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7 UNITED STATES BANKRUPTCY COURT
8 SOUTHERN DISTRICT OF CALIFORNIA

9 In re:
10 PEPPERTREE PARK VILLAGES 9&10,
11 LLC,
12 Debtor.

Lead Case No.: 17-05137-LT7
(Jointly Administered)

**TRUSTEE’S MOTION FOR ORDERS:
(1) APPROVING STALKING HORSE AGREEMENT;
(2) APPROVING OVERBID AUCTION PROCEDURES;
(3) APPROVING SALE OF ASSETS PURSUANT TO 11 U.S.C. SECTION 363, FREE AND CLEAR OF LIENS, CLAIMS, AND INTERESTS; AND
(4) GRANTING RELATED RELIEF**

14 PEPPERTREE PARK VILLAGES 9&10,
15 LLC,
Case No. 17-05137-LT7

16 PEPPERTREE LAND COMPANY,
17 Case No. 17-05135-LT11

18 NORTHERN CAPITAL, INC.
19 Case No. 17-04845-LT11

20 DUANE SCOTT URQUHART,
21 Case No. 17-04846-LT11

22 Debtors.

Initial Approval Hearing
Date: May 17, 2023
Time: 2:00 p.m.

Subsequent Sale/Auction Hearing
Date: June 7, 2023
Time: 10:00 a.m.

Dept: Three (3)
Honorable Laura S. Taylor

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Federal Rules

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Fed. R. Bankr. P. 90171

Fed. R. Evid. 2011

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1 Gerald H. Davis, chapter 7 trustee (the “Trustee”), submits the following Motion for
2 Orders: (1) Approving Stalking Horse Agreement; (2) Approving Overbid Auction
3 Procedures; (3) Approving Sale of Assets Pursuant to 11 U.S.C. Section 363, Free and Clear of
4 Liens, Claims, and Interests; and (4) Granting Related Relief (the “Motion”). This Motion is
5 based on the Memorandum of Points and Authorities cited herein, the Notice of Hearings and
6 Motion and Declaration of Gerald H. Davis (“Davis Declaration”) filed concurrently herewith,
7 and all pleadings and court documents on file in this case.¹

8 I.

9 INTRODUCTION

10 For five years in this bankruptcy case, debtor Peppertree Park Villages 9 & 10, LLC
11 (“Debtor”) and its stakeholders tried to maximize the value of Debtors’ approximately 19
12 acres of undeveloped land known as Units 9 & 10 in Peppertree Park.

13 Since his appointment in late June 2022, the Trustee retained a broker, marketed the
14 property, negotiated with potential buyers, met with staff of the San Diego Planning
15 Commission, and negotiated with the secured lender, all with the goal of selling the property
16 for maximum value for the benefit of the estate.

17 Unfortunately, the time to sell the property must be now. The secured lender that
18 financed Debtor’s reorganization efforts is charging 22% default interest at the rate of almost
19 \$70,000.00 per month.² The property still holds value for the estate, but that value is rapidly
20 diminishing each month. The Trustee and the secured lender just reached an agreement in
21 principle, subject to Court approval, that will provide substantial economic benefit to the
22
23
24

25 ¹ The Trustee respectfully requests, pursuant to Rule 201 of the Federal Rules of Evidence,
26 made applicable herein by Rule 9017 of the Federal Rules of Bankruptcy Procedure, that the
27 Court take judicial notice of the case docket for the above-captioned case and each of the
28 pleadings and other documents on file in the case.

² The Trustee is in negotiations with GF Capital regarding a reduction of the interest rate and a
carve-out to the estate, but the agreement is still in the drafting stage and must be approved by
the Court.

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1 estate; but the risk is foreclosure if the property is not under contract to be sold within four
2 months.³

3 The Trustee requested bids for the property. To date, the only viable firm offer was
4 recently submitted by Justus Wallace Peppertree Park Villages 7 & 8, LLC (“**Justus**
5 **Wallace**”), the owner of land adjacent to the property. The Trustee has entered into a purchase
6 and sale agreement with Justus Wallace (the “**Stalking Horse Agreement**”),⁴ which is subject
7 to overbid and Court approval.

8 By this Motion, the Trustee requests the following relief:

9 1. Entry of an initial order (“**Overbid Procedures Order**”), following the initial
10 hearing on his Motion on May 17, 2023:

11 (a) approving the Stalking Horse Agreement (described below) for the
12 purchase and sale of certain real property and related development
13 application(s) and any interest in the Tepas lease;

14 (b) approving the proposed Overbid Procedures, including prequalification
15 of potential overbidders, auction procedures, and break-up fee.

16 2. Entry of a second order (the “**Sale Order**”), following the subsequent hearing
17 (“**Sale Hearing**”) on June 7, 2023:

18 (a) approving the sale of the real property and related applications(s) and
19 lease to the stalking horse bidder (or any winning overbidder), free and
20 clear of any liens, claims, or encumbrances pursuant to Bankruptcy
21 Code section 363(b) and (f), as a good faith purchaser entitled to the
22 protections of Bankruptcy Code section 363(m);

23 ///

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25 _____
26 ³ See Part II.D below for more information.

27 ⁴ The Stalking Horse Agreement is the initial bid on the property and sets the low-end bidding
28 bar. Other prequalified buyers can submit overbids on terms substantially similar to the
Stalking Horse Agreement except that all contingencies are waived.

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- 1 (b) approving the assumption and assignment of the related
- 2 application(s) and lease to the stalking horse (or any winning overbidder)
- 3 pursuant to Bankruptcy Code section 365; and
- 4 (c) granting related relief.

5 The Trustee continues to advertise sale of the property subject to overbid.

6 In the event the Court approves the proposed auction procedures and an overbidder
7 prequalifies to overbid, then an auction will be held at the Sale Hearing to determine the
8 successful bidder and back-up bidder. Under those circumstances, the Trustee requests
9 authority to sell the property to the successful bidder and back-up bidder on the terms
10 described below.

11 On the other hand, in the event the Court approves the proposed auction procedures but
12 no overbidder satisfies the prequalification requirements described below and no opposition to
13 the Motion is timely filed, the Trustee requests that the Motion be granted, the Sale Hearing be
14 removed from the Court’s calendar, and the Trustee will submit the Sale Order without further
15 hearing.⁵

16 This Motion is brought pursuant to sections 363 and 365 of the Bankruptcy Code (11
17 U.S.C. § 101, *et seq.*) on the grounds that the GF Capital secured note is in default and the
18 amount owed is increasing by about \$70,000.00 per month; the Estate has no funds to pay the
19 secured note; the equity in the property is decreasing each month; the risk that the property will
20 be lost to foreclosure is increasing; the overbid procedures described below are fair,
21 reasonable, and designed to maximize the value of the property while providing for a prompt
22 sale of the property; the terms of the sale and the overbid procedures constitute a proper
23 exercise of the Trustee’s business judgment; and the sale is in the best interests of the estate.

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27 ⁵ Questions regarding whether the hearing will be held should be directed to the Trustee’s
28 counsel (Christin Batt at 858-294-0216 or ChristinB@flgsd.com) after the Prequalification
Deadline (Noon on May 31, 2023).

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1 II.

2 STATEMENT OF FACTS

3 A. General Background

4 On August 28, 2017, Debtor commenced this bankruptcy case by filing a voluntary
5 petition under chapter 11 of the Bankruptcy Code. (ECF No. 1) At about the same time,
6 bankruptcy cases were filed by parties related to Debtor. Northern Capital, Inc. (“NCI”) and
7 Duane Scott Urquhart (“Urquhart”) commenced their respective chapter 11 bankruptcy cases
8 on August 13, 2017. Peppertree Land Company (“PLC”) commenced its chapter 11
9 bankruptcy case on August 28, 2017, the same day that Debtor’s case was commenced.⁶ PLC,
10 NCI, and Urquhart are referred to herein as “Affiliated Debtors.”

11 On October 3, 2017, the Court ordered the joint administration—for procedural purposes
12 only—of Debtor’s and Affiliated Debtors’ cases, with Debtor’s case as the lead case. (ECF No.
13 30) The four cases are not substantively consolidated. (ECF No. 30)

14 Debtor and the Affiliated Debtors proposed their Seventh Amended Joint Chapter 11
15 Plan of Reorganization (the “Plan”), which the Court confirmed on December 16, 2019. (ECF
16 No. 676) Under the Plan, Debtor and Affiliated Debtors were required to do the following by a
17 certain deadline: sell the property described below or obtain financing secured by the property
18 in an amount sufficient to pay all amounts owing under the Plan. The deadline to sell or finance
19 the property was September 15, 2020, which the Court extended to October 13, 2021.

20 Debtor and Affiliated Debtors defaulted under the Plan.

21 On June 27, 2022, the Bankruptcy Court converted Debtor’s case to a case under
22 chapter 7 of the Bankruptcy Code, and the Trustee was appointed as chapter 7 trustee of
23 Debtor’s bankruptcy estate (the “Estate”). Shortly after the Trustee’s appointment, the Court
24 instructed the Trustee, in no uncertain terms, to sell the property without delay.

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27 ⁶ According to documents filed in the respective bankruptcy cases, Debtor is a limited liability
28 company owned by PLC (50%) and NCI (50%). Urquhart is the president and sole shareholder
of NCI.

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1 **B. The Real Property and Assets**

2 The assets in the Estate include certain real property known as Units 9 and 10 of
3 Peppertree Park Villages in Fallbrook, California, APN: 104-350-15-00, 104-351-17-00, 103-
4 350-19-00 (Now known as 104-352-01-00) (the “**Property**”) together with development
5 application(s) currently pending before the San Diego County Planning Commission and/or
6 San Diego County Board of Supervisors and any plans, specifications, plats, maps of
7 dedication, assessments, reports, surveys, and studies prepared by third parties with respect to
8 the Property (collectively, the “**Application and Related Rights**”). Property of the Estate may
9 also include an interest as landlord or land owner under a certain lease of the Property to Tepas
10 Produce (the “**Tepas Lease**”). To the extent that Debtor owns an interest in the Tepas Lease and
11 the ultimate buyer desires to acquire Debtor’s interest in the Tepas Lease, the term “**Property**”
12 as used herein includes Debtor’s interest, if any, in the Tepas Lease. The term “**Assets**” used
13 herein means all rights, title, and interests of Debtor in the Property and the Application and
14 Related Rights. The Assets hold value for the Estate.

15 The Trustee’s current deadline to assume or reject the Application(s), and the Tepas
16 Lease is July 24, 2023. (ECF No. 1040)

17 **C. The Broker and Marketing Efforts**

18 The Trustee engaged Park Place Partners, Inc., a California corporation d/b/a Land
19 Advisors Organization (the “**Broker**”), the broker that worked with Debtor during the
20 chapter 11 phase of the case, to continue marketing the Property for sale. (ECF No. 1011).
21 The Broker has been very cooperative with the Trustee and agreed to reduce its previous
22 commission of 2.25%⁷ to 1.35% of the gross sale proceeds.

23 According to the Broker, there are several buyers interested in the Property but, due to
24 uncertainty about the entitlement process, none has so far been willing to make a firm offer
25 until the stalking horse bid by Justus Wallace.

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27 _____
28 ⁷ Broker’s commission under its now-expired listing agreement with Debtor was 2.25% of the
first \$5 million of gross proceeds and 2.00%% of gross proceeds exceeding \$5 million.

1 The Broker is optimistic that, once the stalking horse bid is before the Court, other
2 interested buyers will choose to overbid. All negotiations with every potential buyer have been
3 conducted in an arm’s-length manner.

4 The Broker is continuing to show the Property to any interested purchaser and will
5 provide notice of the auction opportunity to everyone who has shown or shows an interest in
6 the Property up to the Prequalification Deadline (defined below).

7 **D. Status of GF Capital Loan**

8 In December 2019, in connection with confirmation of Debtor’s and Affiliated Debtor’s
9 Chapter 11 Plan, Debtor and Affiliated Debtors obtained a \$3,350,000 loan from GF Capital,
10 secured by a Deed of Trust on the Property. During the chapter 11 phase of Debtor’s case, the
11 Promissory Note was amended and the maturity date extended several times.

12 Since the case was converted to chapter 7, GF Capital refused to amend the note or
13 extend the maturity date. The loan matured on January 27, 2023. The interest rate on the note
14 rose from 12.0% to 14.5%; GF Capital then increased the interest rate to the default rate of
15 22%. As a result, GF Capital has been charging *nearly \$70,000.00⁸ each month in interest.*

16 GF Capital asserts that, as of April 11, 2023, the current amount owed on the secured
17 loan is \$3,806,104.49.

18 The Trustee has just reached an agreement in principle with GF Capital that would
19 (a) reduce the interest rate back to the 14.5% non-default rate from and after April 15, 2023,
20 and (b) provide a carve-out to the Estate of 10% of GF Capital’s total amount owed at closing.
21 Calculated today, this carve-out amounts to an additional \$380,610.45 to the Estate! In
22 exchange for these economic benefits, GF Capital requires that the sale of the Property close
23 by August 15, 2023 (four months from the date of agreement) and the Trustee must stipulate to
24 relief from stay for GF Capital to foreclose if the Property is not sold by the closing deadline;
25 provided, however, that the closing deadline will be automatically extended up to two
26 additional months if, by August 15, 2023, a buyer is under contract to purchase the Property

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28 ⁸ According to GF Capital’s statements, from February 10, 2023, to March 13, 2023, the
Interest Balance increased by \$69,561.60.

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1 and the deposit is nonrefundable. In addition to the stipulation for relief from stay, the Trustee
2 must provide GF Capital, at its sole election, a deed in lieu of foreclosure as of 30 days
3 following entry of the stay-relief order. This agreement is being drafted in the form of a
4 forbearance and carve-out agreement, and the Trustee will file a motion, possibly on shortened
5 time, for approval of this agreement with GF Capital.

6 Notwithstanding these future adjustments, the dramatically increasing lien on the
7 Property requires a prompt sale before all value is eroded or the lender forecloses.

8 **E. Offer from Justus Wallace Peppertree Park Villages 7 & 8, LLC**

9 Shortly after the Trustee’s appointment in late June 2022, the Trustee sought offers
10 from anyone known to be interested in the Property, including Howard Justus. Howard Justus
11 is the principal of Justus Enterprises, LLC, the former manager and Chief Restructuring Officer
12 of Debtor for about 7½ months in late 2021 and early 2022 while Debtor was still in the
13 chapter 11 phase of this case. Howard Justus is also a principal of Justus Wallace, the
14 proposed buyer of the Assets. In addition, Justus Wallace holds an unsecured claim in this
15 bankruptcy case in the amount of \$7,533,702.44. (Claim No. 4-3; ECF No. 876).

16 At the time the Trustee first discussed the Property with Howard Justus, Mr. Justus
17 stated that he was not interested in submitting a stalking horse bid,⁹ particularly in light of
18 allegations made against him by NCI. Mr. Justus declined to state at that time whether he
19 would submit an overbid if the Trustee were able to find a stalking horse bidder.

20 In February 2023, counsel for Justus Wallace (“**Buyer**”) contacted the Trustee’s
21 counsel with a stalking horse bid to purchase the Property coupled with an offer to settle any
22 claims the Trustee, Debtor, and/or Debtor’s estate may have against Howard Justus, Justus
23 Wallace, Justus Enterprises, LLC, and any other entity owned or controlled by Howard Justus.

24
25 _____
26 ⁹ “A stalking horse bidder ... makes an initial bid to purchase the assets of a debtor. Stalking
27 horse bidders often contract to receive a ‘break-up-fee’ compensating it for its bidding
28 activities should a higher bid ultimately emerge and win an eventual asset auction.” *Rumsey
Land Co. v. Res. Land Holdings, LLC (In re Rumsey Land Co.)*, 944 F.3d 1259, 1266 n.2 (10th
Cir. 2019) (quoting *Brown Media Corp. v. K & L Gates, LLP*, 586 B.R. 508, 518 (E.D.N.Y.
2018).

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1 The Trustee and Justus Wallace, through their respective counsel, negotiated and entered into
2 the following agreements:

3 (1) Purchase and Sale Agreement, subject to overbid (the “**Stalking Horse**
4 **Agreement**”), regarding the Assets for a purchase price of \$4,450,000.00. A copy of the
5 Stalking Horse Agreement is attached as Exhibit A to the Davis Declaration and incorporated
6 herein.

7 (2) Settlement Agreement and Mutual Release (the “**Settlement Agreement**”) with
8 additional parties Howard Justus and Justus Enterprises, LLC, which agreement will bring in
9 \$100,000.00 to the Estate. A copy of the Settlement Agreement is attached to the Declaration
10 of Gerald H. Davis supporting the Trustee’s separate Motion for Order Approving
11 Compromise with Howard Justus, Justus Enterprises, LLC, and Justus Wallace Peppertree Park
12 Villages 7 & 8, LLC.

13 Each agreement is contingent upon the other agreement, and only Howard Justus and/or
14 Justus Wallace may waive such contingencies. In other words, Howard Justus is willing to
15 submit the stalking horse bid and risk being overbid but only if the proposed settlement is
16 approved as well. In addition, the Break-Up Fee described below is an integral component of
17 Justus Wallace’s stalking horse bid.

18 The Trustee is filing a separate motion for an order approving the Settlement
19 Agreement, in which the Trustee explains in more detail the Trustee’s investigation regarding
20 allegations made by NCI against Howard Justus as well as the terms of the proposed
21 Settlement Agreement.

22 This proposed sale has been negotiated at arm’s length. Neither Howard Justus, Justus
23 Wallace, nor Justus Enterprises, LLC is a member or principal of Debtor or Debtors’
24 stakeholders.

25 *The Trustee is unaware of any other higher and better firm offer to purchase the*
26 *Assets.* The Trustee is aware, however, that one or more parties may be interested in
27 overbidding at an auction. The Broker is continuing to show the Property to any interested
28 purchaser and is providing notice of the auction opportunity to everyone who has shown or

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1 shows an interest in the Property up to the Prequalification Deadline (defined below). A copy
2 of the NOTICE OF AUCTION AND SALE is attached as Exhibit B to the Davis Declaration
3 and incorporated herein.

4 The Trustee estimates that the proposed sale of the Assets together with the Settlement
5 Agreement will bring into the Estate about \$480,000.00 after payment of liens and costs of
6 sale.¹⁰ This assumes that nothing is obtained from the lender with respect to a carve-out or
7 interest rate reduction. The Trustee expects to be able to pay the secured lien, including
8 accruing interest before closing, and unpaid property taxes totaling approximately \$3,990,593
9 in full. As such, the Stalking Horse Agreement, or any overbid obtained by Broker, will result
10 in a significant benefit to the Estate. Moreover, with interest on the secured loan currently
11 increasing by nearly \$70,000.00 each month or a possible foreclosure in four months, the
12 Trustee must sell the Assets without delay.

13 The Trustee believes that the sale is in the best interest of the Estate and in his business
14 judgment should be approved.

15 **F. Proposed Sale Transaction, Subject to Overbid**

16 Below are the suggested terms of the sale transaction.

17 (1) Purchase Price: \$4,450,000.00, payable as follows: \$250,000.00 deposit due at
18 execution of the Stalking Horse Agreement, and the remaining balance of the Purchase Price
19 due at Closing.

20 (2) “As-Is, Where-Is”: The sale is as-is, where-is, no representations, no
21 warranties.

22 ///

23 ///

24 ///

26 ¹⁰ The calculation of estimated Net Sale and Settlement Proceeds is gross sale proceeds of
27 \$4,450,000.00 less property taxes of \$8,329.16, less estimated amount of GF Capital loan at
28 June 30, 2023, of \$3,982,264.49, less broker’s commission and closing costs of \$79,404.16
equals \$380,002.19, plus settlement payment from Howard Justus equals an estimated Net Sale
and Settlement Proceeds of \$480,002.19.

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1 (3) Closing Date: On or before five (5) days after the Sale Order and the Settlement
2 Order¹¹ become final and non-appealable orders pursuant to the Federal Rules of Bankruptcy
3 Procedure or as soon thereafter as possible.

4 (4) Sale Free-and-Clear: The Assets will be sold free and clear of any and all
5 monetary liens, claims, encumbrances, or other interests.

6 (5) Buyer Breach: If the Buyer fails to close, Buyer will forfeit its deposit as
7 liquidated damages and the Trustee will have the right to seek any and all other remedies and
8 damages from Buyer.

9 (6) Treatment of Liens, Claims, Encumbrances, and Other Interests: As authorized
10 by Section 363(f) of the Bankruptcy Code, the sale will be free and clear of all monetary liens,
11 claims, encumbrances and other interests (“**Liens**”), with such Liens attaching to the sale
12 proceeds with the same validity, scope, priority, and perfection as they had on the Property
13 immediately prior to the closing. The Trustee is aware of the following interests, liens, and
14 encumbrances on the Property:

15 (a) GF Capital: approximately \$3,806,104.49;¹² and

16 (b) Property taxes: approximately \$8,329.16.

17 In the event the sale is not approved or not consummated, all existing Liens will remain
18 unaffected.

19 (7) Overbid Terms: The Trustee seeks approval of the sale of the Assets subject to
20 the proposed Overbid Procedures described in the section below.

21 (8) Conditions to Close:

22 (a) Final non-appealable Bankruptcy Court orders approving the sale of the
23 Assets to Buyer and approving the separate Settlement Agreement by and among the
24 Trustee, Justus Wallace, Howard Justus, and Justus Enterprises, LLC.

25
26 ¹¹ The Settlement Order refers to an order approving the Settlement Agreement described on
page 8.

27 ¹² Unless there is a carve-out or interest reduction, this amount will increase by nearly
28 \$70,000.00 each month due to the lender’s decision to charge interest at the default rate of
22%.

(b) In the event the Bankruptcy Court enters the Sale Order but such Sale Order is not final and non-appealable by the 90th day after Expiration of the Financing/Due Diligence Period, the Parties will work in good faith to close the sale without a final non-appealable Sale Order. Notwithstanding the foregoing, Buyer shall not be required to close the sale without a title policy acceptable to Buyer and Buyer’s lender in their sole and absolute discretion and agreement by Buyer’s lender to fund the transaction without a final non-appealable Sale Order.

The Trustee believes that the sale is in the best interest of the Estate and in his business judgment should be approved.

G. Proposed Overbid Auction Procedures

At the second hearing on this Motion—the Sale Hearing—if a qualified overbidder is present and interested in bidding, the Trustee will hold an auction. The Trustee requests approval of the following suggested terms and proposed Overbid Procedures.

(1) Initial Overbid: \$4,600,000.00 (\$150,000.00 more than the Purchase Price).

(2) Subsequent Incremental Bids: Minimum \$10,000.00.

(3) Deposit to Bid: \$250,000.00.

(4) Prequalification Deadline: **May 31, 2023, at Noon (Pacific Time)**.

(5) The auction will continue until the Court determines the highest and best bid (the “**Successful Bid**” from the “**Successful Bidder**”) and the second-highest bid (the “**Back-Up Bid**” from the “**Back-Up Bidder**”). The Successful Bid will be irrevocable. The Back-Up Bid is described below.

(6) Buyer and all potential overbidders will be required to attend the Sale Hearing in person (or by Zoom if unable to attend in person).

(7) Prequalification to Overbid: To be allowed to overbid, a potential purchaser must present each of the following to the Trustee on or before the Prequalification Deadline **(Noon on May 31, 2023)** set forth above:

(a) Good funds (i.e., cashier’s check or wire transfer) in the amount of \$250,000.00, payable to Estate of Peppertree Park Villages 9 & 10, LLC, Gerald H.

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1 Davis, Trustee, as a deposit, nonrefundable to the Successful Bidder and Back-Up
2 Bidder, except as provided in subparagraph (5) above. These funds will be deposited
3 into the Estate’s account and will be promptly refunded to unsuccessful overbidders
4 following the conclusion of the Sale Hearing. The deposit of the successful overbidder
5 shall be applied to the final purchase price ordered by the Court.

6 (b) Evidence, satisfactory to the Trustee, that the overbidder has the
7 financial wherewithal to close the transaction. Such evidence must include, at a
8 minimum, financial statements of the overbidder or party responsible for the
9 overbidder’s obligations, certified under penalty of perjury as true and correct.

10 (c) If the overbidder is an entity, evidence of such entity’s good standing.

11 (8) The successful overbidder will be required to execute, at the Sale Hearing, an
12 overbid agreement. The overbid agreement will be similar to the Stalking Horse Agreement
13 except that *all contingencies, including due diligence and financing contingencies, are*
14 *waived*. The overbid agreement is not negotiable. Interested parties may contact the Trustee to
15 obtain a copy of the overbid agreement.

16 (9) In the event of a successful overbid by a party other than Buyer or Buyer’s
17 affiliate or assignee, Buyer may receive, subject to Court approval, a break-up fee of
18 \$100,000.00 (the “**Break-Up Fee**”)¹³ to compensate Buyer for serving as the stalking horse
19 bidder and compensation for costs of negotiating the Stalking Horse Agreement. According to
20 the Trustee’s suggested overbid terms, the Break-Up Fee shall only be paid in the event of a
21 consummated sale of the Assets for at least \$150,000.00 above Buyer’s purchase price to a
22 party other than Buyer or its affiliate or assignee.

23 (10) Back-Up Bid: If, following entry of the order authorizing this sale, the
24 Successful Bidder fails to consummate the sale because of a breach or failure to perform on the
25 part of the Successful Bidder, the Back-Up Bid will be deemed to be the new Successful Bid
26 and the Trustee will be authorized, but not required, to consummate the sale with the Back-Up
27

28 ¹³ See Part III.C below.

1 Bidder without further order of the Court. In the event of a breach or failure to perform by the
2 Successful Bidder, the Successful Bidder will forfeit its deposit to the Estate and the Trustee
3 will have the right to seek any and all other remedies and damages from the Successful Bidder.

4 (11) The Back-Up Bid will be irrevocable until the later of (i) two days after the
5 order approving the Successful Bid becomes final and (ii) the closing of the sale to the
6 Successful Bidder. Once the Back-Up Bid is no longer irrevocable, the Trustee will promptly
7 refund the Back-Up Bidder’s deposit.

8 In the Trustee’s business judgment, the proposed Overbid Procedures are fair,
9 reasonable, and designed to encourage bidding to maximize the value of the Assets for the
10 benefit of the Estate.

11 **H. Tax Analysis**

12 Debtor is a pass-through entity so capital gains taxes are not a concern for the Estate.

13 **I. Status of the Estate and Claims**

14 The Assets are the only tangible assets of the Estate. The Trustee is evaluating possible
15 causes of action against certain individuals but prosecuting such claims will be expensive and
16 take substantial time.

17 The Estate is likely administratively insolvent. Because the case is not ready to close,
18 the Trustee’s chapter 7 professionals have not yet submitted applications for compensation.

19 Four creditors have filed motions for approval of administrative priority claims at the
20 chapter 11 level: Baker Tilly for \$16,855.26; Foley & Lardner for \$474,121.53 plus interest;
21 Higgs Fletcher & Mack for \$309,629.82; and Northern Capital, Inc. for \$193,000.00. Justus
22 Wallace filed Objections to these claims, and each claimant filed a reply. The hearings on the
23 claim objections have been continued to a date after the sale of the Assets.

24 The most important thing now is to sell the Assets before there is no value left to the
25 Estate.

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III.

MEMORANDUM OF POINTS AND AUTHORITIES

Section 704 of the Bankruptcy Code requires that a chapter 7 trustee “collect and reduce to money the property of the estate.” 11 U.S.C. § 704(a)(1).

A. An Articulated Business Justification Exists for the Proposed Sale.

Section 363(b) of the Bankruptcy Code provides that a trustee, after notice and a hearing may “use, sell, or lease, other than in the ordinary course of business, property of the estate.” 11 U.S.C. § 363(b)(1). The standard for approval of a sale of property of the estate under section 363(b) is whether there exists “some articulated business justification” for the proposed transaction. *Walter v. Sunwest Bank (In re Walter)*, 83 B.R. 14, 19 (B.A.P. 9th Cir. 1988) (quoting *Inst. Creditors v. Cont'l Air Lines, Inc. (In re Cont'l Air Lines, Inc.)*, 780 F.2d 1223, 1226 (5th Cir. 1986)).

Ample business justification exists for the proposed sale. The Assets are property of the Estate. The minimum Purchase Price together with the settlement payment will bring in to the Estate net sale and settlement proceeds of about \$480,000.00. Buyer is not an insider of Debtor, and the proposed sale and settlement have been negotiated at arm’s length.

In light of the foregoing, the Trustee believes that the proposed sale to Buyer is in the best interests of the Estate.

B. The Overbid Procedures Are Appropriate and in the Best Interests of the Estate.

The Trustee believes that the proposed Overbid Procedures constitute the best method to maximize the proceeds from the sale of the Assets.

C. The Break-Up Fee Is in the Best Interests of the Estate.

A break-up fee “is an incentive payment to an unsuccessful bidder who placed the estate property in a sales configuration mode ... to attract other bidders to the auction.”

Official Comm. of Subordinated Bondholders v. Integrated Res., Inc. (In re Integrated Res., Inc.), 147 B.R. 650, 659 (S.D.N.Y. 1992).

In assessing a break-up fee, courts should consider the following three questions:

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(1) is the relationship of the parties who negotiated the break-up fee tainted by self-dealing or manipulation; (2) does the fee hamper, rather than encourage, bidding; (3) is the amount of the fee unreasonable relative to the proposed purchase price.

Id. at 657.

To maximize value for the Estate, the Trustee requires that any sale of the Assets be subject to overbid. During negotiations, Justus Wallace required the Break-Up Fee as compensation for serving as the stalking horse bidder. Such compensation includes, but is not limited to, attorney’s fees to negotiate the Stalking Horse Agreement and costs for due diligence and obtaining financing. The Trustee was able to reduce the requested amount of the Break-Up Fee down to \$100,000.00 (2.25% of the purchase price), but Justus Wallace refused any further reduction.

All negotiations with Justus Wallace, including negotiation of the Break-up Fee provision, have been conducted at arm’s-length. The relationship between the Trustee, on one hand, and Justus Wallace and Howard Justus, on the other hand, is untainted by self-dealing and/or manipulation. Although Justus Enterprises, an entity in which Howard Justus is a principal, was Debtor’s manager and Chief Restructuring Officer for a period of about 7½ months in late 2021 and early 2022, Mr. Justus is not a principal or member of Debtor or Affiliated Debtors. Due to his experience with Debtor, however, Mr. Justus is more familiar with the Assets than perhaps any other potential buyer.

The Break-Up Fee encourages bidding. The Trustee has been requesting bids for several months but no other viable stalking horse bidder stepped forward. Without Justus Wallace’s stalking horse bid—with the required Break-Up Fee—the Trustee cannot commence an overbid auction or sale. As explained above, accrual of default interest on the GF Capital loan and the equivalent declining equity in the Property requires that the Trustee sell the Assets as soon as possible. The Break-Up Fee is, therefore, a necessary component to ensure that the Assets are sold without further delay and diminished equity. The Trustee agreed to the Break-Up Fee as a means to encourage bidding by offering this relatively small incentive (2.25% of the purchase price) to commence the sale and auction.

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1 The amount of the Break-Up Fee is reasonable. The suggested Initial Overbid amount
2 of \$4,600,000.00 is \$150,000.00 more than the Purchase Price offered by Justus Wallace. This
3 additional \$150,000.00 is substantially more than the \$100,000.00 Break-Up Fee. This results
4 in an economic benefit of at least \$50,000.00 to the Estate even if there is only one overbidder.
5 Moreover, in the event of an overbid auction at which Justus Wallace or its affiliate or assignee
6 is the successful bidder, the Estate retains the entire amount of the Break-Up Fee.

7 Under the circumstances of this case, the Break-Up Fee is the necessary (potential) cost
8 to move forward with the sale and hopefully an auction. The Trustee is informed that potential
9 buyers are waiting—waiting to see if the situation with the County improves, waiting to see if
10 someone else makes the first bid. The Estate, however, cannot afford to wait. The secured
11 amount owed on the GF Capital loan increases by about \$70,000.00 each month or the lender
12 may foreclose in four months. A stalking horse bid is needed now to move this Property
13 toward auction. In the Trustee’s business judgment, the Break-Up Fee is in the best interests of
14 the Estate and should be approved.

15 **D. The Required Settlement Contingency Should Be Approved.**

16 As discussed above, this sale to Justus Wallace is contingent upon Bankruptcy Court
17 approval of the separate Settlement Agreement with Justus Wallace, Howard Justus, and Justus
18 Enterprises, LLC (the “**Settlement Contingency**”). The terms of that Settlement Agreement
19 as well as the points and authorities supporting the settlement are set out in detail in the
20 Trustee’s separate Motion for Order Approving Compromise with Howard Justus, Justus
21 Enterprises, LLC, and Justus Wallace Peppertree Park Villages 7 & 8, LLC (the “**Settlement**
22 **Motion**”) filed concurrently herewith. Each of the sale and settlement is contingent upon the
23 other, and only Howard Justus and/or Justus Wallace may waive such contingencies. In this
24 Motion, the Trustee requests approval of the Settlement Contingency—not approval of the
25 settlement itself but approval of the contingency that Justus Wallace may decline to purchase
26 the Assets if the Trustee’s separate motion to approve compromise with Howard Justus, et al. is
27 not approved.

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1 During negotiations, the Trustee required that the sale and the settlement be separately
2 considered, documented, and approved, especially for purposes of evaluating overbids. Justus
3 Wallace agreed but refused to enter into the Stalking Horse Agreement without the Settlement
4 Contingency. The Trustee separately evaluated the proposed sale, subject to overbid, and the
5 proposed settlement, and has determined that (i) the sale is in the best interests of the Estate
6 and (ii) for the reasons stated in the Settlement Motion, the settlement is also in the best
7 interests of the Estate. The Trustee requests approval of the Settlement Contingency.

8 **E. Accurate and Reasonable Notice of the Sale and Overbid Opportunity Has Been**
9 **Provided.**

10 As described above, the Property has been marketed for sale since well before the
11 Trustee’s appointment in June 2022.

12 The Trustee has given notice of this Motion and the Sale Hearing to each party who
13 submitted an offer or otherwise expressed an interest in purchasing the Property. A copy of
14 such Notice is attached to the Davis Declaration as Exhibit B and incorporated herein. The
15 Notice was delivered to interested parties by the Broker.

16 The Trustee has also given notice of the sale to all creditors of the Estate, all parties
17 requesting special notice, and all entities required to be given notice under the federal and local
18 bankruptcy rules.

19 **F. The Purchase Price Is Fair and Reasonable.**

20 The Trustee has marketed the Property for many months. Even before the Trustee’s
21 appointment, the Broker had been working to encourage potential buyers in the Property.

22 The Purchase Price offered by Justus Wallace was negotiated at arm’s length. The
23 Trustee is unaware of any other higher and better firm offer to purchase the Property.

24 The Trustee encourages anyone interested in purchasing the Property to prequalify to
25 overbid for the Assets.

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1 **G. Sale of the Property Free and Clear of Liens and Interests Is Permitted Under**
2 **Section 363(f) of the Bankruptcy Code.**

3 Section 363(f) of the Bankruptcy Code describes the circumstances under which a
4 trustee may sell property of the estate free and clear of any interest of third parties in such
5 property:

6 The trustee may sell property under subsection (b) ... free and clear
7 of any interest in such property of an entity other than the estate only
8 if—

- 9 (1) applicable non-bankruptcy law permits sale of such property
10 free and clear of such interests;
- 11 (2) such entity consents;
- 12 (3) such interest is a lien and the price the property is to be sold
13 is greater than the aggregate value of all liens on such
14 property;
- 15 (4) such interest is in bona fide dispute; or
- 16 (5) such entity could be compelled, in a legal or equitable
17 proceeding to accept a money satisfaction of such interest.

18 11 U.S.C. § 363(f).

19 Here, the Trustee is informed and believes that the Property is encumbered by the Liens
20 in the total amount of approximately \$3,806,104.49 plus any additional unpaid property taxes.
21 The minimum Purchase Price of \$4,450,000.00 is substantially greater than the amount of the
22 Liens, and each lienholder can be compelled to accept a money satisfaction of its interest in
23 this Property.

24 **H. Assignment and Assumption of the Application(s) and Lease Are Appropriate.**

25 Section 365(a) of the Bankruptcy Code provides that the trustee, “subject to the court’s
26 approval, may assume or reject any executory contract or unexpired lease.” 11 U.S.C.
27 § 365(a). “Ordinarily, a trustee may take either of these actions without the consent of the
28 other party to the contract or lease and notwithstanding a provision in the applicable agreement
that purports to restrict assignment.” *Everex Sys., Inc. v. Cadtrak Corp. (In re CFLC, Inc.)*, 89
F.3d 673, 676 (9th Cir. 1996) (citing 11 U.S.C. §§ 365(a) & (f)(1) and quoting *Metro. Airports
Comm’n v. Northwest Airlines, Inc. (In re Midway Airlines, Inc.)*, 6 F.3d 492, 494 (7th Cir.
1993)).

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1 Courts routinely approve motions to assume, assume and assign, or reject executory
2 contracts or unexpired leases upon a showing that the trustee’s decision to take such action will
3 benefit the estate and is an exercise of sound business judgment. *See Durkin v. Benedor (In re*
4 *G.I. Indus., Inc.)*, 204 F.3d 1276, 1282 (9th Cir. 2000) (“Specifically, a bankruptcy court
5 applies the business judgment rule to evaluate a trustee’s rejection decision”); *Orion*
6 *Pictures Corp. v. Showtime Networks, Inc. (In re Orion Pictures Corp.)*, 4 F.3d 1095, 1098 (2d
7 Cir. 1993) (stating that section 365 of the Bankruptcy Code “permits the trustee or debtor-in-
8 possession, subject to the approval of the bankruptcy court, to go through the inventory of
9 executory contracts of the debtor and decide which ones it would be beneficial to adhere to and
10 which ones it would be beneficial to reject.”).

11 Courts generally will not second-guess a trustee’s business judgment concerning the
12 assumption or rejection of an executory contract or unexpired lease. *See Agarwal v. Pomona*
13 *Valley Medical Group, Inc. (In re Pomona Valley Medical Group, Inc.)*, 476 F.3d 665, 670
14 (9th Cir. 2007) (stating that a bankruptcy court need engage in only a “cursory review” of a
15 trustee’s decision and apply the business judgment rule to evaluate a trustee’s decision). “[The
16 court] should approve the rejection of an executory contract under § 365(a) unless it finds that
17 the [trustee]’s conclusion that rejection would be ‘advantageous is so manifestly unreasonable
18 that it could not be based on sound business judgment, but only on bad faith, or whim or
19 caprice.’” *Id.* (quoting *Lubrizol Enter. v. Richmond Metal Finishers*, 756 F.2d 1043, 1047 (4th
20 Cir. 1985)).

21 The Trustee has determined, in an exercise of his sound business judgment, that
22 assumption and assignment of the Application(s) currently pending before the San Diego
23 County Planning Commission and/or San Diego County Board of Supervisors is in the best
24 interests of the estate. The Application(s) is critical to the entitlement process and
25 development of the Property. In addition, the Trustee seeks to assume whatever interest
26 Debtor has in the Tepas Lease and assign such interest to Buyer or the successful overbidder if
27 such buyer desires the Tepas Lease.

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1 **I. Buyer Is a Good Faith Purchaser.**

2 Section 363(m) of the Bankruptcy Code provides that “[t]he reversal or modification on
3 appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of
4 property does not affect the validity of a sale or lease under such authorization to an entity that
5 purchased or leased such property in good faith ...”. 11 U.S.C. § 363(m). “Under 11 U.S.C.
6 § 363(m), an appeal of a bankruptcy court’s ruling on a [sale] generally cannot affect the rights
7 of a good faith purchaser of the foreclosed property, unless the debtor [or other complaining
8 party] stays the ... sale pending an appeal.” *Mann v. Alexander Dawson Inc. (In re Mann)*, 907
9 F.2d 923, 926 (9th Cir. 1990).

10 “[T]he primary goal of the mootness rule [embodied in section 363(m)] is to protect the
11 interest of a good faith purchaser ... of the property, thereby assuring finality of sales.”
12 *Onouli-Kona Land Co. v. Estate of Richards (In re Onouli-Kona Land Co.)*, 846 F.2d 1170,
13 1172 (9th Cir. 1988) (internal quotation omitted). As set forth in the Davis Declaration, the
14 protection of Section 363(m) is appropriate in this case because the proposed sale transaction is
15 the product of arm’s-length, good-faith negotiations implemented between the Trustee and
16 Buyer. *See Onouli-Kona Land Co.*, 846 F.2d at 1173 (lack of good faith within meaning of
17 section 363(m) requires “fraud, collusion, ... or an attempt to take grossly unfair advantage of
18 other bidders”) (quoting *Cnty. Thrift & Loan v. Suchy (In re Suchy)*, 786 F.2d 900, 901-02 (9th
19 Cir. 1985). Moreover, any successful overbidder will be required to overbid at the Sale
20 Hearing before the Court, at which time the Court may determine whether such successful
21 overbidder is a good-faith purchaser. As a consequence, the requested finding that each of
22 Buyer or the Successful Bidder and Back-Up Bidder is a “good faith” purchaser within the
23 meaning of Section 363(m) of the Bankruptcy Code is appropriate.

24 **J. The Sale Is in the Best Interests of the Estate.**

25 In view of the compelling business reasons for the proposed transaction—generating
26 funds to pay creditors—the proposed sale is in the best interests of the Estate and should be
27 approved.

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IV.

CONCLUSION

For all the foregoing reasons, the proposed sale of the Assets to Buyer, subject to overbid, is in the best interests of the Estate and should be approved.

WHEREFORE, the Trustee respectfully requests that the Court enter two orders described as follows:

(1) After the initial May 17, 2023 hearing, the Overbid Procedures Order:

(a) approving the Stalking Horse Agreement for the purchase and sale of the Assets, including the Settlement Contingency; and

(b) approving the proposed Overbid Procedures, including prequalification of potential overbidders, the auction procedures, and the Break-Up Fee;

(2) After the June 7, 2023 hearing, the Sale Order:

(a) authorizing the Trustee to consummate the sale of the Assets to Buyer or to Successful Bidder and Back-Up Bidder;

(b) authorizing the sale free and clear of all liens, claims and interests, with any such liens, claims and interests attaching to the sale proceeds with the same validity, scope, priority, and perfection as they had on the Property immediately prior to the closing¹⁴;

(c) authorizing the payment of any existing undisputed liens from the proceeds of the sale,¹⁵

(d) authorizing payment of the Break-Up Fee out of the proceeds of the sale of the Assets, provided that there is a consummated sale of the Assets at \$4,600,000.00 or higher to a party other than Buyer or Buyer’s affiliate or assignee;

¹⁴ In the event the sale is not consummated, the existing liens on the Property shall remain unaffected.

¹⁵ An updated payoff demand has been requested from GF Capital. In the event the Trustee disputes any amount submitted in an updated payoff demand from the lienholder, the undisputed amount shall be promptly paid by escrow or the Trustee and the disputed amount of the lien shall be held by the Trustee pending resolution of the dispute by the Bankruptcy Court.

1 (e) authorizing the Trustee to assume and assign the Application(s) to Buyer
2 or Successful Bidder and Back-Up Bidder;

3 (f) authorizing the Trustee to assume and assign whatever interest Debtor
4 has in the Tepas Lease if such buyer desires the lease; and

5 (g) finding that each of Buyer or Successful Bidder and Back-Up Bidder is a
6 good-faith purchaser within the meaning of section 363(m) of the Bankruptcy Code.

7 The Trustee also requests such other and further relief as this Court deems just and
8 proper.

9 Respectfully submitted,

10 Dated: April 17, 2023

FINANCIAL LAW GROUP

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12 By: /s/ Christin A. Batt
13 Christin A. Batt, Esq.
14 Attorneys for Gerald H. Davis, Trustee

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