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**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION**

In re:  <b>JACKALOPE ESTATES, LLC</b>  Debtor.	Bankruptcy No. 09-10000 (RKM)  Chapter 11  [Filed Electronically]
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**OBJECTION TO DEBTOR'S MOTION TO SELL REAL PROPERTY FREE AND  
CLEAR OF LIENS, CLAIMS, ENCUMBRANCES AND INTERESTS PURSUANT TO  
11 U.S.C. § 363(f)(2) & (3)**

Creditor PAUL'S PAVING PRODUCTS, LLC. ("**Paul's Paving**"), through counsel, hereby objects to the *Debtor's Motion to Approve Sale of Real Property Free and Clear of Liens, Claims, Encumbrances and Interests*, dated July 7, 2009 [Docket No. 666] (the "**Motion**"), filed by the debtor and debtor-in-possession Jackalope Estates, (the "**Debtor**").

Pursuant to 11 U.S.C. § 363(k), Paul's Paving further gives notice of its intent to credit bid the full indebtedness due to it (in the amount of \$537,783.57, plus interest from and after May 31, 2009, plus attorneys' fees and costs) for the labor and materials supplied to the Debtor's property by Paul's Paving.

In further support of its objection, Paul's Paving respectfully states as follows:

## I. INTRODUCTION

The Debtor claims ownership of approximately 25± acres of real property in Tooele County known as Jackalope Estates (the “**Jackalope Estates Property**”). Paul’s Paving holds a mechanic’s lien against the Jackalope Estates Property by virtue of its timely-filed mechanic’s lien (Paul’s Paving Mechanic’s Lien), recorded against the Jackalope Estates Property in July 2007. Paul’s Paving lawfully commenced foreclosure of its mechanic’s lien in the Third District Court in and for Tooele County in November 2007.

Further, Paul’s Paving has not consented to the sale under Bankruptcy Code 363(f)(2). Also, because the Debtor’s proposed sale is for less than the face amount of the liens against the Jackalope Estates Property, under Bankruptcy Code Section 363(d) the Debtor cannot sell the property free and clear of all liens the sale is insufficient to pay of all liens.

Finally, because Paul’s Paving can credit bid the value of its mechanic’s lien at a sale, the sale to Vulture Real Estate Fund cannot be approved and is subject to Paul’s Paving’s credit bid to purchase the right of Jackalope Estates.

In short, because Paul’s Paving can credit bid at the sale, and because the other purported liens are subordinate to the rights of Paul’s Paving as a lawful and senior lienor, only Paul’s Paving can purchase the Property based on its credit bid and payment of \$5.5 million cash for the Property. Otherwise, the sale should not be approved under section 363(b), and it certainly should not be free and clear of Paul’s Paving’s liens under section 363(f).

## II. BACKGROUND

### A. *Paul's Paving's Mechanic's Lien Claim*

1. Paul's Paving completed its contract to supply asphalt and cement to the Jackalope Estates development on March 31, 2007.
2. Paul's Paving timely filed with the Tooele County Recorder its mechanic lien ("**Paul's Paving Mechanic's Lien**") against the Property on July 31, 2007, as entry No. 246812345.
3. Paul's Paving lawfully commenced foreclosure of its mechanic's lien in the Third District Court in and for Tooele County on November 1, 2007, as case no. 07-9751 assigned to the Honorable Charles Babbit.
4. As of May 29, 2009, the balance due to Paul's Paving including accruing interest, attorneys' fees and costs is no less than \$537,783.57.

## III. SUMMARY OF OBJECTION

5. Debtor's *Motion to Approve Sale of Real Property Free and Clear of Liens, Claims, Encumbrances and Interests* should be denied under section 363 of the Bankruptcy Code.
6. Paul's Paving's Objection to the proposed sale should be granted and its offer to purchase the Property should be accepted, approved and granted by the Court, allowing Paul's Paving to credit bid in the amount and pay the balance of the purchase price in the sum of \$5.5 Million.
7. Pursuant to 11 U.S.C. § 363(k), Paul's Paving hereby credit bids for the purchase of the Jackalope Estates Property in the full amount of its mechanic's lien and a cash payment of \$5.5 Million, a total purchase price of \$ \$6,037,783.57.

#### IV. ARGUMENT

##### A. **The Debtor Has Not Established that the Proposed Sale of the Jackalope Estates property together with the Non-Debtor Property Can Be Authorized under Section 363(b) of the Bankruptcy Code.**

8. Paul's Paving Mechanic's Lien is subject only to TARP Bank's first-priority trust deed in the amount of \$1.5 Million, which debt will be paid in full based on Paul's Paving's credit bid and purchase of Jackalope Estates Property.

9. Paul Paving's Mechanic's Lien is senior to any claim of DARTH, which claim is \$3.8 million.

10. Under the Bankruptcy Code, "[t]he Trustee [or debtor-in-possession], 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). A sale of a debtor's assets outside the ordinary course of business, however, should be authorized only if the debtor meets four requirements: "(1) that a sound business reason exists for the sale; (2) 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; (3) that the sale price is fair and reasonable; and (4) that the proposed buyer is proceeding in good faith." In re Medical Software Solutions, 286 B.R. 431 (Bankr. D. Utah 2002); accord Committee of Equity Security Holders v. Lionel Corp. (In re Lionel Corp.), 722 F.2d 1063, 1071 (2d Cir. 1983) (identifying the "sound business purpose" test); In re Abbotts Dairies of Penn., Inc., 788 F.2d 143, 145-47 (3d Cir. 1986) (implicitly adopting the articulated business justification test of Lionel, and adding the "good faith" requirement); In re Delaware & Hudson Ry. Co., 124 B.R. 169, 176 (D. Del. 1991).

11. As Collier notes:

There has been disagreement historically on the issue of whether and under what circumstances a chapter 11 debtor may sell substantial assets under section 363. It is now generally accepted that section 363 allows such sales in chapter 11, provided, however, that the sale proponent

demonstrates a good, sound business justification for conducting the sale prior to confirmation (other than appeasement of the loudest creditor), that there has been adequate and reasonable notice of the sale, that the sale has been proposed in good faith, and that the purchase price is fair and reasonable. These factors are considered to assure that the interests of all parties in interest are protected and that the sale is not for an illegitimate purpose.

3 Collier on Bankruptcy (15th Rev. 2002), ¶ 363.02[4], at 363-19 to -20.

(i) *The Sale is in Good Faith and Pays Paul's Paving as a lawful Mechanic's Lienor.*

12. As described above, Paul's Paving credit bid and cash payment if \$5.5 million will pay TARP and Darth its debt in full and the net sales proceeds will be adequate to pay in full all secured claims.

13. In short, the sale will also provide potential distribution to unsecured creditors and will satisfy in full the claims of secured creditors which are not subordinate or subject to Paul's Paving Mechanic's Lien.

14. Because the Darth Family knew, or should have known, that Paul's Paving Mechanic's Lien and because Jackalope Estates property it is subject to Paul Paving's Mechanic's Lien, the Darth Family receives payment for its subordinate claim as a secured creditor.

15. Because the consent of Paul's Paving is needed for the sale and the sale results in the resolution of more than \$6 million of claims against the Debtor's estate, the sale complies with the purpose and intent of Section 363.

16. The sale to the Vulture Real Estate Fund for only \$5.5 Million is not made in good faith. The sale is less than the total consideration offered by Paul's Paving. Further, the Debtor has provided no evidence concerning the marketing of Jackalope Estates, a prime residential development in Tooele County.

17. The proposed allocation of the sale proceeds based on the sale to Vulture Real Estate also improperly and unlawfully excludes payment to Paul's Paving and is fatally defective on that basis alone.

18. Because the sales proceeds exclude payment to Paul's Paving and because the Jackalope Estates property has not been properly marketed, the Debtor has not exercised its good faith or business judgment with respect to the proposed sale. The sale to DARTH Family Fund should not be approved by this Court.

*(iv) Notice of the proposed sale is neither adequate nor reasonable.*

19. Notice is the cornerstone of the Bankruptcy Code. A pre-confirmation sale of all or substantially all of a debtor's assets pursuant to section 363 of the Bankruptcy Code has sometimes been described as tantamount to a *sub rosa* plan. Accordingly, a motion under section 363(b) and/or (f) of the Bankruptcy Code requires substantial and meaningful notice.

20. The notice provided by the Debtor in the instant case is neither adequate nor reasonable under the circumstances and fails to explain whether or how the Debtor exercised business judgment.

21. The Sales Motion is devoid of any information regarding marketing efforts or any other factual predicate for a determination that the sales process was fair and reasonable. The Court has no basis to determine whether a sale of the Jackalope Estates property is likely to yield a higher and better price for the Jackalope Estates property than that proposed by Paul's Paving.

22. In summary, the notice is not adequate and does not provide the Court or creditors with a meaningful opportunity to consider the merits of the proposed sale.

**B. The Debtor Has Not Satisfied the Requirements of Bankruptcy Code Section 363(f) for a Sale Free and Clear of Liens, Encumbrances and Interests.**

23. Under Bankruptcy Code section 363(f), a debtor-in-possession may sell property free and clear of a lien, encumbrance or interest in such property only if:

(1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;

(2) such entity consents;

(3) 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;

(4) such interest is in bona fide dispute; or

(5) 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).

24. Courts have ruled that a sale may not be approved free and clear of liens under Bankruptcy Code § 363(f)(3) unless the sale price exceeds the face amount of the claims secured by liens on the property. See, e.g., In re Canonigo, 276 B.R. 257 (Bankr. N.D. Cal. 2002); In re Perroncello, 170 B.R. 189, 191 (Bankr. D. Mass. 1994); In re Terrace Chalet Apartments, Ltd., 159 B.R. 821, 828-29 (N.D. Ill. 1993); In re Bobroff, 40 B.R. 526 (Bankr. E.D. Pa. 1984).

25. The Debtor has not satisfied, and cannot satisfy, any of these requirements. Paul's Paving has not consented. The Jackalope Estates property is not being sold for an amount greater than the aggregate amount of the claims secured by liens against the property. Finally, Paul's Paving's Mechanic's Lien is not bona fide dispute because of its existing mechanic's lien and pending, but now stayed, foreclosure action. Accordingly, the Debtor should not be authorized to sell the Jackalope Estates property free of Paul's Paving Mechanic's Lien pursuant to Bankruptcy Code section 363.

**V. CONCLUSION**

WHEREFORE, Paul's Paving respectfully prays that the Court DENY the Sale Motion, and that the Court APPROVE the sale to Paul's Paving for the cash payment of \$5.5 Million together with its credit bid of \$537,783.57, a total purchase price of \$6,037,783.57; and requests such other and further relief as is just and equitable.

Dated: July 4, 2009

**PARSONS KINGHORN HARRIS**

/s/ Harold L. Reiser  
Harold L. Reiser  
*Attorneys for secured creditor PAUL'S PAVING  
PRODUCTS, LLC*