

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA**

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In re:

Bky Case No. 04-60907

**FRAZEE CARE CENTER, INC.**

Chapter 7

Debtor.

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**NOTICE OF EXPEDITED HEARING AND MOTION TO APPROVE (1)  
BIDDING PROCEDURES WITH RESPECT TO THE DISPOSITION OF  
ESTATE ASSETS (2) THE SALE OF ALL OR SUBSTANTIALLY ALL OF  
ESTATE'S ASSETS FREE AND CLEAR OF LIENS AND INTERESTS AND (3)  
AUTHORIZING ASSUMPTION AND ASSIGNMENT OF LEASES AND  
EXECUTORY CONTRACTS**

TO: Entities Specified Local Rule 9013-3(2).

1. Dorraine A. Larison, the Chapter 7 Trustee (the "Trustee"), through her undersigned attorneys, moves the court for the relief requested below and gives notice of hearing.

**NOTICE OF BID PROCEDURES HEARING**

2. The Court will hold a hearing with respect to approval of bid procedures at 10:30 a.m. on August 24, 2004, before The Honorable Dennis D. O'Brien, 204 U.S. Courthouse, 118 South Mill Street, Fergus Falls, Minnesota 56537. **This hearing on August 24, 2004, is only to approve the bid procedures.**

3. Any response to this motion as to bid procedures must be filed and served not later than August 23, 2004, which is twenty-four (24) hours before the time set for the hearing. **UNLESS A RESPONSE TO THE BID PROCEDURES IS TIMELY FILED, THE COURT MAY GRANT THAT ASPECT OF THE MOTION WITHOUT A HEARING.**

## NOTICE OF SALE HEARING

4. The court will hold a hearing with respect to the sale of substantially all of the Debtors assets and authorizing the assumption and assignment of various unexpired leases and/or executory contracts (collectively, the “Assets”) at 10:30 a.m. on September 28, 2004 (the “Sale Hearing”), before The Honorable Dennis D. O’Brien, 204 U.S. Courthouse, 118 South Mill Street, Fergus Falls, Minnesota 56537. The Assets to be sold are as set forth in the Asset Purchase Agreement (the “Asset Purchase Agreement”) attached to this Motion as Exhibit A.<sup>1</sup> There may be excluded Assets that are yet to be determined.

5. Any response to this Sale Hearing Motion as to any matter except the conduct of the Auction must be filed and served not later than September 21, 2004, which is seven (7) days (including Saturdays, Sundays and legal holidays) before the date set for the hearing or served and filed by mail not later than September 17, 2004 which is ten (10) days (including Saturdays, Sundays and legal holidays) before the date set for the hearing. **UNLESS A RESPONSE TO THE SALE MOTION IS TIMELY FILED, THE COURT MAY GRANT THAT ASPECT OF THE MOTION WITHOUT A HEARING.**

6. This court has jurisdiction over this motion pursuant to 28 U.S.C. §§ 157 and 1334. Bankruptcy Rule 5005 and Local Rule 1070-1. This proceeding is a core proceeding. The Petition commencing this Chapter 7 case was filed on August 2, 2004 (the “Petition Date”). As of the date of the filing of this Motion, no schedules have been

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<sup>1</sup> The Exhibits to this Motion may be obtained from the Court’s website at <http://www.mnb.uscourts.gov>. Copies of the Exhibits may also be obtained from the Trustee or her counsel.

filed by the Debtor. The case is now pending in this court. Dorraine A. Larison has been appointed as the Chapter 7 Trustee to oversee the administration of the ease.

7. This motion arises under 11 U.S.C. § § 363 and 365 of the Bankruptcy Code, and Fed.R.Bankr.P. 2002, 6004, 6006, 9007 and 9014. The Trustee requests that this Court enter orders authorizing and approving bidding procedures in connection with the Trustees intended sale of all or substantially all of estate's assets free and clear of liens, claims, encumbrances, and interests and authorizing the assumption and assignment of unexpired leases and executory contracts.

### **BACKGROUND**

8. The Debtor is a Minnesota corporation having its principal place of business in Frazee, Minnesota. On the Petition Date, the Debtor was engaged in the business of operating nursing home and assisted care facilities in Frazee, Minnesota and Vergas, Minnesota.

9. Since the Petition Date, the Trustee has been authorized to operate the Debtor's business pursuant to the terms of an Order Granting Motion For Expedited Hearing and Motion For Authorization to Operate Debtor's Business (the "Operating Order") entered on the Petition Date.

10. Since the Petition Date, the Trustee has obtained authority to obtain postpetition financing and to use cash collateral pursuant to the terms of an Interim Order Authorizing Expedited Hearing and Authorizing Trustee to Obtain Secured Financing and Use of Cash Collateral (the "Financing Order") entered on the Petition Date.

11. GE Capital Small Business Credit ("GE") and United Community Bank ("UCB") (collectively, the "Secured Creditors") are the holders of promissory notes with

approximate outstanding balances on the Petition Date of \$853,000.00 and \$ 105,000.00, respectively.

12. The Debtor is a party to several unexpired leases and executory contracts (collectively, the “Contracts”) which are necessary for the continued operation of the Debtor’s business.

### **PROPOSED SALE OF DEBTOR’S ASSETS**

13. The Trustee requests authority to sell the Assets free and clear of liens, claims, encumbrances, and interests and to assume and assign the Contracts. Through this motion, the Trustee requests the entry of an order approving bidding procedures for the proposed sale of its assets as described in Exhibit B (the “Bidding Procedures”).

14. The Trustee further requests that this Court approve the sale of the Assets pursuant to the Bidding Procedures free and clear of all liens, claims and interests and to assume and assign the Contracts on substantially the terms and conditions set forth in the Asset Purchase Agreement.

15. As described in more detail in the Bidding Procedures, the Trustee intends to sell all or substantially all of the Assets.

16. As more specifically set forth in the Bidding Procedures, in order to participate in the sale process, each potential bidder (a “Potential Bidder”) must deliver to the Trustee, with a copy to Dennis Kamstra, Inc. (“DKI”) 545 Sunset Lane, Cambridge, MN, not later than 5:00 p.m. (Central Time) on September 20, 2004 (the “Bid Deadline”) a bid package (the “Bid Package”) that conforms with the Bidding Procedures. Under the Bidding Procedures, a “Qualified Bidder” is a bidder that delivers these items to the Trustee and that the Trustee, with consent of the Secured Creditors, determines as

reasonably likely (based on availability of financing, and experience and other considerations) to submit a bona fide offer and be able to consummate a sale as the successful bidder. Upon receipt of the bid packages, the Trustee shall distribute copies to the Secured Creditors within twenty-four (24) hours after receipt of the bid package from a Qualified Bidder. Delivery shall be made to:

GE Capital Small Business Finance  
c/o James A. Rubenstein, Esq.  
Moss & Barnett, P.A.  
4800 Wells Fargo Center  
90 South Seventh Street  
Minneapolis, MN 55402-4129

United Community Bank  
c/o Jay D. Carlson, Esq.  
Ohnstad Twitchell, P.C.  
901 13<sup>th</sup> Avenue East  
P.O. Box 458  
West Fargo, ND 58078-0458

The Trustee may extend the Bid Deadline once or successively with the consent of the Secured Creditors, but is not obligated to do so. Each Bid Package must include the following documents:

- (a) An executed copy of an Asset Purchase Agreement in substantially the form provided by the Trustee, together with a copy marked to show all modifications made by the Qualified Bidder to the form provided by the Trustee.
- (b) An earnest money deposit in the form of a certified check or cashier's check payable to the order of the Trustee in an amount equal to at least ten percent (10%) of the cash Purchase Price set forth in the Qualified bidder's Asset Purchase Agreement ("Earnest Money Deposit");

(c) A letter stating that the Qualified Bidder's bid is irrevocable until the later of (i) two (2) business days after the sale of the Assets has closed, and (ii) twenty-five (25) days after the Bankruptcy Court enters an order approving the sale of the Assets.

(d) If the Qualified Bidder is an organization, the officer or agent executing the Asset Purchase Agreement must attach proof of the requisite authority to bid on behalf of the organization.

17. If the Trustee receives more than one Qualified Bid, the Trustee intends to conduct an auction (the "Auction") with respect to the Assets. Subject to Court approval, the Auction shall take place at 10:00 a.m. on September 23, 2004 at 1010 West St. Germain, Suite 600, St. Cloud, MN 56301. Only a Qualified Bidder who has previously submitted a Qualified Bid will be eligible to participate in the Auction. Based on the terms of the Qualified Bids received, the level of interest expressed as to particular assets, and other information as the Trustee and the Secured Creditors determine to be relevant, the Trustee, with the consent of the Secured Creditors, will conduct the Auction in accordance with the applicable Bid Procedures in the manner they determine will result in the highest or best offer for the Assets. The Bid Procedures set forth in Exhibit B will apply.

18. Upon the conclusion of the Auction, the Trustee and DKI, in consultation with the Secured Creditors, shall in consultation with the Secured Creditors, will determine the highest and best Qualified Bid ("High Bid") and the second highest and best Qualified Bid ("Second Place Bid"). In making the foregoing determinations, the Trustee and DKI, in consultation with the Secured Creditors, may consider, among other

things: (a) the amount of the cash purchase price offered in the Qualified Bid; (b) the nature and amount of the obligations to be assumed and/or paid by the Qualified Bidder; (c) the Qualified Bidder's financial situation and relevant wherewithal; (d) the likelihood of the Qualified Bidder obtaining any necessary regulatory consents and approvals; and (e) the probability of prompt closing.

19. The above-described procedures are in the best interests of the estate and the creditors that will result in the maximum value available for the Assets.

**ASSUMPTION AND ASSIGNMENT OF UNEXPIRED  
LEASES AND EXECUTORY CONTRACTS**

20. Unless superceded by a procedure set forth in any prior or subsequent motions, with respect to unexpired leases and executory contracts, the Trustee proposes to give separate notice, with a cure amount to the extent known, to each party to such unexpired lease or executory contract of the potential assumption and assignment of such unexpired leases or executory contract more than three (3) days before the date set for the Sale Hearing. The Trustee further proposes to identify the proposed assignees as soon as known by the Trustee by fax and e-mail immediately following the receipt of bids and immediately following the Auction. The Trustee will seek approval of assumption and assignment of such unexpired leases and executory contracts at the Sale Hearing to the extent that assumption and assignment is a condition to the purchase by the winning bidder(s). For those unexpired leases and executory contract, the assumption and assignment of which is contested, the Trustee shall notice those matters for further evidentiary hearing. If the hearing cannot be scheduled within 60 days from the Petition Date, the date for assumption and assignment shall be automatically extended until the Bankruptcy Court renders a decision.

## **EXPEDITED HEARING**

21. The Trustee requires an expedited hearing on this motion for approval of the Bidding Procedures only in order to avoid unnecessary loss to the estate in connection with approval of the Bidding Procedures.

22. Bankruptcy Rules 2002 and 9006 requires 14 days' notice (by mail) of the hearing on the Bidding Procedures. The Trustee has given eleven (11) days' notice to attorneys that the Trustee is aware of and all attorneys who have filed a Notice of Appearance as of the date of this Motion. The Bankruptcy Clerk's office shall give general notice to all of the creditors in the case of the Motion. The Trustee believes that this notice should be sufficient under the circumstances.

## **WITNESSES**

23. If necessary, the Trustee and Dennis Kamstra may be called as a witness in support of this Motion.

**WHEREFORE**, the Trustee requests that the Court enter orders:

1. Granting an expedited hearing in connection with the Bid Procedures Motion;
2. Approving the Bidding Procedures;
3. Approving and authorizing the Asset Purchase Agreement;
4. Approving the sale of the Assets free and clear of all liens, claims, and interests;
5. Approving the assumption and assignment of unexpired leases and executory contracts;
6. Granting such further relief as the Court deems just and equitable.

Dated: August 13, 2004

GRAY, PLANT, MOOTY,  
MOOTY & BENNETT, P.A.

By /e/ Phillip L. Kunkel  
Phillip L. Kunkel (#58981)  
Dorraine A. Larison (#203609)  
1010 West St. Germain Street, Suite 600  
St. Cloud, MN 56301  
320-252-4414

**VERIFICATION**

I, Dorraine A. Larison, the Chapter 7 Trustee, declare under penalty of perjury that the facts set forth in the foregoing Notice of Hearing And Motion are true and correct according to the best of my knowledge, information and belief.

Executed on: August 13, 2004

/e/ Dorraine A. Larison

**ASSET PURCHASE AGREEMENT**  
**BY AND BETWEEN**

---

**AND**

**DORRAINE A. LARISON**  
**CHAPTER 7 TRUSTEE**  
**FOR THE ESTATE OF**  
**FRAZEE CARE CENTER, INC.**

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## ASSET PURCHASE AGREEMENT

THIS ASSET PURCHASE AGREEMENT (“**Agreement**”), dated as of \_\_\_\_\_, 2004, is by and between \_\_\_\_\_ (“**Buyer**”), and Dorraine A. Larison, solely in her capacity as the Chapter 7 Trustee for the estate of Frazee Care Center, Inc., and not in her individual capacity (“**Trustee**”).

### RECITALS

- A. Frazee Care Center, Inc., a Minnesota corporation (“**Debtor**”), is the debtor in the Chapter 7 case number 04-60907 (“**Case**”), pending before the United States Bankruptcy Court for the District of Minnesota, Sixth Division.
- B. Dorraine A. Larison was appointed interim United States Trustee for the Estate of Frazee Care Center, Inc., in connection with the petition filed by Debtor on August 2, 2004.
- C. The Trustee desires to sell, and Buyer desires to buy, certain assets of the Debtor’s Estate pursuant to the terms and conditions of this Agreement (“**Acquisition**”).

### ARTICLE I DEFINITIONS

1.1. Certain Defined Terms. As used herein, each of the following terms has the meaning ascribed thereto below:

“**Acquired Assets**” means collectively all of the Estate’s interest in everything used in the operation of the Facility, including the following assets of the Estate, but excluding the Excluded Assets:

(a) Real Property. All of the real property and interests therein (together with all of the rights, easements and appurtenances thereto) either owned (“**Owned Property**”) or leased (“**Leased Property**”) by the Estate and used in the operation of the Facility, including all land and buildings and other improvements and fixtures attached to such property, as more particularly described on Schedule 1.1(a) attached hereto (collectively, the “**Real Property**”);

(b) Machinery and Equipment. All of the machinery, vehicles, equipment (including spare parts), computer systems, software, office equipment, fixtures and furniture and all other tangible assets owned by the Estate and used in the operation of the Facility, and, to the extent assignable or transferable by the Estate, all rights in all warranties of any manufacturer or vendor with respect thereto, including, but not by way of limitation, those items described on Schedule 1.1(b) attached hereto (collectively, the “**Equipment**”);

(c) Inventory. All of the Estate's inventory of drugs, medications, food, laundry, housekeeping, nursing and other supplies and other disposables and

consumables (the "**Inventory**"), including, but not by way of limitation, those inventory items described on Schedule 1.1(c) attached hereto;

(d) Contracts. All those leases, contracts and agreements of the Estate identified on Schedule 1.1(d) attached hereto, which shall include any and all agreements with residents of the Facility, and/or any and all contracts which provide for the care of the residents of the Facility (collectively, the "**Acquired Contracts**");

(e) Records. All of the Estate's business, financial, employee and any other records used in the operation of the Facility, all of the Estate's interest in any and all medical records of both inpatient and outpatient services provided at the Facility to the extent transferable under applicable law, and all of the Estate's right, title and interest in and to any other records belonging to or concerning the residents of the Facility, including personal records of the residents and payment records (collectively, "Records");

(f) Resident Agreements. All of the Estate's right, title and interest in, to and under all agreements with residents of the Facility, including any security deposits made in connection therewith and ;

(g) Personal Property and Resident Deposits. All of the Estate's interest in any and all personal property of the residents, whether tangible or intangible, including, any and all cash and deposit accounts belonging to and held in trust for the residents of the Facility, all subject to any rights of the residents in such property, and all personal property listed on Schedule 1.1(e) attached hereto (collectively, "**Personal Property**");

(h) Prepaid Expenses. The full benefit of any and all prepaid expenses of the Estate in connection with any obligation of the Estate assumed by Buyer hereunder;

(i) Accounts Receivable. All of the Estate's right, title and interest in its account receivables, as listed on Schedule 1.1(f), except those which are paid to the estate prior to closing, pursuant to section 6.3(c) herein;

(j) Ownership Interest in Vergas Assisted Living, Inc. All of the Estate's right, title and interest in the stock of Vergas Assisted Living, Inc.

(k) Other Purchased Assets. All of the Estate's rights to all assignable certificates, accreditations, participations, licenses, permits, franchises, governmental approvals and similar rights; all building or construction plans, designs and drawings; all patient lists, assignable data processing software, licenses, supplier lists and all other assets of the Estate used in the conduct of the Facility (including all rights associated with Facility programs and services, including the Estate's interest, right and title to the use of the name "Frazee Care

Center” and related service marks and logos, if any, whether tangible or intangible, and whether or not reflected in the books and records of the Estate (collectively, the "**Other Purchased Assets**");

“**Acquired Contracts**” has the meaning set forth in the definition of Acquired Assets in this Section 1.1.

“**Acquisition**” has the meaning set forth in the Recitals of this Agreement.

“**Action**” means any claim, action, suit, arbitration, inquiry, proceeding or investigation by or before any Governmental Authority or any mediator or arbitrator.

“**Affiliate**” means, with respect to any Person, any other Person that, directly or indirectly, controls, is controlled by, or is under common control with that Person.

“**Agency**” means any state or federal governmental agency.

“**Agreement**” means collectively this Agreement and all Schedules hereto, as each may be amended, supplemented or otherwise modified.

“**Assumed Liabilities**” shall have the meaning specified in Section 3.3 herein.

“**Bankruptcy Code**” means Title 11 of the United States Code, §§ 101, *et seq.*, as amended and in effect on the Petition Date.

“**Business Day**” means any day excluding Saturday, Sunday and any day which is a legal holiday.

“**Buyer**” has the meaning set forth in the Preamble of this Agreement.

“**Case**” has the meaning set forth in the Recitals of this Agreement.

“**Closing**” has the meaning set forth in Section 2.5 of this Agreement.

“**Closing Date**” has the meaning set forth in Section 2.5 of this Agreement.

“**Contracts**” means collectively all contracts, agreements, indentures, notes, bonds, loans, instruments, leases, sub-leases, deeds of trust, conditional sales contracts, mortgages, franchises, licenses, commitments or other binding arrangements, express or implied, whether or not rejected or deemed rejected under Bankruptcy Code § 365, to which the Debtor is a party or by which the Acquired Assets are bound.

“**Court**” means the United States Bankruptcy Court for the District of Minnesota, Sixth Division, or any other court having jurisdiction over the Case.

“**Debtor**” has the meaning set forth in the Recitals of this Agreement.

“**Deposit**” means the cash deposit made by Buyer pursuant to the Bidding Procedures approved by the Court on or about August 24, 2004.

“**Employees**” means the employees of Debtor who work in or are necessary to the operation of the Facility.

“**Encumbrance**” means collectively any Lien, claim, option, right of ownership, right of authorship, right of use, license, restriction or other right of any Person of any kind or any nature whatsoever.

“**Estate**” means the bankruptcy estate of the Debtor created in the Case.

“**Excluded Assets**” means collectively the following assets of the Estate:

- (a) The Debtor’s corporate charter, minute books and stock records;
- (b) Cash and funds on hand or on deposit with any financial institution and deposit and other accounts at any financial institution;
- (c) Contracts that are not Acquired Contracts;
- (d) Any claims or causes of action, except for claims against residents, insureds, or third parties on behalf of the residents, arising out of or related to the goods and services provided to residents in the ordinary course of business;
- (e) The Purchase Price and the rights of the Trustee and the Estate under this Agreement and the Transaction Documents;
- (f) Any and all tax refunds or rights and interests thereto; and
- (g) All items specifically listed on Schedule 1.1(g).

“**Facility**” means the Debtor’s business of operating a nursing home and assisted care facilities in Frazee, Minnesota, and Vergas, Minnesota, including the following:

- (a) Approximately 95-unit nursing home facility located on Debtor’s Owned Property;
- (b) Approximately 12-unit assisted living facility located on Debtor’s Owned Property;
- (c) Operation of approximately 7-unit assisted living facility located on Debtor’s Leased Property (Hamilton Investments of Frazee, LLC, Lessor) located in Frazee, Minnesota; and
- (d) Operation of assisted living facility located on Debtor’s Leased Property (Vergas Assisted Living, Inc., Lessor) located in Vergas, Minnesota.

“**Final Order**” means (a) an order of the Court as to which the time to appeal, petition for certiorari or move for reargument or rehearing has expired and as to which no appeal, petition for certiorari or other proceedings for reargument or rehearing are then pending, or (b) if an appeal, writ of certiorari, reargument or rehearing thereof has been filed or sought, such order of the Court has been affirmed by the highest court to which such order was appealed, or certiorari has been denied or reargument or rehearing has been denied or resulted in no modification of such order, and the time to take any further appeal, petition for certiorari or move for reargument or rehearing has expired; provided, that the possibility that a motion under Rule 59 or Rule 60 of the Federal Rules of Civil Procedure, or any analogous rule under the Bankruptcy Rules, may be filed with respect to such order will not cause such order not to be a Final Order.

“**Governmental Authority**” means any domestic or foreign federal, state, county, parish, municipal or other local court, agency, department, legislative body, commission, council, board or other administrative or governmental body.

“**Law**” means any statute, law (including common law), rule, regulation, ordinance, order, decree, ruling, permit, authorization, action, restriction, requirement or policy of any Governmental Authority (each as may be in effect from time to time).

“**Liability**” means any debt, liability or obligation, whether accrued, contingent, disputed, undisputed, secured, unsecured, liquidated, unliquidated, matured or unmatured, including any liability for Taxes.

“**Lien**” means a charge against or interest in property to secure payment of a debt or performance of a liability, whether granted voluntarily or involuntarily, including any security interest, pledge, mortgage or charge.

“**Order**” means any order, writ, judgment, injunction, decree, determination or award of a Governmental Authority.

“**Outside Date**” has the meaning set forth in Section 8.2(h) of this Agreement.

“**Person**” means any natural person, corporation, partnership, limited liability company, firm, joint venture, association, joint-stock company, trust, unincorporated organization, Governmental Authority or other entity.

“**Petition Date**” means August 2, 2004, the date on which the Case was commenced in the Court.

“**Purchase Price**” has the meaning set forth in Section 2.2 of this Agreement.

“**Sale Order**” means an Order of the Court, in form and substance reasonably acceptable to Buyer and the Trustee, which, among other things, contains the provisions described in Section 3.5 of this Agreement.

“**Trustee**” has the meaning set forth in the Preamble of this Agreement.

“**Taxes**” means collectively all taxes, charges, fees, imposts, levies or other assessments, including all net income, gross receipts, sales, use, ad valorem, value added, transfer, franchise, profits, inventory, capital stock, license, withholding, payroll, employment, social security, unemployment, excise, severance, stamp, occupation, and property taxes, customs duties, fees, assessments and charges of any kind whatsoever, together with any interest and any penalties, additions to tax or additional amounts imposed by any taxing authority (domestic or foreign) and any interest and penalties imposed with respect to the filing, obligation to file or failure to file any Tax return, and shall include any transferee liability in respect of Taxes.

“**Termination Date**” has the meaning set forth in Section 8.2 of this Agreement.

“**Transaction Documents**” means collectively the contracts, agreements, documents and instruments contemplated to be entered into by the terms of this Agreement.

“**Transactions**” means collectively the Acquisition and related transactions contemplated by this Agreement or the Transaction Documents.

1.2. Other Definitional Provisions.

- (a) The words “hereof,” “hereto,” “herein,” and “hereunder” and words of similar import, when used in this Agreement, refer to this Agreement as a whole and not to any particular provision of this Agreement. References herein to Sections and Schedules will be construed as references to Sections and Schedules of this Agreement unless the context otherwise requires.
- (b) The word “including” means “including but not limited to”.
- (c) Terms defined in the singular have a comparable meaning when used in the plural, and vice versa.

**ARTICLE II  
THE ACQUISITION**

2.1. Acquired Assets to be Conveyed Free and Clear of Encumbrances. On the terms and subject to the conditions set forth in this Agreement, on the Closing Date, the Trustee will convey, transfer, assign, sell and deliver to Buyer, and Buyer will acquire, accept and purchase, all right, title and interest of the Estate in and to the Acquired Assets free and clear of all Encumbrances. The Trustee will not transfer to Buyer, and Buyer will not purchase hereunder, the Excluded Assets. The Trustee has no obligation to deliver possession of Acquired Assets to Buyer except Acquired Assets that are in the actual possession or control of the Trustee; provided that the Trustee will not abandon or relinquish actual possession or control of any of the Acquired Assets prior to the Closing without the prior written consent of Buyer or pursuant to an Order of the Court after notice to and an opportunity to object by Buyer.

2.2. Purchase Price for Acquired Assets. The purchase price for the Acquired Assets (“**Purchase Price**”) is \_\_\_\_\_ and No/100 Dollars (\$\_\_\_\_\_.00).

2.3 Deposit. Pursuant to the Bidding Procedures, Buyer is required to deliver a deposit to Trustee to be held in an interest bearing account. At Closing, this Deposit, and all interest and earnings thereon, shall be applied toward the Purchase Price.

2.4. Payment of Purchase Price for Acquired Assets. At the Closing, Buyer will pay the Purchase Price, less the Deposit, to the Trustee by cashier’s check payable to “Dorraine A. Larison, Chapter 7 Trustee,” or wire transfer to an account designated by the Trustee.

2.5. No Liabilities Assumed by Buyer. Buyer will not assume or be responsible for any Liability of the Trustee, the Estate or the Debtor, except for liabilities related to the executory contracts identified as Acquired Contracts pursuant to Section 1.1, as provided for in Section 3.4, and as otherwise expressly provided for in this Agreement. Buyer is not a successor to the Trustee, the Estate or the Debtor, except as provided for herein. The Sale Order will provide that Buyer will not assume or be liable for any Liability of the Trustee, the Estate or the Debtor, except as provided for herein.

2.6. Closing. The closing of the Transactions (“**Closing**”) will take place on October 18, 2004, or such other date as is agreed to in writing by the parties hereto (the “**Closing Date**”).

### **ARTICLE III CERTAIN UNDERSTANDINGS AND AGREEMENTS OF THE PARTIES**

3.1. Treatment of Contracts. The Trustee shall assume and assign to the Buyer all Acquired Contracts pursuant to Bankruptcy Code § 365. The Buyer shall update the list of Acquired Contracts through Closing. The Trustee shall use reasonable efforts to obtain any necessary Bankruptcy Court approval for the assumption and assignment of such additional Contracts. Within 3 business days prior to Closing, Trustee shall deliver to Buyer a listing of all cure amounts due and payable in connection with the assignment and assumption of the Acquired Contracts. On the Closing Date, the Buyer shall cure defaults by the Sellers under the Assumed Contracts by paying to the counter-parties to the Assumed Contracts the cure amounts relating to the Assumed Contracts.

3.2. Employment of Employees of Debtor; Additional Employee Matters. The Buyer shall assume the obligation to provide time to or compensate the Employees for all their accrued vacation and sick leave time as of the Closing. The Buyer shall provide proof of payment or assumption of these obligations to the Trustee, upon Trustee’s reasonable request.

3.3. Self-Funded Employee Health Insurance Plan. The Buyer shall assume the obligation to provide for all vested Employee benefits pursuant to the Debtor’s self-funded employee health insurance plan. Nothing herein shall require the Buyer to

assume the Debtor's existing self-funded employee health insurance plan.

3.4. Assumed Liabilities. At and as of the Closing, the Buyer shall assume and thereafter pay, fully satisfy, discharge and perform all of the Assumed Contracts (the "Assumed Liabilities"), all of the accrued employee time pursuant to Section 3.3, and the obligation to cover the self-funded employee health care plan pursuant to Section 3.4.

3.5. Access to the Records After Closing. After the Closing Date, and continuing for a period of six (6) years from the Closing Date, Buyer agrees that it will give, or cause to be given, to Trustee and Agency, or their successors and representatives, during normal business hours and at the expense of Buyer or its successor, such access to the properties, titles, contracts, books, records, files, documents and affairs of the Facility as is reasonably necessary to allow Trustee and Agency, or their successors to obtain information in the Buyer's possession with respect to any lawful purpose, including any claims, demands, audits, suits or matters of a similar nature made by or against Trustee or Debtor as the previous owner and operator of the Facility, and at the expense of Buyer or its successor, to make copies of such information to the extent reasonably necessary; provided, however, that Trustee or Agency hereby agrees that in the event they gain access to information relating to Buyer, Trustee or Agency will not, unless required by law, disclose or divulge to any third party or otherwise use against the interests of any such party any of such information.

3.6. Purchase Price Allocation. The Trustee and Buyer agree to allocate the Purchase Price between and among the Acquired Assets in accordance with the residual method described in Section 1060 of the Internal Revenue Code of 1986, as amended. The Trustee and Buyer further agree to report this transaction for tax purposes in accordance with such allocation and to attach the applicable asset acquisition statement to their respective income tax returns for the taxable year of reporting this transaction.

3.7. Notice. The Trustee will make reasonable efforts to give not less than twenty (20) days' prior written or published notice of the motion to approve this Agreement and the hearing scheduled thereon to all Persons, including all former management and technical employees of the Debtor, that are creditors or parties in interest in the case, that claim or may claim that the Debtor or the Estate owes an unsatisfied liability to such Person, or that assert or may assert an Encumbrance against any of the Acquired Assets.

3.8. Court Approval. The Trustee will make reasonable efforts to obtain the Sale Order which will, among other things, (a) determine that this Agreement was proposed by Buyer and the Trustee in good faith and represents the highest and best offer for the Acquired Assets and should be approved, (b) determine that Buyer is a good faith purchaser under Bankruptcy Code § 363(m), (c) authorize and direct the Trustee to sell the Acquired Assets to Buyer pursuant to this Agreement and Bankruptcy Code § 363, free and clear of all Liens, claims, interests, liabilities and Encumbrances (including any and all "interests" in the Assets within the meaning of Bankruptcy Code § 363(f)); (d) authorize and direct the Trustee to execute, deliver, perform under, consummate and implement this Agreement, together with all additional instruments and documents that may be reasonably necessary or desirable to implement the foregoing; (e) provide that

Buyer will not assume or be liable for any Liability of the Trustee, the Estate or the Debtor; (f) and authorize the assignment and assumption of the Acquired Contracts.

3.9. Regulatory Approvals. Buyer shall have (a) agreed to participate in the Medicare and Medicaid programs and to accept assignment of the respective provider agreements for such programs, or in case of Medicaid, have negotiated and executed effective as of the Closing Date a new Medicaid provider agreement; and (b) obtained licensure by the Minnesota Department of Health to the use by Buyer of the Acquired Assets for the purpose of operating the Facility or shall have obtained reasonable assurances from the Minnesota Department of Health that such licensure will be effective as of the Closing Date;

#### **ARTICLE IV REPRESENTATIONS AND WARRANTIES OF THE TRUSTEE**

The Trustee represents and warrants to Buyer as follows:

4.1. Trustee Duly Appointed. The Trustee is the duly appointed trustee of the Estate in the Case.

4.2. Risk of Loss. The Trustee assumes all risk of destruction, loss, or damage to the Acquired Assets due to fire, storm, or other casualty up to the Closing. If any destruction, loss, or damage to the Acquired Assets is such that Buyer would have the right to terminate in its discretion this Agreement under Article VII of this Agreement, then Buyer will have the right to: (a) terminate this Agreement pursuant to Article VII; or (b) proceed to Closing and accept from the Trustee an assignment of all insurance proceeds payable in connection with such destruction, loss or damage to the Acquired Assets.

4.3. Bidding Procedures. The Trustee will not accept any bid for all or a material portion of the Acquired Assets from a Person that is not in compliance with the bidding procedures set forth on Schedule 4.3 attached hereto.

4.4. Real Property. The Trustee will provide the Buyer Owners and Encumbrances reports on the Real Property.

4.5. No Warranty. EXCEPT AS IS OTHERWISE EXPRESSLY SET FORTH IN THIS AGREEMENT, THE ACQUIRED ASSETS WILL BE SOLD “AS IS, WHERE IS” AND THE TRUSTEE MAKES NO REPRESENTATIONS OR WARRANTIES OF ANY TYPE OR NATURE, INCLUDING NO WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, WITH RESPECT TO THE ACQUIRED ASSETS.

#### **ARTICLE V REPRESENTATIONS AND WARRANTIES OF BUYER**

The Buyer represents and warrants to Trustee as follows:

5.1 Organization and Standing. The Buyer has been duly incorporated and is validly existing and in good standing under the laws of the State of\_\_\_\_\_.

5.2 Legal Compliance. To the best of Buyer's knowledge and belief, at Closing, Buyer will have duly complied with all applicable laws, rules and regulations relating to the transactions contemplated herein. To the best of Buyer's knowledge and belief, Buyer has the resources and ability to consummate the purchase of the interests and obligations as contemplated herein.

5.3 Power and Authority. Buyer has the corporate power and authority to execute, deliver and perform this Agreement, and as of the Closing, Buyer will have the corporate power and authority to execute and deliver the instruments and agreements required to be delivered by them to the Trustee at the Closing (collectively the "**Buyer's Transaction Documents**") and to consummate the transactions contemplated herein and perform its obligations hereunder.

5.4. Financial Ability. Buyer has the financial resources required to pay the Purchase Price, perform the Acquired Contracts, perform the liabilities assumed under the Acquired Contracts, and will provide evidence of such financial resources to the Trustee.

5.5 Litigation. Except as set forth in Schedule 5.4 attached hereto, there is no action, suit, proceeding, inquiry or investigation by or before any court or federal, state, county or local governmental agency or authority or by any other person or firm which has been decided, is pending, or, to the best knowledge of Buyer, threatened, against the Buyer, its affiliates, or any of the respective officers, directors, or shareholders which might, directly or indirectly, delay or postpone the Closing or affect in any way the ability of the Buyer to consummate the transactions contemplated by this Agreement. There are no judgments, decrees, injunctions or orders of any court, governmental department, commission, agency, instrumentality or arbitrator against the Buyer, its Affiliates, or any of the respective officers, directors, or shareholders which would enjoin, restrain or prevent the Buyer from consummating the transactions contemplated by this Agreement or from obtaining any necessary approvals, permits or documents relating hereto.

5.6 Conflict With Other Agreements. To the best of Buyer's knowledge and belief, the execution and delivery of this Agreement by Buyer, the consummation of the transactions contemplated herein, and the compliance with the terms of this Agreement by Buyer will not conflict with or result in a breach, under its Articles of Incorporation, or Bylaws, or any mortgage, deed of trust, indenture, pledge, security agreement, or other agreement or instrument, or any order, judgment, or decree, to which Buyer is a party or otherwise bound or by which any of the properties, assets or share capital of Buyer are subject.

5.7 Binding Agreement. This execution and delivery of this Agreement and the actions contemplated hereby have been duly and validly authorized by all necessary actions on the part of the Buyer. This Agreement is, and when executed and delivered by Buyer at the Closing and each of the related transaction documents executed by Buyer will be, the

legal, valid and binding obligation of Buyer, enforceable against Buyer in accordance with their respective terms.

5.8 Finders. No broker or finder has acted for the Buyer in connection with the transactions contemplated by this Agreement, and no broker or finder is entitled to any broker's or finder's fee or other commission in respect thereof based in any way on agreements, understandings or arrangements with the Buyer.

## **ARTICLE VI CONDITIONS TO THE ACQUISITION AND ADJUSTMENTS**

6.1. Conditions to Buyer's Obligations to Consummate the Acquisition. The obligations of Buyer to consummate the Acquisition and the other Transactions to be consummated at the Closing as contemplated by this Agreement are subject to the satisfaction or waiver by Buyer in writing on or prior to the Closing Date of each of the following conditions:

- (a) Representations, Warranties, Covenants and Agreements. Each of the representations and warranties of the Trustee shall be true and correct as of the date hereof, and as of the Closing Date, with the same effect as though such representations and warranties had been made on and as of such dates, unless the failure of such representations and warranties so to be true and correct does not materially and adversely affect the ability of Buyer to consummate the Transactions. Each of the covenants and agreements of the Trustee to be performed after the date hereof and prior to the Closing or such other time period as specifically set forth in a particular covenant or agreement shall have been duly performed in all material respects by the prescribed date or for the duration of the prescribed time period.
- (b) No Orders. On the Closing Date, there shall be no Order of any nature issued by a Governmental Authority of competent jurisdiction in effect that directs that the Transactions not be consummated or prevents Buyer from performing this Agreement.
- (c) Additional Closing Documents. Buyer shall have received at the Closing the following documents, executed by the Trustee and dated the Closing Date:
  - (i) Bill of Sale in a form similar to that attached hereto as Exhibit A covering the items of personal property included in the Acquired Assets to be transferred or assigned to Buyer at the Closing;
  - (ii) Instrument of Transfer of Real Property conveying the Owned Property in a form similar to that attached hereto as Exhibit B.
  - (iii) Assignment of the Acquired Contracts in a form similar to that attached hereto as Exhibit C.

- (iv) Such further instruments of sale, transfer, conveyance, assignment or delivery covering the Acquired Assets or any part thereof as Buyer may reasonably require to assure the full and effective sale, transfer, conveyance, assignment or delivery to it of the Acquired Assets to be transferred to Buyer under this Agreement; and
- (d) No Adverse Changes. Between the date of this Agreement and the Closing Date there shall not have occurred any damage, destruction or loss of any material portion of the Acquired Assets, whether or not covered by insurance.
- (e) Sale Order. The Sale Order, in form and substance reasonably satisfactory to the Trustee and Buyer, shall have been entered, shall have become a Final Order and shall not have been modified, amended, dissolved, revoked or rescinded in any material respect.
- (f) Regulatory Approval and Consent. Buyer shall have (a) agreed to participate in the Medicare and Medicaid programs and to accept assignment of the respective provider agreements for such programs, or in case of Medicaid, have negotiated and executed effective as of the Closing Date a new Medicaid provider agreement; (b) obtained licensure by the Minnesota Department of Health to the use by Buyer of the Acquired Assets for the purpose of operating the Facility or shall have obtained reasonable assurances from the Minnesota Department of Health that such licensure will be effective as of the Closing Date; (c) the expiration of the waiting periods and receipt of clearances required by all applicable federal and state laws, rules and regulations; and (d) all other regulatory consents and approvals required to carry on the operation of the Facility as formerly conducted by Debtor. Trustee and/or Buyer shall have obtained consents, approvals and authorizations necessary for the assignment to Buyer of those certain Assumed Contracts which by their terms require consent.

6.2. Conditions to the Obligation of the Trustee to Consummate the Acquisition. The obligation of the Trustee to consummate the Acquisition and the other Transactions to be consummated at the Closing as contemplated by this Agreement are subject to the satisfaction or waiver in writing by the Trustee on or prior to the Closing Date of each of the following conditions:

- (a) Representations, Warranties, Covenants and Agreements. Each of the representations and warranties of Buyer contained in this Agreement shall be true and correct in all material respects as of the date hereof, and as of the Closing Date, with the same effect as though such representations and warranties had been made on and as of such dates, unless the failure of such representations and warranties so to be true and correct does not materially and adversely affect the ability of the Trustee to consummate the Transactions. Each of the covenants and agreements of Buyer to be performed after the date hereof and prior to the Closing Date or such other time period as specifically set forth in a particular covenant or agreement shall have been duly performed in all material respects by the prescribed date or for the duration of the prescribed time period.

- (b) No Orders. On the Closing Date, there shall be no Order of any nature issued by a Governmental Authority of competent jurisdiction in effect that directs that the Transactions not be consummated or prevents the Trustee from performing this Agreement.
- (c) Sale Order. The Sale Order, in form and substance reasonably satisfactory to the Trustee and Buyer, shall have been entered, shall have become a Final Order (unless waived by Buyer) and shall not have been modified, amended, dissolved, revoked or rescinded in any material respect.
- (d) Buyer's Resolutions. Copies of the resolutions and other actions of the directors of Buyer authorizing the execution and delivery of this Agreement and the consummation by Buyer of the transactions contemplated hereby, which copies have been certified by the secretary of Buyer and dated as of the Closing Date.
- (e) Certain Closing Deliveries. The Trustee shall have received from Buyer
- (i) the Purchase Price;
  - (ii) fully executed Assignment and Assumptions of the Acquired Contracts in a form similar to that attached hereto as Exhibit C; and
  - (iii) any documents required to be delivered by Buyer to the Trustee pursuant to the provisions of this Agreement or the Transaction Documents in form and substance reasonably satisfactory to the Trustee.
- (f) Regulatory Approval and Consent. Buyer shall have (a) agreed to participate in the Medicare and Medicaid programs and to accept assignment of the respective provider agreements for such programs, or in case of Medicaid, have negotiated and executed effective as of the Closing Date a new Medicaid provider agreement; (b) obtained licensure by the Minnesota Department of Health to the use by Buyer of the Acquired Assets for the purpose of operating the Facility or shall have obtained reasonable assurances from the Minnesota Department of Health that such licensure will be effective as of the Closing Date; (c) the expiration of the waiting periods and receipt of clearances required by all applicable federal and state laws, rules and regulations; and (d) all other regulatory consents and approvals required to carry on the operation of the Facility as formerly conducted by Debtor. Trustee and/or Buyer shall have obtained consents, approvals and authorizations necessary for the assignment to Buyer of those certain Assumed Contracts which by their terms require consent.

6.3 Adjustments and Prorations. The following prorations will be made as of the Closing and will be paid or credited to the applicable party, unless the amount of proration cannot then be established, in which event it will be paid to the applicable party as provided

below (all prorations and adjustments shall be made on the basis of a 365 day year and the number of days actually elapsed):

(a) Taxes. All real property taxes and personal property taxes due to be paid or which have been paid in 2004 shall be prorated to the date of Closing.

(b) Utility Charges. Trustee will request each utility serving the Premises to render a final bill as of the Closing so that utility charges may be separately billed for the periods before and after the Closing. If any utility charges are not separately billed, they will be prorated and, for proration purposes, it will be assumed that all utility charges were uniformly incurred during the billing period in which the Closing occurs.

(c) Income and Expenses. All income and expense attributable to the ownership or operation of the Facility (measured on an accrual basis) through 11:59 p.m. on the day before the Closing shall be for the account of the Estate. Thereafter, such income and expense shall be for the account of the Buyer. Such income will include, but shall not be limited to, all Medicare/Medicaid reimbursements, Blue Cross or other insurance payments or advances, federal social security payments, and payments or advances from private pay patients received before, on or after the Closing. Adjustment shall be made to the Purchase Price: (a) crediting the Estate for items of expense applicable to the post-Closing period, but paid in advance of Closing; (b) debiting the Estate for items of expense accrued, but not paid for, at the time of Closing; and (c) debiting the Estate for income received before Closing but attributable to the post-Closing period. All items of income or expense that apply both to pre-Closing and post-Closing periods shall be prorated at Closing with price adjustment made for the portion to be credited to the Estate or debited to the Estate. Items to be prorated include, but are not limited to, premiums for assigned insurance policies, if any, and all other items customarily prorated or required by other provisions of this Agreement to be prorated or adjusted. In effecting the proration, the Estate shall be credited for items of expense paid in advance and debited for items of income received in advance and applicable to the period after the Closing and items of expense accrued but not paid for at the time of the Closing.

(d) When Adjustments Made. The adjustments required by Subparagraph 6.3 shall be made at the Closing to the extent reasonably possible. Adjustments made at the Closing shall be reflected in payment in cash. To the extent the information necessary to arrive at such adjustments is not available at the Closing, the parties shall make provisional adjustments based upon the best available information, including reasonable estimates, and shall make final adjustments as soon as reasonably possible, but in any event within 60 days after the Closing. Adjustments made after the Closing shall be payable in cash promptly after all Post-Closing adjustments are determined.

## **ARTICLE VII INDEMNIFICATION**

7.1. Buyer's Indemnification. The Buyer hereby agrees to indemnify and hold harmless the Trustee and her representatives against and from any and all liabilities, claims, demands, losses and expenses, obligations, damages, recoveries and deficiencies, including interest, penalties and attorney fees necessary for the defense of the matters herein described or for collection of amounts due hereunder (all collectively hereinafter referred to as "Damages"), that the Trustee and her representatives may incur or suffer, directly or indirectly, which arise out of, result from, relate to or are due to the breach by the Buyer of any representations, warranties, covenants or agreements made by Buyer pursuant to the terms of this Agreement.

7.2 Procedure for Indemnification. In the event that Trustee shall incur (or anticipate that it may incur in the case of third party claims) any Damages in respect of which indemnity may be sought by such party pursuant to this Section 7 or any other provision of this Agreement, the party seeking indemnification (the "Indemnatee") shall notify the person(s) from whom indemnity is sought (the "Indemnitor") promptly in writing; in the case of third party claims, such notice shall in any event be given within twenty (20) days of the filing or assertion of any claim against the Indemnatee stating the nature and basis of such claim; provided, however, that any delay or failure to notify any Indemnitor of any claim shall not relieve it from any liability except to the extent that the Indemnitor demonstrates that the defense of such action is materially prejudiced by such delay or failure to notify. In the case of third party claims, the Indemnitor shall, within ten (10) days of receipt of notice of such claim, notify the Indemnatee of its intention to assume the defense of such claim. If the Indemnitor shall assume the defense of the claim, the Indemnitor shall have the right and obligation (i) to conduct any proceedings or negotiations in connection therewith necessary or appropriate to defend the Indemnatee, (ii) to take all other required steps or proceedings to settle or defend any such claims; and (iii) to employ counsel to contest any such claims or liability in the name of the Indemnatee or otherwise. If defendants in any action include the Indemnatee and the Indemnitor, and the Indemnatee shall have been advised by its counsel that there may be legal defenses available to the Indemnatee which are different from or in addition to those available to the Indemnitor, the Indemnatee shall have the right to employ its own counsel in such action, and, in such event, the fees and expenses of such counsel shall be borne by the Indemnitor. If the Indemnitor shall not assume the defense of any such claim or litigation resulting therefrom, the Indemnatee may defend against any such claim or litigation in such manner as it may deem appropriate and the Indemnatee may settle such claim or litigation in such manner as it may deem appropriate. If it shall be finally determined that the Indemnitor failed to assume the defense of any claim for which the Indemnitor is liable to the Indemnatee for Damages, then the expense of defending the claim shall be borne by the Indemnitor. Payment of Damages shall be made within ten (10) days of a final determination of a claim.

A final determination of a disputed claim shall be (i) a judgment of any court determining the validity of a disputed claim, if no appeal is pending from such judgment or if the time to appeal therefrom has elapsed, (ii) an award of any arbitration determining the validity of

such disputed claim, if there is not pending any motion to set aside such award or if the time within which to move to set such award aside has elapsed, (iii) a written termination of the dispute with respect to such claim signed by all of the parties thereto or their attorneys, (iv) a written acknowledgment of the Indemnitor that he or it no longer disputes the validity of such claim, or (v) such other evidence of final determination of a disputed claim as shall be acceptable to the parties. In the event a final determination of a claim is made by a court or arbitrator, the prevailing party shall be entitled to its costs and attorneys' fees incurred to prosecute or defend such claim.

## **ARTICLE VIII AMENDMENT; TERMINATION**

8.1. Amendment. Subject to any Court approval requirement that may be applicable, this Agreement may be amended by the written agreement of the Trustee and Buyer at any time prior to the Closing.

8.2. Termination. This Agreement may be terminated prior to the Closing as follows (the actual date on which this Agreement is terminated being referred to herein as the “**Termination Date**”):

- (a) At any time on or prior to the Closing Date, by mutual written consent of the Trustee and Buyer;
- (b) At the election of the Trustee, if any one or more of the conditions to the obligations of the Trustee to close as set forth in Section 6.2 of this Agreement has not been fulfilled prior to the Outside Date;
- (c) At the election of Buyer, if any one or more of the conditions to the obligations of Buyer to close as set forth in Section 6.1 of this Agreement has not been fulfilled prior to the Outside Date;
- (d) At the election of the Trustee, if Buyer has materially breached any representation, warranty, covenant or agreement contained in this Agreement, which breach cannot be or is not cured prior to the Outside Date;
- (e) At the election of Buyer, if the Trustee has breached any representation, warranty, covenant or agreement contained in this Agreement, which breach cannot be or is not cured prior to the Outside Date;
- (f) By either Buyer or the Trustee, if any Governmental Authority of competent jurisdiction shall have issued an Order or taken any other action restraining, enjoining or otherwise prohibiting the Transactions;
- (g) By either Buyer or the Trustee, upon the entry of an Order of the Court declining to approve the sale of all or a material portion of the Acquired Assets to Buyer or another person designated by Buyer or authorizing the sale of all or a material portion of the Acquired Assets to a Person other than Buyer or another Person designated by Buyer;

- (h) By either Buyer or the Trustee if:
- (i) The Closing has not occurred on or before October 18, 2004, unless extended by written notice delivered by Buyer or the Trustee at least five (5) Business Days prior to such date and agreed to by the other party (“**Outside Date**”), time being of the essence; or
  - (ii) The Case is dismissed pursuant to provisions of the Bankruptcy Code; or
  - (iii) The Sale Order has not been entered on or before October 18, 2004.

8.3. Effect of Termination. If this Agreement is terminated and the Transactions are not consummated, this Agreement (other than this Article VII) will become void and of no further force and effect, except that any such termination pursuant to Section 8.2(d) or (e) shall be without prejudice to the rights and obligations of the parties under this Agreement.

8.4. Limitation on Liability. Each party to this Agreement irrevocably waives and relinquishes all rights to consequential, incidental and indirect damages in any Action arising out of or relating to this Agreement, the Transaction Documents or the Transactions contemplated hereby or thereby. Under no circumstances whatsoever will either party to this Agreement be liable to the other for monetary damages in an aggregate amount, including attorneys’ fees, in excess of the Purchase Price.

## **ARTICLE IX SALE PROVISIONS**

9.1. Fiduciary Duty of the Trustee. Nothing contained herein will limit the Trustee from performing her fiduciary duties to maximize the value of the Estate, including the right of the Trustee directly or indirectly to solicit or to encourage any proposals or offers from any Person relating to the acquisition of the Acquired Assets, to assist any third party in preparing or soliciting an offer relating to such an acquisition, or to accept such an offer subject to the obligations of the Trustee under Section 4.3 of this Agreement.

## **ARTICLE X MISCELLANEOUS**

10.1. Expenses. Each of the parties will bear its or her own respective costs and expenses (including all compensation and expenses of counsel, financial advisors, consultants, appraisers and independent accountants) incurred in connection with the preparation and execution of this Agreement and the Transaction Documents, the consummation of the Transactions, and the removal of the Acquired Assets from their location(s).

10.2. Further Documents and Agreements. This Agreement, together with the Schedules heretofore or contemporaneously delivered pursuant to this Agreement or

executed and delivered at Closing, sets forth the entire agreement and understanding among the parties as to the subject matter hereof, and merges and supersedes all prior discussions, agreements, and understandings of every and any nature between them. This Agreement will be effective only when signed by all of the parties on the signature page (or counterpart signature pages hereto). No party will be bound by any condition, definition, warranty or representation, other than as expressly set forth or provided for in this Agreement, on or subsequent to the date hereof, unless set forth in writing and signed by the party to be bound thereby.

10.3. Headings. The Article and Section headings contained in this Agreement are for reference purposes only and will not in any way affect the meaning or interpretation of this Agreement.

10.4. Notices. All notices hereunder will be deemed given if in writing and delivered or sent by facsimile, courier or by registered or certified mail (return receipt requested) to the following addresses or facsimile numbers (or at such other addresses or facsimile numbers as are specified by like notice):

(a) If to the Trustee, to:

Dorraine A. Larison  
1010 W. St. Germain Street  
Suite 600  
St. Cloud, Minnesota, 56301  
Facsimile No.: (320) 252-4414

With copy to:

Phillip L. Kunkel  
Gray Plant Mooty Mooty & Bennett, P.A.  
1010 W. St. Germain Street  
Suite 600  
St. Cloud, Minnesota, 56301  
Facsimile No.: (320) 252-4414

(b) If to Buyer, to:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

With a copy to:

\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Any notice given by mail or courier will be effective when received. Any notice given by facsimile will be effective upon oral or machine confirmation of transmission.

10.5. Governing Law. This Agreement is governed by and will be construed in accordance with the Laws of the State of Minnesota without regard to the conflicts of law principles thereof that would apply any other Law and, to the extent applicable, the Bankruptcy Code.

10.6. Waiver of Jury Trial. EACH OF THE PARTIES HERETO HEREBY WAIVES TRIAL BY JURY IN ANY ACTION ARISING OUT OF THIS AGREEMENT, THE TRANSACTION DOCUMENTS OR THE TRANSACTIONS CONTEMPLATED HEREBY OR THEREBY IN ANY COURT IN WHICH SUCH ACTION MAY BE BROUGHT.

10.7. Survival of Representations and Warranties. The representations and warranties of the Trustee and Buyer set forth in this Agreement will survive the Closing until \_\_\_\_\_.

10.8. Binding Effect. This Agreement will be binding upon and inure to the benefit of the parties hereto and their respective successors and permitted assigns. Notwithstanding the foregoing, the parties hereto acknowledge that the Trustee's execution of this Agreement is subject to approval of the Court. This Agreement will not be binding upon the Trustee or Buyer unless and until it is approved by the Court in accordance with the applicable provisions of the Bankruptcy Code.

10.9. Waivers and Amendments; Non-Contractual Remedies. This Agreement may be amended, superseded, canceled, renewed or extended, and the terms and conditions hereof may be waived, only by a written instrument signed by the parties or, in the case of a waiver, by the party waiving compliance. Except as otherwise provided herein, no delay on the part of any party in exercising any right, power or privilege hereunder, nor any single or partial exercise of any such right, power or privilege hereunder, will preclude any other or further exercise thereof or the exercise of any other such right, power or privilege hereunder. Except as otherwise provided in this Agreement, the rights and remedies herein provided are cumulative and are not exclusive of any rights or remedies that any party may otherwise have at law or in equity.

10.10. No Third-Party Rights. This Agreement is not intended and will not be construed to create any rights in any person or entity other than the parties to this Agreement and no person or entity will have any rights as a third-party beneficiary hereunder.

10.11. Schedules. Each Schedule delivered pursuant to the terms of this Agreement will be in writing and will constitute a part of this Agreement as if fully set forth herein.

10.12. Successor and Assigns. Neither party hereto may assign or transfer any of its rights or obligations hereunder without the prior written consent of the other party, which consent will not be unreasonably withheld. Notwithstanding the foregoing, Buyer may assign its rights and obligations (or any portion thereof) to any other Person, whether presently existing or formed subsequent to the date hereof; provided, however, that Buyer will guarantee the performance hereof by its assignee subject to the terms and conditions hereof.

10.13. Consent to Jurisdiction. Any Action arising out of or relating to this Agreement, the Transaction Documents or the Transactions contemplated hereby or thereby, any sale of all or any portion of the Acquired Assets, or any other matter between the parties hereto arising in or relating to the Case will be instituted in the Court and each party hereto waives any objection which such party may have to the laying of venue of any such Action in the Court and irrevocably submits to the jurisdiction of the Court in any such Action.

10.14. Trustee. The Trustee is a party to this Agreement solely in her capacity as the Chapter 7 trustee of the Debtor's Estate, and not in her individual capacity. All obligations and liabilities of the Trustee arising out of or relating to this Agreement, the Transaction Documents or the Transactions contemplated hereby or thereby are and will be obligations and liabilities of the Trustee solely in her capacity as the Chapter 7 trustee of the Debtor's Estate, and not in her individual capacity.

IN WITNESS WHEREOF, this Agreement has been signed on behalf of each of the parties hereto as of the date first above-written.

BUYER

---

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

DORRAINE A. LARISON, solely in her  
capacity as the trustee of the bankruptcy  
estate of Frazee Care Center, Inc., and not  
in her individual capacity

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**Schedule 1.1(a)**  
**REAL PROPERTY**

**Owned Property:**

Parcel 1:

Parcel 2:

Parcel 3:

Parcel 4:

Parcel 5:

Parcel 6:

**Leased Property:**

Parcel 7:

Lease with Hamilton Investments of Frazee, LLC

Parcel 8:

Lease with Vergas Assisted Living, Inc.

**Schedule 1.1(b)**  
**EQUIPMENT**

**Schedule 1.1(c)**  
**INVENTORY**

**Schedule 1.1(d)**  
**ACQUIRED CONTRACTS**

**Schedule 1.1(e)**  
**PERSONAL PROPERTY**

**Schedule 1.1(f)**  
**ACCOUNTS RECEIVABLE**

**Schedule 1.1(g)**  
**EXCLUDED ASSETS**

**Schedule 4.3**  
**BIDDING PROCEDURES**

**Exhibit A**  
**TRUSTEE'S BILL OF SALE**

**Exhibit B**  
**INSTRUMENT OF TRANSFER OF REAL PROPERTY**

**Exhibit C**  
**ASSIGNMENT AND ASSUMPTION OF LEASE**

GP:1613915 v5

**FRAZEE CARE CENTER, INC.  
BIDDING PROCEDURES**

**A. The Sale.**

1. Dorraine A. Larison, the Chapter 7 Trustee (“Trustee”) for the bankruptcy estate (“Estate”) of Frazee Care Center, Inc., is offering for sale substantially all of the assets of the Estate, including all of the tangible and intangible assets used in connection with the operation of nursing home and assisted care facilities in Frazee, Minnesota, and Vergas, Minnesota, including the following:

(a) Approximately 95-unit nursing home facility located on Debtor’s Owned Property;

(b) Approximately 12-unit assisted living facility located on Debtor’s Owned Property;

(c) Operation of approximately 7-unit assisted living facility located on Debtor’s Leased Property (Hamilton Investments of Frazee, LLC, Lessor) located in Frazee, Minnesota; and

(d) Operation of assisted living facility located on Debtor’s Leased Property (Vergas Assisted Living, Inc., Lessor) located in Vergas, Minnesota.

A more complete description of the assets offered for sale (“Assets”) is attached as Exhibit A to the Trustee’s Notice Of Expedited Hearing And Motion To Approve (1) Bidding Procedures With Respect To The Disposition Of Estate Assets (2) The Sale Of All Or Substantially All Of Estate’s Assets Free And Clear Of Liens And Interests And (3) Authorizing Assumption And Assignment Of Leases And Executory Contracts (“Sale Motion”).

2. The Assets shall be sold “AS IS, WHERE IS”, without any representations or warranties of any kind or nature, including any implied warranties of merchantability or fitness for a particular purpose, except as is otherwise expressly stated in the definitive asset purchase agreement between the Trustee and the successful bidder as approved by the Bankruptcy Court (“Asset Purchase Agreement”).

3. All of the Estate’s right, title and interest in and to the Assets shall be sold free and clear of liens, claims and interests pursuant to 11 U.S.C. §§ 363(f) and 365.

4. The sale shall be for cash payable in full on the Closing Date, and the assumption of certain liabilities of the Estate as expressly set forth in the Asset Purchase Agreement. The closing of the sale of the Assets to the successful bidder shall take place no later than twenty (20) days following approval of the sale by the Bankruptcy Court.

**B. Qualified Bidders; Qualified Bids.**

1. In order to qualify as a Qualified Bidder, a potential bidder or bidding group must register with Dennis Kamstra, Inc. (“DKI”), at 545 Sunset Lane, Cambridge, MN 55008. Such registration shall include the execution of a confidentiality agreement containing terms and conditions acceptable to the Trustee and DKI and written evidence of commitments for financing or other evidence of ability to consummate the proposed transaction reasonably satisfactory to the Trustee and DKI in consultation with the Secured Creditors (as defined in the Sale Motion). The Trustee or DKI will notify a potential bidder of its qualification as a Qualified Bidder. Notwithstanding anything in these Bidding Procedures to the contrary, each of the Secured Creditors, as defined in the Sale Motion, shall be deemed to be a Qualified Bidder.

2. Qualified Bidders may obtain information concerning the Assets by contacting DKI. In preparing its bid, each Qualified Bidder will be required to rely solely upon its own due diligence review which must be completed on or before September 17, 2004. Arrangements to conduct due diligence may be made by contacting Dennis Kamstra of DKI at the address provided in paragraph above. The Trustee reserves the right, in her sole discretion, to supplement or clarify the information provided by DKI at any time prior to sale. Any such supplemental information will be provided to all Qualified Bidders.

3. In order to constitute a Qualified Bid, a Qualified Bidder must submit to DKI the following (“Bid Package”):

(a) An executed copy of an Asset Purchase Agreement in substantially the form provided by the Trustee, together with a copy marked to show all modifications made by the Qualified Bidder to the form provided by the Trustee.

(b) An earnest money deposit in the form of a certified check or cashier’s check payable to the order of the Trustee in an amount equal to at least ten percent (10%) of the cash Purchase Price set forth in the Qualified bidder’s Asset Purchase Agreement (“Earnest Money Deposit”);

(c) A letter stating that the Qualified Bidder’s bid is irrevocable until the later of (i) two (2) business days after the sale of the Assets has closed, and (ii) twenty-five (25) days after the Bankruptcy Court enters an order approving the sale of the Assets.

(d) If the Qualified Bidder is an organization, the officer or agent executing the Asset Purchase Agreement must attach proof of the requisite authority to bid on behalf of the organization.

4. The Bid Package must be delivered or mailed to the Trustee at:

Dorraine A. Larison  
Gray, Plant, Mooty, Mooty & Bennett, P.A.  
1010 West St. Germain, Suite 600  
St. Cloud, MN 56301

A duplicate copy of the Bid Package must also be delivered to:

Dennis Kamstra  
Dennis Kamstra, Inc.  
545 Sunset Lane  
Cambridge, MN 55008

5. The Bid Packages must be received by the Trustee and DKI on or before 5:00 P.M. (Central Time) on September 20, 2004 (“Bid Deadline”). The Trustee will deliver copies of each Bid Package received to counsel for each of the Secured Creditors within twenty-four hours after receipt.

6. Following the Bid Deadline, the Trustee and DKI shall review the Bid Packages received and, in consultation with the Secured Creditors, determine whether each such Bid Package received constitutes a Qualified Bid and which Qualified Bid constitutes the highest and best Qualified Bid. The Trustee reserves the right to reject any Bid Package that the Trustee determines: (a) does not comply with these Bidding Procedures; (b) contains terms or conditions that are materially more burdensome to the Estate than the terms and conditions set forth in the form of Asset Purchase Agreement provided by the Trustee; or (c) is otherwise not in the best interest of the Estate. The Trustee reserves the right to waive any non-material deficiency in a Bid Package if the Trustee determines in her sole discretion that to do so is in the best interest of the Estate.

7. Each Qualified Bidder who timely submits a Bid Package will be notified on or before 10:00 a.m. on September 22, 2004, as to whether its Bid Package constitutes a Qualified Bid, and the terms of the highest and best Qualified Bid received.

8. If the Trustee receives only one Qualified Bid, the Trustee will request the approval of that Qualified Bid at the hearing before the Bankruptcy Court on the Sale Motion (“Sale Hearing”).

**C. The Auction.**

1. If the Trustee receives more than one Qualified Bid, the Trustee will conduct an Auction. The Auction will take place at 10:00 a.m. on September 23, 2004, at the offices of Gray Plant Mooty, 1010 West St. Germain, Suite 600, St. Cloud, MN 56301. The Trustee reserves the right to exclude from attending the Auction any party in interest or other person except the Secured Creditors and their respective representatives and the

Qualified Bidders who timely submitted Qualified Bids and their respective representatives.

2. Only a Qualified Bidder who has previously submitted a Qualified Bid, or a Secured Creditor, will be eligible to participate in the Auction. The highest and best Qualified Bid, as determined above, shall constitute the opening Qualified Bid at the Auction. All subsequent Qualified Bids must be in increments of at least \$25,000 in excess of the highest preceding Qualified Bid.

3. At the conclusion of the Auction, the Trustee and DKI, in consultation with the Secured Creditors, will determine the highest and best Qualified Bid ("High Bid") and the second highest and best Qualified Bid ("Second Place Bid"). In making the foregoing determinations, the Trustee and DKI, in consultation with the Secured Creditors, may consider, among other things: (a) the amount of the cash purchase price offered in the Qualified Bid; (b) the nature and amount of the obligations to be assumed and/or paid by the Qualified Bidder; (c) the Qualified Bidder's financial situation and relevant wherewithal; (d) the likelihood of the Qualified Bidder obtaining any necessary regulatory consents and approvals; and (e) the probability of prompt closing.

4. The Trustee and the Qualified Bidder who made the High Bid will enter into an Asset Purchase Agreement that incorporates the terms of the High Bid. The Trustee will request the approval of the High Bid at the Sale Hearing.

**D. Sale Hearing.**

The Sale Hearing will be held at 10:30 a.m. on September 28, 2004, before The Honorable Dennis D. O'Brien, 204 U.S. Courthouse, 118 South Mill Street, Fergus Falls, Minnesota 56537.

**E. Earnest Money Deposits.**

1. If the Trustee receives an Earnest Money Deposit from a prospective bidder who is determined, as provided above, to not be a Qualified Bidder, the Trustee will return such Earnest Money Deposit to the prospective bidder in the form received. The Trustee will deposit and hold each Earnest Money Deposit received from a Qualified Bidder in a single interest-bearing account.

2. Within two (2) business days after the conclusion of the Auction, the Trustee will refund to each Qualified Bidder, other than the Qualified Bidders who made the High Bid and the Second Place Bid, the amount of its respective Earnest Money Deposit without interest.

3. The Trustee will retain the Earnest Money Deposit of the Qualified Bidder who made the High Bid and apply such Earnest Money Deposit (including all interest and income earned thereon) to the purchase price, or as may otherwise be specified in the Asset Purchase Agreement, at the Closing. Should the Qualified Bidder who made the

High Bid fail to close on or before October 18, 2004, or as is otherwise specified in the Asset Purchase Agreement, said Qualified Bidder's Earnest Money Deposit (including all interest and income earned thereon) shall be forfeited to the Trustee and the Trustee shall retain the same. The Trustee may then, if she so elects, accept the Second Place Bid by written notice to the Qualified Bidder who made the Second Place Bid.

4. The Trustee will retain the Earnest Money Deposit if the Qualified Bidder who made the Second Place Bid until the earlier of (a) two (2) business days after the sale of the Assets to the Qualified Bidder who made the High Bid has closed, and (ii) twenty-five (25) days after the Bankruptcy Court enters an order approving the sale of the Assets, unless the Trustee elects to accept the Second Place Bid as provided above within that twenty-five day period. If the Trustee accepts the Second Place Bid as provided above, the Trustee will apply such Earnest Money Deposit (including all interest and income earned thereon) to the purchase price, or as may otherwise be specified in an Asset Purchase Agreement between the Trustee and such Qualified Bidder, at the Closing. Should such Qualified Bidder fail to close on or before November 1, 2004, or as is otherwise specified in an Asset Purchase Agreement between the Trustee and such Qualified Bidder, such Qualified Bidder's Earnest Money Deposit (including all interest and income earned thereon) shall be forfeited to the Trustee and the Trustee shall retain the same.

GP:1612207 v2

GP:1612274 v1

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA

In Re:

Chapter 7  
Bky. Case No. 04-60907

Frazee Care Center, Inc.,

UNSWORN CERTIFICATE OF SERVICE

Debtor.

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I, Jean M. Eisenschenk, declare under penalty of perjury that on August 13, 2004, I mailed the following documents:

- 1. NOTICE OF EXPEDITED HEARING AND MOTION TO APPROVE (1) BIDDING PROCEDURES WITH RESPECT TO THE DISPOSITION OF ESTATE ASSETS; (2) THE SALE OF ALL OR SUBSTANTIALLY ALL OF ESTATE'S ASSETS FREE AND CLEAR OF LIENS AND INTERESTS; AND (3) AUTHORIZING ASSUMPTION AND ASSIGNMENT OF LEASES AND EXECUTORY CONTRACTS (W/EXHIBITS); AND**
- 2. PROPOSED ORDER APPROVING BIDDING PROCEDURES AND ASSET PURCHASE AGREEMENT RELATING TO PROPOSED SALE OF ALL OR SUBSTANTIALLY ALL THE ESTATE'S ASSETS FREE AND CLEAR OF INTERESTS**

by first class mail postage prepaid to each entity named below at the address stated below for each entity:

**SEE ATTACHED SERVICE LIST**

*Please note that the Clerk of Bankruptcy Court will serve the above documents upon all parties on the Debtor's matrix. The parties on the attached Service List are interested parties/entities not currently on the Debtor's matrix.*

Executed on: August 13, 2004

/e/ Jean M. Eisenschenk  
Jean M. Eisenschenk  
GRAY, PLANT, MOOTY,  
MOOTY & BENNETT, P.A.

SERVICE LIST

UNITED STATES TRUSTEE  
1015 US COURTHOUSE  
300 SOUTH FOURTH ST  
MINNEAPOLIS MN 55415

UNITED COMMUNITY BANK  
C/O JAY D CARLSON ESQ  
P O BOX 458  
FARGO ND 58078-0458

JESSICA PALMER-DENIG  
ASST ATTY GENERAL  
445 MINNESOTA ST #1100  
ST PAUL MN 55101-2128

CHRISTEL M BENDER ESQ  
VOGEL WEIR HUNKLE  
P O BOX 1389  
FARGO ND 58107-1387

GE CAPITAL SMALL BUS FINANCE  
C/O JAMES RUBENSTEIN ESQ  
90 SOUTH SEVENTH ST #4800  
MINNEAPOLIS MN 55402-4129

WESTERN FINANCE & LEASE INC  
P O BOX 650  
DEVILS LAKE ND 58301

MODERN BUSINESS EQUIPMENT  
P O BOX 524  
DETROIT LAKES MN 56501

MERIT CARE HEALTH ACCESSORIES  
3223 - 32ND AVENUE SW  
FARGO ND 58103

TERRY KARKELA ESQ  
P O BOX 160  
PERHAM MN 56573

THOMAS B HEFFELFINGER  
U S ATTORNEY  
DISTRICT OF MINNESOTA  
U S COURTHOUSE  
300 SOUTH FOURTH ST #600  
MINNEAPOLIS MN 55415

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA**

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In re: Bky Case No. 04-60907  
**FRAZEE CARE CENTER, INC.** Chapter 7  
Debtor.

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**ORDER APPROVING BIDDING PROCEDURES AND ASSET PURCHASE  
AGREEMENT RELATING TO PROPOSED SALE OF ALL OR  
SUBSTANTIALLY ALL THE  
ESTATE'S ASSETS FREE AND CLEAR OF INTERESTS**

At Fergus Falls, Minnesota.

This matter came on for hearing on the motion of Dorraine A. Larison, Chapter 7 Trustee of Frazee Care Center, Inc. (the "Trustee"), to approve (1) Bidding Procedures with Respect to the Disposition of Estate's Assets; (2) the Sale of All or Substantially All of Estates Assets Free and Clear of Liens and Interests and (3) Authorizing the Assumption and Assignment of Unexpired Leases and Executory Contracts(the "Sale Motion"). Phillip L. Kunkel appeared on behalf of the Trustee. Other appearances were as noted on the record.

This Court having determined that granting the preliminary relief requested in the Sale Motion is in the best interest of the estate and its creditors, it appearing that proper and adequate notice has been given, and after finding that good and sufficient cause appears therefore upon the record herein,

**IT IS HEREBY ORDERED:**

1. The Sale Motion is granted to the extent set forth herein.

2. The proposed Asset Purchase Agreement and Bidding Procedures, as set forth in the form of Exhibit A and Exhibit B to the Sale Motion, shall be approved in all respects, and the Trustee shall be authorized to comply therewith.

3. The Auction for the Assets, as described in the Bidding Procedures, shall take place at 10:00 a.m. (Central Time) on September 23, 2004, at 1010 West St. Germain Street, Suite 600, St. Cloud, MN 56301, or such later time or other place as the Trustee shall notify all Qualified Bidders who have submitted Qualified Bids.

4. The hearing on the motion for sale of the estate's assets free and clear of liens, claims, encumbrances, and interests, as well as for the assumption and assignment of unexpired leases and executory contracts, shall be held at before this Court at 10:30 a.m. (Central Time) on September 28, 2004, 204 U.S. Courthouse, 118 South Mill Street, Fergus Falls, Minnesota.

Dated: August 24, 2004

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Hon. Dennis D. O'Brien  
United States Bankruptcy Judge