

Samuel M. Stricklin (State Bar No. 19397050)  
Brian C. Mitchell (State Bar No. 24046452)  
Bracewell and Giuliani LLP  
1445 Ross Avenue, Suite 3800  
Dallas, Texas 75202-2711  
Telephone: (214) 468-3800  
Facsimile: (214) 468-3888  
Email: sam.stricklin@bgllp.com  
Email: brian.mitchell@bgllp.com

Attorneys for Hillcrest Bank, N.A.

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
SHERMAN DIVISION**

<b>IN RE:</b>	§	
	§	<b>CHAPTER 11</b>
	§	
<b>WHITESTONE HOUSTON LAND, LTD.,</b>	§	<b>CASE NO. 11-42400</b>
	§	
	§	
<b>Debtor.</b>	§	

**HILLCREST BANK, N.A.'S LIMITED OBJECTIONS TO SALE MOTION**

Bank Midwest, N.A., as successor-in-interest to Hillcrest Bank, N.A. ("Bank"), first priority secured creditor (owed in excess of \$19.6 million) and party in interest, files this Limited Objections to Debtor's First Amended Motion to Debtor's Motion for an Order Authorizing (A) The Sale of the Debtor's Right, Title and Interest In, To and Under Substantially all of the Debtor's Assets Free and Clear of Claims, Encumbrances, Liens, and Interests, (B) The Assumption and Assignment of Executory Contracts and Unexpired Leases, and (C) Related Relief (the "Sale Motion") and in support thereof would show the Court the following:

**I.  
RELEVANT FACTS**

1. An auction was held on April 23, 2012 (the "Auction"), for the sale of certain real property and any improvements located in Montgomery County, Texas (the "Property"), which is the sole asset owned by the Debtor. The Bank is the priority secured creditor in this case, who

is owed more than \$19.6 million. Lennar Homes of Texas Land and Construction, Ltd. (“Lennar”) was the successful bidder at the auction, with a winning bid of \$11,850,000 (which includes a \$300,000 break-up fee and payment of other expenses). Thus, the proposed sale will still leave a substantial deficiency owed to the Bank.

2. The Purchase Agreement between the Debtor and Lennar (the “Purchase Agreement”) and the Sale Motion expressly contemplate and require a payment of \$500,000 from the successful bidder to the Debtor to cure defaults under the Desired 365 Contracts, which includes a Management and Consulting Agreement (the “Consulting Agreement”) between the Debtor and Marlin Atlantis White, Ltd. (“MAW”). *See* Sale Motion at ¶¶ 11, 13; *see also* Purchase and Sale Agreement between Debtor and Lennar Homes of Texas Land and Construction, Ltd. (the “Purchase Agreement”) at Section 6.4. The Purchase Agreement and Sale Motion also require the successful bidder to assume the Consulting Agreement. *Id.*

3. Exhibit N to the Purchase Agreement is a draft of an Amended and Restated Management and Consulting Agreement to be entered into in connection with the purchase transaction, which will be assumed by the successful bidder. *See* the Purchase Agreement at Exhibit N. This Amended and Restated Consulting Agreement provides for certain fees and expenses to be paid by the Debtor (or assignee) to MAW, in addition to the \$500,000 cure amount, including \$5,000 per month for a period of twelve (12) months, 3% of construction costs, 1% of MUD Reimbursements, \$650.00 per developed residential lot closed during the applicable term, and reimbursement of out-of-pocket expenses. *See* Purchase Agreement at Exhibit N, Section 4.

4. Upon information and belief, MAW is an insider of the Debtor. More specifically, MAW is owned and controlled by the same persons that own and control the Debtor

and/or is an affiliate of the Debtor. MAW is also a guarantor of the indebtedness owed to the Bank via its execution of a Payment Guaranty in connection with the Bank's loan to the Debtor.

See the Payment Guaranty, a true and correct copy of which is attached hereto as Exhibit "A."

Paragraph 10 of the Payment Guaranty expressly provides that:

Any indebtedness of Borrower to any Guarantor now or hereafter existing is hereby subordinated to the payment of the Indebtedness. Each Guarantor agrees that, until the entire Indebtedness has been paid in full, such Guarantor will not seek, accept, or retain for its own account, any payment from Borrower on account of such subordinated debt. Any payments to any Guarantor on account of such subordinated debt shall be collected and received by such Guarantor in trust for Lender and shall be paid over to Lender on account of the Indebtedness without impairing or releasing the obligations of such Guarantor hereunder.

See the Payment Guaranty at ¶ 10. Accordingly, any payments received by MAW (until the Indebtedness is paid in full) from the Debtor (or its successors/assigns) under the Consulting Agreement should be paid to the Bank. *Id.*

## **II. OBJECTIONS**

### **A. Any Payments to MAW under the Amended Consulting Agreement Should be Directed to the Bank Until the Indebtedness is Paid in Full**

5. Despite the express provisions of the Payment Guaranty, and in an attempt to bypass MAW's contractual obligations, neither the Sale Motion nor the Purchase Agreement address the payment of the \$500,000 cure amount (or any future amounts to be paid under the Consulting Agreement to MAW) to the Bank. *Id.* Instead, the Purchase Agreement and Sale Motion provide for substantial payments directly to MAW in contravention of the terms of the Payment Guaranty. Any payment(s) made to MAW under the amended Consulting Agreement should be directed immediately to the Bank, not MAW. Accordingly, the Bank objects to the Sale Motion and Purchase Agreement to the extent it directs payments under the amended

Consulting Agreement to MAW and not the Bank, and the Bank respectfully requests that the Court order that any such payment(s) be made directly to the Bank under the proposed sale.

**B. The Contemplated Payments to MAW under the Consulting Agreement are Payments to the Debtor's Owners/Affiliates/Insiders**

6. In the alternative to the relief requested above, the Bank objects to the payments contemplated to be made to MAW under the Consulting Agreement (or its amendment/restatement) because such payments are nothing more than a disguised way to allocate a portion of the sale proceeds to insiders/equity. The \$500,000.00 cure amount and subsequent payments to MAW by the Debtor (or its assigns) under the Consulting Agreement should be considered sale proceeds and paid directly to the Bank.

**III.**  
**CONCLUSION**

WHEREFORE, based on the foregoing, Hillcrest Bank respectfully requests this Court grant its Objection and direct that the payments to MAW under the Purchase Agreement be made directly to Hillcrest Bank until its indebtedness is paid in full. Hillcrest Bank also requests any such other and further relief, at law or in equity, to which it may be justly entitled.

Respectfully submitted,

BRACEWELL & GIULIANI LLP

By: /s/ Samuel M. Stricklin  
Samuel M. Stricklin  
State Bar No. 19397050  
Brian C. Mitchell  
State Bar No. 24046452  
1445 Ross Avenue Suite 3800  
Dallas, TX 75202-2711  
Telephone: (214) 468-3800  
Facsimile: (214) 468-3888

**ATTORNEYS FOR HILLCREST BANK,  
N.A.**

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the above and foregoing instrument has been served electronically via the Court's ECF noticing system on those parties who receive notice from that system, on the 23<sup>rd</sup> day of April, 2012.

/s/ Samuel M. Stricklin