

In the United States Bankruptcy Court
District of Kansas, Kansas City Division
In re Brooke Corporation, et al. Case Nos.: 08-22786-11-DLS (Jointly Administered)
TRUSTEE'S APPLICATION TO SELL BROOKE CAPITAL CORPORATION'S STOCK OF FIRST LIFE
AMERICA CORPORATION FREE AND CLEAR OF LIENS AND ENCUMBRANCES (Sale No. 1)

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS
KANSAS CITY DIVISION**

IN RE:)
)
BROOKE CORPORATION, et al.) **Case No. 08-22786-DLS**
a Kansas corporation,) **(Jointly Administered)**
) **Chapter 11**
Debtor.)

**TRUSTEE'S APPLICATION TO SELL BROOKE CAPITAL CORPORATION'S
STOCK OF FIRST LIFE AMERICA CORPORATION FREE AND CLEAR OF
LIENS AND ENCUMBRANCES AND TO REJECT EXECUTORY CONTRACTS
(Sale No. 1)**

COMES NOW Albert A. Riederer, Chapter 11 Trustee ("Trustee") of Brooke Corporation ("Brooke Corp"), Brooke Capital Corporation ("Brooke Capital") and Brooke Investments, Inc. ("Brooke Investments") (Brooke Corp, Brooke Capital and Brooke Investments hereinafter collectively referred to as the "Debtors"), the debtors in the above referenced cases, and for his Application to Sell Brooke Capital Corporation's Stock of First Life America Corporation Free and Clear of Liens and Encumbrances (Sale No. 1), pursuant to § 363 of the Bankruptcy Code and Fed. R. Bankr. P. 6004, and to Reject Executory Contracts pursuant to § 365 of the Bankruptcy Code, respectfully states and alleges as follows:

Background

1. On October 28, 2008 (the "Petition Date"), Brooke Corp and Brooke Capital filed voluntary petitions for relief under Chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code").
2. Contemporaneously with the commencement of these bankruptcy proceedings, Brooke Corp and Brooke Capital filed their Emergency Motion pursuant to § 1104 of the

Bankruptcy Code seeking the immediate appointment of a Chapter 11 Trustee (the "Trustee Motion"). Also, contemporaneously with the filing of their petitions, Brooke Corp and Brooke Capital sought administrative consolidation of their cases.

3. On November 3, 2008, Brooke Investments filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code (the "Commencement Date"). Brooke Investments also sought to have Trustee appointed as Chapter 11 trustee and to have the Brooke Investments case administratively consolidated with Brooke Corp and Brooke Capital.

4. This Court has entered orders appointing Trustee as the Chapter 11 trustee of all three cases. This Court has also entered orders directing the joint administration of the Debtors' three cases.

5. On November 5, 2008, the United States Trustee ("UST") appointed the official committee of unsecured creditors ("Creditors' Committee") in the Debtors' cases.

Sale of FLAC Stock

6. Brooke Capital owns 100% of the issued and outstanding stock (the "Stock") of First Life America Corporation ("FLAC"), a licensed Kansas life insurance company.

7. Prior to the Commencement Date, the Debtor and First Trinity Financial Corporation ("FTFC") entered into an agreement for the sale of the Stock after the Debtor attempted for a period of time to market the Stock for sale.

8. After the Commencement Date, the parties have negotiated a revised purchase agreement for the sale of the Stock to FTFC (the "Purchase Agreement"). A true and correct

copy of the Purchase Agreement is attached hereto and marked Exhibit A¹. Under the Purchase Agreement, the purchase price is \$2.5 million (the "Purchase Price"). FTFC has paid \$800,000 into escrow as an earnest money deposit toward the purchase of the Stock.

9. Also after the Commencement Date, the Kansas Insurance Department ("KID") entered an order (the "KID Order") and approved the sale of the Stock to FTFC if the sale is closed by December 16, 2008. KID has agreed to extend this deadline to January 30, 2009.

10. Numerous creditors assert a security interest in and lien on the Stock and the proceeds therefrom (the "Stock Claimants"), including Citizens Bank & Trust Company ("Citizens"), who has commenced an adversary proceeding in this Bankruptcy Case to determine the validity and priority of such asserted liens and encumbrances (the "Adversary"). At this time, the Stock Claimants hold claims in excess of \$40 million and assert liens on the Stock to secure such claims.

11. The Trustee and Citizens believe a prompt sale of the Stock pursuant to § 363(b) of the Bankruptcy Code is the only option to achieve any value in the Stock for the benefits of creditors in this case. To that end, Citizens and the Trustee have negotiated an agreement, and seek the Court's approval of a carve out payment to the estate of three percent (3%) of the sale proceeds from the Stock paid to the estate for the payment of administrative expense claims in this case and unsecured creditors free and clear of liens claims and interests (the "Carve Out"). The Carve-Out is tantamount to a surcharge of the collateral pursuant to §506(c) of the Bankruptcy Code.

¹ The Purchase Agreement includes the original Stock Purchase Agreement and Amendment No. 2 to Stock Purchase Agreement. An Amendment No. 1 to Stock Purchase Agreement was prepared but never executed. Thus, Amendment No. 2 directly amends the Stock Purchase Agreement.

12. In the absence of the approval of the proposed sale to FTFC, the KID Order will expire, the sale will be lost, no other buyer will be authorized by KID to acquire the Stock, Brooke Capital cannot provide any financial support to FLAC, and as a consequence, the value of the Stock will likely diminish precipitously.

13. The Purchase Agreement provides for the transfer and sale to FTFC of the Stock at a closing to be held immediately upon approval of this sale free and clear of liens, claims and encumbrances pursuant to § 363 of the Bankruptcy Code. In addition, the Trustee requests the Order granting this Motion also include specific injunctive relief which shall apply to all creditors and equity security holders of the Debtor and any other party in interest having actual or constructive notice of the Sale enjoining such parties from commencing any action or proceeding or taking any other action in any manner against FTFC, its property, or its successors and assigns to recover the Stock or to secure payment of claims or recover any interest of any kind or nature whatsoever that such person or entity had, has or may have against the Debtor, its estate or the Stock, which were incurred by Debtor prior to Closing.

Executory Contracts and Unexpired Leases

14. The Purchase Agreement provides for (a) the rejection and termination of all agreements between FTFC and Brooke Capital pursuant to § 365 of the Bankruptcy Code (the "Agreements"); (b) the netting out, offset, waiver and release of any and all intercompany debts by and between FLAC and Brooke Capital (the "Intercompany Claims"); and (c) the release of any avoidance actions by Brooke Capital against FLAC pursuant to §§ 542-553 of the Bankruptcy Code (the "Avoidance Actions"). There are no executory contracts or unexpired

leases as contemplated by § 365 of the Bankruptcy Code that are being (1) assumed or (2) assumed and assigned pursuant to this Application.

Distribution of Sales Proceeds

15. As referenced above, the total purchase price is \$2,500,000. There are no sales commissions or fees due under the contemplated sale other than the Carve-Out. As such, the net proceeds paid by FTFC will be \$2,425,000 (the "Net Proceeds"). The Net Proceeds shall be deposited in one or more interest bearing accounts (including certificates of deposit or CDARS) insured by the Federal Deposit Insurance Corporation, or in an account collateralized by acceptable government securities in a manner and at such institution(s), in each case acceptable to the Trustee and the Bank, pending resolution of the Adversary or further order of this Court. Such accounts shall be in the joint name of the Trustee and the Bank.

16. The parties are estimating a closing date before the end of the year. The Trustee hereby requests authority to cause the distribution of the Carve-Out as set forth hereof to be made upon entry of an order approving the instant Application and the closing of the contemplated sale; and to retain the Net Proceeds as set forth above.

The Sale Is In the Best Interest of the Estate and Creditors.

17. In exercising its sound business judgment, Trustee has determined that the sale of Stock of FLAC will result in the best, most efficient and most expedient liquidation of this asset of the estate.

18. The Bankruptcy Code allows a trustee, after notice and a hearing "[to] use, sell or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b). To meet the standard under 11 U.S.C. § 363, "there must be some articulated business

justification for [the sale] . . . Whether the proffered business justification is sufficient depends on the case.” In re Continental Airlines, Inc., 708 F.2d 1223, 1226 (5th Cir. 1986). Pursuant to § 363, a debtor or trustee is permitted to sell all or substantially all its assets provided a sound business purpose dictates such action. See Stephens Industries, Inc. v. McClung, 789 F.2d 386 (6th Cir. 1986); In re Lionel Corp., 722 F.2d 1063 (2d Cir. 1983).

19. Moreover, § 363(f) of the Bankruptcy Code provides as follows:

(f) The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if--

(1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;

(2) such entity consents;

(3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;

(4) such interest is in bona fide dispute; or

(5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

11 U.S.C. § 363(f). Section 363(f) is written in the disjunctive, meaning the Bankruptcy Court may approve a sale free and clear of liens and encumbrances provided at least one of the subsections is met. See In re Elliot, 94 B.R. 343,345 (E.D. Pa. 1988). Here, Citizens consents to the sale. In addition, the contemplated sale may be sold free and clear of any other party's claimed lien or encumbrance because the provisions of §§363(f)(1), 363(f)(4) and 363(f)(5) are met.

20. Trustee requests that the Assets contemplated to be sold hereunder be sold free and clear of all liens and encumbrances.

21. Trustee proposes the instant sale in good faith and for the sound business purpose of maximizing the return on the Debtor's assets to be sold hereunder. Trustee believes that the instant sale will produce a value that is fair and reasonable for the bankruptcy estate and the secured creditors.

22. Trustee further requests authority to enter into and execute any agreements and/or documents necessary or convenient to close the sale contemplated herein. Trustee anticipates executing a bill of sale to convey the Stock to FTFC.

23. The Trustee further alleges, based upon the desired closing date and the benefit to all parties involved as a result of the contemplated sale, that cause exists to except any Order approving this Application from the requirements of Fed. R. Bankr. P. 6004(g) and order that the effectiveness of the Order approving this Application should not be stayed for any time period.

24. The Purchase Agreement was negotiated, proposed and entered into by the Trustee and FTFC without collusion, in good faith, and from arm's-length-bargaining positions. Neither the Trustee, nor FTFC have engaged in any conduct that would cause or permit the Sale Agreement to be avoided under § 363(n) of the Bankruptcy Code. FTFC will be acting in good faith, within the meaning of § 363(m) of the Bankruptcy Code in closing the transactions contemplated by the Sale Agreement and at all times after the entry of this Order. Trustee alleges FTFC is paying fair and appropriate value for the Stock. Because FTFC has acted and negotiated in good faith as more fully set forth herein, Trustee requests the Court make a finding

that FTFC has acted in good-faith with respect to the sale proposed by this Application and that FTFC is a good-faith purchaser as contemplated by § 363(m) of the Bankruptcy Code.

Marketing Efforts and Notice

25. The Trustee submits that sale of the Stock was fully explored prior to the Commencement Date, and given the current unique situation, further marketing efforts are not only not feasible, but not possible. Only FTFC is approved by KID to purchase the Stock. It is commonly known that the Stock has been and is for sale. No other suitors have expressed interest, and if a suitor did express interest, it would likely take approximately sixty (60) days to obtain approval from KID. In that period of time, the Debtor could not provide financial support to FLAC and the value of the Stock would decline substantially. Thus, attempts to find another buyer would not be prudent because rather than exploring the possibility of increasing funds for the estate, the likely result would be to decrease the proceeds available to the estate.

26. Trustee intends to notice the instant Application to the matrix of all creditors and parties in interest in the case.

WHEREFORE, Trustee respectfully requests this Court's Order approving the sale of the Stock set forth herein free and clear of all liens and encumbrances, all in accordance with the foregoing Application; and for such other and further relief as the Court deems just and equitable.

Dated this 11th day of December, 2008.

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Respectfully submitted,

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