

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

In re:	§	Chapter 11
	§	
CBC RESTAURANT CORP., et al., ¹	§	Case No. 23-10245-KBO
	§	
Debtors.	§	(Jointly Administered)
	§	
	§	Hearing Date:
	§	[TBD]
	§	
	§	Objection Deadline:
	§	[TBD]

DEBTORS’ MOTION FOR ENTRY OF ORDERS: (I)(A) APPROVING BIDDING PROCEDURES FOR THE SALE OF ALL OR SUBSTANTIALLY ALL OF THE DEBTORS’ ASSETS; (B) AUTHORIZING THE DEBTORS TO ENTER INTO A STALKING HORSE AGREEMENT; (C) SCHEDULING AN AUCTION AND APPROVING THE FORM AND MANNER OF NOTICE THEREOF; (D) APPROVING ASSUMPTION AND ASSIGNMENT PROCEDURES; AND (E) SCHEDULING A SALE HEARING AND APPROVING THE FORM AND MANNER OF NOTICE THEREOF; (II)(A) APPROVING THE SALE OF THE DEBTORS’ ASSETS FREE AND CLEAR OF LIENS, CLAIMS, INTERESTS AND ENCUMBRANCES AND (B) APPROVING THE ASSUMPTION AND ASSIGNMENT OF EXECUTORY CONTRACTS AND UNEXPIRED LEASES; AND (III) GRANTING RELATED RELIEF

CBC Restaurant Corp. and its debtor affiliates, as debtors and debtors in possession in the above-captioned chapter 11 cases (collectively, the “Debtors”) hereby submit this motion (the “Motion”) for the entry of two orders. First, the Debtors seek entry of an order substantially in the form attached hereto as **Exhibit A** (the “Bidding Procedures Order”):

- (a) Approving bidding procedures substantially in the form attached to the Bidding Procedures Order as Exhibit 1 (the “Bidding Procedures”) to be used in connection with the sale (the “Sale”) of substantially all of the Debtors’ assets

¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number, include CBC Restaurant Corp. (0801), Corner Bakery Holding Company (3981), and CBC Cardco, Inc. (1938). The Debtors’ service address is 121 Friends Lane, Suite 300, Newtown PA 18940.

- (collectively, the “Acquired Assets”) to the bidder that submits the highest or otherwise best bid for the Acquired Assets at auction (the “Successful Bidder(s)”);
- (b) Authorizing, but not requiring, the Debtors to enter into a "stalking horse" agreement (a "Stalking Horse Agreement"), which may include bid protections for parties other than the Senior Lender, with one or more bidders (the "Stalking Horse Bidders") for the purpose of establishing a minimum acceptable bid for the Acquired Assets (the "Stalking Horse Bid”);
 - (c) Scheduling an auction of the Acquired Assets and scheduling the hearing to approve the Sale on June 1, 2023 at 9:30 a.m. (prevailing Eastern time) (the "Sale Hearing");
 - (d) Approving the form and manner of notices of the proposed sale hearing, substantially in the form attached to the Bidding Procedures Order as Exhibit 2;
 - (e) Authorizing procedures governing the potential assumption and assignment of certain of the Debtors’ executory contracts and unexpired leases in connection with the Sale, (each a “Potential Assumed Contract” and together, the “Potential Assumed Contracts”); and
 - (f) Approving the form and manner of notice to each relevant non-debtor counterparty to a Potential Assumed Contract of (i) the Debtors’ calculation of the amount necessary to cure any defaults required to be cured under section 365 of the Bankruptcy Code under an applicable Potential Assumed Contract; and (i) certain other information regarding the potential assumption and assignment of Potential Assumed Contracts in connection with the Sale, substantially in the form attached to the Bidding Procedures Order as Exhibit 3.

Second, upon conclusion of the Sale Hearing, the Debtors request entry of an order (the "Sale Order"): (a) authorizing and approving the sale of the Acquired Assets to the Successful Bidder free and clear of all liens, claims, interests, and encumbrances, with such liens, claims, interests, and encumbrances to attach to the proceeds of such sale, (b) authorizing the assumption and assignment of certain contracts and leases to be assumed and assigned in connection with the proposed sale of the Acquired Assets to the Successful Bidder; and (c) granting related relief

Concurrent with the ongoing marketing of the Acquired Assets, SSCP Restaurant Investors LLC ("SSCP" or the "Senior Lender") has indicated that the Senior Lender or its designee may enter into negotiations with the Debtors regarding a Stalking Horse Agreement.

**I.
PRELIMINARY STATEMENT**

1. The Debtors believe the proposed Bidding Procedures will best facilitate a value-maximizing sale of the Acquired Assets for the benefit of the Debtors' estates. The Bidding Procedures likewise will allow the Debtors additional time to continue to market the Acquired Assets, receive and evaluate bids, and hold an auction (if necessary) to determine the highest or otherwise best bid. In addition, the marketing process and the Bidding Procedures proposed herein are aligned with the milestones set forth in the *Interim Order (I) Authorizing the Debtors to (A) Obtain Postpetition Financing and (B) Utilize Cash Collateral, (II) Granting Liens and Superpriority Administrative Expense Claims, (III) Granting Adequate Protection, (IV) Modifying the Automatic Stay, (V) Scheduling a Final Hearing, and (VI) Granting Related Relief* [D.I. 288] (the "Interim DIP Order")² funding these chapter 11 cases.³

2. The Debtors believe that their continued marketing efforts aided by the Bidding Procedures will provide an efficient postpetition sale process for the Acquired Assets, and that approval of the Bidding Procedures and the related relief requested in this Motion is in the best interests of the Debtors' estates and their stakeholders. Accordingly, the Debtors respectfully request that the Court grant the relief requested herein.

² Nothing herein is intended to modify the language included in the Interim DIP Order.

³ The Senior Lender provided senior debtor-in-possession financing pursuant to the terms of the Interim DIP Order.

**II.
JURISDICTION AND VENUE**

3. The United States District Court for the District of Delaware has jurisdiction under 28 U.S.C. § 1334, which was referred to this Court under 28 U.S.C. § 157 pursuant to the *Amended Standing Order of Reference from the United States District Court for the District of Delaware*, dated February 29, 2012. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2)

4. The Debtors confirm their consent 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”), to the entry of a final order by the Court in connection with this motion to the extent that it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments in connection herewith consistent with Article III of the United States Constitution.

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

6. The bases for the relief requested herein are sections 105(a), 363(b), 365, 503 and 507 of title 11 of the United States Code (the “Bankruptcy Code”), Rules 2002, 6004, 6006, 9007, 9008 and 9014 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), and Local Rules 2002-1, 6004-1 and 9006-1.

**III.
BACKGROUND**

7. On February 23, 2023 (the “Petition Date”), each of the Debtors filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. The Debtors are operating their businesses and managing their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in these chapter

11 cases. On March 20, 2023, the office of the United States Trustee appointed an Official Committee of Unsecured Creditors (the “Committee”).

8. Corner Bakery is a fast-casual restaurant serving kitchen-crafted breakfast, lunch, and dinner and catering to guests. Its restaurants have been a neighborhood favorite since the brand was established in 1991. The original American Italian bakery cafe was founded on a philosophy of creating a warm and comfortable place for people to relax with friends, family, and neighbors. Today, the restaurant features artisan-inspired, seasonal menu options made with fresh ingredients, while delivering a premier bakery cafe experience in the heart of neighborhoods and urban markets across California, Texas, Pennsylvania, Illinois, Virginia, Maryland, and the District of Columbia.⁴

IV. RELIEF REQUESTED

9. Pursuant to sections 105, 363 and 365 of the Bankruptcy Code, Rules 2002, 6004, 6006, 9007, 9008 and 9014 of the Bankruptcy Rules and Rules 2002-1, 6004-1 and 9006-1 of the Local Rules, the Debtors hereby seek:

- a. entry of the Bidding Procedures Order, substantially in the form attached hereto as Exhibit A, granting the following relief;
 - (i) authorizing and approving the Bidding Procedures, substantially in the form attached to the Bidding Procedures Order as Exhibit 1, to be used in connection with the sale of Acquired Assets through the proposed Sale;
 - (ii) establishing the following dates and deadlines in connection with the Bidding Procedures:

⁴ Detailed descriptions of the Debtors and their business and the facts and circumstances supporting this Motion and the Debtors’ chapter 11 cases are set forth in detail in the *Declaration of Jignesh Pandya, Chief Executive Officer and Chief Operating Officer of CBC Restaurant Corp. in Support of Chapter 11 Petitions and First Day Motions*, filed on February 23, 2023 at Doc. No. 0022 (the “First Day Declaration”), which First Day Declaration is incorporated by reference as if fully set forth herein.

- a. Bid Deadline: May 25, 2023, at 4:00 p.m. (prevailing Eastern time), as the deadline by which all bids to purchase the Acquired Assets must be actually received by the Debtors pursuant to the Bidding Procedures (the “Bid Deadline”);
 - b. Auction: May 30, 2023 at 10:00 a.m. (prevailing Eastern time), as the date by which the Debtors will conduct an auction pursuant to the Bidding Procedures (the “Auction”), if necessary; and
 - c. Sale Hearing: June 1, 2023 at 9:30 a.m. (prevailing Eastern Time), as the date for the Court to consider approval of the Sale (the “Sale Hearing”).
- (iii) approving the form and manner of notice of the Bidding Procedures, the Auction, and the Sale Hearing, substantially in the form attached to the Bidding Procedures Order as Exhibit 2 (the “Sale Notice”);
 - (iv) approving procedures for the assumption and assignment of the Potential Assumed Contracts in connection with any Sale (the “Assumption and Assignment Procedures”);
 - (v) approving the form and manner of notice to each relevant non-debtor counterparty to a Potential Assumed Contract (each, a “Counterparty” and collectively, the “Counterparties”) of (A) the Debtors’ calculation of the amount necessary to cure any defaults required to be cured under section 365 of the Bankruptcy Code under the applicable Potential Assumed Contracts (the “Cure Amounts”) and (B) certain other information regarding the potential assumption and assignment of Potential Assumed Contracts in connection with the Sale, substantially in the form attached to the Bidding Procedures Order as Exhibit 3 (the “Potential Assumption and Assignment Notice”); and
- b. following entry of the Bidding Procedures Order, entry of the Sale Order at the Sale Hearing, authorizing and approving the following:
 - (i) the Sale of the Acquired Assets to the Successful Bidder free and clear of all liens, claims, interests, and encumbrances;
 - (ii) authorizing the assumption and assignment of the Potential Assumed Contracts in connection with such Sale; and
 - (iii) granting related relief.

V.
SALE TIMELINE

10. The Bidding Procedures and the Debtors' proposed timeline for this sale process are a product of good-faith, arm's length negotiations and reflect the best option available for the Debtors to maximize the value of the Acquired Assets obtained through the proposed Sale under the circumstances. Specifically, the Debtors have agreed to, among others, the following proposed key dates and deadlines to govern the sale process in the proposed Interim DIP Order (the "Milestones"):

<u>INTERIM DIP ORDER MILESTONES</u>	
On or before April 7, 2023	The Debtors shall have filed in the Bankruptcy Court a motion seeking approval of bid procedures for the sale of all or substantially all of the Debtors' assets
On or before April 19, 2023	A hearing shall be set for approval of the Bid Procedures
Not later than April 19, 2023	The Bankruptcy Court shall have entered an order approving the Bid Procedures Motion
On or before May 31, 2023	An Auction (if necessary pursuant to the Bid Procedures) shall have occurred concerning the sale of all or substantially all of the Debtors' assets
On or before June 2, 2023	The Bankruptcy Court shall have conducted a hearing to consider approval of the sale of all or substantially all of the Debtors' assets
On or before June 14, 2023	The sale of all or substantially all of the Debtors' assets shall close

11. The following "Sale Process Key Dates and Deadlines" comply with the Milestones and will provide an efficient postpetition sale process for the Acquired Assets.

<u>SALE PROCESS KEY DATES AND DEADLINES</u>	
April 19, 2023, at 9:30 a.m. (prevailing Eastern Time)	Hearing to consider approval of Bidding Procedures and entry of Bidding Procedures Order
On or before three (3) Business Days after entry of Bidding Procedures Order	Deadline for Debtors to file and serve Sale Notice
As soon as practicable after entry of the Bidding Procedures Order, the Debtors, at their election, shall cause the information contained in the Sale Notice to be published once in either the national edition of <i>USA Today</i> or such publication with similar national circulation	Deadline to publish notice of Sale
May 1, 2023	Deadline for Debtors to file and serve Potential Assumption and Assignment Notice for Potential Assumed Contracts
May 21, 2023, at 4:00 p.m. (prevailing Eastern Time)	Deadline for Counterparties to file objections to Potential Assumption and Assignment Notice for Potential Assumed Contracts
May 25, 2023 at 4:00 p.m. (prevailing Eastern Time)	Deadline for parties to file objections to proposed Sale to Stalking Horse Bidder or Successful Bidder (" <u>Sale Objection Deadline</u> ")
May 25, 2023, at 4:00 p.m. (prevailing Eastern Time)	Bid Deadline
May 26, 2023, at 5:00 p.m. (prevailing Eastern Time)	Deadline to select Qualified Bids
May 26, 2023, at 8:00 p.m. (prevailing Eastern Time)	Deadline to notify Bidders if they are selected as Qualified Bidders and provide them with notice of Auction
May 30, 2023 at 10:00 a.m. (prevailing Eastern Time)	Auction (if necessary)

<u>SALE PROCESS KEY DATES AND DEADLINES</u>	
As soon a reasonably practicable following the closing of the Auction but no later than one day following such closing, but no later than May 31, 2023 at 8:00 a.m. (prevailing Eastern Time)	Notice of Auction Results
May 31, 2023 at 4:00 p.m. (prevailing Eastern Time)	Post-Auction Objection Deadline
June 1, 2023 at 9:30 a.m. (prevailing Eastern Time)	Sale Hearing
June 14, 2023	Closing Deadline

12. The Debtors, with the assistance of their advisors, will continue to market the Acquired Assets to potential purchasers. As such, the Debtors believe that prospective bidders will have sufficient time and information to conduct the necessary due diligence to submit binding bids in accordance with the timeline proposed herein.

13. Completion of the sale process in a timely manner will also maximize the value of the Acquired Assets obtained through the proposed Sale. The proposed dates governing the Sale, marketing, and auction process are within the Milestones. Failure to adhere to the Milestones would constitute a default under the Interim DIP Order. Accordingly, it is in the Debtors' and their stakeholders' best interests to complete a robust sale process as swiftly as possible to consummate the Sale within the parameters set by the Milestones. In view of the foregoing, the Debtors respectfully submit that the Court should grant the relief requested herein and approved proposed timeline for completing the sale, marketing, and auction process for the Acquired Assets.

**VI.
DESCRIPTION OF THE ASSETS⁵**

14. As described in the First Day Declaration, the Debtors' business is a fast-casual restaurant serving kitchen-crafted breakfast, lunch, and dinner and catering to guests. *See* First Day Declaration, ¶ 4. As of the Petition Date, Corner Bakery had 95 open and operating store locations, 15 closed locations, and two stores that had never opened. In February of 2023, Corner Bakery closed 14 store locations. Corner Bakery franchisees operate an additional 25 store locations. Corner Bakery is a leader in the fast casual segment of the food service industry. *Id.*, at ¶ 5. The company was recognized by TripAdvisor as a "Top U.S. Restaurant Chain" for 2019 and ranked one of Franchise Times' "Top 200" brands in the franchise space. *Id.* Corner Bakery ranked No. 121 among chains in U.S. systemwide sales in a recent Nation's Restaurant News census. *Id.*

15. The Debtors propose that a Successful Bidder will purchase the Acquired Assets, which include, but are not limited to:⁶

- a. all of the Debtors' accounts receivable;
- b. all of the Debtors' inventory;
- c. all non-residential real property leases designated as assumed leases for which Debtors have the right to possess, use, lease or occupy (or grant others the right to possess, use, lease or occupy) any leased real property (the "Assumed Leases"), together with all security and other deposits related thereto, prepaid rent as of the Closing and appurtenances and other real property rights pertaining thereto and associated therewith;

⁵ The summary of the provisions of the Bidding Procedures and Bidding Procedures Order described in this Motion (the "Summary"), is provided for the convenience of the Court and parties in interest. To the extent there is any conflict between the Summary and Bidding Procedures or Bidding Procedures Order, as applicable, those documents shall govern in all respects.

⁶ This list is provided for the benefit of parties in interest and remains subject to further revision by the Debtors and any Bidder. The Debtors and any Bidder reserve the right to add, supplement, modify, or delete any of the items listed herein and no parties in interest should rely on the inclusion or exclusion of a certain assets as being included or excluded from the definition of Acquired Assets.

d. all contracts designated as an assumed contracts (the “Assumed Contracts”);

e. all items of machinery, equipment, supplies, furniture, fixtures, leasehold improvements and other tangible personal property and fixed assets owned by Debtors or leased pursuant to any Assumed Contract;

f. to the extent assignable or transferrable, all insurance policies covering any of the Acquired Assets, and all benefits and rights to proceeds thereunder (including rights of recovery, rights of set-off, rights of indemnity, contribution or recoupment, warranties, guarantees, rights, remedies, counter-claims, cross-claims and defenses associated with such insurance policies), in each case, and all rights of every nature and description under or arising out of such policies (including rights to refunds or adjustments relating thereto and proceeds and recoveries therefrom);

g. to the extent transferable under applicable law, all of Debtors’ permits including all applications therefor, relating to the Acquired Assets;

h. all (i) of Debtors’ intellectual property and (ii) to the extent transferable under applicable law, intellectual property licensed to Debtors;

i. all sales orders or other commitments of Debtors to purchasers of goods, services or products produced or sold by the Debtors’ business;

j. all purchase orders with suppliers for delivery of goods under such purchase orders;

k. all rights to (i) refunds relating to, and prepaid expenses and deposits attributable to, any purchase orders, customer orders, Assumed Contracts and eligible inventory, and all rights under credit card merchant accounts, (ii) prepaid charges and deposits in respect of utilities provided to the assumed leased real property, (iii) prepaid common area maintenance expenses relating to any Assumed Leases and security deposits for any Assumed Lease, (iv) prepaid premiums in respect of the assumed benefit plans and the assumed insurance policies, (v) ordinary holdbacks (including ordinary credit card holdback payments or protection reserves) in connection with or relating to any Acquired Asset, and (vi) other deposits, prepaid charges and expenses paid by Debtors, including any prepaid freight charges, prepaid taxes allocable to post-closing taxes and other rights of Debtors in connection with or relating to any Acquired Asset;

l. all goodwill and other intangible assets;

m. all of Debtors’ other tangible or intangible assets primarily used in connection with the ownership, operation and/or management of the Business;

n. all cash maintained at each of the Debtors’ stores; and

o. to the extent permitted by applicable law, all of the Debtors’

documents and books and records.

16. A Bidder may also submit a Bid on Acquired Assets not listed in paragraph 15 herein, including, but not limited to, chapter 5 causes of action.

VII. MARKETING PROCESS

17. As described in the First Day Declaration, like many urban, fast-casual concepts, Corner Bakery struggled during the pandemic, leading its prior owner, Roark Capital Group, to hire restructuring and financial advisors to explore strategic alternatives. In April 2020, Pandya Restaurant Growth Brands, LLC ("PRGB") acquired Corner Bakery. Corner Bakery commenced these Chapter 11 cases on the Petition Date.

18. It is anticipated that the Debtors and the Stalking Horse Bidder will negotiate terms of the Stalking Horse Agreement. The Stalking Horse Agreement will seek to sell the Acquired Assets to the Stalking Horse Bidder, subject to higher and better bids, in consideration of a credit bid as set forth in the Stalking Horse Agreement

19. On or about March 27, 2023, the Debtors' financial advisor and investment banker, Hilco Corporate Finance ("Hilco"), commenced to broadly market the Debtors' assets postpetition with the goal of fostering a robust bidding process and a competitive auction for the sale of the Acquired Assets consistent with terms of the proposed Bidding Procedures. The Debtors are seeking and will continue to pursue interest from direct competitors and other investor groups to solicit offers for the sale of the Acquired Assets. The Debtors will send (to the extent not already provided), notice of this Motion to all parties that they believe may be potentially interested in acquiring the Acquired Assets. The Debtors will assist interested parties who either have, or will, execute confidentiality agreements acceptable to the Debtors to conduct diligence on the Acquired Assets, in accordance with the Bidding Procedures. The Debtors believe that

the marketing of the Acquired Assets over the period contemplated by the Bidding Procedures, in addition to the marketing activities that have taken place to date, will result in the highest and best purchase price for the Acquired Assets and maximize value for all of the Debtors' constituents.

20. Given the Debtors' liquidity and operational constraints, the timing of the Sale proposed herein is reasonable under the circumstances in order to effectuate the sale of the Acquired Assets. Thus, the Debtors believe that the Bidding Procedures proposed hereby will enable the efficient consummation of the sale of the Acquired Assets at an auction to the highest or best bidder.

**VIII.
THE PROPOSED BIDDING PROCEDURES AND THE ACQUIRED ASSETS TO BE
SOLD PURSUANT TO THE SALE**

A. Summary of Proposed Bidding Procedures

21. The Bidding Procedures are designed to promote a competitive and expedient sale process to consummate the Sale. If approved, the Bidding Procedures will allow the Debtors to solicit and identify bids from potential buyers that constitute the highest or best offer for the sale of the Acquired Assets on a schedule consistent with the Milestones.

22. As the Bidding Procedures are attached to the Bidding Procedures Order, they are not herein restated in their entirety.⁷ Pursuant to Local Rule 6004-1(c), certain of the key terms of the Bidding Procedures are highlighted in the chart below:

MATERIAL TERMS OF THE BIDDING PROCEDURES	
Provisions Governing	To receive due diligence information and to receive additional nonpublic information regarding the Debtors, a potential bidder must deliver to Culhane

⁷ Capitalized terms not otherwise defined in this summary have the meanings ascribed to them in the Bidding Procedures. In the event of any inconsistency between the summary provided herein and the Bidding Procedures, the Bidding Procedures shall govern.

MATERIAL TERMS OF THE BIDDING PROCEDURES	
<p>Qualification of Bidders Local Rule 6004-1(c)(i)(A)</p>	<p>Meadows, PLLC, Hilco, and Greg Baracato, the Debtors' Chief Restructuring Officer (collectively, the "<u>Debtors' Advisors</u>"), which will be shared by the Debtors' Advisors with the Consultation Parties (as defined below), the following documents (collectively, the "<u>Preliminary Bid Documents</u>"): </p> <ol style="list-style-type: none"> a. an executed Confidentiality Agreement on terms acceptable to the Debtors, to the extent not already executed, which Confidentiality Agreement shall, among other terms, contain customary provisions regarding: (i) the nondisclosure of confidential information, (ii) prohibitions on contacting third parties in connection with a Transaction, (iii) covenants to not solicit employees of the Debtors, (iv) prohibitions on purchasing or otherwise acquiring the Debtors' debt and equity securities, and (v) the survival of certain provisions of the Confidentiality Agreement; b. written disclosure of any connections or agreements with the Debtors, any other known potential bidder or Qualified Bidder (defined below), "insiders" of the Debtors (as that term is contemplated by section 101(31) of the Bankruptcy Code), and/or any manager, operator, or direct or indirect equity security holder of the Debtors; and c. identification of the potential bidder, its principals, and the representatives thereof who are authorized to appear and act on its behalf for all purposes regarding the contemplated transaction and a Certificate of Good Standing from the potential bidder's state of incorporation.
<p>Provisions Governing Qualified Bids Local Rule 6004- 1(c)(i)(B)</p>	<p>Each Bid submitted by an Acceptable Bidder (a "<u>Bidder</u>") must be submitted in writing and satisfy the following requirements (collectively, the "<u>Bid Requirements</u>"): </p> <ol style="list-style-type: none"> a. <u>Bid Deadline</u>. A Bid must be received no later than the Bid Deadline. b. <u>APA</u>. A Bid must include an executed asset purchase agreement (an "<u>APA</u>"), together with all exhibits and schedules (the "<u>Transaction Documents</u>"), pursuant to which the Bidder proposes to effectuate the contemplated transaction. c. <u>Marked Agreement</u>. If the Debtors have entered into, and obtained Court approval of, a Stalking Horse APA, the APA must be similar in form and substance to the Stalking Horse Agreement and be marked to reflect the differences between the Stalking Horse Agreement and the Bidder's APA, including, without limitation, specification of the proposed purchase price, any assumed liabilities, and any changes to any exhibits or schedules to the APA. For the avoidance of doubt, the Debtors may, upon consultation with the Consultation Parties, disqualify a Bid if the Marked Agreement materially alters any Stalking Horse Agreement. d. <u>Disclosures</u>. A Bid must identify with particularity each and every condition to closing and all executory contracts and unexpired leases to be assumed and assigned pursuant to the Transaction Documents. The Transaction Documents must include a commitment to close by

MATERIAL TERMS OF THE BIDDING PROCEDURES

June 14, 2023. A Bid should, but is not required to, propose a contemplated transaction involving all or substantially all of the Acquired Assets.

- e. Purpose. Each Acceptable Bidder must state that the Bid includes an offer by the Acceptable Bidder to purchase the Assets. Each Acceptable Bid must clearly identify the following: (i) contracts to be assumed, including cure amounts to be paid, if any, and parties responsible for payment thereof; (ii) the liabilities, if any, to be assumed; (iii) leases of equipment or non-residential real property to be assumed, including cure amounts to be paid, if any, and parties responsible for payment thereof; and (iv) which employees or groups thereof will be offered employment.
- f. Purchase Price. All consideration proposed by a Bid may include cash and/or other consideration acceptable to the Debtors and the Senior Lender in an amount of no less than the sum of the Purchase Price (as defined in a Stalking Horse Agreement). Each Bid must clearly set forth the terms of any proposed Transaction, including and identifying separately any cash and non-cash components of the proposed Transaction consideration, including, for example, any liabilities to be assumed by the Acceptable Bidder.
- g. Financial Information. Evidence by the potential bidder of its sufficient financial capacity to close a proposed transaction, which shall include financial statements of, or verified financial commitments obtained by, the potential bidder (or, if the potential bidder is an entity formed for the purpose of acquiring the Acquired Assets, the party that will bear liability for a breach), the adequacy of which will be assessed by the Debtors and the Senior Lender, in consultation with the Consultation Parties.
- h. Deposit. Each Bid must be accompanied by a cash deposit in the amount equal to the greater of \$3,000,000 or 10% of the Purchase Price to be held in an escrow account to be identified and established by the Debtors (the “Deposit”).
- i. Irrevocable. All Bids (including any Stalking Horse Bid) must be irrevocable until the selection of the Successful Bid and Backup Bid; *provided however*, that the Bids selected as either the Successful Bid or the Backup Bid (defined below) must be irrevocable and remain open for acceptance until three (3) Business Days after the closing of the Transaction with the Successful Bidder or the Backup Bidder, as applicable.
- j. Unconditional Offer / Contingencies. A statement that the Bid is formal, binding, and unconditional and is not subject to any further due diligence or financing contingency, and is irrevocable until the Debtors notify the Bidder that such Bid is not a Successful Bid or a Backup Bid.
- k. Non-Reliance. A Bid must include a written acknowledgement and representation of the Qualified Bidder that it has had an opportunity to

MATERIAL TERMS OF THE BIDDING PROCEDURES

conduct any and all due diligence regarding the Assets and Assumed Liabilities prior to making its Bid, that it has relied solely upon its own independent review, investigation and/or inspection of any documents and/or the Assets in making its bid, and that it did not rely upon any written or oral statements, representations, warranties, or guaranties, express, implied, statutory or otherwise, regarding the Assets, the financial performance of the Assets or the physical condition of the Assets, the Assumed Liabilities, or the completeness of any information provided in connection therewith or the Auction.

1. Identity. Each Bid must fully disclose the identity of each entity that will be bidding or otherwise participating in connection with such Bid (including each equity holder or other financial backer of the Acceptable Bidder, including if such Acceptable Bidder is an entity formed for the purpose of consummating the proposed Transaction contemplated by such Bid), and the complete terms of any such participation. Each Bid shall be accompanied by board of director or other organizational resolutions authorizing such Bid. Under no circumstances shall any undisclosed principals, equity holders, or financial backers be associated with any Bid. Each Bid must also include contact information for the specific person(s), counsel and other advisors whom the Debtors' Advisors should contact regarding such Bid.
- m. Adequate Assurance/Wherewithal to Close. Each Bid must contain evidence satisfactory to the Debtors, in consultation with the Consultation Parties, that the Acceptable Bidder has the wherewithal to perform thereunder and otherwise complies with the requirements of adequate assurance of future performance under section 365(b)(1) and 365(b)(3) of the Bankruptcy Code. Such evidence may include audited and unaudited financial statements, tax returns, bank or financial institution confirmations, a description of the proposed business to be conducted at the premises and/or any other documentation that is requested.
- n. Authorization. Each Bid must contain evidence that the Acceptable Bidder has obtained authorization or approval from its board of directors (or a comparable governing body) with respect to the submission of its Bid and the closing of the Transaction contemplated in such Bid.
- o. No Fees Payable to Qualified Bidder. If the Debtors have previously entered into, and obtained approval of, a Stalking Horse Agreement, Bids may not request or entitle the Bidder to any break-up fee, termination fee, expense reimbursement or similar type of payment and by submitting a Bid, a Bidder shall be deemed to waive the right to pursue any break-up fee, termination fee, expense reimbursement or similar type of payment, or substantial contribution claim under section 503 of the Bankruptcy Code related in any way to the submission of its Bid or the Bidding Procedures.
- p. Qualified Bid. A Bid will be considered a "Qualified Bid," and each Bidder that submits a Qualified Bid will be considered a "Qualified Bidder," if the Debtors, upon consultation with the Consultation Parties,

MATERIAL TERMS OF THE BIDDING PROCEDURES	
	<p>determine that such Bid: (i) satisfies the Bid Requirements set forth above; and (ii) is reasonably likely (based on written evidence of financial resources or immediately available financing, demonstrated financial wherewithal of the bidder, antitrust, or other regulatory issues, experience, and other considerations) to be consummated, if selected as the Successful Bid, within a time frame acceptable to the Debtors.</p> <p>q. <u>Credit Bid</u>. The Senior Lender (or its designee) shall, in its sole and absolute discretion, be a Qualified Bidder and shall be permitted to credit bid on the Assets at the Auction, subject to and in accordance with section 363(k) of the Bankruptcy Code up to the full allowed amount of its claims, which credit bid shall be automatically deemed a Qualified Bid in connection with the bidding process without compliance with the Bid Requirements or the submission of any Preliminary Bid Documents, the Auction, and the Sale. Without compliance with any of the Bid Requirements, Preliminary Bid Documents, or any other bid qualification provisions, the Senior Lender’s Credit Bid is automatically deemed to be a Qualified Bid and may be submitted for the first time at the Auction.</p>
<p>Modification of Bidding Procedures Local Rule 6004-1(c)(i)(D)</p>	<p>The Debtors reserve their rights to modify these Bidding Procedures, upon approval of the Senior Lender, if an Milestone is impacted, and after consultation with the Consultation Parties, in their business judgment in any manner that will best promote the goals of these Bidding Procedures or impose at or prior to the Auction, additional customary terms and conditions on a Transaction, including, without limitation: (a) extending the deadlines set forth in these Bidding Procedures; (b) adjourning the Auction at the Auction; (c) adding procedural rules that are reasonably necessary or advisable under the circumstances for conducting the Auction; (d) canceling the Auction; and (e) rejecting any or all Bids or Qualified Bids (other than the Stalking Horse Bid, if any).</p> <p>Nothing in these Bidding Procedures or the Bidding Procedures Order modifies the rights of, or authorizes the Debtors to modify the rights of, the Stalking Horse Bidder under the Stalking Horse Agreement, if any.</p>
<p>Closing with Alternative Backup Bidders Local Rule 6004- 1(c)(i)(E)</p>	<p>Notwithstanding anything in these Bidding Procedures to the contrary, if the Auction is conducted, the Qualified Bidder with the next-highest or otherwise second-best Qualified Bid at the conclusion of the Auction for the Assets or any sub-group thereof, as determined by the Debtors in the exercise of their business judgment, shall be required to serve as a backup bidder (the “<u>Backup Bidder</u>”) with respect to the Assets until such time that the Transaction is consummated. Each Qualified Bidder shall agree and be deemed to agree to be a Backup Bidder if so designated by the Debtors.</p> <p>The identity of a Backup Bidder and the amount and material terms of the Qualified Bid of such Backup Bidder shall be announced by the Debtors, at the conclusion of the Auction at the same time the Debtors announce the identity of the Successful Bidder related thereto. Such Backup Bidder shall be required to keep its Qualified Bid (or if the Backup Bidder submits one or more Overbids</p>

MATERIAL TERMS OF THE BIDDING PROCEDURES	
	<p>at the Auction, its final Overbid) open and irrevocable until the closing of the Approved Transaction. Each Backup Bidder’s Deposit shall be held in escrow until three (3) Business Days after the closing of the Approved Transaction.</p> <p>If a Successful Bidder fails to consummate the Approved Transaction contemplated by its Successful Bid, the Debtors may select the Backup Bidder with respect to the Assets or sub-group of the Debtors’ Assets or business as the Successful Bidder, and such Backup Bidder shall be deemed a Successful Bidder for all purposes. The Debtors will be authorized, but not required, to consummate all transactions contemplated by the Bid of such Backup Bidder without further order of the Court or notice to any party. In such case, the defaulting Successful Bidder’s Deposit shall be forfeited to the Debtors, and the Debtors specifically reserve the right to seek all available remedies against the defaulting Successful Bidder, including with respect to specific performance. Notwithstanding anything herein to the contrary, the Deposit of the Stalking Horse Bidder shall be treated in accordance with the Stalking Horse Agreement, if any.</p>
<p>Provisions Governing the Auction</p> <p>Local Rule 6004- 1(c)(ii)</p>	<p>If no Qualified Bid (other than the Stalking Horse Bid) is received by the Bid Deadline, the Stalking Horse Bidder, if any, shall be deemed the Successful Bidder.</p> <p>If the Debtors receive more than one Qualified Bid for the Assets (including any Stalking Horse Bid, if any), the Debtors will conduct the Auction to determine both the Successful Bidder and the Backup Bidder with respect to such Assets. The Auction shall take place on May 30, 2023 at 10:00 a.m. (prevailing Eastern Time), at the offices of Culhane Meadows PLLC (or by video conference to the live proceeding at this location).</p> <p>No later than the day before the Auction, the Debtors will notify all Qualified Bidders of the highest or otherwise best Qualified Bid (a “<u>Baseline Bid</u>”), and provide copies of the documents supporting the Baseline Bid(s) to all Qualified Bidders. The determination of which Qualified Bid(s) constitutes the Baseline Bid(s) and which Qualified Bid(s) constitutes the Successful Bid(s) shall take into account any factors the Debtors, in consultation with the Consultation Parties, reasonably deem relevant to the value of the Qualified Bid(s) to the Debtors’ estates, which may include, among other things: (a) the type and amount of Assets sought to be purchased in the Bid; (b) the amount and nature of the total consideration; (c) the likelihood of the Bidder’s ability to close a transaction and the timing thereof; (d) the net economic effect of any changes to the value to be received by the Debtors’ estates from the transaction contemplated by the Baseline Bid; (e) the tax consequences of such Qualified Bid; (f) the assumption of obligations, including contracts and leases; (g) the cure amounts to be paid; and (h) the impact on employees, including the number of employees proposed to be transferred and employee-related obligations to be assumed (collectively, the “<u>Bid Assessment Criteria</u>”).</p> <p>The Auction shall be conducted pursuant to the following procedures:</p> <p><u>The Debtors Shall Conduct the Auction</u></p> <p>The Debtors and the Debtors’ Professionals shall direct and preside over the</p>

MATERIAL TERMS OF THE BIDDING PROCEDURES

Auction. At the start of the Auction, the Debtors shall describe the terms of the Baseline Bid(s). All incremental Bids made thereafter shall be Overbids (as defined herein) and shall be made and received on an open basis, and all material terms of each Overbid shall be fully disclosed to all other Qualified Bidders and the Consultation Parties; *provided, however*, the Senior Lender shall be entitled to match any bid with its credit bid rights at any time. The Debtors shall maintain a written transcript of all Bids made and announced at the Auction, including the Baseline Bid(s), all Overbids, the Successful Bid(s), and any Backup Bid(s).

In addition to the Debtors, only (i) Qualified Bidders, (ii) the Senior Lender, (iii) the Junior Lender, (iv) the Stalking Horse Bidder, if any, and (v) the Committee and its members, and each of their respective legal and financial advisors, shall be entitled to attend the Auction, and the Qualified Bidders shall appear at the Auction in person and may speak or bid themselves or through duly authorized representatives. Only Qualified Bidders shall be entitled to make any subsequent bids at the Auction.

Terms of Overbids

“Overbid” means any bid made at the Auction by a Qualified Bidder subsequent to the Debtors’ announcement of the Baseline Bid. Each Overbid must comply with the following conditions; *provided, however*, the Senior Lender shall not be subject to any of these conditions in credit bidding and may match any Bid at any time.

Minimum Overbid Increment

Any Overbid to the initial Baseline Bid at the start of the Auction shall be in increments of no less than a value equal to \$500,000(US).

Conclusion of Each Overbid Round

Upon the solicitation of each round of Overbids, the Debtors may announce a deadline (as the Debtors may, in their business judgment, and upon consultation with the Consultation Parties, extend from time to time, the “Overbid Round Deadline”) by which time any Overbids must be submitted to the Debtors.

Overbid Alterations

An Overbid may contain alterations, modifications, additions, or deletions of any terms of the Bid no less favorable to the Debtors’ estates than any prior Qualified Bid or Overbid.

No Round-Skipping

Round-skipping, as described herein, is explicitly prohibited. To remain eligible to participate in the Auction, in each round of bidding, (i) each Qualified Bidder must submit a Bid in such round of bidding that is a higher or otherwise better offer than the immediately preceding Bid submitted by a Qualified Bidder in such round of bidding and (ii) to the extent a Qualified Bidder fails to bid in such round of bidding or to submit a Bid in such round of bidding that is a higher or otherwise better offer than the immediately preceding Bid submitted by a Qualified Bidder in such round of bidding, such Qualified Bidder shall be

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disqualified from continuing to participate in the Auction for the Assets.

Announcing Highest Bid

With respect to the Auction, the Debtors shall, subsequent to each Overbid Round Deadline, announce whether the Debtors, in consultation with the Consultation Parties, have identified (a) in the initial Overbid round, an Overbid as being higher or otherwise better than the Baseline Bid in respect of the Assets that are the subject of the Auction or (b) in subsequent rounds, an Overbid as being higher or otherwise better than the Overbid previously designated by the Debtors as the prevailing highest or otherwise best Bid (the “Prevailing Highest Bid”). The Debtors shall describe to all Qualified Bidders the material terms of any new Overbid designated as the Prevailing Highest Bid as well as the value attributable to such Prevailing Highest Bid based on, among other things, the Bid Assessment Criteria.

Closing the Auction

The Auction shall continue until there is only one Qualified Bid that the Debtors and the Consultation Parties determine, to be the highest or otherwise best Qualified Bid for the Assets. Such Qualified Bid shall be declared the “Successful Bid,” and such Qualified Bidder, the “Successful Bidder,” at which point the Auction will be closed. The Auction shall not close unless and until all Qualified Bidders have been given a reasonable opportunity to submit an Overbid at the Auction to the then Prevailing Highest Bid. Such acceptance of such Successful Bid is conditioned upon approval by the Court of such Successful Bid. For the avoidance of doubt, nothing in these Bidding Procedures shall prevent the Debtors from exercising their fiduciary duties under applicable law. As soon as reasonably practicable after closing the Auction, the Debtors shall finalize definitive documentation to implement the terms of the Successful Bid, and, as applicable, cause such definitive documentation to be filed with the Court

Additional Procedures

The Debtors (in consultation with the Consultation Parties) may announce at an Auction additional or modified procedural rules that a reasonable under the circumstances for conducting such Auction, so long as such rules are not inconsistent in any material respect with the Bidding Procedures.

23. The Senior Lender shall be deemed to be a Qualified Bidder. The Senior Lender (or its designee) may **credit bid** pursuant to and subject to 11 U.S.C. § 363(k), and thus is not required to make a Deposit with the Debtors. The Senior Lender (or its designee) have the unqualified right at any time to credit bid on a dollar-for-dollar basis up to the full amount of the Prepetition Obligations, the Senior DIP Obligations, and Adequate Protection Superpriority

Claims, if any (as each term is defined in the Interim DIP Order) ("Credit Bid").⁸ The Senior Lender is not otherwise subject to the overbid or no round skipping procedures set forth above. For the avoidance of doubt, the Senior Lender may match any Bid via Credit Bid (the "Matched Credit Bid") and any such Matched Credit Bid shall be deemed the higher Bid as between the two Bidders.

B. Stalking Horse Procedures

24. The Debtors may, subject to Court approval pursuant to the procedures set forth herein enter into a Stalking Horse Agreement. If the Debtors enter into a Stalking Horse Agreement, which may include bid protections for parties other than the Senior Lender, they must file a notice (the "Stalking Horse Notice") with the Bankruptcy Court and serve the Stalking Horse Notice on: (i) proposed counsel to the Committee; (ii) the United States Trustee; (iii) counsel to SSCP; and (iv) any other party that has requested notice pursuant to Bankruptcy Rule 2002 by overnight mail and, if known, by electronic mail. The Stalking Horse Notice must: (i) include a copy of the Stalking Horse Agreement, which may include bid protections for parties other than the Senior Lender, and (ii) disclose whether the Stalking Horse Bidder is an "insider" or "affiliate" of any of the Debtors, as those terms are defined in section 101 of the Bankruptcy Code, as well as any common identity of incorporators, directors, officers, or controlling stockholders between the Stalking Horse Bidder and the Debtors (a "Related Party"). If no objection to the proposed Stalking Horse Agreement is filed and served upon the Debtors within three business days following service of the Stalking Horse Notice, the Debtors may submit an Order approving the Stalking Horse Notice the Court under Certificate of No

⁸ Pursuant to paragraph 25 of the Interim DIP Order, parties in interest, including the Committee, have until March 19, 2023 to challenge, among other things, the amount and priority of the Prepetition Obligations (as defined in the Interim DIP Order). Pursuant to paragraph C of the Interim DIP Order, the Debtors have stipulated to the Senior Lender's liens and claims.

Objection. If any objection to the proposed Stalking Horse Agreement, the Debtors may seek an expedited hearing thereon. The Debtors shall promptly provide a copy of any approved Stalking Horse Agreement to any Potential Bidders.

C. The Minimum Baseline Bid if No Stalking Horse Agreement is Approved.

25. If the Debtors have not obtained approval of a Stalking Horse APA, the Debtors, in their business judgment and in consultation with both Hilco and the Consultation Parties, may establish a minimum baseline bid for any Qualified Bids and Hilco will promptly inform all interested bidders of such baseline bid.

D. Sale Noticing and Objection Procedures

26. The “Sale Process Key Dates and Deadlines” chart set forth above summarizes the proposed noticing and objection procedures and requirements with respect to service of the Sale Notice, the Sale Objection Deadline, and the deadline to publish to the Sale Notice (collectively, the “Sale Noticing and Objection Procedures”). The Debtors submit that the Sale Noticing and Objection Procedures constitute adequate and reasonable notice of the key dates and deadlines and other important information regarding the sale process, including the Sale Objection Deadline and the Sale Hearing. The Sale Notice also provides parties with information on how to obtain copies of the Motion, sets forth the Bid Deadline and the time and place of the Auction. No later than three (3) Business Days after entry of the Bidding Procedures Order, the Debtors will serve the Sale Notice on the following parties: (i) counsel to the Committee; (ii) the United States Trustee; (iii) counsel to SSCP; (iv) counsel to the Stalking Horse Bidder (if any); (v) all known creditors of the Debtors (for whom identifying information and addresses are available to the Debtors); (vi) the Internal Revenue Service; (vii) all applicable federal, state, and local taxing authorities; (viii) all persons and entities known by the Debtors to

have expressed an interest to the Debtors in the Acquired Assets during the past 6 months; (ix) all persons and entities known by the Debtors to have asserted any lien, claim, interest or encumbrance in the Acquired Assets (for whom identifying information and addresses are available to the Debtors); (x) Counterparties to Potential Assumed Contracts; (xi) any governmental authority known to have a claim against the Debtors in the chapter 11 cases; (xii) the United States Securities and Exchange Commission; (xiii) the United States Attorney's Office for the District of Delaware; (xiv) United States Attorney General's Office for the District of Delaware; (xv) the Office of the Attorney General and the Secretary of State in each state in which the Debtors operate; (xvi) all of the parties entitled to notice pursuant to Bankruptcy Rule 2002; and (xvii) all other parties as directed by the Court.

27. The Debtors also propose that any objections to the Sale must be in writing, state, with specificity, the legal and factual bases thereof, be filed with the Court by the Sale Objection Deadline and be served on the following parties: (i) proposed counsel for the Debtors; (ii) counsel to the Committee; (iii) the United States Trustee; (iv) counsel to SSCP; (v) counsel to the Stalking Horse Bidder, if any; and (vi) any other party that has requested notice pursuant to Bankruptcy Rule 2002 (collectively, the "Objection Notice Parties").

28. The Sale Notice also provides information on how to obtain copies of the Motion and other sale related information directly from the case website maintained by the Debtors' claims agent (the "Case Management Website"). Accordingly, the Debtors request that the Court approve the form of Sale Notice, substantially in the form attached to the Bidding Procedures Order as Exhibit 2, and find that the Sale Noticing and Objection Procedures comply with the requirements of Bankruptcy Rule 2002 and Local Rule 2002-1

E. Potential Assumption and Assignment Notice and Proposed Assumption and Assignment Procedures for Contracts

29. At the closing of the Sale, the Debtors may seek to assume and assign to the Successful Bidder all or certain of the Potential Assumed Contracts.⁹ For any Potential Assumed Contract that is listed in the Contracts Schedule (defined below), the Successful Bidder may decide to (i) assume and assign the Potential Assumed Contract, (ii) request that the Debtors reject the Potential Assumed Contract, or (iii) designate a “retained contract” as a Potential Assumed Contract for a limited period of time until the Successful Bidder determines whether such Potential Assumed Contract should be (a) assumed and assigned or (b) rejected.

30. The Debtors will serve the Potential Assumption and Assignment Notice substantially in the form attached to the Bidding Procedures Order as Exhibit 3 on all Counterparties to Potential Assumed Contracts. The Assumption Assignment Notice provides notice of, *inter alia*, the possible assumption and assignment of the Potential Assumed Contracts, the Debtors’ proposed Cure Amounts, the applicable deadlines to object to the assumption and assignment of the Potential Assumed Contracts with respect to disputed Cure Amounts and/or on the basis of adequate assurance of future performance. The Potential Assumption and Assignment Notice also provides information on how to access the Bidding Procedures and Bidding Procedures Order from the Case Management Website. Accordingly, the Debtors request that the Court approve the form of Potential Assumption and Assignment Notice, substantially in the form attached to the Bidding Procedures Order as Exhibit 3, and find that the Sale Noticing and Objection Procedures comply with the requirements of Bankruptcy Rule 6006 and Local Rule 2002-1.

⁹ The inclusion of any agreement in the list of Potential Assumed Contracts does not constitute an admission by the Debtors that such agreement actually constitutes an executory contract or unexpired lease under section 365 of the Bankruptcy Code, and the Debtors expressly reserve the right to challenge the status of any agreement included in the list of Potential Assumed Contracts

31. The Successful Bidder shall be responsible for payment of any Cure Amounts that may be owed to any counterparty to the Potential Assumed Contracts. The Successful Bidder shall also be responsible for satisfying any requirements regarding adequate assurances of future performance that may be imposed under section 365(b)(1) of the Bankruptcy Code in connection with the proposed assignment of any Potential Assumed Contracts. The Debtors propose that the Court make its determinations concerning adequate assurance of future performance under the Potential Assumed Contracts pursuant to section 365(b)(1) of the Bankruptcy Code at the Sale Hearing, or as such other hearing as may be scheduled by the Court.

32. The Debtors request that the Court approve the proposed Assumption and Assignment Procedures, including with respect to objections made by any Counterparty to: the proposed assumption or assignment of its Potential Assumed Contract, the Debtors' proposed Cure Amounts with respect to such Potential Assumed Contract, if any, or the ability of the Stalking Horse Bidder or any potential bidder to provide adequate assurance of future performance (collectively, an "Assumption and Assignment Objection"). The Debtors propose that all Assumption and Assignment Objections must be in writing, comply with the Bankruptcy Code, Bankruptcy Rules and Local Rules, state, with specificity, the legal and factual bases thereof, including, if applicable, the Cure Amount the Counterparty believes is required to cure defaults (as that concept is contemplated by section 365(b)(1) of the Bankruptcy Code) under the relevant Potential Assumed Contract, and be filed by the Assumption and Assignment Objection Deadline.

33. If a Counterparty files a timely Assumption and Assignment Objection, the Debtors propose that the Court hear and determine such objection either at the Sale Hearing or such other date that the Debtors and the Successful Bidder shall determine (subject to the Court's

calendar). If a Counterparty fails to file with the Court and serve a timely Assumption and Assignment Objection, the Counterparty shall be barred from asserting any such objection with regard to the assumption or assignment of its Potential Assumed Contract. In such event, notwithstanding anything to the contrary in the Potential Assumed Contract, or any other document, the Debtors request that the Cure Amounts set forth in the Potential Assumption and Assignment Notice be controlling and shall be the only amount necessary to cure outstanding defaults under the applicable Potential Assumed Contract under section 365(b)(1) of the Bankruptcy Code arising out of or related to the Potential Assumed Contract following the assumption and assignment of the Potential Assumed Contract. Moreover, if a Counterparty fails to file with the Court and serve a timely Assumption and Assignment Objection, the Debtors request that the Counterparty be forever barred from asserting any cure or other pre-assignment amounts in excess of the Cure Amount set forth in the applicable Potential Assumption and Assignment Notice with respect to such Potential Assumed Contract against the Debtors, the Successful Bidder or the property of any of them.

34. The Debtors may, pursuant to the agreement with the Stalking Horse Bidder, if any, or other Successful Bidder, add supplemental Potential Assumed Contracts to the schedule of Potential Assumed Contracts (the “Contracts Schedule”) or modify previously-noticed Cure Amounts in accordance with the Stalking Horse Agreement, if any, or agreement with such other Successful Bidder. In such an event, the Debtors will promptly serve a supplemental assumption and assignment notice, by overnight mail and, if known, e-mail, on the applicable Counterparties (collectively, a “Supplemental Assumption and Assignment Notice”). Each Supplemental Assumption and Assignment Notice will include the same information with respect to the

applicable Potential Assumed Contract as is required to be included in the Potential Assumption and Assignment Notice.

35. The Debtors propose that any Counterparty listed on a Supplemental Assumption and Assignment Notice whose Potential Assumed Contract is proposed to be assumed and assigned and was not included in the Potential Assumption and Assignment Notice may object to the proposed assumption or assignment of its Potential Assumed Contract, the Debtors' proposed Cure Amounts with respect to its Potential Assumed Contract, if any, or the ability of the Successful Bidder to provide adequate assurance of future performance (collectively, a "Supplemental Assumption and Assignment Objection"). The Debtors request that all Supplemental Assumption and Assignment Objections must state, with specificity, the legal and factual bases thereof, including, if applicable, the Cure Amounts the Counterparty believes is required to cure defaults (as that concept is contemplated by section 365 of the Bankruptcy Code) under the relevant Potential Assumed Contract and be filed by no later than ten (10) calendar days after the date of service of such Supplemental Assumption and Assignment Notice. If a Potential Assumed Contract was listed in the Potential Assumption and Assignment Notice and the previously-stated Cure Amount is modified in the Supplemental Assumption and Assignment Notice, the Counterparties to such Potential Assumed Contract may file a Supplemental Assumption and Assignment Objection only if such objection is to the modified Cure Amount.

36. If a Counterparty fails to file with the Court and serve a timely Supplemental Assumption and Assignment Objection, the Counterparty shall be barred from asserting any such objection with regard to the assumption or assignment of its Potential Assumed Contract. In such event, notwithstanding anything to the contrary in the Potential Assumed Contract, or any

other document, the Debtors request that the Cure Amounts set forth in the Supplemental Assumption and Assignment Notice be controlling and shall be the only amount necessary to cure outstanding defaults under the applicable Potential Assumed Contract under section 365(b)(1) of the Bankruptcy Code arising out of or related to the Potential Assumed Contract following the assumption and assignment of the Potential Assumed Contract. Moreover, if a Counterparty fails to file with the Court and serve a timely Supplemental Assumption and Assignment Objection, the Debtors request that the Counterparty be forever barred from asserting any cure or other pre- assignment amounts in excess of the Cure Amount set forth in the applicable Supplemental Assumption and Assignment Notice with respect to such Potential Assumed Contract against the Debtors, the Successful Bidder or the property of any of them.

37. The Successful Bidder will be responsible for providing evidence of “adequate assurances of future performance” to the extent required in connection with the assumption and assignment of any Potential Assumed Contract.

38. Finally, the Debtors request that, following any Auction each Counterparty may raise any objections to such Successful Bidder’s ability to provide adequate assurances of future performance under section 365(b)(1) at the Sale Hearing. For the avoidance of doubt, however, the Debtors request that any objections relating to (i) the ability of the Stalking Horse Bidder to provide adequate assurance of future performance with respect to any Potential Assumed Contract or (ii) the Cure Amounts that must be cured by any Successful Bidder with respect to the Potential Assumed Contract, must be filed by the Assumption and Assignment Objection Deadline as provided above.

39. The Debtors submit that the proposed procedures governing the assumption and assignment of Potential Assumed Contracts are reasonable and should be approved.

F. The Consultation Parties

40. The Debtors shall consult with the Senior Lender (but only to the extent that it is not the Stalking Horse Bidder) and the Committee, and their respective advisors (collectively, the “Consultation Parties” and each, a “Consultation Party”) as explicitly provided for in the Bidding Procedures. Regardless of whether SSCP is a Consultation Party, the Debtors CRO and investment banker will participate in weekly calls with SSCP, in its capacity as the Senior Lender, regarding the status of the marketing and sale process.

**IX.
ARGUMENT**

A. The Bidding Procedures Are Fair, Appropriate, and In the Best Interests of the Debtors and Their Stakeholders

41. The Bidding Procedures are specifically designed to promote what courts have deemed to be the paramount goal of any proposed sale of a debtor’s property—maximizing the value of sale proceeds received by the estate. *See Burtch et al. v. Ganz, et al. (In re Mushroom Co.)*, 382 F.3d 325, 339 (3d Cir. 2004) (finding that debtor “had a fiduciary duty to protect and maximize the estate’s assets”); *Official Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinery*, 330 F.3d 548, 573 (3d Cir. 2003) (debtor has “fiduciary duty to maximize the value of the bankruptcy estate”); *In re Food Barn Stores, Inc.*, 107 F.3d 558, 564- 65 (8th Cir. 1997) (“a primary objective of the Code [in asset sales is] to enhance the value of the estate at hand.”) (citing *Metro. Airports Comm’n v. Northwest Airlines, Inc. (In re Midway Airlines, Inc.)*, 6 F.3d 492, 494 (7th Cir. 1993) (“Section 365 . . . advances one of the Code’s central purposes, the maximization of the value of the bankruptcy estate for the benefit of creditors.”)). Courts uniformly recognize that procedures established for the purpose of enhancing competitive bidding are consistent with the fundamental goal of maximizing the value of a debtor’s estate. *See Calpine Corp. v. O’Brien Env’tl. Energy, Inc. (In re O’Brien Env’tl. Energy, Inc.)*, 181 F.3d 527, 537 (3d Cir. 1999) (noting

that bidding procedures that promote competitive bidding provide a benefit to a debtor's estate); *In re Fin'l News Network, Inc.*, 126 B.R. 152, 156 (Bankr. S.D.N.Y. 1992) (“[C]ourt-imposed rules for the disposition of assets . . . [should] provide an adequate basis for comparison of offers, and [should] provide for fair and efficient resolution of bankrupt estates.”).

42. The Bidding Procedures provide for an orderly, uniform and appropriately competitive process through which interested parties may submit offers in connection with the Sale of the Acquired Assets. The Debtors, with the assistance of their advisors, have structured the Bidding Procedures to promote active bidding by interested parties and to confirm the highest or otherwise best offer reasonably available for the Acquired Assets. The Bidding Procedures will allow the Debtors to conduct any Auction in a fair and transparent manner that will encourage participation by financially capable bidders with demonstrated ability to consummate a timely sale or sales.

43. Courts in this District and other districts routinely approve procedures substantially similar to the proposed Bidding Procedures, including procedures providing for the designation of stalking horse bidders and sale timelines. *See, e.g., In re Consolidated Infrastructure Group, Inc.*, No. 19-10165 (BLS) [Docket No. 151] (Bankr. D. Del. Apr. 24, 2019) (authorizing designation of stalking horse bidders and provision of bid protections without further hearing with consent of United States Trustee and consultation parties); *In re Hobbico, Inc.*, No. 18-10055 (KG) [Docket No. 243] (Bankr. D. Del. Mar. 14, 2018) (same); *In re California Proton Treatment Center, LLC*, No. 1710477 (LSS) [Docket No. 158] (Bankr. D. Del. Apr. 12, 2017) (same); *In re United Road Towing, Inc.*, No. 17-10249 (LSS) [Docket No. 131] (Bankr. D. Del. Mar. 6, 2017) (same); *In re Constellation Enterprises LLC*, No. 16-11213 (CSS) [Docket No. 260] (Bankr. D. Del. Jun. 15, 2016) (same); *See also, e.g., In re Mabvax Therapeutics Holdings, Inc.*,

No. 19-10603 (CSS) [Docket No. 78] (Bankr. D. Del. Apr. 8, 2019) (approving bidding procedures with a bid deadline 18 days after entry of bidding procedures order); *In re Things Remembered, Inc.*, No. 19-10248 (CSS) [Docket No. 100] (Bankr. D. Del. Mar. 13, 2019) (approving bidding procedures with bid deadline 7 days after entry of order and auction scheduled for 26 days after entry of order); *In re Charlotte Russe Holding, Inc.*, No. 19-10210 (LSS) [Docket No. 199] (Bankr. D. Del. Feb. 21, 2019) (approving bidding procedures with bid deadline 10 days after entry of order and auction scheduled for 29 days after entry of order); *In re Maurice Sporting Goods, Inc.*, No. 17-12481 (CSS) [Docket No. 125] (Bankr. D. Del. Dec. 12, 2017) (entering bidding procedures order 22 days after petition date, approving bid deadline 10 days after entry of order); *In re Golfsmith Int'l Holdings, Inc.*, No. 16-12033 (LSS) [Docket No. 196] (Bankr. D. Del. Oct. 6, 2016) (approving bidding procedures with a bid deadline 11 days after entry of order and auction scheduled for 13 days after entry of order).

44. Accordingly, the Bidding Procedures should be approved, not just because they are aligned with the circumstances of the Debtors' chapter 11 cases, but also because they are consistent with procedures approved by courts in this District in cases of similarly-situated debtors and are otherwise reasonable, appropriate, and in the best interests of the Debtors, their estates and all parties in interest.

B. Approval of the Proposed Sale Is Warranted Under Section 363 of the Bankruptcy Code

45. Section 363 of the Bankruptcy Code provides, in relevant part, that the debtor may, "after notice and a hearing . . . use, sell, or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b)(1). While the Bankruptcy Code does not specify the appropriate standard for approving the sale of property under section 363, courts routinely authorize a sale if it is based upon the debtor's sound business judgment. *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, 390 (6th Cir. 1986); *Comm. of Equity Security Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1071 (2d Cir. 1983).

46. Courts typically consider the following factors in determining whether a sale under section 363 of the Bankruptcy Code passes muster under the business judgment 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) (adopting *Lionel* factors) (citing *Guilford Transp. Indus., Inc. v. Delaware & Hudson Ry. Co. (In re Delaware & Hudson Ry. Co.)*, 124 B.R. 169, 176 (D. Del. 1991) (listing non-exclusive factors that may be considered by a court in determining whether there is a sound business purpose for an asset sale)). As such, it follows that when a debtor demonstrates a valid business justification for a decision, the presumption is that the business decision was made “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) (quoting *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985)).

C. **The Debtors Have Demonstrated a Sound Business Justification for the Proposed Sale**

47. A sound business justification exists where the sale of a debtor’s assets is necessary to preserve the value of the debtor’s estate for the benefit of creditors and interest holders. *See, e.g., Cumberland Farms Dairy, Inc. v. Abbotts Dairies of Penn., Inc. (In re*

Abbotts Diaries of Penn., Inc.), 788 F.2d 143 (3d Cir. 1986); *In re Delaware & Hudson Ry. Co.*, 124 B.R. at 179 (approving the sale of the debtor as a going concern upon a showing of “a valid business purpose”); *In re Lionel Corp.*, 722 F.2d at 1071 (adopting a rule “requiring that a judge determining a § 363(b) application expressly find from the evidence presented before him . . . a good business reason to grant” the sale).

48. As set forth above, a strong business justification exists for a sale of the Acquired Assets. In as much as the Interim DIP Order contains requirements for a timely sale of the Acquired Assets, an orderly but expeditious Sale of the Acquired Assets is critical to maximizing recoveries for all of the Debtors’ stakeholders. Moreover, a timely closing of the Sale is necessary under the Interim DIP Order, without which Debtors would not have been able to execute an orderly and value-maximizing sale process or fund these chapter 11 cases.

D. The Proposed Sale Will Yield a Fair and Reasonable Purchase Price for the Debtors’ Assets

49. As set forth above, the Debtors believe that the Sale governed by the Bidding Procedures will yield a fair and reasonable price for the Acquired Assets. The Bidding Procedures were designed to facilitate a robust and competitive bidding process and provide significant flexibility to do so. The Debtors also constructed the Bidding Procedures to promote transparency, good faith and fairness throughout the entire sale process within the parameters of the Milestones. The Bidding Procedures provide an appropriate framework for the Debtors to review, analyze and compare one or more bids for the Acquired Assets and to engage with bidders on an arm’s length basis to work to improve the quality of their bids for the benefit of all parties in interest.

50. A sale or sales governed by the Bidding Procedures undoubtedly will serve the important objectives of obtaining not only a fair and reasonable purchase price for the Acquired

Assets, but also the highest or best value for the Acquired Assets. This is a critical feature of the Bidding Procedures, which will inure to the benefit of all parties in interest in the chapter 11 cases.

E. The Successful Bidder(s) Should be Entitled to the Protections of Section 363(m) of the Bankruptcy Code

51. Section 363(m) of the Bankruptcy Code is designed to protect the sale of a debtor's assets to a good-faith purchaser. Specifically, section 363(m) provides the following:

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

11 U.S.C. § 363(m). Section 363(m) embodies the “policy of not only affording finality to the judgment of the bankruptcy court, but particularly to give finality to those orders and judgments upon which third parties rely.” *See Reloeb Co. v. LTV Corp. (In re Chateaugay Corp.)*, No. 92 Civ. 7054 (PKL), 1993 U.S. Dist. LEXIS 6130, at *9 (S.D.N.Y. May 10, 1993) (quoting *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”).

52. While the Bankruptcy Code does not define “good faith,” the Third Circuit has held that indicia of bad faith typically include “fraud, collusion between the purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders.” *Abbotts Dairies*, 788 F.2d 143, 147 (3d Cir. 1986) (quoting *Hoese Corp. v. Vetter Corp. (In re Vetter*

Corp.), 724 F.2d 52, 55 (7th Cir. 1983)) (other citations omitted); *see also Kabro Assoc. of West Islip, L.L.C. v. Colony Hill Assocs. (In re Colony Hill Assocs.)*, 111 F.3d 269, 276 (2d Cir. 1997).

53. As set forth above, the Bidding Procedures were designed with the goal of producing a fair and transparent sale process that will yield the highest or otherwise best value for the Acquired Assets. The Debtors submit, and the testimony presented at the Sale Hearing will demonstrate, that the terms and conditions of the Sale will have been negotiated by the Debtors and the Stalking Horse Bidder, if any, or Successful Bidder, as applicable, at arm's length and in good faith, with the assistance of the Debtors' professional advisors, and that the parties did not engage in any conduct that would cause or permit the Sale to be avoided under section 363(n) of the Bankruptcy Code.

54. In view of the foregoing, the Debtors believe that a sale of the Acquired Assets pursuant to the Bidding Procedures will demonstrate that the proposed sale should be approved as a sound exercise of their business judgment.

F. The Sale of the Assets Free and Clear of Liens, Claims, Interests, and Encumbrances Is Appropriate under Section 363(f) of the Bankruptcy Code

55. In the interest of attracting the best offers, the Court should authorize the Debtors to sell the Acquired Assets free and clear of any liens, claims, interests and other encumbrances, in accordance with section 363(f) of the Bankruptcy Code. Section 363(f) of the Bankruptcy Code authorizes a debtor to sell assets free and clear of all liens, claims, interests and encumbrances of an entity other than the estate if any one of the following conditions is met:

- (a) applicable non-bankruptcy 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 legal or equitable proceeding, to accept a money satisfaction of such interest.

11 U.S.C. § 363(f)(1) – (5); *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); *Mich. Emp’t Sec. Comm’n v. Wolverine Radio Co. (In re Wolverine Radio Co.)*, 930 F.2d 1132, 1147 n.24 (6th Cir. 1991) (same); *In re Zeigler*, 320 B.R. 362, 381 (Bankr. N.D. Ill. 2005) (same); *In re Bygaph, Inc.*, 56 B.R. 596, 606 n.8 (Bankr. S.D.N.Y. 1986) (same).

56. 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); *see also Volvo White Truck Corp. v. Chambersburg Beverage, Inc. (In re White Motor Credit Corp.)*, 75 B.R. 944, 948 (Bankr. N.D. Ohio 1987) (“Authority to conduct such sales [free and clear of claims] is within the court’s equitable powers when necessary to carry out the provisions of [the Bankruptcy Code].”).

57. The Debtors submit, and to the extent necessary will demonstrate at the Sale Hearing, that the sale of the Acquired 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. The proposed Sale satisfies one or more of the requirements under section 363(f) of the Bankruptcy Code to permit a “free and clear” sale of the Acquired Assets. For example, the Acquired Assets are subject to the liens of the Debtors’ secured lenders, each of whom either have consented or are expected to consent to the Sale. Additionally, any parties with junior liens on

the Acquired Assets can be compelled to accept a money satisfaction of their interests, but also would be adequately protected by such liens attaching to the proceeds of the Sale in the order of their respective priority.

58. Moreover, the Debtors will send the Sale Notice to any other purported prepetition lienholders. If such lienholders do not object to the proposed Sale, then their consent should reasonably be presumed. Accordingly, the Debtors request that, unless a party asserting a prepetition lien, claim, or encumbrance on any of the Acquired Assets timely objects to this Motion as it relates to the Sale (and not the Bidding Procedures), such party shall be deemed to have consented to any Sale approved at the Sale Hearing. *See Hargave 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). Accordingly, the Debtors request that the Court authorize the sale of the Acquired Assets free and clear of any liens, claims, interests, and encumbrances, in accordance with section 363(f) of the Bankruptcy Code, subject to such liens, claims, interests, and encumbrances attaching to the proceed thereof in the same order of relative priority, with the same validity, force, and effect as prior to such.

59. It is also appropriate to sell the Acquired Assets free and clear of successor liability relating to the Debtors' business. Such limitations on successor liability ensure that the Successful Bidder is protected from any claims or lawsuits premised on the theory that the Successful Bidder is the successor in interest to one or more of the Debtors. Courts have consistently held that a buyer of a debtor's assets pursuant to a section 363 sale takes free and clear from successor liability relating to the debtor's business. *See, e.g., In re Trans World Airlines, Inc.*, 322 F.3d 283, 288-90 (3d Cir. 2003) (sale of assets pursuant to section 363(f) barred successor liability claims for employment discrimination and rights under travel voucher

program); *In re Leckie Smokeless Coal Co.*, 99 F.3d 573, 585 (4th Cir. 1996) (affirming the sale of debtors' assets free and clear of certain taxes); *In re Ormet*, 2014 WL 3542133 (Bankr. D. Del. July 17, 2014) (permitting a sale free and clear of successor liability claims relating to an under-funded pension plan); *In re Insilco Techs., Inc.*, 351 B.R. 313, 322 (Bankr. D. Del. 2006) (stating that a 363 sale permits a buyer to take ownership of property without concern that a creditor will file suit based on a successor liability theory).

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

G. The Debtors' Assumption and Assignment of Executory Contracts and Unexpired Leases Are Appropriate under Section 365 of the Bankruptcy Code

61. Section 365(a) of the Bankruptcy Code provides that a debtor "subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor." 11 U.S.C. § 365(a). Courts employ the business judgment standard in determining whether to approve a debtor's decision to assume or reject an executory contract or an unexpired lease. *See, e.g., In re Market Square Inn, Inc.*, 978 F.2d 116, 121 (3d Cir. 1992) (finding that assumption or rejection of a lease "will be a matter of business judgment"); *In re HQ Global Holdings, Inc.*, 290 B.R. 507, 511 (Bankr. D. Del. 2003) (finding debtor's decision to assume or reject executory contract is governed by business judgment standard and can only be overturned if decision was product of bad faith, whim or caprice). In this context, the business judgment test only requires that a debtor demonstrate that assumption or rejection of an executory contract or unexpired lease benefits the estate. *See Sharon Steel Corp. v. Nat'l Fuel Gas Distrib. Corp.*, 872 F.2d 36, 40 (3d Cir. 1989); *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).

62. The proposed Sale will provide a Successful Bidder with the opportunity to designate the Potential Assumed Contracts for assumption and assignment. Assumption and assignment of any Potential Assumed Contract is an exercise of the Debtors' sound business judgment because the transfer of such contracts in connection with any Sale is an essential element in the Debtors' ability to maximize the value of the Acquired Assets—particularly so when a Potential Assumed Contract is integral to the ownership or operation of the Acquired Assets to be acquired. Further, the ability to assume and assign necessary Potential Assumed Contracts will increase the likelihood that the Debtors will be able to sell the Acquired Assets, thereby avoiding needless value-destruction through a liquidation of otherwise marketable operating assets.

63. The consummation of any Sale involving the assignment of a Potential Assumed Contract will be contingent upon the Debtors' compliance with the applicable requirements of section 365 of the Bankruptcy Code. Section 365(b)(1) requires that any outstanding defaults under the Potential Assumed Contracts to be assumed be cured or that the Debtors provide adequate assurance that such defaults will be promptly cured. *See* 11 U.S.C. § 365(b)(1). The Debtors' assumption and assignment of any Potential Assumed Contracts will be dependent upon payment of Cure Amounts and effective only upon the closing of an applicable Sale. As set forth above, subject to the Court's approval, the Debtors will file with the Court and serve on each Counterparty a Potential Assumption and Assignment Notice setting forth the Debtors' calculation of the Cure Amounts for each Potential Assumed Contract that could be assumed in connection with a Sale.

64. Section 365(f) of the Bankruptcy Code requires, in part, that the assignee of any executory contract provide "adequate assurance of future performance ... whether or not there has been a default in such contract." 11 U.S.C. § 365(f)(2). While the Bankruptcy Code does not

define “adequate assurance,” courts have held that what constitutes “adequate assurance” should be determined by “a practical, pragmatic construction based upon the facts and circumstances of each case.” *See Carlisle Homes, Inc. v. Azzari (In re Carlisle Homes, Inc.)*, 103 B.R. 524, 538 (Bankr. D. N.J. 1988) (quoting *In re Bon Ton Rest. & Pastry Shop, Inc.*, 53 B.R. 789, 803 (Bankr. N.D. Ill. 1985)); *see also In re Alipat, Inc.*, 36 B.R. 274, 276-77 (Bankr. E.D. Mo. 1984) (recognizing that the term adequate assurance “borrowed its critical language ... from Section 2609 of the Uniform Commercial Code” which “suggest[s] that adequate assurance is to be defined by commercial rather than legal standards . . . [and] factual considerations.”). While no single standard governs every case, adequate assurance “will fall considerably short of an absolute guarantee of performance.” *In re Carlisle Homes, Inc.*, 103 B.R. at 538 (citations omitted); *In re Natco Indus., Inc.*, 54 B.R. 436, 440 (Bankr. S.D.N.Y. 1985) (adequate assurance of future performance does not mean absolute assurance that debtor will thrive and pay rent).

65. Adequate assurance may be provided by demonstrating, among other things, 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 industrial expertise, past success in running a similar business, and financial wherewithal satisfied the adequate assurance requirement of section 365 of the Bankruptcy Code).

66. The Bidding Procedures expressly specify that for a bid to qualify as a Qualified Bid a prospective bidder must include with its bid adequate assurance information regarding the prospective bidder’s ability to perform the applicable obligations under any Potential Assumed Contracts that may be included in the bid. Accordingly, the proposed Assumption and Assignment Procedures are carefully designed to ensure that Counterparties receive timely and sufficient notice with respect to the disposition of their Potential Assumed Contracts. In light of

the foregoing, the Debtors' assumption and assignment of any Potential Assumed Contracts in accordance with the proposed Assumption and Assignment Procedures would satisfy the requirements of section 365 of the Bankruptcy Code and should be approved.

67. Finally, in order to facilitate the assumption and assignment of Potential Assumed Contracts in furtherance of maximizing the value of the Acquired Assets, the Debtors further request that the Court find that any anti-assignment provision included in any Potential Assumed Contract, whether such provision expressly prohibits, or has the effect of restricting or limiting assignment of a Potential Assumed Contract, is unenforceable and prohibited pursuant to section 365(f) of the Bankruptcy Code.¹⁰

H. SSCP or its Designee Should Be Authorized to Credit Bid on the Assets under Section 363(k) of the Bankruptcy Code

68. Section 363(k) of the Bankruptcy Code provides that, unless the court for cause orders otherwise, the holder of a claim secured by property that is the subject of a sale “may bid at such sale, and, if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property.” 11 U.S.C. § 363(k). Even if a secured creditor is under-secured as determined in accordance with section 506(a) of the Bankruptcy Code, section 363(k) allows such secured creditor to bid the full face value of its claim and does not limit the credit bid to the claim's economic value. *See Cohen v. KB Mezzanine Fund II, LP (In re Submicron Sys. Corp.)*, 432 F.3d 448, 459-60 (3d Cir. 2006).

¹⁰ Section 365(f)(1) provides in pertinent part that, “notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law, that prohibits, restricts, or conditions the assignment of such contract or lease, the trustee may assign such contract or lease” 11 U.S.C. § 365(f)(1). Further, section 365(f)(3) provides that “[n]otwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law that terminates or modifies, or permits a party other than the debtor to terminate or modify, such contract or lease or a right or obligation under such contract or lease on account of an assignment of such contract or lease, such contract, lease, right, or obligation may not be terminated or modified under such provision because of the assumption or assignment of such contract or lease by the trustee.” 11 U.S.C. § 365(f)(3).

69. As a result, the Debtors propose that the Senior Lender (or its designee) as the prepetition secured lender, which hold claims that are secured by valid, binding, enforceable, non-avoidable and perfected liens on and security interests in substantially all of the Debtors' assets as provided for in the Interim DIP Order, be entitled to credit bid all or a portion of the amounts then outstanding under SSCP's claims, or any part thereof, under section 363(k) of the Bankruptcy Code and as provided for in the Interim DIP Order and the Bidding Procedures.

I. The Designation Rights Are Appropriate

70. The Successful Bidder will be permitted to designate executory contracts and unexpired leases as assumed or rejected for a limited period after the Closing Date. The designation rights allow the Successful Bidder to receive the benefits of certain Potential Assumed Contracts while it considers whether to have the Potential Assumed Contracts assumed and assigned or rejected. Under the designation rights, the counterparties will be compensated pursuant to the terms of their Potential Assumed Contract.

71. The designation rights will provide the Successful Bidder and the counterparties to Potential Assumed Contracts with an opportunity to negotiate the Potential Assumed Contracts prior to a decision regarding whether to assume and assign or reject the Potential Assumed Contract. Ultimately, this is expected to result in the Successful Bidder continuing business relationships with more counterparties to Potential Assumed Contracts than if all decisions related to Potential Assumed Contracts were forced to be made on or before the Closing.

72. Bankruptcy courts in this District and other jurisdictions have approved similar designation rights. *See, e.g., In re Francesca's Holdings Corporation*, Case No. 20-13076 (BLS) (Bankr. D. Del. Jan. 22, 2021) (sale order approving designation rights period extending up to 150 days after closing date); *In re Alpha Entm't LLC*, Case No. 20-10940 (LSS) (Bankr. D. Del. Aug.

7, 2020) (sale order approving designation rights period extending through the earlier of (a) plan confirmation occurring no earlier than 70 days after closing date, or (b) 90 days from and after closing date); *In re Brooks Bros. Grp., Inc.*, Case No. 20-11785 (CSS) (Bankr. D. Del. Aug. 3, 2020) (approved bidding procedures order for stalking horse agreement providing for designation rights period extending post-closing until the later of plan confirmation or Dec. 31, 2020); *In re PQ New York, Inc.*, Case No. 20-11266 (JTD) (Bankr. D. Del. June 29, 2020) (order approving private sale with post-closing date designation deadline 10 days following entry of sale order); *In re Sugarfina, Inc.*, Case No. 19- 11973 (MFW) (Bankr. D. Del. Oct. 15, 2019) (approved bidding procedures order for stalking horse agreement providing for designation rights period extending 90 days from and after closing date); *In re RM Holdco LLC*, Case No. 18-11795 (MFW) (Bankr. D. Del. Sept. 6, 2018) (same).

**X.
REQUEST FOR IMMEDIATE RELIEF AND WAIVER OF STAY**

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

74. As set forth above, the relief requested herein is necessary and appropriate to maximize the value of the Debtors’ estates for the benefit of their economic stakeholders.

Accordingly, the Debtors submit that ample cause to justify the waiver of the 14-day stay imposed by Bankruptcy Rules 6004(h) and 6006(d), in each case, to the extent that such stay applies to the relief requested herein.

**XI.
NOTICE**

75. The Debtors have or will provide notice of this Motion to: (a) SSCP, the Debtor's prepetition lender, Ken Schwab (kschwab@sscpmanagement.com); (b) counsel to SSCP, Foley & Lardner LLP, 2021 McKinney Avenue, Suite 1600, Dallas, TX. 75201, Attn: Holland N. O'Neil (honeil@foley.com), Mark C. Moore (mmoore@foley.com), and Tim Mohan (tmohan@foley.com) and Ashby & Geddes, P.A, 500 Delaware Avenue, 8th Floor, P.O. Box 1150, Wilmington, DE. 19899, Attn: Ricardo Palacio; (RPalacio@ashbygeddes.com); (c) the Office of the United States Trustee for the District of Delaware, Attn: Linda Casey (Linda.Casey@usdoj.gov); (d) the United States Attorney's Office for the District of Delaware; (e) the Internal Revenue Service; (f) the office of the attorneys general for the states in which the Debtors operate; (g) counsel for the Committee, Tucker Ellis LLP, 233 S. Wacker Dr., Suite 6950, Chicago, IL 60606, Attn: Jason M. Torf (jason.torf@tuckerellis.com) and Thomas R. Fawkes (thomas.fawkes@tuckerellis.com) and Potter Anderson & Corroon LLP, 1313 N. Market St., 6th Floor, Wilmington, DE 19801, Attn: Christopher M. Samis (csamis@potteranderson.com); and (h) 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.

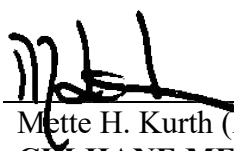
**XII.
NO PRIOR REQUEST**

76. No prior request for the relief sought herein has been made to this Court or any other court in connection with the chapter 11 cases.

**XIII.
CONCLUSION**

WHEREFORE, the Debtors respectfully request that the Court grant the relief requested in this Motion, enter the Bidding Procedures Order, substantially in the form attached hereto as Exhibit A, and grant such other and further relief to the Debtors as the Court may deem proper.

Dated: April 7, 2023
Wilmington, Delaware



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