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5 Proposed Attorneys for Debtor
 6 THE WILKES BASHFORD COMPANY

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 8 UNITED STATES BANKRUPTCY COURT
 9 NORTHERN DISTRICT OF CALIFORNIA
 10 SAN FRANCISCO DIVISION

11
 12 In re
 13 The Wilkes Bashford Company,
 14 Debtor.
 15 Tax I.D. 94-2944325

Case No. 09-33497 TEC

Chapter 11

EMERGENCY MOTION TO ESTABLISH
 BID PROCEDURES AND ALLOW
 BREAK-UP FEE IN CONNECTION WITH
 THE SALE OF ASSETS PURSUANT TO
 BANKRUPTCY CODE § 363

Date: November 10, 2009

Time: 9:30 a.m.

Place: United States Bankruptcy Court
 235 Pine Street, Courtroom 23
 San Francisco, CA

Judge: Thomas E. Carlson

20 The Wilkes Bashford Company (“Debtor”), debtor and debtor-in-possession in
 21 the above-captioned case, hereby moves this Court on an emergency basis for entry of an
 22 order establishing bidding procedures in connection with a proposed sale of the Debtor’s
 23 assets free and clear of liens (the “Bid Procedures Motion”). The Bid Procedures Motion is
 24 brought pursuant to 11 U.S.C. § 363 and 365, Federal Rules of Bankruptcy Procedure 6004
 25 and 6006, and Bankruptcy Local Rule 6004-1.

26 As soon as the Court sets a hearing on the Bid Procedures Motion, the Debtor
 27 will serve a notice to (1) the parties asserting a security interest in the Debtor’s assets, (2) the
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1 Debtor’s creditors holding the twenty largest unsecured claims, and (3) the Office of the
2 United States Trustee.

3 **I. RELIEF REQUESTED**

4 The Debtor intends to seek court approval of a sale of assets of the bankruptcy
5 estate pursuant to an asset purchase agreement (the “Agreement”) with a stalking horse
6 bidder, Ed Mitchell West, LLC (“Mitchell”). A copy of the Agreement is attached to the sale
7 motion filed concurrently. In connection with the Agreement, the Debtor will schedule an
8 auction to consider proposals from other bidders for some or all of the Debtor’s assets. The
9 assets to be sold pursuant to the Agreement include substantially all assets used in the
10 operation of the Debtor’s business, including inventory, accounts receivable, customer lists,
11 the Debtor’s interest in certain agreements, furniture, fixtures, equipment, intellectual
12 property, and certain property leases, as described more fully in the Agreement (the
13 “Assets”).

14 The Debtor requests that the Court approve the Bidding Procedures detailed
15 below. The proposed Bidding Procedures are intended to establish the framework for a
16 prompt sale of the Assets and maximize the return to the estate and all creditors. The
17 procedures are designed to attract multiple and competing bids, represent the sound business
18 judgment of the Debtor, and will ensure a good faith sale of the Assets. Accordingly, the
19 procedures should be approved by the Court.

20 The Debtor is requesting the associated sale motion to be heard on shortened
21 time in order to provide for a closing of the sale on or before November 30, 2009. The
22 holiday shopping season is the busiest season for retailers and it is imperative that the sale
23 close and the operations be transitioned prior to December in order to maintain continuity of
24 operations. Based on the Debtor’s extensive marketing efforts to date, the Debtor believes
25 that the proposed schedule (though accelerated) will provide interested parties with sufficient
26 time to consider the terms of the sale and participate in the sale process if interested.

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1 **II. STATEMENT OF FACTS**

2 **A. The Chapter 11 Filing**

3 On November 6, 2009, the Debtor filed a voluntary petition with this court for
4 reorganization under chapter 11 of Title 11 of the United States Code (the “Bankruptcy
5 Code”). The Debtor continues to manage and operate its business as a debtor in possession
6 pursuant to Bankruptcy Code sections 1107 and 1108. No trustee or examiner has been
7 appointed in this chapter 11 case and no committee has been appointed or designated.

8 The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and
9 1334. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This is a core proceeding
10 pursuant to 28 U.S.C. § 157(b)(2).

11 **B. The Debtor’s Business and Anticipated Sale**

12 The Debtor is a San Francisco institution and a global icon in luxury specialty
13 retail. Founded in 1966 by Wilkes Bashford, the company offers unmatched merchandise
14 quality and an exceptional level of service to its customers. The stores have a loyal and
15 upscale clientele that appreciates the high-quality garments, superb craftsmanship and
16 masterful coordination offered by the Debtor. The company’s exceptional customer service is
17 fully-realized in the long-term relationships established between the members of its sales
18 team and loyal customers.

19 The Debtor’s flagship store is located in the Union Square district of San
20 Francisco. It houses six floors of merchandise, segmented by men’s and women’s collections
21 and a home store, and offers a range of product lines. In 1995, the Debtor opened a “Wilkes
22 Sport” store in Mill Valley, California. In 2001, the Debtor opened its Palo Alto store in the
23 Stanford Shopping Center to better serve its customers in Silicon Valley. In 2006, the Debtor
24 expanded to the Monterey Peninsula, opening a store in Carmel, California.

25 The 2008-2009 recession resulted in poor performance in the luxury sector of
26 the consumer market, including the Debtor. In Spring 2009, the Debtor retained Quest
27 Turnaround Advisors, LLC (“Quest”) to assist it in assessing its financing and strategic
28 alternatives, and to improve operating performance. The result of the Debtor’s and Quest’s

1 efforts was the closure of the Mill Valley store in September 2009 and the Carmel store in
2 October 2009, and a restructuring of the Debtor's prepetition trade payables. The Debtor's
3 principal liabilities consist of its unsecured obligations to vendors, its secured obligation to
4 Comerica Bank and certain shareholders, and its unsecured obligations to landlords.

5 Ultimately, a sale of the business presented the best alternative to address the
6 Debtor's needs. The Debtor entered into negotiations to sell substantially all of its assets to
7 Mitchell. Mitchell is affiliated with a private luxury apparel retailer located on the East
8 Coast. After the closing of the acquisition, Mitchell will continue to operate the San
9 Francisco and Palo Alto stores. This case is filed in order to consummate the sale according
10 to the terms of the agreement and obtain approval of a sale pursuant to Bankruptcy Code §
11 363. A motion to approve the sale is being filed concurrently; the sale is subject to higher and
12 better offers. The Debtor anticipates obtaining court approval and closing the sale by the end
13 of November; maximizing the value to the estate by providing for a transition prior to the
14 holiday shopping season.

15 **C. The Debtor's Prepetition Financing and Marketing Efforts**

16 For over eight months, Debtor has worked to improve its operations, while
17 seeking outside financing, and marketing the company. In this process, the Debtor has been
18 assisted by three investment bankers and financial advisors. Through these advisors, the
19 Debtor has pursued potential sales with financial and strategic buyers. Prior to the filing, the
20 Debtor engaged in extensive, targeted marketing efforts that resulted in a significant exposure
21 to appropriate markets for this company. Additional detail on the Debtor's prepetition
22 financing and marketing efforts is provided in the Declaration of Michael Appel in support of
23 the Sale Motion, filed concurrently herewith.

24 **D. The Asset Purchase Agreement**

25 Prepetition, the Debtor negotiated a sale of the Assets to Mitchell to be
26 accomplished through a sale approved by the Court pursuant to Bankruptcy Code § 363.
27 Mitchell submitted an all cash offer of \$4,600,000, plus or minus adjustments for inventory
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1 (the “Asset Purchase Price”). Mitchell will be the stalking horse bidder and Debtor is seeking
2 approval to sell Assets to Mitchell subject to the opportunity for parties to submit higher or
3 better offers as set forth herein.

4 **E. The Proposed Bidding Procedures**

5 The Debtor has designed these Bidding Procedures, including the Break-Up
6 Fee, to compensate Mitchell for its efforts to date and to facilitate a process that will attract
7 multiple and competing bids in order to maximize the value of the Assets for the benefit of
8 the Debtor’s estate. The Bidding Procedures are as follows:

9 1. Sale Hearing: A hearing on the motion to approve the sale of the Assets
10 and to approve the assumption and assignment of executory contracts and unexpired leases
11 (the “Sale Motion”), will be held at _____ .m. on November 25, 2009 (the “Sale Hearing”).

12 2. Service of Sale-Related Pleadings:

13 (a) Notice of Sale Hearing. The Debtor shall cause, on or before
14 November 10, 2009, service by first class mail of notice of the hearing on the Sale Motion
15 and notice of the Bidding Procedures approved by the Court on all known creditors.

16 (b) Moving Papers. The Debtor shall cause, on or before
17 November 10, 2009, service by first class mail of (a) the Sale Motion (which service shall
18 attach the Agreement and include the Agreement and the order on this Bid Procedures Motion
19 filed by the Court), all declarations in support, and information supporting Mitchell’s ability
20 to provide adequate assurance of future performance, on (1) all parties asserting a security
21 interest in the Debtor’s assets, (2) all parties to the unexpired leases and executory contracts
22 proposed to be assumed and assigned under the sale agreement (the “Assumed Contracts”)
23 and their counsel, if known, (3) the Debtor’s creditors holding the twenty largest unsecured
24 claims, (4) the Office of the United States Trustee, (5) all parties having filed and served
25 request for notice in the Chapter 11 case, (6) Mitchell, and (7) all entities, and if known, their
26 counsel, who have expressed a bona fide interest in acquiring the Assets or that the Debtor
27 believes may be interested in proposing a competing bid upon assets of the Debtor. The sale
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1 motions shall set forth any amount required to satisfy the requirements of Bankruptcy Code §
2 365(b)(1)(A) and (B) (the “Cure Amount”) according to the Debtor’s books and records.

3 3. Due Diligence. Any party interested in bidding for the Assets may
4 conduct reasonable due diligence upon the signing of an agreement acceptable to the Debtor
5 providing that such party will not disclose to any third party non-public information regarding
6 the Debtor or its affairs and consistent with the terms of any such agreement executed by
7 Mitchell.

8 4. Objection Bar Dates

9 (a) Objection to Asset Sale. Any objection to the Sale Motion must
10 be in writing, comply with the Federal Rules of Bankruptcy Procedure and the Local
11 Bankruptcy Rules, be filed with the Court on or before November 19, 2009, and be served on
12 (1) Debtor’s counsel, (2) counsel for Mitchell, and (3) the Office of the United States Trustee
13 no later than November 19, 2009.

14 (b) Objection to Assumption and Cure Amounts. Any objection to
15 assumption of the Assumed Contracts on grounds other than lack of adequate assurance of
16 future performance must be in writing, comply with the Federal Rules of Bankruptcy
17 Procedure and the Local Bankruptcy Rules, be filed with the Court on or before November
18 19, 2009, and be served on (1) Debtor’s counsel, (2) counsel for Mitchell, and (3) the Office
19 of the United States Trustee no later than November 19, 2009. Such objection must set forth
20 (a) the basis for the objection, and, if applicable, (b) the amount the party asserts as the Cure
21 Amount. If no such objection is received by November 19, 2009, then the Debtor shall be
22 determined not to owe any Cure Amount that otherwise could have been asserted by the non-
23 debtor party to the Assumed Contracts against the Debtor, Mitchell or such other Mitchell of
24 the Assets through the effective date of the assumption and assignment in respect of such
25 Assumed Contract.

26 (c) Objection to Lack of Adequate Assurance of Future
27 Performance Any bidder other than Mitchell who wishes to become a Qualified Bidder to the
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1 Assets (“Prospective Bidder”) shall give notice by electronic mail of such desire to the
2 Debtor’s counsel at their electronic mail addresses no later than 1 p.m. PT on November 13,
3 2009. Any such Prospective Bidder shall include with such notice all information in .pdf
4 format that the Prospective Bidder deems appropriate to qualify it as an entity that could
5 provide adequate assurance of future performance, as that term is used in Bankruptcy Code §
6 365 (“Adequate Assurance Package”). The Debtor shall, on or before 4 p.m. PT on
7 November 14, 2009, provide by electronic mail, facsimile or first class mail to the parties to
8 the Assumed Contracts the names of the Prospective Bidders together with their Adequate
9 Assurance Package. The parties to the Assumed Contracts shall have until November 20,
10 2009 to file with the court and serve on (1) Debtor’s counsel, (2) counsel for Mitchell, (3)
11 counsel for each of the Prospective Bidders and (4) the Office of the United States Trustee
12 any objection to the Adequate Assurance of Future Performance by Mitchell or any of the
13 Prospective Bidders (“Adequate Assurance Objection”). If an Adequate Assurance Objection
14 is timely filed, such objection shall be heard and resolved at a hearing immediately prior to
15 the Auction (defined below). If the Court finds that any party has not provided adequate
16 assurance of future performance, such party shall not be deemed a Qualified Bidder, and will
17 not be qualified to bid on the Assets.

18 (d) Effect of Failure to Object. The failure of any person to file a
19 timely objection shall bar the assertion at the Sale Hearing or thereafter of any objection to
20 the Sale Motion and the Debtor’s consummation and performance of the Agreement with
21 Mitchell or any Prospective Bidder.

22 (e) Modifications to the List of Assumed Contracts. The Debtor, at
23 the request of Mitchell, may remove any contract from the list of Assumed Contracts at any
24 time prior to the fifth business day prior to the Closing Date. Additional contracts may be
25 added to the list of Assumed Contracts, provided that to the extent contracts are added
26 following service of the Sale Motion and notice of hearing, assumption of any such contracts
27 shall be requested by separate motion.
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1 5. Alternative Bid Deadline. All alternative bids must be submitted to
2 Debtor's counsel by hand delivery or electronic mail not later than 1 p.m. PT on November
3 23, 2009 (the "Alternative Bid Deadline"). Debtor shall immediately distribute a copy of
4 each alternative bid received to Mitchell, Mitchell's counsel, each alternative bidder and their
5 counsel.

6 6. Qualified Alternative Bid. An alternative bid will only be considered if
7 the alternative bid is a "Qualified Alternative Bid." To be a Qualified Alternative Bid, the
8 alternative bid must:

9 (a) Identify the party submitting the alternative bid and such party
10 must be a "Qualified Bidder." A Qualified Bidder shall mean Mitchell and any other person
11 (i) that the Debtor has determined in the exercise of its reasonable business judgment is
12 financially able to consummate the purchase of the Assets if the Court enters an order
13 approving such purchase and (ii) who can give adequate assurance of future performance of
14 the Assumed Contracts through the procedure set forth above;

15 (b) Propose in writing a transaction that the Debtor determines, in
16 good faith, is not materially more burdensome or conditional than the terms set forth in the
17 Agreement, identifies the assets subject to the offer, provides the proposed closing date, and
18 has a value that exceeds the Asset Purchase Price by \$250,000;

19 (c) Consist of an agreement in the form of the Agreement, marked
20 to show changes thereto, that is when taken as a whole on terms and conditions no less
21 favorable to Debtor than the terms and conditions contained in the Agreement, including but
22 not limited to price, time of closing and additional financing through closing;

23 (d) Not be subject to termination by the Prospective Bidder except
24 on the same terms as the Agreement;

25 (e) Include evidence acceptable to the Debtor of the Prospective
26 Bidder's financial capabilities to fully consummate the purchase, including reference to the
27 Adequate Assurance Package previously provided by the Prospective Bidder;

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1 (f) Not be subject to any contingencies, including any financing,
2 corporate approval or due diligence contingencies;

3 (g) Be accompanied by an initial deposit in the amount of
4 \$250,000, which deposit is immediately refundable only if the Prospective Bidder is not
5 selected to purchase the Assets; and

6 (h) Provide for payment in full of any debtor in possession financing
7 at closing.

8 7. Auction, Bidding Increments and Bids Remaining Open

9 (a) If the Debtor receives at least one Qualified Alternative Bid, the
10 Debtor shall conduct an auction (the “Auction”) at the Sale Hearing. Only Mitchell and
11 Qualified Bidders shall be allowed to make any additional bids (“Subsequent Bids”) at the
12 Auction. The Debtor may announce at the Auction procedural rules that are reasonable under
13 the circumstances for conducting the Auction so long as such rules are not inconsistent with
14 these Bidding Procedures.

15 (b) At the Auction, bidding shall begin with the highest offer
16 submitted by a Qualified Bidder and continue in minimum increments of at least \$100,000
17 higher than the previous bid. Mitchell shall have the right but not the obligation to participate
18 in the Auction. Mitchell shall have the right to match any overbid and to credit bid the
19 “Break-Up Fee” (defined below) in the Auction.

20 (c) At the conclusion of the bidding, the Debtor shall announce its
21 determination as to the Qualified Bidder submitting the successful bid, and shall seek
22 approval of the Court for such bid at the Sale Hearing, or shall determine that it will not
23 proceed with a sale, subject to the terms of the Agreement.

24 (d) If the Debtor does not receive any Qualified Alternative Bids,
25 the Debtor will report the same to the Court and will proceed with the sale to Mitchell on the
26 terms set forth in the Agreement at the Sale Hearing, unless the Debtor terminates the
27 Agreement pursuant to its terms.

1 (e) Break-up Fee. If the Agreement is terminated for any reason,
2 other than (i) if there has been a material breach by Mitchell of its representations and
3 warranties or in the observance, or in the due and timely performance, of any of the covenants
4 or agreements contained in the Agreement on Mitchell's part to be performed, and such
5 breach shall not have been cured within ten (10) days after written notice thereof, (ii) a
6 termination by Mitchell prior to approval of the Break-up Fee based on its dissatisfaction with
7 its due diligence review of the business and assets to be purchased, or (iii) a termination by
8 Mitchell based on a material adverse effect with respect to Mitchell, then the Debtor shall
9 pay, or cause to be paid to Mitchell a "Break-up Fee" of \$100,000, plus out-of-pocket
10 expenses of Mitchell (not to exceed an additional \$250,000). Such Break-up Fee shall be in
11 addition to the return to Mitchell of its deposit. The obligation of the Debtor to pay the
12 Break-up Fee to Mitchell shall: (a) be entitled to administrative expense claim status under
13 Bankruptcy Code §§ 503(b)(1)(A) and 507(a)(2); (b) not be subordinate to any other
14 administrative expense claim against the Seller, other than any superpriority claim granted
15 under any debtor-in-possession order; (c) survive the termination of the Agreement; and (d) in
16 the event of consummation of a sale to an alternate purchaser be satisfied from the proceeds
17 of such sale. Any payment to Mitchell of a Break-up Fee shall constitute Mitchell's sole and
18 exclusive remedy against the Debtor on account of the termination of the Agreement due to
19 acceptance of a Qualified Alternative Bid.

20 8. Deposits shall be returned within two (2) days of Court approval of
21 another party's bid.

1 **III. ARGUMENT**

2 Section 363(b)(1) of the Bankruptcy Code provides that the Debtor may, after
3 notice and hearing, sell property of the estate other than in the ordinary course of business.
4 See 11 U.S.C. § 363(b)(1). In connection with this authority, bankruptcy courts are
5 empowered to establish sale procedures, including incremental overbid requirements. See
6 *Doehring v. Crown Corp. (In re Crown Corp.)*, 679 F.2d 774 (9th Cir. 1982) (noting that the
7 district court had required specified minimum overbid amounts, deposit, and the form of
8 purchase agreement to be used by bidder); *In re Crowthers McCall Pattern, Inc.*, 114 B.R.
9 877, 878-879 (Bankr. S.D.N.Y. 1990) (noting that the bankruptcy court had entered an order
10 requiring that overbids be made in specified minimum increments with deposits). Courts
11 frequently approve the implementation of bidding procedures prior to a sale.

12 More generally, courts have considerable discretion to authorize the debtor's
13 use of estate property where the debtor's request is based upon the sound business judgment
14 of the debtor. See *Walter v. Sonwest Bank (In re Walter)*, 83 B.R. 14, 16 (B.A.P. 9th Cir.
15 1987); *In re Lionel Corp.*, 722 F.2d 1063, 1066 (2d Cir. 1983). This authority is
16 supplemented by the Court's broad powers to "issue any order, process or judgment that is
17 necessary or appropriate to carry out the provisions of [the Bankruptcy Code]." 11 U.S.C. §
18 105(a); see *In re Chinichian*, 784 F.2d 1440, 1443 (9th Cir. 1986).

19 The hallmarks of good faith in any sale procedures are the receipt of adequate
20 value through the potential for higher and better offers, and full and accurate disclosure of the
21 terms of the proposed sale to third parties invited to bid. See *In re Abbotts Dairies of*
22 *Pennsylvania, Inc.*, 788 F.2d 143 (3d Cir. 1986). Additionally, courts consider whether
23 bidding procedures allow third parties to submit higher and better bids and whether potential
24 bidders have adequate time to conduct due diligence in determining whether requested
25 bidding procedures are appropriate. See, e.g., *In re Titusville Country Club*, 128 B.R. 396
26 (Bankr. W.D. Pa. 1991).

27 Finally, the primary intent in any sale of estate property is to obtain the greatest
28 possible recovery on proceeds for the estate assets. See *Official Comm. of Subordinated*

1 *Bondholders v. Integrated Res., Inc. (In re Integrated Res., Inc.)*, 147 B.R. 650, 656-57
2 (S.D.N.Y. 1992) ("It is a well-established principle of bankruptcy law that the objective of
3 bankruptcy rules and the Debtors' duty with respect to such sales is to obtain the highest price
4 or greatest overall benefit possible for the estate.") (quoting *In re Atlanta Packaging Prods.,*
5 *Inc.*, 99 B.R. 124, 130 (Bankr. N.D. Ga. 1998)).

6 Here, the Debtor submits that the Bidding Procedures proposed are fair and
7 equitable and designed to maximize the value received for the Debtor's Assets for the
8 following reasons:

9 Due Diligence. The procedures balance the need of bidders to conduct due
10 diligence against the interests of the Debtor and creditors in protecting the bankruptcy estate.
11 The procedures provide potential bidders with a full opportunity to conduct due diligence, but
12 all such parties will be required to execute non-disclosures agreements with terms consistent
13 to those executed by Mitchell.

14 Bidding Qualifications. The Debtor has proposed that each Prospective Bidder
15 be required to meet some very basic qualifications before they are permitted to bid upon the
16 Assets. The requirement that Qualified Bidders be required to make an earnest money
17 deposit guards against frivolous bidding, and the condition that Prospective Bidders produce
18 evidence of their financial position helps to assure that a winning bidder is actually able to
19 close a sale.

20 Terms of Overbid. The Debtor requires all overbids to be in cash and on the
21 same terms as the Agreement between the Debtor and Mitchell. The requirement of an all
22 cash offer is justified given the risk of non-payment associated with non-cash offers. In
23 addition, limiting bids to a mark-up of the form of Agreement agreed to by Mitchell creates
24 an orderly process that facilitates the Debtor's ability to compare and evaluate competing
25 offers to determine which yields the highest and best return for the estate.

26 Break-up Fee. The Debtor believes that the break-up fee included in the
27 Bidding Procedures has been and will be beneficial to maximizing value. In support of this
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1 position, the Debtor asserts that each of the elements recognized by courts in determining
2 whether a break-up fee is appropriate are satisfied because the break-up fee: (1) is the result
3 of an arm's length negotiation, (2) is designed to encourage, rather than hamper bidding, and
4 (3) the amount of the break-up fee is reasonable relative to its overall benefit of the estate.
5 *See In re Integrated Resources, Inc.*, 147 B.R. at 657-63 (discussing appropriate factors for
6 allowance of break-up fee). A break-up fee which was not tainted by self-dealing and was the
7 product of arms-length negotiations should generally be upheld by the bankruptcy court. *See*
8 *In re 995 5th Avenue Associates*, 96 B.R. 24 (Bankr. S.D.N.Y. 1989). The benefits of a
9 break-up fee are particularly evident where necessary to convince a lead bidder to enter the
10 bidding providing some compensation for the risks it is taking. *See id.* at 28.

11 The Debtor believes that granting the Break-up Fee to Mitchell provided it with
12 an incentive to act as a “stalking horse” purchaser and to negotiate the initial terms of sale.
13 As set forth in the Declaration of Michael Appel, Mitchell was the only party willing to incur
14 the time and expense of completing the necessary due diligence to negotiate and document an
15 agreement to purchase the Assets. Moreover, Mitchell did so in a compressed timeframe and
16 during the very busy weeks leading up to the holiday season, which season is key not only to
17 the Debtor's operations but also to the affiliated retail business operated by Mitchell's
18 principals. The Break-up Fee is the result of an arms-length negotiation between the parties.
19 Mitchell's offer now sets a threshold for determining and encouraging serious alternative
20 bidders, who would be able to take advantage of the time and expense invested by Mitchell in
21 negotiating and documenting the Agreement. Further, the amount of the Break-up Fee is
22 reasonable and equal to approximately 2.25% of the minimum sales price, plus reasonable
23 expenses incurred by Mitchell. As such, the Break-up Fee appropriately compensates
24 Mitchell for its investment of time and finances in negotiating the Agreement without
25 prohibiting Prospective Bidders from participating in the sale process.

