

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:

RYZE RENEWABLES II, LLC, *et al.*,¹

Debtors.

Chapter 11

Case No. 23-10289 (BLS)

(Jointly Administered)

Bidding Procedures Objection Deadline: April
4, 2023 at 4:00 p.m. (ET)

Bidding Procedures Hearing Date:
April 11, 2023 at 11:00 a.m. (ET)

**DEBTORS' MOTION FOR ENTRY OF
(I) AN ORDER (A) APPROVING CERTAIN BIDDING
PROCEDURES AND THE FORM AND MANNER OF NOTICE
THEREOF, (B) SCHEDULING AN AUCTION AND A HEARING ON
THE APPROVAL OF THE SALE OF ALL OR SUBSTANTIALLY ALL OF
THE DEBTORS' ASSETS, (C) ESTABLISHING CERTAIN ASSUMPTION
AND ASSIGNMENT PROCEDURES AND APPROVING THE MANNER OF
NOTICE THEREOF AND (D) GRANTING RELATED RELIEF; AND (II) AN
ORDER (A) AUTHORIZING AND APPROVING THE DEBTORS' ENTRY INTO
AN ASSET PURCHASE AGREEMENT, (B) AUTHORIZING THE SALE OF ALL
OR SUBSTANTIALLY ALL OF THE DEBTORS' ASSETS FREE AND CLEAR OF
ALL ENCUMBRANCES, (C) APPROVING THE ASSUMPTION AND ASSIGNMENT
OF THE ASSIGNED CONTRACTS AND (D) GRANTING RELATED RELIEF**

Ryze Renewables II, LLC and Ryze Renewables Las Vegas, LLC (together, the "Debtors"), the debtors in the above-captioned chapter 11 cases (together, the "Chapter 11 Cases"), respectfully represent as follows in support of this motion (the "Motion"):

RELIEF REQUESTED

1. By this Motion, the Debtors request, pursuant to sections 105, 363, 365, 503 and 507 of title 11 of the United States Code, 11 U.S.C. §§ 101–1532 (the "Bankruptcy Code"),

¹ The Debtors in these chapter 11 cases, along with the last four digits of their respective federal tax identification numbers, are: Ryze Renewables II, LLC (8411) and Ryze Renewables Las Vegas, LLC (8352). The Debtors' address is 5233 E El Campo Grande Ave, Las Vegas, NV 89115.

Rules 2002, 6004, 6006, and 9006 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), and Rules 2002-1, 6004-1 and 9006-1 of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the “Local Rules”), entry of:

- (i) an order, substantially in the form attached hereto as **Exhibit A** (the “Bidding Procedures Order”):
 - (a) approving proposed bidding procedures (the “Bidding Procedures”) with respect to the sale or sales (collectively, the “Sale”) of all or substantially all of the Debtors’ assets or any portion thereof (collectively, the “Assets”), as set forth in Exhibit 1 to the Bidding Procedures Order, and approving the form and manner of notice thereof, substantially in the form attached to the Bidding Procedures Order as Exhibit 2;
 - (b) subject to the Court’s entry of a Stalking Horse Approval Order (as defined below), authorizing, but not directing, the Debtors to designate a Stalking Horse Bidder (as defined below) in accordance with the Bidding Procedures;
 - (c) subject to the Court’s entry of the Sale Order (as defined below), authorizing and approving the Debtors’ entry into and performance under an asset purchase agreement consistent with the Bidding Procedures (the “Purchase Agreement”), a form of which (the “Form Purchase Agreement”) shall be filed by the Debtors on the Court’s docket prior to the hearing to consider entry of the Bidding Procedures Order (the “Bidding Procedures Hearing”);
 - (d) scheduling an auction (the “Auction”), if necessary, and a sale hearing (the “Sale Hearing”) in connection with the Sale;
 - (e) establishing procedures for the assumption and assignment (the “Assumption and Assignment Procedures”) of executory contracts and unexpired leases and approving the form and manner of notice thereof, substantially in the form attached to the Bidding Procedures Order as Exhibit 3; and
 - (f) granting related relief; and
- (ii) an order (the “Sale Order”), substantially in the form to be filed by the Debtors on the Court’s docket prior to the Sale Hearing (the “Proposed Sale Order”):
 - (a) authorizing and approving the Debtors’ entry into a Purchase Agreement with the Successful Bidder(s) (as defined below), the final form(s) of which shall be filed on the Court’s docket prior to the Sale Hearing;

- (b) authorizing the Sale of the Assets to the party or parties that are the Successful Bidder(s), free and clear of all liens, claims, and encumbrances (the “Encumbrances”), except for certain assumed liabilities and permitted encumbrances (if any);
- (c) authorizing and approving the assumption and assignment of the Assigned Contracts (as defined below) in connection with the Sale, including the payment of proposed cure amounts (if any); and
- (d) granting related relief.

2. In support of this Motion, the Debtors rely on the *Declaration of Klaus Gerber in Support of Chapter 11 Petitions and First Day Pleadings* [Docket No. 2] (the “First Day Declaration”),² which was filed on the Petition Date (as defined below), and the declaration of Morgan Suckow (the “Suckow Declaration”), which was filed contemporaneously with this Motion, both of which are incorporated herein by reference.

JURISDICTION AND VENUE

3. The United States Bankruptcy Court for the District of Delaware (the “Court”) has jurisdiction over the Chapter 11 Cases and this Motion 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 as of February 29, 2012. This is a core proceeding pursuant to 28 U.S.C. § 157(b), and, pursuant to Local Rule 9013-1(f), the Debtors consent to entry of one or more final orders 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. Venue of the Chapter 11 Cases and this Motion in this district is proper under 28 U.S.C. §§ 1408 and 1409.

² Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to such terms in the First Day Declaration.

4. The statutory and legal predicates for the relief requested herein are sections 105, 363, 365, 503 and 507 of the Bankruptcy Code; Bankruptcy Rules 2002, 6004, 6006, and 9006; and Local Rules 2002-1, 6004-1 and 9006-1.

BACKGROUND

5. On March 9, 2023 (the "Petition Date"), each of the Debtors commenced a voluntary case under chapter 11 of the Bankruptcy Code. The Debtors are authorized to continue to operate their business and manage their property as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. To date, no trustee, examiner, or statutory committee has been appointed in the Chapter 11 Cases. Additional factual background relating to the Debtors' business, capital structure, and the commencement of the Chapter 11 Cases is set forth in detail in the First Day Declaration.

PRELIMINARY STATEMENT

6. The Debtors commenced these Chapter 11 Cases to initiate a comprehensive, Court-supervised marketing and sale process to consummate a value-maximizing sale transaction of their assets, including the Refinery (as defined below). Although the Debtors retained Guggenheim Securities, LLC ("Guggenheim Securities") and Alvarez & Marsal North America, LLC ("A&M") prior to the Petition Date, for several reasons, the Debtors were unable to fully launch a prepetition out-of-court marketing and sale process. Thus, the Debtors' boards of managers (the "Boards") concluded that commencing the Chapter 11 Cases was in the best interests of the Debtors and their various stakeholders because, among other things, the Debtors would have the ability to obtain necessary postpetition financing and maximize value by selling their assets pursuant to section 363 of the Bankruptcy Code.

7. Accordingly, the Debtors file this Motion to approve the proposed Bidding Procedures, which are designed to facilitate a value-maximizing Sale of the Assets. The proposed Bidding Procedures also allow for the Debtors to identify a Stalking Horse Bidder for the Assets and, in any event, to conduct a competitive Auction in which interested parties will have an opportunity to bid on the Assets. The Bidding Procedures proposed by this Motion are designed to ensure that the sale process is open and fair and encourages interested parties to submit proposals in a manner that maximizes value for the Assets.

8. For these reasons, and as set forth more fully below, the Debtors seek entry of the Bidding Procedures Order, approval to conduct the marketing and Sale process in accordance with the Bidding Procedures, and, following the completion of the Sale process, entry of the Sale Order.

RELEVANT BACKGROUND

A. Overview

9. The Debtors were formed in 2017 in connection with the planned repurposing of an existing biofuels refinery (the “Refinery”) located in Las Vegas, Nevada, that, once complete, will have the capacity to produce 7,500 barrels of renewable diesel per day by converting non-edible renewable and waste feedstocks to premium low-carbon fuels. Such biofuels are one of the most sought-after methods to reduce carbon emissions, particularly in parts of the transportation sector that are more difficult to electrify (e.g., trucks, planes, ships).

10. Upon completion of the repurposing, the Refinery will be uniquely positioned to capitalize on this need. As of the Petition Date, the Refinery was approximately 40% complete, and the Debtors estimate that it will be operational in approximately eighteen (18) to twenty-four (24) months after the next construction phase commences. The Debtors own the

fourteen-acre industrial site in Las Vegas where the Refinery is under construction (the “Site”). The Site is strategically located in Nevada’s “Oil Belt”—offering close proximity to alternative sources of feedstocks, fuel storage, and other hydrocarbon infrastructure—and near California—one of the most mature markets for renewable diesel sales. The Site also offers multiple transportation points, including a dedicated rail yard and trucking depot. The Debtors have obtained all necessary permits for the construction of the Refinery and have completed the engineering and design of the Refinery.

11. In June 2018, the Debtors’ contractor began construction to repurpose the Refinery using a technology design—the “Duke” technology—that qualified under the United States Department of Agriculture’s (the “USDA”) “BioPreferred Program,” pursuant to which the USDA provided loan guarantees to certain qualifying entities in an effort to, among other things, increase the use of biobased products and reduce the nation’s reliance on petroleum. At the time, such USDA guarantees were only available for emerging, commercially unproven technologies, and thus, given the importance of securing the USDA’s partial guarantee of the financing necessary to fund the construction and repurposing of the Refinery, the Debtors initially commenced construction utilizing the Duke technology, which, despite its novelty, had shown promise and was deployed by DuPont in a number of commercial applications utilizing petroleum feedstocks.

12. Approximately seven (7) months after construction of the Refinery commenced, the Debtors became aware of various engineering, mechanical, pollution, and safety issues at another refinery that used the Duke technology. In response, the Debtors’ management team commenced processes to review and evaluate various alternative technologies, and, in October 2019, the Debtors made the decision to utilize Topsoe’s HydroFlex™ to complete the Refinery’s construction. The Debtors’ pivot to this alternative technology to construct the

Refinery, however, resulted in substantial delays and increased costs that vastly exceeded the Debtors' available financing.

13. A more detailed description of the Debtors, their corporate and capital structure, the Refinery, and other events leading to the commencement of the Chapter 11 Cases is set forth in the First Day Declaration.

B. Debtors' Prepetition Evaluation of Strategic Alternatives

14. Prior to the Petition Date, the Debtors diligently evaluated, in consultation with their applicable professionals, a number of options to address the financial issues caused by the dramatic increase in the cost to complete the Refinery. These efforts included engaging A&M in August 2022, as well as Guggenheim Securities in September 2022, to assist the Debtors in their solicitation of interest from investors or to run a sale process. In connection with that contemplated process, the Debtors, with the assistance of Guggenheim Securities, spent significant time preparing transaction materials pertaining to the Debtors to assist interested parties in their assessment of the Refinery.

15. Unfortunately, before the Debtors could launch an out-of-court sale process, certain corporate governance litigation, together with onerous supplier contracts and a lack of cooperation from certain key contractors, brought the Debtors' sale and financing efforts to a halt. Additionally, the Debtors were in default under the Prepetition Term Loan Agreement (as defined in the First Day Declaration), and the Prepetition Agent (as defined in the First Day Declaration) was hesitant to provide additional financing due to the uncertainties of an out-of-court sale process. Accordingly, the Boards concluded that commencing the Chapter 11 Cases would be in the best interests of the Debtors and their various stakeholders, thereby allowing the Debtors to obtain necessary postpetition financing and maximize value by selling their assets free and clear of liens,

claims, and other encumbrances, shed burdensome executory contracts, and stay all pending litigation.

C. Debtors' Proposed Sale Process

16. Since the Petition Date, the Debtors, with the assistance of Guggenheim Securities, have begun to contact potential purchasers of the Assets. Pursuant to the Bidding Procedures, the Debtors intend to further market the Assets to potential buyers and facilitate access to diligence materials to those who express interest in acquiring the Assets. Such materials will include details of the proposed Bidding Procedures, a non-confidential presentation and, for those executing a non-disclosure agreement with the Debtors, access to a virtual data room and confidential presentation materials.

17. Given their liquidity position, the Debtors have determined that their ability to best maximize the value of their estates for the benefit of all stakeholders will require them to expeditiously proceed through the Chapter 11 Cases and complete the Sale in a manner that minimizes administrative expenses. In sum, the Debtors believe that an expedited, efficient Sale process, as provided for in the proposed Bidding Procedures, is necessary to generate the highest or otherwise best bid for the Assets while minimizing costs to the Debtors' estates and maximizing recoveries for the Debtors' stakeholders.

PROPOSED BIDDING PROCEDURES³

18. By this Motion, the Debtors are requesting approval of the Bidding Procedures, which describe, among other things, (a) the Assets available for sale, (b) the manner in which bids and bidders become "qualified," (c) the provision of diligence by the Debtors to bidders, (d) the receipt and negotiation of bids received, (e) the conduct of any Auction, (f) the

³ Capitalized terms used in this section but not otherwise defined herein shall have the meanings ascribed to such terms in the Bidding Procedures attached as Exhibit 1 to the Bidding Procedures Order.

selection and approval of the Successful Bidder and the Next-Highest Bidder (as defined below), and (g) the designation and approval of any Stalking Horse Bidder, Stalking Horse APA (as defined below), and Bid Protections (as defined below), if a Stalking Horse Bidder is designated. The Debtors designed the Bidding Procedures to promote a controlled, fair, and open Sale process to ensure that the highest or otherwise best bid is generated for the Assets. The following is a summary of the proposed Bidding Procedures, as required by Local Rule 6004-1.⁴

19. Confidentiality Agreement. Unless otherwise ordered by the Court for cause shown, to participate in the Bidding Process (as defined below), each person or entity must, on or before the Bid Deadline (as defined below), enter into a confidentiality agreement with the Debtors that is in form and substance satisfactory to the Debtors (the “Confidentiality Agreement”). Each such person or entity that enters into a Confidentiality Agreement with the Debtors on or before the Bid Deadline is hereinafter referred to as a “Potential Bidder,” and the Debtors shall inform the Consultation Parties (as defined below) of any person or entity that becomes a Potential Bidder. After a Potential Bidder enters into a Confidentiality Agreement with the Debtors and provides preliminary proof of (a) its bona fide interest in purchasing some or all of the Assets and (b) its financial capacity to consummate a proposed Sale, the adequacy of which the Debtors, with the assistance of their advisors, will determine after consultation with the Consultation Parties, the Debtors shall deliver or make available (unless previously delivered or made available) to such Potential Bidder certain designated information with respect to the Assets.

20. Designation of a Stalking Horse Bidder. The Debtors may, at any time prior to the Stalking Horse Supplement Deadline (as defined below), in consultation with (a) any

⁴ The summary of the Bidding Procedures contained herein is qualified in its entirety by the actual terms and conditions of the Bidding Procedures. To the extent that there is any conflict between the summary contained herein and the actual terms and conditions of the Bidding Procedures, the terms and conditions of the Bidding Procedures shall control in all respects.

statutory committee appointed in the Chapter 11 Cases, if any (each a “Committee”), and any such Committee’s counsel, (b) the administrative agent under the Debtors’ DIP Facility (as defined in the First Day Declaration) (the “DIP Agent”) and the Prepetition Agent (as defined in the First Day Declaration) and counsel to the DIP Agent and Prepetition Agent, unless a Credit Bid (as defined below) has been submitted, and (c) any other party that the Debtors deem appropriate (collectively, the “Consultation Parties” and each, a “Consultation Party”), designate a stalking horse bidder (the “Stalking Horse Bidder”), whose Qualified Bid (as defined below) shall serve as the stalking horse bid (the “Stalking Horse Bid”). Any asset purchase agreement memorializing the Stalking Horse Bid (the “Stalking Horse APA”) will be binding on the Stalking Horse Bidder on the terms thereof and will set the floor for all other Qualified Bids. If the Stalking Horse Bid is not selected as the Successful Bid (as defined below) at the conclusion of the Auction, the Stalking Horse Bidder may serve as the Next-Highest Bidder if its Qualified Bid represents the second-highest or otherwise best Bid (as defined below) following the conclusion of the Auction. Notwithstanding the foregoing, following consultation with the Consultation Parties, the Debtors may proceed to the Auction without a Stalking Horse Bidder.

21. Timing of the Designation of the Stalking Horse Bidder. In the event that the Debtors designate a Stalking Horse Bidder and seek to enter into a Stalking Horse APA on or prior to May 24, 2023, at 4:00 p.m. (prevailing Eastern Time) (the “Stalking Horse Supplement Deadline”), the Debtors shall file a supplement to the Motion (the “Stalking Horse Supplement”) seeking approval of the same, and serve the Stalking Horse Supplement by email, where available, or otherwise by first class mail or overnight delivery, with no less than three (3) business days’ notice of the objection deadline to (a) the Office of the United States Trustee for the District of Delaware (the “U.S. Trustee”), (b) the Consultation Parties, and (c) those parties who have

requested notice of all pleadings filed in the Chapter 11 Cases pursuant to Bankruptcy Rule 2002 (collectively, the “Stalking Horse Notice Parties”) with no further notice being required. The Stalking Horse Supplement shall (a) set forth the identity of the Stalking Horse Bidder (and, if the Stalking Horse Bidder is a newly formed entity, then the Stalking Horse Bidder’s parent company or sponsor); (b) set forth the amount of the Stalking Horse Bid and what portion of the consideration (if any) is non-cash; (c) state whether the Stalking Horse Bidder has any connection to the Debtors; (d) specify any proposed bid protections (the “Bid Protections”); (e) attach the Stalking Horse APA, including all exhibits, schedules, or attachments thereto; and (f) set forth the deadline to object to the designation of the Stalking Horse Bidder and any Bid Protections, which objection deadline shall be three (3) business days after the service of the Stalking Horse Supplement. The Stalking Horse Supplement shall also include information supporting any request to approve any breakup fee, expense reimbursement, and/or any other Bid Protections as an administrative expense under section 503(b) of the Bankruptcy Code.

22. Notwithstanding the foregoing, the Debtors reserve the right to designate a Stalking Horse Bidder after the occurrence of the Stalking Horse Supplement Deadline but prior to the Auction. In that event, the Debtors may seek Court approval on an expedited basis of their designation of the Stalking Horse Bidder and their entry into the Stalking Horse APA, including any Bid Protections. Prior to the filing of any such motion, the Debtors will consult with the Consultation Parties with respect to the designation of the Stalking Horse Bidder and entry into the Stalking Horse APA.

23. Objections to the designation of a Stalking Horse Bidder or any of the terms of a Stalking Horse Bid, including any Bid Protections (a “Stalking Horse Objection”), shall (a) be in writing, (b) comply with the Bankruptcy Code, Bankruptcy Rules, and Local Rules, (c) state

with specificity the legal and factual bases thereof, and (d) be timely filed with the Court and served on the Stalking Horse Notice Parties in accordance with the objection deadline set forth in the Stalking Horse Supplement (or motion, if applicable) or as otherwise ordered by the Court (the “Stalking Horse Objection Deadline”).

24. If a timely Stalking Horse Objection is filed, the Debtors will schedule a hearing regarding such Stalking Horse Objection as soon as reasonably practicable so that approval of such Stalking Horse Bid may be obtained on or before June 5, 2023. If no Stalking Horse Objection is timely filed and served with respect to the Stalking Horse Bid, upon the expiration of the Stalking Horse Objection Deadline, the Debtors will submit to the Court an order under certification of counsel approving the designation of the Stalking Horse Bidder and the Debtors’ entry into the Stalking Horse APA (the “Stalking Horse Approval Order”), which may be entered by the Court without a hearing, including with respect to any Bid Protections.

25. Upon entry of the Stalking Horse Approval Order, any Bid Protections shall be payable by the Debtors to the Stalking Horse Bidder on the terms and conditions set forth in the Stalking Horse APA, and to the extent such Bid Protections become payable in accordance with the terms and conditions set forth in the Stalking Horse APA, the Debtors’ obligation to pay such Bid Protections shall constitute, pursuant to section 503(b) of the Bankruptcy Code, an administrative expense claim against the Debtors’ estates. For the avoidance of doubt, this Motion does not seek authorization to grant the Bid Protections superpriority administrative expense status pursuant to sections 364(c)(1) or 507(b) of the Bankruptcy Code.

26. Determination by the Debtors. Following consultation with the Consultation Parties, the Debtors shall (a) coordinate with Potential Bidders regarding the provision of diligence, (b) evaluate Bids from Potential Bidders on any or all of the Assets,

(c) negotiate any Bid made to acquire any or all of the Assets, and (d) make such other determinations as are provided in the Bidding Procedures (collectively, the “Bidding Process”); *provided*, that, notwithstanding anything to the contrary contained in this Motion or the Bidding Procedures, the Debtors shall not consult with a Consultation Party (or its advisors) that is actively participating as a Potential Bidder for the Assets.⁵ Neither the Debtors nor their representatives shall be obligated to furnish any information of any kind whatsoever relating to the Assets to any party that is not a Potential Bidder or a Consultation Party.

27. Due Diligence. The Debtors have established a virtual data room (the “Data Room”) into which substantial information about the Debtors and their Assets has been posted. Except to the extent a Confidentiality Agreement or other agreement provides otherwise, all Potential Bidders and the Consultation Parties will be granted full access to the Data Room up to and including the Bid Deadline. The Debtors, with the assistance of Guggenheim Securities, will coordinate all reasonable requests for additional information and diligence from Potential Bidders and the Consultation Parties.

28. Proposed Bid Deadline. On or before **June 7, 2023, at 10:00 a.m. (prevailing Eastern Time)** (the “Bid Deadline”), a Potential Bidder that desires to make a Bid must deliver written copies of its Bid in both portable document format (.pdf) and Microsoft Word (.doc/.docx) format to Guggenheim Securities (Attn: Morgan Suckow (morgan.suckow@guggenheimpartners.com), Joel Foote (joel.foote@guggenheimpartners.com)),

⁵ For the avoidance of doubt, if a lending institution with an interest in the DIP Facility or the Prepetition Term Loan Facility (as defined in the First Day Declaration) other than the DIP Agent or Prepetition Agent (or such lending institutions’ affiliates, as applicable), respectively, or a member of a Committee (or its affiliates, as applicable) is actively participating as a Potential Bidder for the Assets (a “Bidding Party”), then (a) the DIP Agent, the Prepetition Agent, and the remaining members of the Committee other than the Bidding Party, respectively, and (b) the DIP Agent’s, Prepetition Agent’s, or Committee’s respective counsel shall continue to be Consultation Parties but shall not provide any information they receive as Consultation Parties to the Bidding Party.

David Dahlson (david.dahlson@guggenheimpartners.com), Steven Lessans (steven.lessans@guggenheimpartners.com), and Zachary Yost (zachary.yost@guggenheimpartners.com)). The Debtors shall provide to the Consultation Parties copies of each Bid received by the Debtors as soon as reasonably practicable following receipt of such Bid.

29. Bid Requirements. All bids (each, a “Bid”) must comply with the following requirements (the “Bid Requirements”):

- (a) All Bids must be accompanied by a letter or email:
 - (i) fully disclosing the identity of the Potential Bidder and providing the contact information of the specific person(s) whom the Debtors or their advisors should contact (including any equity holder or other financial backer if the Potential Bidder is an entity formed for the purpose of consummating the proposed Sale) in the event that the Debtors have any questions or wish to discuss the Bid submitted by the Potential Bidder;
 - (ii) setting forth the purchase price to be paid by such Potential Bidder and the form(s) of consideration the Potential Bidder intends to use to pay such purchase price;
 - (iii) stating with specificity the Assets (including any specific executory contracts and unexpired leases) such Potential Bidder wishes to bid on and the liabilities and obligations (including any applicable cure costs) to be assumed by the Potential Bidder as part of the Sale;
 - (iv) providing, other than as may be exclusively applicable to the Stalking Horse Bidder, if designated, that the Bid is not subject to any bidding fee, break-up fee, termination fee, transaction fee, expense reimbursement, or any similar type of fee or reimbursement, and including an express waiver of any substantial contribution administrative expense claim under section 503(b) of the Bankruptcy Code related to bidding on the Assets; *provided*, that, in the event a Stalking Horse Bidder is designated, all bids must provide consideration to the Debtors in an amount not less than the sum of (1) the Stalking Horse Bid, *plus* (2) the amount of any Bid Protections, *plus* (3) a reasonable minimum overbid amount in an amount not less than \$500,000 (the “Incremental Overbid”);
 - (v) agreeing that the Potential Bidder’s offer is binding, unconditional, and irrevocable until three (3) business days after the closing of the Sale;

- (vi) containing a commitment to close the contemplated transaction(s) on a date (the “Closing Date”) no later than July 2, 2023;
- (vii) providing that such Bid is not subject to contingencies of any kind, including, without limitation, contingencies related to financing, internal approval, or due diligence;
- (viii) containing a statement that the Potential Bidder has made or will make in a timely manner all necessary filings under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, if applicable, and pay the fees associated with such filings;
- (ix) identifying all required governmental and regulatory approvals and providing an explanation and/or evidence of the Potential Bidder’s plan and ability to obtain all governmental and regulatory approvals required to consummate the Sale transaction and the proposed timing for the Potential Bidder to undertake the actions required to obtain such approvals and agreeing that the Potential Bidder and its legal counsel will coordinate in good faith with the Debtors’ legal counsel to discuss and explain the Potential Bidder’s regulatory analysis, strategy, and timeline for securing all such approvals;
- (x) containing an acknowledgment that the Potential Bidder (i) has had an opportunity to conduct any and all due diligence regarding the Assets or the Sale, (ii) has relied solely upon its own independent review and investigation and/or inspection of any documents and any other information in making the 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, by the Debtors or any of their advisors (including Guggenheim Securities) or other representatives regarding the Bid, the Assets, the Sale or the completeness or accuracy of any information provided in connection therewith or the Auction (other than those representations and warranties of the Debtors set forth in the Qualified Bid Purchase Agreement), and (iv) did not engage in any collusive conduct and acted in good faith in submitting its Bid;
- (xi) providing that the Potential Bidder agrees to serve as a backup bidder (the “Next-Highest Bidder”) if the Potential Bidder’s Qualified Bid is the next highest or otherwise best bid after the Successful Bid (the “Next-Highest Bid”) with respect to the relevant Assets through the Closing Date; and
- (xii) containing an acknowledgment that the Potential Bidder (i) has reviewed the terms and conditions set forth in these Bidding Procedures and the Bidding Procedures Order (including, without limitation, paragraph 33 thereof concerning the satisfaction of any transaction fee payable to the

Debtors' investment banker), and (ii) agrees that the Bid is subject in all respects to the terms and conditions set forth in the Bidding Procedures and the Bidding Procedures Order, with such Bidding Procedures Order controlling in the event of any conflict.

- (b) All Bids must be accompanied by (i) an executed purchase agreement in form and substance reasonably satisfactory to the Debtors (a "Qualified Bid Purchase Agreement") and (ii)(x) if a Stalking Horse APA has been entered into, a redline of the executed Qualified Bid Purchase Agreement to reflect any proposed amendments and modifications to the Stalking Horse APA and the applicable schedules and exhibits or (y) if a Stalking Horse APA has not been entered into, a redline of the executed Qualified Bid Purchase Agreement to reflect any proposed amendments and modifications to the Form Purchase Agreement and the applicable schedules and exhibits.
- (c) All Bids must be accompanied by adequate assurance of future performance information (the "Adequate Assurance Information"), which may include (i) information demonstrating (in the Debtors' reasonable business judgment) that the Potential Bidder has the financial capacity to consummate the proposed Sale, (ii) evidence that the Potential Bidder has obtained authorization or approval from its board of directors (or comparable governing body) with respect to the submission of its Bid, and (iii) such additional information regarding the Potential Bidder as the Potential Bidder may elect to include. By submitting a Bid, a Potential Bidder agrees that the Debtors may disseminate its Adequate Assurance Information to (x) counterparties to any contracts or leases that may be assumed and assigned in connection with the Sale and (y) the Consultation Parties in the event that the Debtors determine such Bid to be a Qualified Bid.
- (d) All Bids (other than a Credit Bid) must be accompanied by (i) a deposit in the form of a certified check or wire transfer, payable to the order of the Debtors, in the amount of ten percent (10%) of the cash consideration of the Bid, which funds will be deposited, prior to the Bid Deadline, into a segregated account to be identified and established by the Debtors (a "Good Faith Deposit"), and (ii) written evidence, documented to the Debtors' satisfaction, that demonstrates the Potential Bidder has available cash and/or a commitment for financing if selected as the Successful Bidder with respect to the relevant Assets (*provided, however*, that the closing shall not be contingent in any way on the Successful Bidder's financing) and such other evidence of ability to consummate the Sale transaction(s) as the Debtors may request, including proof that any financing or other funding commitments are not subject to any internal approvals, syndication requirements, diligence, or credit committee approvals (*provided, further*, that such financing or other funding commitments have covenants and conditions acceptable to the Debtors). The Debtors reserve the right to increase the Good Faith Deposit for one or more Qualified Bidders (as defined below) in their sole discretion after consulting with the Consultation Parties, including by requiring Qualified Bidders to provide a Good Faith Deposit for any non-cash consideration based on such Qualified Bidder's estimate of the value of any such non-cash consideration.

30. A Bid received from a Potential Bidder for any portion of the Assets that is determined by the Debtors, in consultation with the Consultation Parties, to meet the above requirements will be considered a “Qualified Bid,” and each Potential Bidder that submits such a Qualified Bid will be considered a “Qualified Bidder.” Any credit bid submitted by the Prepetition Agent, on behalf of itself and the other Prepetition Secured Parties (as defined in the Interim DIP Order⁶), and/or the DIP Agent, on behalf of itself and the other DIP Secured Parties (as defined in the Interim DIP Order), in each case subject to the provisions of the DIP Orders (as defined in the Interim DIP Order), including, but not limited to, the provisions thereof requiring sufficient cash consideration as part of such credit bid as set forth in the DIP Orders, and the provisions of section 363(k) of the Bankruptcy Code (a “Credit Bid”), shall be deemed to be a Qualified Bid, and the Prepetition Agent and/or the DIP Agent shall be deemed Qualified Bidders in connection with such Credit Bid. The Debtors shall inform Qualified Bidders that their Bids have been designated as Qualified Bids no later than June 9, 2023, at 6:00 p.m. (prevailing Eastern Time). For the avoidance of doubt, any Stalking Horse Bid will be deemed a Qualified Bid and the Stalking Horse Bidder will be deemed a Qualified Bidder for all purposes and requirements pursuant to the Bidding Procedures. The Debtors shall inform the Stalking Horse Bidder of the Qualified Bids received and shall provide copies of the Starting Bid(s) to all Qualified Bidders prior to the commencement of the Auction.

31. Starting Bid(s). If at least two Qualified Bids are received by the Bid Deadline with regard to any particular Assets, the Debtors will conduct the Auction with respect to such Assets and shall determine, after consultation with the Consultation Parties, which

⁶ *Interim Order (I) Authorizing Debtors to Obtain Postpetition Financing, (II) Authorizing the Debtors to Use Cash Collateral, (III) Granting Liens and Providing Superpriority Administrative Expense Claims, (IV) Granting Adequate Protection to Prepetition Lenders, (V) Modifying Automatic Stay, (VI) Scheduling a Final Hearing, and (VII) Granting Related Relief* [Docket No. 40].

Qualified Bid is the highest or otherwise best Qualified Bid for purposes of constituting the opening bid at the Auction for the relevant Assets (the “Starting Bid(s)”). In the event a Stalking Horse Bidder is selected, the Starting Bid shall be in an amount not less than the amount of consideration being provided under the Stalking Horse Bid, *plus* the amount of any Bid Protections, *plus* the Incremental Overbid. The Starting Bid(s) will be communicated and provided to the Qualified Bidders prior to the commencement of the Auction.

32. The determination of which Qualified Bid constitutes the Starting Bid and which Qualified Bid constitutes the Successful Bid shall take into account any factors the Debtors (in consultation with the Consultation Parties) reasonably deem relevant to the value of the Qualified Bid to the Debtors’ estates, including, among other things, the following: (a) the amount and nature of the consideration, including any obligations to be assumed; (b) the executory contracts and unexpired leases of the Debtors, if any, for which assumption and assignment or rejection is required, and the costs and delay associated with any litigation concerning executory contracts and unexpired leases necessitated by such Bid; (c) the number, type, and nature of any changes to the Stalking Horse APA or Form Purchase Agreement, as applicable, requested by each Qualified Bidder; (d) the extent to which such modifications are likely to delay closing of the Sale and the cost to the Debtors of such modifications or delay; (e) the likelihood of the Qualified Bidder being able to close the proposed Sale transaction (including obtaining any required governmental and regulatory approvals) and the timing thereof; (f) the net benefit to the Debtors’ estates (including after accounting for the Bid Protections, if any); and (g) the tax consequences of such Qualified Bid.

33. Auction. The Auction, if required, will be conducted on June 12, 2023, starting at 10:00 a.m. (prevailing Eastern Time) (or as soon as reasonably practicable thereafter)

at the offices of Paul, Weiss, Rifkind, Wharton & Garrison LLP, 1285 Avenue of the Americas, New York, NY 10019 and, if determined by the Debtors to be necessary or convenient, via teleconference and/or videoconference. Professionals and principals for the Debtors, each Qualified Bidder (including, its representative(s), if any), each of the Consultation Parties (including their professionals), the U.S. Trustee, and any other parties the Debtors deem appropriate shall be permitted to attend and observe the Auction. Each Qualified Bidder participating in the Auction will be required to confirm, in writing and on the record at the Auction, that (a) it has not engaged in any collusion with respect to the Bidding Process, and (b) its Qualified Bid is a good faith *bona fide* offer that it intends to consummate if selected as the Successful Bidder.

34. At the Auction, participants will be permitted to increase their Bids and improve their terms in accordance with the Bidding Procedures; *provided*, that any such increased or improved Bid must be a Qualified Bid (except that the Bid Deadline will not apply). Bidding for any part or all of the Assets will start at the applicable Starting Bid(s) and will continue, in one or more rounds of bidding, so long as at least one Qualified Bid is submitted by a Qualified Bidder during each round that is higher or otherwise better (subject to the required Incremental Overbid) than the Qualified Bid that the Debtors, in consultation with the Consultation Parties, determined was the highest or otherwise best Qualified Bid for the relevant Assets in the previous round (the “Leading Bid”). In consultation with the Consultation Parties, the Debtors may at any time adopt rules for the Auction that the Debtors reasonably determine to be appropriate to promote the goals of the Bidding Process; *provided*, that such rules are disclosed to each Qualified Bidder during the Auction.

35. Prior to the conclusion of the Auction, the Debtors, in consultation with the Consultation Parties, will, for the Assets (or subset thereof) that are subject to the Auction: (a) determine, consistent with the Bidding Procedures, which Qualified Bid constitutes the highest or otherwise best Qualified Bid (the “Successful Bid”) and (b) notify all Qualified Bidders at the Auction for the subject Assets, prior to the Auction’s conclusion, of the name of the person or entity that submitted of the Successful Bid (the “Successful Bidder”) with respect to the subject Assets, as well as the amount and other material terms of the Successful Bid.

36. After determining the Successful Bid(s) for the Assets, the Debtors may determine, in their reasonable business judgment, in consultation with the Consultation Parties, which Qualified Bid(s) are the Next-Highest Bid(s) for the Assets. As soon as practicable but in any event prior to 12:00 p.m. (prevailing Eastern Time) on the day following the conclusion of the Auction (or, if an Auction is not held, prior to 12:00 p.m. (prevailing Eastern Time) on June 13, 2023), the Debtors shall file a notice on the Court’s docket identifying the Successful Bidder(s) for the Assets (or subset thereof) and any applicable Next-Highest Bidder(s) (the “Notice of Successful Bidder(s)”).

37. Acceptance of Qualified Bids. The Debtors’ selection and submission to the Court of the Successful Bid will not constitute the Debtors’ acceptance of such Bid. The Debtors will have accepted a Qualified Bid only when such Qualified Bid has been approved by the Court at the Sale Hearing. If the Successful Bidder does not close the Sale by the date agreed upon by the Debtors and the Successful Bidder, then the Debtors shall be authorized under the Sale Order, but not required, to designate the Next-Highest Bidder (which may be the Stalking Horse Bidder) as the Successful Bidder and to close the Sale transaction with the Next-Highest Bidder without further order of the Court.

38. Modification of Bidding Procedures. Following consultation with the Consultation Parties, the Debtors may amend the Bidding Procedures or the Bidding Process at any time and from time to time in any manner that the Debtors determine in good faith will best promote the goals of the process and that does not conflict with the Bankruptcy Code, Bankruptcy Rules, or Local Rules, including extending or modifying any of the dates described herein and the Bidding Procedures.

39. Return of Good Faith Deposit. The Good Faith Deposits of all Qualified Bidders will be held in trust and, while held in trust, will not become property of the Debtors' estates unless released to the Debtors from trust pursuant to the terms of the Bidding Procedures, the Sale Order, or pursuant to further order of the Court. At the closing of a Sale contemplated by a Successful Bid, the applicable Successful Bidder will be entitled to a credit for the amount of its Good Faith Deposit to the extent such a deposit was provided. The Good Faith Deposit of any Next-Highest Bidder shall be retained until three (3) business days after the applicable Closing Date. The Good Faith Deposits of any other Qualified Bidders will be returned as soon as practicable but no later than seven (7) business days following the Auction.

**NOTICE PROCEDURES FOR THE SALE,
BIDDING PROCEDURES, AUCTION, AND SALE HEARING**

40. The Debtors also request approval of the notice of the Auction, Sale Hearing, and Bidding Procedures (the "Sale Notice"), substantially in the form attached to the Bidding Procedures Order as Exhibit 2.

41. As soon as practicable after the entry of the Bidding Procedures Order, the Debtors will serve the Sale Notice by email, if available, or otherwise by first-class mail upon the following parties: (a) the U.S. Trustee; (b) the United States Securities and Exchange Commission; (c) the United States Department of Justice; (d) the DIP Agent and Prepetition Agent; (e) King &

Spalding LLP, as counsel to the DIP Agent and Prepetition Agent; (f) counsel to any Committee (if appointed); (g) all state attorneys general in jurisdictions in which the Assets are located; (h) the parties included on the Debtors' list of twenty (20) largest unsecured creditors; (i) all parties who are known by the Debtors to assert liens against the Assets, if any; (j) any party known or reasonably believed to have expressed an interest in acquiring some or all of the Assets; (k) all of the Debtors' other known creditors and equity security holders; and (l) all parties who, as of the filing of this Motion, have filed a notice of appearance and request for service of papers pursuant to Bankruptcy Rule 2002 (collectively, "Sale Notice Parties"); *provided, however*, that the Debtors need not serve the Sale Notice on any party for whom the Debtors are unable to obtain, after reasonable diligence, an email or physical address as of the entry of the Bidding Procedures Order; *provided, further* that the Debtors shall not be obligated to provide supplemental service of the Sale Notice with respect to any Sale Notice that is returned to the Debtors as undeliverable so long as the Debtors have confirmed that any such Sale Notice was sent to the applicable email or physical address on file in the Debtors' books and records and no other email or physical address could be obtained after reasonable diligence.

42. The Debtors will also (a) cause the Sale Notice to be published once in each of (i) the *Las Vegas Review-Journal* and (ii) the national edition of *The New York Times* or another publication with similar national circulation and (b) post the Sale Notice and the Bidding Procedures Order on the website of the Debtors' claims and noticing agent, Stretto, Inc. The Sale Notice will include, among other things, the date, time, and place of the Auction and the Sale Hearing and the deadlines for filing any objections to the Sale, once such dates and deadlines are set by the Court.

ASSUMPTION AND ASSIGNMENT PROCEDURES

43. To facilitate the Sale, the Debtors seek authority to assume and assign any of the Subject Contracts (as defined below) designated for assumption by any Successful Bidder(s) in accordance with the Assumption and Assignment Procedures set forth herein (the “Assigned Contracts”) and approval of the form and manner of notice thereof substantially in the form attached to the Bidding Procedures Order as Exhibit 3 (the “Assumption and Assignment Notice”).

44. By no later than May 15, 2023 at 4:00 p.m. (prevailing Eastern Time), the Debtors will file the Assumption and Assignment Notice, which shall include a schedule of cure obligations (the “Cure Schedule”) for all of the Subject Contracts. The Cure Schedule will include a description of each executory contract or unexpired lease potentially to be assumed and assigned to a potential bidder (the “Subject Contracts”) and the amount, if any, necessary to cure any defaults under such agreements pursuant to section 365 of the Bankruptcy Code (the “Cure Costs”). A copy of the Assumption and Assignment Notice, including the Cure Schedule, will be served on each of the non-Debtor counterparties listed on the Cure Schedule by email, where available, or otherwise by first-class mail on the date that the Assumption and Assignment Notice is filed with the Court.

45. The Debtors propose that any objections to the assumption and assignment of any executory contract or unexpired lease identified on the Cure Schedule, including, but not limited to, the Cure Costs set forth therein (“Assumption/Assignment/Cure Objections”), must be in writing, state the basis of such objection with specificity, be filed with the Court no later than May 30, 2023, at 4:00 p.m. (prevailing Eastern Time) and be served on the following parties: (a) proposed counsel to the Debtors, Paul, Weiss, Rifkind, Wharton & Garrison LLP (Attn: Kelley A. Cornish (kcornish@paulweiss.com), Diane Meyers (dmeyers@paulweiss.com), and Kyle R.

Satterfield (ksatterfield@paulweiss.com)) and Young Conaway Stargatt & Taylor, LLP (Attn: Pauline K. Morgan (pmorgan@ycst.com), Edmon L. Morton (emorton@ycst.com), Matthew B. Lunn (mlunn@ycst.com), Elizabeth S. Justison (ejustison@ycst.com), and Timothy R. Powell (tpowell@ycst.com)); (b) the U.S. Trustee (Attn.: John Schanne, Esq. (John.Schanne@usdoj.gov)); (c) counsel to any Committee that has been appointed in the Chapter 11 Cases; and (d) counsel to the DIP Agent and Prepetition Agent, King & Spalding LLP (Attn: Jeff Dutson (jdutson@kslaw.com), Michael Sullivan (msullivan@kslaw.com), and Michael Fishel (mfishel@kslaw.com)) and Richards, Layton & Finger, P.A. (Attn: Amanda R. Steele (steele@rlf.com) (collectively, the “Notice Parties”). Any such objections shall set forth a specific default by the Debtor(s) in respect of a Subject Contract and claim a specific monetary amount that differs from the amount (if any) specified by the Debtors in the Cure Schedule.

46. If no objection is timely and properly received with respect to a Subject Contract, then any non-Debtor counterparties to such Subject Contract shall (a) be forever barred from objecting to the Cure Costs and from asserting any additional cure or other amounts with respect to the Subject Contract, and the Debtors and the Successful Bidder shall be entitled to rely solely upon the Cure Costs set forth in the Cure Schedule; (b) be deemed to have consented to the assumption and assignment of such Subject Contract; and (c) be forever barred, estopped, and permanently enjoined from asserting or claiming against the Debtors, the Successful Bidder, or their respective property that any additional amounts are due or other defaults exist, that conditions to assignment must be satisfied under such Subject Contract, or that there is any objection or defense to the assumption and assignment of such Subject Contract. In addition, the Cure Costs set forth in the Cure Schedule shall be binding upon the non-Debtor counterparties to the Subject Contracts for all purposes in the Chapter 11 Cases and will constitute a final determination of the Cure Costs

required to be paid by the Debtor(s) in connection with the assumption and assignment of the Subject Contracts.

47. Where a non-Debtor counterparty to an Subject Contract timely files an objection asserting a cure amount higher or different than the proposed Cure Costs (the “Disputed Cure Amount”), then (a) to the extent that the parties are able to consensually resolve the Disputed Cure Amount, the cure amount shall be as agreed between the parties or (b) to the extent the parties are unable to consensually resolve the dispute, the amount to be paid under section 365 of the Bankruptcy Code with respect to such Disputed Cure Amount will be determined at a hearing to be scheduled by the Court. All other timely objections to the proposed assumption and assignment of the Assumed Contracts will be heard at the Sale Hearing, unless adjourned by agreement of the parties.

KEY SALE PROCESS DATES

48. The following is a summary of the proposed key dates for the Sale process:

<u>Deadline/Event</u>	<u>Proposed Dates/Deadlines</u>
Bidding Procedures Hearing	April 11, 2023, at 11:00 a.m. (ET)
Deadline to File Assumption and Assignment Notice and Cure Schedule	May 15, 2023, at 4:00 p.m. (ET)
Stalking Horse Supplement Deadline	May 24, 2023, at 4:00 p.m. (ET)
Objection Deadline for Assumption/Assignment/Cure Objections	May 30, 2023, at 4:00 p.m. (ET)
Bid Deadline	June 7, 2023, at 10:00 a.m. (ET)
Sale Objection Deadline ⁷	June 7, 2023, at 4:00 p.m. (ET)

⁷ The “Sale Objection Deadline” applies to all objections to the Sale of the Assets to a Successful Bidder or a Next-Highest Bidder, including with respect to any provisions of the Sale contained in the Form Purchase Agreement, with the exception of Stalking Horse Objections or objections related solely to conduct of the Auction, identity

<u>Deadline/Event</u>	<u>Proposed Dates/Deadlines</u>
Deadline to Notify Potential Bidders of Qualified Bid Status	June 9, 2023, at 6:00 p.m. (ET)
Auction (if necessary)	June 12, 2023, at 10:00 a.m. (ET)
Deadline to File and Serve Notice of Successful Bidder(s)	As soon as practicable but in any event prior to 12:00 p.m. (prevailing Eastern Time) on the day following the conclusion of the Auction (or, if an Auction is not held, prior to 12:00 p.m. (prevailing Eastern Time) on June 13, 2023)
Supplemental Sale Objection Deadline ⁸	4:00 p.m. (ET) on the day following the filing of the Notice of Successful Bidder(s)
Sale Hearing	June 16, 2023, at a time TBD
Closing Date	On or prior to July 2, 2023

49. The Debtors respectfully submit that the timeline set forth above is reasonable and necessary under the circumstances of the Chapter 11 Cases. Such timeline provides over eleven (11) weeks between the filing of this Motion and the Bid Deadline, which is lengthier than other timelines recently approved in this district. *See, e.g., In re Winc, Inc.*, Case No. 22-11238 (LSS) (Bankr. D. Del. Dec. 22, 2022) (approving a sale timeline that provided an approximately five-week period between the filing of the motion and the bid deadline); *In re Fast Radius, Inc.*, Case No. 22-11051 (JKS) (Bankr. D. Del. Nov. 14, 2022) (approving a sale timeline that provided an approximately three-week period between the filing of the motion and the bid

of the Successful Bidder(s) or the Next-Highest Bidder(s), and adequate assurance of future performance by the Successful Bidder(s) or Next-Highest Bidder(s).

⁸ The “Supplemental Sale Objection Deadline” applies to objections related solely to conduct of the Auction, identity of the Successful Bidder(s) or the Next-Highest Bidder(s), and adequate assurance of future performance by the Successful Bidder(s) or the Next-Highest Bidder(s).

deadline); *In re Clarus Therapeutics Holdings Inc.*, Case No. 22-10845 (Bankr. D. Del. Sept. 22, 2022 (approving a sale timeline that provided an approximately five-week period between the filing of the motion and the bid deadline). The Debtors submit that this timeline will allow Potential Bidders sufficient time to evaluate the Assets and formulate Bids, the Debtors to conduct an Auction, and the Sale to be approved and consummated in a manner consistent with the applicable milestones under the DIP Facility.

THE PROPOSED SALE ORDER

50. The Debtors anticipate that the Sale Order will contain certain provisions that require disclosure under Local Rule 6004-1. At this time, the Debtors make the following statements:

- (a) Local Rule 6004-1(b)(iv)(A). To the extent a proposed purchaser is an insider (within the meaning of section 101(31) of the Bankruptcy Code), the Debtors will make the necessary disclosures to the Court and take measures to ensure the fairness of the sale process and the proposed transaction.
- (b) Local Rule 6004-1(b)(iv)(B). The Debtors do not presently have any agreement between any interested party and the Debtors' management or key employees. If any agreements are reached, the Debtors will make the necessary disclosures.
- (c) Local Rule 6004-1(b)(iv)(C). To the extent that the Sale Order includes a release in favor of any entity, the Debtors will make the necessary disclosures.
- (d) Local Rule 6004-1(b)(iv)(E). The contemplated Closing Date for the Sale is on or prior to July 2, 2023.
- (e) Local Rule 6004-1(b)(iv)(F). The Debtors are requiring Qualified Bids (other than any Credit Bid) to include a good faith deposit constituting ten percent (10%) of the total cash consideration of the bid.
- (f) Local Rule 6004-1(b)(iv)(G). The Debtors do not currently have any interim management or other arrangement with any party. If any agreements are reached, the Debtors will make the necessary disclosures.
- (g) Local Rule 6004-1(b)(iv)(H). The Debtors may seek to release or allocate any sale proceeds without further order of the Court, including the

application of sale proceeds to pay the Sale Transaction Fee (as defined in the Bidding Procedures Order) and the DIP Obligations (as defined in the Interim DIP Order).

- (h) Local Rule 6004-1(b)(iv)(I). The Debtors may seek to have the Sale declared exempt from taxes under section 1146(a) of the Bankruptcy Code pursuant to this Motion.
- (i) Local Rule 6004-1(b)(iv)(J). The Debtors will retain necessary books and records, copies thereof, or include as part of the Purchase Agreement appropriate access to such information, to enable it to administer the Chapter 11 Cases following any Sale.
- (j) Local Rule 6004-1(b)(iv)(K). The Debtors may seek to sell avoidance actions.
- (k) Local Rule 6004-1(b)(iv)(L). The Debtors are seeking to sell the Assets free and clear of successor liability claims. The Debtors may have unpaid prepetition unsecured claims after the closing of the Sale. No party would likely be willing to purchase the Debtors' assets if it were at risk of liability for those claims under principles of successor liability.
- (l) Local Rule 6004-1(b)(iv)(M). The Debtors are seeking to sell the Assets free and clear of all liens, claims, and encumbrances to the fullest extent permitted by sections 363 and 365 of the Bankruptcy Code.
- (m) Local Rule 6004-1(b)(iv)(N). The Prepetition Agent, on behalf of itself and the other Prepetition Secured Parties, and the DIP Agent, on behalf of itself and the other DIP Secured Parties Secured Parties, are authorized to submit a Credit Bid for the purchase of all of the collateral on which such Prepetition Secured Parties (including the Prepetition Agent) and/or DIP Secured Parties (including the DIP Agent) hold a valid, perfected, and unavoidable lien up to the full amount of the outstanding Prepetition Loan Obligations (as defined in the Interim DIP Order) and/or DIP Obligations, respectively, in each case subject to the provisions of the DIP Orders and the provisions of section 363(k) of the Bankruptcy Code.
- (n) Local Rule 6004-1(b)(iv)(O). The Debtors are seeking relief from the fourteen-day stay imposed by Bankruptcy Rule 6004(h) for any Sale, as further described below.

BASIS FOR RELIEF REQUESTED

A. Approval of the Sale Is Warranted Under Section 363(b) of the Bankruptcy Code

51. Section 363(b) 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). Debtors must demonstrate a sound business justification for a sale or use of assets outside the ordinary course of business. *See, e.g., In re Martin*, 91 F.3d 389 (3d Cir. 1996) (citing *In re Schipper*, 933 F.2d 513 (7th Cir. 1991)); *In re Chateaugay Corp.*, 973 F.2d 141, 143 (2d Cir. 1992); *Stephens Indus., Inc. v. McClung*, 789 F.2d 386 (6th Cir. 1986); *In re Lionel Corp.*, 722 F.2d 1063 (2d Cir. 1983).

52. Courts typically consider the following factors in determining whether a proposed sale meets this standard:

- a. whether a sound business justification exists for the sale;
- b. whether adequate and reasonable notice of the sale was given to interested parties;
- c. whether the sale will produce a fair and reasonable price for the property; and
- d. whether the parties have acted in good faith.

In re Decora Indus., Inc., 2002 WL 32332749, at *2 (D. Del. May 20, 2002) (citing *Del. & Hudson Ry. Co.*, 124 B.R. 169, 176 (D. Del. 1991)).

53. When a debtor demonstrates a valid business justification for a decision, a strong presumption arises “that in making [the] business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.” *Official Comm. of Subordinated Bondholders v. Integrated Res., Inc. (In re Integrated Res., Inc.)*, 147 B.R. 650, 656 (S.D.N.Y. 1990) (holding that the Delaware business judgment rule has “vitality by analogy” in chapter 11) (citations omitted).

54. The Debtors submit that their decision to pursue a Sale on the terms set forth in this Motion and pursuant to the Bidding Procedures represents a reasonable exercise of the Debtors’ business judgment, and, accordingly, the Sale should be approved under section 363(b) of the Bankruptcy Code. The Debtors, with the assistance of their professional advisors, will

conduct an extensive and fulsome process to market the Assets, and the open and fair Auction and Sale process contemplated by the Bidding Procedures will ensure that the Debtors maximize value for their estates and all stakeholders by allowing the market to dictate the value of the Assets. Further, compliance with the Bidding Procedures will ensure that the Sale process is conducted in good faith and that the consideration to be paid by the Successful Bidder(s) will be fair and reasonable.

55. Additionally, the Debtors believe that the notice procedures described above with respect to the Sale process are reasonable and adequate under the circumstances. Bankruptcy Rules 2002(a) and (c) require the Debtors to notify creditors of the Sale, the terms and conditions of the Sale, the time and place of the Auction, and the deadline for filing any objections. The Debtors assert that the proposed notice procedures fully comply with Bankruptcy Rule 2002 and are reasonably calculated to provide timely and adequate notice of the Sale, the Auction, and the 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.

56. The Sale, conducted in accordance with the Bidding Procedures, will provide the Debtors with the best opportunity to generate maximum value for the Debtors' estates and represents the best path forward for maximizing recoveries. The Debtors submit that ample business justification exists for the consummation of the Sale, and, accordingly, the Debtors request that the Court approve the Bidding Procedures.

B. The Sale of the Assets Free and Clear of All Encumbrances Is Authorized Under Section 363(f) of the Bankruptcy Code

57. The Debtors request approval to sell the Assets free and clear of any and all liens, claims, interests, and encumbrances in accordance with section 363(f) of the Bankruptcy Code. It is well established that a bankruptcy court has the power, pursuant to section 363(f) of

the Bankruptcy Code, to approve the sale of a debtor’s assets free and clear of any claims against the debtor. *See In re TWA Airlines, Inc.*, 322 F.3d 283, 288-90 (3d Cir. 2003) (holding that successor liability claims are “interests in property” within the meaning of section 363(f)); *United Mine Workers of Am. Benefit Plan v. Leckie Smokeless Coal Co. (In re Leckie Smokeless Coal Co.)*, 99 F.3d 573 (4th Cir. 1996) (same). Pursuant to section 363(f), a debtor in possession may sell estate property “free and clear of any interest in such property of an entity other than the estate” if any one of the following conditions is satisfied:

- (a) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
- (b) such entity consents;
- (c) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
- (d) such interest is in bona fide dispute; or
- (e) 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); *see Citicorp Homeowners Serv., Inc. v. Elliot (In re Elliot)*, 94 B.R. 343, 345 (Bankr. E.D. Pa. 1988) (finding that, because section 363(f) is written in the disjunctive, a court may approve a “free and clear” sale even if only one of the subsections is met).

58. The Debtors submit that the Sale of the Assets free and clear of all Encumbrances satisfies the requirements of section 363(f) of the Bankruptcy Code. First, the Debtors are conducting the Sale process with the consent of the DIP Agent and Prepetition Agent, which hold liens on the Assets. *See* 11 U.S.C. § 363(f)(2). Further, the Debtors believe that any party holding a lien on the Assets could be compelled to accept a monetary satisfaction of such interests. Where the purchase price for a debtor’s assets is the best available purchase price under the circumstances, a court may authorize a sale free and clear of existing liens, claims, and

encumbrances pursuant to section 363(f)(3) of the Bankruptcy Code even if the purchase price is less than the face amount of liens, claims, and encumbrances. *See In re Boston Generating, LLC*, 440 B.R. 302, 332 (Bankr. S.D.N.Y. 2010); *In re Beker Indus., Corp.*, 63 B.R. 474, 477–78 (Bankr. S.D.N.Y. 1986). The Bidding Procedures and the Debtors' postpetition efforts to market the Assets will ensure that the purchase price paid for the Assets will be the best available. Accordingly, the Debtors believe that the Sale will satisfy the statutory prerequisites of section 363(f) of the Bankruptcy Code and, thus, the Court should approve the Sale of the Assets free and clear of all Encumbrances (other than certain permitted encumbrances and assumed liabilities as set forth in the Purchase Agreement).

C. The Sale Should Be Subject to the Protections of Section 363(m) of the Bankruptcy Code

59. Section 363(m) of the Bankruptcy Code provides, in relevant part, that the reversal or modification on appeal of an authorization of a sale pursuant to section 363(b) or section 363(c) of the Bankruptcy Code 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. *See* 11 U.S.C. § 363(m).

60. In approving the Sale free and clear of all Encumbrances (other than certain permitted encumbrances and assumed liabilities as set forth in the Purchase Agreement), the Debtors request that the Court find that any purchaser(s) of the Assets purchased in accordance with the Bidding Procedures are entitled to the protections afforded by section 363(m) of the Bankruptcy Code. Such relief is appropriate in that the selection of the Successful Bidder(s) will be the result of a competitive Bidding Process and arm's-length, good-faith negotiations, and parties in interest will have the opportunity to review and object to any proposed Sale transaction.

See Esposito v. Title Ins. Co. of Pa. (In re Fernwood Mkts.), 73 B.R. 616, 620 (Bankr. E.D. Pa. 1987) (finding that good-faith purchasers are protected under section 363(m) when notice is provided to lienholders).

D. The Court Should Approve the Bidding Procedures

61. The key objective in any sale of property of a debtor's estate is to maximize the value received by the estate. *See In re Mushroom Transp. Co.*, 382 F.3d 325, 339 (3d Cir. 2004) (finding that debtors "had a fiduciary duty to protect and maximize the estate's assets"); *Official Comm. of Unsecured Creditors v. Chinery*, 330 F.3d 548, 573 (3d Cir. 2003) (same). Procedures implemented to enhance competitive bidding support this objective and, therefore, are appropriate in the context of bankruptcy sales. *See In re O'Brien Envtl. Energy, Inc.*, 181 F.3d 527, 537 (3d Cir. 1999); *see also Integrated Res.*, 147 B.R. at 659 (stating that bidding procedures "encourage bidding and . . . maximize the value of the Debtor's assets").

62. The Debtors, with the assistance of their professional advisors, have designed the Bidding Procedures to promote a competitive and fair Bidding Process and, thus, to maximize value for the Debtors' estates and all stakeholders. Furthermore, allowing for the Debtors to enter into a Stalking Horse APA with a Stalking Horse Bidder prior to the Bid Deadline to set the floor may result in other Potential Bidders submitting higher or otherwise better offers. As a baseline bid, the Stalking Horse Bid could foster competitive bidding, thereby maximizing value for the benefit of the Debtors' stakeholders.

63. The Bidding Procedures will allow the Debtors to market the Assets to a broad universe of potential buyers and conduct the Auction in a controlled, fair, and open manner that will encourage participation and increase the likelihood that the Debtors will receive the highest amount of or otherwise best possible consideration for the Assets. Furthermore, the

Bidding Procedures provide an appropriate framework for the Debtors, with the assistance of their professional advisors, to review, analyze, and compare any Bids received to determine which Bids are in the best interests of the Debtors' estates and stakeholders.

64. The Debtors submit that the Bidding Procedures are necessary and transparent and will result in the submission of the highest or otherwise best Bids for the Assets. Therefore, the Debtors request that the Court approve the Bidding Procedures.

E. The Assumption and Assignment of the Assumed Contracts Satisfies Section 365 of the Bankruptcy Code

65. Section 365(a) of the Bankruptcy Code provides, in relevant part, that a debtor in possession, "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). The standard governing a bankruptcy court's approval of a debtor's decision to assume or reject an executory contract or unexpired lease is whether the debtor's reasonable business judgment supports assumption or rejection. *See, e.g., In re HQ Global Holdings, Inc.*, 290 B.R. 507, 511 (Bankr. D. Del. 2003) (finding that the debtor's decision to assume or reject executory contract is governed by the business judgment standard and can only be overturned if the decision was product of bad faith, whim or caprice); *see also In re Market Square Inn, Inc.*, 978 F.2d 116, 121 (3d Cir. 1992) (finding that the assumption or rejection of lease "will be a matter of business judgment by the bankruptcy court").

66. The business judgment test "requires only that the trustee [or debtor in possession] demonstrate that [assumption] or rejection of the contract will benefit the estate." *Wheeling-Pittsburgh Steel Corp. v. West Penn Power Co., (In re Wheeling-Pittsburgh Steel Corp.)*, 72 B.R. 845, 846 (Bankr. W.D. Pa. 1987). Any more exacting scrutiny would slow the administration of a debtor's estate and increase costs, interfere with the Bankruptcy Code's provision for private control of administration of the estate, and threaten a bankruptcy court's

ability to control a case impartially. *See Richmond Leasing Co. v. Capital Bank*, 762 F.2d 1303, 1311 (5th Cir. 1985). Moreover, pursuant to section 365(b)(1) of the Bankruptcy Code, for a debtor to assume an executory contract, it must “cure, or provide adequate assurance that the debtor will promptly cure,” any default, including compensation for “actual pecuniary loss” relating to such default. 11 U.S.C. § 365(b)(1).

67. Under section 365(f) of the Bankruptcy Code, a debtor, after assuming a contract, may assign its rights under the contract to a third party. 11 U.S.C. § 365(f); *see also In re Rickel Home Center, Inc.*, 209 F.3d 291, 299 (3d Cir. 2000) (“The Code generally favors free assignability as a means to maximize the value of the Debtor’s estate.”); *see also In re Headquarters Dodge, Inc.*, 13 F.3d 674, 682 (3d Cir. 1994) (noting that the purpose of section 365(f) is to assist the trustee in realizing the full value of the debtors’ assets). Section 365(f)(2)(B) requires that the non-debtor counterparty to a contract be given adequate assurance of future performance by an assignee. 11 U.S.C. § 365(f)(2)(B). The purpose of the adequate assurance requirement is to protect the interests of the non-debtor counterparty to an assigned contract, as section 365(k) of the Bankruptcy Code relieves a debtor from liability for any breach of a contract that may occur after an assignment. *Cinicola v. Scharffeberger*, 248 F.3d 110, 120 (3d Cir. 2001). Adequate assurance of future performance is not required for every term of an executory contract or unexpired lease, but only such terms that are “material and economically” significant. *In re Fleming Cos., Inc.*, 499 F.3d 300, 305 (3d Cir. 2007).

68. The meaning of “adequate assurance of future performance” depends on the facts and circumstances of each case but should be given a “practical, pragmatic construction.” *In re DBSI, Inc.*, 405 B.R. 698, 708 (Bankr. D. Del. 2009); *see also In re Decora Indus.*, 2002 U.S. Dist. LEXIS 27031, at *23 (D. Del. 2002) (“[A]dequate assurance falls short of an absolute

guarantee of payment.”). Adequate assurance 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) (finding that adequate assurance is present when prospective assignee of lease from a debtor has financial resources and has expressed willingness to devote sufficient funding to the business to give it strong likelihood of success).

69. The assumption and assignment of certain executory contracts and unexpired leases is an appropriate exercise of the Debtors’ business judgment. Additionally, the Debtors submit that the notice provisions and the objection deadline for counterparties to raise objections to the cure amounts and the assumption and assignment of the Subject Contracts as proposed in this Motion are adequate to protect the rights of counterparties to the Debtors’ executory contracts and unexpired leases. Moreover, the Debtors will demonstrate adequate assurance of future performance at the Sale Hearing.

WAIVER OF RULES 6004(h) AND 6006(d)

70. The Debtors requests that, upon entry of the Sale Order, the Court waive the 14-day stay requirements of Bankruptcy Rules 6004(h) and 6006(d). The waiver of the 14-day stay imposed by Bankruptcy Rules 6004(h) and 6006(d) is necessary to permit the Sale to close expeditiously. The Debtors respectfully requests that the Court waive the 14-day stay requirements contained in Bankruptcy Rules 6004(h) and 6006(d).

NOTICE

71. Notice of this Motion will be provided to: (i) the U.S. Trustee; (ii) counsel to the DIP Lender and Prepetition Agent; (iii) holders of the twenty largest unsecured claims on a consolidated basis against the Debtors; (iv) the Internal Revenue Service; (v) the Securities and

Exchange Commission; (vi) the Office of the United States Attorney for the District of Delaware; (vii) the USDA; and (viii) any party that has requested notice pursuant to Bankruptcy Rule 2002. The Debtors submit that, in light of the nature of the relief requested, no other or further notice need be given.

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CONCLUSION

WHEREFORE, the Debtors respectfully request that the Court grant the relief requested herein and such other relief as is just and proper.

Dated: March 21, 2023
Wilmington, Delaware

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