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

**In re:** § **CHAPTER 11**  
§  
§  
**WHITESTONE HOUSTON LAND, LTD.,** § **CASE NO. 11-42400**  
§  
**Debtor.** §

**HILLCREST BANK, N.A.'S MOTION FOR RELIEF  
FROM THE AUTOMATIC STAY AGAINST THE NEW CANEY PROPERTY**

**NO HEARING WILL BE CONDUCTED ON THIS MOTION UNLESS A WRITTEN OBJECTION IS FILED WITH THE CLERK OF THE UNITED STATES BANKRUPTCY COURT AND SERVED UPON THE PARTY FILING THIS PLEADING WITHIN FOURTEEN (14) DAYS FROM THE DATE OF SERVICE UNLESS THE COURT SHORTENS OR EXTENDS THE TIME FOR FILING SUCH OBJECTION. IF NO OBJECTION IS TIMELY SERVED AND FILED, THIS PLEADING SHALL BE DEEMED TO BE UNOPPOSED, AND THE COURT MAY ENTER AN ORDER GRANTING THE RELIEF SOUGHT. IF AN OBJECTION IS FILED AND SERVED IN A TIMELY MANNER, THE COURT WILL THEREAFTER SET A HEARING. IF YOU FAIL TO APPEAR AT THE HEARING, YOUR OBJECTION MAY BE STRICKEN. THE COURT RESERVES THE RIGHT TO SET A HEARING ON ANY MATTER.**

Hillcrest Bank, N.A. ("Hillcrest")<sup>1</sup>, a secured creditor and party in interest in the above-styled bankruptcy case, hereby files its Motion for Relief from the Automatic (the "Motion")

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<sup>1</sup> On November 7, 2011, Hillcrest Bank, N.A. merged with Bank Midwest, N.A., and now operates under the name Bank Midwest, N.A.

pursuant to 11 U.S.C. § 362 and Federal Rule of Bankruptcy Procedure 4001, and in support thereof respectfully represents as follows:

## **I. JURISDICTION**

1. The Court has jurisdiction over the Motion pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409.

## **II. FACTUAL BACKGROUND**

2. On August 1, 2011 (the "Petition Date"), Whitestone Houston Land, Ltd. ("Whitestone" or "Debtor") filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") in the Eastern District of Texas, Plano Division (the "Bankruptcy Court"), Cause No. 11-42400.

3. Prior to the Petition Date, on or about July 31, 2007, Hillcrest and Whitestone entered into a secured loan agreement (the "Loan Agreement") whereby Hillcrest agreed to loan BB Owen up to \$19,600,000.00 in connection with the acquisition of real property located in New Caney, Montgomery County, Texas (the "Property"). Pursuant to the terms of the Loan Agreement, and contemporaneously therewith, Whitestone executed a promissory note (the "Note") for the principal sum of \$19,600,000.00 in favor of Hillcrest. The Note was secured by a deed of trust granted by Whitestone in favor of Hillcrest.

4. The initial maturity date of the Note, for full repayment of the entire principal balance and unpaid interest to Hillcrest by Whitestone, was January 1, 2009. The maturity date was subsequently modified via agreement on November 24, 2009 and against on August 30, 2010, so that the maturity date under the Note is November 1, 2010 with a potential Extended Maturity Date of September 1, 2011.

5. As a result of the aforementioned Loan Agreement and Note, Hillcrest has properly perfected, first priority liens on the Property.

6. Prior to the Petition Date, Whitestone defaulted in the payment of the Loan Agreement and Note. As a result, the indebtedness evidenced by the Note was wholly due and payable. Hillcrest notified Whitestone of the events of default when Whitestone dialed to pay the outstanding balance on November 1, 2010, the Final Maturity Date under the Note. Whitestone failed to cure the defaults and on November 19, 2010, Hillcrest accelerated the outstanding indebtedness ("Indebtedness") under the Note and Loan Agreement, as permitted under the Loan Agreement. Whitestone failed to pay the amounts due under the Note, and Hillcrest noticed the Property for a non-judicial foreclosure sale to occur on August 2, 2011. However, Whitestone filed for Chapter 11 protection the day before the noticed sale could take place.

7. The Indebtedness remains unpaid, and as of August 1, 2011, the approximate amount due and owing by Whitestone under the Note and Loan Agreement, including principal and accrued interest, was \$21,377,520.24. Interest and penalties continue to accrue on this amount.

8. Since the filing of this action, Whitestone is not receiving any proceeds or revenue from the Property. This is a Single Asset Real Estate case; the Property is raw land, which is not generating income, and there are no structures on the Property with the potential to generate income. Hillcrest is unaware of any viable purchasers currently engaging in discussions with Whitestone regarding the purchase or sale of the Property that would provide funds anywhere close to Whitestone's debt to Hillcrest, much less payment to unsecured creditors. Whitestone has no prospects for an exit from this bankruptcy proceeding.

### **III. RELIEF REQUESTED**

9. Hillcrest respectfully requests that the Court enter an Order granting it relief from the automatic stay so that Hillcrest can conduct a non-judicial foreclosure sale on the Property pursuant to the Loan Agreement and Note, and exercise its full rights and remedies resulting from Hillcrest's liens on the Property.

### **IV. BASIS FOR RELIEF**

10. Section 362(d)(1) of the Bankruptcy Code provides that relief may be granted by "terminating, annulling, modifying, or conditioning" the automatic stay for cause, including the lack of adequate protection. 11 U.S.C. § 362(d)(1). The stay may also be terminated with respect to property if the debtor does not have equity in the property and the property is not necessary to an effective reorganization. *See* 11 U.S.C. § 362(d)(2). In addition, the stay may be terminated as to single asset real estate if the debtor fails to file a plan of reorganization that has a reasonable probability of being confirmed within 90 days. *See* 11 U.S.C. § 362(d)(3). All three grounds for relief from the automatic stay are met in this case.

#### **A. Lack of Adequate Protection—§ 362(d)(1)**

11. Hillcrest is not adequately protected because Hillcrest has no equity cushion, and Whitestone stopped making payments to reduce the principal under the Loan Agreement. *See In re Fry Rd. Assoc.*, 66 B.R. 602, 605 (Bankr. W.D. Tex. 1986); *In re Kelly*, 2007 Bankr. LEXIS 4324, \*3-4 (Bankr. S.D. Miss. 2007) (the debtor's failure to reduce the principal on the loan and the debtor's lack of equity in the property establishes a lack of adequate protection.). In addition, Hillcrest hired a certified appraiser to value to property, and as of August 23, 2011, the Property's value was \$9,880,000. *See* Appraisal, attached as Exhibit A. This demonstrates that the value of the Property has declined because the appraised Property value is significantly less than the Property's value in the Debtor's schedules. *See* Debtor's Schedule A [Dkt No. 5]

(listing the value of the Debtor's real property as \$27,400,000.00). The combination of no equity cushion and a decline in the Property's value demonstrates a lack of adequate protection. *See In re Fry*, 66 B.R. at 605.

12. Furthermore, Whitestone is currently receiving no revenue from the Property, and there is no prospect of generating revenue from the Property; therefore Whitestone has no assets to maintain the Property. Upon information and belief, Whitestone has failed to make timely payments for ad valorem property taxes in connection with the Property, which continues to affect the value and priority of Hillcrest's liens. Therefore, cause exists for lifting the stay under 11 U.S.C. § 362(d)(1). *See CMF Loudoun Ltd. P'ship v. Nattchase Assocs. Ltd. P'ship*, 178 B.R. 409, 416 (Bankr. E.D. Va. 1994) (the failure to pay real estate taxes establishes a lack of adequate protection).

**B. Lack of Equity and Not Necessary for Effective Reorganization—§ 362(d)(2)**

13. The automatic stay may also be terminated with respect to property if the debtor does not have equity in the property and the property is not necessary to an effective reorganization. *See* 11 U.S.C. § 362(d)(2). A debtor has no equity in property for purposes of Section 362(d)(2) when the debts secured by the liens on the property exceed the value of the property itself. *See Sutton v. Bank One, Texas, N.A.*, 904 F.2d 327 (5<sup>th</sup> Cir. 1990).

14. Debtor's Schedule A makes it clear that Whitestone has no equity in the Property, as Debtor calculates the amount of secured claims to be in excess of the current value of the Property (listed secured claim amount of \$20,167,465.94 compared to appraised value of \$9,880,000.00). *See* Debtor's Schedule A [Dkt. No. 5]; Exhibit A. As of August 23, 2011, the Property was valued at \$9,880,000.00 by a certified appraiser. *See* Exhibit A. Therefore, the value of the Property is significantly less than the value listed on Debtor's Schedule A, and Whitestone has no equity in the Property. Having demonstrated that there is no equity in the

Property, the burden is on Whitestone to prove that the Property is necessary for an effective reorganization. *See* 11 U.S.C. § 362(g)(2); *In re Canal Place Ltd. P'ship*, 921 F.2d 569, 576 (5<sup>th</sup> Cir. 1991).

15. The seminal case discussing the standard to be applied under § 362(d)(2)(B) is *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 108 S. Ct. 626, 98 L.Ed.2d 740 (1988). According to the Supreme Court, to demonstrate that property is necessary for an effective reorganization, the debtor must show that "the property is essential for an effective reorganization that is in prospect." *Timbers*, 484 U.S. at 375-76. "This means that there must be 'a reasonable possibility of a successful reorganization within a reasonable time.'" *Timbers*, 484 U.S. at 376.

16. As set forth above, the Debtor bears the burden of proving that the Property is necessary for an effective reorganization. *See* 11 U.S.C. § 362(g)(2); *In re Canal Place Ltd. P'ship*, 921 F.2d 569, 576 (5<sup>th</sup> Cir. 1991). Nevertheless, it is readily apparent that the Property is not necessary for an effective reorganization because there is no reasonable expectation of reorganization in this case. Whitestone has been unable to present any viable plan of reorganization. While Whitestone recently filed a Disclosure Statement, which contains a proposed Plan, the proposed Plan is not feasible and has no chance of confirmation, as set forth in the following section.

17. Continuation of this case will only result in the incurrence of additional administrative expenses, which Whitestone currently has no ability to repay (nor will it as this case proceeds). Additionally, Whitestone's inability to pay other debts relating to the Property as they become due will further injure Hillcrest and the value and priority of its perfected liens against the Property. Accordingly, the Court should grant Hillcrest relief from the automatic stay

to exercise its available legal remedies with respect to the Property, including but not limited to a non-judicial foreclosure sale.

**C. No Plan With Reasonable Probability of Being Confirmed—362(d)(3)**

18. Although Whitestone filed a Joint Plan of Reorganization, it does not have a reasonable probability of being confirmed within a reasonable time. Specifically, the proposed Plan filed by Whitestone is non-confirmable, as a matter of law, because it is not feasible and was proposed in bad faith.

19. Whitestone's Plan is not feasible and cannot be confirmed under section 1129(a)(11). Courts must scrutinize the plan carefully to determine whether it offers a reasonably prospect of success and is workable. *In re Beyond.com Corp.*, 289 B.R. 138, 145 (Bankr. N.D. Cal. 2003). Whitestone has failed to offer anything other than hope and speculation regarding its ability to satisfy the obligations of creditors. *See, e.g., In re M&S Assocs., Ltd.*, 138 B.R. 845, 852 (Bankr. W.D. Tex. 1992) ("Confirmation of the Plan would merely allow the Debtor to postpone the inevitable, and to gamble, with the [secured creditor's] money, on the long shot possibility of a drastic improvement in the real estate market"); *In re Pelham St. Assocs.*, 134 B.R. 700, 701 (Bankr. D.R.I. 1991) (denying confirmation of plan predicated on a 5-year balloon payment to the secured creditor, concluding that the plan was "pure pie in the sky, and no secured creditor should be required to depend on such illusory pie."). Whitestone has no equity in the Property, and this is a Single Asset Real Estate bankruptcy.

20. The proposed Plan does not have a reasonable probability of success because it requires Whitestone to enter into a new third party debt facility and receive an equity investment from a New Capital Partner in order to fund the reorganization. *See* Debtor's Disclosure Statement, Exhibit A, section 2.10. Simultaneously with the refinancing, Whitestone will also place the Property for sale on the market. *Id.* However, Whitestone does not explain how it will

obtain a New Equity Partner and a new debt financing facility when it intends to sell the Property. Further, Whitestone has no equity in the Property. Whitestone values the Property higher than it is worth, according to a certified appraiser; and similarly, Whitestone's projections are likely higher than they will be in actuality.

**D. Bad Faith**

21. The Court should grant Hillcrest relief from the automatic stay because Whitestone filed its Petition and Plan in bad faith. The good faith standard prevents abuse of the bankruptcy process and protects the jurisdictional integrity of the bankruptcy courts. *See In re Little Creek Dev. Co.*, 779 F.2d 1068, 1072 (5th Cir. 1986). Lack of good faith constitutes "cause" for lifting the automatic stay to permit foreclosure. *Id.*; *see also, In re Humble Place Joint Venture*, 936 F.2d 814, 816 (5th Cir. 1991) (Under the Bankruptcy Code, "for cause" has been interpreted to include the lack of good faith). The factors that establish bad faith include several, but not all, of the following: (i) the debtor has one asset, usually a tract of real property; (ii) the asset is encumbered by secured creditors' liens, (iii) there are generally no employees except principals, little or no cash flow, and no available sources of income to sustain a plan of reorganization; (iv) there are few, if any, unsecured creditors; (v) and the property has been posted for foreclosure. *In re Little Creek*, 779 F.2d at 1073.

22. The circumstances here clearly meet all of the factors establishing bad faith. Whitestone has a single asset real estate, which is encumbered by secured creditors' liens, and Whitestone has no equity in the Property. The Property was posted for foreclosure to occur on August 2, 2011, and Whitestone filed for bankruptcy on August 1, 2011, the eve of the foreclosure sale. There are no employees to protect because this is a single asset, undeveloped, real estate case. There is no cash flow, as the Property is an undeveloped tract of real estate, and there is no available source of income for reorganization besides additional financing and an

equity contribution. Bankruptcy is not proper in this case because there is "no going concern to protect, there are no employees to protect, and there is no hope of rehabilitation, accept according to the debtor's 'terminal euphoria.'" *In re Little Creek*, 779 F.2d at 1073. Therefore, the Court should grant Hillcrest relief from the automatic stay to exercise its available legal remedies with respect to the Property, including but not limited to a non-judicial foreclosure sale.

#### **V. CONCLUSION**

WHEREFORE, based on the foregoing, Hillcrest Bank respectfully requests this Court enter an order granting it relief from the automatic stay to pursue whatever remedies are available to it with respect to the Property, including but not limited to posting and conducting a non-judicial foreclosure sale of the Property. 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/ Brian C. Mitchell

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

**CERTIFICATE OF CONFERENCE**

Counsel for Hillcrest and counsel for Whitestone have conferred regarding the relief sought in this Motion, and Whitestone is opposed to the requested relief.

*/s/ Brian C. Mitchell*

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Brian C. Mitchell

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the above and foregoing instrument has been served via U.S. Mail on the debtor, the United States Trustee, all secured creditors, all governmental units, the twenty (20) largest unsecured creditors, and all parties who have filed a notice of appearance or request for notice in the case, as listed in the noticing matrix and pursuant to L.B.R. 9013(f), and electronically via the Court's ECF noticing system on those parties who receive notice from that system, on the 22nd day of November, 2011.

*/s/ Brian C. Mitchell*

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Brian C. Mitchell