

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE**

In re:

XEBEC HOLDING USA INC., *et al.*,

Debtors in a foreign proceeding.¹

Chapter 15

Case No. 22- 10934 (KBO)

Jointly Administered

**MOTION FOR ORDER (I) RECOGNIZING AND ENFORCING
CCAA VESTING ORDER; (II) APPROVING THE SALE OF CERTAIN OF
THE DEBTORS' ASSETS FREE AND CLEAR OF ANY AND ALL LIENS, CLAIMS,
AND ENCUMBRANCES; (III) APPROVING ASSUMPTION AND ASSIGNMENT
OF CERTAIN CONTRACTS; AND (IV) GRANTING RELATED RELIEF**

Xebec Adsorption Inc., in its capacity as the authorized foreign representative (the “**Foreign Representative**”) for the above-captioned debtors (collectively, the “**Debtors**”) in a proceeding (the “**Canadian Proceeding**”) commenced under Canada’s Companies’ Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended (the “**CCAA**”), and pending before the Superior Court of Québec, in the Province of Québec, District of Montréal (the “**Canadian Court**”), respectfully submits this Motion (this “**Motion**”) requesting the entry of an order substantially in the form attached hereto as **Exhibit A** (the “**Sale and Recognition Order**”): (i) recognizing and enforcing the Canadian Court’s order (the “**Vesting Order**”) authorizing Debtor CDA System, LLC (“**CDA**”) and Debtor California Compression, LLC (“**California Compression**,” and together, the “**Sellers**”) to sell substantially all of their assets (the “**Purchased Assets**”) and to assume and assign certain of their contracts (the “**Assigned Contracts**”) to Sullair,

¹ The Debtors in the chapter 15 proceedings and the last four digits of their federal tax identification numbers are: Xebec Adsorption Inc. (0228), Xebec RNG Holdings Inc. (N/A), Applied Compression Systems Ltd. (N/A), Compressed Air International Inc. (N/A), Xebec Holding USA Inc. (8495), Enerphase Industrial Solutions Inc. (1979), CDA Systems, LLC (6293), Xebec Adsorption USA, Inc. (0821), The Titus Company (9757), Nortekbelair Corporation (1897), XBC Flow Services – Wisconsin Inc. (7493), California Compression, LLC (4752), and Xebec Systems USA LLC (4156). The location of the Debtors’ corporate headquarters and the Debtors’ foreign representative is: 730 Industriel Boulevard, Blainville, Quebec, J7C 3V4, Canada.

LLC (“**Sullair**”), pursuant to that certain Asset Purchase Agreement by and between the Sellers and Sullair, dated February 8, 2023 (the “**Purchase Agreement**”); (ii) approving the sale of the Purchased Assets free and clear of any and all liens, claims, and encumbrances (the “**Sullair Transaction**”); (iii) approving the assumption and assignment of the Assigned Contracts; and (iv) granting related relief.

In support of this Motion, the Foreign Representative refers the Court to: (a) the *Declaration of Dimitrios “Jim” Vounassis in Support of Motion for Recognition of Foreign Main Proceeding* [Docket No. 3] (the “**Vounassis First Day Declaration**”), filed on September 30, 2022; (b) *Declaration of Sandra Abitan, as Canadian Counsel to the Debtors, in Support of Motion for Entry of Order (A) Approving Noticing Procedures for Debtors’ Motion for (I) Approval of the Sale of Debtors’ Assets; and (II) Recognition and Enforcement of Canadian Court Order Approving the Sale; (B) Setting a Sale Hearing; and (C) Granting Related Relief* [Docket No. 61] (the “**Abitan Noticing Procedures Declaration**”), filed on December 21, 2022; (c) the *Declaration of Dimitrios “Jim” Vounassis in Support of Foreign Representative’s Motion for Order (I) Recognizing and Enforcing the CCAA Vesting Order; (II) Approving the Sale of Certain of the Debtors’ Assets Free and Clear of Any and All Liens, Claims, and Encumbrances; (III) Approving the Assumption and Assignment of Certain Contracts; and (IV) Granting Related Relief* (the “**Vounassis Sale Declaration**,” or the “**Vounassis Sale Decl.**”), filed contemporaneously herewith; and (d) the *Declaration of Sandra Abitan in Support of Foreign Representative’s Motion for Order (I) Recognizing and Enforcing the CCAA Vesting Order; (II) Approving the Sale of Certain of the Debtors’ Assets Free and Clear of Any and All Liens, Claims, and Encumbrances; (III) Approving the Assumption and Assignment of Certain Contracts; and (IV) Granting Related Relief* (the “**Abitan Sale Declaration**,” or the “**Abitan Sale Decl.**”),

filed contemporaneously herewith. The Vounassis First Day Declaration, the Abitan Noticing Procedures Declaration, the Vounassis Sale Declaration, and the Abitan Sale Declaration each are incorporated herein by reference.

In further support of the relief requested herein, the Foreign Representative respectfully represents as follows:

JURISDICTION AND VENUE

1. The Court has jurisdiction to consider 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.

2. The Foreign Representative, in its capacity as authorized foreign representative, has properly commenced these chapter 15 cases pursuant to sections 1504, 1509, and 1515 of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (the “**Bankruptcy Code**”).

3. 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 Foreign Representative consents to the entry of a final order by the Court in connection with this Motion to the extent it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments consistent with Article III of the United States Constitution.

4. Venue is proper before the Court pursuant to 28 U.S.C. § 1410.

5. The statutory predicates for the relief requested herein are sections 105(a), 363, 365, 1501, 1507, 1520, 1521, 1525, and 1527 of the Bankruptcy Code, Rules 2002 and 6004 of the Federal Rules of Bankruptcy Procedures (the “**Bankruptcy Rules**”), and Local Rules 2002-1, 6004-1, and 9006-1.

BACKGROUND

6. The Debtors and certain non-U.S. based subsidiaries and affiliates of the Debtors (the “**Xebec Group**”) primarily supply a wide range of renewable and low-emission gas products and services globally through several channels, including direct sales, channel partners, project developers, and e-commerce. The Xebec Group portfolio includes proprietary technologies for the on-site and distributed production of renewable and low-emission natural gas, oxygen and nitrogen, and proprietary technologies that transform raw gases into clean sources of renewable energy. The Xebec Group’s operations include manufacturing, research and development, service, and sales. The Xebec Group operates in North America, Europe, the Middle East, and Asia. A more detailed description of the Debtors and their businesses can be found in the Foreign Representative’s Motion for Recognition of Foreign Main Proceeding and Request for Certain Related Relief [Docket No. 7] (the “**Recognition Motion**”).

7. California Compression is a compressed air distributor and provides the Debtors with distribution and service capabilities for customers located in Northern California. CDA sells, rents, and services compressed air products and supports the Debtors’ products in California. (Vounassis Sale Decl. ¶ 7.).

A. The Canadian Proceeding

8. On September 29, 2022, pursuant to an application made by the Debtors in the Canadian Proceeding, the Canadian Court entered: (a) the First Day Initial Order (the “**Initial CCAA Order**”); and (b) the Bidding Procedures Order (the “**CCAA Bidding Procedures Order**”). A copy of the Initial CCAA Order was attached as Exhibit D to the Recognition Motion. (Abitan Sale Decl. ¶ 7.)

9. Pursuant to the Initial CCAA Order, the Canadian Court, among other things: (a) ordered a broad stay of proceedings in respect of the Debtors and their directors and officers

(the “**Canadian Stay**”);² (b) appointed Deloitte Restructuring Inc. (the “**Monitor**”) as monitor in the Canadian Proceeding; (c) declared that Québec is the “centre of main interest” of the Debtors, and, accordingly, authorized the Debtors to apply to any other court, tribunal, regulatory, administrative, or other body, wherever located, for orders to recognize and assist in carrying out the terms of the Initial CCAA Order and any subsequent orders rendered by the Canadian Court in the context of the Canadian Proceeding, including orders under chapter 15 of the Bankruptcy Code. (Abitan Sale Decl. ¶ 8; *see also* Initial CCAA Order at ¶¶ 16-20, 40-48, 65, 67.)

B. The Chapter 15 Cases

10. On September 30, 2022 (the “**Petition Date**”), the Foreign Representative commenced these chapter 15 cases by filing, among other things, verified chapter 15 petitions seeking recognition by the Court of the Canadian Proceeding as a foreign main proceeding under chapter 15 of the Bankruptcy Code.

11. On the Petition Date, the Court entered that certain *Order (A) Directing Joint Administration of Cases Under Chapter 15 of the Bankruptcy Code and (B) Authorizing the Filing of a Consolidated List Under Bankruptcy Rule 1007* [Docket No. 8].

12. On October 27, 2022, the Court entered that certain *Order Granting Recognition of Foreign Main Proceeding and Certain Related Relief* [Docket No. 36] (the “**Original Recognition Order**”). Pursuant to the Original Recognition Order, the Court recognized the Canadian Proceeding as a “foreign main proceeding” pursuant to chapter 15 of the Bankruptcy Code, recognized the Foreign Representative as the “foreign representative” in respect of the Canadian Proceeding, and recognized and granted comity to, and gave full force and effect in the United

² On February 3, 2023, the Canadian Court entered an order extending the Canadian Stay until February 13, 2023. (Abitan Sale Decl. ¶ 9.) By the Canadian Application (as defined below), the Debtors requested an extension of the stay to March 17, 2023. (*Id.*)

States to the Canadian Proceeding and the orders entered in the Canadian Proceeding, including enforcing the automatic stay in the United States.

13. On December 21, 2022, the Foreign Representative filed that certain *Motion for Entry of Order (A) Approving Noticing Procedures for Debtors' Motion for (I) Approval of the Sale of Debtors' Assets; and (II) Recognition and Enforcement of Canadian Court Order Approving the Sale; (B) Setting a Sale Hearing; and (C) Granting Related Relief* [Docket No. 60] (the “**Noticing Procedures Motion**”), pursuant to which the Foreign Representative sought, among other things, approval of noticing procedures for a motion to approve the sale of the Debtors’ assets and for recognition and enforcement of a Canadian Court order approving such sale (the “**Noticing Procedures**”). The Foreign Representative served the Noticing Procedures Motion via U.S. Mail (the “**U.S. Mail Notice**”) on, among others, any party with a United States mailing address that had been served with filings in the Canadian Proceeding or who had previously received notice by mail from the Foreign Representative in these chapter 15 cases. (*See Notice of Service* [Docket No. 62].) The Noticing Procedures provided for the Foreign Representative to serve a copy of this Motion, via overnight mail, on any party that requested service in accordance with the procedures set forth in the U.S. Mail Notice.

14. On January 9, 2023, the Court entered that certain *Order (A) Approving Noticing Procedures for Debtors' Motion for (I) Approval of the Sale of Debtors' Assets; and (II) Recognition and Enforcement of Canadian Court Order Approving the Sale; (B) Setting a Sale Hearing; and (C) Granting Related Relief* [Docket No. 65] (the “**Noticing Procedures Order**”). Pursuant to the Noticing Procedures Order, the Court held, among other things, that notice of the Noticing Procedures Motion was (i) appropriate, (ii) reasonably calculated to provide timely and proper notice and an opportunity to object to the Noticing Procedures Motion, (iii) in compliance

with all applicable requires of the Bankruptcy Code, the Bankruptcy Rules, and the Local Rules, and (iv) adequate and sufficient under the circumstances. (Noticing Procedures Order ¶ 3.) In addition, the Court approved the Noticing Procedures generally, including as they relate to this Motion, and held that they “are necessary and appropriate to facilitate the Debtors’ efforts to close a sale within the timeline required by the Bidding Procedures and the Debtors’ business.” (*Id.* ¶ 8.) The Court also held that the Noticing Procedures are appropriate and reasonably calculated to provide timely and proper notice and an opportunity to object to this Motion. (*Id.* ¶ 9.)

C. Sale Process

15. Pursuant to the CCAA Bidding Procedures Order, the Canadian Court, among other things: (a) approved the Debtors’ proposed Sale and Investment Solicitation Process (the “**SISP**”); and (b) approved the engagement of National Bank Financial Inc. (the “**Financial Advisor**”) to serve as the Debtors’ financial advisor in the context of the sale process. (Abitan Sale Decl. ¶ 10.)

16. The Debtors, with the assistance of the Monitor and the Financial Advisor, and under the oversight of the Canadian Court, conducted a sale process in accordance with the SISP. Similar to a traditional sale process in a case under section 363 of the Bankruptcy Code, the SISP established a clear and open process for the solicitation, receipt, and evaluation of bids on a timeline that will provided parties with sufficient time and information to submit competitive bids. In addition to seeking bids to purchase substantially all of the Debtors’ assets as a going concern, the SISP also authorized the Debtors to sell certain of their assets as part of separate one-off sale transactions. (Abitan Sale Decl. ¶ 11.)

17. At the commencement of the sale process, the Financial Advisor distributed teasers to 479 potential targets, including potential investors and strategic acquirers. A confidential virtual data room was made available to potential targets who executed non-disclosure agreements. Initially, 67 parties were deemed “Phase 1” qualified bidders, of which 32 submitted non-binding

letters of intent. The Debtors, in consultation with the Monitor and the Financial Advisor, determined that 19 Phase 1 qualified bidders were “Phase 2” qualified bidders, and invited them to participate in Phase 2 of the SISP. (Abitan Sale Decl. ¶ 12.)

18. On January 6, 2023, certain Phase 2 qualified bidders submitted binding offers. After consultation with the Monitor and the Financial Advisors, the Debtors directed the Financial Advisor to engage with and obtain clarifications from these bidders. Subsequently, on January 16, 2023, such Phase 2 qualified bidders submitted revised binding offers. Thereafter, the Debtors engaged in further negotiations with the bidders. In light of the revised binding offers, the Debtors, in consultation with the Monitor and the Financial Advisor, determined that it would be in the Debtors’ best interests to not hold an auction. Sustained conversations are ongoing with several Phase 2 qualified bidders in respect of various transactions, designed to ensure the SISP results in the highest and best transactions available, for the benefit of all stakeholders. However, the Debtors, after consultation with the Monitor and the Financial Advisor, have determined that no actionable offers were received for the purchase of substantially all of the Debtors’ assets as a going concern in one single transaction. (Abitan Sale Decl. ¶ 13.)

D. The Sullair Transaction

19. On February 8, 2023, the Debtors filed that certain Application for the Issuance of a Third Amended and Restated Initial Order and Approval and Vesting Orders (the “**Canadian Application**”) in the Canadian Proceeding. Pursuant to the Canadian Application, the Debtors seek, among other things, entry of a proposed Vesting Order approving the Sullair Transaction. (Abitan Sale Decl. ¶ 14.) A copy of the Canadian Application is attached hereto as **Exhibit B.**³

³ The voluminous exhibits to the Canadian Application are available upon request to counsel for the Foreign Representative.

The Proposed Vesting Order is attached as exhibit P-3 to the Canadian Application. A copy of the Purchase Agreement is attached hereto as **Exhibit C**.⁴

20. As detailed in the Canadian Application, during the SISP process, Sullair made a binding offer to purchase the Sellers' assets, conditioned on the completion of certain remaining due diligence and other conditions. Subsequently, the Debtors, with the assistance of the Financial Advisor, worked with Sullair and its advisors to complete the remaining due diligence items and ultimately to negotiate and document a revised and improved offer from Sullair, in the form of the Purchase Agreement. In light of their current circumstances and after careful consideration of all alternatives, the Debtors determined, in consultation with the Monitor and the Financial Advisor, that the revised Sullair offer was the most advantageous to the stakeholders of the Sellers and of the Debtors generally. (Canadian Application ¶¶ 49-51.)

21. The Sullair Transaction contemplates the sale of substantially all the Sellers' assets on an "as is, where is" basis and the assignment to Sullair of the Assigned Contracts. (Abitan Sale Decl. ¶ 15.) The Foreign Representative understands that Sullair intends on hiring all or substantially all of the Sellers' current employees. (Vounassis Sale Decl. ¶ 8.)

22. In accordance with Canadian law and practice, the Debtors filed the Purchase Agreement under seal in the Canadian Proceeding and did not publicly disclose the purchase price in their Canadian Proceeding filings. (Abitan Sale Decl. ¶ 16.) As stated in the Canadian Application, the Purchase Agreement requires entry of the Vesting Order and the Sale and Recognition Order as a condition to closing, which closing must occur prior to February 20, 2023. (Canadian Application ¶¶ 54-55.)

23. The Purchase Agreement also requires the Vesting Order to approve the assignment

⁴ Contemporaneously with the filing of this Motion, the Foreign Representative has filed a motion for authority to file the Purchase Agreement under seal.

of the Assigned Contracts to Sullair, and the payment of any and all cure costs within 30 days of the issuance of the Monitor's closing certificate. (Canadian Application ¶ 56.)

24. In addition, by the proposed Vesting Order, the Debtors are seeking releases in favor of each Seller's directors and officers with respect to any and all claims, liabilities, or obligations related directly or indirectly to the Sellers, including with respect to their business, affairs, or operations, their assets and liabilities, the Canadian Proceeding, but excepting certain claims that cannot be released under the CCAA (the "**D&O Releases**"). (Abitan Sale Decl. ¶ 17.) The Foreign Representative believes the D&O Releases are warranted because the Sellers' directors and officers continuously worked towards maximizing the Sellers' value and, in turn, recovery for their creditors. (Vounassis Sale Decl. ¶ 9.) Given the outcome of the SISF, the Debtors do not anticipate sufficient funds will be available to finance a plan of arrangement or a plan of compromise, which would customarily include releases in favor of the Sellers' directors and officers. (*Id.*; Abitan Sale Decl. ¶ 17.) However, the D&O Releases contained in the proposed Vesting Order are consistent with releases granted by Canadian courts in similar CCAA proceedings. (Abitan Sale Decl. ¶ 17.) The Foreign Representative understands that the Monitor is supportive of the D&O Releases. (Vounassis Sale Decl. ¶ 9.)

25. The Foreign Representative believes that the terms of the Purchase Agreement and Vesting Order are reasonable and fair under the circumstances, and that the Sullair Transaction provides the highest and best return for the Sellers' assets. Further, the Foreign Representative believes that an expedited closing of the Sullair Transaction would benefit all stakeholders. If they cannot consummate the Sullair Transaction, the Sellers will not have sufficient liquidity to continue operations in the ordinary course, and the Debtors may be forced to liquidate the Sellers' business. The Foreign Representative understands that the Monitor and the Debtors' DIP Lenders

are supportive of the Sellers' entry into the Sullair Transaction. (Vounassis Sale Decl. ¶ 10.)

26. A hearing on the Canadian Application is scheduled for February 13, 2023, at which time the Debtors will request entry of the Vesting Order. (Abitan Sale Decl. ¶ 18.)

27. In anticipation of the hearing on the Canadian Application, the Foreign Representative files this Motion in accordance with the Noticing Procedures Order to facilitate the Debtors' and Sullair's ability to close the Sullair Transaction in accordance with the deadlines imposed by the Purchase Agreement.

28. The Foreign Representative believes that consummating the Sullair Transaction in accordance with the deadlines set forth in the Purchase Agreement is critical to preserving the going-concern value of the Purchased Assets. In short, the Sullair Transaction is the best transaction for the Purchased Assets available to the Debtors under the circumstances, and ensures that the Sellers' business can continue as a going-concern, which will benefit a broad array of stakeholders, includes the Sellers' customers, employees, and suppliers. (Vounassis Sale Decl. ¶ 11.)

RELIEF REQUESTED

29. As set out above, the Sullair Transaction is conditioned on the Court's recognition and enforcement of the Vesting Order. Accordingly, the Foreign Representative seeks entry of the Order, (i) recognizing and enforcing the Vesting Order; (ii) approving the proposed Sullair Transaction, including the assumption and assignment of the Assigned Agreements; and (iii) granting related relief.

BASIS FOR RELIEF

A. The Court Should Recognize and Enforce the Vesting Order and Authorize the Sale of the Purchased Assets Pursuant to Section 363 of the Bankruptcy Code

30. Upon a bankruptcy court's granting recognition of a foreign representative and of

a foreign proceeding as a foreign main proceeding, relief is available to the petitioner under section 1520 of the Bankruptcy Code. *See* 11 U.S.C. § 1520. Section 1520(a)(2) of the Bankruptcy Code provides, in relevant part, that, “[u]pon recognition of a foreign proceeding that is a foreign main proceeding . . . section[] 363 [of the Bankruptcy Code] appl[ies] to a transfer of an interest of the debtor in property that is within the territorial jurisdiction of the United States to the same extent that the section[] would apply to property of an estate.” 11 U.S.C. § 1520(a)(2); *see also* 11 U.S.C. § 1521(a)(5) (providing that a U.S. bankruptcy court may “entrust[] the administration or realization of all or part of the debtor’s assets within the territorial jurisdiction of the United States to the foreign representative or another person, including an examiner, authorized by the court.”).

31. Moreover, section 1520(a)(3) of the Bankruptcy Code provides that, upon recognition of a foreign main proceeding, “unless the court orders otherwise, the foreign representative may operate the debtor’s business and may exercise the rights and powers of a trustee under and to the extent provided by section[] 363 [of the Bankruptcy Code].” 11 U.S.C. § 1520(a)(3); *see also In re Elpida Memory, Inc.*, No. 12-10947, 2012 WL 6090194, at *5 (Bankr. D. Del. Nov. 20, 2012) (holding that section 363 of the Bankruptcy Code applies to transfers of assets located within the United States outside of the ordinary course of business in connection with cases commenced under chapter 15 of the Bankruptcy Code).

32. Section 363 of the Bankruptcy Code provides, in relevant part, that “[t]he trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.” 11 U.S.C. § 363(b)(1). Although section 363 of the Bankruptcy Code does not specify a standard for determining when it is appropriate for a court to authorize the use, sale, or lease of property of a debtor’s estate, courts have approved the authorization of a sale of a debtor’s assets if such sale is based upon the sound business judgment of the debtor. *See, e.g.,*

Meyers v. Martin (In re Martin), 91 F.3d 389, 395 (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); *Stephen Indus., Inc. v. McClung*, 789 F.2d 386 (6th Cir. 1986); *Committee of Equity Security Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1071 (2d Cir. 1983).

33. Courts typically consider the following factors in determining whether a proposed sale satisfies this standard: (a) whether a sound business justification exists for the sale; (b) whether adequate and reasonable notice of the sale was provided 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. *See In re Decora Indus., Inc.*, No. 00-4459, 2002 WL 32332749, at *2 (D. Del. May 20, 2002) (citing *In re Del. & Hudson Ry. Co.*, 124 B.R. 169, 176 (D. Del. 1991)).

34. Where a debtor demonstrates a valid business justification for a decision, it is presumed that “in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.” *In re Integrated Res., Inc.*, 147 B.R. at 656. A sound business purpose for the sale of a debtor’s assets outside the ordinary course of business exists where such sale is necessary to preserve the value of the estate for the benefit of creditors and interest holders. *See, e.g., In re Abbotts Dairies of Pa., Inc.*, 788 F.2d 143 (3d Cir. 1986); *In re Lionel Corp.*, 722 F.2d at 1063; *In re Food Barn Stores, Inc.*, 107 F.3d at 564-65 (recognizing the paramount goal of any proposed sale of property of estate is to maximize value).

35. Entering into the Sullair Transaction is a prudent exercise of the Debtors’ business judgment. *First*, the Sullair Transaction is the result of the Debtors’ thorough, transparent, and fair marketing and sale process in accordance with the Canadian Court-approved SISP, which

included extensive stakeholder negotiations and engagement, and ultimately resulted in entry into the Purchase Agreement. Further, the Transaction provides a viable going-concern transaction available to the Debtors to monetize the Sellers' assets as a going-concern for the benefit of all stakeholders. Accordingly, the Foreign Representatives contends that the Debtors have a sound business reason justifying the sale of the Purchased Assets to Sullair pursuant to the Purchase Agreement. (Vounassis Sale Decl. ¶ 12.) As such, recognition of the Vesting Order is necessary and appropriate.

36. *Second*, the Purchase Agreement is the result of an extensive marketing process undertaken by the Debtors and their advisors and the product of arm's-length, good-faith negotiations between the Debtors and Sullair. (Vounassis Sale Decl. ¶ 13.) As discussed below, the Foreign Representative submits that Sullair is a "good faith" purchaser within the meaning of section 363(m) of the Bankruptcy Code. Moreover, considering that the SISP was crafted to ensure that the Purchased Assets were sold for the maximum potential price, the Foreign Representative submits that the Sullair Transaction has been proposed in good faith. (*Id.*)

37. *Third*, during the Canadian Proceeding, the Debtors have complied with all notice and service requirements under the CCAA, including notice of the SISP and the Sullair Transaction. (Abitan Sale Decl. ¶ 19.) In addition, the Foreign Representative provided notice of the Noticing Procedures Motion to, among others, all parties with a U.S. mailing address that had been served with filings in the Canadian Proceeding, and all other parties who had previously received notice from the Foreign Representation in these chapter 15 cases. (*See Notice of Service* [Docket No. 62].) Further, in compliance with the Noticing Procedures Order, the Foreign Representative intends on serving this Motion in accordance with the terms of the Noticing Procedures Order. As such, this Motion, together with the Noticing Procedures, will provide

notice reasonably calculated, under the circumstances, to inform all interested parties of the pendency of this Motion, notice of the objection deadline, and notice of the hearing on this Motion. Accordingly, the Foreign Representative submits that notice of the Sullair Transaction and the hearing on approval thereof is sufficient and appropriate.

38. *Fourth*, the Purchase Agreement is fair, reasonable, and the result of an extensive marketing process and negotiations between the Debtors, the Monitor, and Sullair. Accordingly, the Foreign Representative believes it provides the highest and best value to the Debtors and their stakeholders for the Purchased Assets. The fairness and reasonableness of the consideration to be received by the Debtors from Sullair is validated by a “market test” through the robust court-approved SISP—a reliable means for establishing whether a purchase price is fair and reasonable. The Purchase Agreement presents the best opportunity to maximize the value of the Purchased Assets on a going concern basis. For all of the foregoing reasons, the Debtors have determined that the sale of the Purchased Assets pursuant to the Purchase Agreement is in the best interests of their estates, creditors, and other parties in interest, thereby satisfying the sound business purpose test and section 1520 of the Bankruptcy Code. (*See* Vounassis Sale Decl. ¶ 14.)

39. Lastly, sections 1525 and 1527 of the Bankruptcy Code contemplate cooperation “to the maximum extent possible with the foreign court or a foreign representative,” which includes, “coordination of the administration and supervision of the debtor’s assets and affairs,” and “approval or implementation of agreements concerning the coordination of proceedings.” 11 U.S.C. §§ 1525, 1527. Accordingly, the Foreign Representative respectfully requests that the Court recognize and give effect to the Vesting Order and approve the sale of the Purchased Assets.

B. The Court Should Authorize and Approve the Sale of the Purchased Assets “Free and Clear” Under Section 363(f) of the Bankruptcy Code

40. Section 363(f) of the Bankruptcy Code permits a debtor to sell property free and

clear of another party's interest in the property if: (a) applicable nonbankruptcy law permits such a free and clear sale; (b) the holder of the interest consents; (c) the interest is a lien and the sale price of the property exceeds the value of all liens on the property; (d) the interest is the subject of a bona fide dispute; or (e) the holder of the interest could be compelled in a legal or equitable proceeding to accept a monetary satisfaction of its interest. *See* 11 U.S.C. § 363(f); *see also 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).

41. Section 363(f) of the Bankruptcy Code is supplemented by section 105(a) of the Bankruptcy Code, which provides that "[t]he Court may issue any order, process or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]." 11 U.S.C. § 105(a). The Foreign Representative submits that the sale of the Purchased Assets free and clear of all liens, claims, interests, and encumbrances will satisfy one or more of the requirements under section 363(f) of the Bankruptcy Code.

42. More specifically, the Debtors have obtained the requisite consent from their prepetition secured lenders and the DIP Lenders to sell the Purchased Assets free and clear of their liens, claims, interests, or encumbrances. (Abitan Sale Decl. ¶ 20.) Moreover, as noted above, in accordance with the service requirements of the CCAA, and those approved and required by this Court pursuant to the Noticing Procedures Order, the Debtors have provided notice of the proposed Sullair Transaction to all lienholders. (*See id.* ¶ 21; *Notice of Service* [Docket No. 62].) Accordingly, the Foreign Representative requests that, unless a party asserting a prepetition lien, claim, or encumbrance on any of the Purchased Assets timely objects to this Motion, such party

shall be deemed to have consented to the sale of the Purchased Assets. *See In the Matter of Tabone, Inc. (Hargrave v. Twp. of Pemberton)*, 175 B.R. 855, 858 (Bankr. D.N.J. 1994) (by not objecting to a sale motion, a creditor is deemed to consent to the relief requested therein).

43. Accordingly, the Foreign Representative submits that the sale of the Purchased Assets free and clear of all interests, as provided in the Vesting Order and the proposed Sale and Recognition Order, satisfies the statutory prerequisites of section 363(f) of the Bankruptcy Code, and, therefore, the Court should authorize the sale of the Purchased Assets free and clear of any liens, claims, interests, and encumbrances, in accordance with section 363(f) of the Bankruptcy Code.

44. The Foreign Representative submits that a sale to Sullair of the Purchased Assets free and clear of all liens, claims, encumbrances, and other interests is consistent with the best interests of the Debtors' estates and creditors. Pursuing a sale other than one free and clear of all liens, claims, encumbrances, and other interests would yield substantially less value for the Debtors and their creditors. (Vounassis Sale Decl. ¶ 15.) Therefore, a sale free and clear of all interests is in the best interests of the Debtors, their creditors, and other parties in interest, is consistent with the sale approved by the Vesting Order.

C. The Court Should Afford Sullair All Protections Under Sections 363(m) and (n) of the Bankruptcy Code as a Good Faith Purchaser

45. The Debtors also request that the Court find that Sullair is entitled to the benefits and protections set forth in sections 363(m) and (n) of the Bankruptcy Code. Specifically, section 363(m) of the Bankruptcy Code provides, in pertinent part: “[t]he 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). Section 363(m) of the Bankruptcy Code fosters the “policy of not only affording finality to the judgment of the [B]ankruptcy [C]ourt, but particularly to give finality to those orders and judgments upon which third parties rely.” *In re Abbotts Dairies*, 788 F.2d at 147; *see also Allstate Ins. Co. v. Hughes*, 174 B.R. 884, 888 (S.D.N.Y. 1994) (“Section 363(m) . . . provides that good faith transfers of property will not be affected by the reversal or modification on appeal of an unstayed order, whether or not the transferee knew of the pendency of the appeal.”).

46. While the Bankruptcy Code does not define “good faith,” the Third Circuit has held that “the phrase encompasses one who purchases in ‘good faith’ and for ‘value.’” *In re Abbotts Dairies*, 788 F.2d at 147 (to constitute lack of good faith, a party’s conduct in connection with the sale must usually amount to fraud, collusion between the purchaser and other bidders or the trustee or an attempt to take grossly unfair advantage of other bidders); *see also In re Bedford Springs Hotel, Inc.*, 99 B.R. 302, 305 (Bankr. W.D. Pa. 1989); *In re Perona Bros., Inc.*, 186 B.R. 833, 839 (D.N.J. 1995).

47. In other words, a party would have to show fraud or collusion between the Debtors and Sullair to demonstrate a lack of good faith. *See Kabro Assocs. of West Islip, LLC v. Colony Hill Assocs. (In re Colony Hill Assocs.)*, 111 F.3d 269, 276 (2d Cir. 1997) (“[t]ypically, the misconduct that would destroy a [buyer]’s good faith status at a judicial sale involves fraud, collusion between the [buyer] and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders”). Due to the absence of a bright-line test for good faith, the determination is based on the facts of each case, with a focus on the “integrity of [a bidder’s] conduct in the course of the sale proceedings.” *In re Pisces Leasing Corp.*, 66 B.R. 671, 673 (E.D.N.Y. 1986) (quoting *In re Rock Indus. Mach. Corp.*, 572 F.2d 1195, 1998 (7th Cir. 1978)).

48. The Foreign Representative submits that Sullair is a “good faith purchaser” within the meaning of section 363(m) of the Bankruptcy Code. Further, the Foreign Representative submits that the parties did not engage in any conduct that would cause or permit the Sullair Transaction to be avoided under section 363(n) of the Bankruptcy Code. The Debtors and Sullair, and their respective advisors, have entered into the Purchase Agreement, and seek entry of the Vesting Order and the Sale and Recognition Order, without collusion, in good faith, and after extensive arm’s-length negotiations. There is no evidence of fraud or collusion in the terms of the Purchase Agreement. To the best of the Foreign Representative’s knowledge, information, and belief, no party has engaged in any conduct that would cause or permit the Sullair Transaction to be set aside under section 363(m) of the Bankruptcy Code. (*See* Vounassis Sale Decl. ¶ 16.)

49. Accordingly, the Foreign Representative submits that Sullair is a good faith purchaser under section 363(m) of the Bankruptcy Code and has not violated section 363(n) of the Bankruptcy Code.

D. Assumption and Assignment of Assigned Contracts Should Be Authorized

50. Section 1521(a)(7) of the Bankruptcy Code provides that the court may grant a foreign representative “any appropriate relief,” including “any relief that may be available to a trustee,” where necessary to effectuate the purpose of chapter 15 and to protect the assets of the debtor or the interests of creditors. *See* 11 U.S.C. § 1521(a)(7). Pursuant to this authority, the Foreign Representative requests that the Court extend the protections afforded by Section 365 of the Bankruptcy Code to these chapter 15 cases. Application of section 365 of the Bankruptcy Code in these chapter 15 cases is necessary to ensure that the Debtors can assume and assign the Assigned Contracts to Sullair as contemplated in the Purchase Agreement and the Vesting Order. Absent the application of section 365 of the Bankruptcy Code, there is a risk that the counterparties to the Assigned Contracts may assert that they are not bound by the Vesting Order or may try to

exercise contractual rights that may deprive Sullair of the benefits of performance under the Assigned Contracts.

51. Section 365(a) of the Bankruptcy Code provides 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). Courts employ the business judgment standard in determining whether to approve a debtor’s decision to assume or reject an executory contract or unexpired lease. *See, e.g., In re Market Square Inn, Inc.*, 978 F.2d 116, 121 (3d Cir. 1992) (assumption or rejection of lease “will be a matter of business judgment by the bankruptcy court”); *In re HQ Global Holdings, Inc.*, 290 B.R. 507, 511 (Bankr. D. Del. 2003) (finding that a debtor’s decision to assume or reject executory contract is governed by business judgment standard and may only be overturned if decision is product of bad faith, whim, or caprice). The “business judgment” test in this context only requires that a debtor demonstrate that assumption or rejection of a [Contract or] Lease benefits the estate. *See Sharon Steel Corp. v. Nat’l Fuel Gas Distrib. Corp.*, 872 F.2d 36, 40 (3d Cir. 1989).

52. Any assumption and assignment of the Assigned Contracts is an exercise of the Debtors’ sound business judgment because the transfer of such Assigned Contracts is necessary to the Debtors’ ability to obtain the best value for the Purchased Assets. The Sellers are selling substantially all of their assets and, accordingly, will have no use for the Assigned Contracts after the Sullair Transaction closes. If the Debtors are unable to assign the Assigned Contracts, the Sullair Transaction will be jeopardized, causing a disruption in the administration of the Canadian Proceeding and a significant loss of value to the Debtors and their stakeholders. (Vounassis Sale Decl. ¶ 17.)

53. In addition, the Debtors, the Monitor, and their respective advisors have carefully

considered the economic terms of Assigned Contracts and determined that the assumption and assignment of Assigned Contracts would maximize the value of the Purchased Assets, which benefits all stakeholders. (Vounassis Sale Decl. ¶ 18.) Given that consummation of the Sullair Transaction is critical to the Debtors' efforts to maximize value, the Debtors' assumption and assignment of the Assigned Contracts is an exercise of sound business judgment and, therefore, should be approved.

54. Pursuant to the CCAA, as a condition to the assignment of the Assigned Contracts to Sullair and consummating the Sullair Transaction, the Debtors are required to cure any outstanding monetary defaults under the Assigned Contracts. Accordingly, the Debtors' assignment of the Assigned Contracts will be contingent upon payment of the cure amounts and effective only upon the closing of the Sullair Transaction. Each counterparty to an Assumed Contract has been notified of the assignment of their contract as required by the CCAA. (Abitan Sale Decl. ¶ 22.)

E. Waiver of Notice and Stay Under Bankruptcy Rules 6004 and 6006

55. To the extent that Bankruptcy Rule 6004(a) applies, the Foreign Representative respectfully requests a waiver of such notice requirement in order to successfully implement the foregoing requested relief. As discussed in the Noticing Procedures Motion, due to the compressed timeframe required between the execution of a purchase agreement, obtaining sale orders from the Canadian Court and the Court, and closing a sale transaction, by the Noticing Procedures Motion, and as recognized in the Noticing Procedures Order, the Foreign Representative provided notice of the sale process to all interested parties in the United States, and provided them an opportunity to object. Accordingly, the Foreign Representative respectfully requests a waiver of the requirements of Bankruptcy Rule 6004(a) to the extent applicable.

56. Bankruptcy Rule 6004(h) provides that an "order authorizing the use, sale, or lease

of property . . . is stayed until the expiration of 14 days after entry of the order, unless the court orders otherwise.” Fed. R. Bankr. P. 6004(h). Similarly, Bankruptcy Rule 6006(d) further provides that an “order authorizing the trustee to assign an executory contract or unexpired lease under § 365(f) is stayed until the expiration of 14 days after the entry of the order, unless the court orders otherwise.” Fed. R. Bankr. P. 6006(d).

57. As described above, the relief sought by the Foreign Representative herein is time-sensitive and is necessary for the Debtors to implement the Sale in compliance with the timing requirements set forth in the Purchase Agreement and approved by the Canadian Court. Any delay in closing, could jeopardize the Sullair Transaction to the detriment of the Debtors and their stakeholders. Accordingly, the Foreign Representative respectfully requests that the Court waive the 14-day stay imposed by Bankruptcy Rules 6004(h) and 6006(d), as the exigent nature of the relief sought herein justifies immediate relief.

NOTICE

58. Notice of this Motion will be provided to the following parties or their counsel via U.S. Mail: (a) any party that requested notice of this Motion pursuant to the procedures set forth in the Noticing Procedures Order; (b) any party who has received notice by mail from the Foreign Representative of any previous filing in these chapter 15 cases; (c) all parties to litigation in which any Debtor is a party and that is pending in the United States as of the date that these chapter 15 cases were filed; (d) the Office of the United States Trustee for the District of Delaware; (e) the United States Attorney’s Office for the District of Delaware; (f) National Bank of Canada; (g) Export Development Canada; and (h) the Monitor. Notice of this Noticing Procedures Motion will also be provided, via email, to all parties who receive notices in these chapter 15 cases automatically via the Court’s CM/ECF system.

NO PRIOR REQUEST

59. Except as set forth herein, no previous request for the relief sought herein has been made by the Foreign Representative or the Debtors to this or any other court.

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CONCLUSION

WHEREFORE, the Foreign Representative respectfully requests that the Court grant the relief requested herein and such other and further relief as may be just and proper.

Dated: February 10, 2023
Wilmington, Delaware

BIELLI & KLAUDER, LLC

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