

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:

**8E14 NETWORKS, INC. d/b/a ANANDA
NETWORKS,¹**

Debtor.

Sub-V Chapter 11

Case No. 22-10708 (BLS)

**Proposed Obj. Deadline: Aug. 26, 2022 at 4:00 p.m.
Proposed Hearing Date: Sept. 1, 2022 at 10:00 a.m.**

**DEBTOR’S MOTION FOR ENTRY OF AN ORDER (I) APPROVING THE BIDDING
PROCEDURES (II) APPROVING CERTAIN BIDDING PROTECTIONS IN
CONNECTION WITH THE SALE OF THE DEBTOR’S ASSETS (III) SCHEDULING
THE BID DEADLINE AND THE AUCTION, (IV) APPROVING THE FORM AND
MANNER OF NOTICE THEREOF, AND (V) GRANTING RELATED RELIEF**

8e14 Networks, Inc., d/b/a Ananda Networks, as debtor and debtor in possession (the “Debtor”) hereby moves (the “Motion”) this Court for an order (I) establishing bidding procedures (the “Bidding Procedures”), (II) approving certain bidding protections (the “Stalking Horse Protections” or “Bidding Protections”) in connection with the stalking horse bid (the “Stalking Horse Bid”), (III) scheduling the bid deadline and auction, if any, (IV) approving the form and manner of notice thereof, and (V) granting related relief. In further support of this Motion, the Debtor respectfully states as follows.

Introduction

1. While the Debtor’s business is revolutionary and its intellectual property is very valuable, its operations do not yet generate sufficient working capital to be self-sustaining. The Debtor’s management determined that a sale of substantially all of its assets would be the best path forward and in the best interests of its creditors and equity holders. The Debtor conducted several rounds of marketing efforts which failed due to a dispute with one of the Debtor’s founders.

¹ The last four digits of the Debtor’s tax identification number are 6991. The location of the Debtor’s principal place of business and service address is 2375 Friars Lane, Los Altos, CA 94024.

Ultimately, as a result of that dispute and the Company exhausting its liquidity, this Chapter 11 case became necessary to complete such a sale.

2. The proposed Bidding Procedures provide the Debtor with a cost-effective mechanism to realize value through the sale of the Debtor's assets, which may be (but is not required to be) implemented through a Chapter 11 plan for the Debtor (the "Plan").

3. Pursuant to the debtor-in-possession financing facility (the "DIP Facility"), the agreements governing such DIP Facility (the "DIP Agreement"), the first interim order approving such DIP Facility [Docket No. 30] (the "First Interim DIP Order") and any further interim order (the "Second Interim DIP Order") or final order approving the DIP Facility (the "Final Order," and collectively with the First Interim DIP Order and the Second Interim DIP Order, the "DIP Orders"), the Debtor must adhere to strict sale milestones and remain within the contemplated budget, all of which will require that a sale be promptly completed and the Debtor swiftly exit bankruptcy. To ensure compliance with the DIP Orders and to maximize the value to be received within the timeline contemplated, the proposed Bidding Procedures should be approved.

Relief Requested

4. The Debtor seeks entry of an order (the "Bidding Procedures Order"), substantially in the form attached hereto as **Exhibit A**: (a) authorizing and approving the bidding procedures attached as **Exhibit 1** to the Bidding Procedures Order;² (b) approving Stalking Horse Protections in connection with the Stalking Horse Bid; (c) establishing certain dates and deadlines including the Bid Deadline, and the date of Auction, if any; (d) approving the manner of notice of the Auction, if any; and (e) granting related relief.

² Capitalized terms used by not defined herein have the meanings given to them in the Bidding Procedures.

Jurisdiction and Venue

5. The United States Bankruptcy Court for the District of Delaware (the “Court”) has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order of Reference from the United States District Court for the District of Delaware*, dated February 29, 2012. The Debtor confirms its consent, pursuant to Rule 7008 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”) and Rule 9013-1(f) of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the “Local Rules”), to the entry of a final order by the Court in connection with this Motion to the extent that it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments in connection herewith consistent with Article III of the United States Constitution.

6. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

7. The bases for the relief requested herein are sections 105, 363, 503, and 507 of the Bankruptcy Code, Bankruptcy Rules 2002, 6004, 6006, 9007, 9014, and Local Rule 6004-1.

Background

8. On August 4, 2022 (the “Petition Date”), the Debtor filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”) as a debtor defined in Bankruptcy Code section 1182(1) and the Debtor elected to proceed under Subchapter V of chapter 11 of the Bankruptcy Code pursuant to the Small Business Debtor Reorganization Act, as amended (the “SBRA”).

9. The United States Trustee appointed Jami Nimeroff, Esq. to serve as the Subchapter V trustee (the “Subchapter V Trustee”) in this Case pursuant to Bankruptcy Code section 1183(a). No other trustee, examiner, or official committee of unsecured creditors has been appointed in the Chapter 11 Case.

10. Information about the Debtor's business and the events leading to the commencement of this chapter 11 case can be found in the *Declaration of Adi Ruppin in Support of Debtor's Chapter 11 Petition, First Day Motions and Related Filings* [Docket No. 36], which is incorporated herein by reference.

The Bidding Procedures

11. Prior to commencing this Chapter 11 case, the Debtor undertook an extensive marketing process that ultimately led to the selection of the Stalking Horse Bidder and the Stalking Horse Bid, and the provision by the Stalking Horse Bidder of the DIP Facility. Nevertheless, because the Debtor desires to obtain a higher or better bid if such a bid is available, the Debtor has retained Rock Creek Advisors LLC ("Rock Creek") to, among other things, assist the Debtor in a marketing process for potential purchasers of the Debtor's assets. The Debtor anticipates filing a plan that will provide a potential purchaser (including the stalking horse bidder) with the option to close such a purchase through a Plan (rather than through a standalone sale pursuant to Section 363 of the Bankruptcy Code) if the purchaser so desires. Consistent with that process, the Debtor now files this Motion seeking approval of Bidding Procedures to continue its marketing efforts and complete a sale of its assets in a manner that maximizes the value of the Debtor's assets.

12. Preserving value for the benefit of the Debtor's estate depends in large part on the Debtor proceeding swiftly to completion of a sale. The Bidding Procedures are designed to—and the Debtor believes the Bidding Procedures will actually operate to—maximize the likelihood of an acceptable bid for the benefit of enterprise-wide stakeholders.

13. In consultation with Rock Creek, the Debtor has developed a list of parties whom they believe may be interested in, and whom the Debtor reasonably believes would have the financial resources to consummate a purchase of substantially all of the Debtor's assets, either through a Plan or otherwise (a "Transaction"). The list of parties includes strategic investors and

financial investors, including well-resourced parties that the Debtor had been in contact with as part of its prepetition marketing (collectively, the “Contact Parties”). The Debtor and Rock Creek will contact (to the extent not already contacted) the Contact Parties to explore their interest in pursuing a Transaction. The Contact Parties may include parties whom the Debtor or its advisors previously contacted regarding a transaction, regardless of whether such parties expressed any interest at such time in pursuing a transaction. The Debtor will continue to discuss and may supplement the list of Contact Parties throughout the marketing process, as appropriate.

The Stalking Horse Bidder and the Bidding Protections

14. The Debtor has selected VMware, Inc. as the stalking horse bidder (in such capacity, the “Stalking Horse Bidder”) pursuant to the Asset Purchase Agreement by and among VMware, Inc. as Buyer and 8e14 Networks, Inc. as Seller, dated as of August 4, 2022 (the “Stalking Horse Agreement”), a copy of which is attached hereto as **Exhibit B**. The Stalking Horse Bidder also serves as lender under the DIP Facility. Prior to entry into the DIP Facility, the Stalking Horse Bidder was not a creditor of the Debtor. The Stalking Horse Bidder is in no way affiliated with the Debtor—the DIP Facility and the Stalking Horse Agreement represent true arms-length, third party agreements that have provided a much needed bridge to a sale of the Debtor’s assets for the benefit of its stakeholders.

15. The Stalking Horse Agreement provides for the purchase by the Stalking Horse Bidder of substantially all of the Debtor’s assets as a going concern (but excluding Excluded Assets, as defined in the Stalking Horse Agreement) as of the closing as set forth in more detail in the Stalking Horse Agreement.

16. The Stalking Horse Agreement provides for consideration equal to (a) \$12,500,000 less amounts outstanding under the DIP Facility, which amounts, for the avoidance of doubt shall be credit bid in accordance with Section 363(k) of the Bankruptcy Code *plus* (b) up to \$1,500,000

to fund a key employee incentive plan (collectively, the “Purchase Price”). Based upon the Debtor’s best understanding of its debts, the Purchase Price afforded by the Stalking Horse Agreement will fully satisfy the Debtor’s secured claims, fully satisfy all administrative and priority claims, and provide a substantial possibility of payment in full for all unsecured creditors.

17. The Stalking Horse Agreement requires Bidding Protections in the form of (a) a break-up fee equal to 3% of the Purchase Price plus (b) reimbursement of the reasonable and documented out-of-pocket costs and expenses incurred by the Buyer in connection with the Stalking Horse Agreement. Notably, however, the Stalking Horse Bidder’s legal fees are, as a result of extensive negotiations, *not* a portion of the obligations owed by the Debtor under the DIP Facility, which represents a material benefit to the Debtor relative to standard market terms.

The Bidding Procedures Order

A. The Bidding Procedures.

18. To optimally and expeditiously solicit, receive, and evaluate bids in a fair and accessible manner, the Debtor has developed and proposed the Bidding Procedures, attached as **Exhibit 1** to the Bidding Procedures Order, to govern the sale and Auction process. The Debtor designed the Bidding Procedures to encourage all entities to put their best bids forward and to maximize the value of the Debtor’s estate. The following describes the salient points of the Bidding Procedures and discloses certain information required pursuant to Local Rule 6004-1:³

(a) **Participation Requirements.**

- (i) To receive due diligence information, including full access to the Debtor’s electronic data room and additional non-public information regarding the Debtor, a party interested in consummating a Transaction (a “Potential Bidder”) should deliver (or have delivered) to each of: (x) Rock Creek Advisors LLC, 1738

³ This summary is qualified in its entirety by the Bidding Procedures attached as **Exhibit 1** to the Bidding Procedures Order. All capitalized terms that are used in this summary but not otherwise defined herein shall have the meanings in the Bidding Procedures. To the extent there are any conflicts between this summary and the Bidding Procedures, the terms of the Bidding Procedures shall govern.

Belmar Blvd, Belmar, NJ 07719, Attn: Brian Ayers (BAyers@rockcreekfa.com); (y) proposed counsel to the Debtor, Womble Bond Dickinson (US) LLP, 1313 North Market Street, Suite 1200, Wilmington, Delaware 19801, Attn: Matthew P. Ward (matthew.ward@wbd-us.com) and Morgan L. Patterson (morgan.patterson@wbd-us.com); and (z) proposed special counsel to the Debtor, Norton Rose Fulbright US LLP, 1301 Avenue of the Americas, New York, New York 10019 Attn: Eric Daucher and 555 South Flower Street, 41st Floor, Los Angeles, California 90071 Attn: Rebecca J. Winthrop (collectively, the “Debtor’s Advisors”), the following documents (collectively, the “Preliminary Bid Documents”):

- (A) an executed Confidentiality Agreement, to the extent not already executed; and
- (B) proof or other documentation acceptable to the Debtor of the Potential Bidder’s financial capacity to close a proposed Transaction (or, if the Potential Bidder is an entity formed for the purpose of consummating the Transaction, the party that will bear liability for a breach), the adequacy of which will be assessed by the Debtor (with the assistance of their advisors).

Promptly after a Potential Bidder delivers Preliminary Bid Documents, the Debtor will determine and notify the Potential Bidder whether such Potential Bidder has submitted acceptable Preliminary Bid Documents so that the Potential Bidder may proceed to conduct due diligence and ultimately submit a Bid (as defined below) and participate in the Auction, as applicable, and will provide copies of any such notices to the Notice Parties. Except as otherwise determined in the Debtor’s business judgment, only those Potential Bidders that have submitted acceptable Preliminary Bid Documents (each, an “Acceptable Bidder”) may submit Bids.

Rock Creek will provide access, in the electronic data room, to a form asset purchase agreement and the chapter 11 plan (once filed) (collectively, the “Form Documents”).

- (ii) For any Acceptable Bidder who is a competitor of the Debtor or is affiliated with any competitor of the Debtor, the Debtor reserves the right to withhold, or to delay providing, any diligence materials that the Debtor determines are business-sensitive or otherwise inappropriate for disclosure to such Acceptable Bidder at such time.
- (iii) Each Acceptable Bidder shall comply with all reasonable requests for additional information and due diligence access by the Debtor or

its advisors regarding such Acceptable Bidder and its contemplated transaction.

- (b) **Bid Deadline.** An Acceptable Bidder that desires to make a proposal, solicitation, or offer (each, a “Bid”) shall transmit such proposal, solicitation, or offer via email (in .pdf or similar format) so as to be **actually received** on or before **October 4, 2022, at 5:00 p.m. (prevailing Eastern Time)** (the “Bid Deadline”) to:
- (i) Rock Creek Advisors LLC, 1738 Belmar Blvd, Belmar, NJ 07719, Attn: Brian Ayers (BAyers@rockcreekfa.com);
 - (ii) Womble Bond Dickinson (US) LLP, 1313 North Market Street, Suite 1200, Wilmington, Delaware 19801, Attn: Matthew P. Ward (matthew.ward@wbd-us.com) and Morgan L. Patterson (morgan.patterson@wbd-us.com); and
 - (iii) Norton Rose Fulbright US LLP, 1301 Avenue of the Americas, New York, New York 10019 Attn: Eric Daucher (eric.daucher@nortonrosefulbright.com) and 555 South Flower Street, 41st Floor, Los Angeles, California 90071 Attn: Rebecca J. Winthrop (rebecca.winthrop@nortonrosefulbright.com).
- (c) **Bid Requirements (Local Rule 6004-1(c)(i)).** Each Bid by an Acceptable Bidder must be submitted in writing and satisfy the following requirements (collectively, the “Bid Requirements”):
- (i) **Purpose.** Each Acceptable Bidder must state if the Bid is an offer by the Acceptable Bidder to purchase assets or equity, including the percentage of the new interests to be purchased, if any, and which executory contracts and unexpired leases the Acceptable Bidder seeks to have assumed and assigned as part of the Transaction. Each Acceptable Bidder must also state if it is willing to fund costs of confirming the Plan, including wind-down costs, and if so, the amount of funding to be provided.
 - (ii) **Purchase Price.** Each Bid must clearly set forth the terms of any proposed Transaction, including and identifying separately any cash and non-cash components of the proposed Transaction consideration, including, for example, certain liabilities to be assumed by the Acceptable Bidder (the “Purchase Price”); *provided* that any Bid for the Assets that constitute DIP Collateral (as defined in the DIP Orders) must (a) provide for the indefeasible payment in cash in full of the DIP Obligations (as defined in the DIP Orders) at closing of the applicable Transaction or (b) have the consent of the DIP Lender.

- (iii) Deposit. Each Bid other than the Stalking Horse Bid must be accompanied by a cash deposit in the amount equal to 10% of the aggregate value of the cash and non-cash consideration of the Bid to be held in one or more escrow accounts on terms acceptable to the Debtor (the “Deposit”).
- (iv) Marked Agreement. Each Bid must include a marked version of the applicable Form Documents, in each case, together with the exhibits and schedules related thereto and any related Transaction documents or other material documents integral to such Bid, pursuant to which the Acceptable Bidder proposes to effectuate the Transaction (collectively, the “Transaction Documents”). Any modifications to the Transaction contemplated by the Form Documents must be in form and substance acceptable to the Debtor.
- (v) Committed Financing. To the extent that a Bid is not accompanied by evidence of the Acceptable Bidder’s capacity to consummate the Transaction set forth in its Bid with cash on hand, each Bid must include committed financing documented to the Debtor’s satisfaction that demonstrates that the Acceptable Bidder has received sufficient debt and/or equity funding commitments to satisfy the Acceptable Bidder’s Purchase Price and other obligations under its Bid. Such funding commitments or other financing must be unconditional and must not be subject to any internal approvals, syndication requirements, diligence, or credit committee approvals, or shall have covenants and conditions acceptable to the Debtor.
- (vi) Contingencies; No Financing or Diligence Outs. A Bid shall not be conditioned on the obtaining or the sufficiency of financing or any internal approval, or on the outcome or review of due diligence.
- (vii) No Bidding Protections. Each Bid (other than the Stalking Horse Bid) must disclaim any right to receive a fee analogous to a break-up fee, expense reimbursement, termination fee, or any other similar form of compensation. For the avoidance of doubt, no Qualified Bidder (other than the Stalking Horse Purchaser) will be permitted to request, nor be granted by the Debtor, at any time, whether as part of the Auction or otherwise, a break-up fee, expense reimbursement, termination fee, or any other similar form of compensation. By submitting its Bid, each Bidder (other than the Stalking Horse Purchaser) is agreeing to refrain from and waive any assertion or request for reimbursement on any basis, including pursuant to section 503(b) of the Bankruptcy Code.
- (viii) Identity. Each Bid must fully disclose the identity of each entity that will be bidding or otherwise participating in connection with such Bid (including each equity holder or other financial backer of the

Acceptable Bidder if such Acceptable Bidder is an entity formed for the purpose of consummating the proposed transaction contemplated by such Bid), and the complete terms of any such participation. Each Bid should also include contact information for the specific person(s) and counsel whom the Debtor's Advisors should contact regarding such Bid.

- (ix) Authorization. Each Bid must contain evidence acceptable to the Debtor that the Acceptable Bidder has obtained authorization or approval from its board of directors (or a comparable governing body) with respect to the submission of its Bid and the consummation of the Transaction contemplated in such Bid.
- (x) As-Is, Where-Is. Each Bid must include a written acknowledgement and representation that the Acceptable Bidder: (i) has had an opportunity to conduct any and all due diligence regarding the Transaction prior to making its offer; (ii) has relied solely upon its own independent review, investigation, and/or inspection of any documents in making its Bid; (iii) did not rely upon any written or oral statements, representations, promises, warranties, or guaranties whatsoever, whether express, implied by operation of law, or otherwise, regarding the Transaction or the completeness of any information provided in connection therewith or the Auction, except as expressly stated in the Bidder's Transaction Documents; and (iv) the Acceptable Bidder did not engage in any collusive conduct and acted in good faith in submitting its Bid.

(d) **Stalking Horse Bid Protections**.

- (i) Termination Fee and Expense Reimbursement. The Stalking Horse Purchaser is entitled to bidding protections equal to 3% of the Purchase Price, plus the Buyer Expense Reimbursement (as defined in the Stalking Horse Agreement) (the "Bid Protections").
- (ii) Bidding Increments. Each Bid or combination of Bids must be for all of the Assets and shall clearly show the amount of the purchase price. In addition, a Bid or combination of Bids must propose a purchase price greater than the sum of (i) the value of the Stalking Horse Agreement, as determined by the Debtor in consultation with the Subchapter V Trustee; (ii) the Bid Protections, and (iii) an initial overbid of not less than \$100,000 (the "Initial Overbid").

Unless otherwise determined by the Debtor in its business judgment after consultation with the Subchapter V Trustee, any subsequent overbid after the initial over bid shall be made in increments of at least \$100,000 in the aggregate (the "Minimum Overbid Increment").

(e) **Right to Credit Bid.**

- (i) Any Qualified Bidder who has a valid and perfected lien on any assets of the Debtor's estate (a "Secured Creditor") shall have the right to credit bid all or a portion of the value of such Secured Creditor's claims within the meaning of section 363(k) of the Bankruptcy Code; *provided* that a Secured Creditor shall have the right to credit bid its claim only with respect to the collateral by which such Secured Creditor is secured.

(f) **Designation of Qualified Bidders.**

- (i) A Bid will be considered a "Qualified Bid," and each Acceptable Bidder that submits a Qualified Bid will be considered a "Qualified Bidder," if the Debtor, determines that such Bid:
- (ii) satisfies the Bid Requirements set forth above, including the Initial Overbid;
- (A) is reasonably likely (based on availability of financing, antitrust, or other regulatory issues, experience, and other considerations) to be consummated, if selected as the Winning Bid (as defined below), within a time frame acceptable to the Debtor; and
- (B) when aggregated with other Bids (or portions thereof), provides for payment in full in cash of all allowed DIP Obligations outstanding on the date of closing of the applicable Transaction *plus* payment in full in cash of all administrative, priority, and secured claims (other than the DIP Claims) arising in the Debtor's chapter 11 case through the Effective Date (as defined in the Plan).
- (C) By October 5, 2022, the Debtor will notify each Qualified Bidder whether such party is a Qualified Bidder and shall provide the Notice Parties a copy of each Qualified Bid.
- (D) If any Bid is determined by the Debtor not to be a Qualified Bid, the Debtor will refund such Acceptable Bidder's Deposit on the date that is three business days after the Bid Deadline.
- (E) Between the date that the Debtor notifies an Acceptable Bidder that it is a Qualified Bidder and the Auction, the Debtor may discuss, negotiate, or seek clarification of any Qualified Bid from a Qualified Bidder. Without the prior written consent of the Debtor, a Qualified Bidder may not modify, amend, or withdraw its Qualified Bid, except for

proposed amendments to increase their Purchase Price, or otherwise improve the terms of the Qualified Bid, during the period that such Qualified Bid remains binding as specified in these Bidding Procedures; *provided* that any Qualified Bid may be improved at the Auction as set forth herein. Any improved Qualified Bid must continue to comply with the requirements for Qualified Bids set forth in these Bidding Procedures.

- (F) Notwithstanding anything herein to the contrary, the Debtor reserves the right to work with (1) Potential Bidders and Acceptable Bidders to aggregate two or more Bids into a single consolidated Bid prior to the Bid Deadline or (2) Qualified Bidders to aggregate two or more Qualified Bid into a single Qualified Bid prior to the conclusion of the Auction. The Debtor reserves the right to cooperate with any Acceptable Bidder to cure any deficiencies in a Bid that is not initially deemed to be a Qualified Bid. The Debtor may accept a single Qualified Bid or multiple Bids that, if taken together in the aggregate, would otherwise meet the standards for a single Qualified Bid (in which event those multiple bidders shall be treated as a single Qualified Bidder for purposes of the Auction).
- (G) The Stalking Horse Bid is a Qualified Bid, and the Stalking Horse Bidder is an Acceptable Bidder and a Qualified Bidder.

(g) **The Auction.**

- (i) If the Debtor receives two or more Qualified Bids (including the Stalking Horse Bid), the Debtor will conduct the Auction to determine the Winning Bidder with respect to the Transaction.
- (ii) No later than **October 5, 2022**, the Debtor, will notify all Qualified Bidders of the highest or otherwise best Qualified Bid, as determined in the Debtor's business judgment (the "Baseline Bid"), and provide copies of the documents supporting the Baseline Bid to all Qualified Bidders and the Notice Parties. The determination of which Qualified Bid constitutes the Baseline Bid and which Qualified Bid constitutes the Winning Bid shall take into account any factors the Debtor reasonably deems relevant to the value of the Qualified Bid to the Debtor's estate, including, among other things: (a) the number, type, and nature of any changes to the applicable Form Documents requested by the Qualified Bidder; (b) the amount and nature of the total consideration; (c) the likelihood of the Qualified Bidder's ability to close a transaction and the timing

thereof; (d) the net economic effect of any changes to the value to be received by the Debtor's estate from the Transaction contemplated by the Baseline Bid; and (e) the tax consequences of such Qualified Bid (collectively, the "Bid Assessment Criteria").

(iii) Unless otherwise indicated as provided by the Bidding Procedures Order, the Auction shall take place at **10:00 a.m. (prevailing Eastern Time) on October 6, 2022**, either via videoconference or at the offices of Womble Bond Dickinson (US), LLP, 1313 N. Market Street, Suite 1200, Wilmington, DE 19801, or such later date and time or location as selected by the Debtor. The Auction shall be conducted in a timely fashion according to the following procedures:

(A) The Debtor Shall Conduct the Auction.

- The Debtor and its professionals shall direct and preside over the Auction. At the start of the Auction, the Debtor shall describe the terms of the Baseline Bid. All incremental Bids made thereafter shall be Overbids (as defined herein) and shall be made and received on an open basis, and all material terms of each Overbid shall be fully disclosed to all other Qualified Bidders. The Debtor shall maintain a written transcript of all Bids made and announced at the Auction, including the Baseline Bid, all Overbids, and the Winning Bid.
- Only Qualified Bidders, the Debtor, the DIP Lender and the Subchapter V Trustee, and each of their respective legal and financial advisors, and any other parties specifically invited or permitted to attend by the Debtor, shall be entitled to attend the Auction, and the Qualified Bidders shall appear at the Auction in person and may speak or bid themselves or through duly authorized representatives. Except as otherwise permitted by the Debtor, only Qualified Bidders shall be entitled to bid at the Auction.

(B) Terms of Overbids. "Overbid" means any Bid made at the Auction by a Qualified Bidder subsequent to the Debtor's announcement of the Baseline Bid. Each Overbid must comply with the following conditions:

- Minimum Overbid Increment. Any Overbid following the Baseline Bid or following any subsequent Prevailing Highest Bid (as defined

below) shall be in increments of value (including revised treatment under the Plan) equal to \$100,000, unless otherwise determined by the Debtor in an exercise of its business judgment after consultation with the Subchapter V Trustee.

- Conclusion of Each Overbid Round. Upon the solicitation of each round of Overbids, the Debtor may announce a deadline (as the Debtor may, in its business judgment, extend from time to time, the “Overbid Round Deadline”) by which time any Overbids must be submitted to the Debtor.
 - Overbid Alterations. An Overbid may contain alterations, modifications, additions, or deletions of any terms of the Bid no less favorable in the aggregate to the Debtor’s estate than any prior Qualified Bid or Overbid, as determined in the Debtor’s business judgment, but shall otherwise comply with the terms of these Bidding Procedures.
 - Announcing Highest Bid. Subsequent to each Overbid Round Deadline, the Debtor, in consultation with the Subchapter V Trustee, shall announce whether the Debtor has identified an Overbid as being higher or otherwise better than the Baseline Bid, in the initial Overbid Round, or, in subsequent rounds, the Overbid previously designated by the Debtor as the prevailing highest or otherwise best Bid (the “Prevailing Highest Bid”). The Debtor shall describe to all Qualified Bidders the material terms of any new Overbid designated by the Debtor as the Prevailing Highest Bid, as well as the value attributable by the Debtor to such Prevailing Highest Bid based on, among other things, the Bid Assessment Criteria.
- (C) Consideration of Overbids. The Debtor reserves the right, in consultation with the Subchapter V Trustee, in its business judgment, to adjourn the Auction one or more times, to, among other things, (1) facilitate discussions between the Debtor and Potential Bidders, (2) allow Qualified Bidders to consider how they wish to proceed, and (3) provide Qualified Bidders the opportunity to provide the Debtor with such additional evidence as the Debtor, in its business judgment, may require, that the Qualified Bidder has sufficient internal resources or has received sufficient non-

contingent debt and/or equity funding commitments to consummate the proposed Transaction at the prevailing Overbid amount.

(D) Closing the Auction. The Auction shall continue until there is only one Qualified Bid that the Debtor determines, in consultation with the Subchapter V Trustee, in its business judgment, to be the highest or otherwise best Qualified Bid. Such Qualified Bid shall be declared the “Winning Bid” and such Qualified Bidder, the “Winning Bidder,” at which point the Auction will be closed. The Auction shall not close unless and until all Qualified Bidders have been given a reasonable opportunity to submit an Overbid at the Auction to the then Prevailing Highest Bid. Such acceptance by the Debtor of the Winning Bid is conditioned upon approval by the Court of the Winning Bid. For the avoidance of doubt, nothing in these Bidding Procedures shall prevent the Debtor from exercising its fiduciary duties under applicable law. As soon as reasonably practicable after closing the Auction, the Debtor shall finalize definitive documentation to implement the terms of the Winning Bid, including, if applicable, the Plan, the Plan Supplement (as defined in the Plan), and the Confirmation Order (as defined in the Plan) and, as applicable, cause such definitive documentation to be filed with the Court.

(E) No Collusion; Good-Faith *Bona Fide* Offer. Each Qualified Bidder participating at the Auction will be required to confirm on the record at the Auction that (1) it has not engaged in any collusion with respect to the bidding and (2) its Qualified Bid is a good-faith *bona fide* offer and it intends to consummate the proposed Transaction if selected as the Winning Bidder.

(h) **Backup Bidder (Local Rule 6004-1(c)(1)(E)).**

(i) Notwithstanding anything in these Bidding Procedures to the contrary, if an Auction is conducted, the Qualified Bidder with the next-highest or otherwise second-best Qualified Bid at the Auction, as determined by the Debtor in the exercise of its business judgment, shall be required to serve as a backup bidder (the “Backup Bidder”) until the earlier of (i) thirty (30) days after entry of the Sale Order and (ii) the date of closing of the applicable Transaction (the “Outside Date”), and each Qualified Bidder shall agree and be deemed to agree to be the Backup Bidder if so designated by the Debtor.

- (ii) The identity of the Backup Bidder and the amount and material terms of the Qualified Bid of the Backup Bidder shall be announced by the Debtor, at the conclusion of the Auction at the same time the Debtor announces the identity of the Winning Bidder. The Backup Bidder shall be required to keep its Qualified Bid (or if the Backup Bidder submits one or more Overbids at the Auction, its final Overbid) open and irrevocable until the Outside Date. The Backup Bidder's Deposit shall be held in escrow pending confirmation of the Plan.
- (iii) If the Winning Bidder fails to consummate the approved Transaction contemplated by its Winning Bid prior to the Outside Date, the Debtor may select the Backup Bidder as the Winning Bidder, and such Backup Bidder shall be deemed a Winning Bidder for all purposes. The Debtor will be authorized, but not required, to consummate the Transaction contemplated by the Bid of such Backup Bidder without further order of the Court or notice to any party. In such case, the defaulting Winning Bidder's Deposit shall be forfeited to the Debtor's estate, and the Debtor, on behalf of itself and its estate, specifically reserves the right to seek all available remedies against the defaulting Winning Bidder, including, but not limited to, specific performance.

(i) **Notice Parties.**

- (i) Information that must be provided to the "Notice Parties" under these Bidding Procedures must be provided to the following parties:
 - (a) Rock Creek Advisors LLC, 1738 Belmar Blvd, Belmar, NJ 07719, Attn: Brian Ayers (BAyers@rockcreekfa.com);
 - (b) proposed counsel to the Debtor, Womble Bond Dickinson (US) LLP, 1313 North Market Street, Suite 1200, Wilmington, Delaware 19801, Attn: Matthew P. Ward (matthew.ward@wbd-us.com) and Morgan L. Patterson (morgan.patterson@wbd-us.com);
 - (c) proposed special counsel to the Debtor, Norton Rose Fulbright US LLP, 1301 Avenue of the Americas, New York, New York 10019 Attn: Eric Daucher (eric.daucher@nortonrosefulbright.com) and 555 South Flower Street, 41st Floor, Los Angeles, California 90071 Attn: Rebecca J. Winthrop (rebecca.winthrop@nortonrosefulbright.com);
 - (d) Office of the United States Trustee, 844 King Street, Suite 2207, LockBox 35, Wilmington, Delaware 19801, Attn: Joseph Cudia (Joseph.Cudia@usdoj.gov); and
 - (e) the Subchapter V Trustee, Jami Nimeroff (jnimeroff@bmnlawyers.com).

(j) **“As Is, Where Is.”**

(i) Consummation of any Transaction will be on an “as is, where is” basis and without representations or warranties of any kind, nature, or description by the Debtor or its estate, except as specifically accepted or agreed to by the Debtor. Except as specifically accepted or agreed to by the Debtor, all of the Debtor’s right, title, and interest in and to the respective assets will be transferred to the Winning Bidder free and clear of all pledges, liens, security interests, encumbrances, claims, charges, options, and interests in accordance with sections 363(f) and 1123(a)(5)(D) of the Bankruptcy Code, as applicable.

- By submitting a Bid, except as specifically accepted or agreed to by the Debtor, each Acceptable Bidder will be deemed to acknowledge and represent that it (A) has had an opportunity to conduct adequate due diligence regarding the Transaction prior to making its Bid, (B) has relied solely on its own independent review, investigation, and inspection of any document, including executory contracts and unexpired leases, in making its Bid, and (C) did not rely on or receive from any party any written or oral statements, representations, promises, warranties, or guaranties whatsoever, whether express, implied by operation of law, or otherwise, with respect to the Transaction or the completeness of any information provided in connection with the Transaction or the Auction.

(k) **Reservation of Rights (Local Rule 6004-1(c))**. The Debtor reserves its right to modify these Bidding Procedures in its business judgment, in consultation with the Subchapter V Trustee, in any manner that is not inconsistent with prior orders of the Court or applicable law and will best promote the goals of these Bidding Procedures, or impose, at or prior to the Auction, additional customary terms and conditions on a Transaction, including: (i) extending the deadlines set forth in these Bidding Procedures; (ii) adjourning the Auction at the Auction; (iii) adding procedural rules that are reasonably necessary or advisable under the circumstances for conducting the Auction; (iv) canceling the Auction; and (v) rejecting any or all Bids or Qualified Bids. Nothing in these Bidding Procedures shall abrogate the fiduciary duties of the Debtor.

(l) **Consent to Jurisdiction**. All Qualified Bidders at the Auction shall be deemed to have consented to the jurisdiction of the Court and waived any right to a jury trial in connection with any disputes relating to the Auction, the construction, and enforcement of these Bidding Procedures.

- (m) **Sale Hearing**. A hearing to consider approval of the Transaction and the sale to the Winning Bidder (the “Sale Hearing”) will be held on or about **October 21, 2022**, which Sale Hearing may be combined with a hearing to consider confirmation of a chapter 11 plan to implement Transaction if the Debtor and the Winning Bidder desire to consummate such Transaction through a chapter 11 plan, and otherwise in accordance with any scheduling order entered by the Court.

Any party wishing to object to approval of the Transaction and the sale to the Winning Bidder or Backup Bidder (a “Sale Objection”) or wishing to object to the conduct of the Auction (an “Auction Objection”) shall, by no later than **October 14, 2022 at 4:00 p.m. (prevailing Eastern Time)**, file and serve its Sale Objection or Auction Objection, as applicable, on the Notice parties.

Any party failing to timely file a Sale Objection or an Auction Objection, as applicable, will be forever barred from objecting and will be deemed to have consented to the Sale, including the transfer of the Debtor’s right, title and interest in, to, and under the assets free and clear of any and all liens, claims, interests, and encumbrances in accordance with the definitive agreement for the Transaction.

(n) **Return of Deposit**.

- (i) The Deposit of the Winning Bidder shall be applied to the Purchase Price of such Transaction at closing. The Deposits for each Qualified Bidder shall be held in one or more escrow accounts on terms acceptable to the Debtor and shall be returned (other than with respect to the Winning Bidder and the Backup Bidder) on the date that is three business days after the Auction.
- (ii) If a Winning Bidder fails to consummate a proposed Transaction because of a breach by such Winning Bidder, the Debtor will not have any obligation to return the Deposit deposited by such Winning Bidder, which may be retained by the Debtor as liquidated damages, in addition to any and all rights, remedies, or causes of action that may be available to the Debtor and its estate, and the Debtor shall be free to consummate the proposed Transaction with the applicable Backup Bidder without the need for an additional hearing or order of the Court.

19. Importantly, the Bidding Procedures recognize the Debtor’s fiduciary obligations to maximize sale value, and, as such, do not impair the Debtor’s ability to consider all qualified

bid proposals, and, as noted, preserve the Debtor's right to modify the Bidding Procedures as necessary or appropriate to maximize value for the Debtor's estate.

II. Form and Manner of Notice.

20. The Auction shall take place at **10:00 a.m. (prevailing Eastern Time) on October 6, 2022**, either via videoconference or at the offices of Womble Bond Dickinson (US), LLP, 1313 N. Market Street, Suite 1200, Wilmington, DE 19801, or such other date and time as selected by the Debtor.

21. On or before the date that is twenty-one (21) calendar days prior to the Sale Hearing, in accordance with Bankruptcy Rule 2002(a) and (c), the Debtor (or its agent) shall serve the auction and sale notice (the "Auction and Sale Notice"), substantially in the form attached to the Bidding Procedures Order as **Exhibit 2**, by first-class mail, postage prepaid, upon the Notice Parties and upon all other known creditors of the Debtor.

22. The Auction and Sale Notice shall indicate that copies of the Motion and the Bidding Procedures can be obtained from the Debtor's counsel. The Auction and Sale Notice will also indicate the deadline for objecting to the Transaction to the Winning Bidder and the date and time of the Sale Hearing.

23. The Debtor further submits that notice of this Motion and the related hearing to consider entry of the Bidding Procedures Order, together with service of the Auction and Sale Notice, constitutes good and adequate notice of the Auction and the proceedings with respect thereto in compliance with, and satisfaction of, the applicable requirements of Bankruptcy Rule 2002. The Debtor proposes that no other or further notice of the Auction shall be required. Accordingly, the Debtor requests that the Court approve the form and manner of the notice.

III. Assumption and Assignment Procedures

24. In connection with any Transaction, the Debtor proposes to assume and assign to the Winning Bidder(s) the contracts (“Contracts”) that the Winning Bidder(s) seeks to assume (the “Proposed Assumed Contracts”). The Assumption and Assignment Procedures will, among other things, notice the counterparties (each a “Counterparty” and collectively, the “Counterparties”) of the potential assumption and assignment of their Contracts and the Debtor’s calculation of costs of curing defaults under the Contracts (the “Cure Costs”) with respect thereto. Specifically, the Assumption and Assignment Procedures provide that:

- (a) Assumption and Assignment Notice: No later than **September 6, 2022**, the Debtor shall file with this Court and serve on the non-debtor counterparty (a “Counterparty”) to contracts (“Contracts”) that the Winning Bidder may seek to assume (the “Proposed Assumed Contracts”) the Assumption and Assignment Notice, which shall (i) identify the Contracts; (ii) list the Debtor’s good faith calculation of Cure Costs with respect to each Contract; (iii) expressly state that assumption or assignment of a Contract is not guaranteed and is subject to the agreement of the Winning Bidder and Court approval; and (iv) prominently display the deadline to file objections to the assumption, assignment, or sale of the Proposed Assumed Contracts. In the event that the Debtor identifies Counterparties that were not served with the Assumption and Assignment Notice, the Debtor may subsequently serve such Counterparty with an Assumption and Assignment Notice, and the following procedures will nevertheless apply to such Counterparty; provided, however, that the deadline to file a Cure Objection or Assignability Objection with respect to such additional Counterparty shall be 4:00 p.m. (prevailing Eastern Time) on the date that is 14 days following service of the Assumption and Assignment Notice.
- (b) Cure Objections and/or Assignability Objections
 - (i) Deadline. Any Counterparty to a Contract that wishes to object to the potential assumption, assignment, and sale of the Proposed Assumed Contract on any grounds (other than Adequate Assurance Objections, as noted below), including the subject of which objection is either (i) the Debtor’s proposed Cure Costs to cure any outstanding monetary defaults then existing under such contract (each, a “Cure Objection”) and/or (ii) an objection to the assignability of the Contract, whether on grounds that such contract is not assignable, is not an executory contract or unexpired lease, or

otherwise (each, an “Assignability Objection”), shall file with the Bankruptcy Court and serve on the Notice Parties its Cure Objection and/or Assignability Objection, which must state, with specificity, the legal and factual bases thereof, including any appropriate documentation in support thereof, by no later than **October 4, 2022 at 4:00 p.m. (prevailing Eastern Time)**.

- (ii) Resolution: The Debtor and a Counterparty that has filed a Cure Objection and/or Assignability Objection shall first confer in good faith to attempt to resolve the Cure Objection and/or Assignability Objection without Court intervention. If the parties are unable to consensually resolve the Cure Objection and/or Assignability Objection prior to the commencement of the Sale Hearing, the amount to be paid or reserved with respect to such Cure Objection and the assignability of the Contract shall be determined by the Bankruptcy Court at the Sale Hearing provided that, a Cure Objection may, at the Debtor’s discretion, after consulting with the Subchapter V Trustee, the Winning Bidder and the Counterparty, be adjourned (an “Adjourned Cure Objection”) to a subsequent hearing. An Adjourned Cure Objection may be resolved after the closing date of the applicable Transaction; provided that, the Debtor maintains a cash reserve equal to the cure amount the objecting Counterparty believes is required to cure the asserted monetary default under the applicable Contract. Upon resolution of an Adjourned Cure Objection and subject to the payment of the applicable cure amount, if any, the applicable Contract that was the subject of such Adjourned Cure Objection may be deemed assumed and assigned to the applicable Winning Bidder, as of the closing date of the applicable Transaction. All objections to the potential assumption and assignment of the Debtor’s right, title, and interest in, to, and under a Contract will be heard at the Sale Hearing, except with respect to an Adjourned Cure Objection as set forth herein.
- (iii) Failure to Timely Object: If a Counterparty fails to timely file with the Bankruptcy Court and serve on the Notice Parties a Cure Objection and/or Assignability Objection, the Counterparty shall be deemed to have consented to the assumption, assignment, and sale of the Contract (unless such Counterparty has timely filed an Adequate Assurance Objection (as defined below) with respect to the Contract, in which case the Counterparty may only object to the Winning Bidder’s adequate assurance) to the Winning Bidder and forever shall be barred from asserting any objection with regard to such assumption, assignment, and sale. The Cure Costs set forth in the Assumption and Assignment Notice shall be controlling and will be the only amount necessary to cure outstanding defaults under the Contract under Bankruptcy Code section 365(b), notwithstanding anything to the contrary in any Contract, or any other document, and

the Counterparty to the Contract shall be deemed to have consented to the Cure Costs and forever shall be barred from asserting any other claims related to such Contract against the Debtor or any Winning Bidder(s) or their property.

(c) Adequate Assurance Objections.

- (i) Deadline: Any Counterparty to a Proposed Assumed Contract that wishes to object to the potential assumption, assignment, and sale of the Proposed Assumed Contract, the subject of which objection is a Winning Bidder's proposed form of adequate assurance of future performance with respect to such contract (each, an "Adequate Assurance Objection"), shall file with the Bankruptcy Court and serve on the Notice Parties an Adequate Assurance Objection, which must state, with specificity, the legal and factual bases thereof, including any appropriate documentation in support thereof, by no later than **October 4, 2022 at 4:00 p.m. (prevailing Eastern Time)** for the Stalking Horse Bidder or **October 14, 2022, at 4:00 p.m. (prevailing Eastern Time)** for any Winning Bidder and Back-Up Bidder that is not the Stalking Horse Bidder.
- (ii) Resolution of Objections: The Debtor and a Counterparty that has filed an Adequate Assurance Objection shall first confer in good faith to attempt to resolve the Adequate Assurance Objection without Court intervention. If the parties are unable to consensually resolve the Adequate Assurance Objection prior to the commencement of the Sale Hearing, such objection and all issues of adequate assurance of future performance of the applicable Winning Bidder shall be determined by the Bankruptcy Court at the Sale Hearing.
- (iii) Failure to Timely Object: If a Counterparty fails to timely file with the Bankruptcy Court and serve on the Notice Parties an Adequate Assurance Objection, the Counterparty shall be deemed to have consented to the assumption, assignment, and sale of the Proposed Assumed Contract (unless the Counterparty has filed a timely Cure Objection and/or Assignability Objection with respect to the Proposed Assumed Contract, the deadline and procedures for resolution and adjudication of which are set forth above) to the Winning Bidder and forever shall be barred from asserting any objection. The Winning Bidder shall be deemed to have provided adequate assurance of future performance with respect to the applicable Proposed Assumed Contract in accordance with Bankruptcy Code section 365(f)(2)(B), notwithstanding anything to the contrary in the Proposed Assumed Contract, or any other document.

III. Timeline

25. Set forth below for convenience is a chart reflecting the various proposed deadlines and dates requested by the Debtor set forth herein and the Bidding Procedures Order:

Bidding Procedures Hearing	September 1, 2022 at 10:00 a.m. prevailing Eastern Time
Cure/Adequate Assurance (Stalking Horse Bidder) Objection Deadline	October 4, 2022 at 4:00 p.m. prevailing Eastern Time
Bid Deadline	October 4, 2022 at 5:00 p.m. prevailing Eastern Time
Auction	October 6, 2022 10:00 a.m. prevailing Eastern Time
Sale Objection Deadline	October 14, 2022 at 4:00 p.m. prevailing Eastern Time
Adequate Assurance (Winning Bidder that is not the Stalking Horse Bidder) Objection Deadline	October 14, 2022 at 4:00 p.m. prevailing Eastern Time
Sale Approval/Potential Confirmation Hearing	October 21, 2022 __:__ [•].m. prevailing Eastern Time (or as soon thereafter or before as the Court's schedule permits)

Basis for Relief**A. The Relief Sought in the Bidding Procedures Order Is in the Best Interests of the Debtor's Estate and Should Be Approved.**

26. Adoption of the Bidding Procedures is a valid exercise of the Debtor's business judgment. Courts have consistently held that a debtor's business judgment is entitled to substantial deference with respect to the procedures to be used in selling an estate's assets. *See, e.g., In re Trilogy Dev. Co., LLC*, No. 09-42219, 2010 Bankr. LEXIS 5636, at *3-4 (Bankr. W.D. Mo. 2010) (holding that section 363 of the Bankruptcy Code permits the debtor to sell their assets if a sound business purpose exists); *In re Channel One Commc'ns, Inc.*, 117 BR 493 (Bankr. E.D. Mo. 1990) (same); *In re Schipper*, 933 F.2d 513, 515 (7th Cir. 1991) ("Under Section 363, the debtor in possession can sell property of the estate . . . if he has an 'articulated business justification.'" (internal citations omitted)); *see also In re Farmland Indus., Inc.*, 294 B.R. 855, 881 (Bankr. W.D. Mo. 2003) (holding that courts in this district are reluctant to interfere with corporate decisions unless "it is made clear that those decisions are, inter alia, clearly erroneous, made arbitrarily, are

in breach of the officers' and directors' fiduciary duty to the corporation, are made on the basis of inadequate information or study, are made in bad faith, or are in violation of the Bankruptcy Code"); *In re Integrated Res., Inc.*, 147 B.R. 650, 656–57 (S.D.N.Y. 1992) (noting that bidding procedures that have been negotiated by a trustee are to be reviewed according to the deferential “business judgment” standard, under which such procedures and arrangements are “presumptively valid”).

27. Maximization of proceeds received by the estate is one of the dominant goals of any proposed sale of estate property. In the hope of maximizing the value received by the estate, courts typically establish procedures that are intended to enhance competitive bidding by, among other things, setting forth the rules that will govern the auction process. *See, e.g., In re Fin. News Network, Inc.*, 126 B.R. 152, 156 (Bankr. S.D.N.Y. 1991) (“court-imposed rules for the disposition of assets . . . [should] provide an adequate basis for comparison of offers, and [should] provide for a fair and efficient resolution of bankrupt estates”); *In re Edwards*, 228 B.R. 552, 561 (Bankr. E.D. Pa. 1998) (“The purpose of procedural bidding orders is to facilitate an open and fair public sale designed to maximize value for the estate.”); *In re Food Barn Stores, Inc.*, 107 F.3d 558, 564–65 (8th Cir. 1997) (in bankruptcy sales, “a primary objective of the Code [is] to enhance the value of the estate at hand”); *In re Integrated Res., Inc.*, 147 B.R. at 659 (“[I]t is a well-established principle of bankruptcy law that the objective of the bankruptcy rules and the trustee’s duty with respect to such sales is to obtain the highest price or greatest overall benefit possible for the estate.” (internal citations omitted)).

28. To that end, courts uniformly recognize that procedures intended to enhance competitive bidding are consistent with the goal of maximizing the value received by the estate and therefore are appropriate in the context of bankruptcy transactions. *See, e.g., Integrated*

Resources, 147 B.R. at 659 (bidding procedures “are important tools to encourage bidding and to maximize the value of the debtor’s assets”); *In re Fin. News Network, Inc.*, 126 B.R. 152, 156 (Bankr. S.D.N.Y. 1991) (“court-imposed rules for the disposition of assets . . . [should] provide an adequate basis for comparison of offers, and [should] provide for a fair and efficient resolution of bankrupt estates”).

29. The Debtor believes that the proposed Bidding Procedures represent the best avenue for identifying and promoting active bidding from interested and financially capable parties and will maximize the value the Debtor will receive from the Transaction for the benefit of the Debtor’s estate. The proposed Bidding Procedures will allow the Debtor to conduct the Auction in a controlled, fair, and open fashion that will encourage participation by financially capable bidders who can demonstrate the ability to close a Transaction. In particular, the Bidding Procedures contemplate an open auction process with minimum barriers to entry and provide potential bidding parties with sufficient time to perform due diligence and acquire the information necessary to submit a timely and well-informed bid.

30. The Debtor believes that the proposed Bidding Procedures provide an appropriate framework for expeditiously establishing that the Debtor is receiving the best and highest offer for a Transaction, will encourage competitive bidding, are appropriate under the relevant standards governing auction proceedings and bidding incentives in bankruptcy proceedings, and are consistent with the controlling legal standard. Accordingly, the Court should approve the Debtor’s adoption of the Bidding Procedures as reasonable and appropriate and a valid exercise of the Debtor’s business judgment.

II. The Bid Protections Have a Sound Business Purpose and Should Be Approved.

31. The Debtor also seeks approval to pay the Bid Protections to the extent required by the Stalking Horse Agreement.

32. Payment of termination fees and expense reimbursements, like those proposed here, in a bidding process for sales is appropriate under section 363(b) of the Bankruptcy Code so long as such payment is a valid exercise of the Debtor's business judgment. Under section 363(b), the Debtor may use, sell, or lease estate property outside of the ordinary course of business so long as they articulate a sound business reason for doing so. *See, e.g., In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989); *Armstrong World Indus., Inc. v. James A. Phillips, Inc. (In re James A. Phillips, Inc.)*, 29 B.R. 391, 398 (Bankr. S.D.N.Y. 1983).

33. The use of a stalking horse in a public auction process for dispositions pursuant to section 363 of the Bankruptcy Code is a customary practice in chapter 11 cases, as the use of a stalking horse bid is, in many circumstances, the best way to maximize value in an auction process by "establish[ing] a framework for competitive bidding and facilitat[ing] a realization of that value." *Official Comm. of Unsecured Creditors v. Interforum Holding LLC*, 2011 WL 2671254, *1 (E.D. Wis. July 7, 2011); *see also Agri Processors, Inc. v. Fokkena (In re Tama Beef Packing, Inc.)*, 321 B.R. 496, 497-98 (B.A.P. 8th Cir. 2005). As a result, stalking horse bidders virtually always require forms of bid protections as an inducement for "setting the floor at auction, exposing its bid to competing bidders, and providing other bidders with access to the due diligence necessary to enter into an asset purchase agreement." *Interforum Holding*, 2011 WL 2671254, at *1 (internal citations omitted). Thus, the use of bid protections has become an established practice in chapter 11 cases.

34. Debtor submits that approval of the Bid Protections is justified by the facts and circumstances of this Chapter 11 Case, whether considered under the business judgment rule or as an administrative expense of the estate. Termination fees and expense reimbursements are a vital means by which a debtor-in-possession can manage value maximization risk by setting a value

floor for the assets to be sold, which is a key benefit to the Debtor and its estate and weighs heavily in favor of approving the Bid Protections. Such fees encourage the investment of time, effort, and money necessary to consummate a Transaction, despite the possibility that the Stalking Horse Bidder may not ultimately effectuate the Transaction. The expense reimbursement is an important tool to be used to encourage bidding.

35. Moreover, the Bid Protections are a material inducement for, and condition of, the Stalking Horse Bidder's entry into a Transaction and no other bidding protections are being sought. The Stalking Horse Bidder has put forth considerable time and resources to negotiate a Transaction, which will serve as a floor price at the Auction and, regardless of whether other Qualified Bids are received, will benefit the Debtor's estate. The Debtor believes that the Bid Protections are fair and reasonable in view of (a) the analysis and negotiation that the Stalking Horse Bidder has undertaken in connection with a Transaction and (b) the fact that, if the Bid Protections are triggered, the Stalking Horse Bidder's efforts will have influenced the chances that the Debtor will receive the highest or otherwise best offer for a Transaction to the benefit of all of the Debtor's stakeholders. Moreover, the Debtor notes that the Stalking Horse Bidder is also acting as the DIP Lender, and the DIP Lender has agreed to the Bid Protections in lieu of other protections, such as payment in full of the DIP Lender's legal fees as part of the DIP Lender's secured and superpriority claims, that are customarily approved in chapter 11 cases. Put differently, here the Debtor has successfully negotiated to reimburse the DIP Lender/Stalking Horse Bidder for its legal fees—via the Bid Protections—only if the conditions for payment of a the Bid Protections are triggered and an Alternative Transaction (as defined in the Stalking Horse Agreement) is instead closed rather than simply agreeing to pay all such amounts up front as is customary in connection with debtor-in-possession financings.

36. Thus, the Debtor submits that offering the Bid Protections is: (a) an actual and necessary cost of preserving the Debtor's estate within the meaning of sections 503(b) and 507(a) of the Bankruptcy Code; (b) commensurate to the real and substantial benefit conferred on the Debtor's estate by the Stalking Horse Bidder, and (c) reasonable and appropriate in light of, among other things (i) the size and nature of the Transaction contemplated and comparable transactions, (ii) the substantial efforts that have been and will need to be expended by the Stalking Horse Bidder, (iii) the benefits the Stalking Horse Bidder will have provided to the Debtor's estate, its creditors and other parties in interest, notwithstanding that the Stalking Horse Bid may be terminated by the Debtor if any higher or otherwise better transaction is identified and consummated at the conclusion of the Auction, and (d) necessary to induce the Stalking Horse Purchaser to serve as a "stalking horse" bidder and to continue to pursue the Transaction.

37. The determination of whether bidding incentives should be allowed is made based on standards established by the Third Circuit in *Calpine Corp. v. O'Brien Env't Energy, Inc. (In re O'Brien Env't Energy, Inc.)*, 181 F.3d 527 (3d Cir. 1999). O'Brien held that while bidding incentives are measured against a business judgment standard in non-bankruptcy transactions, the administrative expense provisions in section 503(b) of the Bankruptcy Code govern in the bankruptcy context. *Id.* To be approved, bidding incentives must provide benefit to a debtor's estate. *Id.* at 533; *see also In re Reliant Energy Channelview LP*, 594 F.3d 200, 206 (3d Cir. 2010) ("the allowability of break-up fees, like that of other administrative expenses, depends on the requesting party's ability to show that the fees were actually necessary to preserve the value of the estate").

38. *O'Brien* identified at least two instances in which bidding incentives may provide benefit to the estate. First, benefit may be found if "assurance of a breakup fee promote[s] more

competitive bidding, such as by inducing a bid that otherwise would not have been made and without which bidding would [be] limited.” *Id.* at 537. Second, where the availability of bidding incentives induces a bidder to research the value of the debtor and submit a bid that serves as a minimum or floor bid on which other bidders can rely, “the bidder may have provided a benefit to the estate by increasing the likelihood that the price at which the debtor is sold will reflect its true worth.” *Id.* The Debtor submits that the Expense Reimbursement is consistent with the *O’Brien* standard and should be approved as fair and reasonable.

39. As a result, courts routinely approve bid protections in connection with proposed bankruptcy sales where a proposed fee or reimbursement provides a benefit to the estate. *See, e.g., In re Wintz Cos.*, 230 B.R. 840, 847 (B.A.P. 8th Cir. 1999) (holding that bid protections benefitted the estate rather than chilled bidding); *In re O’Brien Envtl. Energy, Inc.*, 181 F.3d 527 (3d Cir. 1999). The Debtor believes that the allowance of the Bid protections is in the best interests of the Debtor’s estate and its creditors.

40. Accordingly, for the reasons set forth above, the Court should grant the Debtor the authority to incur and pay the Expense Reimbursement in its discretion as a valid exercise of the Debtor’s business judgment and otherwise within the controlling legal standards in this district.

III. The Form and Manner of the Notice Should Be Approved.

41. Pursuant to Bankruptcy Rule 2002(a), the Debtor is required to provide creditors with 21 days’ notice of the Auction. Pursuant to Bankruptcy Rule 2002(c), such notice must include the time and place of the Auction and the deadline for filing any objections to the relief requested herein.

42. The Debtor submits that notice of this Motion and the related hearing to consider entry of the Bidding Procedures Order constitutes good and adequate notice of the Auction and the proceedings with respect thereto in compliance with, and satisfaction of, the applicable

requirements of Bankruptcy Rule 2002. Accordingly, no further notice is necessary and the Debtor requests that this Court approve the form and manner of notice of the Auction. Nevertheless, the Debtor proposes to file on the court docket and serve a notice of entry of the Bidding Procedures Order with a copy of the entered Bidding Procedures Order attached to such notice.

Waiver of Bankruptcy Rule 6004(a)

43. 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.” Similarly, Bankruptcy Rule 6006(d) provides that an “order authorizing the trustee to assign an executory contract or unexpired lease . . . is stayed until the expiration of 14 days after the entry of the order unless the court orders otherwise.” The Debtor requests that the Bidding Procedures Order be effective immediately by providing that the fourteen (14) day stays under Bankruptcy Rules 6004(h) and 6006(d) are waived

Reservation of Rights

44. Nothing contained herein is intended or shall be construed as: (a) an admission as to the amount of, basis for, or validity of any claim against the Debtor under the Bankruptcy Code or other applicable non-bankruptcy law; (b) a waiver of the Debtor’s or any other party in interest’s right to dispute any claim, (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) a request or authorization to assume, adopt, or reject any agreement, contract, or lease pursuant to section 365 of the Bankruptcy Code; (f) an admission as to the validity, priority, enforceability, or perfection of any lien on, security interest in, or other encumbrance on property of the Debtor’s estate; or (g) a waiver of any claims or causes of action which may exist against any entity under the Bankruptcy Code or any other applicable law. If the Court grants the relief sought herein, any payment made pursuant to the Court’s order is not intended and should not be construed as an

admission as to the validity of any particular claim or a waiver of the Debtor's right to subsequently dispute such claim.

Notice

45. The Debtor has provided notice of this Motion to the following parties or their respective counsel: (a) the office of the U.S. Trustee for the District of Delaware; (b) the holders of the 20 largest unsecured claims against the Debtor; (c) the DIP Lender; (e) the Subchapter V Trustee; (f) the Internal Revenue Service; (g) the United States Securities and Exchange Commission; (h) California Attorney General; (i) the United States Attorney's Office for the District of Delaware; and (j) any party that has requested notice pursuant to Bankruptcy Rule 2002. The Debtor submits that, in light of the nature of the relief requested, no other or further notice need be given.

No Prior Request

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

WHEREFORE, the Debtor respectfully requests that the Court enter the Order granting the relief requested herein and such other relief as the Court deems appropriate under the circumstances.

Dated: August 12, 2022
Wilmington, Delaware

WOMBLE BOND DICKINSON (US) LLP

/s/ Morgan L. Patterson

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