential Bidders are deemed to have submitted to the jurisdiction of the Court with respect to any dispute regarding any aspect of the Sale Procedures.
  
- ◆ **Reimbursement of Expenses.**  
  
If a competing bidder other than Stalking Horse shall be named the Successful Bidder and acquire the Sale Assets, the Stalking Horse shall be entitled to reimbursement of expenses in the amount of \$50,000.00 which shall be paid to the Stalking Horse concurrent with the Closing of the Sale to the Successful Bidder.



**APPROVAL OF NOTICE OF PROPOSED SALE AND  
BIDDING PROCEDURES AND OBJECTION DEADLINE**

13. The Debtor proposes the following Notice Procedures in relation to the Sale:

- ◆ **Notice.** The Debtor will give notice, (“Notice of Auction and Sale Hearing”) immediately after the entry of an order of this Court approving the Sale Procedures, of the time and place of the Auction, the time and place of the Sale Hearing, and the objection deadline for the Sale Hearing, by sending a notice, substantially in the form attached hereto as **Exhibit “C”** to: (i) counsel for WH; (ii) the United States Trustee (the “U.S. Trustee”); (iii) all other applicable state and federal taxing authorities; (iv) all other parties known to the Debtor who have or may have asserted liens against the sale assets; (v) all of the Debtor’s creditors, including all parties that have requested notice pursuant to Bankruptcy Rule 2002; and (vi) all other entities known to have expressed an interest in a transaction with respect to all or part of the sale assets (collectively, the “Notice Parties”).
  
- ◆ **Sale Objections.** The Notice of Auction and Sale Hearing will specify that objections to the relief requested by the Sale Motion shall be set forth in writing and specify with particularity the grounds for such objections or other statements of position, and shall be filed with the Court and served by \_\_\_\_\_, 2012 at 5:00 p.m. prevailing Eastern Time (the “Sale Objection Deadline”) on: (i) the Debtor, 3598 Hwy 11, Travelers Rest, South Carolina 29690, Attn: James B. Anthony, email: [janthony.cliffs@gmail.com](mailto:janthony.cliffs@gmail.com) / Fax (864) \_\_\_\_\_ (ii) Debtor’s counsel, Levy Law Firm, LLC, 2300 Wayne Street, Columbia, South Carolina, 29201, Attn: R. Geoffrey Levy, Esq., Fax: (803) 799-5245, Email: [glevy@levylawfirm.org](mailto:glevy@levylawfirm.org), (iii) counsel for WH, Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C. Attn: E. Franklin Childress, Jr., Fax: (901) 577-0845/email: [fchildress@bakerdonelson.com](mailto:fchildress@bakerdonelson.com). and (iv) the Office of the United States Trustee, Attn: Linda Barr, Esquire, 1835 Assembly Street, Room 953, Columbia, South Carolina, 29201, Fax (803) 765-5260. The Debtor requests that the Court order that the failure to file and serve objections by the Sale Objection Deadline and in accordance with the foregoing procedure shall be deemed a waiver of such objections, and the objecting party shall be forever barred from asserting such objections with respect to the consummation and closing of the sale of the sale assets. The Notice of Auction and Sale Hearing will further state that any objections filed and served in accordance with the foregoing procedure will be heard by the Court at the Sale Hearing.

**BASIS FOR RELIEF**

**(i) Sale of Sale Assets.**

14. Pursuant to 11 U.S.C. §363, the Bankruptcy Court must approve any use, sale or lease of property by the Debtor outside the ordinary course of business. §363(b)(1) of the Bankruptcy Code provides that “[t]he trustee, after notice and a hearing, may use, sell or lease, other than in the ordinary course of business, property of the estate . . . .” §1107(a) of the Bankruptcy Code gives Debtor the same rights and powers as a trustee. The Bankruptcy Court may authorize a sale of a Chapter 11 debtor’s assets under §363(b)(1) if a “sound business purpose dictates such action.” *In re New Era Resorts, LLC*, 238 B.R. 381, 387 (Bankr. E.D. Tenn. 1999) (quoting *Stephens Indus., Inc. v. McClung*, 789 F.2d 386, 390 (6<sup>th</sup> Cir. 1986)); *see, also, In re Lionel Corp.*, 722 F.2d 1063 (2d Cir. 1983); *In re Taylor*, 198 B.R. 142, 156-57 (Bankr. D.S.C. 1996). Under the sound business purpose test, the Debtor has the burden of proving that : (a) sound business reason or emergency justifies a pre-confirmation sale; (b) the sale has been proposed in good faith; (c) adequate and reasonable notice of the sale has been provided to interested parties; and (d) the purchase price is fair and reasonable. *In re Taylor*, 198 B.R. at 157.
15. Although sales are usually proposed and conducted pursuant to a plan of reorganization, this Court has recognized that when a sound business justification exists, the court may authorize a sale pursuant to 11 U.S.C.

§363(b)(1) without a confirmed plan of reorganization. *In re Taylor*, 198 B.R. at 156-157; see, also, *Stephens Indus., Inc., v. McClung*, 789 F.2d 386 (6<sup>th</sup> Cir. 1986); *In re WBQ Partnership*, 189 B.R. 97 (Bankr. E.D. Va. 1995).

**a. Sound Business Reason or Emergency**

16. Debtor has a sound business purpose for the Sale. In the exercise of its business judgment, Debtor believes that the Sale will be for the highest possible consideration. The Sale will further Debtor's reorganization efforts by allowing Debtor to liquidate the sale assets and eliminate a significant portion of its debt.

**b. Good Faith**

17. The proposed Sale meets the good faith requirement for the approval of a sale outside the ordinary course of business. The issue of good faith in connection with a sale outside the ordinary course of business includes the issue of special treatment of a debtor's insiders. See, *In re Industrial Valley Refrigeration & Air Conditioning App., Inc.*, 77 B.R. 15 (Bankr. E.D. Pa. 1987). In this instance, the Sale will be conducted pursuant to an arms' length transaction, arrived at after significant negotiations and after all interested and qualified parties have had an opportunity to bid on the sale assets. As such, the Court should find the good faith requirement has been met and that the Successful Bidder is entitled to the protections found in §363(m) of the Bankruptcy Code.

**c. Notice**

18. As set forth in the Bidding Procedures Motion, the Debtor proposes to give notice of the Sale to: (i) WH; (ii) the United States Trustee; (iii) all applicable state and federal taxing authorities; (iv) all other parties known to the Debtor who have or may have asserted liens against the sale assets; (v) all of the Debtor's creditors, including all parties that have requested notice pursuant to Bankruptcy Rule 2002; and (vi) all other entities known to have expressed an interest in a transaction with respect to the sale assets (the "Notice Parties"). As set forth in the Bidding Procedures Motion, the Debtor proposes sending to the Notice Parties: (a) a notice that will include the date, time and place for the Auction, the deadlines and requirements for bidding at the Auction, the date, time and place of the hearing to approve the Sale, and the time and requirements for filing objections to the Sale; and (b) a copy of the proposed Bidding Procedures and a copy of the Proposed Bidding Procedures Order. The Notice Parties will be provided with notice materials and access to the sale assets to conduct due diligence prior to the hearing to approve the Sale. Based upon the foregoing, Debtor believes that notice is adequate and reasonable under the circumstances.

**d. Purchase Price**

The Debtor submits to the Court that the proposed bidding procedures have been designed to encourage bidding and to maximize the value of the Debtor's estate. The Debtor intends to advertise this Sale in such a manner as is necessary to properly and adequately publicize the sale to potential purchasers.

Debtor will continue to market the sale assets until the Bid Deadline. The Debtor will ask the Court to approve the Successful Bidder for the sale assets upon a determination that such bid represents the highest and best offer for the sale assets.

19. The Debtor believes that the Sale Procedures are the best method by which it can obtain the best price for the sale assets and provide interested persons with accurate and reasonable notice of the proposed sale. The Sale Procedures will allow the Debtor to conduct the Auction in a controlled, fair and open fashion that will encourage participation by financially capable bidders who demonstrate ability to close a transaction, thereby increasing the likelihood that the Debtor will receive the best possible price for the sale assets. Moreover, the Debtor submits that the proposed Sale Procedures will enable the Debtor to obtain the most value for the sale assets in an expeditious manner as possible. See *In re*

*Integrated*

*Res. Inc.*, 147 B.R. 650, 659 (Bankr. S.D.N.Y. 1992) (Sale procedures are created to “encourage bidding and maximizing the value of the debtor’s estate.”)

WHEREFORE, having set forth the basis for his Motion, the Debtor requests that the Court enter an order approving the Motion in substantially the form of the Proposed Bidding Procedures Order attached hereto: (i) establishing the Bidding Procedures; (ii) approving the form, manner, scope and substance of notice for the sale of the sale assets; (iii) establishing the time and date of the Auction and Sale Hearing; and (iv) provide such other and further relief as the Court may deem necessary and proper.

RESPECTFULLY SUBMITTED on this 18th day of July, 2012 at Columbia, South Carolina.

/s/ R. Geoffrey Levy

R. Geoffrey Levy

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