

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

In re

KELHAM VINEYARD & WINERY, LLC.

Debtor.

Case No. 23-10384-WJL

Chapter 11

**NOTICE OF OPPORTUNITY TO
OVERBID, AUCTION SALE, AND
HEARING ON MOTION TO APPROVE
SALE**

AUCTION SALE:

Date: TBD

Time: 11:00 a.m. PT

Place: Video Conference

SALE HEARING:

Date: TBD

Time: 10:30 a.m. PT

Place: 1300 Clay Street
Courtroom 220

Oakland, CA 94612

Judge: Honorable William J. Lafferty, III

**TO: ALL CREDITORS OF THE ESTATE, POTENTIAL BUYERS OF ESTATE
ASSETS, PARTIES WHO HAVE REQUESTED SPECIAL NOTICE, AND THE
UNITED STATES TRUSTEE:**

PLEASE TAKE NOTICE that Michael G. Kasolas, trustee herein (“**Trustee**”), has entered into an agreement to sell (the “**Sale**”) substantially all of the right, title, and interest in all tangible and intangible property, including lease rights, of Kelham Vineyard & Winery, LLC (the “**Debtor**”), pursuant to sections 365 and 363 of the Bankruptcy Code,¹ subject to overbid and Bankruptcy Court approval. The assets (the “**Sale Assets**”) to be sold are more particularly described in the Stalking Horse Asset Purchase Agreement (the “**Stalking Horse APA**”), a copy of which is available upon request sent to: kotus@thinkonyx.com.

PLEASE TAKE FURTHER NOTICE that the sale of purchased Sale Assets shall be conditioned upon entry, by the above-captioned bankruptcy court (the “**Bankruptcy Court**”), of an order authorizing the sale of such assets pursuant to Section 363 of the Bankruptcy Code and, to the extent applicable, authorizing the assumption and assignment of certain leases and executory

¹ 11 U.S.C. §§ 101 *et seq.* (the “**Bankruptcy Code**”).

contracts pursuant to Section 365 of the Bankruptcy Code (the "**Sale Order**").

PLEASE TAKE FURTHER NOTICE that the Sale is subject to overbid. Overbids must be all-cash, and without contingencies. If any prospective overbidder desires to inspect the Sale Assets prior to submission of an overbid, such overbidder should contact: kotus@thinkonyx.com.

PLEASE TAKE FURTHER NOTICE that anyone interested in purchasing some or all of the Sale Assets must satisfy the following bidder qualification requirements ("**Qualification Requirements**"):

- a. **Offer.** The potential bidder shall submit a written offer (the "**Bidder APA**").
 - i. Such written offer shall be irrevocable until conclusion of the Auction.
 - ii. Such written may not be conditioned on obtaining financing or any internal approval or on the outcome or review of due diligence.
 - iii. If bidder desires to purchase all of the Sale Assets, the submitted offer must be in the form of a modified Stalking Horse APA. The Bidder APA must include a blackline showing any changes to the Stalking Horse APA. If bidding on all of the Sale Assets, there will be a minimum overbid in the amount of [TBD].
 - iv. If bidder desires to purchase some but not all of the Sale Assets, the submitted offer does not need to be in the form of a modified Stalking Horse APA, provided, however, that Trustee may at any time and in his sole discretion require an alternate form of offer.
 - v. Qualified Bidders may not request, and the Bidder APA may not be conditioned on or otherwise entitle the Qualified Bidder to any break-up fee, expense reimbursement or similar type of payment; provided, however, the Stalking Horse Bidder is entitled to the Topping Fee (*see* Stalking Horse APA **Section 11**).
 - vi. Bidder APA must provide bidder expressly consents to bid procedures described herein and the jurisdiction of the Bankruptcy Court and waives any right to a jury trial in connection with any disputes relating to the Auction or the consummation of the Bidder APA.
- b. **Adequate Assurance Declaration.** If the Bidder APA seeks to bid on one or more Assigned Agreement(s),² the Bidder APA must be accompanied by a duly executed declaration on behalf of the applicable bidder concerning its ability to provide adequate assurance of future performance with respect to the Assigned Agreement(s), as required by 11 U.S.C. §§ 365(b)(1)(C) and (f) (a "**Qualified Bidder Declaration**"). All Qualified Bidder Declarations may be filed and shared with the counterparties to the Assigned Agreement(s).
- c. **License, Permit, and Bond Transfer.** If Bidder APA seeks to bid on assets that have regulatory requirements, Bidder shall be capable of satisfying provisions in the Stalking Horse APA related to licenses, permits, and bonds (e.g. **Stalking Horse APA Section 5.3**).
- d. **363(m) Declaration.** Bidder shall request a finding that it is a "good faith" purchaser within the meaning of 11 U.S.C. § 363(m); it must provide Trustee, a competent declaration of such bidder's representative confirming facts supporting a finding by the Court that such bidder would be a good faith purchaser entitled to the protections of 11

² Any capitalized term that is not defined herein shall have the meaning given to such term in the Stalking Horse APA.

USC § 363(m). The declaration will be filed by Seller prior to the hearing to approve the sale.

- e. Confidentiality Agreement. A confidentiality agreement in a form and substance acceptable to Seller must be executed by each potential bidder. Upon receipt of the executed confidentiality agreement, the potential bidder will be provided access to the due diligence files. Parties that have previously executed confidentiality agreements to access the Trustee's sale data room will not need to execute another agreement.
- f. Financial Information. The potential bidder shall provide Trustee verified financial information evidencing the potential bidder's ability to consummate the Bidder APA, including the source of funding for the purchase price. Financial information must identify the actual potential bidder and owners and ultimate parent company of the potential bidder.
- g. Request for Information. Each Qualified Bidder shall comply with all reasonable requests for additional information by Seller regarding such Qualified Bidder and its contemplated transaction. Seller may determine that the Qualified Bidder is not or is no longer a Qualified Bidder if Qualified Bidder fails to comply with Seller's requests for additional information.
- h. Commitment Deposit. The potential bidder shall submit to Trustee a commitment deposit in the amount of 20% (twenty percent) of the overbid purchase amount ("**Commitment Deposit**"). The Commitment Deposit shall be made by wire transfer of immediately available funds (wire instructions available upon request). If the potential bidder is not qualified by Trustee as a Qualified Bidder (defined below) or is not the successful bidder or designated as a back-up bidder (if any), its Commitment Deposit will be returned.
- i. Delivery. All of the foregoing items (including, without limitation, the Commitment Deposit) must be delivered to Onyx Asset Advisors, LLC, 50 California Street, Suite 1500, San Francisco, CA 94111, no later than [**at least 3 days before Auction**], at **5:00 p.m. PT** with copies sent via email to kotus@thinkonyx.com.

PLEASE TAKE FURTHER NOTICE that Upon completion of the Qualification Requirements, Trustee may, in his sole discretion, determine and designate the potential bidder as a qualified bidder ("**Qualified Bidder**"). Trustee in his sole discretion, may qualify bidders at any time before the end of the Auction.

PLEASE TAKE FURTHER NOTICE that if a timely qualified overbid is received, Trustee will commence an auction (the "**Auction**") on [**one day before the Sale Hearing**], at **11:00 a.m. PT** via video conference, and may, in the sole discretion of the Trustee, be continued from time to time until completed. All Qualified Bidders shall receive instructions for how to attend the Auction at least two calendar (2) days prior to the date of the Auction. The Auction will be conducted via video conference, and may, in the sole discretion of the Trustee.

PLEASE TAKE FURTHER NOTICE that the following auction procedures shall apply:

- j. Opening Bid and other Auction Procedures. At or before the Auction, after review of all Qualified Bidder submissions, Trustee, in his sole discretion, may determine the opening bid (or bids, if Trustee elects to sell lots separately), may set minimum bid increments for any subsequent bid(s), and may establish any other procedures (including adjusting minimum bid increments) he deems necessary to facilitate the Auction. At least twenty-four hours prior to the start of the Sale Auction, Trustee shall provide a copy of the opening bid (or bids, if Trustee elects to sell lots separately) to all participating Qualified Bidders attending the Auction. Trustee or his representatives shall direct and preside over the Sale Auction.

- k. Authority to Bid. All representatives of Qualified Bidders who submit any bid at the Auction represent that he/she has authority to bid and that the bid he/she submits is/are binding on the Qualified Bidder.
- l. Overbids. Each subsequent round of bidding (following the opening bid) must comply with the Qualification Requirements and minimum bid increments set by Trustee until the Trustee elects to close bidding when he has determined the highest and best bid(s) for the Sale Assets at the Auction.
- m. Determination of Winning Bid(s). Trustee shall, in his sole discretion, determine the highest and best bid(s) at Auction (the "**Winning Bid(s)**"). Trustee may sell the Sale Assets separately or together. All bidding will be concluded at the Auction and there will be no further bidding subsequent to the closure of the Auction.
- n. Back-Up Bid. At the conclusion of the Auction, Trustee may designate a back-up bid(s) from those bids at auction that Qualified Bidders have designated as available for back-up bid(s) selection (the "**Back-Up Bid(s)**"). At the conclusion of the overbid auction, if a bidder is designated as a backup bidder ("**Backup Bidder**"), his/her/its Commitment Deposit shall be non-refundable unless or until the sale closes with the Winning Bidder.
- o. Discretion to Determine Opening and Winning Bid. The Seller will take into account any factors Seller deems relevant to the value of the Qualified Bidder's bid to Seller when determining which bid constitutes the opening bid, and overbid or Winning Bid(s) including, among other things, the following: (A) the amount and nature of the consideration; (B) the proposed assumption of liabilities, if any; (C) the ability of the Qualified Bidder to consummate the proposed transaction; (D) the proposed closing date and the likelihood, extent and impact of any potential delays in closing; (E) any purchase price adjustments; (F) the impact of the contemplated transaction on any actual or potential litigation; (G) the net economic effect of any changes from the Form APA, if any, contemplated; (H) the net after-tax consideration to be received by Seller; (I) the net amounts to be paid to Seller, taking into account, among other things, payment of cure costs for the Assumed Contracts; and (J) such other considerations as Seller deems relevant.

PLEASE TAKE FURTHER NOTICE that Trustee's acceptance of the Winning Bid(s) at Auction is subject to Bankruptcy Court approval. Seller and the winning bidder(s) shall each use their commercially reasonable efforts, and shall cooperate, assist and consult with each other, to secure the entry of an order approving the sale. The hearing on the Trustee's motion to approve the Sale will occur on [TBD], at 10:30 a.m.

DATED: _____

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