IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF PUERTO RICO

In re: SAN JUAN RESORT OWNER, INC. Debtor.	Case No. 15-01627(MCF) Chapter 11

MOTION TENDERING REPLY TO OPPOSITION TO MOTION FOR APPROVAL OF ASSET PURCHASE AGREEMENT AND SALE OF ASSETS

TO THE HONORABLE UNITED STATES BANKRUPTCY COURT:

COMES NOW secured creditor Banco Popular de Puerto Rico ("BPPR"), by its undersigned counsel, and respectfully submits this Motion Tendering Reply (the "Reply") to the Opposition (the "Opposition", or Docket No. 37) to the Motion for Approval of Asset Purchase Agreement and Sale of Assets (the "Sale Motion", or Docket No. 21).

Preliminary Statement

Prior to the Petition Date[1], Condado San Juan Hotel 2, LLC ("CSJH2") made a proposal, through the Option Agreement, to purchase the Sale Assets for $8.250 Million and from such purchase price make a net payment to BPPR of $7.550 Million. The proposal and Option Agreement were expressly conditioned on, among other things, BPPR executing an agreement accepting such discounted payment proposal as consideration for releasing its liens over the Sale Assets. While BPPR considered the proposal, it did not enter into a binding agreement accepting the same and ultimately rejected the proposal, and so notified CSJH2 through the Debtor.

Months later, as part of this bankruptcy case and after the pre-petition solicitation detailed herein, the Debtor received and submitted to the Court for its approval the stalking horse

[1] Capitalized terms not otherwise defined herein shall have the meaning provided to such term in the Sale Motion.

proposal made by the Stalking Horse Purchaser to purchase the Sale Assets for a total consideration of approximately $9.450 Million, a net Settlement Payment to BPPR of approximately $7.857 Million, and a Carve-Out for the estate of over $800,000. Unquestionably, the Stalking Horse Purchaser's offer is higher and better than the proposal made by CSJH2 and rejected prior to the Petition Date. Further, the Stalking Horse Proposal is subject to an open and competitive bidding sale process that allows **all** interested parties to present a higher and better offer than that of the Stalking Horse Purchaser through the proposed Bidding Procedures and should pave the way for the Debtor to confirm a plan.

CSJH2 could very well participate in the proposed Bidding Procedures and submit a higher or better offer than that of the Stalking Horse Purchaser. CSJH2 could even have participated in the pre-petition solicitation for stalking horse proposals and submitted a proposal to be considered as a stalking horse purchaser. CSJH2, however, has apparently decided to ignore the possibility of purchasing the Sale Assets through the proposed Bidding Procedures and rather wants to convince this Court, through unfounded and misleading arguments, to forgo the Sale process and the possibility to maximize the value of the Sale Assets, disregard and reject the Stalking Horse Purchaser's proposal, which is over $1 Million higher than that of CSJH2, and somehow force the Debtor, BPPR, and the estate to sell the Sale Assets, through a private sale, to CSJH2. Under CSJH2's proposed sale process, the Sale would be a private sale to CSJH2 at a substantial discount and detriment to the estate and BPPR, with no ability to receive higher and better offers and maximize the value of the Sale Assets, without testing the market for the Sale Assets, and with sale proceeds insufficient to confirm a plan.

To substantiate these allegations, CSJH2 presents misleading and unfounded arguments regarding the Sale process, disclosures made, the proposed Bidding Procedures, applicable law, and agreements included in the Sale Motion. Incredibly, as part of these unfounded arguments, CSJH2 even argues that one of the most fundamental provisions in the Bankruptcy Code (Section 365), which has been in place for over 100 years, is somehow unconstitutional. As detailed below, BPPR submits that the Court should reject CSJH2's attempt to delay the approval of the Sale Motion and convert the Sale process into a private sale, at a discount and benefit only to CSJH2, reject CSJH2's unfounded arguments, deny the Opposition, and grant the Sale Motion.

Brief Background

1. On March 5, 2015 (the "Petition Date"), the Debtor filed a voluntary petition under the provisions of chapter 11 of the Bankruptcy Code, in the United States Bankruptcy Court for the District of Puerto Rico (the "Bankruptcy Court"), Case No. 15-1627(MCF).

2. On March 11, 2015, the Debtor filed a motion to conditionally reject the Option Agreement. See Docket No. 11.

3. On March 27, 2015, BPPR and the Debtor filed the Sale Motion. See Docket No. 21. BPPR incorporates the allegations and exhibits to the Sale Motion as if set forth in full herein.

4. On April 14, 2015, CSJH2 filed the Opposition. See Docket No. 37.

5. On April 16, 2015, the Debtor filed a Disclosure Statement and Plan. See Docket No. 44.

6. On April 21, 2015, BPPR filed a Motion for Leave to Reply to the Opposition. See Docket No. 56.

Reply to Opposition

7. Through the Opposition, CSJH2 raises a number of arguments that can essentially be categorized into: (I) allegations regarding the alleged validity and enforceability of the Option Agreement and its alleged effect on the Sale; and (II) allegations regarding the Sale process and Sale Motion. BPPR addresses each of CSJH2's arguments below.

I. CSJH2'S ALLEGATIONS REGARDING THE OPTION AGREEMENT

8. In the Opposition, CSJH2 argues that the Sale Motion should be denied, as: (a) CSJH2 has an allegedly binding and effective agreement, through the Option Agreement, to purchase the Sale Assets; (b) the Settlement Agreement with BPPR constitutes an approval of the proposal to purchase the Sale Assets from CSJH2; (c) the Settlement Agreement with BPPR constitutes a breach of the Option Agreement; and (d) the rejection of the Option Agreement is somehow unconstitutional. BPPR submits that these allegations have no merit and addresses each below.

A. There is No Binding, Valid, or Enforceable Option Agreement with CSJH2

9. As detailed in the Sale Motion, on or about August 21, 2014, the Debtor executed an option agreement (the "Option Agreement")[2] with CSJH2 to sell the Sale Assets for an approximate amount of $8,250,000 with a net payment to BPPR of approximately $7,550,000 in exchange for, among other things, BPPR releasing its liens over the Sale Assets (the "CSJH2 DPO").

i. The CSJH2 DPO was not Approved

[2] A copy of the Option Agreement is included in Docket No. 11.

10. The Option Agreement was specifically conditioned, as a requisite for the agreement becoming effective, upon, among other things, BPPR executing an agreement approving the CSJH2 DPO.

11. Specifically, page 3 of the Option Agreement, provides as follows:

> Term. The Option shall remain in effect for a period of sixty (60) days commencing on the date of the execution of the DPO with BPPR or the amount of days to close granted by BPPR to [the Debtor] in the DPO whichever occurs first (the "Option Term"); provided, however, that in the event the term set forth in the DPO is less than thirty (30) days, [CSJH2] shall have the right to terminate this Agreement and demand reimbursement of the Option Fee, as hereinafter defined.

12. Accordingly, the express language in the Option Agreement defines a specific period for the Option Term - it would only become effective and commence once and if BPPR executed an agreement approving the CSJH2 DPO, and, if it became effective as set forth therein, the Option Term would only last the amount of time provided by BPPR to the Debtor to close on the CSJH2 DPO, or 60 days, whichever term was shorter.

13. BPPR never entered into a binding agreement accepting the CSJH2 DPO and, thus, the Option Agreement was never effective or binding.

14. CSJH2 is aware of this, and, accordingly, the only evidence that it included in its Opposition to support an alleged binding agreement with BPPR regarding the CSJH2 DPO is that certain term sheet dated August 28, 2014 and attached to the Opposition as Exhibit 1 (the "Term Sheet").[3]

15. BPPR issued the term sheet to detail the terms under which it would potentially agree to accept the CSJH2 DPO. The Term Sheet explicitly and clearly states that:

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[3] CSJH2 states that the Option Agreement "is currently valid and enforceable, the purported condition of acceptance by BPPR was achieved and such is documented by letter dated August 28, 2014 (see Exhibit 1 hereof)". Opposition, Par. 5.

> This letter of intent is an expression of interest to proceed with the proposed Settlement Transaction [which included, among other things, the CSJH2 DPO] and **is not intended to constitute a binding obligation on the part of either party to consummate the Settlement Transaction. The Settlement Transaction will only be effective upon the execution by the Borrowers [which includes the Debtor], the Guarantors and Banco Popular of the Settlement Agreement**.

Term Sheet, Paragraph 9, pg. 4 (emphasis added).

16. BPPR and the Debtor did not enter into the Settlement Agreement, as defined in the Term Sheet. Therefore, there was never a binding agreement approving the CSJH2 DPO between the Debtor and BPPR.

17. CSJH2 was well aware that BPPR had not approved the CSJH2 DPO. For example, and contrary to the convenient and contradictory allegations that CSJH2 now makes in the Opposition, on October 29, 2014, CSJH2's counsel admitted and recognized that the CSJH2 DPO was "still being negotiated" between the Debtor and BPPR. See **Exhibit 1**, Electronic Mail dated October 20, 2014 from CSJH2's counsel. CSJH2 admits then that it is unable to move forward on the CSJH2 DPO and in fact makes a proposal for an alternative transaction to potentially purchase the Sale Assets after BPPR forecloses over the same. BPPR did not accept CSJH2's alternative transaction either.

18. Further, while BPPR and the Debtor discussed the possibility of entering into a binding agreement on the CSJH2 DPO and into the Settlement Agreement as set forth in the Term Sheet, no such agreements were ever executed and the deadline to executed these agreements and close on the CSJH2 DPO was not extended by BPPR. BPPR so notified, formally, the Debtor. Specifically, on or about November 12, 2014, BPPR formally notified the Debtor that it did not approve the CSJH2 DPO nor agreed to extend the closing deadline set forth in the Term Sheet. BPPR understands that the Debtor promptly advised CSJH2 San Juan of such determination.

19. Therefore, since BPPR did not enter into a binding agreement approving the CSJH2 DPO, the Option Agreement never became effective.

ii. In the Alternative, if the Term Sheet Constitutes a Binding Approval of the CSJH2 DPO as Alleged by CSJH2 (which BPPR denies), the Option Term Expired on October 23, 2014

20. In the alternative, if somehow the Term Sheet could be construed, as CSJH2 argues, as the binding agreement through which BPPR accepted and agreed to the CSJH2 DPO (which BPPR submits would be contrary to the clear and unequivocal terms of the Term Sheet), then the Option Term, and thus, the Option Agreement, expired on October 23, 2014.

21. Specifically, as stated in paragraph 11 above, once the Option Agreement became effective, the Option Term (e.g., CSJH2's alleged right to close on the sale of the Sale Assets) was limited to the earliest of: (a) 60 days after BPPR approved the CSJH2 DPO, or (b) the time provided by BPPR to the Debtor to close on the CSJH2 DPO. In the Term Sheet, the term provided by BPPR to the Debtor to close on the potential CSJH2 DPO was "no later than October 23, 2014". See Paragraph 2, pg. 2, of the Term Sheet.

22. It is uncontested that CSJH2 did not close on the CSJH2 DPO on or before October 23, 2014. Thus, even assuming that CSJH2's allegations were accurate (which they are not as they are contrary to the clear terms of the Term Sheet and to CSJH2's own admissions at the time as detailed above) and BPPR somehow approved the CSJH2 DPO through the non-binding Term Sheet, then the Option Agreement and Option Term expired on October 23, 2015. As such, there is no binding, valid, or enforceable Option Agreement since at least October 23, 2014.

iii. CSJH2 Has Waived the Right to Pursue the Claims Detailed in the Opposition

23. The Option Agreement states what is the sole and only remedy available to CSJH2 in the event that the CSJH2 DPO was not accepted, or, if accepted, if the Option Term expires. That sole remedy is the return of the $200,000 deposit made by CSJH2. CSJH2 has expressly waived any other remedies, such as those that it now seeks in the Opposition. For example, Section 10(a) of the Option Agreement provides:

> In the event that the [CSJH2 DPO] is not completed for refusal from BPPR to approve the DPO, [CSJH2's] sole remedy shall be the termination of this Agreement and full reimbursement of the Option Fee. **[CSJH2] acknowledges (i) the adequacy of this exclusive remedy and (ii) that this limitation of remedies is an essential part of this Contract from the perspective of the [Debtor]. [CSJH2] expressly waives the right to pursue any other right or remedy in law or equity other than the remedy specified above, including the right of specific performance and the right to sue for damages**. (emphasis added)

24. Thus, CSJH2's exclusive and sole remedy is the return of its deposit. CSJH2 has expressly waived all of the remedies and defenses it asserts in the Opposition, and by presenting the same, has apparently decided to breach its obligations under the Option Agreement. These improper acts and allegations should be rejected by the Court.

iv. Additional Conditions Precedent to the Effectiveness of the Option Agreement Possibly Were Not Completed

25. As part of a side agreement between the Debtor and CSJH2, among others, which is attached at page 21 to Docket 11 (the "CSJH2 Side Letter Agreement"), the parties "covenant[ed] and agree[d] that in the event that the P.R. Tourism Company does not grant the requisite approvals set forth in Sections 1 and 2 of the aforesaid Assignment and Assumption Agreement (Room Tax Liability) on or before September 21, 2014, then the Option [Agreement] … shall be null, void, and or no force and effect and CSJH2 shall be entitled to a full reimbursement of any deposit paid in connection therewith.".

26. It is BPPR's understanding that the P.R. Tourism Company approvals detailed above were not obtained prior to September 21, 2014 and, accordingly, if this understanding is correct this is an additional basis to find that the Option Agreement is "null, void, and of no force and effect.".

27. For all of these reasons, BPPR respectfully submits that the Option Agreement was never effective or binding and, if it somehow became effective as alleged by CSJH2 through the alleged approval of the CSJH2 DPO through the Term Sheet, then the Option Term and Option Agreement expired on October 23, 2014.

B. CSJH2's Allegation that the BPPR Settlement Agreement Constitutes an Approval of the CSJH2 DPO is Unfounded and Frivolous

28. In a clearly unfounded argument, CSJH2 argues that through the BPPR Settlement Agreement (attached as Exhibit 3 to the Sale Motion), through which BPPR consented to the Sale of the Sale Assets through the proposed Bidding Procedures upon the receipt of a minimum net Settlement Payment of approximately \$7.7 Million[4], BPPR somehow validated and accepted the CSJH2 DPO.

29. First, it is clear that the net minimum Settlement Payment set forth in the BPPR Settlement Agreement (\$7.7 Million) is a higher amount than that proposed by CSJH2 in the CSJH2 DPO (\$7.550 Million) and rejected by BPPR.

30. Second, it is clear that the minimum Purchase Price for the Sale Assets set forth in the Settlement Agreement (over \$9.3 Million) is a higher amount than that proposed by CSJH2 in the CSJH2 DPO (\$8.250 Million) and rejected by BPPR.

[4] Which, through the solicitation efforts detailed in the Sale Motion, has already increased to over \$7.8 Million through the Stalking Horse Purchaser's proposal.

31. Third, from the terms of the Settlement Agreement, it is clear that the transaction and net minimum Settlement Payment agreed to by BPPR is subject and conditioned on the Sale Assets being marketed and sold pursuant to the proposed Bidding Procedures, where there is an opportunity for all interested parties to present a Qualified Bid and thus maximize the value of the Sale Assets and Settlement Payment to BPPR. In other words, BPPR has not agreed to accept the net Settlement Payment as part of a private sale, as CSJH2 requests.

32. Thus, CSJH2's allegation that the Settlement Agreement somehow provides an authorization or approval to the CSJH2 DPO is a frivolous argument, unsupported by the terms of the Settlement Agreement, the amounts agreed to therein, or the process approved in such agreement.

C. The BPPR Settlement Agreement Does Not Breach the Option Agreement

33. CSJH2 argues that the Settlement Agreement is somehow a breach of the Option Agreement and therefor not legal nor in good faith. This allegation is also unfounded. As detailed above, the Option Agreement is without any effect and was terminated at least as of October 23, 2014, months prior to the execution of the Settlement Agreement. Further, the Settlement Agreement is subject to Court approval, as requested in the Sale Motion.

D. Section 365 of the Bankruptcy Code, Providing for the Rejection of Executory Contracts, is NOT Unconstitutional

34. In an incredible argument, CSJH2 argues that the ability to reject executory contracts under section 365 of the Bankruptcy Code, which has been in place for over 100 years, is unconstitutional. Accordingly, CSJH2 argues that the Debtor's rejection of the Option Agreement, which was done in an alternative argument, as the Option Agreement is not effective and/or was terminated prior to the Petition Date, somehow constitutes an unconstitutional act, a

taking, and a violation of the contract impairment clause. Not surprisingly, CSJH2 fails to cite to a single case on point to support such an unfounded proposition.

35. Nonetheless, and contrary to CSJH2's allegations contained in its Opposition, the rejection of an executory contract under section 365 of the Bankruptcy Code does not constitute an unconstitutional taking of property or an unconstitutional impairment of contracts, since in the enactment of the Bankruptcy Code itself, Congress specifically allowed for the impairment of contract obligations. In particular, the Supreme Court of the United States in Sturges v. Crowninshield, held that "congress is expressly vested with the power of passing bankrupt laws, and is not prohibited from passing laws impairing the obligation of contracts, and may, consequently, pass a bankrupt law which does impair it; whilst the states have not reserved the power of passing bankrupt laws, and are expressly prohibited from passing laws impairing the obligation of contracts." Sturges v. Crowninshield, 17 U.S. 122, 191, (1819)[5]. Accordingly, section 365 of the Bankruptcy Code enacted by Congress, was approved within Congress' ability to pass laws that could impair contractual relationships. See In re James Lewis, 506 F.3rd 927 (Ct. App. 9th Cir. 2007) ("pursuant to authority under the Bankruptcy Clause, Congress may pass laws that impair contractual obligations").

36. Furthermore, in another case, the Supreme Court also noted that the "especial purpose of all bankruptcy legislation is to interfere with the relations between the parties concerned—to change, modify, or impair the obligation of their contracts." Ashton v. Cameron Cnty. Water Improvement Dist. No. 1, 298 U.S. 513, 530 (1936) (cited by In re City of Stockton,

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[5] The U.S. Constitution provides a provision "whereby Congress 'was to have an all-inclusive power ... to enact legislation reasonably framed and related to the subject of bankruptcies, which in turn is indissolubly linked to commerce and credit. (citations omitted) The result was Article I, Section 8, Clause 4 which provides that Congress shall have power 'to establish ... uniform laws on the subject of bankruptcies throughout the United States.' 'All agree,' wrote Chief Justice Marshall in Sturges v. Crowninshield, that "the power is both unlimited and supreme." In

478 B.R. 8, 15, (Bankr. E.D. Cal. 2012)). Moreover, "even if the plaintiffs' benefits are vested property interests, the shield of the Contracts Clause crumbles in the bankruptcy arena." In re City of Stockton, Cal., 478 B.R. 8, 16, (Bankr. E.D. Cal. 2012). See also Wright v. Union Central Life Ins. Co., 304 U.S. 502, (1938) ("Property rights do not gain any absolute inviolability in the bankruptcy court because created and protected by state law. Most property rights are so created and protected. But if Congress is acting within its bankruptcy power, it may authorize the bankruptcy court to affect these property rights…"). As a result, the allegation that the Bankruptcy Code is unconstitutional as applied is simply unfounded, as Congress' vested powers include the authority to limit or modify agreements existing pre-bankruptcy as a means to carry out the intent of the Bankruptcy Code.

37. Finally, it is black letter law that the Bankruptcy Code and Congress' authority to enact bankruptcy laws is written into each and every contract, such as it was written into the Option Agreement. See e.g., Wright v. Union Central Life Insurance Company, 304 U.S. 502-516 (1938) (Supreme Court held that the bankruptcy power of Congress is impliedly written into every contract). Accordingly the potential power to reject the Option Agremeent under section 365 of the Bankruptcy Code was and must have been contemplated as part of the negotiation and execution of the Option Agreement.

II. CSJH2'S ALLEGATIONS REGARDING THE SALE PROCESS

38. CSJH2 also argues that the Sale Motion should be denied, as: (a) the Sale was not done in good faith as the Sale Assets have not been exposed to the market or to a competitive bidding; (b) the Sale seeks to divert assets or value to Debtor's principals; (c) there is no benefit

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re Pillow, 8 B.R. 404, 407-08 (Bankr. D. Utah 1981).

to the estate from the competitive bidding; and (d) the Sale constitutes a sub rosa plan. BPPR submits that these allegations are unfounded and addresses each below.

A. **The Pre and Post-Petition Sale Process Were and Are Being Done in Good Faith**

39. CSJH2 argues, without any basis or evidence, that the "[t]he sale process prior to bankruptcy was not in good faith, was reached in collusion with BPPR and the Stalking Horse purported purchaser who is controlled by Mr. Paulson, a large stockholder of BPPR." The basis of CSJH2's allegations is, mainly: (a) that the Sale Assets were only exposed to the market for one week which is not a "sufficient" amount of time and were not exposed to competitive bidding; and (b) that only a week was given to obtain financing or come up with the deposit amount. As detailed below, these unsubstantiated allegations have no merit.

i. **The Sale Assets Were and Are Exposed to the Market and Competitive Bidding**

40. First, it is completely contradictory for CSJH2 to object to the Sale Motion on the basis that the Sale Assets have not been exposed to the market or to a competitive bid on the one hand, yet on the other request that the Court enforce the terminated and not binding Option Agreement and sell the Sale Assets to CSJH2 through a private sale, without any exposure to the market, and at a price lower than that proposed by the Stalking Horse Purchaser. Such inconsistent and convenient statements should be rejected by the Court.

41. Second, and more importantly, CSJH2's allegation is baseless. As detailed in paragraphs 15 through 18 the Sale Motion, the Debtor marketed the Sale Assets and solicited proposals prior to the Petition Date for Qualified Bidders to participate as a Stalking Horse Purchaser. As detailed in the Sale Motion, the pre-petition solicitation was open to all parties, on the same terms and conditions, and anyone interested had the same opportunity and the same

terms to submit a proposal to be considered as a Stalking Horse Purchaser. The Pre-Petition solicitation was sent to CSJH2, and CSJH2 decided not to participate. While CSJH2 argues that the time provided to make a stalking horse proposal was inadequate[6], the Debtor received two proposals from Qualified Bidders to participate as a Stalking Horse Purchaser. Both proposals satisfied the minimum requirements of the pre-petition solicitation, and were proposals to purchase the Sale Assets in an amount that exceeds by at least $1 Million the proposal by CSJH2 in the Option Agreement.

42. Further, the Sale Assets are and continue to be marketed and subject to competitive bidding. CSJH2's allegations as to the pre-petition sale process, alleging that only one week was provided to bidders, that the process is aimed to limit access to bidders, and that the Sale Assets have not been marketed reflect an incomplete and clearly misleading reading of the pre-petition solicitation and proposed post-petition Bidding Procedures. As detailed in the proposed Bidding Procedures submitted as part of the Sale Motion, the sale to the Stalking Horse Purchaser is subject to competitive bidding and the receipt of higher and better offers. The proposed Bidding Procedures and Sale Documents were circulated to all parties in interest, creditors, and entities that have shown any interest in purchasing the Sale Assets, including CSJH2. Nowhere in the Opposition does CSJH2 mention that the Sale Assets are currently in the "market", that contrary to its allegations that bidders had one week to decide, the current proposed Bidding Procedures provide a period of at least thirty days of due diligence (which have not yet expired) for any potential bidder to evaluate the Sale Assets and decide whether to submit a Qualified Bid, and an additional time thereafter to decide whether to propose a

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[6] Again, it is a convenient, yet contradictory argument for CSJH2 to argue, on one hand, that the time allowed to decide whether to participate as a stalking horse purchaser was too short, and on the other hand, to argue that it allegedly has concluded all due diligence and is ready to close on the ineffective Option Agreement. These

Qualified Bid that is higher and better than that of the Stalking Horse Purchaser. Bankruptcy Rule 2002 only requires that a debtor proposing a sale free and clear of all liens provide at least a twenty one (21) day notice, which was afforded in this case.

43. To date, there are multiple bidders conducting due diligence on the Sale Assets as allowed in the Bidding Procedures. Clearly, the marketing and solicitation for competitive bidding done by the Debtor at this stage has been effective, as it has shown unequivocally that the proposal made by CSJH2 in the Option Agreement, and rejected by BPPR, was not the highest or best offer for the Sale Assets, as shown by the Stalking Horse Proposal.

44. CSJH2 has the option to participate in the proposed Bidding Procedures and make a Qualified Offer, just as any other party that desires to purchase the Sale Assets. CSJH2's refusal to participate should be telling to the Court, as it shows CSJH2's true motives – attempt to confuse the Court, with baseless arguments, alleging that an ineffective and/or terminated Option Agreement should somehow be revived and enforced, in order to attempt to purchase the Sale Assets at a price lower than what the market is willing to pay, with lesser benefits to the estate and to BPPR.

ii. The Amount of the Deposit and Requirement of No Financing Contingency Do Not Provide Any Evidence of Any Collusion; to the Contrary, these are Standard and Customary Terms

45. CSJH2 alleges as its basis to state that the Sale process was made in some type of collusion and tailored to "an elite group of prospects, or one prospect, namely Mr. John Paulson" (Opposition, Paragraph 18), the fact that the proposed Bidding Procedures require that to submit a Qualified Bid, the Qualified Bidder's offer should not be subject to a financing contingency and must post a deposit of approximately 10% of the Purchase Price.

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inconsistent and convenient statements should be rejected.

46. First, BPPR categorically denies and rejects any allegation that it has engaged in any type of collusion and submits that these types of unsubstantiated allegations are completely without any merit. As part of the Sale Motion, BPPR has disclosed all of the terms of any and all agreements that it has with the Debtor and related borrowers and guarantors, which terms are contained within the Settlement Agreement. Similarly, all agreements between BPPR and the Stalking Horse Purchaser relating to the Sale have been disclosed and are included as part of the Asset Purchase Agreement. All other details and information relative to the Sale, the Sale Assets, and the Bidding Procedures has been disclosed, and is subject to Court approval as part of the Sale Motion. Moreover, the Sale Documents have been submitted to and are expressly conditioned on the approval by the Court.

47. Second, these allegations reflect either a lack of knowledge of the way bankruptcy sales are structured, or, more likely, simply another unfounded allegation aimed at misleading the Court. First, deposits of 10% of the purchase price are common in bankruptcy sales.[7] Further, it is common in bankruptcy sales to require that proposals not be subject to financing contingencies[8] – after all, the seller and parties in interest want the certainty that if they accept a

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[7] See In re Cable & Wireless USA, Inc., Case No. 03-13711 (CGC) (approximately 10% deposit); In re Calpine Corp., Case No. 05-60200 (BRL) (Dighton Sale) (approximately 10 percent deposit); In re Calpine Corp., Case No. 05-60200 (BRL) (Freemont Sale) (approximately 10 % deposit); In re Centis, Inc., Case No. SA 02-15865 (G. Neil sale) (approximately 10 % deposit); In re Easy Gardener Products, Ltd., Case No. 06-10396 (KG) (approximately 10% deposit); In re Enron Corp., Case No. 01-16034 (AJG) (Bridgeline Sale) (approximately 10% deposit); In re H&S Media, Case No. 01-30691 (approximately 10% deposit); In re Divine, Inc., Case No. 03-11472 (JNF) (approximately 25% deposit); In re K-Mart Corp., Case No. 02-2474 (approximately 12%); In re Network Plus, Case No. 02-10341 (PJW) (approximately 12.5% deposit); In re Ritter Ranch Development LLC, Case No. 98-25043 (GM) (approximately 20% deposit); In re RSL Com Primecall, Inc., Case No. 01-11457 (ALG) (approximately 16.8 %).

[8] In this District, bidding procedures and Sales with terms and conditions similar and in some cases identical to the Proposed Bidding Procedures are common:

- In re Desarrolladores del Caribe, Case No. 14-02855 (ESL). In this case, the Bidding Procedures included a stalking horse purchaser and provided that qualified bidders must submit a deposit of 5% of the purchase price and that to submit a higher and better qualified bid, such bid shall not be "contingent or conditioned proposal, such proposal will close. BPPR submits that the proposed Bidding Procedures are customary and typical not only for similar sales within this District, but also as to other section 363 sales in the mainland. See footnotes 7 and 8.

iii. The Sale Satisfies the Good Faith Requirements Under the Bankruptcy Code

48. BPPR submits that CSJH2's allegations are not only unfounded from a factual basis, but also are not supported by the case law regarding the standard for determining good faith as to a sale. For example, the bankruptcy court is required to make specific findings as to the good faith of the purchaser when the court authorizes a sale. In re Abbotts Dairies of Pennsylvania, Inc., 788 F.2d 143, 150 (3d Cir. 1986) (Emphasis ours). "Though the Bankruptcy Code and Rules do not provide a definition of good faith, courts generally have followed traditional principles in holding that a good faith purchaser is one who buys "in good faith" and

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on obtaining financing or on any additional due diligence". See Bidding Procedures filed under Docket No. 106, at page 24. These bidding procedures were approved by the Court under Docket No. 123.

- In re Certenejas, Inc., Case No. 12-02806 (ESL). The Bidding Procedures included a stalking horse purchaser and provided that to submit a higher and better qualified bid, such proposal shall "not be conditioned on obtaining financing or on any additional due diligence". See Bidding Procedures filed under Docket No. 158, pg. 25. These bidding procedures were approved by the Court under Docket No. 178.
- In re PMC Marketing Corp., Case No. 09-02048 (BKT). The Bidding Procedures provided that to submit a Qualified Bid, such bid must not be subject to a financing contingency. See Bidding Procedures filed under Docket No. 394, pg. 4 of Exhibit IV. The Bidding Procedures were approved by the Court under Docket No. 406.
- In re Sabana del Palmar, Case No. 12-06177 (ESL). The Bidding Procedures included a stalking horse purchaser and provided that any competing offer "shall not be conditioned on any due diligence or financing contingency". See Bidding Procedures filed under Docket No. 367, Pg. 5, Paragraph 3(d). The bidding procedures were approved under Docket No. 389.
- In re San Juan Bautista Medical Center, Inc., Case No. 11-02270 (BKT). The Bidding Procedures included a stalking horse purchaser and provided for a 10% deposit for additional competing offers and that any such competing offer shall not be "subject to any financing contingency". See Bidding Procedures filed under Docket No. 363, pages 2, paragraph 2(d) and 3. The bidding procedures were approved under Docket No. 416.
- In re Compresores & Equipos, Case No. 09-02193 (ESL). The Bidding Procedures provided that to submit a Qualified Bid, such bid must not be subject to a financing contingency. See Bidding Procedures filed under Docket No. 64, pg. 3, of Exhibit IV, and approved under Docket No. 68.

"for value." In re M Capital Corp., 290 B.R. 743, 746 (B.A.P. 9th Cir. 2003); In re Abbotts Dairies of Pennsylvania, Inc., 788 F.2d 143, 147 (3d Cir.1986).

49. The requirement that a purchaser act in good faith, speaks to the integrity of his conduct in the course of the sale proceedings. In re Rock Indus. Mach. Corp., 572 F.2d 1195, 1198 (7th Cir. 1978). "Typically, the misconduct that would destroy a purchaser's good faith status at a judicial sale involves fraud, collusion between the purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders." In re Rock Indus. Mach. Corp., 572 F.2d at 1198 citing In re Webcor, Inc., 392 F.2d 893, 899 (7th Cir. 1968). In this case, however, no such flagrant misconduct has been alleged or, as far as BPPR's knowledge, even remotely exists.

B. The Sale Does Not Divert Assets or Value to Debtor's Principals

50. CSJH2 argues that the "sale seeks to divert assets and value to Debtor's principal". Opposition, page 4. As basis, CSJH2 argues that as part of the sale, there is a "deviation of over one million dollars away from the estate" as a result of the alleged receivable due from Premier Hotel Management to the Debtor, which CSJH2 argues will not be collected. Opposition, Paragraph 19. Finally, CSJH2 also argues that "those funds will flow to Mr. Luis Carreras, at the unjust and illegal expense of the estate". Id.

51. BPPR understands that CSJH2 has submitted no evidence or basis to support this allegation. But, in any event, assuming that CSJH2 understands that the estate may have a claim as to Premier, the Sale does not affect any such claim that the estate may have – any and all such claims are preserved by the estate, could be prosecuted and the alleged receivable collected, after the Sale. Nothing in the Sale impairs the estate's ability to pursue a collection on such receivable or any claim against Premier. BPPR notes, however, that it has a properly perfected security

interest that covers all of the Debtor's receivables, rent payments, and proceeds – including any proceeds that may be collected from Premier.

C. The Estate Benefits from the Competitive Bidding

52. CSJH2 argues that there is no benefit to the estate from a competitive sale, as any increases in the Purchase Price would be paid to BPPR. CSJH2's argument is misplaced and incomplete. While it is correct that under the BPPR Settlement Agreement, any increase to the Purchase Price is paid to BPPR, as a result of that consideration and the terms of the Settlement Agreement, BPPR has consented to a carve-out that exceeds $1Million. The Carve-Out provides a benefit to the estate that would not be available without the BPPR Settlement Agreement, considering the amount of the BPPR Pre-Petition Claim, and the Purchase Price. Further, the Carve-Out provides the funds to confirm a plan and distribute the same to the estate.

D. The Sale is Not a Sub Rosa Plan

53. Finally, CSJH2 argues that the Sale Motion should be denied, as the same is an alleged *sub rosa* plan of liquidation. As detailed below, this allegation should be rejected.

54. The term "*sub rosa* plan" was first mentioned in the Fifth Circuit decision of Pension Benefit Guar. Corp. v. Braniff Airways, Inc. (In re Braniff Airways, Inc.), 700 F.2d 935, 940 (5th Cir. 1983). The concept consists on the impermissible use of an asset sale or settlement to "thwar[t] the Code's carefully crafted scheme for creditor enfranchisement." *Id.* See also In re Chrysler, LLC, 405 B.R. 84, 96 (Bankr. S.D.N.Y. 2009); Motorola v Comm of Unsecured Creditors (In re Iridium Operating LLC), 478 F.3d 452, 466 (2d Cir. 2007)

55. In order for an asset sale to qualify as a *sub rosa* plan, the same must "seek[] to allocate or dictate the distribution of sale proceeds among different classes of creditors." In re GSC, Inc., 453 B.R. 132, 179-180 (Bankr. S.D.N.Y. 2011) (*citing* In re GMC, 407 B.R. 463,

494-495 (Bankr. S.D.N.Y. 2009)). Specifically, the sale must "either (a) dispose of claims against the estate or (b) restrict the creditors' right to vote." In re Millennium Multiple Emplr. Welfare Benefit Plan, 2011 Bankr. LEXIS 1973 at *23 (Bankr. W.D. Okla. 2011).

56. "Thus, where the debtor proposes to distribute significant estate assets to major classes of creditors on account of prepetition claims or to otherwise dictate the terms of a future plan outside the context of a chapter 11 plan, such proposal violates the policies of chapter 11 and should be denied." *Id.* (*citing* Braniff, 700 F.2d at 939-940).

57. As established in the leading cases of Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.), 722 F.2d 1063, 1066 (2d Cir. 1983), Chrysler, 405 B.R. at 96-100, and General Motors, 407 B.R. at 495-498, when the sale transaction does not dictate the terms of a plan of reorganization but, instead, "has 'a proper business justification' which has potential to lead toward confirmation of a plan and is not to evade the plan confirmation process, the transaction may be authorized" and will not be treated as a *sub rosa* plan. Chrysler, 405 B.R. at 96 (*citing* Iridium, 478 F.3d at 467); General Motors, 407 B.R. at 495-496.

58. As explained in more detail in the Chrysler case:

> A debtor may sell substantially all of its assets as a going concern and later submit a plan of liquidation providing for the distribution of the proceeds of the sale.

405 B.R. at 96 (citations omitted) (Emphasis supplied).

59. "In addition, a court must consider if those opposing the sale produced some evidence that the sale was not justified." Chrysler, 405 B.R. at 95 (*citing* Lionel, 722 F.2d at 1071) (Emphasis supplied).

60. As provided in more detail in the Sale Motion, the Debtor has proffered a substantial and valid business reason to sell the Sale Assets under the proposed Bidding

Procedures. First, the Debtor is not generating sufficient revenues to pay its creditors or confirm a plan. The Debtor's only means for providing a distribution to creditors and confirm a plan is through a sale of the Sale Assets. And, the only way to achieve this through a Sale is to enter into an agreement with its secured creditor, BPPR, given the amount of the BPPR Pre-Petition Claim and the Purchase Price for the Sale Assets. These agreements are contained within the Sale Motion and Settlement Agreement, pursuant to which the Sale will provide the Debtor with the Carve-Out, which will fund the plan and provide the basis to confirm the same.

61. After determining that the Sale Motion meets the business justification standards for approval under section 363 of the Code, and in consideration that CSJH2 has not produced any evidence whatsoever showing that the sale is not justified (See, Lionel, 722 F.2d at 1071), we must next consider whether (a) the transaction seeks to allocate or dictate the distribution of sale proceeds among different classes of creditors, (b) it either dispose of claims against the estate, or (c) restricts creditors' right to vote, in order to consider whether the Sale Motion constitutes a *sub rosa* plan. GSC, 453 B.R. at 179-180; General Motors, 407 B.R. at 494-495; Millennium, 2011 Bankr. LEXIS 1973 at *23.

62. None of the aforementioned factors are present in the instant case. First of all, the terms and conditions contained at the Sale Motion are not unusual in this District. Second, neither the Sale Motion, the Settlement Agreement nor the Carve-Out limits and/or restricts creditor's rights to vote on a Chapter 11 plan.

63. Lastly, while the Sale Motion details the expenses covered under a Plan from the Carve-Out, the same does not constitute an allocation or distribution of estate proceeds between different classes of creditors, nor disposes of claims against the estate. To the contrary, it provides the Debtor's proposed use of the Carve-Out, which Carve-Out does not constitute

property of Debtor's estate nor is subject to the Code's distribution scheme under section 507 of the Code. See, In re SPM Mfg. Corp., 984 F.2d 1305, 1315 (1st Cir. 1993) ("Code provisions governing priorities and distribution of estate property gave the estate no right to share in proceeds from [a secured creditor's claim], the bankruptcy court derived no right under those same provisions to order [the secured creditor] to pay a portion of its own claim proceeds to the estate."). Therefore, any alleged "disparate treatment of creditors**"** that may result from the Carve-Out allocation "**occurs as a consequence of the sale transaction itself and is not an attempt by the debtor to circumvent the distribution scheme of the Code**" and does not constitute a *sub rosa* plan. See In re TWA, 2001 Bankr. LEXIS 980 at *11 (Bankr. D. Del. 2001).

64. The foregoing becomes even more paramount when considering that, on April 16, 2015, just 20 days after the filing of the Sale Motion, Debtor submitted its corresponding Disclosure Statement and Chapter 11 Plan pursuant to 11 U.S.C. §§ 1125 and 1129, as amended on April 17, 2015. See, Dockets No. 44 – 45 and 50 – 51. Contrary to CSJH2's argument, the Debtor is not attempting to "short circuit the requirements of Chapter 11 for confirmation of a reorganization plan" through the filing of the Sale Motion, Settlement Agreement, and/or Carve-Out. Quite the contrary, Debtor has moved, to comply with the confirmation requirements before this Honorable Court.

65. Based on the above, we can observe that the Sale Motion, as filed:

> …does not dictate the terms of a plan of reorganization, as it does not attempt to dictate or restructure the rights of the creditors of this estate. It merely brings in value. **Creditors will thereafter share in that value pursuant to a chapter 11 plan subject to confirmation by the Court**. **A transaction contemplating that does not amount to a *sub rosa* plan**.

General Motors, 407 B.R. at 495-496 (Emphasis supplied).

66. Finally, the Sale Motion, complies with the provisions of Local Bankruptcy Rule 6004-1(b)(4), which sets forth the standard in this District for approving sales outside a plan.

67. Given that the Opposition does not provide any evidence whatsoever to rebut the business justification provided for approval of the Sale Motion, the fact the Sale Motion contains those terms typical and ordinary for a transaction of this nature, the fact that the contemplated sale transaction does not constitute a *sub rosa* plan as it does not attempt to substitute the claim allocation and creditor voting procedure of a Chapter 11 plan, the fact that Debtor has already filed a Disclosure Statement and Chapter 11 Plan for the Court's consideration, the Court should deny the allegations contained in the Opposition therein, and should, instead, approve the Sale Motion as it complies with the substantive standards of section 363 and 365 of the Bankruptcy Code, 11 U.S.C. §§ 363 and 365.

WHEREFORE, BPPR respectfully requests that the Court deny the Opposition and grant the Sale Motion and such other relief as is just and proper.

WE HEREBY CERTIFY that on this same date, the Parties have electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all CM/ECF participants in this case, including, but not limited to, Debtor's counsel and the U.S. Trustee. Furthermore, the Parties have provided notice of this Sale Motion, by certified mail, to the Notice Parties.

In San Juan, Puerto Rico, this 23rd day of April, 2015.

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