

George B. Hofmann (10005)  
**Parsons Kinghorn Harris**  
A Professional Corporation  
111 East Broadway, 11th Floor  
Salt Lake City, UT 84111  
Telephone: (801) 363-4300  
Facsimile: (801) 363-4378

Attorneys for Jackalope Estates, LLC

---

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

---

In re

JACKALOPE ESTATES, LLC,  
  
Debtor.

Bankruptcy No. 09-10000 (RKM)

Chapter 11

[Filed Electronically]

---

**DEBTOR'S MOTION TO APPROVE SALE OF REAL PROPERTY FREE AND CLEAR  
OF LIENS, CLAIMS, ENCUMBRANCES, AND INTERESTS**

Pursuant to Bankruptcy Code §§ 105, and 363 and Federal Rules of Bankruptcy Procedure 2002, 4001, and 6004, Jackalope Estates, LLC (the "Debtor"), through its undersigned counsel, hereby moves this Court for entry of an order authorizing the sale of the Debtor's real property free and clear of liens, claims, encumbrances and interests. In support of this motion, the Debtor respectfully represents as follows:

**JURISDICTION AND GENERAL BACKGROUND**

1. The Debtor filed a voluntary Chapter 11 petition on June 15, 2009. The Debtor continues to operate its business and manage its property as a debtor in

possession pursuant to sections 1107 and 1108 of the Bankruptcy Code. No examiner or trustee has been appointed in this Case.

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

3. The Debtor is in the business of real estate development. Its primary asset is a real estate development located on the outskirts of Grantsville, Utah known as Jackalope Estates (the “Real Property”). The Real Property consists of (a) 20 fully entitled and buildable vacant lots, and (b) 25 lots on which a completed home has been constructed.

4. The Debtor believes that there are two valid liens on the Real Property. Texas American Republic People’s Bank (“TARP Bank”) is secured by a first-priority deed of trust which secures \$1.5 million. The Darth Family Fund (“Darth”) is secured by a second-priority deed of trust to secure \$3.8 million.

5. By this Motion, the Debtor requests entry of an order approving the sale of the Real Estate to the Vulture Real Estate Fund (“Vulture”) for a total sale price of \$5.5 million.

### **APPLICABLE AUTHORITY**

#### **I. The Sale Should Be Approved Pursuant to Bankruptcy Code § 363**

Bankruptcy Code § 363 provides that a debtor, “after notice and a hearing, may use, sell or lease, other than in the ordinary course of business, property of the estate.” Bankruptcy Code § 363(b). To approve the use, sale or lease of property outside of the ordinary course of business, the Debtor must show 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).

In general, bankruptcy courts often defer to a debtor's business judgment regarding the sale of estate assets, unless such decision is arbitrary and capricious. See In re Curlew Valley Assocs., 14 B.R. 506, 511-13 (Bankr. D. Utah 1981). Courts generally will not second-guess a debtor's business decisions when those decisions involve "a business judgment made in good faith, upon a reasonable basis, and within the scope of his authority under the Code." Curlew Valley, 14 B.R. at 513-14.

The Debtor has sound business reasons for the proposed sale. Vulture has offered to purchase the Real Property for \$5.5 million. This sale will yield sufficient proceeds to pay in full the two claims secured by the Real Property, and also produce equity for the Debtor's estate in the approximate amount of \$200,000. The Debtor believes that this sale price is fair, as evidenced in part by Darth's recent appraisal for the Real Property showing the value of the Real Property to be only \$5 million.

The Debtor submits that this motion provide ample notice to parties in interest of the proposed sale.

The identity of the proposed buyer has been disclosed. Vulture is the proposed purchaser of the Real Property. The Debtor has engaged in extensive, good-faith negotiations with Vulture, and submits that Vulture has also negotiated in good-faith to acquire the Debtor's assets.

**II. The Sale Satisfies the Requirements of Bankruptcy Code § 363(f) for a Sale Free and Clear of Liens, Claims, Encumbrances and Interests**

Pursuant to Bankruptcy Code § 363(f), the Debtor may sell property free and clear of any lien, claim, or interest in such property, if, among other things:

- (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 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.

Because Bankruptcy Code § 363(f) is drafted in the disjunctive, satisfaction of any one of the five requirements will be sufficient to permit the sale of the Real Property free and clear of liens, claims, encumbrances, pledges, mortgages, security interests, charges, options, and other interests (collectively, the “Interests”). The Debtor believes that there are two valid Interests in the Real Property—the first priority lien of TARP Bank which secures debt of \$1.5 million, and the second priority lien of the Darrh Family Fund, which secures debt of \$3.8 million. In addition, the Debtor is aware that Paul’s Paving asserts a mechanics’ lien against the Real Estate in the amount of \$500,000.

**A. The Sale May Be Approved Free and Clear of Interests Because Paul’s Paving’s Mechanics’ Lien is Subject to a Bona Fide Dispute**

In order to approve a sale free and clear of liens pursuant to Bankruptcy Code § 363(f)(4), the Court need only find that there is an objective basis for either a factual or legal dispute as to the validity of the interest. Union Planters Bank v. Burns (In re Gaylord Grain L.L.C.), 306 B.R. 624 (8th Cir. B.A.P. 2004) (citing cases).

There are two objective grounds for a legal dispute as to the validity of Paul's Paving's mechanics' lien. First, Paul's Paving failed to file a pre-lien notice as required by Utah Code Ann. § 38-1-32, and therefore may not assert its alleged mechanics' lien against the Real Property. Second, Paul's Paving failed to file a lis pendens after it commenced its state court action to foreclose its mechanics' lien as required by Utah Code Ann. § 38-1-11, and therefore its alleged mechanics' lien is unperfected.

Based on these bona fide disputes, the Real Property may be sold free and clear of Paul's Paving's alleged mechanics' lien pursuant to Bankruptcy Code § 363(f)(4).

**B. The Sale May Be Approved Free and Clear of Interests Because the Price is Greater than the Value of Liens Against the Real Property**

In the alternative, the Real Property may also be sold free and clear of all alleged secured claims pursuant to Bankruptcy Code § 363(f)(3). That section permits a debtor to sell property free and clear of liens if "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." (Emphasis added). While the Debtor acknowledges that courts are divided on the interpretation of this section, the better view is that "value" means the economic value of the liens on the property, rather than the face amount of the debts secured by the property. See, e.g., In re Beker Indus. Corp., 63 B.R. 474, 476 (Bankr. S.D.N.Y. 1986); In re Terrace Gardens Park Partnership, 96 B.R. 707, 713 (Bankr. W.D. Tex. 1989); In re Oneida Lake Development, Inc., 114 B.R. 352, 357 (Bankr. N.D.N.Y. 1990); In re Equity Management Systems, 149 B.R. 120, 123 (Bankr. S.D. Iowa 1993); In re Collins, 180 B.R. 447, 451 (Bankr. E.D. Va. 1995).

Since the Debtor is selling the Real Property for the fair market value, the proceeds of the sale will necessarily equal to the economic value of the liens against the Real Property. Therefore, the Debtor may sell the Real Property free and clear of liens pursuant to Bankruptcy Code § 363(f)(3).

WHEREFORE, the Debtor respectfully requests entry of an order approving the sale of the Real Property pursuant to Bankruptcy Code § 363 free and clear of Interests.

Dated: July 7, 2009

**PARSONS KINGHORN HARRIS**  
*A Professional Corporation*

/s/ George B. Hofmann  
GEORGE B. HOFMANN

Attorneys for the Debtor