

## TERMS AND CONDITIONS OF SALE

1. These Terms and Conditions of Sale are made in connection with the public auction sale to solicit the highest and best offer (the "Auction Sale") of certain real property and improvements thereon, consisting of a condominium apartment and the personal property located therein at 15 W. 53<sup>rd</sup> St, Unit 18F, New York, NY 10019 (the "Property"), which is property of the estate in the Dan Wise and Whispering Winds Properties, LLC (the "Debtors") chapter 7 bankruptcy cases jointly administered in the United States Bankruptcy Court, District of Arizona ("Bankruptcy Court"), at Case No. 2:08-bk-15620-RJH.

2. The Seller of the Property is Maureen Gaughan (the "Trustee") as the chapter 7 trustee of the estate (the "Estate") of Dan Wise and Whispering Winds Properties, LLC. The Auction Sale is conducted pursuant to Bankruptcy Code section 363.

3. The Auction Sale is scheduled for October 22, 2009 at 7:00 pm (New York Time) at The Millennium Broadway Hotel, 145 West 44th Street, New York, NY.

4. If the final offer on the Property at the Auction Sale is acceptable to the Trustee, the Trustee will request the Bankruptcy Court enter its order approving the sale at the hearing ("Hearing") before the Bankruptcy Court scheduled on October 26, 2009 at 1:30 p.m. (Arizona Time).

5. In order to be permitted to submit a competing bid to purchase the Property, prior to the commencement of the Auction Sale, each prospective bidder must deliver to Richard Maltz of David R. Maltz & Co. (collectively, the "Auctioneer") a certified check or bank check in the amount of \$75,000 (the "Qualifying Deposit") payable to "Maureen Gaughan, Trustee", which amount shall serve as a partial good faith deposit against payment of the purchase price by such competing bidder as the Trustee determines to have made the highest or best bid for the Property (the "Successful Bidder").

6. On or before 5:00 pm (EST) on October 26, 2009, the Successful Bidder shall deliver to the Trustee by certified check or bank check or wire transfer an amount equal to 10% of its successful bid minus the Qualifying Deposit (together with the Qualifying Deposit, the "Deposit"). The Trustee will retain the Deposit of the Successful Bidder. The Successful Bidder must execute, and thereby agree to be bound by (i) the Terms and Conditions of Sale, and (ii) a Memorandum of Sale.

7. At the conclusion of the Auction Sale, the Trustee or her representative will return the Qualifying Deposits to all unsuccessful bidders. The Successful Bidder must pay the balance of the purchase price for the Property (the difference between the amount of the successful bid and the Deposit) to the Trustee, by certified check, bank check, federal funds or wire transfer at the closing of title to the Property (the "Closing"). The Successful Bidder must close its purchase of the Condominium and Personal Property ("collectively, the "Property") title to the Property on or before December 4, 2009 ("Closing Date"), although such date may be extended in writing solely by the Trustee.

8. The Sale Price is subject to approval by the Trustee and the Bankruptcy Court. Prior to the Closing, the Bankruptcy Court may enter an Order confirming the results of the Auction and approving the sale to the Successful Bidder. The Closing shall take place at the offices of special counsel for the Trustee:

Alan Nisselson, Esq.  
Windels Marx Lane & Mittendorf, LLP  
156 West 56th Street  
New York, New York 10019  
(212) 237-1021

9. The Successful Bidder shall pay any New York City, New York State or other real property transfer taxes incurred by the transfer of the Property, the 2% "Flip Tax" of the Board of Managers of the Property at the Closing as well as any fees for recording charges. In connection with the Closing and Closing Date, the Successful Bidder is hereby given notice that Time is of the Essence Against the Successful Bidder and the failure of the Successful Bidder to close for any reason whatsoever (except as otherwise provided below) including its failure to pay the balance of the Purchase Price on the Closing Date, will result in the forfeiture of the Deposit and the termination of the Successful Bidder's right to acquire the Property under these Terms and Conditions of Sale. The Successful Bidder shall be obligated to close its purchase of the Property and there is no contingency of any kind or nature that will permit the Successful Bidder to cancel or avoid its obligation under these Terms of and Conditions of Sale other than the Trustee's inability to deliver title to the Property. Further, the Successful Bidder shall have demonstrated, to the sole satisfaction of the Trustee or the Court, as the case may be, evidence of its ability to conclude the transaction upon these Terms and Conditions of Sale, without delay. The Trustee reserves the right to reject any offeror, who in the sole discretion of the Trustee, the Trustee believes is not financially capable of consummating the purchase of the Property. Expenses incurred by the Successful Bidder or any competing bidder concerning any due diligence, such as obtaining title reports or environmental inspections, shall be the sole responsibility of such bidder, and under no circumstances shall the Trustee or the Estate or the Trustee's professionals be responsible for, or pay, such expenses.

10. In the event the Successful Bidder for the Property fails to tender the payment of the balance of the Purchase Price on the Closing Date, or otherwise perform any of its obligations under these Terms and Conditions of Sale, the Trustee, at her option, shall be authorized to sell the Property to the next highest bidder ("Backup Bidder"), which sale is subject to Bankruptcy Court approval, without giving credit for the Deposit forfeited by the Successful Bidder, and upon such other terms and conditions as the Trustee deems appropriate. Should the Backup Bidder fail to close on the Property, within such time as the Trustee alone may agree but not to exceed thirty (30) days after notice from the Trustee to the Backup Bidder, the Trustee shall be authorized to sell the Property to the next highest or best bidder, subject to Bankruptcy Court approval. The Backup Bidder, or as other junior bidder, will be bound by these Terms and Conditions of Sale.

11. The Trustee or the Trustee's professionals have not made and do not make any representations as to the physical condition, rents, leases, expenses, operations, value of the land or buildings thereon, or any other matter or thing affecting or related to the Property or this Auction Sale, which might be pertinent to the purchase of the Property, including, without limitation, (i) the current or future real estate tax liability, assessment or valuation of the Property; (ii) the potential qualification of the Property for any and all benefits conferred by or available under federal,

state or municipal laws, whether for subsidies, special real estate tax treatment, insurance, mortgages, or any other benefits, whether similar or dissimilar to those enumerated; (iii) the compliance or non-compliance of the Property, in its current or any future state, with applicable present or future zoning ordinances or other land use law or regulation, or the ability to obtain a change in the zoning or use, or a variance in respect to the Property; (iv) the availability of any financing for the purchase, alteration, rehabilitation or operation of the Property from any source, including, but not limited to, any state, city or federal government or institutional lender; (v) the current or future use of the Property; (vi) the present and future condition and operating state of any and all machinery or equipment on the Property and the present or future structural and physical condition of any building thereon or its suitability for rehabilitation or renovation; (vii) the ownership or state of title of any personal property on the Property; (viii) the presence or absence of any laws, ordinances, rules or regulations issued by any governmental authority, agency or board and any violations thereof; (ix) the rent regulatory status of the Property, to wit, whether the Property, or any portion thereof, is subject to New York City Rent Control, Rent Stabilization or the Emergency Tenant Protection Act or any related rule or regulation; (x) the status of, or any law or regulation regarding, bulkhead lines or restrictions, or anything else which arises out of the waterfront status of the Property, or any present or future issues concerning subdivision or non-subdivision of the Property; or (xi) the compliance or non-compliance with environmental laws and the presence or absence of underground fuel storage tanks, any asbestos or other hazardous materials anywhere on the Property.

12. The Property is being sold strictly **"AS IS" "WHERE IS", "WITH ALL FAULTS"**, without any representations, covenants, guarantees or warranties of any kind or nature whatsoever, and free and clear of any and all liens, claims, interests and encumbrances of whatever kind or nature, such liens, claims, interests and encumbrances, if any, to attach to the proceeds of sale in such order and priority as they existed immediately prior to the Sale Date, and subject to, among other things (a) any state of facts that an accurate survey may show; (b) any covenants, restrictions and easements of record; (c) any state of facts a physical inspection may show; (d) any building or zoning ordinances or other applicable municipal regulations and violations thereof; (e) all leases and occupancies, if any, as may exist or encumber the Property or any portion(s) thereof; and (f) environmental conditions. By delivering their respective Qualifying Deposits, all bidders acknowledge that they have had the opportunity to review and inspect the Property, the state of title thereof and laws, rules and regulations applicable thereto, and the form of the Trustee's Deed that the Trustee will execute to convey the Property, and will rely solely thereon and on their own independent investigations and inspections of the Property in making their bids. Neither the Trustee nor any of his representatives make any representations or warranties with respect to the permissible uses of the Property, including, but not limited to, the zoning of the Property. All bidders acknowledge that they have conducted their own due diligence in connection with the Property, and are not relying on any information provided by the Trustee, the Auctioneer for the Estate or the Trustee's counsel. The Property shall be delivered vacant of tenancies, but AS IS, and not in broom clean condition upon closing.

13. The Trustee shall convey the Property by delivery of a quitclaim deed or other similar deed.

14. Neither the Trustee, Trustee's counsel, the Auctioneer, nor the Estate is liable or responsible for the payment of fees of any broker. The only commissions that the estate may be liable for are those of the Auctioneer, which has been retained pursuant to an Order of the Bankruptcy Court, and those of the Trustee.

15. Nothing contained in these Terms and Conditions of Sale is intended to supersede or alter any provisions of Title 11 of the United States Code (the "Bankruptcy Code") or otherwise interfere with the jurisdiction of the Bankruptcy Court. All of the terms and conditions set forth in these Terms and Conditions of Sale are subject to modification as may be directed by the Trustee or by the Court. The Trustee reserves the right to modify these Terms and Conditions of Sale at the Auction Sale or thereafter to maintain consistency with the provisions of the Bankruptcy Code and/or prior orders of the Bankruptcy Court.

16. By making a bid for the Property, all bidders will be deemed to have acknowledged having read these Terms and Conditions of Sale and have agreed to be bound by them. Without delay, an in no stance more than five (5) days from the conclusion of the Auction Sale, Successful Bidder shall provide any and all information requested by the condominium Board of managers and execute any and all documents reasonably requested by the condominium Board of Managers.

17. If the Trustee is unable to deliver title to the Property in accordance with these Terms and Conditions of Sale for any reason whatsoever, her only obligation will be to refund the Deposit, together with any interest earned thereon, to the Successful Bidder and upon such refund, the Successful Bidder will have no claim or recourse against the Trustee, the Trustee's professionals or the Auctioneer for the Estate.

18. The Trustee reserves her right to withdraw the Property from the Auction Sale, either prior, or subsequent to the Auction Sale, for any reason whatsoever, as she deems necessary or appropriate.

19. The Auction Sale of the Property is subject to confirmation by the Trustee and the Bankruptcy Court.

20. The Trustee or the Trustee's attorney shall notify the Successful Bidder, or the Second Highest Bidder, as the case may be, whether the Auction Sale is confirmed. The Bankruptcy Court shall determine any disputes concerning the Auction Sale of the Property. By participating in the Auction Sale, all bidders consent to the jurisdiction of the Bankruptcy Court to determine such disputes under the Debtors' pending case.

I have read these Terms and Conditions of Sale and agree to be bound by them.

By: \_\_\_\_\_

Date: \_\_\_\_\_

Print Name: \_\_\_\_\_

Title: \_\_\_\_\_

Buyer # \_\_\_\_\_

MEMORANDUM OF SALE

The undersigned has this 22<sup>nd</sup> day of October, 2009 agreed to purchase the condominium apartment and personal property located therein at 15 W. 53<sup>rd</sup> St, Unit 18F, New York, NY 10019 (the "Property") being sold by Maureen Gaughan as the appointed chapter 7 trustee of the Dan Wise and Whispering Winds Properties, LLC chapter 7 bankruptcy cases jointly administered in the United States Bankruptcy Court, District of Arizona, at Case No. 2:08-bk-15620-RJH for the sum of \$ \_\_\_\_\_, and hereby promise and agree to comply with the terms and conditions of the sale of said Property, as set forth in the annexed Terms of Sale.

\_\_\_\_\_  
PURCHASER (Signature)

\_\_\_\_\_  
PURCHASER (Signature)

\_\_\_\_\_  
PRINT NAME OF PURCHASER

\_\_\_\_\_  
PRINT NAME OF PURCHASER

\_\_\_\_\_  
ADDRESS

\_\_\_\_\_  
ADDRESS

\_\_\_\_\_  
TELEPHONE NUMBER

\_\_\_\_\_  
TELEPHONE NUMBER

\_\_\_\_\_  
FAX NUMBER

\_\_\_\_\_  
FAX NUMBER

Received from \_\_\_\_\_ the sum of \$ \_\_\_\_\_ as a non-refundable deposit for the purchase of the Property pursuant to the Terms of Sale.

This is to verify that the high bid in the above sale is \$ \_\_\_\_\_.

\_\_\_\_\_  
Richard Maltz, AUCTIONEER

**PURCHASER'S ATTORNEY INFORMATION**

Name \_\_\_\_\_

Address \_\_\_\_\_

Phone \_\_\_\_\_