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Honorable Christopher M. Alston
Chapter 11
Hearing Location: Seattle, Rm. 7206
Hearing Date: Friday, July 8, 2016
Hearing Time: 9:30 a.m.

9 UNITED STATES BANKRUPTCY COURT
10 WESTERN DISTRICT OF WASHINGTON
11 AT SEATTLE

12 In re
13 NORTHWEST TERRITORIAL MINT
14 LLC,
15 Debtor.

No. 16-11767-CMA
**G RA CO AWARDS
MANUFACTURING, LP'S
MEMORANDUM SUPPORTING
PAYMENT OF BREAK-UP FEE**

17 **I. INTRODUCTION**

18 G Ra Co Awards Manufacturing, LP (“Graco LP” or “Stalking Horse”) submits this
19 memorandum supporting the Trustee Mark Calvert’s (the “Trustee”) agreement that this Court order
20 payment of the \$25,000 break-up fee provisionally approved as part of the Stalking Horse offer
21 contained in the Trustee’s Motion for Order Approving the Sale of the Debtor’s Assets Associated
22 with the Graco Awards Manufacturing Business Enterprise in Tomball, Texas Free and Clear of All
23 Liens, Claims, Interest and Encumbrances; Approving the Assumption and Assignment by the
24 Debtor to Buyer of Certain of the Debtor’s Executory Contracts; and Granting Other Relief (“Sale

1 Motion”) (Docket #200). Graco LP requests that this Court order payment of the break-up fee in
2 the amount of \$52,111.14, plus costs and attorney’s fees not to exceed \$6,000.00.

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4 **II. FACTS**

5 Stalking Horse entered into an arrangement with Larry R. Cook & Associates, PC (the “Cook
6 Firm”) whereby the Cook Firm would assist Stalking Horse with the acquisition of Graco Awards
7 Manufacturing’s (“Graco Inc.” or the “Target”) assets. Declaration of Larry R. Cook (“Cook
8 Decl.”), ¶ 2. Graco Inc. is or was an affiliate of the debtor, Northwest Territorial Mint, LLC,
9 (“Debtor”). Id.

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11 The Cook Firm assisted the Stalking Horse with a substantial amount of due diligence,
12 including but not limited to developing a financial model for the business; providing valuation
13 services; conduct investigations; retaining and working with other professionals, including
14 bankruptcy counsel, appraisers, and bankers; examining the portability of leases; assessing present
15 plant personnel; assessing the condition of the Target’s inventory; and assessing the status and
16 nature of existing unfinished contracts and work in progress. Id., ¶ 4. The Stalking Horse needed
17 to complete all of this work before it could develop and present an offer to the Trustee. Id.
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20 It was during the due diligence period that the Stalking Horse and the Cook Firm learned
21 that the business operations of the Target were in disarray, and that the Target lacked many basic
22 financial records, such as financial statements and tax returns. Id., ¶ 5.
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24 From the beginning of the Stalking Horse’s negotiations with the Trustee regarding the
25 potential purchase of the Target’s assets, the Stalking Horse’s offer included a break-up fee that was
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1 agreed to by the trustee. Id., ¶ 7. The purpose of the break-up fee was the offset the substantial
2 costs associated with being the stalking horse bidder, including the fact that in this particular case,
3 the Stalking Horse collected and assembled business and financial information for the benefit of the
4 Trustee and other bidders. Id. The Stalking Horse also provided a significant amount of ongoing
5 due diligence support to the Trustee, including but not limited to updated information regarding
6 equipment quantities and condition; information regarding contract conveyance and government
7 penalties; appraisal information; and additional information regarding leases and computer
8 hardware and software. Id.

11 When Ross Hansen or a company that he was affiliated with, objected to the asset sale by
12 claiming that the Trustee had no right to sell certain assets, the Stalking Horse researched, obtained
13 and shared detailed and otherwise unavailable information with the Trustee regarding the 2011 sale
14 of Graco, Inc. to the debtor. Id., ¶ 8. That information helped the Trustee to resolve the objections
15 and to approve sale of the assets for additional hundreds of thousands of dollars . Id.

18 During the bidding process, the Stalking Horse gradually increased its offer to \$600,000.00,
19 plus other valuable creditor claim considerations. Id., ¶ 9. At that point, the Stalking Horse
20 understood from the Trustee that all other bidders were “out” and that the Stalking Horse should
21 proceed to pay for the assets and begin work to transition to ownership. Id. The Stalking Horse
22 sent the Trustee \$60,000.00 in earnest money, which was deposited into the IOLTA account of the
23 Trustee’s attorney. Id. During this time, the Cook Firm was assisting the Stalking Horse in the
24 takeover of the Target. Id. On the very last day that anyone could make a proposal, Ira Green, Inc.
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1 re-entered the bidding process, and using information that the Stalking Horse had provided to the
2 Trustee, made an offer to the Trustee in excess of the Stalking Horse's highest offer. Id.

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4 Throughout the bidding process, the Trustee used the information provided by the Stalking
5 Horse to induce others to bid. Id. The Stalking Horse effectively did the due diligence for the
6 competing bidders, and the Trustee was ultimately able to sell the Target's assets for \$500,000.00
7 more than the Stalking Horse's original offer. Id., ¶ 7.

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9 The Trustee led the Stalking Horse to understand that he agreed that the amount of the break-
10 up fee would be equal to the fees and expenses the Stalking Horse incurred during the bidding
11 process, even if that figure was ultimately higher than \$25,000.00. Id., ¶ 10. Accordingly the trustee
12 induced the Stalking Horse and the Cook firm to incur greater expenses assisting the trustee's
13 efforts. Between April 8, 2016, and the date of this memorandum, the Cook Firm charged GRACO
14 LP, fees in the amount of \$46,190.50, and out of pocket expenses in the amount of \$5,920.64, for a
15 total amount of \$52,111.14. Id., ¶ 10. A true and correct copy of Cook Firm's invoices in this
16 matter is attached to the Cook Declaration, submitted herewith, as Exhibit A. Given the trustee's
17 requests and assurances, the substantial issues with the Target company financial records and assets
18 and the last minute winning bid submitted by Ira Green, Inc., the Stalking Horse could not possibly
19 have anticipated the extra expenditure of time and money at the time of the initial proposal. Id., ¶
20 10.
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24 III. AUTHORITY

25 In evaluating breakup and similar fees, courts have applied three basic standards: (a) the
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1 business judgment test; (b) the best interests of creditors test; and (c) the "actual and necessary" or
2 administrative expense test. It appears that the Ninth Circuit has not adopted (or rejected) any of the
3 foregoing tests. No matter which test the Court chooses to apply, however, it would be appropriate
4 for the Court to approve the break-up fee.
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6 Although courts may apply different analytical standards, they generally reach the same
7 conclusion: breakup fees are appropriate when they encourage bidding and are in the best interest
8 of the estate. See, e.g., *In re Integrated Resources, Inc.*, 147 B.R. 650 (S.D.N.Y. 1992), *app.*
9 *dismissed on jurisdictional grounds*, 3 F.3d 49 (2d Cir. 1993) (applying the business judgment
10 standard to approve breakup fee that helped attract and retain a potentially successful bid and attract
11 other bidders); *In re America West Airlines, Inc.*, 166 B.R. 908, 912 (Bankr. D. Ariz. 1994) (applying
12 the best interest of creditors tests and focusing on "whether the transaction will further the diverse
13 interests of the debtor, creditors and equity holders alike"); *In re O'Brien Environmental Energy,*
14 *Inc.*, 181 F.3d 527, 535 (3d Cir. 1999) (applying the "actual and necessary" test and stating that the
15 estate benefits if the breakup fee induced "a bid that otherwise would not have been made"); *In re*
16 *995 Fifth Avenue Associates, L.P.*, 96 B.R. 24, 28 (Bankr. S.D.N.Y. 1989) (bidding incentives may
17 be "legitimately necessary to convince a white knight to enter the bidding by providing some form
18 of compensation for the risks it is undertaking").
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23 The Stalking Horse expended substantial resources to conduct due diligence of the Target's
24 business and assets, and freely shared that information with the Trustee. The Trustee in turn used
25 that information to attract other bidders, ultimately resulting in a winning bid that was \$500,000.00
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1 above the Stalking Horse's original bid. Other bidders benefitted from the Stalking Horse's due
2 diligence and used the Stalking Horse's initial offer and support exhibits and references as a template
3 resulting in stimulating negotiations and adding value for the Debtor and the estate. This resulted
4 in a substantial benefit to the estate. The Stalking Horse's break-up fee request is analogous to an
5 administrative expense request based on 11 U.S.C. § 503(b)(3)(D), which provides that creditors
6 who make a "substantial contribution in a case under chapter...11" shall be allowed an
7 administrative expense claim for their actual and necessary expenses. See, e.g., *Cellular 101, Inc.*
8 *v. Channel Communs., Inc. (In re Cellular 101, Inc.)*, 377 F.3d 1902 (9th Cir. 2004)(creditors
9 making substantial contribution to chapter 11 case granted 503(b) administrative claim irrespective
10 of self-interest motivation).
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14 Here, the break-up fee is designed to compensate the Stalking Horse for the time and expense
15 of negotiation, due diligence and additional research and work as requested by the trustee and in
16 connection with its proposed purchase. The amount of the break-up fee is the amount of expenses
17 incurred by Stalking Horse in connection with the proposed transaction and work enhancing the
18 price obtained for the assets, totaling \$52,111.14. Invoices from the Cook Firm for this amount are
19 attached to the Declaration of Larry Cook as Exhibit A, and the Stalking Horse is obligated to pay
20 that amount.
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23 The break-up fee requested by the Stalking Horse is in line with break-up fees approved in
24 other cases. See, e.g., *Consumer News & Business Channel Partnership v. Financial News Network,*
25 *Inc. (In re Financial News Network, Inc.)*, 980 F.2d 165, 167 (2d Cir. 1992) (noting without
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1 discussion \$8.2 million breakup fee on \$149.3 million transaction (5.5% of consideration offered));
2 *In re CXM, Inc.*, 307 B.R. 94 (Bankr. N.D. 111. 2004) (approving breakup fee which represented an
3 expense reimbursement of 2.59%); see also *LTV Aerospace & Defense Co. v. Thomson-CSF, S.A.*
4 (*In Re Chateaugay Corp.*), 1998 B.R. 848, 861 (S.D.N.Y. 1996) (enforcing \$20 million "reverse
5 breakup fee" payable to debtor on \$450 million offer (4.4% of consideration)). In this case the
6 proposed break-up fee is well within the range of reasonableness at approximately 5.2% and should
7 be approved.
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10 IV. CONCLUSION

11 For the foregoing reasons, the Stalking Horse respectfully requests that this Court approve
12 a break-up fee in the amount of \$52,111.14, and costs and attorney's fees in an amount not to
13 exceed \$6,000.00.
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15 DATED this 1st day of July 2016.

16
17 LASHER HOLZAPFEL
18 SPERRY & EBBERSON, P.L.L.C.

19 /s/ Danial D. Pharris
20 Danial D. Pharris, WSBA #13617
21 Jason E. Wax, WSBA #41944
22 Attorneys for GRACO LP
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