

**UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION**

**In re:** )  
 ) **Chapter 11**  
**US FIDELIS, INC.,** )  
 ) **Case No. 10-41902-705**  
**Debtor.** )  
 ) **Hon. Charles E. Rendlen, III**  
 )  
 )  
 ) **JOINT MOTION FOR ORDERS (A)**  
 ) **AUTHORIZING SALE OF TAHOE REAL**  
 ) **ESTATE FREE AND CLEAR OF ALL**  
 ) **LIENS, CLAIMS, AND**  
 ) **ENCUMBRANCES, SUBJECT TO**  
 ) **HIGHER OR BETTER OFFERS, (B)**  
 ) **ESTABLISHING SALE AND BIDDING**  
 ) **PROCEDURES, AND (C) APPROVING**  
 ) **BREAK-UP FEE**  
 )  
 ) **Sale Procedures Hearing Date: December 8, 2010**  
 ) **Sale Procedures Hearing Time: 10:00 a.m.**  
 )

COMES NOW US Fidelis, Inc. (the “Debtor”) and the Official Unsecured Creditors’ Committee of US Fidelis, Inc. (the “Committee”) and for their Joint Motion For Orders (A) Authorizing Sale of Tahoe Real Estate Free and Clear of All Liens, Claims, and Encumbrances, Subject to Higher or Better Offers, (B) Establishing Sale And Bidding Procedures, and (C) Approving Break-Up Fee (the “Sale Motion”) and states as follows:

**BACKGROUND**

1. This Court has jurisdiction to hear and determine this matter pursuant to 28 U.S.C. § 1334, 28 U.S.C. §157(a), (b)(1), (b)(2)(A), E.D. Mo. L.R. 81-9.01(B)(1), and 11 U.S.C. § 363. This is a “core” proceeding under 28 U.S.C. §157(b)(2)(A).

2. Venue is proper in this Court pursuant to 28 U.S.C. §1409.

3. On March 1, 2010 (the “Petition Date”), Debtor filed a voluntary petition for relief under Chapter 11, Title 11 of the United States Code (the “Bankruptcy Code”). Pursuant to sections 1107(a) and 1108 of the Bankruptcy Code, Debtor is continuing to operate its businesses and manage its financial

affairs as a debtor-in-possession. On March 11, 2010, the Office of the United States Trustee appointed the Committee.

4. On September 30, 2010, the Debtor and the Committee (sometimes hereafter jointly referred to as the “Movants”) filed a Joint Motion for Order Approving Settlements with Defendants Cory and Heather Atkinson and Defendants Darain and Mia Atkinson (the “Settlement Motion”). The Settlement Motion sought approval, *inter alia*, of a Settlement Agreement by and among Cory and Heather Atkinson, the Debtor and the Committee. Pursuant to the Settlement Agreement, Cory and Heather Atkinson agreed to surrender to the Debtor substantially all of their assets in exchange for the consideration spelled out in the Settlement Motion. On October 22, 2010, this Court entered its Order Approving Settlement (the “Settlement Order”).

5. Pursuant to the Settlement Order, Cory and Heather Atkinson surrendered to the Debtor the real estate, improvements and other personal property located at 1756 Grouse Ridge Road, Truckee, California 96161 (the “Tahoe Real Estate”).

6. The Movants have reached an agreement with Ray Akrawi (the “Prospective Buyer”) to purchase the Tahoe Real Estate pursuant to the terms of a Residential Purchase Agreement which is subject to higher or better bids, all as is more particularly described in the Residential Purchase Agreement which is attached hereto as **Exhibit A** and incorporated herein by reference (the “Purchase Agreement”). The purchase price under the Purchase Agreement is \$2,450,000.00.

7. By this Motion, the Movants seek the following:

- (a) Entry of an Order (the “Procedures Order”) following a hearing on December 8, 2010 at 10:00 a.m. (the “Sale Procedures Hearing”) (i) establishing certain objection deadlines, hearing dates and other procedures (the “Bidding and Sale Procedures”) for considering a sale of the Tahoe Real Estate, under Section 363 of the Bankruptcy Code, and (ii) approving the a break-up fee payable to the Prospective Buyer if a competing bid for the Tahoe Real Estate is ultimately accepted and the purchase closes (the “Break-Up Fee”); and
- (b) Entry of an Order (the “Sale Order”) following a final hearing to be scheduled by the Court (the “Sale Hearing”) authorizing Movants to sell the Tahoe Real Estate to the Prospective Buyer pursuant to the Purchase Agreement free and clear of all liens, claims and encumbrances or, alternatively, in the event that the Court approves a higher or better offer from a party not affiliated with the Prospective Buyer, approving the sale of the

Tahoe Real Estate to such other party and the payment of the Break-Up Fee to the Prospective Buyer.

#### **BACKGROUND ON PURCHASE AGREEMENT**

8. The offer submitted by Prospective Buyer for the Tahoe Real Estate is the highest and best of the proposals received for the Tahoe Real Estate.

9. The sale of the Tahoe Real Estate to Prospective Buyer under the Purchase Agreement is the product of substantial negotiations between parties.

10. 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. The Prospective Buyer has no prior business or personal relationship with the Debtor, the Committee, Cory Atkinson, or Heather Atkinson. The Prospective Buyer is not an “insider” within the meaning of Section 101(31).

11. The closing of the proposed sale is to occur only after the Bankruptcy Court approves the sale after notice and a hearing as required by Section 363 of the Bankruptcy Code and Bankruptcy Rule 2002(a) with an outside closing date of December 25, 2010.

#### **APPROVAL OF BREAK-UP FEE**

12. In consideration of Prospective Buyer’s agreement to be bound by the terms of the Purchase Agreement, the Movants have agreed, subject to Court approval, to pay to the Prospective Buyer a fee equal to \$36,750.00 (or 1.5% of the purchase price) upon the occurrence of certain conditions (the “Break-Up Fee”).

13. In summary, the Prospective Buyer will be paid the Break-Up Fee in cash only if the Debtor consummates a sale of the Tahoe Real Estate pursuant to section 363(b) of the Bankruptcy Code to a buyer or buyers other than Prospective Buyer.

14. The Movants request that the Court approve payment of the Break-Up Fee under the conditions set forth in the Purchase Agreement as an administrative expense under 11 U.S.C. § 503(b) and a surcharge under 11 U.S.C. § 506(c) payable in full by the Debtor to Prospective Buyer to be deducted from

the purchase price concurrently with the closing of the transaction with a party other than Prospective Buyer or an affiliate of Prospective Buyer.

15. The Break-Up Fee is 1.5% percent of the purchase price, which Movants believe is reasonable and would fairly compensate Prospective Buyer for the substantial time and effort it has invested and the risks it has assumed and for time and effort that Prospective Buyer will incur prior to the Sale Hearing in performing additional due diligence and negotiating with third-parties. The Movants believe that Prospective Buyer's agreement to purchase the Tahoe Real Estate, as evidenced by the Purchase Agreement, is critical to arranging an orderly sale of the Tahoe Real Estate and obtaining the highest realizable price. If Prospective Buyer had not committed its resources to the sale process, the Debtor may have been forced to resort to a less orderly process with higher costs and the risk of a smaller recovery for the estate.

16. As a condition to receipt of the Break-Up Fee, the Prospective Buyer has agreed to make available to the Movants all due diligence materials respecting the Tahoe Property, including but not limited to title commitments, building inspections, pest inspections and similar types of reports respecting the Tahoe Property. The Prospective Buyer's offer also benefits the estate by creating a form of purchase agreement and by establishing the "floor" amount of the purchase price, both of which Debtor will now use to attempt to generate competing bids. Accordingly, Prospective Buyer's efforts have provided material benefits to the Debtor's estate that justify payment of the Break-Up Fee.

#### **APPROVAL OF BIDDING AND SALE PROCEDURES**

17. The Movants request approval of the following Bidding and Sale Procedures governing the Sale Hearing and the submission of any bid (a "Competing Bid") by parties interested in purchasing the Tahoe Real Estate:

- (a) Any parties desiring to submit a Competing Bid (hereinafter referred to as "Competitive Bidders") must by 5:00 p.m. (St. Louis time) on December 20, 2010 (the "Bid Deadline") file any and all documents evidencing their Competing Bid (as required herein) with the Court and serve copies of such documentation upon David A. Warfield, Thompson Coburn LLP, One U.S. Bank Plaza, St. Louis, Missouri 63101 and Robert E. Eggmann, Lathrop & Gage, LLP, Pierre Laclède Center, 7701 Forsyth Boulevard, Suite 400, Clayton, MO 63105 (the "Notice Parties").

- (b) Competing Bids must be in writing and must state that (i) such Competitive Bidder offers to purchase all of the Tahoe Real Estate upon substantially the same terms and conditions set forth in the Purchase Agreement, together with all exhibits and schedules thereto, marked to show any amendments and modifications to the Purchase Agreement, including, without limitation, the proposed purchase price and time of closing; (ii) such Competitive Bidder is prepared to enter into and consummate the transaction by the deadlines set forth in the Purchase Agreement; and (iii) such Competing Bid is irrevocable until the completion of the Sale Hearing, and, in the event that the Competitive Bidder is the Prevailing Party (as defined herein) until December 31, 2010.
- (c) A Competing Bid will not be considered by the Debtor or the Court as qualified for the Auction, as hereinafter defined, unless such Competing Bid is for an amount equal to, or greater than \$2,500,000.
- (d) Any subsequent Competing Bids thereafter must be higher than the existing lead bid in increments of not less than \$25,000 in cash; provided, however, any overbids by Prospective Buyer thereafter shall only be required to be equal to the sum of: (i) the then existing lead bid plus (ii) \$25,000 less (iii) the dollar value of the Break-Up Fee.
- (e) A Competing Bid will not be considered by the Debtor as qualified for the Auction if: (i) such Competing Bid contains financing, due diligence, or other contingencies of any kind (other than Bankruptcy Court approval); (ii) such Competing Bid consists of any form of consideration other than cash consideration, payable by wire transfer of immediately available funds to the account or accounts designated in writing by the Debtor; (iii) such Competing Bid is not received by the Notice Parties in writing on or prior to the Bid Deadline (each Competing Bid that satisfies the criteria set forth herein constitutes a "Qualifying Bid").
- (f) Prior to the Bid Deadline, a Competitive Bidder must deliver to the Debtor a deposit, by wire transfer of immediately available funds or certified check, in the amount of \$75,000 (the "Deposit"):
- (g) Competing Bids must be accompanied by (i) sufficient financial information about the Competitive Bidder that will enable the Debtor and the Committee to evaluate the Competitive Bidder's ability to satisfy its obligations under the Competing Bid; and (ii) other evidence of the Competitive Bidder's ability to close the acquisition of the assets in a timely manner.
- (h) If one or more Qualifying Bids are submitted by the Bid Deadline, the Debtor shall convene an outcry auction to be held on December 21, 2010 at 10:00 a.m. (Central) at Thompson Coburn LLP, One US Bank Plaza, Suite 3500 (the "Auction"), at which Auction only Qualifying Bidders and the Prospective Buyer shall be entitled to participate as provided herein.
- (i) At the Auction, the Movants shall have the right to select the highest or best bid from Prospective Buyer and any Competitive Bidders who submitted a Qualifying Bid (the "Highest or Best Bid"), which will be determined by considering, among other things: (i) the number, type, and nature of any changes to the Purchase Agreement requested by each Competitive Bidder; (ii) the extent to which such modifications are likely to delay closing of the sale of the Tahoe Real Estate and the cost to the Debtor of such modifications or delay, including potential decrease in purchase sale price of the Debtor's

Tahoe Real Estate if not sold by the Closing Date, as defined in the Purchase Agreement; (iii) the total consideration to be received by the Debtor; (iv) the likelihood of the Competitive Bidder's ability to close a transaction and the timing thereof; and (v) the net benefit to the estate, taking into account Prospective Buyer's rights to the Break Up Fee and the payment of any commissions that will be due on account of such sales.

- (j) If the person submitting the Highest or Best Bid (the "Prevailing Party") fails to perform its obligation pursuant to the terms of its Highest or Best Bid (and if Debtor is not in material breach of their obligations thereunder), its Deposit shall be retained by Debtor as liquidated damages. The Deposit shall be returned to the Competitive Bidder if the Court does not approve its Competing Bid.
- (k) After the Sale Hearing, the Movants promptly shall return any Deposit received in connection with the submission of an unsuccessful Competing Bid. Any Deposit received from a Prevailing Party shall be applied to its purchase price on the closing of the Sale pursuant to the Sale Order, or released to the Debtor upon termination of the Sale upon default by the Prevailing Party.

**SALE OF ASSETS UNDER SECTION  
363 OF THE BANKRUPTCY CODE**

18. The Movants request that the Court authorize the sale of the Tahoe Real Estate 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.

19. 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. In re Channel One Comm., Inc., 117 B.R. 493, 496 (E.D. Mo. 1990); In re Apex Oil Co., 92 B.R. 847, 866 (Bankr. E.D. Mo. 1988).

20. The Movants have determined that, in their respective business judgments, the sale of the Tahoe Real Estate to Prospective Buyer in accordance with the terms of the Purchase Agreement (or to another bidder making a higher or better offer for the Tahoe Real Estate in accordance with the Proposed Bidding and Sale Procedures) is in the best interest of Debtor's Chapter 11 estate and its creditors. The proposed sale of the Tahoe Real Estate is 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 Debtor's estate.

### SALE FREE AND CLEAR OF ALL LIENS

21. 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 Tahoe Real Estate is 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. Alternatively, in the event that a Competitive Bidder makes a higher or better offer for the Tahoe Real Estate, the Tahoe Real Estate is to be sold to such party 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 transaction.

22. The Movants have previously purchased a title report on the Tahoe Real Estate and it revealed that there are no consensual mortgages, deeds of trust, mechanic's liens or similar encumbrances in favor of creditors.

23. The report further revealed that no governmental unit has filed or recorded a lien on the Tahoe Real Estate for the non-payment of any state, federal or local taxes or charges of any sort. Nevertheless, the Movants wish to sell the Tahoe Real Estate free and clear any unrecorded liens that may exist in favor of any governmental unit receiving notice of this Motion, including liens arising under 26 U.S.C. §6231 (the "Unrecorded Governmental Unit Claims").<sup>1</sup>

24. The sale of the Tahoe Real Estate may be ordered free and clear of the Unrecorded Governmental Unit Claims because such claims are in bona fide dispute. *See* 11 U.S.C. § 363(f)(1).

---

<sup>1</sup> The sale of the Tahoe Real Estate shall, however, be subject to any real estate taxes due and payable at the time of Closing.

**WAIVE 6004(H) PERIOD**

25. To facilitate a prompt closing of the sale, the Movants request that the time period set forth in Bankruptcy Rule 6004(h) be waived and that the order approving the sale hereunder be immediately final.

WHEREFORE the Movants hereby respectfully request:

(a) Entry of a Procedures Order following the Sale Procedures Hearing (i) approving the Proposed Bidding and Sale Procedures, and (ii) authorizing payment of the Break-Up Fee to Prospective Buyer under the terms and conditions set forth in the Purchase Agreement; and

(b) Entry of a Sale Order following the Sale Hearing authorizing the Debtor (i) to sell the Tahoe Real Estate to Prospective Buyer pursuant to the Purchase Agreement or, alternatively, in the event that Prospective Buyer is not the Prevailing Party, approving the sale of the Tahoe Real Estate to the Prevailing Party and the payment of the Break-Up Fee to Prospective Buyer, and (ii) take each of those steps outlined in the Purchase Agreement, or in the event that Prospective Buyer is not the Prevailing Party, those steps outlined in the Prevailing Party's form of purchase contract, to close on the sale of the Tahoe Real Estate.

Dated: December 3, 2010

THOMPSON COBURN LLP

LATHROP & GAGE LLP

By /s/ David A. Warfield  
David A. Warfield, (34288MO)  
One US Bank Plaza  
St. Louis, Missouri 63101  
(314) 552-6000 (Phone)  
(314)-552-7000 (Fax)  
dwarfield@thompsoncoburn.com

By: /s/ Robert E. Eggmann  
Robert E. Eggmann, #37374  
7701 Forsyth Blvd., Suite 400  
Clayton, Missouri 63105  
Ph: (314) 613-2800 (Phone)  
Fax: (314) 613-2801 (Fax)  
Reggmann@lathropgage.com

Attorneys for the Official Unsecured Creditors' Committee for US Fidelis, Inc.      Attorneys for the Debtor



**Exhibit A**

Purchase Agreement

[attached]