

# EXHIBIT J

I hereby certify that the annexes and foregoing is a true and complete copy of a document, or, an authorized electronic entry, on file in the United States Bankruptcy Court for the District of Utah

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Deputy Clerk

George Hofmann (10005)  
Victor P. Copeland (13511)  
**Parsons Kinghorn Harris**  
A Professional Corporation  
111 East Broadway, 11th Floor  
Salt Lake City, UT 84111  
Telephone: (801) 363-4300  
Facsimile: (801) 363-4378

Proposed Attorneys for George Hofmann,  
Chapter 7 Trustee

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION**

In re

RENEWABLE ENERGY DEVELOPMENT  
CORPORATION,

Debtor.

Bankruptcy No. 11-38145 (WTT)

Chapter 7

**TRUSTEE'S MOTION FOR ORDER (A) APPROVING BID PROCEDURES FOR SALE OF SUBSTANTIALLY ALL OF THE DEBTOR'S ASSETS, (B) AUTHORIZING THE SALE OF THE DEBTOR'S ASSETS FREE AND CLEAR OF LIENS, CLAIMS, ENCUMBRANCES, AND INTERESTS, (C) WAIVING THE 14 DAY STAY OTHERWISE APPLICABLE UNDER BANKRUPTCY RULES 6004 AND 6006, AND (D) AUTHORIZING ASSUMPTION AND ASSIGNMENT OF EXECUTORY CONTRACTS AND UNEXPIRED LEASES**

Pursuant to Bankruptcy Code §§ 105, 363, and 365 and Federal Rules of Bankruptcy Procedure 2002, 6004, and 6006, George Hofmann, in his capacity as Chapter 7 Trustee (the "Trustee") of the bankruptcy estate of Renewable Energy Development Corporation (the "Debtor"), through his counsel, hereby moves this Court for an order (a) approving bid procedures for the sale of the Debtor's assets, (b) authorizing the sale of the Debtor's assets free and clear of liens, claims, encumbrances

and interests, (c) waiving the 14 day stay otherwise applicable under Bankruptcy Rules 6004 and 6006, and (d) authorizing the assumption and assignment of executory contracts and unexpired leases. In support of this Motion, the Trustee respectfully represents as follows:

**JURISDICTION AND GENERAL BACKGROUND**

1. This Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

2. The Debtor commenced this case under Chapter 7 of the Bankruptcy Code by filing a voluntary petition on December 30, 2011.

3. On December 30, 2011, the Trustee was appointed as the interim Chapter 7 Trustee of the Debtor's estate.

4. Since his appointment, the Trustee has performed his duties as required by Bankruptcy Code § 704. The Trustee has commenced an investigation of the financial affairs of the Debtor, and the acts, conduct, assets, liabilities and financial condition of the Debtor, and other matters relevant to the administration of the Debtor's estate. This investigation is ongoing.

5. Based upon his ongoing investigation, the Trustee believes that the Debtor is in the business of developing solar and wind energy. Generally, the Debtor's business model is to negotiate packages of contract and leasehold rights to develop solar and wind energy projects and hire contractors to implement the project. The Debtor has fully completed only one such project, a solar panel system atop the University of Utah's Natural History Museum. The Debtor has approximately ten other projects in various

other stages of development, ranging from preliminary term sheets to projects otherwise ready to commence installation (the "Remaining Projects"). The Debtor does not own or have an interest in real property or similarly appreciable assets, other than leasehold interests. Rather, the bulk of the Debtor's Assets (as defined below) consist of potentially valuable business opportunities in the form of contract and leasehold rights associated with the Remaining Projects.

6. However, the value of the Debtor's Assets is time sensitive, and may decrease substantially if the Remaining Projects are interrupted. Among other things, the value of the Debtor's Assets is conditioned upon the availability of federal and state tax credit incentives to implement the Remaining Projects, which expire at varying points in time. If eligibility for these tax credits were to expire, the Trustee believes the Remaining Projects would not be economically viable.

7. In light of the potentially depreciating nature of the Debtor's Assets, the Trustee has concluded that a sale of the Debtor's assets pursuant to Bankruptcy Code § 363 on an expedited basis is the best means to reduce the Debtor's Assets to cash. By this Motion, the Trustee requests the Court to establish the procedures for the auction of substantially all of the Debtor's Assets.

#### **RELIEF REQUESTED**

8. The Trustee requests entry of an order, substantially in the form attached as Exhibit A, approving bidding procedures (the "Bid Procedures") for the proposed sale of substantially all of the Debtor's assets, including, without limitation, all of the Debtor's interests, intellectual property, patents, patent rights, notebooks, know-how, trademarks, leases, contract rights, claims and causes of action (collectively, the "Assets"):

9. The Trustee has requested this Court to conduct and set a hearing (the "Sale Hearing") to approve any sale of the Debtor's assets pursuant to the Bid Procedures on January 30, 2012 at 11:30 a.m.

10. The Trustee also requests the waiver of the 14 day stay that would otherwise apply under Bankruptcy Rules 6004 and 6006 on the ground that cause exists to waive this stay.

11. Finally, the Trustee seeks authority to assume and assign any unexpired leases and executory contracts to the Successful Bidder (as defined below) to the extent the Successful Bidder requests such assumption and assignment in its bid.

**A. The Stalking Horse Bid**

12. The Trustee has received a proposal (the "Stalking Horse Bid") from Sustainable Power Group, LLC ("SPG") and its assigns, the holder of the secured claim of AEG Power Solutions USA, Inc., a copy of which is attached as Exhibit B. The Trustee understands that SPG has agreed that its proposal will serve as the stalking horse bid at the Auction (as defined below).

13. SPG is the holder of a secured claim in the amount of \$1,058,767.12 that is not listed as contingent, unliquidated, or disputed in the Debtor's schedules (the "AEG Secured Claim"). Under the terms of the Stalking Horse Bid, SPG has offered to purchase the following portion of the Assets (collectively, the "SPG Assets<sup>1</sup>"):

- A. the Debtor's member or equity interests in: UofU Solar 1, LLC, REDCO-CIN Solar 1, LLC, OUS Solar 1, LLC, OUS Solar 2, LLC, and OUS Solar 4, LLC;
- B. all right, title and interest in and to the Intellectual Property;

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<sup>1</sup> Unless otherwise noted, capitalized terms shall have the meanings as defined in the Stalking Horse Bid, as defined below. To the extent there are any inconsistencies between any summary description of the Stalking Horse Bid in this Motion and the terms and conditions of the Stalking Horse Bid, the terms and conditions of the Stalking Horse Bid control.

C. all ownership, leasehold and real property interests of whatever nature, except those "Excluded Leases" contained in Exhibit A to the Stalking Horse Bid (as defined below), including the Cal Farley's Boys Ranch Lease Option Agreement, the Cal Farley's Ranch MET Tower Agreement, the Option Agreement for Rooftop Lease with Prudential REIT (together with any other intangible assets related to the Prudential contract and project, including, without limitation, all buildings, structures, fixtures and other improvements situated thereon or attached thereto), and including all of Seller's right, title and interest in and to all leases, subleases, franchises, licenses, permits, easements, privileges, rights-of-way, riparian and other water rights, lands underlying any adjacent streets or roads and appurtenances pertaining to or accruing to the benefit of such property;

D. all Equipment used in the operation of the Business, wherever located and all warranties and guarantees, if any, express or implied, existing on the Closing Date for the benefit of the Seller in connection with the Equipment;

E. all management information systems, computers, hardware and software either owned by the Seller or otherwise used in the operation of the Business;

F. with the exception of the books and records included in the definition of Excluded Assets below, all books, records and accounts, correspondence, production records, technical, accounting, manufacturing and procedural manuals, customer lists, vendor lists, employment records, research material, drawings, studies, reports or summaries relating to any environmental conditions or consequences of any operation, present or former, and any information (including confidential information) which has been reduced to writing relating to or arising out of the operation of the Business;

G. all Inventories;

H. the Assumed Contracts;

I. all licenses, permits or franchises issued by any federal, state, municipal or foreign authority relating to the development, use, maintenance or occupation of the Seller or the Business;

J. all rights under express or implied warranties in favor of the Seller existing on the Closing Date;

K. all right, title and interest in and to all goods and services and all other economic benefits to be received subsequent to the Closing Date arising out of prepayments and payments by the Seller prior to the Closing Date, including without limitation Seller's deposit with Idaho Power, PacifiCorp, and Parkway Office Condos, LLC;

L. all right, title and interest in and to any insurance policies in existence on the Closing Date;

M. all personal computers, computer hardware and software, and other management information systems of Seller, whether owned by Seller or used in the Business;

N. all rights to non-disclosure agreements, including any rights of REDCO or the Seller in any non-disclosure agreements signed after the date of this Agreement and before the Closing, including without limitation any rights to sue for breach of any such agreements or any rights to obtain injunctive relief pursuant to such agreements;

O. all Accounts Receivable; and

P. the goodwill in or arising from the Assets and the Business.

14. Notwithstanding the foregoing paragraph, under the Stalking Horse Bid the SPG Assets do not include the following Excluded Assets:

A. all of Seller's cash and cash equivalents, interests in deposit or checking accounts, certificates of deposit, treasury bills and other freely-tradable marketable securities of Seller as of the Closing Date, and the Cash Consideration;

B. all of Seller's rights to insurance proceeds or other insurance contract recoveries in respect of any the Excluded Assets and Excluded Liabilities;

C. all Contracts other than the Assumed Contracts;

D. all business books and records of REDCO which the Seller deems necessary to administer REDCO's bankruptcy estate, provided that Buyer shall have access to such books and records and the right to make a copy of such books and records at the Buyer's expense;

E. all claims arising under Chapter 5 of the Bankruptcy Code in connection with the Bankruptcy Case;

F. all claims of any nature of REDCO against Ryan Davies;

G. the Debtor's equity interests in Blue Mountain Wind, LLC and OUS Solar 3, LLC; and

H. the Excluded Leases contained in Exhibit A to the Stalking Horse Bid.

15. Under the Stalking Horse Bid, SPG has offered to purchase the SPG Assets for (i) \$40,000 in cash (the "Cash Consideration"), payable (a) through a deposit

in the amount of \$20,000 paid by Buyer to Seller contemporaneously with the execution of this Agreement (the "Deposit"), and (b) an additional \$20,000 paid by SPG to the Trustee on the Closing Date; (ii) \$1,058,767.12 in the form of a credit bid of the AEG Secured Claim, which is the full amount of the AEG Secured Claim; and (iii) SPG's assumption of (a) the Debtor's liability to McCalmont Engineering, in the approximate amount of \$52,043.10; (b) REDCO's liability to Okland Construction, in the approximate amount of \$2,101,600; (c) all Cure Amounts; and (d) any taxes (including sales or transfer taxes), transfer fees, any personal property taxes, or other costs incurred in connection with the sale of the SPG Assets. In the event the Closing does not occur for any reason other than the fault of SPG, including without limitation, the failure to obtain approval from the Bankruptcy Court, the Deposit shall be fully refunded to SPG.

16. Because SPG is mostly associated with a group of equity holders of the Debtor, SPG likely is an "insider" of the Debtor as that term is defined in Bankruptcy Code § 101(31).

17. Under the terms of the Stalking Horse Bid, the SPG Assets will be sold to SPG free and clear of all liens, claims, interests and any and all other encumbrances of any kind or nature, except any valid mechanics' liens held by Okland Construction and McCalmont Engineering.

18. The Stalking Horse Bid is the highest and best proposal that the Trustee has received to date for a portion of the Assets.

#### **B. The Bid Procedures**

19. As described above, the Trustee believes that a controlled liquidation of the Debtor's Assets is the best way to maximize returns to creditors of this estate. The



Trustee proposes to further test the marketplace by the sale and bidding process to ensure that the Debtor's estate realizes the maximum value for the Assets.

20. Although the Trustee presently intends to sell the Assets as a whole to the highest bidder, the Trustee reserves the right in the Bid Procedures to offer the Debtor's Assets for sale in other lots as the Trustee determines in the exercise of his business judgment if an alternative sale would result in the highest or otherwise best collective value for the Assets. SPG has no obligation to purchase less than all the SPG Assets.

21. The Trustee intends to publicize and market the Assets, to the extent possible, in the energy industry. In addition, the Trustee proposes to give notice, immediately and not later than one business day after the entry of the Order approving the Bid Procedures, of the Bid Procedures, Stalking Horse Bid, the Cure Notices (as defined below), the time and place of the Auction, the Sale Hearing, and the Objection Deadline. The Trustee further proposes to give notice of the Sale Hearing and Objection Deadline by sending the Notice of Auction and Sale Hearing to (a) all entities reasonably known to the Trustee to have expressed an interest in a transaction with respect to the Assets during the past twelve months, (b) the Office of the United States Trustee, (c) all non-debtor parties to relevant contracts or leases (executory or other), (d) all known creditors of the Debtors, including all known persons asserting a lien, claim, encumbrance or other interest in any of the Debtor's Assets, and (e) all parties who have requested service under Bankruptcy Rule 2002.

22. Upon execution of a confidentiality and nondisclosure agreement in the form attached as Exhibit E to the Stalking Horse Bid (the "Nondisclosure Agreement"),

SPG has agreed to provide reasonable access to Qualified Bidders through an electronic data room for the purposes of due diligence.

23. In order for a potential buyer (each, a "Potential Bidder") to participate in the sale process, the Potential Bidder must deliver to the Trustee (a) an executed non-disclosure agreement in form and substance satisfactory to the Trustee; (b) written evidence of a commitment for financing or other evidence of ability to consummate the proposed transaction satisfactory to the Trustee in his sole discretion; (c) an irrevocable proposal to purchase some or substantially all of the Debtor's Assets. A "Qualified Bidder" is a Potential Bidder that delivers these items to the Trustee.

24. A Qualified Bidder that desires to make a bid shall deliver a written copy of its bid to the Trustee as follows: George Hofmann, Trustee of Renewable Energy Development Corporation, LLC, c/o Parsons Kinghorn Harris, 111 East Broadway, 11th Floor, Salt Lake City, Utah 84111, not later than 4:00 p.m. (Prevailing Mountain Time) on January 24, 2012 (the "Bid Deadline"). The Trustee may extend the Bid Deadline once or successively, but he is not obligated to do so. All bids must include the following documents (the "Required Bid Documents"):

A. A letter stating that the bidder's offer is irrevocable until the earlier of (i) two business days after the Assets upon which the bidder is bidding have been disposed of pursuant to the Bid Procedures, or (ii) thirty days after the Sale Hearing;

B. An executed form of asset purchase agreement in form and substance acceptable to the Trustee;

C. A list of all executory contracts of the Debtor that the bidder wishes to receive through assumption and assignment under Bankruptcy Code § 365, including a

description of each contract, the addresses of all counterparties to each contract, and any cure amount that the bidder believes to be due; and

D. Written evidence of a commitment for financing or other evidence of ability to consummate the proposed transaction satisfactory to the Trustee in his sole discretion.

25. After all Qualified Bids have been received, the Trustee shall conduct an auction (the "Auction") with respect to any Assets as to which a Qualified Bid has been received. The Auction shall take place at 10:00 a.m. on January 27, 2012 at the offices of the Trustee's counsel, Parsons Kinghorn Harris, P.C., 111 East Broadway, 11th Floor, Salt Lake City, Utah 84111. At the Trustee's discretion, Qualified Bidders may participate in the Auction by telephone.

26. The Trustee intends to conduct the Auction by announcing the highest and best Qualified Bid received, which may be the Stalking Horse Bid. The Trustee will then open the Auction to competing bids for either some or substantially all of the Assets in whatever lots the Trustee in the exercise of his business judgment deems appropriate to result in the highest or otherwise best collective value for the Assets. The Trustee will thereafter entertain bids for the Assets in such successive rounds as the Trustee determines to be appropriate so as to obtain the highest or otherwise best bid or combination of bids for the Assets. The Trustee also may set opening bid amounts in each round of bidding as the Trustee determines to be appropriate.

27. The Trustee may consider waivers or assignments of claims against the Debtor's estate in conjunction with any bid. The Trustee intends to inform all parties

present at the Auction of his evaluation of the economic value of any waivers or assignments of claims that may be offered at the Auction.

28. At the Auction, the Trustee, in consultation with his advisors, shall (a) review each bid or bids on the basis of financial and contractual terms and the factors relevant to the sale process, including those factors affecting the speed and certainty of consummating the sale; and (b) identify the highest and otherwise best offer or group of offers for the Assets (the "Successful Bid(s)"). At the Sale Hearing, the Trustee shall present the Successful Bid(s) for approval to the Bankruptcy Court.

**C. Assigned Contracts**

29. In connection with the sale of the Assets, the Trustee seeks authority, to the extent necessary, to assume and assign certain unexpired leases and executory contracts to the maker of the Successful Bid(s) under Bankruptcy Code § 365. In particular, on January 5, 2012, the Debtor filed its schedules, including Schedule G [Docket No. 3, pp. 32-34]. On its Schedule G, the Debtor listed 21 wind and renewable energy leasehold interests and five solar power contracts. The Trustee seeks authority to assume and assign any unexpired leases and executory contracts to the Successful Bidder to the extent the Successful Bidder requests such assumption and assignment in its bid.

30. Because of the need to close any transactions as quickly as possible in order to maximize value, the Trustee proposes the following procedures for assuming and assigning unexpired leases and executory contracts.

31. On or before January 26, 2012, the Trustee will file a notice (a "Cure Notice") with the Court and serve the Cure Notice on each non-debtor party to those

executory contracts and unexpired leases that the Trustee determines, in the exercise of his business judgment, are necessary to maximize value of any proposed transaction(s). The Cure Notice shall designate the proposed purchaser(s) and shall provide information regarding adequate assurance of future performance.

32. The Cure Notice shall state the cure amounts that the Trustee believes are necessary to assume such contracts and leases pursuant to Bankruptcy Code § 365 (the "Cure Amount") and notify the non-debtor party that such party's contract or lease may be assumed and assigned to the purchaser of the Assets should the sale be consummated. The Cure Notice shall set a deadline by which the non-debtor party shall file an objection to the Cure Amount, adequate assurances of future performance or assumption and assignment of the relevant executory contract or unexpired lease generally. Any such objections shall be addressed at the Sale Hearing or such other date as the Court determines.

33. The Trustee intends to request entry of an order requesting approval of the assumption and assignment of any unexpired leases and executory contracts to the Successful Purchaser(s) at the Sale Hearing.

#### **APPLICABLE AUTHORITY**

##### **A. Bid Procedures**

34. Bankruptcy Code § 363 provides that the Trustee, "after notice and a hearing, may use, sell or lease, other than in the ordinary course of business, property of the estate." Bankruptcy Code § 363(b). To approve the use, sale or lease of property outside of the ordinary course of business, the Trustee must show four requirements: "(1) that a sound business reason exists for the sale; (2) there has been adequate and

reasonable notice to interested parties, including full disclosure of the sale terms and the Debtor's relationship with the buyer; (3) that the sale price is fair and reasonable; and (4) that the proposed buyer is proceeding in good faith." In re Medical Software Solutions, 286 B.R. 431 (Bankr. D. Utah 2002); accord Committee of Equity Security Holders v. Lionel Corp. (In re Lionel Corp.), 722 F.2d 1063, 1071 (2d Cir. 1983) (identifying the "sound business purpose" test); In re Abbotts Dairies of Penn., Inc., 788 F.2d 143, 145-47 (3d Cir. 1986) (implicitly adopting the articulated business justification test of Lionel, and adding the "good faith" requirement).

35. In general, bankruptcy courts often defer to a trustee's business judgment regarding the sale of estate assets, unless such decision is arbitrary and capricious. See In re Curlew Valley Assocs., 14 B.R. 506, 511-13 (Bankr. D. Utah 1981). Courts generally will not second-guess a trustee's business decisions when those decisions involve "a business judgment made in good faith, upon a reasonable basis, and within the scope of his authority under the Code." Curlew Valley, 14 B.R., at 513-14 (footnotes omitted).

36. The Trustee has sound business reasons for the proposed sale. This is a Chapter 7 liquidation case, and the Trustee has a duty to "collect and reduce to money the property of the estate." Bankruptcy Code § 704(a)(1). The Trustee has concluded that a sale of the Debtor's Assets is the best means to maximize returns to creditors in light of the nature of the Assets. A sale by auction, using reasonable procedures, presents the best opportunity to realize the maximum value of the estate's assets for distributions to creditors.

37. Specifically, the time-sensitive and potentially decreasing value of the Debtor's Assets are such that the Trustee believes the value of the Debtor's Assets and,

therefore, the consummation of a sale will be seriously jeopardized unless the Trustee can begin the sale process contemplated in the Bid Procedures as expeditiously as possible. See, e.g., In re Medical Software Solutions, 286 B.R. at 441 (emphasizing "whether the asset is increasing or decreasing in value" as the most important consideration in case where the "assets' value is reducing rapidly").

38. The Trustee submits that this motion and the Bid Procedures provide ample notice to parties in interest of the proposed sale. Among other things, the Trustee proposes to provide notice and sufficient time for parties in interest to submit objections and for bidders to formulate and submit competing proposals, using due diligence materials that are reasonably accessible under the circumstances.

39. The Trustee believes that the proposed sale price obtained through the Auction will likely represent fair value for the Debtor's assets. The Trustee will use his best efforts to publicize the Auction and the Bid Procedures. The Trustee believes that exposing all Assets of the Debtor to the market will be the best indication of the true value of those assets.

40. Moreover, the Trustee submits that the Bid Procedures and Stalking Horse Bid satisfy the heightened good faith requirement set out in the Medical Software Solutions case. See 286 B.R. at 241 (agreeing that where "the asset sale is to a purported insider, the purchaser has a heightened responsibility to show that the sale is proposed in good faith and for value"). The Bankruptcy Code does not define "good faith." Courts have therefore turned to the traditional equitable definition of a "good faith purchaser"—a purchaser who buys in "good faith" and for "value." Tomkins v. Frey (In re Bel Air Assocs., Ltd.), 706 F.2d 301, 305 (10th Cir. 1983). In addition, certain types of

misconduct, including "fraud, collusion between the purchaser and other bidders or the trustee, or an attempt to take advantage of other bidders," will "destroy a buyer's 'good faith purchaser' status." Id. (quoting In re Rock Indus. Machinery Corp., 573 F.2d 1195, 1197 (7th Cir. 1197)). Although Tomkins was a case arising under the Bankruptcy Act, it remains good law in this circuit. See Plotner v. AT&T Corp., 224 F.3d 1161, 1171 (10th Cir. 2000) (citing Tomkins with approval).

41. The identity and affiliations of SPG, the stalking horse bidder, have been fully disclosed. See id. at 445-446 (finding that debtor acted in good faith where the debtor "disclosed all elements of the transaction, including the insider status of the proposed purchaser").

42. In addition, the Trustee has engaged in extensive good faith negotiations with SPG, and submits that SPG also has negotiated in good faith to acquire a substantial portion of the Debtor's Assets. The Trustee submits that SPG has proceeded in good faith and is offering to pay value. With respect to the "value" requirement, the value of the Debtor's Assets is difficult to quantify. Nevertheless, the Debtor listed the total value of the Assets in its schedules at \$792,297.19, and SPG has offered to credit bid the full amount of the AEG Secured Claim—in excess of \$1 million—in addition to cash consideration and the assumption of certain liabilities. In sum, the Trustee estimates the Purchase Price for the SPG Assets to be approximately \$3,252,410.22.

43. Moreover, the Stalking Horse Bid is subject to higher and better offers, and SPG has not requested any compensation or additional bid protections from the estate for its role as stalking horse bidder. As such, the Trustee does not believe that SPG has engaged in any conduct that would preclude this Court from making a "good faith" finding



at the hearing to approve this proposed sale. The Court, therefore, should conclude that the Bid Procedures and the Stalking Horse Bid meet each of the four Medical Software Solutions requirements.

**B. The Sale Satisfies the Requirements of Bankruptcy Code § 363(f) for a Sale Free and Clear of Liens, Claims, Encumbrances and Interests**

44. Pursuant to Bankruptcy Code § 363(f), the Trustee may sell property free and clear of any lien, claim, or interest in such property, if, among other things:

- (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
- (2) such entity consents;
- (3) such interest is a lien and the price at which such property is sold is greater than the aggregate value of all liens on such property;
- (4) such interest is in bona fide dispute; or
- (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

45. Because Bankruptcy Code § 363(f) is drafted in the disjunctive, satisfaction of any one of the five requirements will be sufficient to permit the sale of the Assets free and clear of lines, claims, encumbrances, pledges, mortgages, security interests, charges, options, and other interests (collectively, the "Interests"). The Trustee believes that three parties may assert that they hold Interests in the Assets:

A. AEG is listed on the Debtor's amended Schedule D dated January 5, 2012 as the holder of a secured claim, which claim SPG has subsequently acquired;

B. McCalmont Engineering ("McCalmont") is listed on the Debtor's amended Schedule D dated January 5, 2012 as the holder of a security interest in assets held by the Debtor's subsidiary UofU Solar 1, LLC; and

C. Okland Construction ("Okland") is listed on the Debtor's amended Schedule D dated January 5, 2012 as the holder of a mechanic's lien arising out of a construction project at the University of Utah, but the entire amount of its claim is listed as unsecured.

46. SPG has consented to the sale free and clear of liens, therefore satisfying Bankruptcy Code § 363(f)(2). Moreover, under the terms of the Stalking Horse Bid, the SPG Assets will be sold to SPG free and clear of all liens, claims, interests and any and all other encumbrances except any valid mechanics' liens held by Okland Construction and McCalmont Engineering.

47. Moreover, McCalmont and Okland can be compelled to accept a money satisfaction of such Interests in legal or equitable proceedings in accordance with Bankruptcy Code § 363(f)(5). Such legal or equitable proceedings include proceedings to confirm a plan, under which the holder of a lien may be compelled to accept payment in satisfaction of its lien pursuant to Bankruptcy Code § 1129(b)(2)(A).

48. Indeed, Bankruptcy Code § 1129(b)(2)(A) specifically allows a trustee to sell property subject to a lien, free and clear of such lien, if such lien attaches to the net proceeds of the sale, subject to any claims and defenses the trustee may possess with respect thereto. The Trustee proposes that any Interests in the Assets attach to the net proceeds of the sale. Accordingly, the Assets may also be sold free and clear of the alleged secured claims asserted by McCalmont and Okland pursuant to Bankruptcy Code § 363(f)(5).

49. The Assets also may be sold free and clear of any interests asserted by the Purported Interest Holders pursuant to Bankruptcy Code § 363(f)(3). That section

permits a trustee to sell property free and clear of liens if "such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property." (Emphasis added). While the Trustee acknowledges that courts are divided on the interpretation of this section, the better view is that "value" means the economic value of the liens on the property, rather than the face amount of the debts secured by the property. See, e.g., In re Beker Indus. Corp., 63 B.R. 474, 476 (Bankr. S.D.N.Y. 1986); In re Terrace Gardens Park Partnership, 96 B.R. 707, 713 (Bankr. W.D. Tex. 1989); In re Oneida Lake Development, Inc., 114 B.R. 352, 357 (Bankr. N.D.N.Y. 1990); In re Equity Management Systems, 149 B.R. 120, 123 (Bankr. S.D. Iowa 1993); In re Collins, 180 B.R. 447, 451 (Bankr. E.D. Va. 1995).

50. Since the Trustee will expose the Assets to the market through these Bid Procedures, the market will dictate the value of the Assets at the Auction. Therefore, the requirements of Bankruptcy Code § 363(f)(3) will be satisfied.

**C. Cause Exists to Waive the 14 Day Stay Otherwise Applicable Under Bankruptcy Rules 6004 and 6006**

51. Bankruptcy Rule 6004(h) provides that unless the Court orders otherwise, all orders authorizing the sale of property under Bankruptcy Code § 363 are automatically stayed for 14 days after entry of the order. Similarly, under Bankruptcy Rule 6006(d), unless the Court orders otherwise, all orders authorizing the assignment of contracts or unexpired leases are automatically stayed for 14 days after entry of the order.

52. The Trustee submits that cause exists to waive the automatic 14 day stay otherwise applicable under Bankruptcy Rules 6004(h) and 6006(d). The Stalking Horse Bid sets the Closing Date to occur no later than January 31, 2012. SPG bargained for

this Closing Date. Accordingly, the 14 day stay would prevent the closing from going forward as scheduled. If the closing is postponed, the sale may be lost, interest would continue to accrue on claims against the estate, and the value of the Assets is likely to decrease. Closing the sale at the earliest possible time will reduce the costs of administering this estate and thus maximize creditor recoveries

**D. The Assumption and Assignment of Executory Contracts and Unexpired Leases Should Be Authorized**

53. Bankruptcy Code § 365(f)(2) provides that:

[t]he trustee may assign an executory contract or unexpired lease of the debtor only if—

(A) the trustee assumes such contract or lease in accordance with the provisions of this section; and

(B) adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease.

54. Under Bankruptcy Code § 365(a), a trustee, "subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor." 11 U.S.C. § 365(a). Section 365(b)(1) of the Bankruptcy Code, in turn, codifies the requirements for assuming an unexpired lease or executory contract of a debtor. This subsection provides as follows:

(b)(1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee —

(A) cures, or provides adequate assurance that the trustee will promptly cure, such default;

(B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such

contract or lease, for any actual pecuniary loss to such party resulting from such default; and

(C) provides adequate assurance of future performance under such contract or lease.

11 U.S.C. § 365(b)(1).

55. The meaning of "adequate assurance of future performance" depends on the facts and circumstances of each case, but should be given a "practical, pragmatic construction." See e.g., EBG Midtown South Corp. v. McLaren/Hart Env. Engineering Corp. (In re Sanshoe Worldwide Corp.), 139 B.R. 585, 593 (S.D.N.Y. 1992); In re Prime Motor Inns Inc., 166 B.R. 993, 997 (Bankr. S.D. Fla. 1994) ("[a]lthough no single solution will satisfy every case, the required assurance will fall considerably short of an absolute guarantee of performance"); Carlisle Homes, Inc. v. Azzari (In re Carlisle Homes, Inc.), 103 B.R. 524, 538 (Bankr. D.N.J. 1988).

56. Among other things, adequate assurance may be provided by demonstrating the assignee's financial health and experience in managing the type of enterprise or property assigned. See, e.g., In re Bygaph, Inc., 56 B.R. 596, 605-06 (Bankr. S.D.N.Y. 1986) (reasoning that adequate assurance of future performance is present when prospective assignee of lease from debtor has financial resources and has expressed willingness to devote sufficient funding to business in order to give it strong likelihood of succeeding).

57. To the extent that any defaults exist under any executory contract or unexpired lease that is to be assumed and assigned in connection with the sale of any Assets, the Trustee will cure any such default prior to such assumption and assignment. At the Sale Hearing, the Trustee will further adduce facts demonstrating the financial

wherewithal of the Successful Bidder, its industry experience, and its willingness and ability to perform under the contracts to be assumed and assigned to it.

58. Therefore, the Sale Hearing will provide the Court and other interested parties ample opportunity to evaluate and, if necessary, challenge the ability of the Successful Bidder to provide adequate assurance of future performance under the contracts to be assumed. Thus, the Court will have a sufficient basis to authorize the Trustee to reject or assume and assign contracts as will be set forth in an asset purchase agreement.

WHEREFORE, the Trustee respectfully requests entry of an order (i) approving bid procedures in connection with the sale of the Debtor's assets; (ii) authorizing the sale of assets free and clear of liens, claims, encumbrances and interests; (iii) waiving the 14 day stay otherwise applicable under Bankruptcy Rules 6004 and 6006 (iv) authorizing assumption and assignment of executory contracts and unexpired leases and (v) granting the Trustee such other and further relief as the Court deems just and proper.

Dated: January 10, 2012

**PARSONS KINGHORN HARRIS**  
*A Professional Corporation*

/s/ Victor P. Copeland

GEORGE B. HOFMANN  
VICTOR P. COPELAND

Proposed Attorneys for Trustee

# EXHIBIT A

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**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION**

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In re

RENEWABLE ENERGY DEVELOPMENT  
CORPORATION,

Debtor.

Bankruptcy No. 11-38145 (WTT)

Chapter 7

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**ORDER APPROVING BID PROCEDURES FOR SALE OF  
SUBSTANTIALLY ALL OF THE DEBTOR'S ASSETS**

The Trustee's Motion for Order (A) Approving Bid Procedures for Sale of Substantially All of the Debtor's Assets, (B) Authorizing the Sale of the Debtor's Assets Free and Clear of Liens, Claims, Encumbrances, and Interests, (C) Waiving the 14 Day Stay Otherwise Applicable under Bankruptcy Rules 6004 and 6006, and (D) Authorizing Assumption and Assignment of Executory Contracts and Unexpired Leases (the "Motion"<sup>1</sup>) came on for hearing before this Court on January 18, 2012 at 1:00 p.m. with regard to approval of the Bid Procedures.<sup>2</sup> Appearances were noted on the record of the hearing on the Motion. The Court having considered the Motion, having determined that appropriate notice of the Motion was provided to creditors and parties in interest in this case, having heard the statements of counsel at the hearing in support of

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<sup>1</sup> Unless otherwise defined, capitalized terms used in this Order shall have the meanings ascribed to them in the Motion.

<sup>2</sup> The remaining aspects of the Motion, other than approval of the Bid Procedures, will be addressed at a later date.



the Motion, and good cause appearing to grant the relief sought through the Motion, it is hereby

**ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:**

1. The Motion is granted in part, specifically with regard to the Court's approval of the Bid Procedures.
2. All objections to the Motion or the relief requested in the Motion related to the Bid Procedures that have not been withdrawn, waived, or settled, and all reservations of rights included therein, are overruled on the merits.
3. The Bid Procedures, in the form attached as Exhibit 1 to this Order, are approved in all respects.
4. The Auction for the Assets shall take place at 10:00 a.m. on January 27, 2012 at the offices of the Trustee's counsel, Parsons Kinghorn Harris, P.C., 111 East Broadway, 11th Floor, Salt Lake City, Utah 84111.
5. The Sale Hearing to approve the Successful Bid(s) for the Assets shall be held before this Court on January 30, 2012 at 11:30 a.m.
6. On or before January 26, 2012, the Trustee will file a notice (the "Cure Notice") with the Court and serve such Cure Notice on each non-debtor party to those executory contracts and unexpired leases that the Trustee determines, in the exercise of his business judgment, are necessary to maximize value of any proposed transaction(s). The Cure Notice shall designate the proposed purchaser(s) and shall provide information regarding adequate assurances of future performances.
7. The Cure Notice shall state the cure amounts that the Trustee believes

are necessary to assume such contracts and leases pursuant to Bankruptcy Code § 365 (the "Cure Amount") and notify the non-debtor party that such party's contract or lease may be assumed and assigned to the purchaser of the Assets should the sale be consummated. The Cure Notice shall set a deadline by which the non-debtor party shall file an objection to the Cure Amount, adequate assurances of future performance or assumption and assignment.

8. At the Sale Hearing, the Court shall consider approval of the assumption and assignment of any Assigned Agreements to the Successful Purchaser(s).

— END OF ORDER —

# EXHIBIT 1

## **RENEWABLE ENERGY DEVELOPMENT CORPORATION**

### **The Bid Procedures**

Set forth below are the bid procedures (the "Bid Procedures") to be employed with respect to the prospective sale(s) (the "Sale(s)") of the business and assets of Renewable Energy Development Corporation (the "Debtor") in connection with case number 11-38145 (the "Bankruptcy Case") pending in the United States Bankruptcy Court for the District of Utah (the "Bankruptcy Court"). George Hofmann, in his capacity as Chapter 7 trustee (the "Trustee") of the Debtor's bankruptcy estate will seek entry of an order from the Bankruptcy Court authorizing and approving Sale(s) of the assets to the Qualified Bidder(s) (as hereinafter defined) as the Trustee, in the exercise of his business judgment after consultation with his advisors may determine to have made the highest or otherwise best offers to purchase assets (the "Successful Bidder(s)").

### **Stalking Horse Bid**

The Trustee has received a "stalking horse" bid proposal from Sustainable Power Group, LLC or its assigns ("SPG"). SPG has proposed to buy the following portion of the Assets (collectively, the "SPG Assets<sup>3</sup>"):

- A. the Debtor's member or equity interests in: UofU Solar 1, LLC, REDCO-CIN Solar 1, LLC, OUS Solar 1, LLC, OUS Solar 2, LLC, and OUS Solar 4, LLC;
- B. all right, title and interest in and to the Intellectual Property;
- C. all ownership, leasehold and real property interests of whatever nature, except those "Excluded Leases" contained in Exhibit A to the Stalking Horse Bid (as defined below), including the Cal Farley's Boys Ranch Lease Option Agreement, the Cal Farley's Ranch MET Tower Agreement, the Option Agreement for Rooftop Lease with Prudential REIT (together with any other intangible assets related to the Prudential contract and project, including, without limitation, all buildings, structures, fixtures and other improvements situated thereon or attached thereto), and including all of Seller's right, title and interest in and to all leases, subleases, franchises, licenses, permits, easements, privileges, rights-of-way, riparian and other water rights, lands underlying any adjacent streets or roads and appurtenances pertaining to or accruing to the benefit of such property;

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<sup>3</sup> To the extent there are any inconsistencies between any summary description of the Stalking Horse Bid and the terms and conditions of the Stalking Horse Bid, the terms and conditions of the Stalking Horse Bid control.

D. all Equipment used in the operation of the Business, wherever located and all warranties and guarantees, if any, express or implied, existing on the Closing Date for the benefit of the Seller in connection with the Equipment;

E. all management information systems, computers, hardware and software either owned by the Seller or otherwise used in the operation of the Business;

F. with the exception of the books and records included in the definition of Excluded Assets below, all books, records and accounts, correspondence, production records, technical, accounting, manufacturing and procedural manuals, customer lists, vendor lists, employment records, research material, drawings, studies, reports or summaries relating to any environmental conditions or consequences of any operation, present or former, and any information (including confidential information) which has been reduced to writing relating to or arising out of the operation of the Business;

G. all Inventories;

H. the Assumed Contracts;

I. all licenses, permits or franchises issued by any federal, state, municipal or foreign authority relating to the development, use, maintenance or occupation of the Seller or the Business;

J. all rights under express or implied warranties in favor of the Seller existing on the Closing Date;

K. all right, title and interest in and to all goods and services and all other economic benefits to be received subsequent to the Closing Date arising out of prepayments and payments by the Seller prior to the Closing Date, including without limitation Seller's deposit with Idaho Power, PacifiCorp, and Parkway Office Condos, LLC;

L. all right, title and interest in and to any insurance policies in existence on the Closing Date;

M. all personal computers, computer hardware and software, and other management information systems of Seller, whether owned by Seller or used in the Business;

N. all rights to non-disclosure agreements, including any rights of REDCO or the Seller in any non-disclosure agreements signed after the date of this Agreement and before the Closing, including without limitation any rights to sue for

breach of any such agreements or any rights to obtain injunctive relief pursuant to such agreements;

- O. all Accounts Receivable; and
- P. the goodwill in or arising from the Assets and the Business;

Notwithstanding the foregoing, under the Stalking Horse Bid the SPG Assets do not include the following Excluded Assets:

- A. all of Seller's cash and cash equivalents, interests in deposit or checking accounts, certificates of deposit, treasury bills and other freely-tradable marketable securities of Seller as of the Closing Date, and the Cash Consideration;
- B. all of Seller's rights to insurance proceeds or other insurance contract recoveries in respect of any the Excluded Assets and Excluded Liabilities;
- C. all Contracts other than the Assumed Contracts;
- D. all business books and records of REDCO which the Seller deems necessary to administer REDCO's bankruptcy estate, provided that Buyer shall have access to such books and records and the right to make a copy of such books and records at the Buyer's expense;
- E. all claims arising under Chapter 5 of the Bankruptcy Code in connection with the Bankruptcy Case;
- F. all claims of any nature of REDCO against Ryan Davies;
- G. the Debtor's equity interests in Blue Mountain Wind, LLC and OUS Solar 3, LLC; and
- H. the Excluded Leases contained in Exhibit A to the Stalking Horse Bid.

Under the terms of the Stalking Horse Bid, SPG has offered to purchase the SPG Assets for (i) \$40,000 in cash (the "Cash Consideration"), payable (a) through a deposit in the amount of \$20,000 paid by Buyer to Seller contemporaneously with the execution of this Agreement (the "Deposit"), and (b) an additional \$20,000 paid by SPG to the Trustee on the Closing Date; (ii) \$1,058,767.12 in the form of a credit bid of the AEG Secured Claim, which is the full amount of the AEG Secured Claim; and (iii) Buyer's assumption of (a) the Debtor's liability to McCalmont Engineering, in the approximate amount of \$52,043.10; (b) REDCO's liability to Okland Construction, in the approximate amount of \$2,101,600; (c) all Cure Amounts; and (d) any taxes (including sales or

