

# EXHIBIT A

**EMERGENCY JOINT MOTION OF MICHAEL B. SCHMIDT, CHAPTER 7  
TRUSTEE FOR THE DEBTORS AND SEASHORE TO SELL CERTAIN ASSETS  
OF THE DEBTOR'S ESTATES PURSUANT TO BANKRUPTCY CODE  
SECTION 262(b) AND TO APPROVE SALE AGREEMENT**

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
CORPUS CHRISTI DIVISION

In re:

|                                |   |                      |
|--------------------------------|---|----------------------|
| BNP PETROLEUM CORPORATION      | § | Case No. 09-20206    |
| BNP OIL & GAS PROPERTIES, LTD. | § | Case No. 09-20612    |
| Debtors.                       | § | Jointly Administered |

**EMERGENCY JOINT MOTION OF MICHAEL B. SCHMIDT,  
CHAPTER 7 TRUSTEE FOR THE DEBTORS AND SEASHORE TO SELL  
CERTAIN ASSETS OF THE DEBTORS' ESTATES PURSUANT TO  
BANKRUPTCY CODE SECTION 363(b) AND TO APPROVE SALE AGREEMENT**

**THIS MOTION SEEKS AN ORDER THAT MAY ADVERSELY AFFECT YOU. IF YOU OPPOSE THE MOTION, YOU SHOULD IMMEDIATELY CONTACT THE MOVING PARTY TO RESOLVE THE DISPUTE. IF YOU AND THE MOVING PARTY CANNOT AGREE, YOU MUST FILE A RESPONSE AND SEND A COPY TO THE MOVING PARTY. YOU MUST FILE AND SERVE YOUR RESPONSE WITHIN 21 DAYS OF THE DATE THIS WAS SERVED ON YOU. YOUR RESPONSE MUST STATE WHY THE MOTION SHOULD NOT BE GRANTED. IF YOU DO NOT FILE A TIMELY RESPONSE, THE RELIEF MAY BE GRANTED WITHOUT FURTHER NOTICE TO YOU. IF YOU OPPOSE THE MOTION AND HAVE NOT REACHED AN AGREEMENT, YOU MUST ATTEND THE HEARING. UNLESS THE PARTIES AGREE OTHERWISE, THE COURT MAY CONSIDER EVIDENCE AT THE HEARING AND MAY DECIDE THE MOTION AT THE HEARING. REPRESENTED PARTIES SHOULD ACT THROUGH THEIR ATTORNEY.**

**EMERGENCY RELIEF HAS BEEN REQUESTED. IF THE COURT CONSIDERS THE MOTION ON AN EMERGENCY BASIS, THEN YOU WILL HAVE LESS THAN 21DAYS TO ANSWER. IF YOU OBJECT TO THE REQUESTED RELIEF OR IF YOU BELIEVE THAT THE EMERGENCY CONSIDERATION IS NOT WARRANTED, YOU SHOULD FILE AN IMMEDIATE RESPONSE.**

**THERE WILL BE A HEARING ON THIS MOTION ON JULY 19, 2011 AT 10:00 A.M. O'CLOCK IN CORPUS CHRISTI, TX.**

BNP Petroleum Corporation ("BNP Petroleum") and BNP Oil & Gas Properties, Ltd. ("Oil and Gas," collectively with BNP Petroleum, the "Debtors"), by and through the Chapter 7 trustee, Michael B. Schmidt (the "Trustee"), jointly with Toby Shor, Seashore Investments Management Trust, and 2004 GRAT (collectively, "Seashore"), hereby move the Court for an order pursuant to section 363(b) of the United States Bankruptcy Code (the "Bankruptcy Code")

to approve the conveyance of certain estate assets as described in the Sale and Conveyance of Estates' Rights, Settlement Agreement, and Mutual Release (the "Sale Agreement"), and to the extent necessary under Federal Rule of Bankruptcy Procedure ("Bankruptcy Rules") 9019, to approve the Sale Agreement (the "Motion") and respectfully represent as follows:

### **BACKGROUND**

#### **A. Background of the Debtors' Bankruptcy Cases**

1. On April 3, 2009, an involuntary petition was filed against BNP Petroleum in this Court under Chapter 7 of Title 11 of Bankruptcy Code. The Court entered an order for relief under Chapter 11 of the Bankruptcy Code on August 5, 2009.

2. On September 22, 2009, Oil & Gas filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code.

3. On October 13, 2010, the Court granted Seashore's motion to convert these cases to Chapter 7 (Doc. No. 901). The Court later appointed Michael B. Schmidt to serve as the Debtors' Chapter 7 trustee.

#### **B. Background of the Trustee Suit**

4. On June 1, 2010, the Trustee commenced an action (the "Trustee Suit") against Seashore, Paul Black, a number of entities controlled by Paul Black, and associates and family members of Paul Black, among others (Adv. Doc. No. 1). The currently-pending complaint is the Third Amended Complaint for Avoidance of Fraudulent Transfers, For Turnover of Property of the Estates, Breach of Fiduciary Duty, Aiding and Abetting, Conversion and for Monetary Damages (the "Third Amended Complaint"), filed on January 18, 2011 (Adv. Doc. No. 94).

5. On May 13, 2011, Seashore filed their Answer, Affirmative Defenses, Counterclaim and Demand for Jury Trial in response to the Third Amended Complaint (the

“Seashore Answer”) (Adv. Doc. No. 105). The Seashore Answer denies the substantive allegations in the Third Amended Complaint and asserts twenty-five affirmative defenses. The Seashore Answer also contains a counterclaim (the “Seashore Counterclaim”) against the Trustee for the payment of legal fees that they have incurred, pursuant to Texas Business & Commerce Code § 24.013.

6. On May 13, 2011, Seashore filed a motion to sever (the “Motion to Sever”) and a motion to withdraw the reference to the District Court (the “Motion to Withdraw the Reference”) (Adv. Doc. Nos. 106, 107). The Trustee contests the relief sought in these motions and has filed responses articulating his objections (Adv. Doc. Nos. 116, 124).

7. On June 7, 2011, the Trustee filed a motion to dismiss the Seashore Counterclaim (the “Trustee Motion to Dismiss”), and also filed a separate answer to the Seashore Counterclaim (Adv. Doc. Nos. 118, 119).

8. Thus, the following matters remain pending in the Trustee Suit: (i) the Third Amended Complaint (which is subject to Seashore’s answer and numerous affirmative defenses); (ii) the Seashore Counterclaim (which is subject to the Trustee’s answer); (iii) the Motion to Sever (which is subject to the Trustee’s response); (iv) the Motion to Withdraw the Reference (which is subject to the Trustee’s response); and (v) the Trustee Motion to Dismiss (which the Trustee understands will be opposed by Seashore). The Trustee expects that Seashore will continue to vigorously defend the allegations in the Third Amended Complaint. Even if the Trustee might prevail, the successful prosecution of the case against Seashore will be very time consuming and expensive.

9. On June 24, 2011, following good faith and arm’s-length negotiations, the Trustee and Seashore executed the Sale Agreement, providing for the sale of all of the claims against the

Black Entities (defined below) to Seashore and a release of disputes between the Trustee and Seashore. In particular, the Sale Agreement provides for the Trustee to sell, and Seashore to buy, claims and causes of action against the Black Entities (defined below), pursuant to Bankruptcy Code section 363(b). Further, through the Sale Agreement, the Trustee and Seashore (collectively, the “Parties”) seek to provide for mutual releases of the Parties.

**C. Summary of the Sale Agreement<sup>1</sup>**

10. The primary features of the Sale Agreement include (i) the agreement of Seashore to pay certain cash consideration to the Trustee and to share with the Trustee a portion of future recoveries that it obtains against the “Black Entities” (defined in the Sale Agreement to include Paul Black and a number of related entities); (ii) the Trustee’s sale to Seashore or its designee of all claims and causes of action that the Debtors have against the Black Entities; and (iii) the mutual releases of all claims that the Debtors/Trustee and Seashore have against each other.

11. In particular, the Sale Agreement provides for Seashore to pay to the Trustee, upon approval of the Sale Agreement by this Court, the sum of \$216,000, and for Seashore to share recoveries it obtains from the Black Entities as follows: (i) 50% of the first \$500,000 actually recovered against the Black Entities, and (ii) 10% of all other amounts actually recovered against the Black Entities, up to a cap of \$1,750,000 (collectively, the “Purchase Price”). These percentages are net of contingent legal fees that may be incurred by Seashore. In exchange for Seashore’ payment, and agreement to pay, the Purchase Price, the Trustee is required to transfer to Seashore or its designee all claims and causes of action that the Debtors hold against the Black Entities, for Seashore to pursue in its sole discretion. In addition, the

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<sup>1</sup> The description of the Sale Agreement in this Motion is subject in all respects to the terms of the Sale Agreement itself and in the event of inconsistency, the terms of the Sale Agreement shall control.

Parties agree to release each other and to dismiss with prejudice the claims and counterclaims against each other that are pending in the Trustee Suit.

12. The Sale Agreement contains a number of other material provisions, including the Trustee's agreement to assist Seashore in collection efforts. The Sale Agreement also provides that Seashore's claims in the Debtors' bankruptcy cases shall be allowed claims of \$26,203,994.66, but that Seashore's claim in the BNP Petroleum case shall be subordinated to claims of creditors other than the Black Entities.

13. The Parties believe that the Sale Agreement and sale of assets contained therein, is in the best interests of the Debtors' estates and should be approved. Among other things, it provides substantial consideration to the Debtors' estates and relieves the estates of the continuing (and growing) burden of prosecuting the Trustee Suit.

**D. Agreement Previously Reached with Paul Black**

14. Prior to negotiating the Sale Agreement with Seashore, the Trustee negotiated a settlement with another defendant, Paul Black (the "Black Settlement Agreement"), which is dated June 8, 2011.

15. The Paul Black Settlement Agreement provides, among other things, that Paul Black will "transfer" (or more accurately, will hypothecate) to the Debtors his membership and partnership interests in certain entities, and will share with the Debtors 10% of the net proceeds from the operations of those entities, with a minimum monthly payment of \$6,000 for ten years. The consideration to be paid is capped at \$1,500,000. Unlike the Seashore Sale Agreement, the Black Settlement Agreement does not contain an up-front cash component.

16. In addition, the Black Settlement Agreement provides for the release of Paul Black and numerous other entities and persons who are not parties to the agreement. The only

parties to the Black Settlement Agreement are the Trustee and Paul Black, but the agreement releases claims against at least twenty-eight (28) other entities, in addition to full releases for James Black, III (Paul Black's father), James Black, IV (Paul Black's brother) and Wendy Bennett (Paul Black's wife).

17. Court approval of the Black Settlement Agreement may be difficult because: (i) the third-party releases raise significant issues under the applicable law of this Circuit, given that they are not supported by any consideration; (ii) the agreement itself may be subject to allegations by Seashore that it is a fraudulent transfer designed to impair the rights of Seashore, as a creditor of Paul Black; and (iii) the Black Settlement Agreement provides only a very long term payout to the Debtors' estates with no right to accelerate payment.

18. Regardless, the Trustee believes that the Seashore Sale Agreement clearly and objectively provides the Debtors' estates with higher and better value than the Black Settlement Agreement. It provides the Debtors' estates with immediate cash and a share of future recoveries against Paul Black, while bearing no direct cost to the estate to do so. Further, it does not include certain features, like third-party releases and alleged fraudulent transfers, that could inhibit approval by the Court.

#### **RELIEF REQUESTED**

19. The Trustee and Seashore jointly seek an Order from this Court approving the Sale Agreement and the sale transaction contemplated therein, pursuant to Bankruptcy Code section 363(b). To the extent necessary, the Trustee and Seashore also seek approval of the settlement of claims contained in the Sale Agreement pursuant to Bankruptcy Rule 9019.

#### **BASIS FOR RELIEF REQUESTED**

- A. The Court Should Approve the Sale Agreement Pursuant to Bankruptcy Code Section 363(b)**

*i. Legal Standard*

20. Section 363 of the Bankruptcy Code, which authorizes a debtor to sell assets of the estate other than in the ordinary course of business, free and clear of liens, claims and encumbrances, provides, in relevant part, as follows:

(b)(1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate . . .

1 U.S.C. § 363(b)(1); *see* FED. R. BANK. P. 6004(f)(1) (“All sales not in the ordinary course of business may be by private sale or by public auction.”). Courts within this Circuit and elsewhere apply the business judgment standard to approving the sale of assets under Section 363. *See, e.g., Institutional Creditors of Continental Air Lines, Inc. v. Continental Air Lines, Inc. (In re Continental Air Lines, Inc.)*, 780 F.2d 1223, 1226 (5th Cir. 1986) (citing *Lionel* and applying business judgment test for § 363(b) transactions in the Fifth Circuit); *In re ASARCO LLC*, 441 B.R. 813, 823 (S.D. Tex. 2010); *In re Chateaugay Corp.*, 973 F.2d 141 (2d Cir. 1992); *Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 772 F.2d 1063, 1071 (2d Cir. 1983).

21. In considering the business judgment of the Trustee, the Court may also consider (i) whether fair and reasonable consideration is provided; (ii) whether the transaction has been proposed and negotiated in good faith; and (iii) whether reasonable notice has been provided. *See In re Condere*, 228 B.R. 615, 626 (Bankr. S.D. Miss. 1998); *see also In re Nicole Energy Servs., Inc.*, 385 B.R. 201, 210 (Bankr. S.D. Ohio 2008) (citations omitted); 3 COLLIER ON BANKRUPTCY ¶ 363.02[3] (15th ed. rev. 2009). Bankruptcy Code section 363(f) further provides for the sale of assets free and clear of all interests, liens, claims, encumbrances and other interests, although the Debtors are unaware of any liens on the assets to be transferred. 11 U.S.C. § 363(f).



*ii. The Sale Agreement is Appropriate and Should be Approved Under the Applicable Standard*

22. The proposed sale transaction is in the best interests of the Debtors' estates and should be approved. The Trustee has considered the alternatives, including the Black Settlement Agreement and the prospect of continuing to prosecute the Trustee Suit. After due consideration, and evaluation of the options, the Trustee believes that resolution of the Trustee Suit pursuant to the terms of the Sale Agreement is preferable to all alternatives. The Sale Agreement with Seashore is comprehensive in that it resolves pending disputes with Seashore and conveys the remaining claims asserted by the Trustee in the Trustee Suit. Accordingly, the Debtors will receive value immediately while limiting additional costs to the estates.

23. Further, the Sale Agreement with Seashore provides substantially more value to the Debtors' estates than the Black Settlement Agreement. The Sale Agreement with Seashore provides cash of \$216,000 to the Debtors' estates upon approval of the Sale Agreement by this Court, while it would take it three years for the Debtors to receive this amount under the Black Settlement Agreement (assuming that Paul Black is even able to make payments for three years). Further, the Sale Agreement with Seashore provides for a 50% sharing of recoveries against the Black Entities up to a cap of \$500,000, and 10% thereafter, while the Black Settlement Agreement only provides for a sharing of 10% of the revenues from a group of primarily defunct entities. Finally, the total consideration cap of \$1.75 million is greater under the Seashore agreement.

24. The Sale Agreement with Seashore has other advantages as well. Unlike the Black Settlement Agreement, it will conclude the Trustee Suit (or at least end the Trustee's involvement), thereby saving the Debtors' estates substantial cost and effort in prosecuting the Trustee Suit. In the same vein, it will result in the settlement of the various pending disputes

with Seashore, as described above. It also avoids the uncertainties associated with seeking approval of the agreement with Paul Black. Accordingly, the Court should approve the Seashore Sale Agreement. *See Cadle v. Mims (In re Moore)*, 608 F.3d 253, 264-65 (5th Cir. 2010).

***iii. Seashore Should be Afforded All Protections Under Section 363(m) as a Good Faith Purchaser***

25. Section 363(m) of the Bankruptcy Code protects a good-faith purchaser's interest in property purchased from a debtor notwithstanding that the sale conducted under section 363(b) is later reversed or modified on appeal. Specifically, section 363(m) states that:

The reversal or modification on appeal of an authorization under [section 363(b)] ... does not affect the validity of a sale ... to an entity that purchased ... such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale ... were stayed pending appeal.

11 U.S.C. § 363(m). Section 363(m) “fosters the ‘policy of not only affording finality to the judgment of the bankruptcy court, but particularly to give finality to those orders and judgments upon which third parties rely.’” *In re Chateaugay Corp.*, No. 92 CIV. 7054 (PKL), 1993 WL 159969, at \*3 (S.D.N.Y. May 10, 1993) (quotation marks omitted); *see also Allstate Ins. Co. v. Hughes*, 174 B.R. 884, 888 (S.D.N.Y. 1994) (“Section 363(m) . . . provides that good faith transfers of property will not be affected by the reversal or modification on appeal of an unstayed order, whether or not the transferee knew of the pendency of the appeal.”).

26. Seashore and the Trustee have negotiated this sale and settlement in good faith and the Sale Agreement is the product of extensive arm-length, good-faith negotiations.

**B. To the Extent Necessary, the Dismissal of Claims Contained in the Sale Agreement Should be Approved Pursuant to Bankruptcy Rule 9019**

27. Bankruptcy Rule 9019(a) states that “[o]n motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement.” FED. R. BANK. P. 9019(a);

see also *Official Comm. of Unsecured Creditors v. Cajun Elec. Power Coop., Inc. (In re Cajun Elec. Power Coop., Inc.)*, 119 F.3d 349, 355 (5th Cir. 1997) (“[T]he courts are empowered to approve a compromise settlement of a debtor’s claim under Bankruptcy Rule 9019(a).”). The Supreme Court has established that such compromises must be “fair and equitable.” *TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424 (1968); see *Cajun Elec.*, 119 F.3d at 355 (utilizing the “fair and equitable” standard under Rule 9019(a)). When determining whether to approve a proposed settlement, the Court should consider:

- (1) The probability of success in the litigation, with due consideration for the uncertainty in fact and law,
- (2) The complexity and likely duration of the litigation and any attendant expense, inconvenience and delay, and
- (3) All other factors bearing on the wisdom of the compromise.

*Cajun Elec.*, 119 F.3d at 356. Under the third, catch-all element, a court should also consider (i) whether the settlement is in “the best interests of the creditors with proper deference to their reasonable views,” and (ii) “the extent to which the settlement is truly the product of arms-length bargaining, and not of fraud or collusion.” *Id.* (internal quotations and citations omitted); see also *In re J T Thorpe Co.*, 308 B.R. 782, 792 (Bankr. S.D. Tex. 2003) (utilizing the same factors).

28. Importantly, the Court need not conduct a mini-trial to determine the probable expense and outcome of claims released in a settlement. *In re Cajun Elec. Power Coop., Inc.*, 119 F.3d at 356. Instead, a court must appraise itself “of the relevant facts and law” so that it can make an “informed and intelligent decision.” *Id.* (citing *LaSalle National Bank v. Holland (In re American Reserve Corp.)*, 841 F.2d 159, 163 (7th Cir. 1987)).

29. As discussed above, the Sale Agreement contains provisions settling disputes between the Debtors and Seashore. To the extent necessary, these provisions of the Sale Agreement should be approved pursuant to Bankruptcy Rule 9019 because the settlement is fair, equitable and in the best interests of the Debtors' estates for the reasons articulated above.

30. In addition, the Trustee's probability of success in the Trustee Suit is subject to numerous contingencies, given the affirmative defenses asserted by Seashore, the Seashore counterclaim, and the determined opposition mounted by Seashore. Also, there are numerous uncertainties in the facts and law that create risk for the Trustee.

31. The Trustee Suit is also extremely complex and continued prosecution will be costly and time consuming. Given the pending motions by Seashore, and a very recent opinion by the Supreme Court that bears on the pending issues, it is not clear whether claims against Seashore will be severed from the remaining claims and whether the reference will be withdrawn. These issues create additional uncertainty and likely will increase the time and expense involved in prosecuting the suit. For all of these reasons, the settlement provisions contained in the Sale Agreement is in the best interest of the Debtors' estates and should be approved.

**RELIEF UNDER BANKRUPTCY RULE 6004(h) IS APPROPRIATE**

32. Bankruptcy Rule 6004(h) provides that an "order authorizing the use, sale, or lease of property . . . is stayed until the expiration of 14 days after entry of the order, unless the court orders otherwise." FED. R. BANK. P. 6004(h). The Trustee requests that any order approving the Sale Agreement be effective immediately by providing that the 14-day stay under Bankruptcy Rule 6004(h) is waived.

33. The purpose of Bankruptcy Rule 6004(h) is to provide sufficient time for an objecting party to appeal before an order can be implemented. *See* Advisory Creditors' Committee Notes to Fed. R. Bankr. P. 6004(h) and 6006(d). Although Bankruptcy Rule 6004(h) and the Advisory Committee Notes are silent as to when a court should "order otherwise" and eliminate or reduce the 14-day stay period, the leading treatise on bankruptcy suggests that the 14-day stay period should be eliminated to allow a sale or other transaction to close immediately "where there has been no objection to the procedure." 10 COLLIER ON BANKRUPTCY ¶ 6004.10 (15th rev. ed. 2006). Furthermore, *Collier* suggests that if an objection is filed and overruled, and the objecting party informs the court of its intent to appeal, the stay may be reduced to the amount of time actually necessary to file such appeal. *See id.*

34. To maximize the value received in this transaction, the Trustee seeks to close the sale as soon as possible. Accordingly, the Trustee and Seashore hereby request that the Court waive the 14-day stay period under Bankruptcy Rule 6004(h).

**NOTICE UNDER RULES 2002 AND 6004**

35. Pursuant to Bankruptcy Rules 2002 and 6004, the Trustee is required to provide notice to their creditors of a proposed sale, the terms and conditions of the sale, and the deadline for filing any objections thereto. The Trustee has served this Motion by the electronic court filing system (ECF) and first class United States mail, postage prepaid, as the case may be, on the parties listed registered to receive notices in these cases. The notices to be provided and the method of service proposed herein constitute good, proper and adequate notice of the sale described herein. Therefore, the Trustee respectfully requests that this Court approve the foregoing notice procedures.

CONCLUSION

For the foregoing reasons, the Trustee and Seashore respectfully request this Court to grant the Motion and approve the Sale Agreement.

Respectfully submitted this 28<sup>th</sup> day of June 2011.

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**ATTORNEYS FOR SEASHORE  
INVESTMENTS MANAGEMENT TRUST**

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document has been served via electronic mail on June 27, 2011, to the parties on the ECF service list.

/s/ Kevin Hanna

Kevin P. Hanna

**BNP PETROLEUM CORPORATION  
SERVICE LIST AS OF JANUARY 11, 2010**

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