

OFFICE OF THE UNITED STATES TRUSTEE

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IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF HAWAII

In re

Association of Apartment Owners of
Kauai Beach Villas,

Debtor and
Debtor-in-Possession.

Bk. No. 25-01103 (RJF)

(Chapter 11)

(Subchapter V)

Hearing:

Date: March 16, 2026

Time: 2:00 p.m.

Judge: Hon. Robert J. Faris

[Related Docket Entry: Dkt. 75]

**UNITED STATES TRUSTEE’S LIMITED OBJECTION AND
RESERVATION OF RIGHTS TO DEBTOR’S MOTION FOR ENTRY OF
AN ORDER (I) (A) APPROVING AUCTION AND BIDDING
PROCEDURES, (B) SCHEDULING BID DEADLINES AND AUCTION,
AND (C) APPROVING THE FORM AND MANNER OF NOTICE
THEREOF, AND (II) AUTHORIZING THE SALE OF ASSETS AND (B)
GRANTING RELATED RELIEF**

Tiffany L. Carroll, the Acting United States Trustee for Region 15 (the
“United States Trustee”), by and through her attorney, hereby files this objection

and reservation of rights (the “Objection”) to the Debtor’s motion (Dkt. No. 75) (the “Bid Procedures Motion”) for approval of procedures for the sale of the Debtor’s interest in the Kauai Beach Villas resort located at 4330 Kauai Beach Drive, Lihue, Kauai, Hawaii (the “Property”). The United States Trustee has authority and standing to make this statement since its responsibilities include, among other things, supervising “the administration of cases ... under Chapter 11” of the Bankruptcy Code. 28 U.S.C. § 586(a)(3). Further, the United States Trustee has standing under 11 U.S.C. § 307. In support of her Objection, the United States Trustee respectfully represents as follows:

I. INTRODUCTION

1. The Bid Procedures Motion should be modified or denied.
2. First, the proposed sale process has a truncated period for parties in interest to object to the motion to approve the sale. Parties in interest should have more time to interpose objections, if any, to the final approval of the sale.
3. Second, because no stalking horse has been identified, and no information is yet available regarding the value of the transaction, at a minimum, any order entered on the bid procedures motion should make clear that any bid protections are subject to objection and final approval by the Court in connection with any motion for approval of the sale.

II. **BACKGROUND**

4. On December 5, 2025, the Debtor commenced these Chapter 11 cases by filing a voluntary petition for relief under subchapter V of Chapter 11 of the Bankruptcy Code. Dkt. No. 1.

5. On February 13, 2026, the Debtor filed the Bid Procedures Motion. Dkt. No. 75.

6. Debtor acknowledges its fiduciary obligation to maximize value for the bankruptcy estate.

7. As part of the Bid Procedures Motion, the Debtor has proposed a sale process with the following key dates:

<u>Event</u>	<u>Proposed Date</u>
Marketing Campaign	No later than March 23, 2026
Selection of Stalking Horse	April 2, 2026
Initial Qualified Bid	May 22, 2026
Evaluation of Qualified Bids	June 1, 2026
Auction	June 3, 2026
Selection of Successful Bid	2 business days after Auction
PSA Execution	2 business days after Auction
Notice of Successful Bidder	3 business days after Auction
Sale Approval Request	3 business days after signing PSA
Sale Objection Deadline	3 business days after filing Sale Approval
Sale hearing	5 business days after Sale Objection Deadline

See Bid Procedures Motion, pp. 17-21.

8. The Debtor has not identified a stalking horse bidder.

9. However, the Debtor seeks authority to provide bid protections to any subsequently identified stalking horse bidder in the form of:

(a) Expense Reimbursement: for actual and necessary due diligence expenses up to a maximum of \$100,000. *Id.* at 10;

(b) Break-up Fee: not to exceed 3% of the proposed stalking horse purchase bid price. *Id.*, p 10.

10. The Debtor requires any “overbid” must be sufficient to satisfy any Expense Reimbursement (\$100,000) and Break-Up Fee (3% of stalking horse purchase price bid) approved by the Court.

5. The Debtor has not filed a form of asset purchase agreement with the Bid Procedures Motion. *See Bid Procedures Motion generally.*

III. OBJECTION

Parties in Interest should have more time to object to sale approval.

11. In general, Rule 2002(a)(2) provides for 21 day notice to all creditors for proposal for a sale.

12. Although the timeline to market the Property, select a stalking horse bidder, and evaluate qualified bids appears adequate, the Debtor has greatly compressed the time between the filing of the sale approval motion, objections, and the hearing. It is not clear why this part of the timeline has been so greatly truncated. From the date the motion to approve the sale is filed, parties in interest

would only have 3 business days to review the motion to approve the sale, analyze any concerns relating to the sale, and prepare and file an objection. This appears to be an insufficient time to object, particularly where the identity of the stalking horse bidder is not yet known and the form of the APA is not attached to the bid procedures motion.

Break-up Fee and Expense Reimbursement should be subject to further objection and final Court approval.

6. “The term ‘break-up fee’ refers to a fee paid by a seller to a prospective purchaser in the event that a contemplated transaction is not consummated.” *In re O'Brien Envtl. Energy, Inc.*, 181 F.3d 527, 528 (3d Cir. 1999).¹ “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.” *Id* at. 535. A “proposed break-up fee must be carefully scrutinized² to insure that the Debtor's estate is not

¹ “Break-up fees may take the form of paying the out-of-pocket expenses incurred in arranging the deal, including due diligence expenses, or break-up fees may be wholly independent of the transaction costs. For example, a break-up fee may include compensation for a bidder’s lost opportunity costs.” *In re Integrated Res., Inc.*, 135 B.R. 746, 750 (Bankr. S.D.N.Y.), *aff’d*, 147 B.R. 650 (S.D.N.Y. 1992).

² Prior to approving a break-up fee, the Court may assess whether the break-up fee: (1) is of substantial benefit to the estate, (2) is fair and reasonable given the size and nature of the proposed transaction, the risk the buyer is taking in pursuing the acquisition as a stalking horse bidder, the efforts that have been or will be expended notwithstanding the proposed transaction is subject to higher and better offers, (3) was negotiated in good faith, and (4) is necessary to ensure the buyer will continue its proposed acquisition. *See In re Pomare, Ltd.*, 2015 WL 3523096, at *4 (Bankr. D. Haw. 2015) (approving break-up fee and reciting four factors

unduly burdened and that the relative rights of the parties in interest are protected.” *In re Am. W. Airlines, Inc.*, 166 B.R. 908, 912 (Bankr. D. Ariz. 1994). The Court has the authority to refuse to approve a break-up fee, or to approve lower break-up fee.

7. A break-up fee should constitute a fair and reasonable percentage of the proposed purchase price, and should be reasonably related to the risk, effort, and expenses of the prospective purchaser. “When reasonable in relation to the bidder's efforts and to the magnitude of the transaction, break-up fees are generally permissible.” *See In re O'Brien Env'tl. Energy, Inc.*, 181 F.3d 527, 533 (3d Cir. 1999) (affirming denial of prospective bidder Calpine’s request for break-up fee and expense reimbursement).

8. Here, no stalking horse has been identified. Accordingly, at this juncture it is unclear if the proposed Break-up Fee of 3% will encourage or chill bidding. *See In re O'Brien Env'tl. Energy, Inc.*, 181 F.3d at 537 (stating that bidding might have been more heated if the bankruptcy court definitively ruled earlier in the process that prospective bidder was not entitled to substantial break-up fee); *In re Reliant Energy Channelview LP*, 594 F.3d 200, 206 (3d Cir. 2010) (noting that a break-up fee is not necessary to preserve the value of the estate when

assessed). *See also In re O'Brien Env'tl. Energy, Inc.*, 181 F.3d 527, 536 (3d Cir. 1999) (identifying nine factors relevant in deciding whether to award a break-up fee and expenses).

the bidder would have bid even without the break-up fee). Because the minimum overbid must be sufficient to satisfy any Expense Reimbursement and Break-up Fee approved by the Court, any dollar reduction in the Break-up Fee will also reduce the amount of any potential purchaser's required overbid over any potential stalking horse bid which should encourage further bidding.

9. Also, it is unclear what the potential amount (or range in value) will be for an initial purchase price bid. Without knowing the "floor" bid amount, it is impossible to know whether the 3% Break-up Fee is a fair and reasonable percentage of the proposed purchase price, and whether it is reasonably related to the risk, effort, and expenses of the prospective purchaser (especially since there is already a \$100,000 expense reimbursement).

10. Additionally, because the identity of any stalking horse bidder is unknown,³ it is unclear the magnitude of effort and due diligence required (if the stalking horse bidder is an "insider" or has connections with an "insider" the expected level of due diligence maybe less burdensome). At this juncture, because

³ Many of the cases cited by Debtor involve motions to approve break-up fees where stalking horse bidder has been identified. See, e.g., *In re Cmty. Healthcare of Douglas, Inc.*, 2013 WL 12291504 (Bankr. D. Ariz. 2013) (approving break-up fee stalking horse bidder People's Choice Hospital, LLC); *In re Cascade AG Services, Inc.*, 2012 WL 5943928 (Bankr. W.D. Wash. 2012) (approving break-up fee to stalking horse bidder Pleasant Valley Farms LLC); *Official Comm. of Unsecured Creditors v. Interforum Holding LLC*, 2011 WL 2671254, at *1 (E.D. Wis. 2011) (stating Amalgamated Bank agreed to act as a stalking horse bidder). But see *In re Freedom Communications, Inc.*, No. 15-15311 (Bankr. C.D. Cal, February 5, 2016) (debtor filed motion for bid procedures without a final proposal and sought authorization to grant bid protections to potential stalking horse bidders).

there is insufficient evidence to conclude the entire Break-up Fee is reasonable in relation to the work and expense involved or incurred, and there is no indication that there are any lost opportunity costs, to the extent the proposed break-up fee makes it more costly for other bidders to propose a qualified bid, it is more akin to a blocking device.

11. Further, it is not clear what constitutes a qualifying transaction for the Break-Up Fee. The stalking horse bidder should not be allowed a Break-up Fee under circumstances where no benefit to the estate exists, e.g., if the potential sale of the Property to the stalking horse bidder fails for some reason without a higher bidder,⁴ and the Debtor later consummates a refinancing or other recapitalization transaction. Given the Debtor's justification for the Break-up Fee, the bid procedures order should make clear that the break-up fee is available only upon the consummation of a court approved prevailing overbid *sale* transaction other than to Buyer/stalking horse bidder.⁵ Debtor should only be allowed to pay a break-up fee

⁴ A failure in the sale process that does not result in an actual benefit to the estate does not justify a break-up fee. For example, “[p]ayment of a termination or break-up fee when a court (or regulatory body) declines to approve the related transaction cannot provide an actual benefit to a debtor's estate....” *In re Energy Future Holdings Corp.*, 575 B.R. 616, 635 (Bankr. D. Del. 2017), *aff'd*, 904 F.3d 298 (3d Cir. 2018), *cert. denied sub nom. NextEra Energy, Inc. v. Elliott Assocs., L.P.*, 139 S. Ct. 1620, 203 L. Ed. 2d 898 (2019).

⁵ In *In re Pomare, Ltd.*, 2015 WL 3523096, at *4 (Bankr. D. Haw. 2015), the Court entered an order that provided “35. The break-up fee (“Break-Up Fee”) in the amount of \$250,000.00, if earned, shall be paid in accordance with the Purchase Agreement.” In turn, the Purchase Agreement stated: “6. *Break-Up Fees*. In the event the Buyer confirms its offer/bid for the Property on or before the date set for submission of Bids under the Bid Procedures and the Buyer is not the Successful Bidder approved by the Court, then in such event the Buyer shall be paid a

if the Buyer is not the high bidder for the Property (and has not otherwise withdrawn its offer), and such alternate sale transaction actually closes.

12. Because of the lack of information about the identity of the stalking horse bidder, if any, and the initial purchase price bid, any order approving the bid procedures should provide that: (i) the Break-up Fee and Expense Reimbursement are subject to final approval by the Court, and (ii) if a party in interest objects to the amount of the Break-up Fee and Expense Reimbursement, such amounts shall not be allowed until after notice and hearing.

13. In *In re Cascade AG Services, Inc.*, 2012 WL 5943928, at *2 (Bankr. W.D. Wash. 2012), the bankruptcy court's order granting bid procedures required:

If the Break-Up Fee is triggered, the Debtor shall pay the Break-Up Fee to the Stalking Horse pursuant to the terms and conditions set forth in the Stalking Horse Sale Agreement Term Sheet, subject to documentation and further order of the Court, if a party in interest objects to the amount of the Break-Up Fee, in which case it shall not be paid until after notice and hearing, which hearing may address, among other things, the reasonableness of the actual out of pocket third party expenses incurred in connection with the Stalking Horse transaction.

14. A similar reservation of rights to object to the Break-up Fee should be incorporated into the bid procedures order.

Break-Up Fee in the amount of \$250,000, in accordance with the terms of the Bid Procedures.” *Id.* at *6.

IV. CONCLUSION

Based on the foregoing, the United States Trustee respectfully requests that the Court sustain the Objection and modify any ordered entered thereon or deny the Bid Procedures Motion. The United States Trustee reserves all rights in connection with the Bid Procedures Motion.

DATE: Honolulu, Hawaii, March 2, 2026.

Tiffany L. Carroll
Acting United States Trustee

By: /s/ Neil Verbrugge
Neil Verbrugge
Trial Attorney for the
United States Trustee