IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: RAIT FUNDING, LLC, a Delaware limited liability company, *et al.*,[1] Debtors.	Chapter 11 Case No. 19-11915 (BLS) (Jointly Administered) **Docket No. 53**

REIT ADMINISTRATION, LLC'S OBJECTION TO
DEBTOR'S BIDDING PROCEDURES MOTION

REIT Administration, LLC ("**REIT**"), as administrative agent for the 125 unaffiliated preferred shareholders of Taberna Realty Finance Trust ("**Taberna**"), hereby objects to the *Debtors' Motion for Entry of an Order (I) Establishing the Bidding Procedures, Including Approval of a Break-Up Fee and Expense Reimbursement, (II) Approving Sale of Substantially All of the Debtors' Assets Free and Clear of all Liens, Claims, Interests and Encumbrances, and (III) Granting Related Relief* [Docket No. 53] (the "**Motion**"). In support hereof, REIT states as follows:

1. A mere ten days after filing these chapter 11 cases, the Debtors filed the Motion seeking approval of the Bidding Procedures[2] to sell certain of the Debtors' assets. The Motion prematurely seeks to lock the estate and stakeholders into a sale process for substantially all of the Debtors' assets, while failing to provide stakeholders and the Court with the necessary information

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are as follows: RAIT Funding, LLC, a Delaware limited liability company (9983); RAIT Financial Trust, a Maryland real estate investment trust (9819); RAIT General, Inc., a Maryland corporation (9987); RAIT Limited, Inc., a Maryland corporation (9773); Taberna Realty Finance Trust, a Maryland real estate investment trust (3577); RAIT JV TRS, LLC, a Delaware limited liability company (3190); and RAIT JV TRS Sub, LLC, a Delaware limited liability company (4870). The mailing address for all Debtors is Two Logan Square, 100 N. 18th Street, 23rd Floor, Philadelphia, Pennsylvania 19103 (Attn: John J. Reyle).

[2] Capitalized terms used but not defined herein shall have the meanings ascribed to them in the Motion.

to evaluate the terms of the proposed sale. Given the lack of material information, it is impossible to evaluate whether the sale process is in the best interest of the estate, and as such, the Motion should be denied.

2. *First*, the Debtors have failed to disclose the Purchase Price allocation of the Debtors' assets being sold. This is particularly important for Taberna's stakeholders. Pursuant to the terms of the Debtors' *Restructuring and Plan Support Agreement* with Taberna's noteholders [Docket No. 52], Taberna's equity holders, including its preferred shareholders, will not be entitled to receive any recovery or distribution under the proposed plan of reorganization. However, a preliminary calculation indicates that Taberna may be solvent. Upon information and belief, Taberna has known liabilities of $18.6 million. However, Taberna has numerous assets, including $8.6 million in cash, a senior participation interest in a commercial mortgage, and Class F, G, and H holdings in RAIT I securitization. Taberna also holds certain tax attributes, a 10% interest in RAIT JV TRS, LLC, and an interest in various affiliates and subsidiaries. Although the Debtors have not disclosed the value of these assets, an analysis may demonstrate that Taberna is solvent, and therefore, its preferred shareholders should be eligible for a recovery through a reorganization. Without these disclosures now, the sale process will proceed and dictate Taberna's stakeholders' recoveries while eliminating the protections such stakeholders would receive under a plan. The Debtors should be required to disclose where value is held in its corporate structure, and creditors and equity holders should, at a minimum, have additional time to investigate whether an alternative transaction would maximize recoveries for ***all*** stakeholders.

3. *Second*, because the sale proposes selling substantially all of the Debtors' assets, approval of the Bidding Procedures will have the practical effect of dictating recoveries under the plan. Any sale transaction that dictates terms of a future reorganization should be vetted through

a plan-like approval process to ensure that other stakeholders are given adequate opportunity to analyze the transaction and respond accordingly. The Debtors must put forth, and stakeholders should be given the opportunity to test, whether the transaction is actually fair and equitable, as required under 11 U.S.C. 1129(b). Moreover, given the Debtors' stated intention to pursue a plan process after the sale, the proposed stand-alone sale and its attendant lack of plan-type disclosure is particularly troubling and unsupportable.[3]

4. *Third*, the Debtors have offered no evidence as to why it is imperative to commence a sale process now, rather than wait to commence the sale process and plan process at the same time, or, in the alternative, include a sale of the Debtors' assets within a plan. The Debtors have represented that they undertook a sale process approximately two years ago. *Declaration of John J. Reyle In Support of Debtors' Chapter 11 Petitions and Requests for First Day Relief* [Docket No. 7] (the "**Reyle Declaration**") ¶ 39. The Debtors reinitiated this process in the second half of 2018, and signed a term sheet with Fortress Credit Advisors LLC on March 6, 2019. Id. ¶49. The Debtors filed these chapter 11 cases almost six months later, demonstrating that the Debtors were not pressed to close the deal quickly in order to sustain operations. Moreover, the Debtors have approximately $40 million in cash on hand, held at RAIT Financial Trust and Taberna. *See id*. ¶¶ 23, 24. The Debtors have offered no evidence that they are spending cash quickly, or need

[3] The sale process and certain pre-petition support agreements are tantamount to a *sub rosa* plan. The Debtors are seeking to sell their assets soon after filing their chapter 11 cases and in a manner that circumvents the fundamental protections of chapter 11. Bankruptcy courts may not, "in the guise of authorizing a transaction out of the ordinary course of business in a chapter 11 case, authorize a transaction that is tantamount to a plan. Such a transaction requires full compliance with the plan confirmation provisions of chapter 11." 3 Alan Resnick & Henry Sommer, COLLIER ON BANKRUPTCY ¶ 363.02, at 363-11 (16th ed. rev. 2019); *In re Braniff Airways, Inc.*, 700 F.2d 935 (5th Cir. 1983); *In re CGE Shattuck, LLC*, 254 B.R. 5, 12 (Bankr. D.N.H. 2000) ("The closer a proposed transaction gets to the heart of the reorganization process, the greater scrutiny the Court must give to that matter."). This type of sale process could deny creditors the statutory protections they would otherwise receive through the chapter 11 confirmation process by establishing the terms of a *sub rosa*, or perhaps more accurately, de facto, plan in connection with the sale. *See In re Tempnology*, 542 B.R. 50, 63-64 (Bankr. D.N.H. 2015). Among the factors that courts consider in evaluating whether a transaction constitutes a *sub rosa* plan is whether the proposed transaction renders creditors' rights under chapter 11 meaningless. *See Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1071 (2nd Cir. 1983).

additional capital quickly, and therefore, have not demonstrated that a quick sale is in the best interest of the estate. By encompassing the sale in the plan process, the Debtors will be required to provide the disclosures mandated by the plan process set forth in the Bankruptcy Code, and creditors and equity holders will have a better understanding of what entities in the Debtors' corporate structure hold value, the value of the assets held at each Debtor, the value of the assets that the Debtors are attempting to sell, and the purchase price allocation for the assets. A sale process in conjunction with the plan will allow the Court and other stakeholders the opportunity to evaluate the transaction as a whole, and determine whether a sale process is actually in the best interest of the estate, or if creditors and equity holders would be better served through a reorganization of the Debtors.

5. *Fourth*, the Bidding Procedures include provisions that are unnecessarily protective of the Stalking Horse Bidder and are likely to chill bidding. For instance, the minimum overbid of $1 million, which may be altered at the sole discretion of the Debtors, is unduly burdensome, and is likely to chill bidding. Similarly, the Break-up Fee of $5,233,000 and Expense Reimbursement in an amount not to exceed $1,744,000 are excessive and should be reduced. Break-up fees and expenses are only appropriate where there is evidence that "the fees were actually necessary to preserve the value of the estate." *See e.g., Calpine v. O'Brien Envtl. Energy, Inc. (In re O'Brien Envtl. Energy, Inc.)*, 181 F.3d 527, 534 (3d Cir. 1999) ("the allowability of break-up fees, like that of other administrative expenses, depends upon the requesting party's ability to show that the fees were actually necessary to preserve the value of the estate."). In seeking approval for a break-up fee, the claimant has "the burden of proving that its claim was for actual, necessary costs and expenses of preserving the estate." *Toma Steel Supply, Inc. v. TransAmerican Natural Gas Corp. (In re TransAmerican Natural Gas Corp.)*, 978 F.2d 1409,

1416 (5th Cir. 1992). The Debtors have failed to demonstrate that the Break-up Fee and Expense Reimbursement are an actual and necessary expense, and should not be approved as proposed. Finally, the Debtors have the sole authority to disqualify Qualified Bidders. Any bidders deemed Qualified Bidders should have the opportunity to bid at the auction, without risk of being disqualified at the sole discretion of the Debtors.

6. In summary, if the Bidding Procedures are approved at this point in the case, the Debtors will lock stakeholders into a sale process, while failing to disclose crucial information about the value of the assets and Purchase Price allocation. If pertinent disclosures made at a later date indicate that a sale is not in the best interest of the estate, and the estate would be better served by a reorganization, the Debtors will be saddled with an excessive Break-up Fee and Expense Reimbursement, further depleting stakeholder recoveries. The Debtors should be required to present additional evidence as to why an asset sale is in the best interest of the estate and all stakeholders, rather than proceeding through a plan of reorganization, particularly as the Debtors' minimal disclosures indicate substantial value throughout the Debtors' corporate structure.

7. REIT reserves all rights to supplement this Objection and raise additional objections at the hearing on the Motion. REIT further reserves the right to and object to a future sale of the Debtors' assets.

WHEREFORE, REIT respectfully requests that the Court deny the Motion.

Dated: September 25, 2019
Wilmington, Delaware

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