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9 **UNITED STATES BANKRUPTCY COURT**  
10 **SOUTHERN DISTRICT OF CALIFORNIA, SAN DIEGO DIVISION**

11 **In re**  
12 **BLUE WAVE ENTERPRISES, LLC,**  
13 **Debtor/Debtor in Possession.**

**Case No. 3-22-01075-CL11**

**Chapter 11**

**NOTICE OF MOTION AND MOTION BY DEBTOR  
AND DEBTOR IN POSSESSION MOTION FOR  
ORDER AUTHORIZING:**

(1) **SALE OF REAL PROPERTIES AT 550 HIGHWAY  
75 AND 624 7<sup>TH</sup> ST., IMPERIAL BEACH, CA 91932  
OUTSIDE THE ORDINARY COURSE OF BUSINESS  
PURSUANT TO SECTION 363(b) AND FREE AND  
CLEAR OF LIENS, ENCUMBRANCES AND  
INTERESTS PURSUANT TO SECTION 363(f);**

(2) **A DETERMINATION BUYER IS A GOOD FAITH  
PURCHASER PURSUANT TO SECTION 363(m);**

(3) **APPROVAL OF OVERBID PROCEDURES;**

(4) **AUTHORIZING DISBURSEMENT OF PROCEEDS;  
AND**

(5) **WAIVING THE 14-DAY STAY IMPOSED BY FRBP  
6004;**

**MEMORANDUM OF POINTS AND AUTHORITIES**

**Date: December 12, 2022**  
**Time: 2:30 p.m.**  
**Ctrm: 318**  
**325 W. F St.**  
**San Diego, CA 92101-6991**

1           **TO THE HONORABLE COURT, THE SUBCHAPTER V TRUSTEE, THE**  
2 **UNITED STATES TRUSTEE AND ALL INTERESTED PARTIES:**

3           **PLEASE TAKE NOTICE** that Debtor and Debtor in Possession Blue Wave  
4 Enterprises, LLC (“Debtor”) in the above captioned case, respectfully moves this Court  
5 for an Order:

- 6           1. Authorizing the sale of the real property located at 550 Highway 75, Imperial  
7 Beach, CA 91932 and 624 7<sup>th</sup> St., Imperial Beach, CA 91932 which includes  
8 three lots APN 625-140-08, 626-070-33 and 626-070-57 (the “Property”)  
9 outside the ordinary course of business and free and clear of liens,  
10 encumbrances and interests pursuant to 11 U.S.C. §§363(b) and (f)(3) &(5);
- 11           2. Deeming buyer Amazing Blue Wave, LLC (“Buyer”) or any to be a good  
12 faith purchaser pursuant to 11 U.S.C. §363(m);
- 13           3. Approving Overbid Procedures;
- 14           4. Authorizing escrow to disburse sale proceeds to pay the liens, costs of sale,  
15 commissions, and property tax claims with the balance of the proceeds if any  
16 to be disbursed to the Debtor in Possession (“DIP”) account; and
- 17           5. Waiving the 14-day stay imposed by FRBP 6004 (“the Motion”).

18           Debtor seeks this Court’s order to authorize the above referenced sale of the  
19 Property which will benefit the estate by paying the majority of the encumbrances. The  
20 proposed sale of the Property is for the highest and best offer Debtor has received in the  
21 last several years and based on a proposed sale negotiated in good faith in an “arm’s  
22 length” transaction without any collusion by any party.

23           On October 21, 2022, Amazing Blue Wave, LLC (“Buyer”) through its managing  
24 member Jeffrey Fleming, submitted its offer to purchase the Property for the amount of  
25 \$4,950,000.00. This is memorialized by execution of a Vacant Land Purchase Agreement  
26 and Joint Escrow Instructions and related documents. On November 5, 2022 Debtor  
27 submitted a Counteroffer No. 1, Addendum No. 1 and Bankruptcy addendum No. 1 to  
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1 Counteroffer executed by both managers in response to Buyer's Offer. The Buyer  
2 accepted these by signing all documents on November 7, 2022. Addendum No. 1 which  
3 included the second address and corrected the Assessors' Parcel Number given adding  
4 correct numbers for all three lots. The Bankruptcy Addendum removed all contingencies.  
5 All documents have been signed by Buyer and Debtor as Seller. Collectively these  
6 documents are referred to as the Purchase Agreement and attached as Exhibit 1 herein.

7 The Property has been marketed for several years prior to filing this case with no  
8 offers. This is the only offer Debtor has received and in Debtor's business judgment it is  
9 currently the best option Debtor has. The overbid process will assure Debtor receives the  
10 highest and best offer possible. Thus, the sale is in the best interest of the estate.

11 The Property, which includes three parcels of essentially vacant real estate in San  
12 Diego County, is Debtor's only asset and with the sale will pay off commissions, closing  
13 costs, its secured loans, and property taxes. There is a large judgement lien which was  
14 recorded within the preference period and could be avoided through an adversary action.  
15 Debtor does not have funds to engage in litigation but will seek to have the Court order  
16 the sale free and clear of this lien pursuant to Bankruptcy Code Section 363(f)(3) & (5).

17 **THE PURCHASE AGREEMENT**

18 The sale shall be pursuant to the terms contained in the attached fully executed  
19 Purchase Agreement effective November 7, 2022. Exhibit 1.

20 Pursuant to Local Bankruptcy Rule 6004-1(c)(3), Debtor provides the following  
21 information:

22 (A) The date, time and place of the hearing is December 12, 2022, at 2:30 p.m. in  
23 Courtroom 318 of the above-entitled Court located at 325 W. F St., San Diego, CA 9201-  
24 6991. Any Opposition to the Motion must be filed by November 25, 2022, and any Reply  
25 by Debtor by December 2, 2022.

26 (B) The Property being sold has two addresses: 550 Highway 75, Imperial Beach,  
27 CA 91932 and 624 7<sup>th</sup> St., Imperial Beach, CA 91932 (the "Property") which is  
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1 comprised of a 3 lots totaling 1.34 acres, mixed use development. The Legal Description  
2 for these lots is attached as Exhibit 2.

3 (C) The Buyer is Amazing Blue Wave, LLC (“Buyer”).

4 (D) The terms of the sale include, without limitation, the following:

5 (1) The purchase price of \$4,950,000.00 for the Property which is inclusive  
6 of commissions and payable by initial deposit of \$100,000.00, to be deposited in  
7 escrow within 24 hours after court approval of the sale, and the balance of the  
8 purchase price due before the closing date of escrow;

9 (2) Escrow for the sale of the Property shall close **not later than** 45 days  
10 after entry of the order approving the sale;

11 (3) The Property is being sold on an “as is” “where is” basis, without any  
12 representations or warranties, with no loan, appraisal or inspection contingencies;

13 (4) Buyer warrants its financial resources are as represented and sufficient to  
14 purchase the Property at the agreed price;

15 (5) The sale is free and clear of liens, encumbrances, and interests pursuant  
16 to 11 U.S.C. § 363(f)(3) & (5) as set forth herein;

17 (6) The sale is subject to overbids; Debtor shall seek to sell the Property  
18 subject to the followings Overbid Procedures:

19 (a) Overbid Amount and Purchase Agreement.

20 Any person or entity desiring to submit an overbid for the purchase of the estate’s  
21 interest in the Property (“Overbidder”) shall advise Debtor’s bankruptcy counsel (contact  
22 information listed above) of his, her or its’ intent to bid on the Property and the amount of  
23 the overbid (the “Overbid”), which must be at least a total of \$5,000,000,00 (i.e., the  
24 current sales price of the Property plus a \$50,000 minimum overbid), cash or certified  
25 check payable to the Debtor, by no later than 5:00 pm (PST), on the business day that is  
26 at least two days prior to the hearing on the Motion (the “Overbid Deadline”). In its  
27 absolute sole discretion, the Debtor or its’ counsel shall have the right to accept an  
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1 Overbid at any time after the Overbid Deadline.

2 The Overbidder must accept and agree to a sale that contains a purchase price of at  
3 least the minimum overbid and terms and conditions that are the same as, or not less  
4 favorable to the estate (in Debtor's sole discretion) than, the terms stated in the Purchase  
5 Agreement between Debtor and the Buyer (Exhibit 1).

6 **(b) Payment of Deposit and Evidence of Financial Ability to Perform.**

7 Any Overbidder shall submit to Debtor's bankruptcy counsel: (a) a cashier's  
8 checks made payable to "Blue Wave Enterprises, LLC", in the amount of at least  
9 \$50,000.00 to serve as a deposit towards the purchase price of the Property (the "Property  
10 deposit"); and (c) evidence that the Overbidder has the financial wherewithal to close the  
11 contemplated sale. The Deposit and evidence of financial wherewithal must be delivered  
12 so that these items are received by both Debtor's counsel no later than the Overbid  
13 Deadline. In its' sole and absolute discretion, Debtors or their counsel shall have the right  
14 to accept these items at any time after the Overbid Deadline.

15 In the event of any Overbid, the initial deposit tendered by the Buyer shall be  
16 refunded as well as any other deposits by other potential overbidders upon close of  
17 escrow.

18 **(c) Auction, Due Diligence, Consummation of Sale and Forfeiture of**  
19 **Deposit.**

20 In the event the Debtor receives any Overbid, the bidder will be able to participate  
21 in an auction to be conducted at the hearing on the Motion as is necessary to increase  
22 their bid.

23 Subject to Court approval, Debtor recommends that the first overbid be in the  
24 amount of \$50,000.00. Debtor also recommends that thereafter overbids shall be made in  
25 minimal increments of \$20,000.00 (subject to adjustment as appropriate) such that the  
26 next highest minimum overbid at any auction shall be an amount no less than  
27 \$5,020,000.00. All due diligence is to be completed prior to the hearing on the Motion,  
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1 as the sale is an “as is” “where is” basis, with no warranties, representations, recourse or  
2 contingencies of any kind whatsoever.

3 The Debtor will request authority to sell their estate’s interest in the Property to  
4 the bidder who, in the Debtor’s business judgment, makes the highest and best Overbid  
5 (the “Winning Bidder”). Debtor shall be authorized to sell their estate’s interest in the  
6 Property to the next highest and best Overbidder in the event the Winning Bidder fails to  
7 perform (“Backup Bidder”). Debtor reserves the right to reject any and all overbids that,  
8 in its’ or counsel’s business judgment, are insufficient.

9 The Winning Bidder’s Deposit shall be applied towards the total and final  
10 purchase price. The Winning Bidder must pay the full amount of the successful overbid  
11 to escrow and close escrow within forty-five (45) days from the date of entry of the Order  
12 authorizing the sale, or as otherwise set forth in the applicable purchase agreement.

13 To the extent the Winning Bidder is unable, unwilling or otherwise fails to  
14 consummate the Sale, that bidder’s entire Deposit shall become non-refundable and  
15 forfeited to the Debtor and, in the event of a Backup Bidder, Debtor shall be authorized to  
16 proceed with a sale to the Backup Bidder (at the Backup Bidder’s last bid at the auction).

17 To the extent a bidder is not the winning Bidder, that bidder’s Deposit will be  
18 refunded by Debtor, except that Debtor shall not refund the Deposit of any Backup  
19 Bidder until the sale to the Winning Bidder closes.

20 **(d) Agreement to terms and Overbid Procedures.**

21 Any bidder’s tender of a Deposit to Debtor shall serve as that bidder’s consent to,  
22 and agreement with, these proposed Overbid Procedures and the terms and conditions of  
23 the Sale as set forth in the applicable purchase agreement, and agreement not to object or  
24 seek to modify the Overbid Procedures in any manner. If there are no overbids the  
25 Purchase Price will be \$4,950,000.00 as listed in Exhibit 1.

26 (7) The sale is subject to Bankruptcy Court approval after providing notice to  
27 Debtor and their counsel, the United States Trustee, all creditors, and other parties in  
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1 interests as required by the Bankruptcy Code, Federal Rules of Bankruptcy Procedure,  
2 and the Local Bankruptcy Rules.

3 (8) The costs of sale include real estate commissions in the amount of 6% of  
4 the sales price of the Property to be divided with 3% to the Seller/Debtor's Agent/Broker  
5 and 3% to the Buyer's Agent/Broker.

6 (9) There are no remaining contingencies, except Bankruptcy Court approval.

7 (E) The proposed sale is free and clear of liens and encumbrances beyond those  
8 covered by the sales price of the Property. All voluntary liens will be paid from the sale  
9 proceeds. Each creditor should make a demand into escrow for the current amount owed.  
10 However, there is a large judgment lien in the amount of \$2,445,881.00. The Purchase  
11 Price is not sufficient to pay all of this claimed secured amount. However, the Abstract of  
12 Judgment in favor of Ed Fleming, no relation to Buyer's managing member with the  
13 same last name, which created the lien recorded on February 16, 2022, is within the 90  
14 period before the Petition was filed on April 24, 2022, and the lien avoidable as a  
15 preference and could be treated as unsecured debt. Section 363(f)(5) is applicable and  
16 allows a sale free and clear of this lien as discussed further herein.

17 (F) The sale is in the best interests of the estate and will at least pay off all valid  
18 liens provided for in this case, administrative costs, broker/agent commissions, and costs  
19 of sale, etc. There may be some residual for unsecured creditors but not be enough to pay  
20 all claims;

21 (G) Unless otherwise stated in the Order on this Motion, all surplus funds after  
22 paying the above cees and costs, shall be disbursed to Debtor's DIP account to be  
23 disbursed in accordance with Debtor's Plan of reorganization or any Court Order;

24 (H) The exact tax consequences to the estate relative to the sale are presently  
25 unknown.

26 **PLEASE TAKE NOTICE** that the Motion is made pursuant to 11 U.S.C.  
27 §§363(b),(e),(f) & (m), 365, FRBP 2002, 3020(a) and 6004, as well as Local Bankruptcy  
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1 Rule (“LBR”) 6004 and 9013.

2 **PLEASE TAKE FURTHER NOTICE** that the Motion is based on the attached  
3 Memorandum of Points and Authorities and the Declarations of Susan L. Hackett, David  
4 Brienza and Michael R. Totaro, the supporting exhibits, the arguments of counsel and  
5 other admissible evidence properly brought before the Court at or before the hearing on  
6 this Motion. In addition, Debtor requests that the Court take judicial notice of all  
7 documents filed with the Court in this case.

8 **PLEASE TAKE FURTHER NOTICE** that if you wish to object to the relief  
9 sought by the Motion you must file a written response no later than November 25, 2022.  
10 The failure to timely object may be deemed by the Court to constitute consent to the  
11 relief requested herein. If you do not have any objections to this Motion, you need not  
12 take any further action.

13 **WHEREFORE**, Debtor respectfully requests that the Court enter the orders set  
14 forth herein.

15 Dated: November 8, 2022

Respectfully submitted,

Totaro & Shanahan

17 By /s/ Michael R. Totaro  
18 Michael R. Totaro  
19 Attorneys for Debtor/Debtor in  
20 Possession

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **INTRODUCTION AND BACKGROUND**

3 **A. Jurisdiction and Venue**

4 This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§157 and 1334.  
5 This proceeding is a core proceeding under 28 U.S.C. §157(b)(2). Venue of the case and  
6 Motion is proper in this district pursuant to 28 U.S.C. §1408. The statutory predicates for  
7 the relief sought are sections 105, 363(b), (f)(3) and (m) of the Bankruptcy Code  
8 and Federal Rules of Bankruptcy Procedure Rules 2002, 3020, 6004, 6006, and 9014.

9 **B. General Background**

10 Debtor is the owner of 3 parcels of real property in Imperial Beach, California  
11 known as 550 Highway 75, Imperial Beach, CA 91932 and 624 7<sup>th</sup> St., Imperial Beach,  
12 CA 91932 (collectively the “Property”). There are three APNs, 625-140-08, 626-070-33  
13 and 626-070-57. The three properties were refinanced into one loan but remain three  
14 individual properties. On April 24, 2022, Debtor filed this Chapter 11 Subchapter V case  
15 with the intention of either refinancing or selling all parcels. The full legal description is  
16 attached to the Declaration of David Brienza as Exhibit 2.

17 The Property is encumbered by a first deed of trust in favor of Addison  
18 Technology, Inc., et al (“Movant”) herein asserted to be in the amount of \$4,204,836.54.  
19 There is also a judgment lien in favor of Ed Fleming (“Fleming”) in the amount of  
20 \$2,445,881.14 recorded on February 16, 2022, which Debtor believes is a preference by  
21 an insider since Fleming is a member of Debtor and clearly record within the 90-day  
22 preference period and could be avoided. Totaro Dec. ¶5.

23 Debtor had purchased the Property for a specific development project in 2017 and  
24 2018 and has worked to obtain required governmental approvals and entitlements  
25 necessary for the development. Brienza Dec. ¶4.

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1           **C. Value of the Property**

2           The Property had been on the market for several years prior to filing and did not  
3 receive any offers. Debtor questions the efforts to market the Property. In fact, after filing  
4 Debtor had to reject the existing listing agreement which was with one of its members as  
5 the agent before it could be listed by approved real estate agent and broker. The Court  
6 approved employment of real estate agent Susan L. Hackett and Rodeo Realty in Beverly  
7 Hills, as agent and broker with experience in selling properties in chapter 11 cases.  
8 Docket No. 63.

9           The most recent appraisal provided by the lender in its Motion for Relief from  
10 Stay shows no change in value since the loan was made. Docket No. 56. This showed a  
11 Land Value of \$4,125,000.00 and “As Is” with entitlements of \$5,670,000.00. Although  
12 Debtor does not agree with these appraised amounts, the Property was listed at  
13 \$6,000,000.00 not much higher than the “As Is” value with entitlements lender proposed.  
14 The purchase price to be approved in this Motion is \$4,950,000.00, somewhere between  
15 the lender’s values. This was the only offer received knowing it was required to get the  
16 Property sold rather quickly in this case. Hackett, Dec. ¶12-13.

17           The Property has been marketed for at least 3 years prior to filing this case with no  
18 real offers. Since the approval of Debtor’s agent/broker with extensive marketing, they  
19 only received three inquiries. Debtor’s managing member, real estate agent and  
20 bankruptcy counsel all believe this is the highest and best price Debtor was likely to  
21 obtain under the circumstances. Hackett Dec. ¶2 ; David Brienza Declaration. (“Brienza  
22 Dec.”), ¶¶14-15 and Declaration of Michael R. Totaro (“Totaro Dec.”), ¶3.

23           The offer in this case was submitted by Amazing Blue Wave, LLC (“Buyer”) on  
24 October 21, 2022, as a Vacant Land Purchase Agreement and Joint Escrow Instructions  
25 to purchase the Property for \$4,950,000.00. The initial offer contained only one of the  
26 property addresses and a single incorrect APN. On November 4, 2022, Debtor submitted  
27 Counteroffer No. 1, Addendum No. 1, correcting the description of the Property and  
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1 Bankruptcy Addendum No. 1 to Counter-Offer. These latter documents were signed by  
2 both of Debtor’s managers on November 5, 2022, and by Buyer on November 7, 2022.  
3 Each of these referenced documents comprise the Purchase Agreement which is attached  
4 as Exhibit 1. Hackett Dec., ¶¶13-15.

5 The sale of the Property will be subject to overbids at the hearing on this matter  
6 which is set for December 12, 2022 at 2:30 pm before this Court. This should assure  
7 Debtor receives the highest and best price

8 Debtor believes the purchase price of \$4,950,000,00 reflects the market value of  
9 the Property. Indeed, the true value of a property is what a buyer is willing to pay in a  
10 negotiated sale. See *BFP v. Resolution Trust Corporation*, 511 U.S. 531, 538 (1994).

11 **THE PROPOSED SALE**

12 **A. Material Terms of the Purchase Agreement**

13 Debtor proposes to sell the Property to the Buyer in accordance with Bankruptcy  
14 Code §§363(b), (f) and (k). The Purchase Agreement as defined herein was fully  
15 executed on November 7, 2022. See Exhibit 1.

16 **1. Purchase Price**

17 The sale involves a purchase price for the Property of \$4,950,000.00. Exhibit 1,

18 **2. Purchased Assets**

19 The physical address of the Property is 550 Highway 75, Imperial Beach, CA  
20 91932 and 624 7<sup>th</sup> St., Imperial Beach, CA 91932, There are three APN’s 625-140-08,  
21 626-070-33 and 626-070-57 (the “Property”). The Legal Descriptions of the Property are  
22 set forth in Exhibit 2. Brienza Dec., ¶¶2,17.

23 **3. No liabilities will be assumed by the Buyer.**

24 The Buyer assumes no liabilities. The sale will be free and clear of liens pursuant  
25 to 11 U.S.C. §§ 363(f)(3) and (5).

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1 estate, i.e., the sale price is fair and reasonable; (3) notice to creditors was proper; and (4)  
2 the sale is made in good faith.” *In re Industrial Valley Refrig. & Air Cond. Supplies, Inc.*,  
3 77 B.R. 15, 21 (Bank. E.D. Pa. 1987). A court has broad discretion to authorize a sale  
4 under 11 U.S.C. §363(h). See *In re Walter*, 83 B.R. 14, 19 (9<sup>th</sup> Cir. BAP 1988), see also  
5 *In re WPRV-TV*, 983 F.2d 336, 340 (1<sup>st</sup> Cir. 1993).

6 The courts will find that a proposed sale is in the best interests of the estate where  
7 the Debtor has a valid “business justification” for the proposed sale. See *Stephans Indus.*  
8 *Inc. v. McClung*, 789 F.2d 386, 390; *In re Baldwin United Corp.*, 43 B.R. 888, 905  
9 (Bankr.S.D. Ohio 1984). A debtor’s application of its sound business judgment in the use,  
10 sale or lease of the property is subject to great judicial deference. See *In re Moore*, 110  
11 B.R. 924 (Bankr.C.D. Cal. 1990); *In re Walter*, 83 B.R. at 19-20. The Court’s decision to  
12 authorize a sale under §363(b) is reviewed for abuse of discretion. *Id.*

13 There must be some articulated business justification for using, selling or  
14 leasing the property outside the ordinary course of business . . . whether  
15 the proffered business justification is sufficient depends on the facts of the  
16 case. As the Second Circuit held in *Lionel* [722 F.2d 1063, 1071 (2<sup>nd</sup> Cir.  
1983)], the bankruptcy judge should consider all salient factors pertaining  
17 to the proceeding and, accordingly, act to further the diverse interests of  
18 the debtor, creditors and equity holders, . . . alike.

19 *In re Walter*, 83 B.R. at 19-20.

20 In interpreting Section 363(b)(1) courts have held that a transaction involving  
21 property of the estate should be approved where the debtor can demonstrate “some  
22 articulated business justification for using, selling, or leasing property outside of the  
23 ordinary course of business.” *In re Continental Airlines, Inc.*, 780 F.2d 1223, 1226 (5<sup>th</sup>  
24 Cir. 1986); *In re Walter*, 83 B.R. at 19-21. The courts should consider various factors  
25 including the consideration to be paid, the financial condition and needs of the debtor, the  
26 qualifications of the buyer, and whether a risk exists that the assets proposed to be sold  
27 would decline in value if left in the debtor’s possession. See *Equity Funding Corp. Of*  
28 *Am. v. Fin. Assocs. (In re Equity Corp.)*, 492 F.2d 793, 794 (9<sup>th</sup> Cir. 1974).

1 Here, the proposed sale is supported by a valid business justification. While  
2 Debtor owes more than the value of the Property, a large part of this is a judgment in  
3 favor of a member Debtor in the amount of \$2,445,881.14. The Creditor recorded an  
4 abstract of judgment just 67 days prior to Debtor filing this case. This is within the  
5 preference period and the sale will be free and clear of all liens. Totaro Dec., ¶5. After all  
6 costs of sale, commissions, valid secured claims, priority claims there will be probably  
7 over \$264,000.00 available to be paid to unsecured creditors pro rata. If there is an  
8 overbid the amount could increase depending on the amount. Totaro Dec., ¶ 6.

9 It is the business judgment of the Debtor's manager, and counsel after considering  
10 potential alternatives, the proposed sale is in the best interests of Debtor, the estate, and  
11 its' creditors. Totaro Dec., ¶ 3, Brienza Dec., ¶¶ 14-15, Hackett Dec., ¶ 16.

12 **B. THE PROPOSED SALE SHOULD BE**  
13 **APPROVED FREE AND CLEAR OF LIENS,**  
14 **CLAIMS AND INTERESTS**

14 Debtor is seeking authority to sell the Property free and clear of all liens and  
15 encumbrances pursuant to 11 U.S.C. §363(f). Section 363(f) provides:

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

- 18 1. Applicable non-bankruptcy law permits sale of such property free and  
19 clear of such interests;
- 20 2. Such entity consents;
- 21 3. Such interest is a lien and the price at which such property is to be  
22 sold is greater than the aggregate value of all liens on such property;
- 23 4. Such interest is a bona fide dispute; or
- 24 5. Such entity could be compelled, in a legal or equitable proceeding, to  
25 accept money satisfaction of such interest.

25 Because subsections (1) through (5) of Bankruptcy Code §363(f) are written in the  
26 disjunctive, authority to sell the property free and clear of any and all liens, claims, and  
27 interests should be granted if any of the conditions are met with respect to each interest  
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1 holder. *Citicorp Homeowners Servs., Inc. v. Elliot (In re Elliot)*, 94 B.R. 343, 345 (E.D.  
2 Pa. 1988). In addition, any debt can be discharged by full payment of the underlying debt  
3 pursuant to Section 363 (f)(3). *Scherer v. Federal National Mortgage Association (In re*  
4 *Terrace Chalet Apartments, Ltd.)* 159 B.R. 821, 829 (Bankr. N.D. Ill 1993).

5 In this case the first lienholder with a voluntary lien will be paid in full of the sale  
6 proceeds. The Property taxes will also be paid in full from the sale. Section 363(f)(3).  
7 The only other secured claim is that of Ed Fleming who has a recorded judgment lien  
8 which can be avoided as a preference. Totaro Dec., ¶ 5. Pursuant to Section 363 (f)(5) the  
9 sale can be free and clear of this lien because the creditor “could be compelled, in a legal  
10 or equitable proceeding, to accept money satisfaction of such interest.”

11 The judgment lien is based on money being owed and because the security interest  
12 can be avoided as a priority the creditor could be compelled to accept money satisfaction.  
13 Therefore, this section should be applicable. In addition, the Property is not a Debtor’s  
14 principal residence, and as such Debtor could file a motion pursuant to 11 U.S.C. §506(b)  
15 to bifurcate and avoid this junior lien to the extent it is unsecured and would have to be  
16 paid pro rata with unsecured creditors. There will never be enough funds in the estate to  
17 pay all liens. Section 363(f) permits title to transfer free and clear of liens and  
18 encumbrances on the Property in this case.

19 To the extent any other party who may assert an interest in the Property receives  
20 notice of the Motion and does not file a written objection hereto, such party should be  
21 deemed to have consented to the proposed sale of the Property free and clear of its  
22 asserted interest. *In re Channel One Communications, Inc.*, 117 B.R. 493, 496 (Bankr.  
23 E.D. Mo. 1990). Debtor is hopeful that lienholders who clearly cannot be paid from this  
24 sale will consent to the sale without payment as there is no possibility of anyone buying  
25 the property with all these liens attached.

1 Given all the above, Debtor asserts that this Court should approve the sale of the  
2 Property free and clear of any and all liens, claims, and interests under Bankruptcy Code  
3 §§363(f) and (k).

4 **C. THE BUYER SHOULD BE DEEMED A GOOD**  
5 **FAITH PURCHASER PURSUANT TO SECTION**  
6 **363(m).**

7 11 U.S.C. §363(m) provides:

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

14 The Bankruptcy Code does not specifically define good faith; however, the Ninth  
15 Circuit has said that a good faith buyer “is one who buys ‘in good faith’ and ‘for value.’”  
16 *Ewell v. Diebert (In re Ewell)* 958 F.2d 276, 281 (9<sup>th</sup> Cir. 1992). “Lack of good faith is  
17 [typically] shown by ‘fraud, collusion between the purchaser and other bidders or the  
18 Debtors, or an attempt to take grossly unfair advantage of other bidders.’” *Id.*, quoting  
19 *Community Thrift & Loan v. Suchy (In re Suchy)*, 786 F.2d 900, 902 (9<sup>th</sup> Cir. 1985).

20 The requirement that a Buyer act in good faith . . . speaks to the  
21 integrity of his conduct in the course of the sale proceedings.  
22 Typically, the misconduct that would destroy a Buyer’s good faith  
23 status at a judicial sale involves fraud, collusion between the Buyer  
24 and other bidders or the trustee, or an attempt to take grossly unfair  
25 advantage of other bidders.

26 *In re Abbotts Dairies of Pennsylvania, Inc.*, 788 F.2d 143, 147 (3<sup>rd</sup> Cir. 1986) (citations  
27 omitted).

28 In this case, Buyer is purchasing the Property which is part of the bankruptcy  
estate. Buyer has offered to pay a fair market price for the Property and the terms are fair  
and equitable. The anticipated sale was negotiated at “arm’s length” between the  
respective Buyer and Debtor. Buyer made the offer to purchase the Property for



1 \$4,950,000.00 which is the first and best offer Debtor has received in over three years of  
2 marketing. Buyer has proposed to pay all cost of inspections, sale etc. except that Debtor  
3 is to pay 50% of the city and county transfer fees. There are no contingencies to the sale  
4 except for bankruptcy court approval and an overbid procedure with the sale to close  
5 within 45 days of court approval. Buyer does not know Debtor and there is no collusion  
6 with any party or any attempt to take unfair advantage of anyone in this sale offer.  
7 Brienza Dec., ¶ 18.

8 Based on the foregoing, Debtor submits the Court may properly determine the  
9 Buyer and any potential overbidder to be a “good-faith purchaser” within the meaning of  
10 11 U.S.C. §363(m).

11  
12 **D. THE COURT SHOULD AUTHORIZE ESCROW**  
13 **TO PAY THE EXISTING LIEN, OUTSTANDING**  
14 **REAL ESTATE AGENTS-BROKERS**  
15 **COMMISSIONS PER THE PURCHASE**  
16 **AGREEMENT AND DISBURSE THE BALANCE**  
17 **OF FUNDS TO THE SUBCHAPTER V**  
18 **TRUSTEE MARK SHARF TO HOLD IN TRUST**  
19 **FOR THE ESTATE.**

20 The Purchase Agreement provides for real estate commissions to the  
21 agents/brokers in the total amount of 6% of the purchase price. The commissions are to  
22 be split between the agents/brokers for Debtor/Seller and the agents/brokers for the  
23 Buyers. Hackett Dec., ¶ 4. The Court should authorize payment of the full commissions  
24 out of escrow. As noted there are no closing costs being paid by Debtor as the Buyer has  
25 agreed to pay all such costs and fees. Exhibit 1. The only items to be paid at closing  
26 consist of the claims of the first lienholder, property taxes, and commissions, priority  
27 claims for US Trustee fees, legal fees, and California taxes. The balance should be paid  
28 by escrow to the debtor in Possession account to be held pending a confirmed plan or  
court order as to disbursement.

The following is a list of payments and approximate amounts where applicable Debtor is requesting the Court approve to be paid from the sale proceeds:

Payee	Basis for claim	Amount
Addison Technology, et al	1 <sup>st</sup> lien	4,204,835.54
San Diego County	Claim 3-2 Property taxes	106,014.18
Rodeo Realty	Seller's Commission	148,500.00
Derrick Biron Paine III	Buyer's Commission	148,500.00
Escrow	Seller' Costs of Sale	Minimal unknown
US Trustee	US Trustee Quarterly Fees	40,000.00
Priority admin claims	Subchapter V Trustee	2,775.00
Priority admin claims	Debtor's Attorney's Fees	35,000.00 estimated
<b>Total Estimated Paid</b>		<b>\$4,685,624.72</b>
<b>Total Estimated Balance</b>		<b>264,375.28</b>

The foregoing shows that the sale will provide a benefit to the estate. Totaro Dec., ¶ 6, Brienza Dec., ¶¶ 14-15.

Pursuant to FRBP 3020(a) Debtor requests the Court order the balance of the sale proceeds be deposited Debtor's DIP account to hold for purposes of distribution as further required by the Court and/or under the Chapter 11 Plan in this case.

**F. WAIVER OF THE 14-DAY STAY IS REQUESTED.**

In order to complete the sale in this case, and to not miss the opportunity presented by the sale to Debtor, the estate and its creditors, Debtor respectfully requests that the order on this Motion be effective immediately, notwithstanding the 14-day stay imposed by *FRBP* 6004(h). Under this Rule, the Court has the discretion to waive the stay which is appropriate in this case. This is very important as the Buyer is ready to close as soon as possible to benefit from her guaranteed interest rate which is about to expire. In addition, waiver of Bankruptcy Rule 6004(h) will permit the sale to close as soon as possible and

1 prevent added interest from accruing. Therefore, it is especially important that the Sale  
2 Order be entered promptly and that *FRBP* 6004(h) is waived to permit a prompt closing.

3 **CONCLUSION**

4 Based on the foregoing, Debtor respectfully requests the Court enter an Order after  
5 a hearing stating:

- 6 1. The Motion is granted;
- 7 2. The Sale of the Property is supported by a sound business justification and  
8 in the best interests of the estate;
- 9 3. Debtor is authorized to sell the Property outside the ordinary course of  
10 business pursuant to Section 363 (b) on the terms set forth herein;
- 11 4. Buyer is deemed a good faith purchaser, entitled to the protections as  
12 provided in Section 363(m);
- 13 5. The Sale shall be free and clear of the existing liens pursuant to Section  
14 363(f)(3) & (5):
- 15 6. Escrow is authorized to pay the distributions as set forth herein;
- 16 7. Escrow is directed to disburse the remaining balance of the sale proceeds to  
17 Debtor's Debtor in Possession account to be paid according to a Plan of Reorganization  
18 or Court Order.
- 19 8. The 14-day stay as to the effectiveness of the order shall be waived and the  
20 parties authorized to close escrow as soon as the order is entered;
- 21 9. Such other and further relief as the Court deems just and proper.

22 Dated: November 8, 2022

Totaro & Shanahan

24 By: /s/ Michael R. Totaro  
25 Michael R. Totaro  
26 Attorneys for Debtor and  
27 Debtor in Possession  
28