

Richard J. Samson
CHRISTIAN, SAMSON & JONES, PLLC
310 W. Spruce
Missoula, MT 59802
Telephone: (406) 721-7772
Fax: (406) 721-7776
E-mail: rjs@csjlaw.com
Attorney I.D. No.: 1904
Chapter 7 Trustee

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MONTANA

In re:)
)
VANN’S, Inc., a Montana) Case No. 12-61281
corporation,)
)
Debtor.)

MOTION FOR ORDER (A) AUTHORIZING THE SALE OF ALL OR SUBSTANTIALLY ALL OF THE ASSETS OF THE DEBTOR FREE AND CLEAR OF ALL LIENS, CLAIMS, ENCUMBRANCES, AND INTERESTS; (B) APPROVING ASSET PURCHASE AGREEMENT AND (C) AUTHORIZING THE ASSUMPTION AND ASSIGNMENT OF EXECUTORY CONTRACTS AND UNEXPIRED LEASES IN CONNECTION THEREWITH

COMES NOW Richard J. Samson, in his capacity as chapter 7 Trustee for the estate of Vann’s, Inc. (the “Trustee” or “Seller”), and for his *Motion For Order (A) Authorizing Sale Of Debtor’s Assets Free And Clear Of All Liens, Claims, And Encumbrances Pursuant To Section 363 Of The Bankruptcy Code; (B) Approving*

Asset Purchase Agreement; and (C) Approving The Assumption And Assignment Of Executory Contracts (the “Motion”), respectfully states as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction to consider this Motion pursuant to 28 U.S.C. §§ 1334 and 157 and 11 U.S.C. §§ 363 and 365. This is a core proceeding under 11 U.S.C. § 157(b)(2)(A), (N), and (O). Venue is proper in this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

BACKGROUND

2. On August 15, 2012 (the “Petition Date”), Vann’s, Inc. (the “Debtor”), filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”), in the United States Bankruptcy Court for the District of Montana (the “Bankruptcy Court”). On August 10, 2012, the U.S. Trustee appointed an official committee of unsecured creditors (the “Committee”).

3. On October 3, 2012, the Court entered an order appointing the Trustee.

4. On October 26, 2012, the Court entered a stipulated order converting the Debtor’s bankruptcy case to a case under chapter 7 of the Bankruptcy Code.

5. The Debtor believes that the sale of substantially all of its assets as a going concern pursuant to section 363 of the Bankruptcy Code to McMagic LP, a

Texas Partnership, and/or its assigns (the “Buyer”) is in the best interests of the Debtor, its creditors, and other parties-in-interest.

6. The Trustee has entered into an Asset Purchase Agreement (the “Agreement”) with Buyer for the purchase of substantially all of the Debtor’s assets related to its Vann’s electronics retail operations, the OnStore and the Big Sky inventory (the “Acquired Assets”). A copy of the Agreement is attached as **Exhibit A** hereto.

RELIEF REQUESTED

7. By this Motion, the Trustee seeks entry of an order (the “Sale Order”), following a final hearing (the “Sale Hearing”) to be scheduled by the Court, (a) approving the Agreement between Seller and Buyer, (b) authorizing the Seller to sell the Acquired Assets to Buyer pursuant to the Agreement free and clear of all liens, claims and encumbrances and (c) authorizing and approving the assumption and assignment of executory contracts and unexpired leases included among the Acquired Assets.

THE PROPOSED SALE

8. Buyer proposes to purchase the Acquired Assets (as more fully and completely described in the Agreement) (the “Proposed Sale”) for a purchase price in the amount of \$4,500,000.00, subject to certain purchase price adjustments

described in the Agreement and assumption of the Assumed Obligations, each as defined in the Agreement (the "Purchase Price").

9. The proposed sale has been negotiated at arms-length and constitutes a good faith offer to purchase in accordance with section 363(m) of the Bankruptcy Code.

10. In September 2012, Debtor's counsel advised the Court that it had concluded that a liquidation of the Debtor's assets was likely to yield the highest and best return for substantially all of the Debtor's assets. Prior to a hearing on October 2, 2012 on the secured lenders' motions to convert the case to chapter 7 and the Committee's motion to appoint a chapter 11 trustee, the Debtor advised the parties that it had been contacted by a party interested in purchasing the Debtor's assets. On October 2, 2012, the Court approved the Committee's motion to appoint a chapter 11 trustee. The chapter 11 trustee pursued discussions with several parties interested in purchasing the Debtor's assets and the Buyer is the only party that was willing to execute an agreement to purchase the Acquired Assets. Given the seasonal nature of Debtor's electronic retail business, the fact that Debtor has no postpetition financing with which to replenish inventory, and the fact that the Agreement preserves the going-concern value of the Debtor's business, including employment for many of its employees, the Trustee believes that the Agreement represents the highest and best offer for the Acquired Assets.

Moreover, given the foregoing facts, Trustee believes that a private sale to Buyer is justified and is in the best interest of the estate, creditors and parties in interest.

EXPENSE REIMBURSEMENT

11. In consideration of Buyer's agreement to be bound by the terms of the Agreement, the Trustee has agreed, subject to Court approval and in the event that an Alternative Transaction is consummated, to pay Buyer a break-up fee of \$250,000, plus reimburse Buyer for certain reasonable expenses, not to exceed \$50,000 incurred by Buyer in connection with the Proposed Sale as set forth in the Agreement (collectively, the "Break-Up Fee").

12. The Break-Up Fee is reasonable in amount and would fairly compensate Buyer for the substantial time and effort it has invested and the risks it has assumed and for time and effort Buyer will incur prior to the Sale Hearing in performing additional due diligence and negotiating with third parties, such as holders of unexpired leases and executory contracts. The Trustee believes that Buyer's agreement to purchase the Acquired Assets, as evidenced by the Agreement, is critical to arranging an orderly sale of the Acquired Assets and obtaining the highest realizable price.

13. Accordingly, Buyer's efforts have provided material benefits to this Bankruptcy Estate which justify payment of the Break-Up Fee.

**SALE OF ASSETS PURSUANT TO SECTION 363 OF THE
BANKRUPTCY CODE**

14. Trustee requests that the Court authorize the sale of the Acquired Assets pursuant to Section 363 of the Bankruptcy Code free and clear of all liens, claims, and encumbrances, with such liens, claims, and encumbrances to attach to the sale proceeds.

15. Section 363(b) of the Bankruptcy Code authorizes the sale of property of the estate other than in the ordinary course of business after notice and a hearing. A sale of assets outside the ordinary course of business is a matter within the Court's discretion. Generally, where it appears from a review of all the facts and circumstances that a sale is in the best interests of the estate, a court will not disturb the trustee's business judgment regarding the terms of a proposed sale absent some compelling reason to do so. *See generally* 2 Collier on Bankruptcy at ¶ 363.03 (15th ed. Rev. 2008); *In re Canyon Partnership*, 55 B.R. 520, 524 (Bankr. S.D. Cal. 1985); *In re Enrst Home Center, Inc.*, 209 B.R. 974, 979 (Bankr. W.D. Wash. 1997). Federal Rule of Bankruptcy Procedure 6004 provides that the sale of property outside the ordinary course of business may take place by private sale. Fed. R. Bankr. P. 6004(f)(1). The Trustee has determined that, in his business judgment, the sale of the Acquired Assets to Buyer in accordance with the Agreement is in the best interests of the estate and the creditors, and provides the

best chance for maintaining the Debtor's business operations and preserving jobs for the employees of the business.

16. Courts generally permit a debtor to sell property of the estate outside of the ordinary course where the proposed sale is a sound exercise of the Trustee's business judgment and when such sale is for fair and reasonable consideration and is in good faith. See e.g. *In re Roger N. Fearing*, 143 Fed. Appx. 744, 745-46 (9th Cir. 2005). "Absence of 'good faith' is shown by fraud, collusion between the purchaser and the other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders." *Fearing* at 746.

17. Further, the Proposed Sale of the Acquired Assets is also for fair and reasonable consideration, is in good faith, does not unfairly benefit any insiders or creditors of the Debtor, and will maximize the value of the estate.

SALE FREE AND CLEAR OF ALL LIENS

18. Section 363(f) of the Bankruptcy Code authorizes a debtor to use, sell, or lease property of the estate outside of the ordinary course of business free and clear of any interest in such property. Under the Proposed Sale, the Acquired Assets are to be sold free and clear of all liens, claims, and encumbrances with any such liens, claims, and encumbrances to attach to the net sale proceeds with the same validity, priority, force, and effect that such liens, claims, and encumbrances had on such assets prior to the closing of the Proposed Sale.

19. Certain lenders to Debtor and parties hold valid, properly perfected liens upon and security interest in the Acquired Assets. Under Section 363(f) of the Bankruptcy Code, a sale free and clear of liens is permissible if, among other things, (i) the secured lienholders consent or (ii) applicable nonbankruptcy law permits such a sale. In this case, the Debtor's senior secured lenders, GE Commercial Distribution Finance Corporation ("CDF") and First Interstate Bank (the "Bank") will receive the sales proceeds upon closing of the transaction in exchange for their consent to the sale of the Acquired Assets free and clear of CDF's and the Bank's liens and interests. The proceeds from the sale shall be paid first to CDF to satisfy its secured claim, (principal, interest, reasonable attorneys' fees, and costs are paid in full). Then any net amount remaining after payment to CDF shall be paid to the Bank.

20. The claims of Onkyo and Yamaha shall be satisfied by payment at Closing of their claims with funds currently in Debtor's possession which reflect Onkyo and Yamaha's cash collateral, funds generated from the sale their inventory. The Debtor's property, including the Acquired Assets, may also be subject to liens of entities junior to CDF and the Bank. The Acquired Assets may be sold free and clear of the junior secured creditors liens and interests, pursuant to section 363(f) of the Bankruptcy Code, because the value of the Acquired Assets is insufficient to satisfy the Debtor's obligations to both CDF and the Bank in full.

The secured claims of two (2) creditors holding purchase money security interests in the Debtor's inventory, Onkyo and Yamaha, will be paid in full at the time of closing of this transaction.

**ASSUMPTION AND ASSIGNMENT OF CERTAIN EXECUTORY
CONTRACTS AND UNEXPIRED LEASES PURSUANT TO SECTION 365
OF THE BANKRUPTCY CODE**

21. The assumption and assignment of certain executory contracts and unexpired leases are an integral part of the Proposed Sale and should be approved by the Court. Section 365(a) of the Bankruptcy Code authorizes a Trustee to assume an executory contract or unexpired lease subject to the Court's approval. Section 365(b) of the Bankruptcy Code requires the Trustee to satisfy certain requirements at the time of assumption if a default exists under the contract to be assumed.

22. The standard for determining whether an executory contract or unexpired lease should be assumed is the Trustee's "business judgment" that assumption is in its economic best interests. *In re Food Barn Stores, Inc.*, 107 F.3d 558, 567 n.16 (8th Cir. 1996).

23. The Trustee requests that the Court approve the assumption and assignment of those executory contracts and unexpired leases set forth on Schedule 2.1(a)(ix) to the Agreement. The Trustee will establish at the hearing to consider

this Motion that adequate business justifications exist which merits judicial approval of the proposed assumptions and assignments.

24. The Trustee will promptly cure any and all defaults under leases that arose before October 31, 2012, at the time of the assumption and assignment. The Buyer shall be responsible for all cure payments that arise on or after November 1, 2012. Following entry of the Sale Order, the Trustee shall serve all parties to executory contracts and unexpired leases with a copy of this Motion (exclusive of exhibits, but with a notice that copies of the exhibits may be obtained from Trustee upon request) and the Sale Order.

ALLOCATION AND PAYMENT OF SALE PROCEEDS

25. The Trustee requests that the proceeds from the sale shall be paid first to CDF to satisfy its secured claim, (principal, interest, reasonable attorneys' fees, and costs are paid in full). Then any net amount remaining after payment to CDF shall be paid to the Bank. The claims of Onkyo and Yamaha shall be satisfied by payment at Closing of their claims with funds currently in Debtor's possession which reflect Onkyo and Yamaha's cash collateral, funds generated from the sale of their inventory.

NOTICE

26. Notice of this Motion and the Proposed Sale is being provided to all parties-in-interest, including (i) all creditors, (ii) those parties requesting notice in

this case, (iii) any entities or persons known to the Trustee as having expressed a bona fide interest in the purchase of the Acquired Assets, and (iv) any other interested parties known to the Trustee.

CONCLUSION

WHEREFORE, the Trustee hereby respectfully requests entry of a Sale Order, following the Sale Hearing, (a) approving the Agreement; (b) authorizing the Debtor to sell the Acquired Assets to Buyer pursuant to the Agreement free and clear of all liens, claims and encumbrances; (c) authorizing and approving the assumption and assignment of executory contracts and unexpired leases included among the Acquired Assets; (d) authorizing the Trustee to take each of those steps outlined in the Agreement to close the sale; and (e) granting such other and further relief as the Court deems just and proper.

Dated this 29th day of October, 2012.

CHRISTIAN, SAMSON & JONES, PLLC
310 W. Spruce
Missoula, MT 59802

/s/ Richard J. Samson
Richard J. Samson
Chapter 7 Trustee

CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury that on October 29th, 2012, a copy of the forgoing pleading was served (i) by electronic means, pursuant to LBR 7005-1, 9013-1(c) and 9036-1 on the parties noted in the Court's ECF transmission facilities and/or (ii) will be served by mail on the parties identified within the Mailing Matrix maintained by the Court on October 30, 2012.¹

/s/ Richard J. Samson
Richard J. Samson, Chapter 7 Trustee

¹ The Trustee has arranged for the mailing to be done by a third-party bulk mailer and the mailing will be completed on October 30, 2012.

