

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION**

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| IN RE: | § | |
| | § | |
| SCHLOTZSKY’S, INC., <u>et al.</u> | § | CHAPTER 11 |
| | § | |
| Debtors. | § | Case No. 04-54504 (lmc) |
| | § | Jointly Administered |

DEBTORS’ SECOND MOTION FOR ORDERS: (A)(i) APPROVING BID PROTECTIONS AND PROCEDURES IN CONNECTION WITH THE PROPOSED SALE OF CERTAIN SURPLUS PARCELS OF REAL PROPERTY, AND (ii) SCHEDULING A HEARING TO CONSIDER APPROVAL OF SUCH SALE AND PRESCRIBING THE FORM AND MANNER OF NOTICE WITH RESPECT THERETO; AND (B) AUTHORIZING AND APPROVING THE SALE OF SUCH REAL PROPERTY, FREE AND CLEAR OF ALL LIENS, CLAIMS AND ENCUMBRANCES AND GRANTING RELATED RELIEF

Schlotsky’s, Inc., Schlotsky’s Real Estate, Inc., and DFW Restaurant Transfer Corp., each a debtor and debtor-in-possession (collectively, the “Debtors”), by and through their undersigned counsel, hereby submit this motion (the “Motion”) and respectfully represent as follows:

I. JURISDICTION

1. The Debtors each filed voluntary Chapter 11 petitions in this Court on August 3, 2004 (the “Petition Date”). Pursuant to Sections 1107 and 1108 of the Bankruptcy Code, the Debtors are continuing to operate their businesses and manage their properties as debtors-in-possession. Pursuant to an Order of this Court, the Debtors’ estates are being jointly administered solely for procedural purposes.

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2. This Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157. Venue is proper in this District pursuant to 28 U.S.C. §§ 1408 and 1409. The statutory predicate for the relief sought herein is 11 U.S.C. §§ 105 and 363, as complemented by Rules 2002 and 6004 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”).

II. BACKGROUND

3. The Debtors’ Businesses. Schlotzsky’s, Inc. (“SI”), through its wholly-owned subsidiaries, is a franchisor and operator of restaurants in the fast casual sector under the Schlotzsky’s brand. Schlotzsky’s restaurants offer a current menu of hot sandwiches and pizza served on their proprietary buns and crusts as well as wraps, chips, salads, soups, desserts and beverages. As of August 3, 2004, the Schlotzsky’s system included twenty-one (21) company-owned restaurants (“Company Restaurants”), as well as 471 domestic franchised restaurants and twenty-one (21) international franchised restaurants (“Franchise Operations”) located in thirty-six (36) states, the District of Columbia, and six (6) foreign countries.

4. Schlotzsky’s, Inc. SI is a Texas corporation with executive offices located at 203 Colorado Street, Suite 600, Austin, Texas 78701. SI is the parent corporation of Schlotzsky’s Restaurants, Inc. (“Restaurants”), Schlotzsky’s Real Estate, Inc. (“Schlotzsky’s Real Estate”), Schlotzsky’s Franchisor, LLC (“Franchisor”), Franchise Operations, LLC (“Franchise Operations”), DFW Restaurant Transfer Corp. (“DFW”), and RAD Acquisition Corp. (“RAD”).

5. Schlotzsky’s Restaurants, Inc. Restaurants is a Texas corporation wholly-owned by SI and is the parent corporation of 56th and 6th, Inc. (“56th and 6th”). Restaurants operates the

twenty-one (21) Company Restaurants. Fifteen (15) of these Company Restaurants are in Schlotzsky's long-term portfolio that Schlotzsky's intends to operate for the purposes of leadership of the franchise system and, in certain cases, to stimulate the redevelopment of certain markets. These stores also are used to demonstrate sales potential and key operating metrics, to build brand awareness, and to serve as laboratories for product development, concept refinement, product and process testing, and training. In addition, Schlotzsky's operates three (3) Company Restaurants that were developed for or acquired from franchisees and are expected to be operated until those stores are re-franchised or otherwise divested. Schlotzsky's has recently ceased operations in several Company Restaurants that were unprofitable.

6. Schlotzsky's Real Estate, Inc. Schlotzsky's Real Estate is a Texas corporation wholly-owned by SI. Schlotzsky's Real Estate is party to a number of real estate mortgage and lease contracts and documentation for the Company Restaurants that are owned by Restaurants as well as undeveloped properties purchased for future development.

7. DFW Restaurant Transfer Corp. DFW is a Texas corporation wholly-owned by SI. DFW serves as the Area Developer under certain Area Developer Agreements that were re-purchased by Schlotzsky's through DFW and holds certain real estate and equipment leases and contracts associated with several recently closed Company Restaurants in Georgia, Mississippi and Utah.

8. 56th & 6th, Inc. 56th & 6th is a Texas corporation wholly-owned by Restaurants. 56th & 6th is party to certain Franchise Agreements and other agreements related to the operation of three (3) now closed Schlotzsky's restaurants in New York and Tennessee.

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9. The Debtors have a serious need for cash to sustain their current operations and to preserve both the going concern value and prospects of reorganization for these Debtors. Debtors seek to liquidate certain owned real estate to generate funds for post-petition operations.

10. Schlotzsky's Real Estate, as explained above, is a Debtor-entity that owns numerous parcels of real property, many of which are utilized for the Company Restaurants that are operated by Restaurants.¹ However, Restaurants also owns parcels of real property that are either unimproved and not being utilized for business purposes or are closed restaurant locations, and the Debtors have determined they are not necessary for the Debtors' future operations (hereinafter, the "Surplus Real Property"). The Surplus Real Property is encumbered with debt and the continuing obligation of debt service on the Surplus Real Property, combined with taxes, insurance and other costs associated with the property, has made the Surplus Real Property burdensome for the Debtors to maintain. The Surplus Real Property is not expected to materially appreciate in value at any time in the near future. Nor is it likely that the Debtors' business plan going forward would include development of the Surplus Real Property.

11. On August 23, 2004, Debtors retained Hilco Real Estate, Inc. ("Hilco") to assist them in further marketing the Surplus Real Property. Some of the Surplus Real Property had been marketed for several years. For example, some of the properties have had "for sale" signs posted for years and Debtors have fielded various inquiries over time from interested parties and have distributed marketing materials to same. Debtors had also marketed the operating

¹ As later explained, the Debtor SI may own one of the parcels of real property that is the subject of this Motion.

restaurants to potential franchisees. Debtors retained Hilco to actively market the Surplus Real Estate for a prompt sale. Hilco's marketing efforts have included all of the following:

- Hilco announced the sale of certain real property of the Debtor, including the Surplus Real Property, on Hilco's website. Each property listing includes a detailed description of the property and other information relevant to the due diligence needs of potential purchasers.
- The Surplus Real Property was among Debtor-owned real property that Hilco listed on LoopNet, a premier commercial real estate website. In addition to information about each property, the LoopNet listing directed all interested parties to Hilco's website for further information.
- "For Sale" signs were posted on the Surplus Real Property.
- Sales advertisements about the Surplus Real Property were placed in the local Austin newspaper and the national edition of the Wall Street Journal.
- Hilco developed a global marketing flyer listing all of the Debtor's properties and providing information on each location and details of the bankruptcy sale process. Hilco has posted the flyer on its website and distributed the flyer via e-mail and facsimile to potentially interested parties.

As part of its marketing strategy, Hilco conducts on-going broadcast facsimiles and mass e-mail campaigns, targeting thousands of potentially interested parties that Hilco has compiled in its database.

12. Hilco has received numerous offers for some of the Surplus Real Property and the Debtors wish to sell certain parcels of Surplus Real Property using the procedures described herein.

13. The following chart identifies (a) the location of the property to be sold, (b) the bidder, (c) the amount of the bid accepted subject to the auction procedures described herein, (d) the lender, and (e) the amount of debt encumbering the real property as 8/31/04. Each bidder has

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provided Hilco with a deposit of ten percent (10%) of its offer. The form of the Agreement of Sale between each of the Debtors and each of the prospective purchasers is attached hereto as Exhibit A. Each Agreement of Sale gives the purchaser ten (10) days after the date that Debtors execute the Sale Agreement to conduct title and other due diligence and, during this period purchaser may, in its sole discretion, terminate the Sale Agreement by giving written notice of the election to Seller on or before this date (and, if such termination shall occur, the deposit shall be returned to purchaser). The Debtors propose to provide each purchaser with a break up fee of 3% of the purchaser's offer.

| LOCATION | BIDDER | AMOUNT OF BID | LENDER | DEBT (as of 11/20/04) |
|---|---|---------------|---|-----------------------|
| *7328 Shallowford Rd. Chattanooga, TN | Kingott, LLC 26 Maxwell Road Richmond, VA 23226 | \$700,000 | First Volunteer Bank of Tennessee | \$598,000 |
| *7709 E. Ben White Blvd. Austin, TX | Kingott, LLC 26 Maxwell Road Richmond, VA 23226 | \$350,000 | State Bank | \$4,050,000 |
| 5760 Airport Blvd. Austin, TX (Koenig) | James M. Easterling, Jr. & Kensinger Properties Limited 1800 St. James Place, Ste. 206 Houston, TX 77056 | \$260,000 | State Bank | \$4,050,000 |
| 1001 Palm Valley Blvd. Round Rock, TX | James M. Easterling, Jr. & Kensinger Properties Limited 1800 St. James Place, Ste. 206 Houston, TX 77056 | \$480,000 | State Bank | \$4,050,000 |
| 1409 E. Tyler Athens, TX | Thomas Kirk May, Jr. 4807 W. Lovers Lane, Ste. 200 Dallas, TX 75209 | \$150,000 | State Bank | \$4,050,000 |

*These two properties were bundled for a total bid of \$1,050,000.

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III. RELIEF REQUESTED

14. With this Motion, Debtors seek: (a) approval for certain bid procedures and bid protections for each proposed purchaser, (b) actual approval for the ultimate sale of each of the parcels of Surplus Real Property to the identified purchaser or to a higher or better bidder; and (c) certain related relief.

15. Accordingly, by this Motion, Debtors seek the entry of two (2) orders, pursuant to Sections 105 and 363 of the Bankruptcy Code (as defined below) and Rule 6004 of the Federal Rules of Bankruptcy Procedure, as follows:

- a. an order (the “Bidding Procedures Order”):
 - i. establishing and approving auction procedures and requirements for interested parties to submit competing bids for the Surplus Real Property;
 - ii. approving a proposed break-up fee for the benefit of each Purchaser;
 - iii. scheduling a hearing (the “Sale Hearing”) to consider approval of the proposed sale to each of the Purchasers (or any successful overbidder) and the related relief requested in this Motion;
 - iv. approving the form and manner of notice of the sale contemplated by this Motion and the related relief requested herein; and
 - v. fixing a date for the filing of objections, if any, to the relief requested in this Motion; and
- b. an order (the “Sale Order”):
 - i. approving and authorizing the implementation of the relevant Sale Agreement with each Purchaser (or any successful overbidder);
 - ii. authorizing the sale of the Surplus Real Property to each Purchaser (or to any successful overbidder), free and clear of all liens, claims

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and encumbrances pursuant to 11 U.S.C. §363(f) (with such liens to attach to the sale proceeds), subject to higher or better offers;

- iii. authorizing the Debtors to take any and all other actions necessary to consummate the proposed transactions including distribution of certain of the sale proceeds to the mortgagees and any other secured creditors at closing, as determined necessary.

IV. PROPOSED AUCTION PROCEDURES

16. In an effort to ensure that maximum value is obtained for the Surplus Real Property, the sale will be subject to higher and better offers. In order to appropriately evaluate such bids (each, a “Bid”), the Debtors hereby seek to have this Court establish certain uniform auction procedures. The Debtors will conduct a separate auction for each parcel or group of parcels for which Debtors have accepted a Bid. The following terms and procedures (collectively, the “Auction Procedures”) are proposed to govern the submission of competing bids for the Surplus Real Property by bidders (each, a “Bidder”) in the form of Auction Procedures which would be attached to the proposed Bidding Procedures Order, which would provide as follows:

- A. All Bids must satisfy the following requirements:
 - i. The purchase price of any initial bid by any third party must include consideration of at least the value of the consideration being offered by Purchaser, plus 3% of the Purchaser’s offer (i.e. if the Purchaser has offered \$350,000, the initial minimum overbid is \$360,500) (an “Initial Minimum Overbid”).
 - ii. All subsequent bids (together with the Initial Minimum Overbid, each an “Overbid”) submitted at the Auction (as defined and described in subparagraph “B” below) including any by Purchaser, must include additional consideration of at least \$10,000 over the previous Overbid and meet the Minimum Initial Overbid requirement.

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- iii. Overbids shall not be conditioned on the outcome of any remaining or unperformed due diligence by the bidder. Overbids shall not be subject to any financing contingencies. The Debtors will not be required to assume any payment risk whatsoever (acceptable methods of payment include letters of credit, cash escrow, or wire transfers).
- iv. Prior to the Auction described in subparagraph “B” below, and by no later than the date set forth in subsection viii below, Overbids (other than those by Purchaser) shall be accompanied by a cash deposit in the amount of 10% of the Overbid (the “Deposit”). The Deposit and any interest thereon shall be applied to the purchase price if depositor is the successful purchaser and returned to any depositor, fifteen (15) days after the Closing Date. In the event the successful bidder fails to consummate the sale (other than by reason of a material breach by the Debtors or non-entry of the Sale Order), the Debtors shall retain the Deposit and any interest earned thereon. Notwithstanding anything contained herein to the contrary, the Debtors are under no obligation to earn interest on the Deposit.
- v. Overbids shall be in writing in the form of the Sale Agreement, marked thereon to show any and all proposed changes thereto. The terms of any Overbids must be substantially the same as those contained in the Sale Agreement (except to the extent such changes are more favorable to the Debtors).
- vi. Bidders must agree to maintain the confidentiality of (and not to use for its or any other person’s benefit) any information or material regarding the Debtors, the Surplus Real Property or the Debtors’ business.
- vii. Overbids (other than those by Purchaser) shall be accompanied by appropriate evidence, reasonably satisfactory to the Debtors, or if a dispute arises, to the Court, of the bidder’s financial ability to conclude a transaction on or prior to the Closing Date contained in the Sale Agreement (the “Financials”). Financials may be (a) personal financial statements completed within the last six (6) months, (b) tax returns for the past two (2) tax years, or (3) a current bank statement reflecting sufficient funds to close the purchase.

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- viii. Overbids, together with the Financials, shall be delivered so as to be received by Schlotzsky's Real Estate, Inc., Suite 800, Austin, Texas 78701, Attn: Legal Department, Facsimile Number 512-236-3740, with a copy to Haynes and Boone, LLP, 600 Congress Avenue, Suite 1300, Austin, Texas 78701, Attn: Sarah Foster, counsel for the Debtors, no later than noon (Austin, Texas time) on November 12, 2004, and no other Overbid shall be considered after such time without leave of the Court; provided, however, that qualified bidders that submit timely Overbids and Purchaser shall be permitted to make subsequent Overbids at the Auction described in subparagraph "B" below.
- ix. The Debtors shall determine whether any Initial Minimum Overbids have been received.

B. If at least one Initial Minimum Overbid has been received, an auction (the "Auction") will be conducted on December 14, 2004 at the offices of Haynes and Boone, LLP, 600 Congress Avenue, Suite 1300, Austin, Texas 78701. Only the Purchaser and any bidder that has timely submitted an Initial Minimum Overbid in conformity with paragraph "A" above shall be entitled to participate in the Auction of any given parcel. At the commencement of the Auction for a particular parcel, the Debtors shall announce the highest and best Overbid and invite those parties entitled to participate in the Auction to submit higher and better bids. The Auction shall be in the format of an open "outcry" auction with all parties that are entitled to participate being permitted to hear the oral Overbids (and see any changes proposed to the Sale Agreement). The Purchaser shall be permitted to bid its Break-up Fee in an Overbid. At the Auction, the Debtors shall determine (i) the final highest and best offer for each parcel of Surplus Real Property (the "Accepted Offer"), which shall be submitted for approval to the Court at the Sale Hearing and (ii) the next highest and best offer for each parcel of Surplus Real Property, if any

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(the “Alternative Offer”). The Debtors reserve the right to determine, in their sole discretion, which offer is the highest and best offer and to reject, any time prior to entry of an order approving the sale, any offer which is deemed to be inadequate, or not in conformity with these terms and conditions, or contrary to the best interest of the estates. The bidders whose offer becomes an Accepted Offer or Alternative Offer shall increase their deposits within two business days following the Auction so that the deposits equal 10% of the Accepted Offer or Alternative Offer.

C. Each Accepted Offer and the Alternative Offer shall remain open and irrevocable until the sale of the Surplus Real Property is fully consummated. If the offeror of an Accepted Offer is not ready, willing and able to consummate the purchase of the Surplus Real Property pursuant to the Accepted Offer on or before the closing, the Debtors’ acceptance of such offer shall be automatically revoked without penalty of any kind whatsoever to the Debtors. The offeror of the Accepted Offer that is revoked shall forfeit its Deposit and the Debtors shall reserve its right to seek any additional damages permitted under law against such offeror, and the Alternative Offer shall become the Accepted Offer.

D. The Debtors reserve the right, in their sole discretion, to modify or impose such other terms and conditions regarding offers up to and including the conclusion of the Auction, as may be determined in the best interests of their estates, creditors and other parties-in-interest.

E. The sale of the Surplus Real Property is subject to Court approval. The Court shall retain jurisdiction to determine all matters arising out of or relating to the making of an objection or a higher and better bid, and each person or entity by making such an objection or bid shall subject itself to the jurisdiction of the Court with respect to all matters arising out of such objection or bid and all matters related thereto.

17. The Auction Procedures outlined above are designed to strike a balance between the Debtors' fiduciary duty to subject the sale of Surplus Real Property to competitive bids and enabling the Debtors to close a sale with a Purchaser (or other Successful Bidder) on a timely basis. The Debtors submit that the Auction Procedures are fair, reasonable and necessary and do not impose undue obstacles to the competitive bid process. Accordingly, the Debtors respectfully submit that approval of the proposed Auction Procedures is warranted and appropriate.

V. BASIS FOR APPROVAL OF THE PURCHASE AGREEMENT AND RELATED TRANSACTIONS

A. Sale of the Assets is Authorized Pursuant to Section 363 of the Bankruptcy Code

18. Section 363(b)(1) of the Bankruptcy Code provides that “[t]he 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). Courts have uniformly held that approval of a proposed sale of property pursuant to Section 363(b) of the Bankruptcy Code is appropriate if a court finds that the transaction represents a reasonable business judgment on the part of the debtor. *See*

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Institutional Creditors of Cont'l Air Lines, Inc. v. Cont'l Air Lines, Inc. (In re Cont'l Air Lines, Inc.), 780 F.2d 1223, 1226 (5th Cir. 1986) (there must be some “articulated business justification for selling property outside the ordinary course of business). *See also* In re Martin, 91 F.3d 389, 395 (3d Cir. 1996) (in approving the use, sale or lease of property outside of the ordinary course of business, “under normal circumstances the court would defer to the trustee’s judgment so long as there is a legitimate business justification”); In re Abbotts Dairies of Pa., Inc., 788 F.2d 143 (3d Cir. 1986); In re Montgomery Ward Holding Corp., 242 B.R. 147, 152-153 (D. Del. 1999) (stating that bankruptcy courts have considerable discretion when deciding whether to authorize a sale of a debtor’s assets outside of the ordinary course of business); In re Tempo Techs Corp., 202 B.R. 363, 365 (D. Del 1996) (approving bankruptcy court’s articulation of the Abbotts Dairies standard); In re Delaware & Hudson Ry. Co., 124 B.R. 169, 176 (D. Del. 1991) (holding that a court must be satisfied that there is a “sound business reason” justifying the pre-confirmation sale of assets); In re Phoenix Steel Corp., 82 B.R. 334, 335 (Bankr. D. Del. 1987) (stating that the elements necessary for approval of a section 363 sale in a chapter 11 case are “that the proposed sale is fair and equitable, that there is a good business reason for completing the sale and the transaction is in good faith”).

19. The Debtors believe that, for the reasons set forth herein, the proposed transactions represent a prudent and proper exercise of their business judgment and are supported by articulated business reasons. In summary, the consideration to be received is reasonable and is the result of good faith, arm’s length, bona fide negotiations and the proposed transaction is expected to yield net sale proceeds sufficient to pay the claims of the Debtors’ secured lenders

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and other secured creditors in an agreed upon amount, satisfy and provide net proceeds for these Debtors' estates. In addition, consummation of the sale to Purchaser (or any successful overbidder) will provide necessary cash to allow the Debtors' operations to continue as a going concern. Given these circumstances, there is little question that a transaction, such as that proposed in the Sale Agreement, represents the best way for the Debtors to maximize value for their estates.

B. Sale of the Assets Free and Clear of Liens, Claims and Encumbrances Should be Authorized

20. As required pursuant to the Sale Agreement, the Debtors request authority to transfer the Surplus Real Property free and clear of any and all liens, claims and encumbrances. In evaluating a proposed sale free and clear of liens, a court must balance the need for the Debtor to have flexibility to effectuate the reorganization goals of chapter 11 with the competing concern of the affected for adequate protection. In re Terrace Gardens Park P'ship, 96 B.R. 707, 715 (Bankr. W.D. Tex. 1989). Section 363(f) of the Bankruptcy Code permits such sales if one of the following conditions is satisfied:

- A. applicable non-bankruptcy law permits sale of such property free and clear of such interest;
- B. such entity consents;
- C. such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
- D. such interest is in bona fide dispute; and
- E. such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

11. U.S.C. § 363(f).

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21. The Debtors anticipate that they can satisfy one or more of these requirements. In addition, the Sale Orders will provide that, except to the extent paid and released at the closing, all liens, claims and encumbrances will attach to the proceeds of the sale transaction with the same force and effect as such liens previously had on the Surplus Real Property, thus the affected creditors will be adequately protected. Accordingly, the Debtors submit that the transfer of the Surplus Real Property free and clear of any liens, claims and encumbrances satisfies the statutory prerequisites of Section 363(f).

C. Approval of the Break-Up Fee is Warranted

22. A break-up or termination fee is an incentive payment to a prospective purchaser, which is made to the prospective purchaser in the event that the transaction between the prospective purchaser and the seller is not consummated. Calpine Corporation v. O'Brien Environmental Energy, Inc. (In re O'Brien Environmental Energy, Inc.), 181 F.3d 527 (3d Cir. 1999). Break-up fees may take several forms, including the payment of the costs associated with pursuing the transaction, including professional fees and due diligence costs, and compensation for lost opportunity costs. Outside of bankruptcy break-up fees are presumptively valid under the business judgment rule, and are often authorized by bankruptcy courts if they serve to encourage rather than discourage bidding. See In re O'Brien Environmental Energy, Inc., 181 F.3d at 535. Thus, bankruptcy courts will generally authorize a break-up fee if it serves one of three purposes: “(1) to attract or retain a potentially successful bid, (2) to establish a bid standard or minimum for other bidders to follow, or (3) to attract additional bidders.” See In re Integrated

Resources, Inc., 147 B.R. 650, 662 (S.D.N.Y. 1992), appeal dismissed, 3 F.2d 49 (2d Cir. 1993); see also In re Crowthers McCall Pattern, Inc., 166 B.R. 908, 913 (Bankr. S.D.N.Y. 1990).

23. Given the sale process articulated herein, the Break-Up Fee is reasonably calculated to establish a minimum bid and encourage bidders to submit bids within the range of reasonably anticipated values. The Purchaser, therefore, is a “stalking horse” for competitive bidding, which may lead to higher and better offers for the purchase of the Assets to the benefit of the Debtors’ estates and creditors. In addition, Purchaser has invested substantial time and resources in pursuing the transaction contemplated by the Sale Agreement. The Break-Up Fee in amount of 3% of the Purchase Price is necessary to induce parties to make competitive offers subject to the Auction procedures and to offset their expenses in connection with the process if they are not the successful bidder. Although 3% is a relatively high percentage for a break-up fee, given the amount of the bids, this amount is necessary to address the likely expenses that a “stalking horse” will incur. Accordingly, the Debtors submit that the Break-Up Fee is reasonable under the circumstances and that the Court should approve the Break-Up Fee contained in the Sale Agreement as it meets the standard articulated in case law.

D. A Finding of Purchaser’s Good Faith is Warranted

24. Pursuant to Section 363(m) of the Bankruptcy Code, a good faith purchaser is one who purchases assets for value and in good faith. The Debtors submit that the Sale Agreement were negotiated in good faith and at arm’s length with both parties represented by sophisticated counsel. Accordingly, each Sale Agreement has been proposed, and is, in good faith, and the

Debtors submit that providing the Purchasers with such protections will help to ensure that the maximum value is received by the Debtors.

E. Waiver of Bankruptcy Rule 6004(g)

25. The Debtors request that the Court direct that the Sale Order become effective immediately upon its entry, notwithstanding the automatic stay provisions set forth in Rule 6004(g) of the Bankruptcy Rules, such that the stay provisions will not apply to the Sale Order.

26. Bankruptcy Rule 6004(g) provides that “an order authorizing the use, sale or lease of property other than cash collateral is stayed until expiration of 10 days after entry of the order, unless the court orders otherwise.” See Bankruptcy Rule 6004(g). The Purchaser and the Debtors desire to close as soon as possible on the sale of the Surplus Real Property and consider time to be of the essence. The Sale Agreement contemplates an expedited closing after the Due Diligence Period. Indeed, as noted above, it is not just the Purchaser who has required a tight closing time frame in the Sale Agreement, but the Debtors have an acute need for cash to preserve their going concern value to successfully emerge from Chapter 11. Absent waiver of the provisions of Bankruptcy Rule 6004(g), the Debtors believe that it may not be possible to consummate the sale of the Surplus Real Property prior to the deadline required by the Sale Agreement and could otherwise cause serious harm to the Debtors, their creditors and their estates, by delaying receipt of the cash proceeds.

VI. PROPOSED NOTICE PROCEDURES

27. The Debtors propose to serve by first-class U.S. mail, a conformed copy of the Bidding Procedures Order, the Motion and the Sale Agreement (with the exhibits and schedules

DEBTORS' SECOND MOTION FOR ORDERS: (A)(i) APPROVING BID PROTECTIONS AND PROCEDURES IN CONNECTION WITH THE PROPOSED SALE OF CERTAIN SURPLUS PARCELS OF REAL PROPERTY, AND (ii) SCHEDULING A HEARING TO CONSIDER APPROVAL OF SUCH SALE AND PRESCRIBING THE FORM AND MANNER OF NOTICE WITH RESPECT THERETO; AND (B) AUTHORIZING AND APPROVING THE SALE OF SUCH REAL PROPERTY, FREE AND CLEAR OF ALL LIENS, CLAIMS AND ENCUMBRANCES AND GRANTING RELATED RELIEF

thereto) upon (a) the twenty (20) largest unsecured creditors of each Debtor; (b) all of the pre-petition secured lenders of Schlotzsky's Real Estate and SI; (c) the United States Trustee, (d) counsel to the Purchaser; (e) all applicable federal, state and local taxing authorities; (f) the District Director of the Internal Revenue Service; (g) any other party, which, to the best of the Debtors' knowledge as of the Petition Date, asserts a lien, mortgage, or security interest in the Surplus Real Property, (h) any entity which has expressed an interest in purchasing the Surplus Real Property or that the Debtors believe may have an interest in the Surplus Real Property; and (i) any entity entering a notice of appearance in these cases. The Debtors also propose to post the Bidding Procedures Order, the Motion and the Sale Agreements at the website maintained at www.haynesboone.com/schlotzskys (and such website will be referenced in the Austin American Statesman notice) and on the Hilco Real Estate website, www.hilcorealestate.com.

28. Under all of the relevant facts and circumstances herein and the nature of the relief requested herein, the Debtors respectfully submit that the foregoing limited notice should be deemed adequate and sufficient notice of the sale of Surplus Real Property, the Sale Hearing, the Auction Procedures, and the Motion.

VII. CONCLUSION

29. The Debtors believe that the relief requested herein will maximize the value of the Surplus Real Property and facilitate a sale process that best accomplishes, under the circumstances, the Debtors' goal of ensuring that the highest and best offer is obtained for the Surplus Real Property. Accordingly, based upon the foregoing, the Debtors respectfully submit that approval of the sale of the Surplus Real Property pursuant to Section 363(b) of the

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Bankruptcy Code and in accordance with the Sale Agreement is in the best interest of the Debtors, their creditors and their estates.

WHEREFORE, the Debtors respectfully request that the Court enter a Bidding Procedures Order and a Sale Order, and grant such other relief as the Court may deem just and proper.

RESPECTFULLY SUBMITTED THIS 29th DAY OF NOVEMBER, 2004.

HAYNES AND BOONE, LLP
901 Main Street, Suite 3100
Dallas, Texas 75202
Tel.: 214-651-5000
Fax: 214-651-5940

By: /s/ Sarah Foster
Robert D. Albergotti
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State Bar No. 07297500
Eric B. Terry
State Bar No. 00794729

ATTORNEYS FOR THE DEBTORS AND
DEBTORS IN POSSESSION

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served on the parties listed below via email, and on the Master Service List and attached Bidder Service List via first class United States Mail, postage prepaid, on the 29th day of November, 2004.

/s/ Eric B. Terry

Eric B. Terry

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BIDDER SERVICE LIST

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Richmond, VA 23226

James M. Easterling, Jr. & Kensinger Properties Limited
1800 St. James Place, Ste. 206
Houston, TX 77056

Thomas Kirk May, Jr.
4807 W. Lovers Lane, Ste. 200
Dallas, TX 75209

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EXHIBIT A

City, State

AGREEMENT OF SALE

(City, State)

Street Address

THIS AGREEMENT OF SALE (this "Agreement") is made and entered into on and as of the ____ day of _____, 200____, by and between Schlotzsky's Real Estate, Inc., a Texas corporation ("Seller"), whose address is 203 Colorado Street, Austin, Texas 78701 and _____ ("Purchaser"), whose address is _____. Subject to all terms and conditions of this Agreement, including the condition set forth in Article IX below, Seller hereby agrees to sell and convey to Purchaser, and Purchaser hereby agrees to purchase from Seller, the Property (as defined below) on and subject to the terms and conditions hereinafter set forth. This Agreement shall become effective on the date of full execution by the parties (the "Effective Date").

ARTICLE I

DEFINITIONS AND GENERAL PROVISIONS

1.01 Definitions.

(a) Property: The Property, as used herein, shall mean that certain real property (the "Land") in _____, _____ County, _____, as more particularly described on **Exhibit "A"** attached hereto and made a part hereof for all purposes, together with any and all improvements thereon and all rights and appurtenances pertaining thereto.

(b) Purchase Price: The purchase price to be paid by Purchaser to Seller for the Property shall be _____ and No/100 Dollars (\$_____).

(c) Escrow Deposit: The Escrow Deposit, equal to **10%** of the purchase price, shall be _____ and No/100 Dollars (\$_____).

(d) Broker: Hilco Real Estate, LLC, 5 Revere Drive, Suite 320, Northbrook, Illinois 60062; Attention: Scott Peterman; Phone: (847) 504-2472; Fax: (847) 714-1289; E-mail: speterman@hilcorealestate.com.

(e) Title Company: Stewart Title Guaranty Company, 2 North La Salle Street, Suite 1400, Chicago, Illinois 60602; Attention: Jeff Dahlen; Phone: (800) 261-9800 Ext. 243 or (312) 849-4339; Fax: (312) 849-4410; E-mail: jdahlen@stewart.com.

1.02 Payment of Purchase Price. The Purchase Price shall be paid to Seller through the Title Company by the delivery by Purchaser at the Closing of a bank cashier's check(s), a certified check(s), or by wire transfer delivery of good funds at or before 10:00 A.M. Central Standard or Daylight Time, whichever is then applicable, on the Closing Date as hereinafter defined in Section 3.01.

1.03 Delivery of Escrow Deposit.

(a) Purchaser, within two (2) business days of the Effective Date, shall deliver to the Title Company the Escrow Deposit, which Escrow Deposit is to be held and disbursed by the Title Company in accordance with the terms and provisions of this Agreement. In the event that Purchaser exercises its right to terminate this Agreement pursuant to Section 2.04 hereof, then this Agreement shall be deemed terminated effective as of the expiration of the Review Period (as defined in Section 2.04) and the Escrow Deposit shall be returned to Purchaser, and the parties shall have no further rights or obligations in connection with this Agreement other than those obligations of Purchaser that expressly survive the termination hereof.

(b) In the event the Closing shall be consummated, the Escrow Deposit shall be credited against the Purchase Price. Otherwise, the Escrow Deposit shall be held and disbursed by the Title Company in accordance with the terms and provisions of this Agreement.

(c) The Escrow Deposit shall be invested by the Title Company as directed by Purchaser, and all interest accrued on the Escrow Deposit shall belong and be paid to the party to whom the Escrow Deposit, or any applicable portion thereof, is ultimately paid (or returned, as the case may be) according to the terms of this Agreement.

ARTICLE II
REVIEW DOCUMENTS; REVIEW PERIOD

2.01 Title Commitment. Within three (3) days of the Effective Date, or as soon thereafter as reasonably possible, Seller, at Seller's sole cost and expense, shall cause Title Company to issue and deliver to Purchaser, in Purchaser's name as the proposed insured thereunder, a commitment for an owner's policy of title insurance (the "Title Commitment") accompanied by copies of all recorded documents ("Title Documents") affecting title to the Property and/or which, absent some curative measure to be undertaken at or prior to the Closing, will constitute encumbrances against the Property at the Closing.

2.02 Current Survey. Within three (3) days of the Effective Date, Seller shall provide, to the extent that it has such in its possession, an ALTA survey. Should Purchaser determine, in conjunction with the Title Company that such survey is not sufficient, then Purchaser, at Purchaser's sole cost and expense, shall obtain a current on-the-ground ALTA survey of the Property (the "Survey") as soon as reasonably possible. The Survey shall contain such information as would permit the Title Company to issue its extended coverage policy. Promptly upon Purchaser's receipt of the Survey, Purchaser shall provide a copy of the Survey to Seller.

2.03 Title Approval Period. Purchaser hereby approves all the matters reflected on the Seller's ALTA Owner's Policy No. _____ dated _____, a copy of which is attached to this Agreement as **Exhibit "B"** and incorporated herein by this reference for all purposes. Purchaser shall have five (5) days after receipt of the Title Commitment (with copies of all the Title Documents) which comply with the provisions of this Agreement (the "Title Approval Period") within which to approve or disapprove of all such items which do not appear on **Exhibit "B"** hereto, including the information reflected therein, such approvals or disapprovals to be within Purchaser's reasonable discretion. If Purchaser fails to disapprove

any such item by written notice to Seller and Title Company prior to the expiration of the Title Approval Period, Purchaser shall be deemed to have approved such item. If Purchaser disapproves any such item by written notice to Seller and Title Company during such period, Seller, at its option, may attempt to cure the objectionable item(s), but Seller shall not have any obligation to attempt to cure such item(s). If Seller fails to cure said item(s), Purchaser shall either (i) terminate this Agreement within thirty (30) days after Purchaser's notice of disapproval and receive a refund of the Escrow Deposit or (ii) waive said objection in writing. Purchaser's failure to terminate prior to the expiration of such thirty (30) day period shall constitute waiver of the objection(s). The title exceptions reflected on **Exhibit "B"** hereto and those listed in the Title Commitment that Purchaser approves or is deemed to approve pursuant to this Section 2.03 are hereinafter called the "Permitted Exceptions."

2.04 Review Period. Purchaser shall have ten (10) days from the Effective Date (the "Review Period") to review title and survey, to inspect the condition of the Property, and to conduct such inspections and examinations of the Property as Purchaser deems necessary, to determine if the Property is suitable for Purchaser's intended use.

Seller shall allow Purchaser, its representatives and agents, access during reasonable business hours to the Property in order for Purchaser to conduct its inspections and examinations hereunder. Purchaser hereby covenants and agrees to indemnify, defend and hold Seller and the Property harmless from and against any damage or injury to person or property and any monetary liens against the Property resulting from any such inspection occasioned by the acts of the Purchaser, its employees, agents or representatives. This obligation of Purchaser shall survive any termination of this Agreement.

If Purchaser determines that the Property is not suitable for Purchaser's intended use, Purchaser shall notify Seller in writing of its disapproval prior to the expiration of the Review Period. Upon Seller's receipt of such written notification prior to the expiration of the Review Period, this Agreement shall be canceled and the Title Company shall be obligated to return the Escrow Deposit, including any interest earned thereon, to the Purchaser less One Hundred and No/100 Dollars (\$100.00) of such Escrow Deposit. Upon proper return of the Escrow Deposit (and interest, if any) to the Purchaser, the parties shall have no further obligations one to the other hereunder, except the obligations of Purchaser that expressly survive the termination hereof.

2.05 Delivery of Documents. Within five (5) days of Seller's receipt of a written request by Purchaser, Seller shall deliver to Purchaser, to the extent (a) available in its original acquisition files and (b) not prohibited by law or by Seller's existing contracts, the following information relating to the Property: (i) Phase I Environmental Site Assessment Report or other such environmental reports, (ii) survey, (iii) title information, and (iv) geotechnical report. Seller makes no representation or warranty, either express or implied, as to the accuracy or validity of the information contained in said documents.

ARTICLE III **THE CLOSING**

3.01 Closing Date. The consummation of the transaction contemplated by this Agreement (the "Closing") shall take place at the offices of the Title Company, or at such other

location as may be mutually agreed, on or before _____, 2004 or on such date as otherwise agreed upon in writing by the parties (the "Closing Date").

3.02 Seller's Obligations at Closing. At the Closing, Seller shall do the following:

(a) Execute, acknowledge and deliver to Purchaser a special warranty deed (the "Deed") conveying to Purchaser good and indefeasible title in fee simple absolute to the Property, subject only to the Permitted Exceptions;

(b) Surrender possession of the Property to the Purchaser not later than the business day immediately following the Closing Date;

(c) Deliver to Purchaser a certificate stating that Seller is not a "foreign person" as defined in the federal Foreign Investment in Real Property Tax Act of 1980 and the 1984 Tax Reform Act, as amended; and

(d) Deliver to Purchaser evidence reasonably satisfactory to Purchaser and the Title Company of (i) the authority of the person executing this Agreement and all of the documents to be executed and delivered on behalf of Seller at the Closing and (ii) the validity and binding effect of this Agreement and such documents on Seller.

3.03 Purchaser's Obligations at Closing. Subject to the terms, conditions and provisions hereof, and contemporaneously with the performance by Seller of its obligations set forth in Section 3.02 above, Purchaser shall do the following at the Closing:

(a) Deliver to Seller the Purchase Price in the form required by Section 1.02.

(b) Deliver to Seller evidence reasonably satisfactory to Seller and the Title Company of (i) the authority of the person executing this Agreement and all of the documents, if any, to be executed and delivered on behalf of Purchaser at the Closing and (ii) the validity and binding effect of this Agreement and, if applicable, such documents on Purchaser.

3.04 Closing Documents/Closing Costs and Prorations.

(a) All Closing documents shall be in a form reasonably satisfactory to Purchaser and Seller.

(b) Purchaser shall pay the premium for issuing the Owner Title Policy. Purchaser shall further pay the cost of providing tax certificates, all transfer, recording or similar taxes or fees, the cost of recording the Deed and escrow fees charged by the Title Company. Each party shall pay its own attorneys' fees.

(c) Ad valorem taxes for the Property for the year of Closing shall be prorated to the Closing Date. If the Closing shall occur before the tax rate is fixed for the then current year, the apportionment of taxes shall be upon the basis of the tax rate of the preceding year applied to the latest assessed valuation.

ARTICLE IV
REPRESENTATIONS AND WARRANTIES
WITH RESPECT TO THE PROPERTY AND SELLER

Seller represents and warrants to Purchaser as follows:

4.01 Authority of Seller. Subject to Bankruptcy Court approval as stated in Article IX below, Seller has full requisite power and authority to own and hold the property and to perform all its obligations under this Agreement.

4.02 Condition of Property. Except as specifically set forth herein, Seller makes no warranty or representation of any kind, either express or implied, as to the condition of the Property or fitness for a particular use. Purchaser agrees to inspect the Property and agrees to accept the Property "AS IS", "WHERE IS" and "SUBJECT TO ALL FAULTS".

ARTICLE V
PURCHASER'S REPRESENTATIONS AND WARRANTIES

5.01 Authority of Purchaser. Purchaser has full requisite power and authority to own and hold its properties, to carry on its business as presently conducted, and to perform all its obligations under this Agreement.

ARTICLE VI
CONDEMNATION PRIOR TO CLOSING

6.01 Notice of Condemnation. Seller agrees to give Purchaser prompt notice of any actual or threatened taking or condemnation of all or any portion of the Property.

6.02 Condemnation. In the event that all or any portion of the Property shall be taken in condemnation or by conveyance in lieu thereof or under the right of eminent domain after the Effective Date and before the Closing Date, Purchaser may, at its option, either (a) terminate this Agreement by written notice thereof to Seller within ten (10) days after Seller notifies Purchaser of the condemnation, and receive an immediate refund of the Escrow Deposit or (b) proceed to close the transaction contemplated herein pursuant to the terms hereof, in which event Seller shall deliver to Purchaser at the Closing any proceeds actually received by Seller attributable to the Property from such condemnation or eminent domain proceeding or conveyance in lieu thereof, or Seller shall assign to Purchaser all of Seller's rights in and to such proceeds, and there shall be no reduction in the Purchase Price. In the event Purchaser fails to timely deliver written notice of termination as described in clause (a) above, Purchaser shall be deemed to have elected to proceed in accordance with clause (b) above.

6.03 Risk of Loss. Subject to the foregoing provisions contained in Sections 6.01 and 6.02 above, risk of loss until Closing shall otherwise be borne by Seller.

ARTICLE VII
PROVISIONS WITH RESPECT TO DEFAULT

7.01 Default by Seller. In the event that Seller should fail to consummate the transaction contemplated herein for any reason, except Purchaser's default or the termination by Purchaser of this Agreement pursuant to its express rights hereunder, Purchaser may terminate this Agreement and have the Escrow Deposit immediately returned to Purchaser as Purchaser's sole and exclusive remedy.

7.02 Default by Purchaser. In the event that Purchaser should fail to consummate the transaction contemplated herein for any reason, except a default by Seller or the termination by Purchaser of this Agreement pursuant to its express rights hereunder, the Title Company shall deliver the Escrow Deposit to Seller and the Escrow Deposit shall be retained by Seller as liquidated damages for Purchaser's default as Seller's sole and exclusive remedy. Because of the difficulty, inconvenience and uncertainty of ascertaining actual damages, no other damage, rights or remedies shall in any case be collectable, enforceable or available to Seller, and Seller agrees to accept and take the Escrow Deposit as its total damages and relief hereunder in such event.

ARTICLE VIII **MISCELLANEOUS**

8.01 Real Estate Commissions. Seller agrees to pay the Broker, for its services and efforts relating to this Agreement, a real estate commission pursuant to the terms of a separate written agreement between Seller and Broker, which commission shall be deemed earned and payable at and conditioned upon the Closing contemplated by this Agreement. Except as disclosed in the previous sentence, Seller and Purchaser each represent and warrant to the other that no real estate broker, agent, commission salesman, or other person has represented the warranting party in the negotiations for and procurement of this Agreement and of the Property. Each party agrees to defend, indemnify, and hold the other harmless from and against any claim for any such commissions, fees, or other forms of compensation by any such third party claiming through the indemnifying party, including, without limitation, any and all claims, causes of action, damages, costs and expenses (including reasonable attorney's fees and court costs) associated therewith.

8.02 Notices. Any notice provided or permitted to be given under this Agreement must be in writing and may be served by depositing same in the United States mail, addressed to the party to be notified, postage prepaid and certified, with return receipt requested, or by delivering the same in person to such party. Notice given in accordance herewith shall be effective upon the earlier of receipt at the address of the addressee or on the second (2nd) day following deposit of same in the United States mail as provided for herein, regardless of whether same is actually received. For purposes of notice, the addresses of the parties shall be as set forth in the first paragraph of this Agreement. Either party may change its address for notice by giving ten (10) days prior written notice thereof to the other party.

8.03 Entire Agreement - Modification. This Agreement (including all exhibits attached hereto) embodies and constitutes the entire understanding between the parties hereto with respect to the transactions contemplated herein, and all prior or contemporaneous agreements, understandings, representations and statements, oral or written, are merged into this Agreement. Neither this Agreement nor any provision hereof may be waived, modified, amended, discharged or terminated except by an instrument in writing signed by the party

against which the enforcement of such waiver, modification, amendment, discharge or termination is sought, and then only to the extent set forth in such instrument.

8.04 Binding Effect. This Agreement shall be binding upon and shall inure to the benefit of the parties hereto and their respective successors and assigns.

8.05 Assignment. Purchaser shall not, without first obtaining Seller's prior written consent, assign this Agreement to any person, firm, corporation or other entity such consent not to be unreasonably withheld. Upon any permitted assignment, Purchaser shall not be relieved of any of its liabilities or obligations hereunder.

8.06 Survival of Covenant. The covenants, representations and warranties contained herein shall survive and be enforceable after the Closing, shall not be merged into the documents executed at Closing and shall not be affected by any investigation, verification or approval by any party hereto or by anyone acting on behalf of any party hereto.

8.07 Counterparts. To facilitate execution, this Agreement may be executed in any number of counterparts as may be convenient or necessary, and it shall not be necessary that the signatures of all parties hereto be contained on any one counterpart hereof. Additionally, the parties hereto hereby covenant and agree that, for purposes of facilitating the execution of this Agreement, (a) the signature pages taken from separate individually executed counterparts of this Agreement may be combined to form multiple fully executed counterparts and (b) a facsimile signature shall be deemed to be an original signature. All executed counterparts of this Agreement shall be deemed to be originals, but all such counterparts taken together shall constitute one and the same agreement.

ARTICLE IX **BANKRUPTCY CONDITION**

On or about August 3, 2004 (the "Petition Date"), the following Debtors filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 101, et seq. (as amended, the "Bankruptcy Code") in the United States Bankruptcy Court for the Western District of Texas, San Antonio Division (Judge Leif Clark presiding) (the "Bankruptcy Court"): Schlotzsky's, Inc. ("SI"), Schlotzsky's Restaurants, Inc. ("Restaurants"), Schlotzsky's Real Estate, Inc. ("Real Estate"), Schlotzsky's Franchisor, LLC ("Franchisor"), Schlotzsky's Franchise Operations, LLC ("Franchise Operations"), Schlotzsky's Brand Products ("Brand Products"), DFW Restaurant Transfer Corp. ("DFW"), 56th and 6th, Inc. ("56th and 6th"), RAD Acquisition Corp. ("RAD"), San Felipe, LLC ("San Felipe") (collectively, the "Debtors"). The Debtors' cases are jointly administered under **Case No. 04-54504**. Anything in this Agreement to the contrary notwithstanding, Seller's obligations under this Agreement are subject to and conditioned upon the Bankruptcy Court entering and filing an order approving the terms and conditions of this Agreement and the execution hereof by Seller. If for any reason the Bankruptcy Court fails to enter and file an order approving this Agreement, then this Agreement shall be automatically terminated and of no further force or effect, except for the obligations of Purchaser that expressly survive the termination hereof.

[Signature page follows]

IN WITNESS WHEREOF, the parties hereto have executed this Agreement on and as of the day and year set forth below.

SELLER:

SCHLOTZSKY'S REAL ESTATE, INC.,
a Texas corporation

By: _____
Name: _____
Title: _____

Date: _____

PURCHASER:

a _____

By: _____
Name: _____
Title: _____

Date: _____

ACCEPTANCE BY THE TITLE COMPANY

The undersigned Title Company hereby acknowledges receipt of a fully executed counterpart of the above and foregoing Agreement of Sale and agrees to accept, hold, invest, return and/or deposit the Escrow Deposit and the interest accrued thereon in accordance with the provisions of such Agreement.

TITLE COMPANY:

By: _____

Name: _____

Title: _____

Date: _____

Exhibits:

"A" - Description of Land

"B" - ALTA Owner's Policy

EXHIBIT "A"
(Legal Description)

EXHIBIT "B"
(ALTA Owner's Policy)

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION**

| | | |
|--|---|--------------------------------|
| IN RE: | § | |
| | § | |
| SCHLOTZSKY'S, INC., <u>et al.</u> | § | CHAPTER 11 |
| | § | |
| | § | Case No. 04-54504 (lmc) |
| Debtors. | § | Jointly Administered |

ORDER: (A) SCHEDULING HEARING AND PRESCRIBING FORM AND MANNER OF NOTICE THEREOF TO CONSIDER SECOND MOTION OF SCHLOTZSKY'S REAL ESTATE, INC., SCHLOTZSKY'S, INC. AND RELATED DEBTORS FOR ORDER AUTHORIZING THE SALE OF CERTAIN SURPLUS PARCELS OF REAL PROPERTY; (B) APPROVING BID PROTECTIONS AND PROCEDURES IN CONNECTION WITH THE PROPOSED SALE; AND (C) GRANTING RELATED RELIEF

Upon the Motion (“Motion”) of Schlotzsky’s, Inc. (“SI”), Schlotzsky’s Real Estate, Inc. (“Schlotzsky's Real Estate”), and DFW Restaurant Transfer Corp. (“DFW”), each a debtor and debtor-in-possession (collectively, the “Debtors”), pursuant to sections 105 and 363 of Title 11

ORDER: (A) SCHEDULING HEARING AND PRESCRIBING FORM AND MANNER OF NOTICE THEREOF TO CONSIDER SECOND MOTION OF SCHLOTZSKY'S REAL ESTATE, INC., SCHLOTZSKY'S, INC. AND RELATED DEBTORS FOR ORDER AUTHORIZING THE SALE OF CERTAIN SURPLUS PARCELS OF REAL PROPERTY; (B) APPROVING BID PROTECTIONS AND PROCEDURES IN CONNECTION WITH THE PROPOSED SALE; AND (C) GRANTING RELATED RELIEF

of the United States Code, (1) authorizing and approving bid protections and procedures in connection with the proposed sale of certain surplus parcels of real property described in the Motion (the “Surplus Real Property”); (2) authorizing and approving the sale of the Surplus Real Property; (3) scheduling hearings and approving notice procedures, including scheduling a hearing to consider approval of bid protections and procedures (“Bid Procedures Hearing”); and (4) granting related relief; and upon the record of the Bid Procedures Hearing; and after due deliberation and sufficient cause appearing therefor, it is hereby:

ORDERED that the Debtors may solicit higher and better offers for the sale of the Surplus Real Property in accordance with the Auction Procedures annexed hereto as Exhibit A, which are hereby approved in their entirety. Exhibit B identifies the offers that have been accepted by the Debtors, subject to higher and better offers. The Debtors shall use their reasonable best efforts to obtain higher and better offers subject to the terms and provisions of the Purchase Agreement; and it is further

ORDERED that, with respect to the Break-Up Fee, the relief requested in the Motion is granted; and it is further

ORDERED that a hearing (the “Sale Hearing”) shall be held before the Honorable Leif M. Clark, United States Bankruptcy Judge for the Western District of Texas, on **December 15, 2004 at 9:30 A.M.**, or as soon thereafter as counsel can be heard, at the Homer Thornberry Building, 903 San Jacinto Blvd., Suite 322, Austin, Texas to consider entry of an order approving the sale of the Surplus Real Property (“Sale Order”); and it is further

ORDERED that objections, if any, to the relief requested in the Motion shall (a) be in writing, (b) comply with the Federal Rules of Bankruptcy Procedure and the Local Bankruptcy Rules of this Court, (c) set forth the names of the objector, the nature and amount of any claim or interest alleged by such objector against the Debtors' estates or properties, (d) state with particularity the legal and factual basis of such objection, and (e) be filed with the Clerk of the Bankruptcy Court with a copy thereof served upon Haynes and Boone, LLP, counsel to the Debtors, 600 Congress Avenue, Suite 1300, Austin, Texas 78701, Attn: Sarah Foster, such that all objections are received and filed no later than 4:00 p.m., CDT, on December 13, 2004; and it is further

ORDERED that the Debtors shall, no later than December __, 2004, serve a copy of this Order by first-class mail on (a) the twenty (20) largest unsecured creditors of each Debtor; (b) all of the pre-petition lenders with liens on the Surplus Real Property; (c) the United States Trustee; (d) counsel to the Purchasers; (e) all applicable federal, state and local taxing authorities; (f) the District Director of the Internal Revenue Service; (g) any other party, which, to the best of the Debtors' knowledge as of the Petition Date, asserts a lien, mortgage, or security interest in the Surplus Real Property, (h) any entity which has expressed an interest in purchasing the Surplus Real Property or that the Debtors believe may have an interest in the Surplus Real Property; and (i) any entity entering a notice of appearance in these cases and shall be posted on www.hilcorealestate.com and at www.haynesboone.com/schlotzskys; and it is further

ORDERED that notice of the Motion and the Sale Hearing as provided for herein is hereby deemed good and sufficient notice under the circumstances; and it is further

ORDER: (A) SCHEDULING HEARING AND PRESCRIBING FORM AND MANNER OF NOTICE THEREOF TO CONSIDER SECOND MOTION OF SCHLOTZSKY'S REAL ESTATE, INC., SCHLOTZSKY'S, INC. AND RELATED DEBTORS FOR ORDER AUTHORIZING THE SALE OF CERTAIN SURPLUS PARCELS OF REAL PROPERTY; (B) APPROVING BID PROTECTIONS AND PROCEDURES IN CONNECTION WITH THE PROPOSED SALE; AND (C) GRANTING RELATED RELIEF

ORDERED that the Sale Hearing may be adjourned from time to time without further notice to creditors or other parties-in-interest other than by an announcement of the adjourned date at such hearing.

#

ORDER: (A) SCHEDULING HEARING AND PRESCRIBING FORM AND MANNER OF NOTICE THEREOF TO CONSIDER SECOND MOTION OF SCHLOTZSKY'S REAL ESTATE, INC., SCHLOTZSKY'S, INC. AND RELATED DEBTORS FOR ORDER AUTHORIZING THE SALE OF CERTAIN SURPLUS PARCELS OF REAL PROPERTY; (B) APPROVING BID PROTECTIONS AND PROCEDURES IN CONNECTION WITH THE PROPOSED SALE; AND (C) GRANTING RELATED RELIEF

EXHIBIT A

SCHLOTZSKY'S, INC., ET AL.

PROPOSED AUCTION PROCEDURES

The following procedures (the "Auction Procedures") shall govern the prospective sale ("Sale") of the Surplus Real Property of Schlotzsky's Real Estate, Inc. ("Schlotzsky's Real Estate") and/or Schlotzsky's, Inc. ("SI") and/or DFW Restaurant Transfer Corp ("DFW") to be sold pursuant to the Sale Agreements in the form attached to the Motion of Schlotzsky's Real Estate, Inc. and for the consideration identified in the DEBTORS' SECOND MOTION FOR ORDERS: (A)(I) APPROVING BID PROTECTIONS AND PROCEDURES IN CONNECTION WITH THE PROPOSED SALE OF CERTAIN SURPLUS PARCELS OF REAL PROPERTY, AND (II) SCHEDULING A HEARING TO CONSIDER APPROVAL OF SUCH SALE AND PRESCRIBING THE FORM AND MANNER OF NOTICE WITH RESPECT THERETO; AND (B) AUTHORIZING AND APPROVING THE SALE OF SUCH REAL PROPERTY, FREE AND CLEAR OF ALL LIENS, CLAIMS AND ENCUMBRANCES AND GRANTING RELATED RELIEF are available for review at www.haynesboone.com/schlotzskys. These Auction Procedures have been approved by and authorized by order dated December __, 2004 (the "Bid Procedures Order") of the United States Bankruptcy Court for the Western District of Texas, San Antonio Division (the "Bankruptcy Court"). The Debtors will seek entry of an order authorizing and approving the sale of the Surplus Real Property to a qualified bidder that the Debtors, in the exercise of their sole business judgment, determine has made the highest and best offer to purchase the Surplus Real Property.

1. Form and Content of Overbids.

All Bids must satisfy the following requirements:

- A. A separate bid must be made for each parcel of the Surplus Real Property.
- B. The purchase price of any initial bid by any third party must include consideration of at least the value of the consideration being offered by Purchaser, plus additional consideration of not less than the greater of 3% of the consideration offered by Purchaser plus \$10,000 (an "Initial Minimum Overbid").
- C. All subsequent bids (together with the Initial Minimum Overbid, each an "Overbid") submitted at the Auction (as defined and described in subparagraph "3" below), including any by Purchaser, must include additional consideration of at least \$10,000 over the previous Overbid and meet the Minimum Initial Overbid requirement.
- D. Overbids shall not be conditioned on the outcome of any remaining or unperformed due diligence by the bidder. Overbids shall not be subject to any financing contingencies. The Debtors will not be required to assume any payment risk whatsoever (acceptable methods of payment include letters of credit, cash escrow, or wire transfers).

E. Prior to the Auction described in subparagraph “3” below, and by no later than the date set forth in subsection viii below, Overbids (other than those by Purchaser) shall be accompanied by a cash deposit in the amount of 10% of the Overbid (the “Deposit”). The Deposit and any interest thereon shall be applied to the purchase price if depositor is the successful purchaser and returned to any depositor, fifteen (15) days after the Closing Date. In the event the successful bidder fails to consummate the sale (other than by reason of a material breach by the Debtors or non-entry of the Sale Order), the Debtors shall retain the Deposit and any interest earned thereon. Notwithstanding anything contained herein to the contrary, the Debtors are under no obligation to earn interest on the Deposit.

F. Overbids shall be in writing in the form of the Sale Agreement, marked thereon to show any and all proposed changes thereto. The terms of any Overbids must be substantially the same as those contained in the Sale Agreement (except to the extent such changes are more favorable to the Debtors).

G. Bidders must agree to maintain the confidentiality of (and not to use for its or any other person’s benefit) any information or material regarding the Debtors, the Surplus Real Property or the Debtors’ business.

H. Overbids (other than those by Purchaser) shall be accompanied by appropriate evidence, reasonably satisfactory to the Debtors, or if a dispute arises, to the Court, of the bidder’s financial ability to conclude a transaction on or prior to the Closing Date contained in the Purchase Agreement (the “Financials”). Financials may be (a) personal financial statements completed within the last six (6) months, (b) tax returns for the past two (2) tax years, or (3) a current bank statement reflecting sufficient funds to close the purchase.

2. Time for Submission of Overbids.

Overbids for any parcel of Surplus Real Property, together with the Financials, shall be delivered so as to be received by Schlotzsky's Real Estate, Inc., 203 Colorado Street, Suite 800, Austin, Texas 78701, Attn: Legal Department, Facsimile Number 512-236-3740, with a copy to Haynes and Boone, LLP, 600 Congress Avenue, Suite 1300, Austin, Texas 78701, Attn: Sarah Foster counsel for the Debtors, no later than noon (Austin, Texas time) on December __, 2004, and no other Overbid shall be considered after such time without leave of the Court; provided, however, that qualified bidders that submit timely Overbids and Purchaser shall be permitted to make subsequent Overbids at the Auction described in subparagraph “3” below.

3. The Auction.

The Debtors shall determine whether any Initial Minimum Overbids have been received. If at least one Initial Minimum Overbid has been received, an auction (the “Auction”) will be conducted on December __, 2004 at the offices of Haynes and Boone, LLP, 600 Congress Avenue, Suite 1300, Austin, Texas 78701. Only Purchaser and any bidder that has timely submitted an Initial Minimum Overbid in conformity with paragraph “1” above shall be entitled to participate in the Auction. At the commencement of the Auction of each parcel, the Debtors

shall announce the highest and best Overbid and invite those parties entitled to participate in the Auction to submit higher and better bids. The Auction shall be in the format of an open “outcry” auction with all parties that are entitled to participate being permitted to hear the oral Overbids (and see any changes proposed to the Purchase Agreement). At the Auction, the Debtors shall determine (i) the final highest and best offer for each parcel of the Surplus Real Property (the “Accepted Offer”), which shall be submitted for approval to the Court at the Sale Hearing and (ii) the next highest and best offer for each parcel of the Surplus Real Property, if any (the “Alternative Offer”). The Debtors reserve the right to determine, in their sole discretion, which offer is the highest and best offer and to reject, any time prior to entry of an order approving the sale, any offer which is deemed to be inadequate, or not in conformity with these terms and conditions, or contrary to the best interest of the estates.

4. Selection of Successful Bidder.

The Accepted Offer and the Alternative Offer shall remain open and irrevocable until the sale of the Surplus Real Property is fully consummated. If the offeror of the Accepted Offer is not ready, willing and able to consummate the purchase of the Surplus Real Property pursuant to the Accepted Offer on or before the Closing, the Debtors’ acceptance of such offer shall be automatically revoked without penalty of any kind whatsoever to the Debtors. The offeror of the Accepted Offer shall forfeit its Deposit and the Debtors shall reserve its right to seek any additional damages permitted under law against such offeror, and the Alternative Offer shall become the Accepted Offer. The Debtors shall reserve the right, in their sole discretion, to modify or impose such other terms and conditions regarding offers up to and including the conclusion of the Auction, as may be determined in the best interests of their estates, creditors and other parties-in-interest. The bidders whose offer becomes an Accepted Offer or Alternative Offer shall increase their deposits within two business days following the Auction so that the deposits equal 10% of the Accepted Offer or Alternative Offer.

5. Bankruptcy Court Approval of the Successful Bidder.

The sale of the Surplus Real Property is subject to Court approval. The Sale Hearing will be held before the Honorable Leif M. Clark, United States Bankruptcy Judge for the Western District of Texas, on December 15, 2004 at 9:30 A.M., or as soon thereafter as counsel can be heard, at the United States Courthouse, 615 E. Houston St. Room 383, P.O. Box 1439, San Antonio, Texas 78295-1439, to consider entry of the Sale Order. The Court shall retain jurisdiction to determine all matters arising out of or relating to the making of an objection or a higher and better bid, and each person or entity by making such an objection or bid shall subject itself to the jurisdiction of the Court with respect to all matters arising out of such objection or bid and all matters related thereto.

6. Business Judgment of the Debtors.

The Debtors reserve the right to modify or impose such other terms and conditions regarding offers up to and including the conclusion of the Auction, as may be determined to be in the best interests of their estates, creditors, and other parties in interest (subject to the terms of the Purchase Agreement).

EXHIBIT B

| LOCATION | BIDDER | AMOUNT OF BID | LENDER | DEBT (as of 11/20/04) |
|---|---|----------------------|---|------------------------------|
| *7328 Shallowford Rd. Chattanooga, TN | Kingott, LLC 26 Maxwell Road Richmond, VA 23226 | \$700,000 | First Volunteer Bank of Tennessee | \$598,000 |
| *7709 E. Ben White Blvd. Austin, TX | Kingott, LLC 26 Maxwell Road Richmond, VA 23226 | \$350,000 | State Bank | \$4,050,000 |
| 5760 Airport Blvd. Austin, TX (Koenig) | James M. Easterling, Jr. & Kensinger Properties Limited 1800 St. James Place, Ste. 206 Houston, TX 77056 | \$260,000 | State Bank | \$4,050,000 |
| 1001 Palm Valley Blvd. Round Rock, TX | James M. Easterling, Jr. & Kensinger Properties Limited 1800 St. James Place, Ste. 206 Houston, TX 77056 | \$480,000 | State Bank | \$4,050,000 |
| 1409 E. Tyler Athens, TX | Thomas Kirk May, Jr. 4807 W. Lovers Lane, Ste. 200 Dallas, TX 75209 | \$150,000 | State Bank | \$4,050,000 |

*These two properties were bundled for a total bid of \$1,050,000.

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION**

| | | |
|--|---|--------------------------------|
| IN RE: | § | |
| | § | |
| SCHLOTZSKY'S, INC., <u>et al.</u> | § | CHAPTER 11 |
| | § | |
| Debtors. | § | Case No. 04-54504 (lmc) |
| | § | Jointly Administered |

**SECOND ORDER AUTHORIZING AND APPROVING THE SALE OF CERTAIN
PARCELS OF REAL PROPERTY, FREE AND CLEAR OF ALL LIENS, CLAIMS AND
ENCUMBRANCES; AND GRANTING RELATED RELIEF**

Before the Court is the Second Motion of Schlotsky's, Inc. ("SI"), Schlotsky's Real Estate, Inc. ("Schlotsky's Real Estate"), and DFW Restaurant Transfer Corp. ("DFW"), each a debtor and debtor-in-possession (collectively, the "Debtors"), for Orders: (A)(i) Approving Bid Protections and Procedures in Connection With the Proposed Sale of Certain Surplus Parcels of Real Property (the "Surplus Real Property"), and (ii) Scheduling a Hearing to Consider Approval of Such Sale and Prescribing the Form and Manner of Notice with Respect Thereto; and (B) Authorizing and Approving the Sale of Such Real Property; Free and Clear of All Liens, Claims and Encumbrances and Granting Related Relief (the "Motion"). In the Motion, the Debtors seek two orders: (a) one

**SECOND ORDER AUTHORIZING AND APPROVING
THE SALE OF CERTAIN PARCELS OF REAL PROPERTY,
FREE AND CLEAR OF ALL LIENS, CLAIMS AND
ENCUMBRANCES; AND GRANTING RELATED RELIEF**

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approving certain bid protections for various proposed purchasers (“Purchasers”) and bid procedures for an auction of certain Surplus Real Property (“Bidding Procedures Order”), and (b) one approving the ultimate sale of the Surplus Real Property to the Purchasers or to a higher or better bidder (“Sale Order”). The Court having previously granted the Bidding Procedures Order at a hearing on December ____, 2004 (the “Bidding Procedures Hearing”), the Court now considers the portion of the Motion seeking the Sale Order. Following its consideration of the arguments of counsel, the evidence presented and the record before it, the Court made oral findings and conclusions on the record in accordance with Bankruptcy Rule 7052. In addition

IT IS HEREBY FOUND AND DETERMINED, that

Jurisdiction

1. The Court has jurisdiction over this matter under 28 U.S.C. §§ 157 and 1334. This proceeding is a core proceeding under 28 U.S.C. § 157(b)(2)(N). Venue is proper in this district under 28 U.S.C. 1408 and 1409. The statutory predicates for the relief requested herein are 11 U.S.C. §§ 105 and 363, as complemented by Rules 2002 and 6004 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”).

Notice

2. Due notice of the proposed form of this Order, the proposed sale of the Surplus Real Property pursuant to the certain Agreements of Sale between each of the Debtors and the prospective Purchasers, the Motion, and the Sale Hearing has been given to all parties entitled thereto, and the Debtors have complied with all of the procedures for notice of the Motion and the Sale Hearing as approved by the Court. Such notice constitutes appropriate and adequate notice to all parties-in-interest under the circumstances and complies with Section 102(1) of the Bankruptcy Code and Rules 2002, 6004, and 9014 of the Bankruptcy Rules. No other or further notice of the Motion, the Sale Hearing, or the entry of this Order is necessary.

3. Under the circumstances, a reasonable opportunity to object or be heard regarding the relief requested has been afforded to all interested entities.

Objections; Other Bidders

4. No objections to the Motion were filed. There were no overbids. Thus, the buyers are those identified in the Motion.

Justification for Sale

5. The Debtors have established sound business justification in support of the proposed sale of the Surplus Real Property to the prospective Purchasers (or successful overbidders) pursuant to the terms of those certain Agreements of Sale (the “Sale Agreements”) as described in the Motion and on **Exhibit A** attached hereto. Such business justifications include, but are not limited to, the facts that (i) the Surplus Real Property is burdensome to the estate, (ii) Hilco marketed the Surplus Real Property extensively, and (iii) the consideration to be received is reasonable and resulted from good faith, arm’s length bona fide negotiations.

6. Each transaction contemplated by the Motion, as approved and implemented by this Order, is in compliance with and satisfies all applicable provisions of the Bankruptcy Code including, without limitation, Sections 363(b), (f), and (o). The terms and conditions of the sale of the Surplus Real Property approved by this Order and contemplated by each of the respective Sale Agreements are fair and reasonable. The sale of the Surplus Real Property outside of a plan of reorganization pursuant to each of the Sale Agreements is reasonable and appropriate under the circumstances and does not impermissibly dictate the terms of any such plan.

7. The sale of the Surplus Real Property to the proposed Purchasers (or any successful overbidders) for the consideration set forth in the Motion and in **Exhibit A** to this Order is in the best interest of the Debtors’ estates, their creditors, and all parties-in-interest.

Good Faith

8. The Sales Agreements have been negotiated, proposed and entered into by the parties in good faith, from an arm's length bargaining position and without collusion. Neither the Debtors nor any proposed Purchasers have engaged in any conduct that would prevent the application of Section 363(m) of the Bankruptcy Code or cause the application of Section 363(n) of the Bankruptcy Code to these transactions.

Corporate Authority; Consents and Approvals

9. The Debtors have full corporate power and authority to execute the Sale Agreements, and the sale of the Surplus Real Property has been duly and validly authorized by all necessary corporate power and authority necessary to consummate the transactions contemplated by the Sale Agreements.

10. The sale of the Surplus Real Property will be legal, valid and effective sales of the Surplus Real Property and will vest the proposed Purchasers (or successful overbidders) with all right, title and interest of the Debtors in and to the Surplus Real Property as of the date of the closing of the sale free and clear of all liens and claims pursuant to Bankruptcy Code §§ 363(b) and (f).

BASED UPON THE FOREGOING, IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT

11. The Motion shall be, and hereby is, granted in its entirety. All objections to the Motion that were not withdrawn or settled on the record of the Sale Hearing are hereby overruled in their entirety.

Sale of Surplus Real Property is Authorized

12. The Debtors are authorized pursuant to Section 363 of the Bankruptcy Code to enter into each of the Sale Agreements with each of the proposed Purchasers listed in the chart found in paragraph 13 of the Motion, or, in the event there has been one or more overbids (as defined in the

Motion), the party whose offer is an Accepted Offer, and in the event that the Accepted Offer fails to close, the party whose offer is an Alternative Offer. A list of the proposed Purchasers for each parcel are identified on **Exhibit A**, attached hereto.

13. The Sale Agreements, which were introduced into evidence at the hearing, are hereby approved in their entirety.

Sale of Surplus Real Property Free and Clear is Authorized

14. The sale of Surplus Real Property to each of the prospective Purchasers pursuant to each of the Sale Agreements free and clear of all liens, claims and encumbrances is hereby authorized under Sections 363(f) of the Bankruptcy Code; and any such liens, claims or encumbrances on the Surplus Real Property will attach to the proceeds of the sale transaction with the same force and effect as such liens previously had on the Surplus Real Property, with the exception of any amounts paid in accordance with this Order and released at the closing.

15. All persons and entities holding liens, claims, interests or encumbrances of any kind or nature with respect to the Surplus Real Property are hereby forever barred and permanently enjoined from asserting such liens, claims, interests and encumbrances of any kind or nature against the Surplus Real Property or the Purchasers, their successors, assigns or affiliates. All persons and entities holding liens, claims, interests or encumbrances of any kind or nature with respect to the Surplus Real Property are hereby directed to execute and deliver all additional instruments and documents which the purchasers may deem reasonable and necessary, convenient or desirable to evidence the sale of the Surplus Real Property free and clear of all liens, claims, interests and encumbrances.

16. The Debtors shall cause the title company to remit directly to State Bank (“GE”) via wire transfer at closing all net proceeds from the sale of the properties pledged to State Bank. Such net proceeds shall consist of the purchase price minus (i) the commission of Hilco Real Estate, Inc.,

(ii) the Debtors' prorated portion of the applicable real property taxes relating to the Raleigh Property and (iii) other reasonable and customary charges shown on the title company's closing statement.

17. With respect to the Surplus Real Property located in Chattanooga, Tennessee, on the Closing Date, the Purchaser shall deliver the Purchase Price to the Title Company in immediately available funds. The Title Company shall hold the Purchase Price in escrow along with the Escrow Deposit. All liens, claims and encumbrances on the Surplus Real Property shall attach to the proceeds held in escrow by the Title Company with the same force and effect as such liens previously had on the Surplus Real Property. The Title Company may pay the Hilco commission from the escrow at any time following the Closing Date. The remaining sale proceeds as to each property shall remain in escrow subject to paragraph 19 of this Order.

18. Taxes owed on the Surplus Real Property shall be prorated to the Closing Date and shall be paid based on the current year tax bills or, if such tax rate has not been fixed for the then current year, the apportionment of taxes shall be upon the basis of the tax rate of the preceding year applied to the latest assessment.

19. Each creditor asserting a lien in the Surplus Real Property, other than State Bank, shall deliver to the Debtors and the Title Company a statement reflecting the amount of its claim within five (5) business days of the date of this Order. The Debtors shall have ten (10) days to inform the Title Company and creditor in writing of any dispute regarding the amount of the claim and the basis for the dispute. If the Debtors dispute the amount of the claim, the Title Company shall not pay the claim until it receives (a) a court order establishing the amount of the claim, or (b) a letter signed by both the creditor and the Debtors designating the amount of the claim. Upon the presentation of a court order or a letter agreement resolving the amount of a creditor's claim, the Title Company shall immediately release the amount of the creditor's claim to the creditor in accordance with its instructions. To the extent that the creditor's claim is determined to be fully

secured, such creditor shall be entitled to the payment of interest after the Closing Date and until the date that payment is received as well as any reasonable fees, costs or other charges provided under 11 U.S.C. §506(b).

20. Following payment of all secured creditors from the sale proceeds, the Title Company shall deliver all remaining proceeds to the Debtors. The Debtors shall not commingle the proceeds with its operating funds. The Debtors shall hold the proceeds in escrow in a segregated account pending further Order of this Court.

Miscellaneous

21. The Debtors are hereby authorized to take any and all other actions necessary to consummate the proposed transactions including the distribution of certain of the sale proceeds to the mortgagees and any other secured creditors at closing, as determined necessary.

22. Except as expressly permitted or otherwise specifically provided by the respective Sale Agreements or this Order, and only to the fullest extent authorized by applicable law, all persons and entities (and their respective successors and assigns) including, but not limited to, all debt security holders, equity security holders, governmental, tax, and regulatory authorities, lenders, trade and other creditors, holding interests, liens, claims, and/or encumbrances of any kind or nature whatsoever against or in the Debtors or the Surplus Real Property (whether legal or equitable, secured or unsecured, matured or unmatured, contingent or non-contingent, senior or subordinated), arising under or out of, in connection with, or in any way relating to, the Debtors, the Surplus Real Property, the operation of the Debtors' business prior to the Closing Date, or the sale of the Surplus Real Property to the Purchasers, hereby are forever barred, estopped, and permanently enjoined from asserting such persons' or entities' interests, liens, claims, or encumbrances against the Purchasers, their affiliates, designees, assignees, or successors, their properties, or their assets. Effective upon the Closing Date, the Purchasers shall have no liability for any claims (as defined in Section 101(5)

of the Bankruptcy Code) against the Debtors or their estates or interests in the Debtors or their estates, except as expressly provided in the respective Sale Agreements, and only to the fullest extent authorized by applicable law.

23. Except for the liabilities expressly assumed under the Sale Agreements, if any, and only to the fullest extent authorized by applicable law, the Purchasers shall not be liable for any Claims against the Debtors or any of their predecessors or affiliates, and the Purchasers shall have no successor or vicarious liabilities of any kind or character whether known or unknown as of the closing of the sale, now existing or hereafter arising, whether fixed or contingent, with respect to the Debtors. Except for the liabilities assumed under the Sale Agreements, and only to the fullest extent authorized by applicable law, under no circumstances will the Purchasers be deemed a successor of or to the Debtors for any Claim or Encumbrance against the Debtors or the Surplus Real Property, except as set forth in the Sale Agreements.

24. If any person or entity that has filed any documents or agreements evidencing interests with respect to the Debtors or the Surplus Real Property shall not have delivered to the Debtors prior to the Closing Date, in proper form for filing and executed by the appropriate parties, instruments of satisfaction, releases of all interests which the person or entity has with respect to the Debtors or the Surplus Real Property or otherwise, then (a) the Debtors are hereby authorized to execute and file such instruments, releases and other documents on behalf of the person or entity with respect to the Surplus Real Property and (b) the Purchasers and/or the Debtors are hereby authorized to file, register, or otherwise record a certified copy of this Order, which, once filed, registered, or otherwise recorded, shall constitute conclusive evidence of the release of all interests, liens, claims, and/or encumbrances in the Surplus Real Property of any kind or nature whatsoever. This Order is deemed to be in recordable form sufficient to be placed in the filing or recording system of each and every federal, state, and local governmental agency, department, or office.

25. All entities who are presently, or on the Closing Date may be, in possession of any of the Surplus Real Property are hereby directed to surrender possession of the Surplus Real Property to the Purchasers on the Closing Date except as may be otherwise directed by the Purchasers.

26. The Sale Agreements and all other documents, agreements, and instruments necessary to effectuate and consummate the transactions contemplated by the Sale Agreements together with the terms and provisions of this Order, shall be binding upon and shall inure to the benefit of the Debtors, the Purchasers and their respective successors and assigns, including, without limitation, any trustee, responsible person, estate administrator, representative or similar person hereinafter appointed for or in connection with any of the Debtors' estates or affairs in this or in any subsequent case under the Bankruptcy Code involving the Debtors.

Nothing contained in any Chapter 11 plan of reorganization (or liquidation) confirmed in this case or the order of confirmation confirming any such plan shall conflict with or derogate from the provisions of the respective Sale Agreements or the terms of this Order.

27. This Order is a final and enforceable order immediately upon entry. The 10 day stay under Bankruptcy Rules 4001(a)(3), 6004(g) and 6006(d) is hereby waived. To the extent necessary under Rules 5003, 9014, 9021 and 9022 of the Bankruptcy Rules, the Court expressly find that there is no just reason for delay in the implementation of this Order and expressly (i) directs entry of this Order and (ii) authorizes the Debtors to consummate the transactions as soon as practicable.

28. The failure to specifically include any particular provision of the respective Sale Agreements in this Order will not diminish the effectiveness of such provision, it being the intent of this Court that the respective Sale Agreements are authorized and approved in their entirety, provided, however, that in the event of any inconsistency between this Order and the respective Sale Agreements, this Order shall control.

29. Headings are included in this Order for ease of reference only.

30. Pursuant to Section 363(m) of the Bankruptcy Code, the reversal or modification of this Order on appeal will not affect the validity of the transfer of the Surplus Real Property to Purchasers, unless the same is stayed pending appeal prior to the closing date and the consummation of the transactions authorized by this Order.

31. The provisions of this Order are non-severable and mutually dependent.

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EXHIBIT "A"

| LOCATION | BIDDER | AMOUNT OF BID | LENDER | DEBT (as of 11/20/04) |
|---|---|------------------|---|-----------------------------|
| *7328 Shallowford Rd. Chattanooga, TN | Kingott, LLC 26 Maxwell Road Richmond, VA 23226 | \$700,000 | First Volunteer Bank of Tennessee | \$598,000 |
| *7709 E. Ben White Blvd. Austin, TX | Kingott, LLC 26 Maxwell Road Richmond, VA 23226 | \$350,000 | State Bank | \$4,050,000 |
| 5760 Airport Blvd. Austin, TX (Koenig) | James M. Easterling, Jr. & Kensinger Properties Limited 1800 St. James Place, Ste. 206 Houston, TX 77056 | \$260,000 | State Bank | \$4,050,000 |
| 1001 Palm Valley Blvd. Round Rock, TX | James M. Easterling, Jr. & Kensinger Properties Limited 1800 St. James Place, Ste. 206 Houston, TX 77056 | \$480,000 | State Bank | \$4,050,000 |
| 1409 E. Tyler Athens, TX | Thomas Kirk May, Jr. 4807 W. Lovers Lane, Ste. 200 Dallas, TX 75209 | \$150,000 | State Bank | \$4,050,000 |

*These two properties were bundled for a total bid of \$1,050,000.