

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

In re:

NOVA WILDCAT SHUR-LINE HOLDINGS,  
INC., *et al.*,<sup>1</sup>

Debtors.

Chapter 11

Case No. 23-10114 (CTG)

(Joint Administration Requested)

**DEBTORS' MOTION FOR ENTRY OF: (A) AN ORDER (I) APPROVING BIDDING PROCEDURES IN CONNECTION WITH THE SALE OF SUBSTANTIALLY ALL OR ANY PORTION OF THE DEBTORS' ASSETS, (II) AUTHORIZING THE DEBTORS TO ENTER INTO ONE OR MORE STALKING HORSE AGREEMENTS, (III) SCHEDULING AN AUCTION FOR AND HEARING TO APPROVE THE SALE, (IV) APPROVING NOTICE OF RESPECTIVE DATE, TIME, AND PLACE FOR AUCTION AND FOR HEARING ON APPROVAL OF SALE, (V) APPROVING PROCEDURES FOR THE ASSUMPTION AND ASSIGNMENT OF CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES, (VI) APPROVING FORM AND MANNER OF NOTICE THEREOF, AND (VII) GRANTING RELATED RELIEF; AND (B) AN ORDER AUTHORIZING AND APPROVING (I) THE SALE FREE AND CLEAR OF LIENS, CLAIMS, RIGHTS, ENCUMBRANCES, AND OTHER INTERESTS, (II) THE ASSUMPTION AND ASSIGNMENT OF CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES, AND (III) RELATED RELIEF**

The debtors and debtors-in-possession in the above-captioned cases (collectively, the “Debtors”) hereby move (this “Motion”) for the entry of orders granting the relief requested below.

In support of the Motion, the Debtors, through their undersigned counsel, respectfully state as follows:

**INTRODUCTION**

1. The Debtors and their non-debtor subsidiaries (collectively, the “Company”) comprise an affordable home and hardware products company branded commercially as H2

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<sup>1</sup> The Debtors in these chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number, are: Nova Wildcat Shur-Line Holdings, Inc. (1805); Nova Wildcat Shur-Line, LLC (8851); World and Main (Air), LLC (0035); World and Main (Cranbury), LLC (3903); HBC Holdings LLC (6461); and HBC Chemical LLC (6379). The Debtors’ corporate headquarters and service address is 324A Half Acre Road Cranbury, NJ 08512.

Brands Group Home & Hardware (“H2B”). The Company owns more than ten (10) brands and sources and distributes to various end retailers more than 10,000 products across multiple home-related product categories, including hardware, paint applicators, fans, heaters, plumbing, electrical, and locks/locksets. The Company’s products are sold through top retailers—the Company’s customers—nationwide, including big box retailers, chain stores, local hardware stores, wholesalers, and online retailers.

2. In December 2022, the Debtors engaged SSG Advisors, LLC (“SSG”), as their investment banker, and Carl Marks Advisory Group, LLC (“CMAG”), as their financial advisor, to assist the Debtors in their consideration of strategic alternatives after an extended period of experiencing constrained liquidity and operational issues as a result of the COVID-19 pandemic and the accompanying supply chain disruptions. The Debtors, in consultation with their advisors, ultimately determined that the best path forward was the commencement of these chapter 11 cases to implement a sale of substantially all or any portion of the Debtors’ assets in one or more sale transactions under section 363 of the Bankruptcy Code. The Debtors believe a section 363 sale process will provide maximum value to all stakeholders.

3. Through this Motion, the Debtors seek to establish bidding procedures for the auction of their assets that build upon the pre-petition marketing process that the Debtors have been conducting since early December 2022. The Debtors believe that the bidding procedures described herein will best facilitate a potential auction, thereby maximizing recoveries for all creditors. The bidding procedures provide for substantial flexibility with respect to the number and structure of any sale transactions.

4. Consistent with this goal, the Debtors’ investment banker, SSG, began marketing the assets in early December 2022. The Debtors developed an extensive list of parties whom they

believe may be interested in, and whom the Debtors reasonably believe would have the financial resources to consummate a sale. The Debtors distributed a teaser to prospective purchasers in December 2022, and already have executed confidentiality agreements with 46 prospective purchasers with more anticipated to follow. During the sale process, SSG and the Debtors will work with all interested parties to provide all due diligence and will continue to actively seek potential interested purchasers.

5. The marketing process and the bidding procedures proposed in this Motion provide appropriate time for the Debtors to finish marketing the assets, receive and evaluate bids, execute one or more stalking horse agreements, and hold an auction (if necessary) to determine the highest or otherwise best bid(s), particularly in light of the pre-petition marketing process already conducted by the Debtors and SSG and the liquidity constraints that the Debtors are anticipated to continue to face in these chapter 11 cases. The timeline of the bidding procedures is also aligned with the milestones set forth in the Debtors' post-petition credit agreement, which provide a roadmap through these chapter 11 cases supported by the Debtors' Pre-Petition Lenders and DIP Lenders.

6. For these and other reasons set forth in the Motion, the Debtors respectfully request that the Court grant the relief requested in the Motion.

### **RELIEF REQUESTED**

7. The Debtors seek entry of an order substantially in the form attached as **Exhibit A** (the "**Bidding Procedures Order**"):

- i. authorizing and approving the procedures, substantially in the form attached to the Bidding Procedures Order as **Exhibit 1** (the "**Bidding Procedures**"), to be used in connection with the sale (the "**Sale**") of substantially all or any portion of the Debtors' assets (collectively, the "**Assets**") through one or more sale transactions (each, a "**Sale Transaction**");

- ii. authorizing the Debtors in their discretion to (i) select one or more bidders to act as stalking horse bidders (each, a “Stalking Horse Bidder”) and enter into purchase agreements with such Stalking Horse Bidder(s) (each such agreement, a “Stalking Horse Agreement”);
  - iii. establishing certain dates and deadlines for the sale process, including scheduling an auction of the Assets (the “Auction”) and a final hearing to consider approval of the proposed Sale Transaction(s) (the “Sale Hearing”);
  - iv. approving the form and manner of notice of the Bidding Procedures, the Auction, and the Sale Hearing, substantially in the form attached to the Bidding Procedures Order as **Exhibit 2** (the “Sale Notice”);
  - v. approving procedures for the assumption and assignment of executory contracts and unexpired leases (collectively, the “Contracts”) in connection with any Sale Transaction (the “Assumption and Assignment Procedures”);
  - vi. approving the form and manner of notice to each relevant non-debtor counterparty to a Contract (each, a “Counterparty”) of (A) the Debtors’ calculation of the amount necessary to cure any pre-petition defaults under an applicable Contract (the “Cure Costs”) and (B) certain other information regarding the potential assumption and assignment of Contracts in connection with a Sale Transaction, substantially in the form attached to the Bidding Procedures Order as **Exhibit 3** (the “Assumption and Assignment Notice”); and
  - vii. granting related relief.
8. The Debtors also seek entry of an order (the “Sale Order”), (i) authorizing and approving the Sale of the Assets to any potential Stalking Horse Bidder(s) or otherwise Successful Bidder(s) (as defined below), as applicable (each, a “Buyer”), free and clear of all liens, claims, interests, and encumbrances to the extent set forth in the applicable Stalking Horse Agreement or asset purchase agreement(s) with the otherwise Successful Bidder(s), as applicable; (ii) authorizing the assumption and assignment of certain Contracts in connection with an applicable Sale Transaction; and (iii) granting any related relief.
9. In support of this Motion, the Debtors rely upon the First Day Declaration (as defined herein) and the declaration of J. Scott Victor, a founding partner and Managing Director of SSG (the “Victor Declaration”).

### **JURISDICTION AND VENUE**

10. 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. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Pursuant to 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”), the Debtors consent to entry of a final order by the Court in connection with this Motion to the extent that 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.

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

12. The statutory predicates for the relief requested by this Motion are sections 105(a), 363(b), 365, 503 and 507 of title 11 of the United States Code, 11 U.S.C. § 101 *et seq.* (the “Bankruptcy Code”), and such relief is warranted under Rules 2002, 6004, 6006, 9007, 9008 and 9014 of the Federal Rules of Bankruptcy Procedure, and Local Rules 2002-1, 6004-1, 9006-1 and 9013-1(m).

### **BACKGROUND**

13. On January 29, 2023 (the “Petition Date”), each Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code, thereby commencing the above-captioned cases (collectively, the “Chapter 11 Cases”). The Debtors are authorized to continue operating their businesses and managing their properties as debtors in possession under section 1107(a) and 1108 of the Bankruptcy Code. No official committees have been appointed in the Chapter 11 Cases and no request has been made for the appointment of a trustee or an examiner.

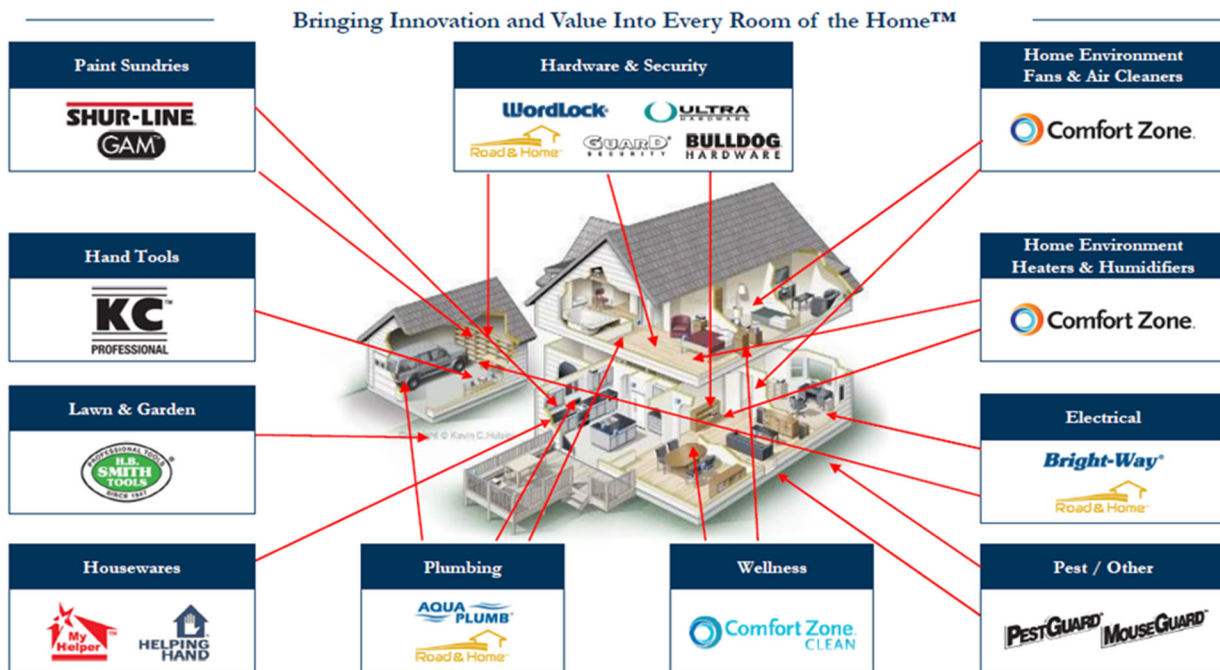
14. Contemporaneously herewith, the Debtors have filed a motion requesting joint administration of the Chapter 11 Cases under Bankruptcy Rule 1015(a).

15. Additional information regarding the Debtors’ business, their capital structure, and the circumstances leading to the filing of the Chapter 11 Cases is set forth in the *Declaration of Mark Rostagno, the Debtors’ President and Chief Executive Officer, in Support of Debtors’ Chapter 11 Petitions and First Day Motions* (the “First Day Declaration”), filed contemporaneously herewith and incorporated by reference.<sup>2</sup>

**A. The Debtors’ Business and Assets**

16. The Company is a privately held brand portfolio housed under the H2B umbrella. The Company owns more than ten (10) brands consisting of an assortment of consumable products intended to reach every room of the average consumer’s home.

17. A snapshot of the Company’s owned brands follows:



<sup>2</sup> Capitalized terms used but not defined in this Motion have the meanings in the First Day Declaration and the DIP Credit Agreement as the context of each defined term so requires.

18. The Company operates in the following five (5) primary business segments, and a sixth business segment houses a number of miscellaneous business lines.

- a. Home Environment: This business segment includes the Comfort Zone products, which is the #4 home environment brand in the United States. This segment includes the broadest line of electric fans, heaters, humidifiers, and air purifiers. This business segment benefits from strong and consistent seasonal demand plus recent growth due to evolving work-from-home trends stemming from the COVID-19 pandemic. The home environment business segment is experiencing growth through e-commerce because online consumer demand is strong and the products are well suited for direct to consumer fulfillment.
- b. Hardware and Security: This business line offers a broad range of products of over 3,000 SKUs (“stock keeping unit”) across many hardware and security categories. These brands include BULLDOG, Wordlock, ULTRA, GUARD, and EH Tate. Many of these products are placed at major brick and mortar retailers, including Target, Menard’s, Dollar General, Family Dollar, and Lowe’s.
- c. Paint Applicators: This product assortment offers a broad range of over 1,300 SKUs across multi-tiered price points. The legacy product line in this business segment is the Shur-Line product, which is known as an innovation leader in the marketplace. This business line also includes brands GAM Paint and PXpro.
- d. Plumbing: This business segment includes more than 4,000 retail ready plumbing specialty items for the hardware trade.
- e. Electrical: This business segment includes 345 SKUs focused on basic electrical items.
- f. All Other Categories: These business lines include Housewares (Helping Hand is the leading supplier of home hardware products to supermarkets nationwide (utility carts, step stools, laundry, rope, and trash bags)); hand tools; pest control (Pest Guard offers a full line of products to handle everything from annoying flies to roaches); and lawn and garden.

19. As the Company has evolved over time, it has established foundational relationships and partnerships with premier retailers, including retailers with established e-commerce platforms and channels. For example, the Company’s products can be found in the following national retail (*i.e.*, “big box”) stores: (i) Walmart; (ii) The Home Depot; (iii) Lowe’s; (iv) Dollar General; (v) Family Dollar; (vi) Menards; and (vii) Target, among others. The Debtors also have established sales channels in (a) regional retail stores, including Tractor Supply Co.,

Blaine's Farm and Fleet, and Mid-States, (b) hardware stores, including ACE Hardware, TrueValue, and Pro Hardware, (c) large supermarket chains, including Safeway, Publix, Kroger, and Albertsons, and (d) drug stores such as CVS, Rite-Aid, and Walgreens. In addition to the brick and mortar sales channels, the Company also has a growing e-commerce business through retailers with significant e-commerce presence, including Amazon, Walmart, Target, The Home Depot, Wayfair, Houzz, and Overstock.

20. The Assets primarily include inventory, accounts receivable, intellectual property related to the Debtors' brands, as well as the contracts supporting the Debtors' relationships with vendors and customers.

21. In the ordinary course of operating their businesses, the Debtors accrue accounts receivable across their various business lines. As of December 31, 2022, the Debtors have significant accounts receivable (approximately \$15 million) that are current. The Debtors' current accounts receivable represent approximately 42% of their total accounts receivable (approximately \$35 million). More than 50% of the Debtors' accounts receivable either are current or aged less than 30 days. As of December 31, 2022, the Debtors maintain inventory totaling approximately \$64 million.

#### **B. Pre-Petition Marketing Process**

22. On September 29, 2022, the Debtors engaged Paramax Group to assist with a prepetition marketing and sale process of the Company's division operating under the "Shur-Line" brand. This process included contacting a number of strategic buyers that Paramax Group believed would be the most likely to purchase the assets related to the brand at the highest valuation. Prior to the Petition Date, the Debtors terminated the engagement with Paramax Group on January 24, 2023, in favor of including the potential sale of the "Shur-Line" brand as part of the SSG sale process.



23. Additionally, and separate from the Paramax Group process, the Debtors were able to sell two related subsidiaries, NewTech Electronics Industries, Inc. and Craig Electronics Inc. The Debtors used the sale proceeds to effectuate a substantial reduction of the pre-petition indebtedness under the pre-petition credit agreement.

24. In December 2022, the Debtors and their advisors communicated with numerous investment banking and financial advisory firms regarding a potential engagement with the Debtors to assist with the marketing process and consideration of the Debtors' strategic alternatives. Ultimately, several investment banking firms and financial advisory firms provided the Debtors and their advisors with their proposed material terms of engagement. After an interview process, the Debtors ultimately engaged SSG as their new investment banker on December 20, 2022, and CMAG as their new financial advisor and Howard P. Meitiner, a managing director of CMAG, as the Debtors' Chief Restructuring Officer, on December 23, 2022.

25. SSG was retained to provide investment banking services to the Debtors, focusing on the sale of all or part of certain of the Debtors' brands and assets. Upon its retention, SSG immediately began conducting due diligence with respect to the Assets and the Debtors' operations. Based on those efforts, SSG began marketing preparations, including determining market interest in a potential sale of all or parts of the Debtors' Assets. This specifically included initiating and coordinating discussions with potential purchasers and advising the Debtors as to negotiating strategy and other matters in connection therewith.

26. Shortly after being engaged, SSG developed an extensive list of approximately 266 parties that SSG believes might be interested in acquiring some all or part of the Debtors' assets (the "Identified Parties"). SSG distributed to the Identified Parties initial opportunity materials,

including (i) a summary of the Debtors' assets, along with a general overview of the acquisition opportunity (*i.e.*, a "teaser" document); and (ii) a form of non-disclosure agreement.

27. SSG also established a process that enabled each Identified Party that executed a non-disclosure agreement to perform due diligence. This process included populating a typical sellside virtual data room that contained, among other items: (i) a confidential information memorandum; and (ii) detailed due diligence materials consistent with those customarily shared in similar sale processes.

28. As of the Petition Date, the Debtors have executed non-disclosure agreements with 46 potential bidders, and those potential bidders have received access to the virtual data room. The Debtors and their advisors are actively facilitating diligence for potential bidders throughout this process.

### **C. Sales Process and Path Forward**

29. The Debtors are seeking approval of the Bidding Procedures to establish an open process for the solicitation, receipt, and evaluation of bids on a timeline that is aligned with the milestones set forth in the Debtors' post-petition credit agreement.

30. As discussed above, the current efforts to market the Debtors' assets for sale commenced in early December 2022. The Bidding Procedures contemplate that all parties that execute confidentiality agreements in accordance with the Bidding Procedures will continue to have access to the data room throughout the sale process. The timeline set forth in the Bidding Procedures was calculated to balance the need to provide adequate notice to parties in interest and potential bidders (understanding that many parties already are familiar with the Debtors due to the pre-petition marketing process) with the desire to run an expeditious and efficient sale process and preserve value of the Debtors' estates. The Bidding Procedures are designed to generate the

highest or otherwise best available recoveries to the Debtors' stakeholders by encouraging prospective bidders to submit competitive, value-maximizing bids for the Assets.

31. More specifically, the Debtors propose the following timeline for the Sale (the "Sale Timeline"):

<b>Event</b>	<b>Date</b>
Sale Objection Deadline	March 13, 2023
Cure Cost/Assignment Objection Deadline	March 13, 2023, at 5:00 P.M. (ET)
Bid Deadline	March 15, 2023, at 5:00 P.M. (ET)
Bid Qualification Deadline	March 16, 2023
Auction	March 20, 2023, at 10:00 A.M. (ET)
Post-Auction Objection Deadline	5:00 P.M. (ET) on the later of (i) March 22, 2023, and (ii) two (2) business days after notice of the Auction results are filed with the Court
Sale Hearing	March 24, 2023, or as soon thereafter as the Court is available <sup>3</sup>
Deadline to Consummate Approved Sale Transactions	March 31, 2023

32. The proposed Bidding Procedures and the Sale Timeline will allow the Debtors to obtain the highest or otherwise best value for the Assets under the circumstances of the Chapter 11 Cases. The Debtors already conducted a robust marketing process, having reached out to approximately 266 potential buyers earlier this year. Nevertheless, the Debtors seek to ensure that the ultimate successful bid will represent the highest or otherwise best value for the Assets. The proposed Bidding Procedures make clear that the Debtors will run a comprehensive marketing

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<sup>3</sup> Subject to the Court's availability.

process. Establishing a Bid Deadline approximately 2 weeks after the Bid Procedures Hearing will provide sufficient time for potential buyers—who already should be familiar with the Assets from the approximately two-month pre-petition marketing process—to review the Debtors’ Assets and formulate a bid. The Debtors’ Assets do not require extensive diligence, and such diligence generally can be performed remotely. As such, the Debtors believe that prospective bidders will have sufficient time and information to conduct the necessary due diligence to submit binding bids in accordance with the timeline proposed herein.

33. Completion of the sale process in a timely manner will also maximize the value of the Debtors’ Assets. The proposed dates governing the sale, marketing, and auction process are within the sale milestones set forth in the proposed DIP Order. Failure to adhere to the Milestones could compromise the Debtors’ chapter 11 strategy. Accordingly, it is in the Debtors’ and their stakeholders’ best interests to complete a robust sale process as swiftly as possible. The Bidding Procedures and the proposed timeline allow the Debtors to maximize value while minimizing administrative expenses. The schedule as set forth in the Bidding Procedures is designed to maximize value for the Assets while positioning the Debtors to consummate the Sale within the milestones provided for in the DIP Order.

#### **STALKING HORSE BID**

34. As part of the sale process, the Debtors seek authority to select one or more bidders to act as stalking horse bidders (each, a “Stalking Horse Bidder”) and enter into a purchase agreement with such Stalking Horse Bidder (each such agreement, a “Stalking Horse Agreement”).

35. If the Debtors select one or more Stalking Horse Bidders, the Debtors will file with the Court and cause to be published on the case website a notice that contains information about the Stalking Horse Bidder(s), including the identity of the Stalking Horse Bidder(s), key terms of

the Stalking Horse Bidders' bid(s), and the proposed Stalking Horse Agreement(s) (the "Stalking Horse Selection Notice"). After selecting a Stalking Horse Bidder(s) that is not an insider (as defined in Section 101(31) of the Bankruptcy Code) and provided that no bid protections are offered as part of any Stalking Horse Agreement, the Debtors may submit an order under certification of counsel approving the designation of the Stalking Horse Bidder(s) and Stalking Horse Agreement(s) as stalking horse(s) without the need for further hearing. To the extent the Stalking Horse Bidder or Stalking Horse Agreement does not satisfy the foregoing criteria, the Debtors shall seek court approval of the designation of the Stalking Horse Bidder and Stalking Horse Agreement upon motion and an opportunity to be heard.

36. Having the flexibility to designate a Stalking Horse Bidder will provide the Debtors with the ability to maximize the value of the Assets. Given the Debtors' need to maximize value for creditors and other stakeholders through a timely and efficient marketing and sale process, the ability to designate a Stalking Horse Bidder (although the Debtors ultimately may, in the exercise of their business judgment, not designate a Stalking Horse Bidder at all) is a reasonable and sound exercise of the Debtors' business judgment and provides an actual benefit to the Debtors' estates.

### **THE BIDDING PROCEDURES**

#### **A. Overview<sup>4</sup>**

37. The Bidding Procedures are designed to promote a competitive and expedient sale process. If approved, the Bidding Procedures will allow the Debtors to solicit and identify bids from potential buyers that constitute the highest or best offer for the Assets on a schedule consistent with the Milestones and the Debtors' chapter 11 strategy. The Bidding Procedures provide

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<sup>4</sup> To the extent that there is any conflict between this summary and the Bidding Procedures, the latter governs in all respects. Capitalized terms used but not defined in this paragraph shall have the meanings set forth in the Bidding Procedures.

flexibility for prospective bidders and permits bids on the Assets in either (a) individual lots, (b) as a collective whole, or (c) in any combination. The Bidding Procedures allow the Debtors to determine whether pursuing multiple transactions will produce a higher or otherwise better value than a single sale of substantially all of the Debtors' assets. Therefore, the Debtors have the discretion to declare multiple successful bidders.

38. The Bidding Procedures are intended to permit a fair and efficient competitive process, and to promptly identify the bid or bids that constitute the highest or otherwise best offer for the Assets. The Sale may be for all of the Assets or for a portion thereof, as potential purchasers direct. The Bidding Procedures establish, among other things:

- the requirements a Potential Bidder must satisfy to be entitled to participate in the bidding process and become a Qualified Bidder;
- the requirements for submitting bids and the method and criteria by which such bids become entitled to be a Qualified Bid;
- the availability of, access to, and conduct during due diligence by Potential Bidders;
- the deadline by which bids must be submitted;
- the selection of one or more Stalking Horse Bidder(s);
- the procedures for conducting the Auction;
- the criteria by which a Successful Bidder or Successful Bidders will be selected by the Debtors; and
- various other matters relating to the sale process generally, the Sale Hearing, the return of any Good Faith Deposits, and the designation of Backup Bidders.

39. Importantly, the Bidding Procedures do not impair the Debtors' ability to consider all Qualified Bid proposals, and preserve the Debtors' right to modify the Bidding Procedures as necessary or appropriate to maximize value for their estates.

40. The Bidding Procedures contain the following provisions which are more fully described in the Bidding Procedures and the proposed Bidding Procedures Order:

- a. **Form of Purchase and Sale Agreement.** The Debtors have drafted a form of Purchase and Sale Agreement (together with all ancillary documents and agreements, the “PSA”) for parties interested in acquiring the Assets. The Debtors intend to provide copies of the form of PSA to all parties who express interest in submitting a Bid in the form of a section 363 sale and will also make such form of PSA available in the electronic data room established by the Debtors in connection with their sale process. Pursuant to the form of PSA, the Successful Bidder shall acquire the Assets free and clear of any and all interests to the maximum extent permitted by section 363 of the Bankruptcy Code subject to certain other conditions, with such interests to attach to the net proceeds of the sale of the Assets with the same validity and priority as such interests applied against the Assets.
- b. **Provisions Governing Qualification of Bidders.** To become a “Potential Bidder,” each person or entity (other than any Stalking Horse Bidder) must deliver to the Debtors, on or before the Bid Deadline, an executed confidentiality agreement in form and substance satisfactory to the Debtors. Each Potential Bidder must, on or before the Bid Deadline, satisfy the “Bid Requirements” by submitting to the Debtors certain documents, including, among others, a duly executed binding agreement for the Sale of the Assets (and in the case of an Auction with a Stalking Horse Bidder, a markup of the Stalking Horse Agreement) and information about the Potential Bidder’s financial condition evidencing the financial wherewithal of the Potential Bidder to consummate the Sale.
- c. **Provisions Governing Qualified Bids.** Except for a Credit Bid submitted by the Agent, to participate in the Auction, each Potential Bidder (other than any Stalking Horse Bidder, which shall be deemed to be a Qualified Bidder) must:
  - i. deliver to the Debtors by the Bid Deadline an irrevocable, good faith, and bona fide offer to purchase the Assets, which Bid is accompanied by a letter: (A) disclosing the identity of the person or entity submitting the bid; (B) stating with specificity the Assets such Potential Bidder wishes to bid on, the liabilities and obligations to be assumed by the Potential Bidder, and the amount of the cash consideration included in the bid and the value the Potential Bidder ascribes to any non-cash consideration; (C) acknowledging and representing that the Potential Bidder (I) has had an opportunity to conduct any and all due diligence regarding the Assets prior to submitting the Bid; (II) has relied solely upon its own independent review, investigation, and/or inspection of any documents and/or the Assets in making its Bid; and (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 Assets or the completeness of any information provided in connection therewith or the Auction, except as expressly stated in the Bid; (D) agreeing that the Potential Bidder’s offer is binding and irrevocable until the later of (x) the Closing Date, or (y) the date that is twenty (20) days after entry of the Sale Order (unless it is the Backup Bid in which case such offer will remain open until the Closing Date); (E) providing for a Closing Date that is consistent

with the schedule contemplated in the Bidding Procedures; (F) providing that such Bid is not subject to or conditioned on (x) obtaining any financing, (y) shareholder, board of directors, or other internal approval, or (z) the outcome or completion of a due diligence review by the Potential Bidder; (G) providing that the Potential Bidder agrees to serve as a backup bidder (the “Backup Bidder”) if the Potential Bidder’s Qualified Bid is the next highest or otherwise best bid after the Successful Bid (the “Backup Bid”) with respect to the relevant Assets; and (H) providing that the Potential Bidder submits to the jurisdiction of the Court and waives any right to a jury trial in connection with any disputes relating to Debtors’ qualification of Bids, the Auction, the construction and enforcement of these Bidding Procedures, the Sale documents, and the closing of the Sale, as applicable.

- ii. provide adequate assurance of future performance information (the “Adequate Assurance Information”), including (A) information about the Potential Bidder’s financial condition, such as federal tax returns, a current financial statement, bank account statements, and equity and financing commitment letters; (B) information demonstrating (in the Debtors’ reasonable business judgment) that the Potential Bidder has the financial capacity to consummate the proposed Sale, and (C) such additional information regarding the Potential Bidder as the Potential Bidder may elect to include, or that the Debtors, in consultation with the Consultation Parties, require. By submitting a bid, Potential Bidders agree that the Debtors may disseminate their Adequate Assurance Information to contract counterparties, as applicable, in the event that the Debtors determine such bid to be a Qualified Bid; and
- iii. deliver (A) a Good Faith Deposit in the form of a certified check or wire transfer, payable to the order of the Debtors, in an amount equal to ten percent (10%) of the total cash and non-cash consideration of the Bid, which funds will be deposited into an escrow account to be identified and established by the Debtors;<sup>5</sup> (B) written evidence, documented to the Debtors’ satisfaction, that demonstrates the Potential Bidder has available cash, a commitment for financing if selected as the Successful Bidder (as defined below) with respect to the Assets, and such other evidence of ability to consummate the transaction satisfactory to the Debtors, including proof that such funding commitments or other financing are not subject to any internal approvals, syndication requirements, diligence or credit committee approvals (provided that such commitments may have covenants and conditions acceptable to the Debtors); and (C) evidence that the Potential

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<sup>5</sup> The Successful Bidder and Next-Highest Bidder (as such terms are defined Bidding Procedures) shall be required to supplement their Good Faith Deposits, if necessary, within one (1) business day of the close of the Auction so that such Good Faith Deposits shall be equal to an amount that is ten percent (10%) of the Successful Bid or Next-Highest Bid, as applicable. The Debtors reserve the right to increase or decrease the Good Faith Deposit for one or more Qualified Bidders (as defined Bidding Procedures) in their sole discretion.



Bidder has obtained all required organizational authorization and approval with respect to the submission of its Bid.

- iv. must include the following representations and warranties: (a) a statement that the Prospective Bidder has had an opportunity to conduct any and all due diligence regarding the Debtors' businesses and the applicable Assets prior to submitting its bid; (b) a statement that the Prospective Bidder has relied solely upon its own independent review, investigation, and/or inspection of any relevant documents and the Assets in making its bid and did not rely on any written or oral statements, representations, promises, warranties, or guaranties whatsoever, whether express or implied, by operation of law or otherwise, regarding the Debtors' businesses or the applicable Assets or the completeness of any information provided in connection therewith; (c) a statement that all proof of financial ability to consummate the applicable Sale Transaction in a timely manner and all information provided to support adequate assurance of future performance is true and correct; and (d) a statement that the Prospective Bidder agrees to be bound by the terms of the Bidding Procedures
- d. **Credit Bidding.** A Prospective Bidder holding a perfected security interest in any of the Assets ("Secured Creditor") may seek to credit bid all or a portion of the Prospective Bidder's claims for the collateral in which it holds a perfected security interest (each such bid, a "Credit Bid") in accordance with section 363(k) of the Bankruptcy Code. A Credit Bid may be applied only with respect to those Assets in which the party submitting such Credit Bid holds a perfected security interest. In order to qualify to Credit Bid, a Secured Creditor, other than Agent, acting on behalf of the Pre-Petition Lenders and DIP Lenders, (i) must be a Qualified Bidder and a Credit Bid must qualify as a Qualified Bid, and (ii) that has a Security Interest in the assets being sold that is disputed, must have its Security Interest allowed prior to being able to submit a Credit Bid.
- e. **Stalking Horse Bidders.** To the extent provided for in the Bidding Procedures Order, the Debtors shall be authorized, but not obligated, in an exercise of their business judgment, to: select one or more Qualified Bidders to act as Stalking Horse Bidders in connection with the Sale and enter into one or more Stalking Horse Agreements. Any Stalking Horse Bidder (if any) will be considered a Qualified Bidder and the bid reflected in the Stalking Horse Bid (including as many be increased at the Auction (if any)) will be considered a Qualified Bid, as more fully set forth in the Bid Procedures. Subject to the terms of the Bidding Procedures, in the event of a competing Qualified Bid, the Stalking Horse Bidder (if any) will be entitled, but not obligated, to submit overbids and will be entitled in any such overbids to credit bid all of its claims for bid protections pursuant to section 363(k) of the Bankruptcy Code.
- f. **Modification of Bid and Auction Procedures.** The Debtors may announce at the Auction additional procedural rules (*e.g.*, the amount of time to make Subsequent Bids or the requirement that parties submit "best and final" Bids) for conducting

the Auction or otherwise modify the Bidding Procedures; provided that such rules (1) are not materially inconsistent with the Bidding Procedures, the Bankruptcy Code, or any order of the Court, and (2) are disclosed to each Qualified Bidder at the Auction. The Debtors and their estates in consultation with the Consultation Parties, reserve the right to modify the Bidding Procedures at or prior to the Auction, including, without limitation, to extend the deadlines set forth in the Bidding Procedures, modify bidding increments, waive terms and conditions set forth herein with respect to any or all Potential Bidders (including, without limitation, the Bid Requirements), impose additional terms and conditions with respect to any or all potential bidders, adjourn, postpone, or cancel the Auction at or prior to the Auction, and adjourn the Sale Hearing.

- g. **Closing with Alternative Backup Bidders.** At the Auction, the Debtors may designate the Backup Bid (and the corresponding Backup Bidder) in the event that a Successful Bidder does not close the Sale. In the event that a Successful Bidder fails to close prior to the date designated in the applicable Purchase Agreement (or such date as may be extended by the Debtors), the Debtors, upon written notice to the Backup Bidder, may designate the applicable Backup Bid as the Successful Bid for the Assets, the Backup Bidder will be deemed to be a Successful Bidder for such Assets, and the Debtors will be authorized, but not directed, to close with the Backup Bidder subject to the terms of the Backup Bid without the need for further order of the Court and without the need for further notice to any interested parties.
- h. **Provisions Governing the Auction.** If more than one Qualified Bid is submitted by the Bid Deadline with regard to the Assets, the Debtors will conduct an auction telephonically, by videoconference, or at the offices of proposed counsel to the Debtors, Reed Smith LLP, 599 Lexington Avenue, 22<sup>nd</sup> Floor New York, New York 10022, on **March 20, 2023**, which is three Business Days after the Bid Deadline (or such later time or such other place as the Debtors shall designate and notify all Qualified Bidders who have submitted Qualified Bids) for consideration of the Qualified Bids, each as may be increased at such Auction. For the avoidance of doubt, the Debtors reserve the right to conduct the Auction telephonically.

**B. Notice Procedures for the Sale, Auction, and Sale Hearing**

41. The Debtors request approval of the Notice of Auction and Sale Hearing, substantially in the form attached to the Bidding Procedures Order as **Exhibit 2**. Within two (2) business days of entry of the Bidding Procedures Order, the Debtors will serve the Notice of Auction and Sale Hearing by first-class mail upon: (i) counsel to any Stalking Horse Bidder; (ii) all persons and entities that are known by the Debtors to have expressed an interest to the Debtors in a Sale Transaction involving any of the Assets during the past 12 months, including

any person or entity that has submitted a Bid for any of the Assets; (iii) all persons and entities known by the Debtors to have asserted any lien, claim, interest, or encumbrance in the Assets (for whom identifying information and addresses are available to the Debtors), including, for the avoidance of doubt, the DIP Lenders; (iv) all relevant non-debtor parties (each, a “Counterparty”) to any Contract that may be assumed or rejected in connection with a Sale Transaction; (v) all of the Debtors’ known creditors (for whom identifying information and addresses are available to the Debtors); (vi) any governmental authority known to have a claim against the Debtors in these Chapter 11 Cases; (vii) the office of the U.S. Trustee; (viii) all applicable federal, state, and local taxing authorities, including the Internal Revenue Service; (ix) the United States Attorney’s Office for the District of Delaware; (x) the Office of the Attorney General and the Secretary of State in each state in which the Debtors operate; (xi) counsel for any official committee appointed in these Chapter 11 Cases; (xii) all of the parties entitled to notice pursuant to Bankruptcy Rule 2002; and (xiii) all other parties as directed by the Court (collectively, the “Sale Notice Parties”).

42. The Debtors shall also post the Notice of Auction and Sale Hearing and the Bidding Procedures Order on the website of the Debtors’ claims and noticing agent.

43. As soon as reasonably practicable following conclusion of the Auction, the Debtors propose to file a notice on the Court’s docket identifying the Successful Bidder(s) for the Assets and any applicable Backup Bidder(s).

**C. Assumption and Assignment Procedures**

44. In connection with any Sale Transaction, the Debtors may seek to assume and assign to a Successful Bidder one or more contracts or non-residential leases, as selected by such Successful Bidder in its Successful Bid, in accordance with the Assumption and Assignment Procedures. The Assumption and Assignment Procedures are designed to, among other things,

govern the Debtors' provision of Adequate Assurance Information and the provision of notice to all Counterparties. The proposed Assumption and Assignment Procedures are as follows:

- a. On or before February 27, 2023, the Debtors shall file with the Court and serve on each Non-Debtor counterparty to any existing contract with the Debtor (each, a "Non-Debtor Counterparty"), the Notice of Assumption and Assignment, regardless of whether the contract has been listed as a Designated Contract. In the event that the Debtors identify any Non-Debtor Counterparties which were not served with the Notice of Assumption and Assignment, the Debtors may subsequently serve (by overnight mail) such Non-Debtor Counterparty with a Notice of Assumption and Assignment, and the following procedures will nevertheless apply to such Non-Debtor Counterparty; provided, however, that the Cure Cost/Assignment Objection Deadline with respect to such Non-Debtor Counterparty shall be the date that is fourteen (14) calendar days after service of the Notice of Assumption and Assignment.
- b. The Notice of Assumption and Assignment served on each Non-Debtor Counterparty shall: (i) identify each Designated Contract; (ii) list the proposed calculation of the cure amounts that the Debtors believe must be paid to cure all defaults outstanding under the Designated Contract as of such date (the "Cure Costs"); (iii) include a statement that assumption and assignment of such Designated Contract is not required or guaranteed; and (iv) inform such Non-Debtor Counterparty of the requirement to file any Cure Cost/Assignment Objections by the Cure Cost/Assignment Objection Deadline. Service of a Notice of Assumption and Assignment does not constitute an admission that a particular Designated Contract is an executory contract or unexpired lease of property, or confirm that the Debtors are required to or will assume and/or assign such Designated Contract as a part of any transaction.
- c. Objections (a "Cure Cost/Assignment Objection"), if any, to (i) the scheduled Cure Costs, and/or (ii) the potential assumption, assignment, and/or transfer of such Designated Contract (including the transfer of any related rights or benefits thereunder), other than objections that relate specifically to the identity of the Successful Bidder, must (x) be in writing, (y) state with specificity the nature of such objection, including the amount of Cure Costs in dispute, and (z) be filed with the Court and properly served on the Notice Parties (as defined in the Bidding Procedures Order) so as to be received no later than **March 13, 2023, at 5:00 p.m. (prevailing Eastern Time)** (the "Cure Cost/Assignment Objection Deadline").
- d. Objections (a "Post-Auction Objection") of any Non-Debtor Counterparty related solely to the identity of and adequate assurance of future performance provided by the Successful Bidder must (x) be in writing, (y) state with specificity the nature of such objection, and (z) be filed with the Court and properly served on the Notice Parties so as to be received no later than **5:00 p.m. (prevailing Eastern Time) on the later of (i) March 22, 2023, and (ii) two (2) business days after the notice of**

**Auction results are filed with the Court** (the “Post-Auction Objection Deadline”).

- e. Any Non-Debtor Counterparty to a Designated Contract who fails to timely file and properly serve a Cure Cost/Assignment Objection or Post-Auction Objection as provided herein will (i) be forever barred from objecting to the Cure Costs and from asserting any additional cure or other amounts with respect to such Designated Contract in the event it is assumed and/or assigned by the Debtors and the Debtors and any successor to the Debtors on any such Designated Contract shall be entitled to rely solely upon the Cure Costs, and (ii) be deemed to have consented to the assumption, assignment and/or transfer of such Designated Contract (including the transfer of any related rights and benefits thereunder) to the relevant Successful Bidder and shall be forever barred and estopped from asserting or claiming against the Debtors or such Successful Bidder that any additional amounts are due or defaults exist, or conditions to assumption, assignment, and/or transfer must be satisfied under such Designated Contract, or that any related right or benefit under such Designated Contract cannot or will not be available to the Successful Bidder.
- f. Consideration of unresolved Cure Cost/Assignment Objections and Post-Auction Objections relating to all Designated Contracts, if any, will be held at the Sale Hearing, provided, however, that (i) any Designated Contract that is the subject of a Cure Cost/Assignment Objection with respect solely to the amount of the Cure Cost may be assumed and assigned prior to resolution of such objection and (ii) the Debtors may adjourn a Cure Cost/Assignment Objection in their discretion.
- g. A timely filed and properly served Cure Cost/Assignment Objection or Post-Auction Objection will reserve the filing Non-Debtor Counterparty’s rights relating to the Designated Contract, but will not be deemed to constitute an objection to the relief generally requested in the Motion with respect to the approval of the Sale.
- h. The inclusion of a Designated Contract or Cure Costs with respect thereto on the Notice of Assumption and Assignment or the notice of Auction results shall not constitute or be deemed a determination or admission by the Debtors, a Stalking Horse Bidder, a Successful Bidder, or any other party in interest that such contract is an executory contract or an unexpired lease within the meaning of the Bankruptcy Code. The Debtors reserve all of their rights, claims, and causes of action with respect to each Designated Contract. The Debtors’ inclusion of any Designated Contract on the Notice of Assumption and Assignment or the notice of Auction results shall not be a guarantee that such contract ultimately will be assumed or assumed and assigned. The initial Notice of Assumption and Assignment and any subsequent notice shall be without prejudice to a Stalking Horse Bidder’s or Successful Bidder’s rights under the applicable purchase agreement to subsequently (1) exclude a contract from the schedule of Designated Contracts previously included on such notice or (2) include additional contracts for assumption and assignment in accordance with the applicable Stalking Horse Bidder’s or Successful Bidder’s purchase agreement.

- i. The Debtors' decision to assume and assign the Designated Contracts to the relevant Successful Bidder is subject to the Court's approval and the closing of the Sale. Accordingly, absent the Court's approval and the closing of the Sale, the Designated Contracts shall not be deemed assumed or assumed and assigned, and shall in all respects be subject to further administration by the Debtors and their estates under the Bankruptcy Code in connection with the Chapter 11 Cases.

### **BASIS FOR RELIEF REQUESTED**

#### **I. The Bidding Procedures Are Appropriate and in the Best Interests of the Debtors, Their Estates, and Creditors.**

##### **A. The Bidding Procedures Are Reasonable, Appropriate, and Will Maximize Value.**

45. The paramount goal in any proposed sale of property of the estate is to maximize the proceeds received by the estate. *See Burtch et al. v. Ganz, et al. (In re Mushroom Transp. Co.)*, 382 F.3d 325, 339 (3d Cir. 2004) (noting debtor in possession "had a fiduciary duty to protect and maximize the estate's assets"); *Official Comm. of Unsecured Creditors of Cybergenics, Corp v. Chinery*, 330 F.3d 548, 573 (3d Cir. 2003) (same); *Four B. Corp. v. Food Barn Stores, Inc. (In re Barn Stores, Inc.)*, 107 F.3d 558, 564–65 (8th Cir. 1997) (observing in bankruptcy sales, "a primary objective of the Code [is] to enhance the value of the estate at hand"); *Metro. Airports Comm'm v. Northwest Airlines, Inc. (In re Midway Airlines, Inc.)*, 6 F.3d 492, 494 (7th Cir. 1993) ("Section 365 . . . advances one of the Code's central purposes, the maximization of the value of the bankruptcy estate for the benefit of creditors.").

46. To that end, courts uniformly recognize that procedures 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 Calpine Corp. v. O'Brien Env'tl. Energy, Inc. (In re O'Brien Env'tl. Energy, Inc.)*, 181 F.3d 527, 537 (3d Cir. 1999); *In re Fin'l News Network, Inc.*, 126 B.R. 152, 156 (Bankr. S.D.N.U. 1992) ("Court-imposed rules for the disposition of assets . . . [should] provide an adequate basis for comparison of offers, and [should

provide for fair and efficient resolution of bankrupt estates.”); *see also Official Comm. of Subordinated Bondholders v. Integrated Res. Inc. (In re Integrated Res. Inc.)*, 147 B.R. 650, 659 (S.D.N.Y. 1992) (stating bidding procedures “encourage bidding and . . . maximize the value of the Debtors’ assets”).

47. The Debtors believe that the Bidding Procedures will provide an orderly and uniform mechanism by which interested buyers and investors can submit offers for the Assets, and will ensure a competitive and fair bidding process. The Debtors also believe that the Bidding Procedures will promote active bidding from seriously interested parties and will confirm the best and highest offer reasonably available for such Assets. The Bidding Procedures will allow the Debtors to conduct the Auction, subject to the terms of the Bidding Procedures, in a controlled, fair, and open manner that will encourage participation by financially capable bidders that demonstrate the ability to close a transaction. The Debtors believe that the Bidding Procedures will encourage bidding, are consistent with other procedures routinely approved by courts in this and other districts, and are appropriate under the relevant standards governing auction proceedings and bidding incentives in bankruptcy proceedings.

48. Courts in this District and other districts routinely approve procedures substantially similar to the proposed Bidding Procedures, including procedures providing for sale timelines consistent with (or more accelerated) than the timeline proposed herein. *See, e.g., In re Mabvax Therapeutics Holdings, Inc.*, No. 19-10603 (CSS) [D.I. 78] (Bankr. D. Del. Apr. 8, 2019) (approving bidding procedures with a bid deadline 18 days after entry of bidding procedures order); *In re Things Remembered, Inc.*, No. 19-10248 (CSS) [D.I. 100] (Bankr. D. Del. Mar. 13, 2019) (approving bidding procedures with bid deadline 7 days after entry of order and auction scheduled for 26 days after entry of order); *In re Sequential Brads Group, Inc.*, No. 21-11194

(JTD) (Bankr. D. Del. Sept. 24, 2021) [D.I. 138] (approving bidding procedures with bid deadline 30 days after entry of order allowing for bids for some or substantially all assets of the debtor); *In re Charlotte Russe Holding, Inc.*, No. 19-10210 (LSS) [D.I. 199] (Bankr. D. Del. Feb. 21, 2019) (approving bidding procedures with bid deadline 10 days after entry of order and auction scheduled for 29 days after entry of order).

49. Accordingly, the Bidding Procedures should be approved as the procedures are consistent with procedures approved by courts in this District in cases of similarly-situated debtors and are otherwise reasonable, appropriate, and in the best interests of the Debtors, their estates and all parties in interest.

**B. The Qualified Bid Requirements Are Reasonable and Appropriate.**

50. The Bidding Procedures recognize and comply with the Debtors' fiduciary obligations to maximize sale value because they do not impair the Debtors' ability to consider all Qualified Bids made at or prior to the Auction, and they preserve the Debtors' right to modify the Bidding Procedures as necessary or appropriate to maximize value for the Debtors' estates.

51. In the event that the Debtors obtain more than one competing Qualified Bid with respect to the Assets and the Auction is held, bidding shall commence at the amount of the highest or otherwise best bid received for such assets, which determination will be communicated to Qualified Bidders prior to the commencement of the Auction, and the relevant Qualified Bidders may submit successive bids in higher increments (in amounts to be determined at or prior to the Auction).

**C. The Notice Procedures for the Sale, Bidding Procedures, Auction, and Sale Hearing Are Reasonable and Appropriate.**

52. Pursuant to Bankruptcy Rules 2002(a) and (c), the Debtors are required to notify creditors of the Sale, including a disclosure of the time and place of any auction, the terms and



conditions of the sale, and the deadline for filing any objections. The Debtors submit that the notice procedures described above fully comply with Bankruptcy Rule 2002 and are reasonably calculated to provide timely and adequate notice of the Sale, Bidding Procedures, Auction, and Sale Hearing to the Debtors' creditors and all other parties in interest that are entitled to notice, as well as those parties that have expressed a bona fide interest in acquiring the Assets.

53. Accordingly, the Debtors respectfully request that the Court approve the notice procedures set forth in this Motion, including the form and manner of service and publication of the Notice of Auction and Sale Hearing, and that no other or further notice of the Sale, Bidding Procedures, Auction, or Sale Hearing is necessary or required.

**D. The Assignment Procedures Are Reasonable and Appropriate.**

54. As part of this Motion, the Debtors also seek authority under sections 105(a) and 365 of the Bankruptcy Code to assume and assign the Designated Contracts to the Successful Bidder. The Bidding Procedures Order specifies the process by which the Debtors will serve the Notice of Assumption and Assignment and the procedures and deadlines for Non-Debtor Counterparties to file Cure Cost/Assignment Objections and/or Post-Auction Objections.

55. The Assignment Procedures ensure that each Non-Debtor Counterparty will have sufficient notice of such potential assumption and assignment, and an opportunity to contest the Cure Amount, if any, for its Designated Contract, as well as the ability of the relevant Successful Bidder to provide adequate assurance of future performance with respect to such Designated Contract.

56. Accordingly, the Debtors submit that the Assignment Procedures are fair and reasonable, and request that the Court approve such procedures.

**II. Approval of the Sale is Appropriate and in the Best Interests of the Debtors' Estates.**

**A. The Sale is Authorized by Section 363 of the Bankruptcy Code as a Sound Exercise of the Debtors' Business Judgment.**

57. Section 363 of the Bankruptcy Code provides that a debtor, “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). A debtor must demonstrate a sound business justification for the sale or use of assets outside the ordinary course of business. *See, e.g., Myers v. Martin (In re Martin)*, 91 F.3d 389, 395 (3d Cir. 1996); *Dai-Ichi Kangyo Bank, Ltd. V. Montgomery Ward Holding Corp. (In re Montgomery Ward Holding Corp.)*, 242 B.R. 147, 153 (D. Del. 1999); *In re Del. & Hudson Ry. Co.*, 124 B.R. 169, 175-76 (D. Del. 1991).

58. The “sound business reason” test requires a debtor to establish four elements in order to justify the sale or lease of property outside the ordinary course of business, namely: (1) that a sound business purpose justifies the sale of assets outside the ordinary course of business; (2) that accurate and reasonable notice has been provided to interested persons; (3) that the debtor has obtained a fair and reasonable price; and (4) good faith. *See generally In re Abbotts Dairies of Penn., Inc.*, 788 F.2d 143 (3d Cir. 1986); *see also Titusville Country Club*, 128 B.R. 396, 399 (Bankr. W.D. Pa. 1991); *In re Phoenix Steel Corp.*, 82 B.R. 334, 335-36 (Bankr. D. Del. 1987); *Comm. Of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1071 (2d Cir. 1983). A debtor’s showing of a sound business purpose need not be unduly exhaustive, rather, a debtor is “similarly situated to justify the proposed disposition with sound business reasons.” *In re Baldwin United Corp.*, 43 B.R. 888, 906 (Bankr. S.D. Ohio 1984). Whether or not there are sufficient business reasons to justify a transaction depends upon the facts and circumstances of each case. *Lionel*, 722 F.2d at 1071.

59. Pursuant to the Bidding Procedures, the Debtors, in consultation with their advisors, will reserve the right to disregard and disqualify any bid that does not contain a fair and adequate price or the acceptance of which would not be in the best interests of the estates or the Auction. In addition, the value of the Assets will be tested through the Auction and sale process provided for in the Bidding Procedures. Consequently, the fairness and reasonableness of the consideration to be paid by the Successful Bidder for the Assets ultimately will be demonstrated by adequate “market exposure” and an open and fair auction and sale process—the best means for establishing whether a fair and reasonable price is being paid. The Successful Bid will constitute the highest or best offer for the Assets, and may provide a greater recovery for the Debtors’ estates than is likely to be provided by any other available alternative. As a result, the Debtors’ determination to explore a sale of the Assets through an auction and sale process, as provided for in the Bidding Procedures, is a valid and sound exercise of the Debtors’ business judgment. Accordingly, the Debtors respectfully request that the Sale be approved.

**B. A Sale of the Assets Free and Clear of Liens, Claims, Interest and Encumbrances Is Appropriate Under Section 363(f) of the Bankruptcy Code.**

54. In the interest of attracting the highest and best bids for the Assets, the Debtors submit that the Sale should be free and clear of all encumbrances in accordance with section 363(f) of the Bankruptcy Code, with any such encumbrances attaching to the net proceeds of the Sale.

55. Section 363(f) of the Bankruptcy Code authorizes a debtor to sell assets free and clear of liens, claims, interests, and encumbrances if:

- (1) applicable non-bankruptcy law permits sale of such property free and clear of such interests;
- (2) such entity consents;
- (3) such interest is a lien and the price at which such property is to be sold is greater than the 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).

56. Because section 363(f) of the Bankruptcy Code is drafted in the disjunctive, satisfaction of any one of its five requirements will suffice to permit the sale of the Assets “free and clear” of all encumbrances. *In re Kellstrom Indus., Inc.*, 282 B.R. 787, 793 (Bankr. D. Del. 2002) (“Section 363(f) is written in the disjunctive, not the conjunctive, and if any of the five conditions are met, the debtor has the authority to conduct the sale free and clear of all liens”); *Citicorp Homeowners Servs., Inc. v. Elliot (In re Elliot)*, 94 B.R. 343, 345 (E.D. Pa. 1988) (same); *see also Michigan Employment Sec. Comm’n v. Wolverine Radio Co. (In re Wolverine Radio Co.)*, 930 F.2d 1132, 1147 n.24 (6th Cir. 1991) (same); *In re Zeigler*, 320 B.R. 362, 381 (Bankr. N.D. Ill. 2005) (same); *In re Bygaph, Inc.*, 56 B.R. 596, 606 n.8 (Bankr. S.D.N.Y. 1986).

57. The Court also may authorize the sale of a debtor’s assets free and clear of any liens pursuant to section 105 of the Bankruptcy Code, even if section 363(f) does not apply. *See Matter of Selby Farms*, 15 B.R. 372, 375 (Bankr. S.D. Miss. 1981) (“The power of the Bankruptcy Court to sell property free and clear of liens has long been recognized.” (citing *Van Huffel v. Harkelrode*, 284 U.S. 225, 227-28 (1931))); *In re Trans World Airlines, Inc.*, No. 01-0056, 2001 WL 1820325, at \*3 (Bankr. D. Del. Mar. 27, 2001) (“Bankruptcy courts have long had the authority to authorize the sale of estate assets free and clear even in the absence of § 363(f.)”; *see also Volvo White Truck Corp. v. Chambersberg Beverage, Inc. (In re White Motor Credit Corp.)*, 75 B.R. 944, 948 (Bankr. N.D. Ohio 1987) (“Authority to conduct such sales [free and clear of liens] is within the court’s equitable powers when necessary to carry out the provisions of Title 11.”).

58. The Debtors submit that one or more of the conditions set forth in section 363(f) of the Bankruptcy Code will be satisfied with respect to the Sale. To the extent lienholders consent or otherwise do not object, section 363(f)(2) allows the sale free and clear of liens. *See In re Christ Hosp.*, 502 B.R. 158, 174 (Bankr. D.N.J. 2013) (“Given adequate notice, failure to object to a § 363 sale has been found to constitute consent per § 363(f)(2) to a ‘free and clear’ sale of the nonobjector’s interests in property being sold.”). The Debtors believe that at least section 363(f)(2) will be satisfied because each of the parties holding liens on the Assets will consent to or, absent any objection to the Sale, will be deemed to have consented to the Sale. Any lienholder also will be adequately protected by having its liens, if any, attach to the proceeds of the Sale, in the same order of priority, with the same validity, force, and effect that such creditor had prior to such sale, subject to any claims and defenses that the Debtors and their estates may possess with respect thereto. For the avoidance of doubt, nothing in this Motion, the Bidding Procedures, or the Bidding Procedures Order waives or modified any party’s right to object to any sale proposed in connection herewith, with all such rights being expressly preserved.

59. Additionally, section 363(f)(4) permits the sale because there is a bona fide dispute as to the interest of any vendor lienholder. Depending upon the value of the successful bid, the Debtors may in good faith dispute the interest of any statutory lien claimant to being treated as a secured claim holder in these chapter 11 cases.

60. Accordingly, the Debtors request that the Court authorize the sale of the Assets free and clear of any liens, claims, interests and encumbrances, to the fullest extent permitted by section 363(f) of the Bankruptcy Code.

**C. The Successful Bidder(s) Will be Entitled to the Full Protection of Section 363(m) of the Bankruptcy Code, and the Sale Does Not Violate Section 363(n) of the Bankruptcy Code.**

61. Section 363(m) of the Bankruptcy Code protects the sale of a debtor's property to a good faith purchaser. Specifically, section 363(m) 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.

11 U.S.C. § 363(m).

62. Courts in this Circuit have upheld section 363 purchase agreements “negotiated, proposed, and entered into . . . in good faith, without collusion . . . [resulting from] arm’s-length bargaining with . . . parties represented by independent counsel.” *In re THQ Inc.*, No. -12-13398 (MFW), 2013 Bankr. LEXIS 781 (Bankr. D. Del. Jan. 24, 2013); *In re Gottschalks Inc.*, Nos. 09-10157 (KJC), 526, 603, 2009 Bankr. LEXIS 4880 (Bankr. D. Del. June 10, 2009); *In re Against All Odds USA, Inc.*, Nos. 09-10117 (DHS), TIN: 22-3391747, 2009 Bankr. LEXIS 5234, at \*1 (Bankr. D.N.J. May 28, 2009); *In re Allegheny Health, Educ. & Research Found.*, Case Nos. 98-25773, 98-25774, 98-25775, 98-25776, 98-25777, 1998 Bankr. LEXIS 1684, at \*31 (Bankr. W.D. Pa. Oct. 30, 1998). A sale to a good-faith purchaser cannot be avoided under section 363(m), unless the sale authorization was stayed pending appeal. *See* 11 U.S.C. § 363(m) (“The reversal or modification of an authorization under subsection (b) of this section of a sale . . . does not affect the validity of [the] sale . . . to an entity that purchased . . . the property in good faith . . .”). However, “[t]he trustee may avoid a sale . . . if the sale price was controlled by an agreement among potential bidders . . .” *Id.* § 363(n). Additionally, for the sale to be considered in good-faith, consideration must: (1) be fair and reasonable; (2) be the highest and best offer for the

property, and (3) constitute reasonably equivalent value, fair value, and fair consideration. *Gottschalks*, 2009 Bankr. LEXIS 4880, at \*5.

63. The Debtors submit, and the testimony presented at the Sale Hearing will demonstrate, that the terms and conditions of the Sale will have been negotiated by the Debtors and the Successful Bidder at arm's length and in good faith, with the assistance of the Debtors' professional advisors, and that the parties did not engage in any conduct that would cause or permit the Sale to be avoided under section 363(n) of the Bankruptcy Code.

64. Accordingly, the Debtors request that the Court make a finding at the Sale Hearing that the Successful Bidder purchased the Assets in good faith and that such purchase will be entitled to the full protections of section 363(m) of the Bankruptcy Code.

**III. Assumption and Assignment of the Designated Contracts Is Authorized by Section 365 of the Bankruptcy Code.**

**A. The Debtors' Sound Business Judgment Supports the Assumption and Assignment of the Designated Contracts.**

65. Sections 365(a) and (b) of the Bankruptcy Code authorize a debtor in possession to assume, subject to the court's approval, executory contracts or unexpired leases of the debtor. Under section 365(a) of the Bankruptcy Code, a debtor, "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). Section 365(b)(1) of the Bankruptcy Code, in turn, codifies the requirements for assuming an unexpired lease or executory contract of a debtor, providing that:

(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).

66. The standard applied by the Third Circuit in determining whether an executory contract or unexpired lease should be assumed is the “business judgment” test, which requires a debtor to determine that the requested assumption or rejection would be beneficial to its estate. *See Sharon Steel Corp. v. Nat’l Fuel Gas Distrib. Corp.*, 872 F.2d 36, 40 (3d Cir. 1989); *see also NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 523 (1984) (describing business judgment test as “traditional”) (superseded in part by 11 U.S.C. § 1113).

67. Courts generally will not second-guess a debtor’s business judgment concerning the assumption of an executory contract. *See In re Decora Indus., Inc.*, No. 00-4459 (JJF), 2002 WL 32332749, at \*8; *Official Comm. for Unsecured Creditors v. Aust (In re Network Access Sols., Corp.)*, 330 B.R. 67, 75 (Bankr. D. Del. 2005) (“The standard for approving the assumption of an executory contract is the business judgment rule”); *In re Exide Techs.*, 340 B.R. 222, 239 (Bankr. Del. 2006) (“The propriety of a decision to reject an executory contract is governed by the business judgment standard”).

68. To determine if the business judgment standard is met, the court is “required to examine whether a reasonable business person would make a similar decision under similar circumstances.” *In re AbitibiBowater Inc.*, 418 B.R. 815, 831 (Bankr. D. Del. 2009). “This is not a difficult standard to satisfy and requires only a showing that rejection will benefit the estate.” *Id.* (citations omitted). Specifically, a court should find that the assumption or rejection is elected on



“an informed basis, in good faith, and with the honest belief that the assumption . . . [is] in the best interests of [the Debtors] and the estate.” *Network Access Sols.*, 330 B.R. at 75. Under this standard, a court should approve a debtor’s business decision unless that decision is the product of bad faith or a gross abuse of discretion. *See In re Federal Mogul Global, Inc.*, 293 B.R. 124, 126 (D. Del. 2003).

69. In the present case, the Debtors’ assumption and assignment of the Designated Contracts to the relevant Successful Bidder will meet the business judgment standard and satisfy the requirements of section 365 of the Bankruptcy Code. The assumption and assignment will likely be necessary for the Successful Bidder to conduct business going forward, and since it is anticipated that no Successful Bidder would take the Assets without certain Designated Contracts, the assumption and assignment of such agreements is essential to securing the highest or best offer for the Assets.

70. Consequently, the Debtors submit that the Assignment Procedures are fair and reasonable, and respectfully request that the Court approve such procedures and authorize the Debtors to assume and assign the Designated Contracts in the manner provided for herein.

**B. Adequate Assurance of Future Performance Will Be Demonstrated with Respect to the Designated Contracts.**

71. A debtor in possession may assign an executory contract or an unexpired lease if it assumes the agreement in accordance with section 365(a) of the Bankruptcy Code and provides adequate assurance of future performance by the assignee, whether or not there has been a default under the agreement. *See* 11 U.S.C. § 365(c)(2).

72. The meaning of “adequate assurance of future performance” depends on the facts and circumstances of each case but should be given “practical, pragmatic construction.” *EBG Midtown South Corp. v. McLaren/Hart Envtl. Eng’g Corp. (In re Sanshoe Worldwide Corp.)*, 139

B.R. 585, 592 (S.D.N.Y. 1992) (citations omitted), *aff'd*, 993 F.2d 300 (2d Cir. 1993); *In re Prime Motor Inns Inc.*, 166 B.R. 993, 997 (Bankr. S.D. Fla. 1994); *In re Rachels Indus. Inc.*, 109 B.R. 797, 803 (Bankr. W.D. Tenn. 1990); *Carlisle Homes, Inc. v. Azzari (In re Carlisle Homes, Inc.)*, 103 B.R. 524, 538 (Bankr. D.N.J. 1988).

73. Significantly, among other things, adequate assurance of future performance may be provided by demonstrating the assignee's financial health and experience in managing the type of enterprise or property assigned. *See, e.g., In re Bygaph, Inc.*, 56 B.R. 596, 605-06 (Bankr. S.D.N.Y. 1986) (stating that adequate assurance of future performance is present when the prospective assignee of a lease from the debtor has financial resources and has expressed willingness to devote sufficient funding to the business in order to give it a strong likelihood of succeeding).

74. Pursuant to the Bidding Procedures, the Potential Bidders are required to provide to the Debtors such financial and other information providing adequate assurance of future performance under any executory contracts and unexpired leases to be assumed pursuant to section 365 of the Bankruptcy Code in connection with the Sale, in a form requested by the Debtors. Within one (1) business day after receipt, the Debtors shall provide such information to any Non-Debtor Counterparty that has requested, in writing, such information. Moreover, under the Assignment Procedures, the Non-Debtor Counterparties will have the opportunity to object to adequate assurance of future performance by the relevant Successful Bidder.

75. Accordingly, the Debtors submit that the assumption and assignment of the Designated Contracts as set forth herein should be approved pursuant to section 365 of the Bankruptcy Code.

**REQUESTS FOR IMMEDIATE RELIEF & WAIVER OF STAY**

76. Pursuant to Bankruptcy Rules 6004(h) and 6006(d), the Debtors seek a waiver of any stay of the effectiveness of the Bidding Procedures Order, any Sale Order and any other order authorizing the assumption or assumption and assignment of a Contract in connection with a Sale Transaction. Bankruptcy Rule 6004(h) provides that “a[n] order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of 14 days after entry of the order, unless the court orders otherwise.” Fed. R. Bankr. P. 6004(h). Bankruptcy Rule 6006(d) provides that “a[n] order authorizing the trustee to assign an executory contract or unexpired lease under § 365(f) is stayed until the expiration of 14 days after entry of the order unless the court orders otherwise.” Fed. R. Bankr. P. 6006(d).

77. As set forth above, the relief requested herein is necessary and appropriate to maximize the value of the Debtors’ estates for the benefit of their economic stakeholders. Accordingly, the Debtors submit that ample cause to justify the waiver of the 14-day stay imposed by Bankruptcy Rules 6004(h) and 6006(d), in each case, to the extent that such stay applies to the relief requested herein.

**RESERVATION OF RIGHTS**

78. Nothing contained herein is intended, or should be construed, as an admission of the validity of any claim against the Debtors or a waiver of the Debtors’ rights to dispute any claim. Nothing contained herein is intended, or should be construed, as an approval, assumption, or rejection of any agreement, contract, or lease under section 365 of the Bankruptcy Code.

**NOTICE**

79. The Debtors will provide notice of this motion to: (i) the Office of the United States Trustee for the District of Delaware; (ii) the holders of the thirty (30) largest unsecured claims against the Debtors’ estates on a consolidated basis; (iii) counsel to PNC Bank, National

Association, as administrative agent under the Pre-Petition Credit Agreement and the DIP Facility; (iv) the Office of the United States Attorney for the District of Delaware; (v) the Internal Revenue Service; (vi) any party that has requested notice pursuant to Bankruptcy Rule 2002; and (viii) any other party in interest entitled to notice of this Motion pursuant to Local Rule 9013-1(m). Based on the nature of the relief requested herein, the Debtors respectfully submit that no other or further notice is necessary.

**NO PRIOR REQUEST**

80. No previous request for the relief sought herein has been made to this Court or any other court.

WHEREFORE, the Debtors respectfully request that the Court enter: (a) the Bidding Procedures Order (i) authorizing and approving the proposed bidding procedures to be used in connection with the Sale of the Assets; (ii) setting the dates for the Bid, the Auction, and the Sale Hearing, (iii) approving the Notice Procedures, (iv) authorizing the Assignment Procedures for Designated Contracts, and (v) granting related relief; and (b) the Sale Order, (i) authorizing the Sale free and clear of all liens, claims, interests, and encumbrances (except for any permitted liens and encumbrances), (ii) authorizing the assumption and assignment of the Designated Contracts, and (iii) granting related relief and such other and further relief as the Court may deem just and proper.

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Dated: January 31, 2023  
Wilmington, Delaware

Respectfully submitted,

**REED SMITH LLP**

/s/ Jason D. Angelo  
Kurt F. Gwynne (No. 3951)  
Jason D. Angelo (No. 6009)  
1201 North Market Street, Suite 1500  
Wilmington, DE 19801  
Telephone: (302)778-7500  
E-mail: kgwynne@reedsmith.com  
jangelo@reedsmith.com

- and -

Omar J. Alaniz, Esq. (*pro hac vice* pending)  
Bradley J. Purcell, Esq. (*pro hac vice* pending)  
Devan J. Dal Col, Esq. (*pro hac vice* pending)  
2850 N. Harwood St., Suite 1500  
Dallas, TX 75201  
Telephone: (469) 680-4200  
E-mail: oalaniz@reedsmith.com  
bpurcell@reedsmith.com  
ddalcol@reedsmith.com

- and -

Luke A. Sizemore, Esq. (*pro hac vice* pending)  
Amy M. Kerlin, Esq. (*pro hac vice* pending)  
Reed Smith Centre  
225 Fifth Avenue, Suite 1200  
Pittsburgh, PA 15222  
Telephone: (412) 288-3334  
E-mail: lsizemore@reedsmith.com  
akerlin@reedsmith.com

*Proposed Counsel for the Debtors and  
Debtors-in-Possession*