

**Debtors' Motion Pursuant to Sections 105(a) and 363(b) of the Bankruptcy Code and Bankruptcy Rule 6004 for Authority to Establish and Implement Procedures for the Multiple-Unit Sale of Homes, Tower Residences and Certain Other Real Property Free and Clear of All Liens, Claims, Encumbrances, and Other Interests (the "Bulk Sales Motion").**

By the Bulk Sales Motion, the Debtors seek entry of an order authorizing them to establish and implement expedited procedures for the bulk sales of homes, tower residences, and certain other real property (collectively, the "Units") free and clear of all liens, claims, encumbrances, and other interests (together, the "Interests").<sup>1</sup>

*The Bulk Sales.* Prior to the commencement of the Debtors' chapter 11 cases, the Debtors would occasionally sell a group of Units pursuant to single sales transactions (each, a "Bulk Sale"). According to the Debtors, the Bulk Sales have historically ranged from two to four Units, with aggregate sale consideration ranging from approximately \$450,000 to \$5.7 million. The Bulk Sales have generally resulted in the Debtors receiving substantial value while achieving economy of scale over sales of individual Units.

According to the Bulk Sales Motion, the Debtors closed Bulk Sales of approximately 38 Units in the last year and a half. Given the pendency of the Debtors' chapter 11 cases and the Debtors' more aggressive process of assessing their assets, the Debtors anticipate that they will sell a significant number of Units pursuant to Bulk Sales. Because neither the Bankruptcy Code nor the existing Home Sales Order authorizes the Debtors to sell Units outside the ordinary course of business, however, the Debtors assert that the procedural burdens of seeking authority under section 363 of the Bankruptcy Code with respect to each Bulk Sale would reduce, and in some cases exceed, the potential benefits of the Bulk Sales. To that end, the Debtors seek authority to implement the following procedures (the "Bulk Sale Procedures") to provide due process protections commensurate with the consideration involved and, thus, strike an appropriate balance between procedural protection and maximizing value.

*Ordinary Course Bulk Sales.* With regard to any Bulk Sale involving the sale of five or less Units, the Debtors seek authorization to consummate such sale in the ordinary course of business without further notice, hearing, or order of the Court, if the Debtors determine in the reasonable exercise of their business judgment that such sale is in the best interest of the estates.

*Tier I Bulk Sales.* With regard to any Bulk Sale involving the sale of six or more Units and where the aggregate purchase price is less than or equal to \$20 million (a "Tier I Bulk Sale"):

- (i) if the Debtors determine that the Tier I Bulk Sale is in the best interest of their estates, the Debtors shall send written notice of the sale (the "Tier I

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<sup>1</sup> The Debtors were previously authorized to sell Units free and clear of Interests pursuant to the Order (I) Authorizing the Debtors to Deliver Title to Homes, Tower Residences and Certain Other Real Property Free and Clear of Liens, Claims, Encumbrances and Other Interests, (II) Authorizing the Debtors to Satisfy Certain Prepetition Obligations in Connection with the Sale of Such Property, (III) Establishing Procedures for the Resolution and Payment of Certain Lien Claims and Granting Related Relief (the "Home Sales Order"). Any Bulk Sales approved by the Court would be subject to the terms of the Home Sales Order.

Sale Notice”) to certain parties in interest, including, among others, the Committee (collectively, the “Notice Parties”);

- (ii) the Tier I Sale Notice will set forth (a) the location of each Unit to be sold, (b) the identity of the buyer, which shall not be an employee or insider (as defined by 11 U.S.C. § 101) of any Debtor, and the Debtor selling the Units, (c) the proposed aggregate purchase price, and will include a copy of the Tier I Bulk Sale agreement and Home Sales Order (collectively, the “Sale Information”);
- (iii) if none of the Notice Parties files and serves a written objection to the proposed Tier I Bulk Sale within fifteen (15) days (the “Tier I Notice Period”) or any such objection is withdrawn or otherwise resolved, the Debtors will submit a certification of no objection and proposed sale order to the Court (the “Tier I Bulk Sale Order”); and
- (iv) if the Debtors receive a written objection from any Notice Party prior to the expiration of the Tier I Notice Period, and such objection is not withdrawn or otherwise resolved, a hearing will be scheduled for the next available omnibus hearing date that is at least twenty (20) days after the date of service of the Tier I Sale Notice (the “Tier I Hearing”), and the Debtors will not consummate the Tier I Bulk Sale without first obtaining Court approval at the Tier I Hearing, which may be sought on an expedited basis.

*Tier II Bulk Sales.* With regard to any Bulk Sale pursuant to which (i) the Debtors have entered into an agreement (the “Sale Agreement”) with a particular buyer (the “Stalking Horse”) to sell, subject to Court approval, six or more Units and (ii) the aggregate purchase price (the “Purchase Price”) for such Units exceeds \$20 million (a “Tier II Bulk Sale”):

- (i) if the Debtors determine that the Bulk Sale is in the best interest of their estates, the Debtors shall send written notice of the sale (the “Tier II Sale Notice”) to the Notice Parties;
- (ii) the Tier II Sale Notice will specify and include the Sale Information;
- (iii) the Tier II Sale Notice will provide that any party (each, a “Competing Bidder”) may submit a competing bid for the Tier II Bulk Sale within thirty (30) days after the date the Debtors send the Tier II Sale Notice (the “Bid Deadline”);
- (iv) any Competing Bidder that the Debtors determine, in their sole discretion, has satisfied the following requirements shall be deemed a “Qualified Bidder”:
  - (a) prior to the expiration of the Bid Deadline, the Competing Bidder must submit an executed sale agreement, together

with a markup showing all changes to the Sale Agreement, for the Tier II Bulk Sale (the “Competing Agreement”), which shall be made upon terms and conditions substantially similar to and no less economically favorable to the Debtors than those contained in the Sale Agreement;

- (b) the Competing Agreement must provide for total net consideration consisting of cash or marketable securities to the Debtors’ estates of not less than an amount equal to 110% of the Purchase Price;
  - (c) the Competing Agreement must not contain any financial or due diligence contingencies, or any other contingencies not already included in the Sale Agreement;
  - (d) the Competing Agreement must provide for the closing of the Tier II Bulk Sale on a date no later than that specified in the Sale Agreement; and
  - (e) the Competing Agreement must be accompanied by a letter affirmatively (y) setting forth the identity of the Competing Bidder, the contact information for such bidder, and full disclosure of any affiliates or insiders of the Debtors involved in such bid and (z) stating the form of the deposit (*i.e.*, cashier’s check, cash or letter of credit) that the Competing Bidder intends to provide.
- (v) the Debtors shall promptly notify each Competing Bidder whether such bidder has been determined to be a Qualified Bidder. Within three (3) business days following the receipt of such notice, each Qualified Bidder shall provide a deposit in an amount equal to 10% of the Purchase Price, which deposit shall be returned to the Qualified Bidder if (y) the Debtors choose not to accept its bid or (z) such bid is not approved by the Court;
- (vi) if the Debtors receive one or more bids from Qualified Bidders prior to the expiration of the Bid Deadline, the Debtors shall schedule an auction (the “Auction”) within five (5) business days of the Bid Deadline;
- (vii) only the Stalking Horse and Qualified Bidders will be entitled to participate in the Auction, for which the time, date, location and incremental bid procedures will be established by the Debtors in their sole discretion and provided to the Stalking Horse, Qualified Bidders and the Notice Parties at least four (4) days prior to the date of the Auction;
- (viii) at the Auction, the Debtors, in consultation with their advisors and the Committee, shall be the sole arbiters of determining the highest and best offer, and they may discount offers for additional risks associated with

Competing Agreements such as delays in closing, contingencies, additional representations;

- (ix) the highest and best offer shall be determined and announced at the conclusion of the Auction. The bidder making the bid that is selected as the highest and best by the Debtors shall be considered the “Winning Bidder.” Within two (2) days from the selection of the Winning Bidder, the Debtors shall send notice to each of the Notice Parties identifying the Winning Bidder and providing a copy of the Winning Bidder’s Competing Agreement;
- (x) if none of the Notice Parties files and serves the Debtors with a written objection within forty (40) days (the “Tier II Notice Period”) or any such objection is withdrawn or otherwise resolved, the Debtors will submit a certification of no objection and proposed sale order to the Court for approval of the Tier II Bulk Sale (the “Tier II Bulk Sale Order”), pursuant to which the Debtors shall be authorized to consummate the Tier II Bulk Sale and take such actions as are necessary to close the sale and obtain the sale proceeds without further notice or hearing; and
- (xi) if the Debtors receive a written objection from any Notice Party prior to the expiration of the Tier II Notice Period, and such objection is not withdrawn or otherwise resolved, a hearing will be scheduled for the next available omnibus hearing date that is at least forty-five (45) days after the date of service of the Tier II Sale Notice (the “Tier II Hearing”), and the Debtors will not consummate the Tier II Bulk Sale without first obtaining Court approval at the Tier II Hearing, which may be requested on an expedited basis.

The Break-Up Fee. With respect to Tier II Bulk Sales, the Debtors request authority to pay a break-up fee (the “Break-Up Fee”) to the Stalking Horse under the terms of the applicable Sale Agreement, in an amount not to exceed 3% of the Purchase Price, in the event that the Debtors consummate a Bulk Sale at a higher and better price with respect to the Units covered by the Sale Agreement. To the extent that a Stalking Horse becomes entitled to receive a Break-Up Fee, the Debtors request authority to pay such fee as an allowed administrative expense pursuant to sections 503(b)(1)(A) and 507(a)(2) of the Bankruptcy Code without need for any application, motion or further order of the Court.

Rationale for Bulk Sale Procedures. The Debtors submit that (i) the sale of Units pursuant to the Bulk Sales Procedures is an exercise of their sound business judgment and is in the best interests of their estates and creditors and (ii) obtaining Court approval for each Bulk Sale would result in unnecessary administrative expenses attendant to drafting, serving, and filing pleadings, as well as time incurred by attorneys for appearing at Court hearings. The Debtors believe that these costs could significantly reduce the ultimate net value of the Bulk Sales. Moreover, the Debtors are often faced with time constraints in meeting closing deadlines established by interested purchasers and in selling Units before there is a significant decline in value. According to the Debtors, the expedited nature of the Bulk Sales Procedures will permit the Debtors to be

responsive to the needs of interested purchasers, thereby guarding against lost sales due to delay, while still providing for a review of Bulk Sale transactions by the Notice Parties and a meaningful opportunity for other parties to submit Qualified Competing Bids for each Bulk Sale.

With respect to the Break-Up Fee, the Debtors believe that such fee will encourage bidding and that many potential Buyers will be unwilling to enter into a Sale Agreement without the protection provided thereby. The Debtors further believe that the Auction contemplated by the Bulk Sales Procedures will initiate an overbid process at a floor price that is desirable for the Debtors, thereby increasing the likelihood that the sales price will represent the true worth of the Units. In sum, the Debtors' ability to provide the Break-Up Fee enables them to ensure sales to contractually-committed bidders at prices they believe to be fair, while providing the Debtors with the potential of even greater benefit to the estates. Additionally, the Debtors believe that the Break-Up Fee constitutes both a fair and reasonable percentage of the proposed purchase price and a valid means of ensuring that the Auction will maximize the value of the Units because the amount of the Break-Up Fee would be limited to 3% of the Purchase Price.