IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	:	Chapter 11
PROMISE HEALTHCARE GROUP, LLC, *et al.*,[1]	:	Case No. 18-12491 (CSS)
Debtors.	:	(Jointly Administered)
	:	**Hearing Date: TBD**
	:	**Obj. Deadline: TBD**

MOTION OF THE DEBTORS FOR ENTRY OF AN ORDER (I) AUTHORIZING THE SALE OF CERTAIN LOUISIANA FACILITIES AND RELATED ASSETS FREE AND CLEAR OF ALL LIENS, CLAIMS, INTERESTS, AND ENCUMBRANCES, (II) AUTHORIZING THE SELLER TO ASSUME AND ASSIGN CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES, AND (III) GRANTING OTHER RELATED RELIEF

Promise Healthcare Group, LLC ("***Promise***") and its affiliated debtors and debtors in possession (collectively, the "***Debtors***") in the above-captioned chapter 11 cases (the "***Chapter 11 Cases***") file this motion (this "***Motion***") pursuant to sections 105(a), 363 and 365 of Title 11 of the United States Code (the "***Bankruptcy Code***"), Rules 2002, 6004, and 6006 of the Federal

[1] The Debtors in these Chapter 11 cases, together with the last four digits of each Debtor's federal tax identification number, are as follows: HLP HealthCare, Inc. (8381), PH-ELA, Inc. (9180), Professional Rehabilitation Hospital, L.L.C. (5340), Promise Healthcare #2, Inc. (1913), Promise Healthcare Group, LLC (1895), Promise Healthcare Holdings, Inc. (2601), Bossier Land Acquisition Corp. (6644), HLP of Los Angeles, LLC (9102), HLP of Shreveport, Inc. (1708), HLP Properties at The Villages Holdings, LLC (0006), HLP Properties at the Villages, L.L.C. (1938), HLP Properties of Vidalia, LLC (4255), HLP Properties, Inc. (0068), Promise Healthcare of California, Inc. (9179), Promise Healthcare, Inc. (7953), Promise Hospital of Ascension, Inc. (9219), Promise Hospital of Baton Rouge, Inc. (8831), Promise Hospital of Dade, Inc. (7837), Promise Hospital of Dallas, Inc. (0240), Promise Hospital of East Los Angeles, L.P. (4671), Promise Hospital of Florida at The Villages, Inc. (2171), Promise Hospital of Louisiana, Inc. (4886), Promise Hospital of Lee, Inc. (8552), Promise Hospital of Overland Park, Inc. (5562), Promise Hospital of Phoenix, Inc. (1318), Promise Hospital of Salt Lake, Inc. (0659), Promise Hospital of Vicksburg, Inc. (2834), Promise Hospital of Wichita Falls, Inc. (4104), Promise Properties of Dade, Inc. (1592), Promise Properties of Lee, Inc. (9065), Promise Properties of Shreveport, LLC (9057), Promise Skilled Nursing Facility of Overland Park, Inc. (5752), Promise Skilled Nursing Facility of Wichita Falls, Inc. (1791), Quantum Health, Inc. (4298), Quantum Properties, L.P. (8203), St. Alexius Hospital Corporation #1 (2766), St. Alexius Properties, LLC (4610), Success Healthcare 1, LLC (6535), Success Healthcare 2, LLC (8861), Success Healthcare, LLC (1604), Vidalia Real Estate Partners, LLC (4947), LH Acquisition, LLC (2328), Promise Behavioral Health Hospital of Shreveport, Inc. (1823), Promise Rejuvenation Centers, Inc. (7301), Promise Rejuvenation Center at the Villages, Inc. (7529), and PHG Technology Development and Services Company, Inc. (7766). The mailing address for the Debtors, solely for purposes of notices and communications, is 999 Yamato Road, 3rd FL, Boca Raton, FL 33431.

Rules of Bankruptcy Procedure (the "***Bankruptcy Rules***"), and Rule 6004-1 of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the "***Local Rules***"), for entry of an order, substantially in the form attached hereto as **Exhibit A** (the "***Proposed Order***"), (i) approving a private sale by the Debtors of the Purchased Assets,[2] as designated in that certain Purchase Agreement(the "***Purchase Agreement***") among Promise Healthcare, Inc., as parent, and Bossier Land Acquisition Corp., Promise Properties of Shreveport, LLC, and Promise Healthcare of Louisiana, Inc., as sellers (the "***Sellers***"), and Lexmark Holdings LLC, a New York limited liability company, or its assignee, nominee, or designee, as purchaser (the "***Purchaser***"), free and clear of Encumbrances (as defined in the Purchase Agreement) and interests (except as set forth in the Purchase Agreement), (ii) authorizing the Sellers to assume certain executory contracts and unexpired leases (the "***Assumed Contracts***") to which the Sellers are party, a list of which is included in Schedule 2.3(b) of the Schedules to the Purchase Agreement, and to assign the Assumed Contracts to the Purchaser pursuant to the Purchase Agreement, and (iii) granting other related relief. In support of the Motion, the Debtors rely on the *Declaration of Andrew Hinkelman in Support of the Sale of Certain Louisiana Facilities and Related Assets* attached hereto as **Exhibit B** and incorporated herein by reference (the "***Hinkelman Declaration***") and the *Declaration of Andrew Turnbull in Support of the Sale of Certain Louisiana Facilities and Related Assets* attached hereto as **Exhibit C** and incorporated herein by reference (the "***Turnbull Declaration***"). In further support of the Motion, the Debtors respectfully represent:

PRELIMINARY STATEMENT

1. The proposed sale of the Purchased Assets will result in the sale of two (the

[2] Capitalized terms used but not defined herein shall have the meanings ascribed to them in the Purchase Agreement.

"***Seller Facilities***") of the Debtors' Louisiana healthcare facilities, which were initially marketed by the Debtors' investment banker, Houlihan Lokey, as part of the Debtors' Remaining Assets (as defined in the Remaining Assets Motion (defined below)) subject to *Debtors' Motion for Orders: (I)(A) Approving Bidding Procedures and Bid Protections, (B) Permitting Debtors to Designate Stalking Horse Purchaser(s) and Grant Bid Protections, (C) Scheduling a Hearing to Consider Approval of the Sale of Assets, (D) Approving Form and Manner of Notice of Sale, and (E) Granting Related Relief; and (II)(A) Authorizing and Approving the Sale of Substantially all Assets of Certain of the Debtors Free and Clear of Liens, Claims, Interests, and Encumbrances, (B) Authorizing the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases, and (C) Granting Related Relief* filed on January 1, 2019 [D.I. 374] (the "***Remaining Assets Motion***"). As such, the Purchased Assets were subject to the same robust marketing efforts as described in the Remaining Assets Motion.

2. While the Debtors initially intended to sell the Purchased Assets at auction with the other Remaining Assets, the terms offered by Purchaser under the Purchase Agreement are materially superior to the terms the Debtors had hoped to achieve at auction, and, given the time sensitive nature of the offer and beneficial terms, the Debtors believe sale of the Purchased Assets pursuant to the Purchase Agreement as a private sale is in the best interests of the Debtors and their estates.

3. As set forth in the Hinkelman Declaration, Houlihan Lokey began marketing the Purchased Assets along with the remainder of the Remaining Assets in July 2018. This process involved extensive business discussions, including telephone calls, in-person meetings between and among senior management, and numerous parties' legal teams and various advisors. As a result of these marketing efforts, the Debtors received an indication of interest from other

potential bidders as well as interest from the Purchaser for the Purchased Assets and commenced negotiating the Purchase Agreement. Purchaser's offer was significantly superior to the other expressions of interest received and as stated above at or above Debtors' expectations of value should the Debtors have conducted an auction. As a result of substantial arm's length negotiations between Purchaser and the Debtors, Purchaser agreed to purchase the Purchased Assets for $34,650,000 plus specified cure amounts for the Assumed Contracts.

4. Given that (a) the Purchaser has evidenced an ability to continue to operate the Seller Facilities as a going concern, (b) the Purchaser can consummate the private sale transaction sooner than should the Debtors seek to continue to market the Sellers' Facilities and auction them with the other Remaining Assets and (c) other potential bids and indications of interest the Debtors have received in connection with marketing of the Remaining Assets have not exhibited value or interest in the Purchased Assets comparable to the proposed sale, the Debtors believe, in their business judgment, that it is unlikely an auction will lead to a higher or otherwise better bid for the Purchased Assets. Accordingly, the Debtors seek to sell the Purchased Assets to the Purchaser, pursuant to a private sale free and clear of all Encumbrances and interests.

5. The Debtors have conferred with the Committee (defined below) and their DIP Agent (as defined in the *Final Order (I) Authorizing the Debtors to Obtain Postpetition Financing, (II) Authorizing the Debtors to Use Cash Collateral, (III) Granting Liens and Providing Superpriority Administrative Expenses Status, (IV) Granting Adequate Protection to the Prepetition ABL Parties, (V) Modifying the Automatic Stay, (VI) Scheduling a Final Hearing, and (VII) Granting Related Relief* (D.I. 218) (the "***Final DIP Order***")). Both the Committee and

the DIP Agent agree that a private sale to the Purchaser under the terms and conditions set forth in the Purchase Agreement are in the best interests of the Debtors' estates.

6. In short, given consideration to the terms set forth in the Purchase Agreement, (a) the Purchase Agreement represents fair value and the highest or otherwise best transaction available to the Debtors, (b) the sale to Purchaser is in the best interests of the Debtors and their estates, as it provides a greater recovery for the Debtors' estates sooner than would be available by any other available alternative, (c) any further marketing process or delay in the sale to Purchaser would only harm the Debtors' business and impair the Debtors' ability to maximize the value of their assets for all creditors, and (d) proceeding expeditiously with the sale to Purchaser will preserve the value of the Debtors' operations and ensure that the Debtors maximize the value of their estates for all of their constituents.

7. For these reasons and as set forth more fully below, the relief sought by this Motion should be granted.

JURISDICTION AND VENUE

8. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334 and the Amended Standing Order of Reference from the United States District Court for the District of Delaware, dated February 29, 2012. This is a core proceeding pursuant to 28 U.S.C. § 157(b) and, pursuant to Local Rule 9013-1(f), the Debtors consent to the entry of a final judgment or order with respect to the Motion, if it is determined that the Court, absent consent of the parties, cannot enter final orders or judgments consistent with Article III of the United States Constitution.

9. Venue is proper before the Court pursuant to 28 U.S.C. §§ 1408 and 1409.

BACKGROUND

10. On November 5, 2018 (the "***Petition Date***"), each Debtor commenced a case under chapter 11 of the Bankruptcy Code (collectively, the "***Chapter 11 Cases***"). The Debtors are operating their businesses and managing their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No request for the appointment of a trustee or examiner has been made in the Chapter 11 Cases, and an official unsecured creditors committee ("***Committee***") was appointed on November 14, 2018.

11. A detailed background of the Debtors' businesses and operations, as well as the events leading to the filing of the Chapter 11 Cases is set forth in the *Declaration of Andrew Hinkelman in Support of First Day Relief* (D.I. 18).

RELIEF REQUESTED

12. By this Motion, the Debtors seek (i) approval of a private sale (the "***Sale***") of the Purchased Assets to the Purchaser for cash consideration equal to $34,650,000 plus the Cure Amount (the "***Purchase Price***") as set forth in the Purchase Agreement, (ii) to assume and assign certain executory contracts and unexpired leases pursuant to section 365 of the Bankruptcy Code, and (iii) other related relief.

BASIS FOR RELIEF REQUESTED

I. The Purchase Agreement is Typical, Customary and Reasonable, and Entering into the Purchase Agreement is an Exercise of the Debtors' Business Judgment.

13. The Debtors believe, and respectfully submit, that the terms of the Purchase Agreement are typical, customary and reasonable under the circumstances, and have been entered into in the proper exercise of their business judgment.

14. Pursuant to Bankruptcy Rule 6004(f)(1), sales of property outside the ordinary course of business may be by private sale or by public auction. The paramount goal in any

proposed sale of property of the estate is to maximize the proceeds received by the estate. *See In re Mushroom Transp. Co.*, 382 F.3d 325, 339 (3d Cir. 2004) (noting that the debtor in possession "had a fiduciary duty to protect and maximize the estate's assets"). *See also Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 352 (1985) (debtor in possession has the duty to maximize the value of the estate); *Cadle Co. v. Mims (In re Moore)*, 608 F.3d 253, 263 (5th Cir. 2010) (same).

15. In accordance with Local Rule 6004-1, the Purchase Agreement, in summary fashion, provides as follows:[3]

(a) Sale of Purchased Assets. The Debtors are seeking approval for the Sale of the Purchased Assets to Purchaser by private sale for the Purchase Price and upon the terms and conditions set forth in the Purchase Agreement.

(b) Free of Any and All Encumbrances. The Sale will be free and clear of all Encumbrances and interests, with such Encumbrances to attach to the net proceeds of the Sale.

(c) Indemnification. The Purchase Agreement does not provide for indemnity by either party.

(d) Consent to Jurisdiction. Purchaser will be deemed to have consented to the core and exclusive jurisdiction of the Bankruptcy Court and waived any right to a jury trial in connection with any and all disputes relating to, arising from or connected with the purchase and sale of the Purchased Assets, and the construction and enforcement of the Purchase Agreement.

16. Pursuant to Local Rule 6004-1, a copy of the Proposed Order is attached to this Motion as **Exhibit A** and the executed Purchase Agreement is attached to the Proposed Order as **Exhibit 1**. In compliance with Local Rule 6004-1(b)(iv), Debtors further show:

(a) Sale to Insider. The Purchaser is not an insider of the Debtors within the meaning of section 101(31) of the Bankruptcy Code.

(b) Agreements with Management. The Purchaser has not discussed or entered into any agreements with Debtors' management or key employees regarding future compensation or employment.

[3] This summary is qualified in its entirety by reference to the provisions of the Purchase Agreement itself. In the event of any inconsistencies between this summary and the Purchase Agreement, the terms of the Purchase Agreement shall govern.

(c) Release. The Purchase Agreement does not include a release in favor of any entity.

(d) Private Sale/No Competitive Bidding. The Debtors are seeking approval for a proposed Sale of the Purchased Assets to Purchaser by private sale free and clear of all Encumbrances and interests for the Purchase Price and upon the terms and conditions set forth in the Purchase Agreement.

(e) Closing and Other Deadlines. The closing date of the Sale shall take place on the later of (a) the last business day of the month on which all of the conditions to Closing set forth in the Purchase Agreement (other than those conditions which are to be satisfied at Closing, but subject to such conditions being satisfied at the Closing) are satisfied or waived, or (b) upon such other date as the Sellers' Parent and Purchaser's Parent may mutually agree, with an outside date of 120 days following the execution of the Purchase Agreement.

(f) Good Faith Deposit. The Purchase Agreement requires Purchaser to fund in good available funds a First Deposit of $3,000,000 (upon execution of the Purchase Agreement) and a Second Deposit of $2,000,000 (within two business days of entry of an order approving this Motion), to be applied towards the Purchase Price.

(g) Interim Arrangements with Proposed Purchaser. The Debtors do not currently have any interim management or other agreement with Purchaser.

(h) Use of Proceeds. The Purchase Agreement does not address the use of proceeds generated from the proposed Sale. All proceeds will be distributed pursuant to the Final DIP Order or as otherwise ordered by this Court.

(i) Tax Exemption. The Debtors are not seeking pursuant to this Motion to have the Sale declared exempt from taxes under section 1146(a) of the Bankruptcy Code.

(j) Record Retention. The Debtors will retain, or have reasonable access to, all records needed to administer these Chapter 11 Cases.

(k) Sale of Avoidance Actions. The Debtors are not seeking to sell avoidance actions.

(l) Requested Findings as to Successor Liability. The Debtors are seeking to sell the Purchased Assets free and clear of successor liability claims that do not constitute Assumed Liabilities.

(m) Sale Free and Clear of Unexpired Leases. The Debtors do not seek to sell the Purchased Assets free and clear of any unexpired leasehold interests or other rights.

(n) Credit Bid. The Purchase Agreement does not contemplate a right to credit bid.

(o) Relief from Bankruptcy Rule 6004(h). The Debtors are seeking relief from the fourteen-day stay imposed by Bankruptcy Rule 6004(h) for any sale.

17. While the Debtors believe the Purchase Agreement is in final agreed form, Debtors request authorization to accept such modifications and edits to the Purchase Agreement

as may be submitted by and agreed upon between Purchaser and Debtors (in consultation with the Committee and DIP Agent) in their discretion and in Debtors' business judgment.

II. A Sale of the Purchased Assets is Appropriate Under Section 363(b)(1) of the Bankruptcy Code.

18. The Debtors respectfully submit that the Sale meets the standard set forth in section 363(b) for sales outside of the ordinary course of a debtor's business. Section 363(b)(1) of the Bankruptcy Code provides that "[t]he trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b)(1).

19. This Court's power under section 363 is supplemented by section 105(a), which provides in relevant part that "[t]he Court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title . . ." § 105(a). As set forth below, the Debtors submit that they have satisfied the requirements of sections 105 and 363 as those sections have been construed by courts in the Third Circuit.

20. A debtor should be authorized to sell assets out of the ordinary course of business pursuant to section 363 of the Bankruptcy Code and prior to obtaining a confirmed plan of reorganization if it demonstrates a sound business purpose for doing so. *See In re Del. & Hudson Ry. Co.*, 124 B.R. 169 (D. Del. 1991) (finding that the sale of substantially all of debtor's assets outside of a plan of reorganization is appropriate when a sound business reason justifies such a sale); *Myers v. Martin (In re Martin)*, 91 F.3d 389, 394–95 (3d Cir. 1996) (citing *Fulton State Bank v. Schipper (In re Schipper)*, 933 F.2d 513 (7th Cir. 1991)); *Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1070–71 (2d Cir. 1983).

21. Courts have applied the following four factors in determining whether a sound business justification exists: (a) whether a sound business reason exists for the proposed transaction; (b) whether fair and reasonable consideration is provided; (c) whether the transaction

has been proposed and negotiated in good faith; and (d) whether adequate and reasonable notice is provided. *See In re Del. & Hudson Ry. Co.*, 124 B.R. at 175–76 (adopting *Lionel* factors to consider in determining whether sound business purpose exists for sale outside ordinary course of business in this District); *Lionel Corp.*, 722 F.2d at 1071 (setting forth the "sound business" purpose test); *In re Abbotts Dairies of Penn., Inc.*, 788 F.2d 143, 147–49 (3d Cir. 1986) (implicitly adopting the articulated business justification test set forth in *Lionel* and adding the "good faith" requirement).

22. Once the Debtors articulate a valid business justification, their decision to sell property out of the ordinary course of business enjoys a strong "presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in an honest belief that the action taken was in the best interests of the company." *In re Integrated Res. Inc.*, 147 B.R. 650, 656 (S.D.N.Y. 1992) (quoting *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985)). Therefore, any party objecting to a debtor's proposed asset sale must make a showing of "bad faith, self-interest, or gross negligence," as courts are loath to interfere with corporate decisions absent such a showing. *See id*. at 656.

23. The Debtors have exercised their business judgment and set forth sound business justifications for pursuing a private sale of the Purchased Assets, pursuant to the factors discussed above. They have marketed the Purchased Assets for over six months and believe that the Purchaser is the only bidder for the Purchased Assets that can close a sale promptly on terms this favorable to the Debtors. (Hinkelman Dec., ¶¶ 5-6.) The Purchased Assets, as with substantially all of the Debtors' assets are to be sold and liquidated and, therefore, are not integral to the Debtors' on-going business.

24. The Debtors believe that this proposed private sale of the Purchased Assets will

allow for the greatest possible consideration for the Purchased Assets without unnecessary time and estate resources being expended on a further marketing process that the Debtors do not believe will yield a higher purchase price for the Purchased Assets. The Debtors believe that the Purchase Price is a fair and reasonable value for the Purchased Assets. Accordingly, the Debtors seek authority to consummate the Sale under the terms and conditions proposed.

III. Any Sale Should be Approved Free and Clear of Liens, Claims, Interests and Encumbrances.

25. Under section 363(f) of the Bankruptcy Code, a debtor in possession may sell property free and clear of any lien, claim, interest or encumbrance 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.

11 U.S.C. § 363(f).

26. Because section 363(f) is stated in the disjunctive, satisfaction of any one of its five requirements will suffice to warrant approval of the proposed sale. *See In re Collins*, 180 B.R. 447, 450 (Bankr. E.D. Va. 1995) ("Section 363(f) is phrased in the disjunctive, such that only one of the enumerated conditions must be met in order for the Court to approve the proposed sale"); *Scherer v. Fed. Nat'l Mortg. Ass'n (In re Terrace Chalet Apts., Ltd.)*, 159 B.R. 821, 827 (N.D. Ill. 1993) (sale extinguishes liens under section 363(f) as long as one of the five specified exceptions applies).

27. The Debtors will serve notice of the Motion on all creditors of the Sellers and the Assumed Contracts Counterparties (defined below). The Debtors have obtained the consent of the DIP Agent such that section 363(f)(2) will apply. The Debtors contend that the only other asserted lien on the Purchased Assets secures claims related to contingent, unmatured and unliquidated indemnity claims of three of the Debtors' former officers. The Debtors intend to negotiate an adequate protection arrangement with such creditors prior to entry of the sale order, or to allow such liens to attach to the sale proceeds subject to all of the Debtors' claims, causes of action, rights and defenses. Otherwise, to the extent any party contends that it holds a valid lien on the Purchased Assets, such lien is subject to bona fide dispute, and the Debtors may sell the Purchased Assets free and clear of such purported lien, under section 363(f)(4) of the Bankruptcy Code. Therefore, the Debtors request that the Sale be approved free and clear of all Encumbrances and interests, with the proceeds of the Sale being distributed in accordance with the terms of the Final DIP Order or as otherwise ordered by the Court.

IV. The Sale is Proposed in Good Faith.

28. Section 363(m) of the Bankruptcy Code provides:

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

29. Section 363(m) "reflects 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.'" *Abbotts Dairies of Penn., Inc.*, 788 F.2d at 147 (quoting *Hoese Corp. v. Vetter Corp. (In re Vetter Corp.)*, 724 F.2d 52, 55 (7th Cir. 1983)). *See also United States v. Salerno*, 932 F.2d 117, 123 (2d Cir. 1991) (noting that section 363(m) furthers the

policy of finality in bankruptcy sales and "assists bankruptcy courts in maximizing the price for assets sold in such proceedings"); *In re Stein & Day, Inc.*, 113 B.R. 157, 162 (Bankr. S.D.N.Y. 1990) (same).

30. While the Bankruptcy Code does not define "good faith," some courts have held that a good faith purchaser is one who "purchases the assets for value, in good faith, and without notice of adverse claims." *Hardage v. Herring Nat'l Bank,* 837 F.2d 1319, 1323 (5th Cir. 1988) (quoting *Willemain v. Kivitz (In re Willemain),* 764 F.2d 1019, 1023 (4th Cir. 1985)). Furthermore, the good faith status of a purchaser can be destroyed with evidence of "fraud, collusion between the purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders." *TMT Procurement Corp. v. Vantage Drilling Co.* (*In re TMT Procurement Corp.),* 764 F.3d 512, 521 (5th Cir. 2014).

31. The Sale has been proposed in good faith. The Purchase Agreement was the product of extensive good faith, arm's length negotiations between the Debtors, on the one hand, and Purchaser, on the other, and was negotiated with the active involvement of the Debtors' officers and professionals. The Debtors believe and submit that the sale of the Purchased Assets to the Purchaser pursuant to the terms and conditions of the Purchase Agreement is not the product of collusion or bad faith. No evidence suggests that the Purchase Agreement is anything but the product of arm's length negotiations between the Debtors, Purchaser, and their respective professional advisors. In connection with approval of the proposed Sale, the Debtors request that the Court make a finding that the Purchaser is a good faith purchaser and entitled to the protections of section 363(m) of the Bankruptcy Code.

V. Assumption and Assignment of the Assumed Contracts Is Warranted Under Section 365 of the Bankruptcy Code.

A. Assumption and Assignment of the Assumed Contracts Is Within Debtors' Business Judgment

32. Pursuant to the Purchase Agreement, Debtors are required to seek to assume the Assumed Contracts and the obligations thereunder, and to subsequently assign the Assumed Contracts and the obligations thereunder to Purchaser. Section 365 of the Bankruptcy Code provides as follows:

> (a) Except as provided in . . . subsections (b), (c), and (d) of this section, the 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), (b)(1). Accordingly, section 365 authorizes the proposed assumption of the Assumed Contracts by Debtors. The assumption of a contract by a debtor is subject to review under the business judgment standard. *In re Federated Dept. Stores, Inc.*, 131 B.R. 808, 811 (S.D. Ohio 1991) ("Courts traditionally have applied the business judgment standard in determining whether to authorize the rejection of executory contracts and unexpired leases"). If a debtor's business judgment has been reasonably exercised, a court should approve the assumption or rejection of the contracts. *See, e.g., NLRB v. Bildisco and Bildisco*, 465 U.S. 513, 523 (1984); *Grp. of Institutional Investors v. Chicago M. St. P. & P.R.R. Co.*, 318 U.S. 523 (1943); *In re Market Square Inn, Inc.*, 978 F.2d 116, 121 (3d Cir. 1992) (holding that the "resolution of [the] issue of assumption or rejection will be a matter of business judgment").

33. The business judgment rule shields a debtor's management from judicial second-guessing. *Id.*; *In re Johns-Manville Corp.*, 60 B.R. 612, 615–16 (Bankr. S.D.N.Y. 1986) ("[T]he Code favors the continued operation of a business by a debtor and a presumption of reasonableness attaches to a debtor's management decisions."). Once a debtor articulates a valid business justification, "[t]he business judgment rule 'is a presumption that in making a business

decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action was in the best interests of the company.'" *In re Integrated Res., Inc.*, 147 B.R. 650, 656 (S.D.N.Y. 1992) (quoting *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985)). Indeed, when applying the business judgment rule, courts show great deference to a debtor's decision to assume a contract. *See Summit Land Co. v. Allen (In re Summit Land Co.*), 13 B.R. 310, 315 (Bankr. D. Utah 1981) (absent extraordinary circumstances, court approval of a debtor's decision to assume an executory contract "should be granted as a matter of course"). Thus, this Court should approve the assumption of the Assumed Contracts, if the Debtors are able to demonstrate a sound business justification for doing so. *See In re Lionel Corp.*, 722 F.2d 1063, 1071 (2d Cir. 1983); *In re Delaware Hudson Ry. Co.*, 124 B.R. 169, 179 (Bankr. D. Del. 1991).

34. As previously noted, the assumption of the Assumed Contracts is required so that they may be assigned to the Purchaser pursuant to the Purchase Agreement. In addition, the Purchaser is responsible for any and all cure amounts associated with assuming the Assumed Contracts. The Debtors have carefully reviewed the economic benefits of assumption and assignment of the Assumed Contracts and believe that their decision to assume the Assumed Contracts is within the Debtors' sound business judgment, as the assumption of the Assumed Contracts will permit the consummation of the Sale, thereby benefiting the Debtors and their estates, while avoiding any further liability under the Assumed Contracts. Accordingly, Debtors believe that assuming the Assumed Contracts is in the best interests of the Debtors, the Debtors' estates, their creditors, and all other parties in interest.

B. Purchaser Will Pay Cure Amounts, If Any

35. The Purchase Agreement provides that, to the extent that any cure payments are required, the Purchaser will pay all cure amounts. Section 365 of the Bankruptcy Code 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).

36. Accordingly, section 365 authorizes the proposed assumption of the Assumed Contracts, provided that any defaults under the Assumed Contracts are cured, or adequate assurance is given by the debtor that the default will be promptly cured. The Debtors' proposed cure payments for the Assumed Contracts are set forth in Schedule 2.3(b) to the Purchase Agreement, with such amounts to be paid by Purchaser at Closing. The Assumed Contracts Counterparties (as defined in Schedule 2.3(b) of the Schedules) are being served with this Motion.

C. Debtors and Purchaser Can Demonstrate Adequate Assurance of Future Performance

37. Section 365 of the Bankruptcy Code provides that the trustee may assign an executory contract or unexpired lease if (i) such contract or lease is assumed in accordance with

the Bankruptcy Code and (ii) adequate assurance of future performance by the assignee is provided. 11 U.S.C. § 365(f)(2).

38. The words "adequate assurance of future performance" must be given a "practical, pragmatic construction" in "light of the proposed assumption." *In re Fleming Cos.*, 499 F.3d 300, 307 (3d Cir. 2007) (quoting *Cinicola v. Scharffenberger*, 248 F.3d 110, 120 n. 10 (3d Cir. 2001); *see Carlisle Homes, Inc. v. Arrari (In re Carlisle Homes, Inc.)*, 103 B.R. 524, 538 (Bankr. D.N.J. 1989); *In re Natco Indus., Inc.*, 54 B.R. 436, 440 (Bankr. S.D.N.Y. 1985) (adequate assurance of future performance does not mean absolute assurance that debtor will thrive and pay rent); *In re Bon Ton Rest. & Pastry Shop, Inc.*, 53 B.R. 789, 803 (Bankr. N.D. Ill. 1985) ("[A]lthough no single solution will satisfy every case, the required assurance will fall considerably short of an absolute guarantee of performance.").

39. Among other things, adequate assurance may be given by demonstrating the assignee's financial health and experience in managing the type of enterprise or property assigned. *See In re Bygaph, Inc.*, 56 B.R. 596, 605–06 (Bankr. S.D.N.Y. 1986) (adequate assurance of future performance is present when prospective assignee of a lease from debtor has financial resources and has expressed a willingness to devote sufficient funding to the business being acquired in order to give it strong likelihood of succeeding; chief determinant of adequate assurance is whether rent will be paid).

40. As set forth above, Debtors will be assigning the Assumed Contracts to the Purchaser, who has been selected due to its financial condition and ability to consummate the Sale. Debtors submit that the Purchaser's financial condition provides sufficient adequate assurance of future performance, and that the assignment of the Assumed Contracts to the

Purchaser as part of the Sale should be approved. Purchaser will provide information to Assumed Contracts Counterparties upon request.

WAIVER OF BANKRUPTCY RULE 6004(h)

41. The Debtors request that the Court waive the fourteen (14) day stay period under Bankruptcy Rule 6004(h). Timely consummation of the Sale is of critical importance to both the Debtors and the Purchaser and the Debtors' efforts to maximize the value of the estates. Accordingly, the Debtors hereby request that the Court waive the fourteen-day stay period under Bankruptcy Rules 6004(h).

RESERVATION OF RIGHTS

42. Nothing contained in this Motion or any actions taken by the Debtors pursuant to relief granted in the Order is intended or should be construed as: (a) an admission as to the validity, priority, or amount of any particular claim against a Debtor entity; (b) a waiver of the Debtors' or any other party-in-interest's rights to dispute any particular claim on any grounds; (c) a promise or requirement to pay any particular claim; (d) an implication or admission that any particular claim is of a type specified or defined in this Motion; (e) an admission that any Assumed Contract is an executory contract or unexpired lease within the purview of section 365 of the Bankruptcy Code or a request or authorization to assume any agreement, contract, or lease pursuant to section 365 of the Bankruptcy Code; or (f) a waiver or limitation of the Debtors' or any other party-in-interest's right under the Bankruptcy Code or any other applicable law.

NOTICE

43. The Debtors have provided notice of the filing of the Motion in accordance with Local Rule 2002-1(B) to: (i) the Office of the United States Trustee; (ii) counsel to the Committee; (iii) counsel to Wells Fargo, N.A., as administrative agent under the Debtors' prepetition and debtor-in-possession credit facilities; (iv) the Internal Revenue Service; (v) the

United States Attorney for the District of Delaware; (vi) the United States Department of Justice; (vii) the Louisiana State Attorney General's Office, (viii) Louisiana Board of Pharmacy, (ix) United States Drug Enforcement Administration, (x) Louisiana Joint Commission, (xi) Louisiana Department of Health; (xii) Centers for Medicare & Medicaid Services, (xiii) all parties known to have a lien on the Purchased Assets; (xiv) all creditors of the Sellers, (xv) the Assumed Contracts Counterparties, and (xvi) any party that has requested notice pursuant to Bankruptcy Rule 2002 (collectively, the "***Notice Parties***"). The Debtors respectfully submit that no further notice of this Motion is required.

NO PRIOR REQUEST

44. No prior request for the relief sought in this Motion has been made to this or any other court.

WHEREFORE, the Debtors respectfully request entry of the Proposed Order, granting the relief requested herein and such other and further relief as the Court may deem just and proper.

[*Remainder of page left intentionally blank*]

Dated: February 4, 2019
Wilmington, Delaware

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