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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH**

In re: THE FALLS EVENT CENTER LLC, Debtor.	Bankr. Case No. 18-25116 Chapter 11 The Honorable R. Kimball Mosier
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**CHAPTER 11 TRUSTEE’S MOTION PURSUANT TO 11 U.S.C. § 363(b)(1)
TO AUTHORIZE TRUSTEE TO (1) EFFECTUATE THE SALE OF PROPERTY
OF THE DEBTOR’S WHOLLY OWNED, NON-DEBTOR SUBSIDIARY, THE
FALLS AT CEDAR PARK, LLC, TO A THIRD PARTY BUYER, AND
(2) RELEASE LIEN IN FAVOR OF THE DEBTOR AGAINST THE
PROPERTY IN EXCHANGE FOR AGREEMENT WITH
SECURED CREDITOR ON ALLOCATION OF SALE PROCEEDS**

Pursuant to 11 U.S.C. § 363(b)(1), Michael F. Thomson, the duly appointed Chapter 11 trustee (the “Trustee”) for the bankruptcy estate of The Falls Event Center LLC (the “Debtor”), by and through his proposed counsel, hereby moves this Court for entry of an Order authorizing the Trustee, as representative of the Debtor that serves as manager of The Falls at Cedar Park, LLC, a wholly owned, non-debtor subsidiary of the Debtor (the “TFCP” or “Seller”), to effectuate a sale of certain real property described in more detail below and to release a lien against the property in favor of the Debtor against the Property in exchange for an agreement

with a secured creditor as to an allocation of the gross proceeds of sale (the “Motion”). This Motion is supported by the Trustee’s *Declaration* filed concurrently herewith. In support hereof, the Trustee states as follows:

JURISDICTION AND VENUE

1. The Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334.
2. This is a core proceeding pursuant to 28 U.S.C. § 157(b).
3. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

BACKGROUND

General

4. On July 11, 2018, the Debtor filed a petition seeking relief under Chapter 11 of the Bankruptcy Code (the “Petition Date”).
5. On November 27, 2018, the Court entered an *Order* appointing the Trustee as the Chapter 11 trustee of the Debtor’s bankruptcy estate.¹
6. The Debtor owns a 100 percent membership interest in the Seller-TFCP, The Falls at Cutten Road, LLC (“TFCR”) and The Falls at Stone Oak, LLC (“TFSO”) (collectively, the “Non-Debtor Subsidiaries”).
7. Pursuant to a Unanimous Consent effective October 15, 2018, a copy of which is attached to the Declaration as **Exhibit 1**, the Debtor is the manager of the Seller-TFCP.
8. Each of the Non-Debtor Subsidiaries owns a single asset in the form of real property, as follows:

¹ See Docket No. 214.

a. The Seller owns certain real property located in Williamson County, Texas with a street address of 1400 Discovery Boulevard, Cedar Park, Texas 78613 (the “Property”). This Property is unimproved real property, and the Debtor is not conducting any reception business on the Property.

b. TFCR owns a parcel of real property located in Harris County, Texas.

c. TFSO owns two parcels of real property located in Bexar County, Texas (collectively, the “Non-Debtor Properties”).

The Golf Secured Debt

9. The Debtor and the Non-Debtor Subsidiaries, as borrowers (collectively, the “Borrowers”), and Golf 6061, LLC, as lender (“Golf”), entered into a Loan Agreement and Secured Promissory Note dated May 31, 2018, evidencing a loan in the principal amount of \$2,640,000 at an interest rate of 14% per annum (the “Promissory Note”).²

10. The Promissory Note is secured by a Deed of Trust from the Borrowers in favor of Golf against each of the Non-Debtor Properties (the “Golf DOT”). The Golf DOT was recorded against TFCP’s Property in Williamson County on June 12, 2018 as Document Number 2018050971, against TFCR’s property in Harris County on June 7, 2018 as Document Number RP-2018-252686, and against TFSO’s property in Bexar County on June 6, 2018 as Document Number 20180108741.³

² See Proof of Claim No. 327.

³ See *id.*

11. As of the Petition Date, the Trustee understands that the amounts owed under Golf's Promissory Note were in arrears and payments have not been made since the Petition Date.⁴

12. Golf has filed a Proof of Claim in the Debtor's case asserting a secured claim in the total amount of \$2,701,520.96.⁵

TFCP's Debt to the Debtor

13. On or about November 26, 2016, Steven Down, as manager for the Seller TFCP, executed a Secured Promissory Note for the benefit of the Debtor in the principal amount of \$1,631,610.11 (the "Debtor Note"). A copy of the Debtor Note is attached to the Declaration as part of **Exhibit 2**. The Debtor Note states that the Debtor "agrees to advance to the [Seller TFCP] . . . proceeds received by the [Debtor] from the sale of convertible secured promissory notes pursuant to the [Debtor's] private placement offering" dated November 28, 2016, pursuant to which agreement the Debtor "may issue and sell to third parties convertible secured promissory notes having an aggregate principal amount of up to \$1,631,610.11."⁶

14. The Debtor Note is secured by a Deed of Trust dated November 28, 2016 against the Property (the "Debtor DOT"), which was recorded with Williamston County, Texas in 2017. A copy of the Debtor DOT is attached to the Declaration as part of **Exhibit 2**. The Debtor DOT states that the Debtor is the beneficiary of the Debtor DOT, but also states that investors have an interest in the Debtor DOT as holders of the convertible secured promissory notes.⁷

⁴ Declaration, ¶ 5.

⁵ See Proof of Claim No. 327.

⁶ Declaration, Exh. 2, at p. 8.

⁷ See Declaration Exh. 2, p. 1

15. The Trustee is informed that no one has established that convertible secured promissory notes pursuant to a November 28, 2016 private placement offering by the Debtor ever came into existence, or that loan funds from such convertible secured promissory notes were advanced to the Seller. As part of the Trustee's initial investigation, he has been told that the Debtor's management in 2016 may have made documents such as the Debtor Note and Debtor DOT to attempt to validate fundraising representations that it was providing security to investors. The Trustee has also been informed that some investors who were demanding payment were given notes with promises of security or interests in property. The Trustee does not know if any of these types of notes are the convertible secured promissory notes referenced in the Debtor Note or the Debtor DOT.⁸

16. Regardless, when the Debtor and TFCP entered into the Promissory Note and Deed of Trust with Golf, the Debtor's lien against the Property was subordinated pursuant to the Subordination Agreements recorded under Document Nos. 2018029624 and 2018053986 of the Official Public Records of Williamson County, Texas, copies of which are attached to the Declaration as **Exhibit 3** and **Exhibit 4**.

The Proposed Sale of the Property

17. On or about October 2018, TFCP, through Gil A. Miller as Chief Restructuring Officer, entered into a *Commercial Contract-Unimproved Land* (the "Agreement"), a copy of which is attached to the Declaration as **Exhibit 5**, agreeing to sell the Property to Gogoplot Venture, LLC, Aaron Holmes, and Taylor Holmes for the amount of \$1,830,000.00 (collectively, the "Buyer").

⁸ Declaration, ¶ 8.

18. A Title Report for the Property, a copy of which is attached to the Declaration as **Exhibit 6**, states that there are no interests against the Property other than those held by Golf and the Debtor, and any property taxes that are owed to Williamson County, Texas.

19. The Trustee has independently reviewed the proposed Agreement, and has determined that a sale of the Property as proposed therein is in the best interests of the Debtor and the Non-Debtor Subsidiaries.⁹

20. The proposed purchase price of the Property of \$1,830,000.00 appears to be fair and reasonable based on the appraised value of the Property.¹⁰

21. The Trustee has no connection to the Buyer, and he understands that the sale of the Property proposed in the Agreement was negotiated at arms' length and in good faith.¹¹

22. The Trustee understands that the Agreement provided that the closing date was to occur in early December 2018.¹² Since the Trustee's appointment, he has informed the Buyer that he will not proceed with the sale until he has an order authorizing him to act on behalf of the Seller and approving the Lien Release (as defined below). Initially, the Seller and Buyer agreed to extend the closing date until December 21, 2018, but the Trustee has since informed the Buyer that the date will now need to be pushed to January, 2019. The Buyer has informed the Trustee that it requires a closing as soon as possible. Accordingly, the Trustee is requesting that this Motion be heard on shortened time.¹³

⁹ Declaration ¶ 12.

¹⁰ Declaration ¶ 13.

¹¹ Declaration ¶ 14.

¹² See Declaration, Exh. 5.

¹³ Declaration ¶ 15.

23. The non-debtor Seller does not have a bank account. As such, the remaining proceeds from the sale will be paid to the Debtor and deposited in the Debtor's operating account. The Trustee is informed that there are no current creditors of the Seller other than Golf, Williamson County, Texas, and, potentially, the Debtor as a result of the Debtor Note, but he will give notice of this Motion as set forth below, which includes all known potential creditors of the Seller.

Allocation of the Gross Sale Proceeds—Allocation Agreement and Lien Release

24. The amount owed to Golf under its Promissory Note exceeds the value and proposed purchase price of the Property and Golf is cross-collateralized by the other Non-Debtor Properties.¹⁴ Furthermore, the Debtor Note and Debtor DOT is subordinate to the obligations owed to Golf.¹⁵

25. The Buyer has conditioned its purchase of the Property on obtaining title free and clear of the Golf DOT and the Debtor DOT.¹⁶

26. As a result, TFCP, through the Trustee, and Golf have agreed, subject to the Court granting this Motion, upon the following with regard to the \$1,830,000.00 in gross sale proceeds and treatment of the Debtor DOT:

(a) From the gross sale proceeds, Golf shall be paid \$1,499,955.00 at closing in exchange for Golf (and its assignee Texas Gulf Bank) (i) releasing the Golf DOT against the Property, and (ii) applying \$99,955.00 to six months of interest under Golf's remaining Promissory Note;

(b) Outstanding taxes on the Property shall be paid from the gross sale proceeds at closing, in the approximate amount of \$29,000.00;

¹⁴ Proof of Claim No. 327.

¹⁵ Declaration, Exhs. 3, 4.

¹⁶ Declaration, Exh. 5.

(c) Golf shall (i) pay the outstanding property taxes on the remaining Non-Debtor Properties, due in January 2019, in the approximate amount of \$15,000.00 and \$50,000.00, respectively, and (ii) will add this approximate sum of \$65,000.00 to the amount of its claim as set forth in the Proof of Claim that it filed;

(d) Any remaining gross sale proceeds, after payment of ordinary closing costs, will be paid to the Debtor; and

(e) The Trustee, as manager of the Debtor, shall execute a *Release of Deed of Trust*, a copy of which is attached to the Declaration as **Exhibit 7**, releasing the Debtor DOT against the Property (the "Lien Release").

27. The Trustee's negotiation with Golf related to the allocation of sale proceeds and the Lien Release described above (the "Allocation Agreement") have been at arms' length and in good faith.¹⁷

RELIEF REQUESTED

28. To the extent necessary, the Trustee requests authorization as the representative of the Debtor which is the manager of the Seller, to effectuate the sale of the non-debtor Seller's Property to the Buyer pursuant to the Agreement under 11 U.S.C. § 363(b).

29. Additionally, as part of the sale of the Property, the Trustee requests authority under 11 U.S.C. § 363(b) to enter into the Lien Release, releasing the Debtor DOT recorded against the Property, and to the extent approval is necessary, to enter into the Allocation Agreement with Golf outlined above.

APPLICABLE AUTHORITY

30. Section 363(b)(1) of the Bankruptcy Code provides that the "trustee, after notice and a hearing, may use, sell, lease, other than in the ordinary course of business, property of the estate."¹⁸

¹⁷ Declaration ¶ 16.

¹⁸ 11 U.S.C. § 363(b)(1).

31. Here, the Property is owned by the non-debtor Seller and therefore is not property of the estate under Section 541(a) of the Bankruptcy Code to which Section 363(b) applies. Accordingly, the Trustee does not believe that the sale of the Property by non-debtor TFCP requires Court approval. However, under Section 363(b)(1), the Trustee requires approval of the Court to take actions on behalf of the Debtor as the manager of Seller TFCP that are deemed to be out of the ordinary course of the Debtor's business.¹⁹ Here, it is arguable that the Trustee effectuating the non-debtor Seller's sale of the Property is out of the ordinary course of the Debtor's business. Moreover, the Trustee's execution of the Lien Release and, possibly, entering into the Allocation Agreement with Golf, is out of the ordinary course of business and, therefore, requires approval of this Court under Section 363(b)(1).

32. Generally, in order to approve a sale of a Debtor's assets outside the ordinary course of business pursuant to section 363(b)(1), the Trustee must show that:

- (a) a sound business reason exists for the sale;
- (b) there has been adequate and reasonable notice to interested parties, including full disclosure of the sale terms and the Debtor's relationship with the buyer;
- (c) the sale price is fair and reasonable; and
- (d) the proposed buyer is proceeding in good faith.²⁰

33. As noted above, the Trustee is not seeking to sell the Debtor's assets, but instead to effectuate the sale of the non-debtor Seller's assets. The analysis, however, is the same. The Trustee has met all four parts of this test, and as such, he respectfully requests that the Court

¹⁹ *See id.*

²⁰ *See In re Med. Software Solutions*, 286 B.R. 431, 439–40 (Bankr. D. Utah 2002).

grant the relief requested in this Motion by authorizing the Trustee to effectuate the sale of the property and release the Debtor DOT.

Sound Business Purpose

34. Courts show great deference to a trustee's decisions.²¹ Additionally, a "presumption of reasonableness" attaches to the decisions of those controlling a Debtor.²²

35. The Trustee submits that the proposed sale will benefit the Debtor and all of the Non-Debtor Subsidiaries. The Seller has no income to maintain debt service to Golf or the Debtor. The proposed sale will significantly reduce the total amount owed to Golf under its Promissory Note, which includes the Debtor's obligation as a borrower. As a result, obligations of the Debtor's estate will be reduced, and Golf's secured claim based on the Golf DOT against the other Non-Debtor Properties will be reduced. Significantly, the Trustee is informed that with the reduction of the debt against the Non-Debtor Subsidiaries, there should be equity in the other Non-Debtor Properties.²³

36. Additionally, the Trustee submits that the release of the Debtor DOT in connection with the sale will benefit the Debtor inasmuch as its release is necessary to convey the Property and sale of the Property will reduce obligations under Golf's Promissory Note, thereby reducing the amount of Golf's claims. Release of the Debtor DOT does not harm the Debtor's estate because the Debtor DOT has no value inasmuch as Golf's secured claim is senior

²¹ See *Summit Land Co. v. Allen (In re Summit Land Co.)*, 13 B.R. 310, 315 (Bankr. D. Utah 1981) (applying to sale of property).

²² *In re Johns-Manville Corp.*, 60 B.R. 612, 615–16 (Bankr. S.D.N.Y. 1986).

²³ Declaration, ¶ 17.

to the Debtor Note and Debtor DOT and the amount of Golf's its claim exceeds the value of the Property.²⁴

37. Also, the Allocation Agreement is in the best interests of all parties. Absent the Allocation Agreement, the Debtor would not receive any proceeds from the proposed sale. The release of the Debtor DOT thus will not only facilitate the sale of the Property, but it will allow the Debtor to receive proceeds from the proposed sale of the Property.²⁵

38. The Trustee maintains that, in his business judgment, effectuating the non-debtor Seller's sale of the Property, executing the Lien Release and agreeing to allocation of the gross sale proceeds under the Allocation Agreement is in the best interest of Debtor's creditors, the Debtor's estate and the interests of the Non-Debtor Subsidiaries.²⁶

Notice of the Proposed Sale Is Appropriate

39. Concurrently with the filing of this Motion, the Trustee will file with the Court a *Notice of Hearing*, which will give notice of the Motion, including his intent to effectuate the sale of the Property and of the Allocation Agreement, including his intent to execute the Lien Release. The Notice of Hearing will be served on on (a) all creditors and parties in interest listed on the Debtor's mailing matrix, which should include all investors in the Debtor who may claim to hold an interest in the Debtor Note and Debtor DOT that is being released under the Lien Release, (b) all persons listed in the Title Report, including taxing authorities in Williamson County, Texas, (c) all known potential creditors of the Seller, and (d) the Office of the United States Trustee.

²⁴ Declaration, ¶ 18.

²⁵ Declaration, ¶ 19.

²⁶ Declaration, ¶ 20.

40. Such notice is fair, reasonable, and affords notice of the actions of the Trustee as required under the Bankruptcy Code and Federal Rule of Bankruptcy Procedure 2002(a)(2).

Fair and Reasonable Price

41. The Trustee has reviewed an appraisal of the Property obtained by the Debtor prior to the Petition Date, which valued the Property at approximately \$1,870,000.00. Based thereon, the proposed purchase price for the Property is fair and reasonable.²⁷

42. The Allocation Agreement is in the best interests of all parties. Absent the Allocation Agreement, the Debtor would not receive any proceeds from the proposed sale. The release of the Debtor DOT thus will not only facilitate the sale of the Property, but it will allow the Debtor to receive proceeds from the proposed sale of the Property as well as reduce the significant debts of the Debtor and the Non-Debtor Subsidiaries.²⁸

Good Faith Purchaser

43. The Trustee believes that the Property will be sold to a good faith purchaser.²⁹

44. Although the Bankruptcy Code does not define “good faith,” the Court of Appeals for the Tenth Circuit has determined, in the context of 11 U.S.C. § 363(m), that a “good faith” purchaser is “one that buys in good faith, and for value.”³⁰ Actions that destroy a purchaser’s good faith include “fraud, collusion between the purchaser and other bidders or trustee, or an attempt to take grossly unfair advantage of other bidders.”³¹

²⁷ Declaration, ¶ 13.

²⁸ Declaration, ¶ 19.

²⁹ Declaration, ¶ 21.

³⁰ *Tompkins v. Frey (In re Bel Air Assocs., Ltd.)*, 706 F.2d 301, 304 (10th Cir. 1983).

³¹ *Id.* at 305 n.11 (citation omitted); *see also In re Lotspeich*, 328 B.R. 209 (10th Cir. BAP 2005).

45. The Trustee has no connections to the Buyer, and no knowledge of and no reason to believe that there has been any fraud, collusion or unfair advantage. Furthermore, the Trustee is informed that the terms of the Agreement were negotiated by the Debtor's former Chief Restructuring Officer, Gil A. Miller, and that the negotiations were at arm's length and in good faith.³²

46. To the best of the Trustee's knowledge, Buyer is a third-party purchaser who has no connections to the Trustee, the Trustee's professionals, the Office of the United States Trustee or its employees. Furthermore, to the best of the Trustee's knowledge, the Buyer has no connections to the Debtor or the Debtor's creditors.³³

47. Finally, for the reasons set forth above, the Trustee believes that the sale of the Property pursuant to the Agreement will be for a fair and reasonable value.

CONCLUSION

In the Trustee's business judgment, it would be in the best interests of the Debtor's creditors and the estate to effectuate the sale of the Property to the Buyer as set forth in the Agreement, and execute the Lien Release as part of the Allocation Agreement. The Trustee further believes that the Allocation Agreement benefits the Debtor's estate and, to the extent necessary, should be approved. Finally, it is the Trustee's business judgment that the sale of the Property and the treatment of the gross sale proceeds is beneficial to all of the Non-Debtor Subsidiaries for the reasons stated herein.³⁴

³² Declaration, ¶ 14.

³³ Declaration, ¶ 14.

³⁴ Declaration, ¶ 22.

Thus, the Trustee requests a Court order (1) authorizing him to effectuate TFCP's sale of the Property to the Buyer, and (2) to execute the Lien Release attached as **Exhibit 7** to the Declaration, including to the extent necessary, entering into the Allocation Agreement.

DATED this 18th day of December, 2018.

/s/ Peggy Hunt

Michael F. Thomson
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Attorneys for Chapter 11 Trustee

CERTIFICATE OF SERVICE – BY NOTICE OF ELECTRONIC FILING (CM/ECF)

I hereby certify that on this 18th day of December, 2018, I electronically filed the foregoing **CHAPTER 11 TRUSTEE’S MOTION PURSUANT TO 11 U.S.C. § 363(b)(1) TO AUTHORIZE TRUSTEE TO (1) EFFECTUATE THE SALE OF PROPERTY OF THE DEBTOR’S WHOLLY OWNED, NON-DEBTOR SUBSIDIARY, THE FALLS AT CEDAR PARK, LLC, TO A THIRD PARTY BUYER, AND (2) RELEASE LIEN IN FAVOR OF THE DEBTOR AGAINST THE PROPERTY IN EXCHANGE FOR AGREEMENT WITH SECURED CREDITOR ON ALLOCATION OF SALE PROCEEDS** with the United States Bankruptcy Court for the District of Utah by using the CM/ECF system. I further certify that the parties of record in this case, as identified below, are registered CM/ECF users and will be served through the CM/ECF system.

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