

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re

AN GLOBAL LLC, *et al.*,¹

Debtors.

Chapter 11

Case No. 23-11294 (JKS)

(Jointly Administered)

Hearing Date: Sept. 22, 2023 at 11:00 a.m. (ET)

Objection Deadline: Sept. 15, 2023 at 4:00 p.m. (ET)

DEBTORS' MOTION FOR ENTRY OF: (I) AN ORDER (A) SCHEDULING A HEARING ON THE APPROVAL OF THE SALE OF ALL OR SUBSTANTIALLY ALL OF THE DEBTORS' ASSETS FREE AND CLEAR OF ALL ENCUMBRANCES OTHER THAN ASSUMED LIABILITIES AND PERMITTED ENCUMBRANCES, AND THE ASSUMPTION AND ASSIGNMENT OF CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES, (B) APPROVING CERTAIN BIDDING PROCEDURES, BIDDING PROTECTIONS, AND ASSUMPTION AND ASSIGNMENT PROCEDURES, AND THE FORM AND MANNER OF NOTICE THEREOF, (C) AUTHORIZING THE DEBTORS TO ENTER INTO THE STALKING HORSE APA, AND (D) GRANTING RELATED RELIEF; AND (II) AN ORDER (A) APPROVING ASSET PURCHASE AGREEMENT, (B) AUTHORIZING THE SALE OF ALL OR SUBSTANTIALLY ALL OF THE DEBTORS' ASSETS FREE AND CLEAR OF ALL ENCUMBRANCES OTHER THAN ASSUMED LIABILITIES AND PERMITTED ENCUMBRANCES, (C) AUTHORIZING THE ASSUMPTION AND ASSIGNMENT OF CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES, AND (D) GRANTING RELATED RELIEF

The debtors and debtors-in-possession in the above-captioned cases (collectively, the “Debtors” or the “Company”) hereby submit this motion (this “Motion”), pursuant to sections

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1. The Debtors in these Chapter 11 Cases, along with the last four digits of each Debtor’s federal tax identification number or registration number in the applicable jurisdiction, are: AN Global LLC (5504); AgileThought, Inc. (2509); 4th Source Holding Corp. (9629); 4th Source Mexico, LLC (7552); 4th Source, LLC (7626); AgileThought Brasil-Consultoria Em Tecnologia LTDA (01-42); AgileThought Brasil Servicos de Consultoria Em Software (01-20); AgileThought Costa Rica S.A. (6822); AgileThought Digital Solutions, S.A.P.I. de C.V. (3KR0); AgileThought México S.A. de C.V. (7E46); AgileThought, LLC (7076); AgileThought Servicios Administrativos, S.A. de C.V. (4AG1); AgileThought Servicios México S.A. de C.V. (8MY5); AgileThought, S.A.P.I. de C.V. (No Tax ID); AGS Alpama Global Services USA, LLC (0487); AN Data Intelligence, S.A. de C.V. (8I73); AN Extend, S.A. de C.V. (1D80); AN Evolution, S. de R.L. de C.V. (7973); AN USA (5502); AN UX, S.A. de C.V. (7A42); Cuarto Origen, S. de R.L. de C.V. (0IQ9); Entrepids México, S.A. de C.V. (OCYA); Entrepids Technology Inc. (No Tax ID); Facultas Analytics, S.A.P.I. de C.V. (6G37); Faktos Inc., S.A.P.I. de C.V. (3LLA); IT Global Holding LLC (8776); and QMX Investment Holdings USA, Inc. (9707). The Debtors’ headquarters are located at 222 W. Las Colinas Boulevard, Suite 1650E, Irving, Texas 75039.

105, 363, 365, 503 and 507 of title 11 of the United States Code (the “Bankruptcy Code”), for the entry of: (i) an order, substantially in the form attached hereto as **Exhibit A** (the “Bidding Procedures Order”), (a) scheduling a hearing (the “Sale Hearing”) on approval of the proposed sale (the “Sale”) of all or substantially all of the Debtors’ assets (the “Assets”), free and clear of all encumbrances other than designated assumed liabilities and permitted encumbrances, to [Blue Torch Finance LLC], an entity organized and controlled by the Agent (as defined below), which has agreed to become the stalking horse bidder subject to finalizing the Stalking Horse APA (as defined below) (the “Stalking Horse Bidder”) or, in the event the Stalking Horse Bidder is not the Successful Bidder (as defined herein), then to the Successful Bidder (as defined below); (b) authorizing and approving certain bidding procedures for the Sale (collectively, the “Bidding Procedures,” a copy of which is attached as **Exhibit 1** to the Bidding Procedures Order), approving bidding protections in the form of an expense reimbursement for the Stalking Horse Bidder, and certain procedures for the assumption and assignment of the executory contracts and unexpired leases (collectively, the “Assumption Procedures”), and the form and manner of notice thereof; (c) authorizing and approving the Debtors’ entry into an Asset Purchase Agreement substantially in the form attached as **Exhibit 2** to the Bidding Procedures Order (the “Stalking Horse APA”) with the Stalking Horse Bidder; and (d) granting related relief; and (ii) an order (the “Sale Order”) (a) authorizing and approving the Sale on the terms contemplated in the Stalking Horse APA or, in the event the Stalking Horse Bidder is not the Successful Bidder, then an alternative asset purchase agreement (“Alternative APA”) with the Successful Bidder, and the Sale Order; (b) authorizing and approving the assumption and assignment of the certain executory contracts and unexpired leases in connection therewith (each an “Assigned Contract” and collectively, the

“Assigned Contracts”); and (c) granting related relief. In support of this Motion, the Debtors respectfully state as follows:

PRELIMINARY STATEMENT

1. The Debtors commenced these chapter 11 cases (the “Chapter 11 Cases”) to effectuate an orderly and value-maximizing sale transaction for the benefit of their stakeholders and to address their liquidity issues and certain inequitable and heavily disputed tax assessments against certain of its Mexican Debtor-affiliates that now exceed \$200 million with interest and penalties (the “Mexican Tax Assessment”).

2. Prior to the Petition Date (as defined below), in an effort to ameliorate these conditions, the Company pursued several strategies with two nationally recognized investment banks. On March 22, 2023, the Debtors engaged Cantor Fitzgerald & Co. (“Cantor”) to help them seek financing, additional equity investment, and restructuring of debt. Cantor ran an extensive, multi-month process to obtain such alternative financing or investment for the Company. The Company received seven (7) indications of interest for financing or investment. However, these efforts ultimately proved unfruitful. Subsequently, on May 3, 2023, the Debtors engaged J.P. Morgan Securities LLC (“JPM”) to solicit bids to purchase the Debtors. JPM contacted fifty-nine (59) parties, thirty-four (34) of whom signed non-disclosure agreements. JPM’s marketing efforts yielded several rounds of bidding, including eleven (11) non-binding indications of interests and three (3) bids. However, despite interest from multiple bidders, the participating bidders ultimately declined to proceed with a purchase of the Debtors in an out-of-court transaction upon learning of the Mexican Tax Assessment and the other factors described above.

3. On August 11, 2023, the Debtors retained Guggenheim Securities, LLC (“Guggenheim Securities”) to assist the Debtors in their exploration and solicitation of offers for the Debtors’ assets in a going-concern sale during these Chapter 11 Cases. At this juncture, while

the Debtors, with the assistance of Guggenheim Securities, continue their postpetition marketing efforts, the Debtors have negotiated a stalking horse asset purchase agreement with the Stalking Horse Bidder, an entity formed and controlled by Blue Torch Finance LLC, as administrative agent and collateral agent for the prepetition first lien lenders and the postpetition lenders (in such capacity, the “Agent”), that contemplates the Agent credit bidding certain of its secured debt in the aggregate amount of \$100 million and assuming certain liabilities. As part of a broader agreement related to postpetition financing and the ongoing consensual use of cash collateral and to avoid the value-destructive consequences of a protracted stay in chapter 11, the Debtors have committed to conducting an efficient, 80-day in-court sale process, wherein the Stalking Horse Bidder will serve as the stalking horse. The Debtors seek the relief requested in this Motion to ensure that a timely and thorough sale process is implemented, and alternative purchasers understand the metrics and terms of the stalking horse arrangement when framing competitive offers for the subject assets. The Debtors believe that the relief requested in this Motion balances the dual goals of running a robust marketing process to ensure that the Debtors secure the highest and best purchase price possible, while also minimizing any potential business disruption. The proposed procedures outlined herein are reasonable, value-maximizing and in the best interest of the estates and all interested parties and should be approved by the Court.

JURISDICTION AND VENUE

4. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order of Reference from the United States District Court for the District of Delaware*, dated February 29, 2012. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2), and 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. Venue for this matter is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409.

5. The statutory and legal predicates for the relief sought herein are sections 105, 363, 365, 503 and 507 of the Bankruptcy Code, Rules 2002, 6004 and 6006 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), and Local Rules 2002-1 and 6004-1.

BACKGROUND

6. On August 28, 2023 (the “Petition Date”), the Debtors commenced their bankruptcy cases by filing voluntary petitions for relief under chapter 11 of the Bankruptcy Code (the “Chapter 11 Cases”). No trustee, examiner, or creditors’ committee has been appointed in these cases. The Debtors are operating their businesses as debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

7. The events leading up to the Petition Date and the facts and circumstances supporting the relief requested herein are set forth in the *Declaration of James S. Feltman, Chief Restructuring Officer of the Debtors, in Support of First Day Relief* [Docket No. 13] (the “Feltman Declaration”), incorporated herein by reference.

THE SALE PROCESS

8. The Debtors hereby seek authority to implement certain procedures and, ultimately, consummate a sale of all or substantially all of the Assets that will maximize recoveries for the Debtors’ estates, maintain a viable business, and ensure the continued employment of hundreds of current employees. As part of its agreement to allow continued consensual use of cash collateral, the Stalking Horse Bidder has agreed to serve as the stalking horse for the Assets,

subject to finalizing the Stalking Horse APA, and the Debtors, in turn, agreed to file this Motion and trigger the sale process in earnest.

9. With the foundation of the marketing process and extensive bidder outreach conducted by Cantor and JPM since March 2023, Guggenheim Securities has worked to prepare for a robust postpetition marketing process on an expedited basis that aligns with the milestones required under the DIP Credit Agreement.² To date, sixty-four (64) potential transaction parties, including strategic and financial partners, have been contacted regarding the Assets, thirty-seven (37) of whom have signed non-disclosure agreements. The Debtors, in consultation with Guggenheim Securities, expect that additional parties may become aware of the potential sale through the chapter 11 process, thus driving even more interest in the Assets. However, many of the potential bidders are already well underway with their diligence given the extensive sale process that has been ongoing for nearly six (6) months. During these Chapter 11 Cases, the Debtors, with the assistance of Guggenheim Securities, will continue to canvas the market for viable, value-maximizing proposals that will benefit all interested parties.

A. Use of Cash Collateral and Sale Timeline

10. Following arms-length negotiations, the Debtors and the Agent recently reached agreement on a case timeline that adequately balances the Debtors' need to execute a robust marketing process for the Assets with the need of their secured lender to have certainty on how and when the Debtors' assets will be monetized (the "Sale Process"). To that end, the Debtors respectfully request, pursuant to this Motion, a hearing to be held no later than September 23,

2. As defined in the Debtors' Motion for Entry of Interim and Final Orders (I) Authorizing the Debtors to (A) Obtain Postpetition Financing and (B) Utilize Cash Collateral, (II) Granting Senior Secured Priming Liens and Superpriority Administrative Expense Claims, (III) Granting Adequate Protection to the Prepetition IL Secured Parties, (IV) Modifying the Automatic Stay, (V) Scheduling a Final Hearing, and (VI) Granting Related Relief [Docket No. 12] (the "DIP Motion").

2023, to consider approval of the Bidding Procedures and the Stalking Horse APA, consistent with the milestones (the “Transaction Milestones”) contemplated by the DIP Credit Agreement (as defined in the DIP Motion), and summarized below:

<u>Event</u>	<u>Due Date</u>
Entry of the Bidding Procedures Order	No later than September 23, 2023
Deadline for submitting a Qualified Bid	No later than November 9, 2023
Conclusion of an Auction (if necessary)	No later than November 13, 2023
Sale Hearing and Entry of the Sale Order	No later than November 16, 2023
Consummation of the Sale	No later than November 27, 2023

B. Proposed Sale Process

11. Among other things, the Sale Process will provide a transparent and comprehensive avenue through which the Debtors will seek bids for the Assets. In connection with the Sale Process, the Stalking Horse Bidder will have the right to submit a credit bid for the Assets in the form of the Stalking Horse APA, substantially in the form attached as **Exhibit 2** to the Bidding Procedures Order. The final form of the Stalking Horse APA will be filed no later than three (3) calendar days prior to the hearing on approval of the Bidding Procedures Order.

12. The contemplated Stalking Horse APA will serve as the baseline for all prospective bidders to negotiate from, and will be subject to higher or otherwise better bids for the Assets pursuant to the Bidding Procedures. Thus, upon the completion of the Sale Process (coupled with the Debtors’ robust sale process conducted for nearly six months prior to the Petition Date), the Debtors will have fully market tested the value of their Assets.

13. In furtherance of the ongoing efforts to actively market the Assets for sale, and consistent with the Transaction Milestones, the Debtors have filed this Motion seeking authority to proceed with a bidding and auction process to consummate a sale (or series of sales) that the Debtors expect will generate maximum value for their Assets. To facilitate the Sale, the

Debtors, in consultation with Guggenheim Securities and their other professional advisors, have developed certain customary bidding procedures (i.e., the Bidding Procedures) to preserve flexibility in the Sale Process, generate the greatest level of interest in the Assets, and result in the highest or otherwise best value for those Assets. Among other things, these procedures, in the Debtors' business judgment, create an appropriate timeline for the Sale Process, consistent with the Transaction Milestones and the contemplated Stalking Horse APA.

STALKING HORSE APA

14. The Debtors have negotiated the Stalking Horse APA with the Stalking Horse Bidder on a good faith and arms-length basis. The Debtors believe that consummation of the Stalking Horse APA, subject to higher or otherwise better offers, will maximize value for the Debtors' estates, provide for the continued employment of a significant portion of the Debtors' employees, and afford the Debtors the best possible opportunity to continue to service their customers and maintain business relationships with their vendors.

15. The following chart summarizes the terms and conditions of the Stalking Horse APA attached to the Bidding Procedures Order as **Exhibit 2** and discloses certain information required pursuant to Local Rule 6004-1:³

Stalking Horse APA Provision	Summary Description	Reference
Stalking Horse APA Parties	<u>Sellers</u> : AgileThought, Inc., AN Global LLC, and IT Global Holding LLC, AgileThought, LLC, 4th Source Holding Corp., 4th Source, LLC, 4th Source Mexico, LLC, QMX Investment Holdings USA, Inc., AGS Alpama Global Services USA, LLC, Entrepids Technology Inc., and AN USA; provided, that Buyer may in its sole discretion add or	Preamble, §§ 2.5(f), 4.2(c)

3. This summary is provided for the convenience of the Court and parties in interest. To the extent there is any conflict between this summary and the Stalking Horse APA, the Stalking Horse APA shall govern in all respects. All references to schedules or sections in the following summary shall refer to schedules or sections of the Stalking Horse APA. Terms used but not defined in this summary description have the meaning ascribed to such terms as in the Stalking Horse APA.

Stalking Horse APA Provision	Summary Description	Reference
	<p>remove any direct or indirect Subsidiary of Sellers as Additional Sellers until the date that is two (2) Business Days prior to the Closing Date.</p> <p><u>Buyer</u>: [Blue Torch Finance LLC] or one or more Affiliates designated by Blue Torch Finance LLC to purchase the Assets, assume the Assumed Liabilities, and employ Transferred Employees.</p>	
Purchase Price <i>Local Rule 6004-1(b)(iv)(N)</i>	<p>At the Closing, the Buyer shall (i) decrease the amount of principal due under the loans due under the Pre-Petition Credit Facility pursuant to the credit bid of such amount, by the Agent on behalf of the Pre-Petition Secured Lenders, pursuant to an irrevocable instruction letter, (ii) decrease the amount of obligations due under the DIP Facility by the amount under the DIP Facility as of the Closing Date pursuant to the credit bid of such amount, by the Agent on behalf of the DIP Lenders, pursuant to an irrevocable instruction letter (the sum of the amounts in (i) and (ii) shall be \$100,000,000), and (iii) assume the Assumed Liabilities as provided in the Stalking Horse APA (the sum of (i)-(iii) above, the “<u>Purchase Price</u>”).</p>	§ 3.2
Acquired Assets	<p>“<u>Acquired Assets</u>” will include:</p> <ul style="list-style-type: none"> (a) the Acquired Equity Interests; (b) cash, cash equivalents, all prepayments (including all prepayments made to third party vendors), deferred assets, refunds, cash held in reserve, deposits made by Sellers to any third parties, credits or overpayments, except for the Excluded Cash; (c) the Assigned Contracts; (d) all Accounts Receivables; (e) all Inventory; (f) all furniture, fixtures, equipment, marketing materials, merchandise and other personal property; (g) to the extent transferable pursuant to applicable Law, all Permits required for Sellers to conduct the Business as currently conducted or for the ownership, operation, use, maintenance, or repair of any of the Acquired Assets; (h) all Books and Records; (i) all Intellectual Property; (j) all General Intangibles; 	§ 2.1

Stalking Horse APA Provision	Summary Description	Reference
	<p>(k) all guarantees, representations, warranties and indemnities associated with the operation of the Business, including in respect of any Assumed Liabilities;</p> <p>(l) all insurance policies of Sellers and any claims thereunder to the extent such policies relate to the operation of the Business or to any Assumed Liabilities except to the extent included as an Excluded Asset in Section 2.2 of the Stalking Horse APA;</p> <p>(m) all goodwill associated with, or relating to, the Business or the Acquired Assets;</p> <p>(n) all claims, causes of action, choses in action, rights of recovery, rights of set off, and rights of recoupment (including any such item relating to the payment of Taxes) relating to the Acquired Assets set forth in clauses (a)-(r);</p> <p>(o) all claims and causes of action arising under sections 502(d), 542, 544, 545, 547, 548, 549, 550, 551, 553(b), or 724(a) of the Bankruptcy Code or any other avoidance actions under the Bankruptcy Code or applicable state-law equivalents and the proceeds of such claims, causes of action or avoidance actions;</p> <p>(p) all refunds, credits or overpayments or other receivables for Taxes, including Pre-Closing Straddle Period Taxes, that may be due for Pre-Closing Tax Periods (other than any refunds, credits, overpayments, or other receivables with respect to Taxes paid by Sellers after the Closing);</p> <p>(q) all claims of any Seller against any Excluded Subsidiary or other Group Company and any claim of any nature by any Seller against any present or former officer, director, employee, partner, member, Representative or agent of any member of any Seller, whether arising by way of counterclaim or otherwise; and</p> <p>(r) rights with respect to proofs of claim filed by or on behalf of any Sellers in any bankruptcy case other than the Bankruptcy Cases of Sellers.</p>	

Stalking Horse APA Provision	Summary Description	Reference
Assumed Liabilities	<p>“<u>Assumed Liabilities</u>” means:</p> <p>(a) all Liabilities of Sellers relating to or arising under Assigned Contracts, but only to the extent that such Liabilities thereunder are required to be performed after the Closing Date and to the extent such Liabilities do not relate to any failure to perform, improper performance, warranty or other breach, default or violation by Sellers or their Affiliates on or prior to the Closing (other than as it pertains to the Cure Costs as set forth in clause (h), below);</p> <p>(b) all Liabilities of Sellers (other than in respect of Taxes) relating to, or arising in respect of, the Acquired Assets accruing, arising out of or relating to events, occurrences, acts or omissions occurring or existing after the Closing Date or the operation of the Business or the Acquired Assets after the Closing Date;</p> <p>(c) (i) Taxes with respect to the Acquired Assets or the Business for any taxable period beginning after the Closing Date and for any Straddle Period (other than Pre-Closing Straddle Period Taxes) and (ii) the Transaction Taxes;</p> <p>(d) all Liabilities of Sellers relating to Transferred Employees accruing from and after the Closing Date, to the extent arising out of or relating to their employment by Stalking Horse Bidder or any of its Affiliates;</p> <p>(e) all Liabilities of Sellers relating to accrued and unpaid vacation or paid time off obligations of Transferred Employees;</p> <p>(f) to the extent lawfully transferable, all obligations, commitments and Liabilities under any Permits assigned to Stalking Horse Bidder hereunder;</p> <p>(g) undisputed post-Petition Date accrued trade payables of Sellers incurred in the ordinary course of business that are reflected in the DIP Budget with respect to the Acquired Assets to the extent not paid by Sellers at or prior to Closing and in an amount no greater in the aggregate than an amount equal to (1) \$[____], less (2) any amounts paid by Sellers for such Liabilities at or prior to the Closing; and</p> <p>(h) any Cure Costs owed in connection with the Assigned Contracts.</p>	§ 2.3
Excluded Assets	<p>“<u>Excluded Assets</u>” means:</p> <p>(a) Equity Securities of each Seller;</p>	§ 2.2

Stalking Horse APA Provision	Summary Description	Reference
	<p>(b) Any properties, rights and assets under any Benefit Plan;</p> <p>(c) any Excluded Contracts;</p> <p>(d) Unless and until otherwise designated by Stalking Horse Bidder, (i) Equity Securities of the Excluded Subsidiaries and the Mexican Entities or (ii) any assets of the Mexican Entities;</p> <p>(e) any confidential personnel and medical records pertaining to any employee of any Seller and its Affiliates who is not a Transferred Employee;</p> <p>(f) rights of Sellers under the Stalking Horse APA;</p> <p>(g) subject to the DIP Facility, retainers held by any professional retained by Sellers, and any funds of Sellers held in escrow or reserve with respect to the fees and expenses of any professional retained by Sellers;</p> <p>(h) Sellers' (i) Fundamental Documents and stock and minute books, and (ii) documents protected by any applicable privilege, including attorney-client or attorney work product privilege;</p> <p>(i) Excluded Cash, except to the extent of the DIP Reversionary Interest; and</p> <p>(j) Sellers' director and officer insurance policies, fiduciary policies or employment practices policies (in each case of the foregoing, including any tail policies or coverage thereon); <i>provided, however</i>, that Buyer shall acquire the right of any Target Company to receive proceeds under such policies relating to derivative claims of equity holders or creditors of such Target Companies or direct claims of such Target Companies, in each case, against any of Sellers' directors or officers.</p>	
Excluded Liabilities	<p><u>"Excluded Liabilities"</u> will include:</p> <p>(a) any Liability of any Seller relating to any Excluded Asset;</p> <p>(b) all of Sellers' Liabilities under Indebtedness of the type referred to in clause (a) of the definition of "Indebtedness" in the Stalking Horse APA (including any Indebtedness or accounts payable owing from any Seller to an Affiliate of such Seller);</p>	§ 2.4

Stalking Horse APA Provision	Summary Description	Reference
	<p>(c) except for any Liabilities for Taxes that are Assumed Liabilities, all Tax Liabilities for Pre-Closing Tax Periods, including Pre-Closing Straddle Period Taxes, and any Tax Liabilities of Sellers arising from the transactions contemplated by the Stalking Horse APA;</p> <p>(d) all Excluded Employees;</p> <p>(e) all Liabilities of Sellers arising out of, relating to or with respect to (i) the employment or performance of services, or termination of employment or services by any Seller of any employee, or independent contractor on or before the close of business on the Closing Date, (ii) employment or labor Actions accruing either directly or indirectly against Seller that relate to the period on or before the close of business on the Closing Date, irrespective of whether such claims are made prior to or after the Closing and (iii) any Benefit Plan (including all Liabilities to the IRS or Department of Labor);</p> <p>(f) all Rejection Damages Claims;</p> <p>(g) any tort Liabilities of any Seller based on any acts, omissions, or conditions occurring or existing prior to the Closing Date;</p> <p>(h) all Environmental Liabilities relating to, resulting from, caused by or arising out of ownership, operation or control of the Business, to the extent accruing, arising out of or relating to events, occurrences, acts or omissions occurring or existing prior to the Closing Date;</p> <p>(i) all Actions against each Seller, any of their respective assets, the Business and any of their past or present operations or activities;</p> <p>(j) the obligations under the 2L Credit Agreement (as defined in the DIP Motion);</p> <p>(k) any Tax obligations of the Mexican Entities or any other Group Company, in each case, other than the Acquired Entities and their Subsidiaries; and</p> <p>(l) all Indemnification Claims.</p>	
Transition Services <i>Local Rule 6004-1(b)(iv)(G)</i>	It is a condition to Closing that Buyer and Sellers enter in a reverse transition services agreement (the “ <u>Operating Agreement</u> ”) pursuant to which Buyer or its Affiliates will provide certain transitional services to the Mexican Entities.	§ 9.2(b)

Stalking Horse APA Provision	Summary Description	Reference
Good Faith Deposit <i>Local Rule 6004-1(b)(iv)(F)</i>	<p>Stalking Horse Bidder will contingently assign \$10 million of secured claims under the Pre-Petition Credit Facility to Sellers (the “<u>Deposit Amount</u>”).</p> <p>The Deposit Amount shall be retained by Sellers in the following circumstances: (i) at the Closing, at which time such Deposit Amount shall be credited against the Purchase Price; or (ii) if this Agreement is terminated under the circumstances set forth in Section 10.2(d) of the Stalking Horse APA.</p>	§ 3.1
Record Retention <i>Local Rule 6004-1(b)(iv)(J)</i>	<p>Following the Closing, for the purposes of Sellers (i) preparing or reviewing Tax Returns or participating in any Tax Proceeding, (ii) monitoring or enforcing rights or obligations under this Agreement, (iii) defending third-party lawsuits or complying with the requirements of any Governmental Authority, or (iv) any other reasonable business purpose, including assistance with the wind-down and closing of the Chapter 11 Cases, the dissolution of Sellers, and related tax and other administrative matters, (x) upon reasonable notice, Stalking Horse Bidder shall permit Sellers, their counsel, and other professionals reasonable access to all premises, information, properties, personnel, Books and Records, and Contracts or Leases, which access shall include (1) the right to copy such documents and records as they may request, and (2) Stalking Horse Bidder’s copying and delivering such documents or records as requested, (y) Stalking Horse Bidder shall provide reasonable access to Stalking Horse Bidder’s personnel during regular business hours to assist Sellers’ in their post-Closing activities (including preparation of Tax Returns and requirements in the Bankruptcy Cases), provided that such access does not unreasonably interfere with Stalking Horse Bidder’s operations and (z) Stalking Horse Bidder shall provide reasonable access to Stalking Horse Bidder’s employees and systems during regular business hours, at no expense to Sellers, to assist Sellers in managing payments and benefits to non-Transferred Employees.</p>	§ 7.6(b)
Sale of Avoidance Actions <i>Local Rule 6004-1(b)(iv)(K)</i>	<p>Stalking Horse Bidder will acquire all claims and causes of action arising under sections 502(d), 542, 544, 545, 547, 548, 549, 550, 551, 553(b), or 724(a) of the Bankruptcy Code or any other avoidance actions under the Bankruptcy Code or applicable state-law equivalents and the proceeds of such claims, causes of action or avoidance actions.</p>	§ 2.1(o)

Stalking Horse APA Provision	Summary Description	Reference
Requested Findings as to Successor Liability <i>Local Rule 6004-1(b)(iv)(L)</i>	Stalking Horse Bidder will not assume, and shall be deemed not to have assumed, any Liabilities relating to the Business of Sellers or any Affiliate of Sellers and Sellers and their Affiliates shall be solely and exclusively liable with respect to all such Liabilities, other than the Assumed Liabilities.	<i>See § 2.4, Sale Order</i>

BIDDING PROCEDURES⁴

16. To optimize solicitation, receipt, and evaluation of bids in an efficient, fair, and equitable manner, the Debtors have developed and proposed the Bidding Procedures. The Bidding Procedures describe, among other things, (i) the Assets available for sale, (ii) the manner in which bids become “qualified,” (iii) the coordination of diligence efforts among the bidders and the Debtors, (iv) the receipt and negotiation of bids received, (v) the conduct of any Auction, and (vi) the selection and approval of the Successful Bidder and the selection of the Back-Up Bidder (as defined below). The proposed Bidding Procedures are designed to permit a fair, efficient, competitive, and value-maximizing auction process for the Debtors’ assets, consistent with the timeline of the Chapter 11 Cases.

17. Certain of the key terms of the Bidding Procedures, which shall apply to Interested Parties (as defined herein), Qualified Bidders, the submission, receipt, and analysis of all bids relating to the Sale, and the conduct of the Sale and the Auction, are included below:

- (a) Participation Requirements. To receive due diligence information, including full access to the Debtors’ electronic data room (the “Data Room”) and to additional non-public information regarding the Debtors, a potential bidder (each, an “Interested Party”) must have delivered to each of: (i) counsel to the Debtors: (a) Hughes Hubbard & Reed LLP, One Battery Park Plaza, 16th Floor, New York, NY 10004 (Attn: Kathryn A. Coleman, Esq.

4. Any summary of the Bidding Procedures contained herein is qualified in its entirety by the actual terms and conditions of the Bidding Procedures as provided for in the Bidding Procedures Order. To the extent that there is any conflict between any summary contained herein and the actual terms and conditions of the Bidding Procedures as provided for in the Bidding Procedures Order, the actual terms and conditions of the Bidding Procedures as provided for in the Bidding Procedures Order shall control.

(katie.coleman@hugheshubbard.com), Christopher Gartman, Esq. (chris.gartman@hugheshubbard.com), and Elizabeth A. Beitler, Esq. (elizabeth.beitler@hugheshubbard.com)); and (b) Potter Anderson & Corroon LLP, 1313 North Market Street, Sixth Floor, P.O. Box 951, Wilmington, Delaware 19801 (Attn: Jeremy W. Ryan, Esq. (jryan@potteranderson.com)); and (ii) investment banker to the Debtors: Guggenheim Securities, LLC, 330 Madison Avenue, New York, NY 10017 (Attn: Stephen Preefer (Stephen.Preefer@guggenheimpartners.com), Jim Suprenant (Jim.Suprenant@guggenheimpartners.com), and Scott Green (Scott.Green@guggenheimpartners.com)), the following documents (the “Preliminary Bid Documents”):

- (i) documentation identifying the Interested Party, its principals, and the representatives thereof who are authorized to appear and act on their behalf for all purposes regarding the contemplated transaction;
- (ii) an executed confidentiality agreement in form and substance satisfactory to the Debtors;
- (iii) a statement and other factual support demonstrating to the Debtors’ reasonable satisfaction, after consultation with the Consultation Parties, that the Interested Party has a bona fide interest in consummating a transaction involving the Assets; and
- (iv) sufficient information, as determined by the Debtors, after consultation with the Consultation Parties, to allow the Debtors to determine that the Interested Party (x) has, or can obtain, the financial wherewithal and any required internal corporate, legal, or other authorizations to close a transaction for the Assets, including, but not limited to, current audited financial statements of the Interested Party (or such other form of financial disclosure acceptable to the Debtors in their discretion), and (y) can provide adequate assurance of future performance under any executory contracts and unexpired leases to be assumed by the Debtors and assigned to Interested Party, pursuant to section 365 of the Bankruptcy Code, in connection with the Sale.

Only those Interested Parties who have submitted acceptable Preliminary Bid Documents (each, a “Qualified Bidder”) may submit bids. For the avoidance of doubt, the Stalking Horse Bidder has been deemed to be a Qualified Bidder and is not required to provide any of the foregoing Preliminary Bid Documents.

Notwithstanding anything to the contrary herein, and for the avoidance of doubt, for all purposes under the Bidding Procedures: (i) the Stalking Horse Bidder shall be considered a Qualified Bidder and (ii) the Stalking Horse APA shall be considered a Qualified Bid, without regard to any of the requirements or conditions set forth herein and without any other or further action by the Stalking Horse

Bidder. Additionally, in determining whether Interested Parties constitute Qualified Bidders, the Debtors may consider a combination of bids for the Assets.

- (b) Bid Requirements. Other than in the case of the Stalking Horse Bidder and the Stalking Horse APA, which shall be considered a Qualified Bidder and a Qualified Bid, respectively, for all purposes under the Bidding Procedures, without regard to any of the requirements or conditions set forth therein and without any other or further action by the Stalking Horse Bidder, to be deemed a “Qualified Bid,” a bid must be received from a Qualified Bidder by each of the Bid Notice Parties (as defined herein) on or before the Bid Deadline and include the following items:
- (i) a letter stating that the Qualified Bidder’s offer is irrevocable until consummation of a transaction involving the Assets (or lot thereof) identified in such offer (such Assets, the “Bid Assets”);
 - (ii) other than for any Chapter 11 Plan Bid, a duly authorized and executed purchase agreement based on the form purchase agreement provided by the Debtors (through their advisors), marked to show any revisions, including, among other things, the purchase price for the Bid Assets, together with all exhibits and schedules thereto (including, among other things, a proposed form of order approving the transaction(s) contemplated in such purchase agreement) (collectively, the “Transaction Documents”). For the avoidance of doubt, a “conceptual” or “issues list”-style markup of the form asset purchase agreement would not satisfy this requirement;
 - (iii) each Chapter 11 Plan Bid must be accompanied by an executed investment agreement, signed by an authorized representative of such bidder, pursuant to which the bidder proposes to effectuate the Chapter 11 Plan Transaction, in the form of a non-taxable recapitalization transaction effectuated pursuant to a chapter 11 plan of reorganization, and must provide for a fully-committed investment of capital in exchange for substantially all of the equity of the reorganized Debtors;
 - (iv) written evidence acceptable to the Debtors, in their discretion and in consultation with the Consultation Parties, demonstrating financial wherewithal, operational ability, and corporate authorization to consummate the proposed transaction;
 - (v) a written acknowledgment that the Qualified Bidder (i) has had an opportunity to conduct any and all due diligence regarding the Bid Assets, the Sale, and/or a Chapter 11 Plan Transaction, (ii) has relied solely upon its own independent review, investigation, and/or inspection of any documents and any other information in making the bid, (iii) did not rely upon any written or oral

statements, representations, promises, warranties, or guaranties whatsoever, whether express, implied by operation of law, or otherwise, by the Debtors or any of their advisors or other representatives, including, without limitation, the Debtors' investment banker, Guggenheim Securities, LLC, regarding the bid, the Bid Assets, the Sale, the Chapter 11 Plan Transaction, or the completeness or accuracy of any information provided in connection therewith or with the Auction, except as expressly stated in these Bidding Procedures, and (iv) the Qualified Bidder did not engage in any collusive conduct and acted in good faith in submitting its bid; and

- (vi) written evidence of a firm commitment for financing to consummate the proposed transaction, or other evidence of ability to consummate the proposed transaction without financing, in either case which is satisfactory to the Debtors in their discretion, in consultation with the Consultation Parties.

A bid will be considered only if the bid:

- (i) fully discloses 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 Qualified Bidder, including if such Qualified 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. 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) and counsel whom the Debtors or their advisors should contact regarding such bid. Nothing herein shall preclude multiple Qualified Bidders from submitting a joint bid, subject to the Debtors' prior written consent to such submission and the disclosure requirements set forth herein.
- (ii) other than for a Chapter 11 Plan Bid, identifies the Bid Assets to be purchased and the contracts and leases to be assumed;
- (iii) other than for a Chapter 11 Plan Bid, identifies the liabilities of the Debtors or the Bid Assets to be assumed;
- (iv) includes a statement of proposed terms for employees;
- (v) sets forth the consideration, including the form thereof, for the Bid Assets to be purchased and the executory contracts and unexpired leases to be assumed (the "Bid Value"); *provided* that, the Bid Value must be at least equal to the following: (i) \$100,000,000;

plus (ii) assumption of those Assumed Liabilities in the Stalking Horse APA that the Stalking Horse Bidder has agreed to pay or assume or the cash equivalent of such amount; plus (iii) the Expense Reimbursement; plus (iv) cash equal to the amount of any transaction fee due to Debtors' investment banker, Guggenheim Securities, LLC, that would be payable on account of the consummation of a sale based on the Bid Value; plus (v) the minimum overbid amount of \$250,000;

- (vi) allocates the Bid Value among the Bid Assets and Contracts and Leases to be assumed (per lot of Assets);
- (vii) is not conditioned on (i) obtaining financing or (ii) the outcome of unperformed due diligence;
- (viii) includes a description of all governmental, licensing, regulatory, or other approvals or consents that are required to consummate the proposed transaction (including any antitrust approval related to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended), together with evidence satisfactory to the Debtors, in consultation with the Consultation Parties, of the ability to obtain such approvals or consents as soon as reasonably practicable, and in no event later than November 17, 2023 at 5:00 p.m. (prevailing Eastern Time), as well as a description of any material contingencies or other conditions that will be imposed upon, or that will otherwise apply to, the obtainment or effectiveness of any such approvals or consents;
- (ix) provides for the Qualified Bidder to serve as a backup bidder (the "Back-Up Bidder") if the Qualified Bidder's bid is the next highest and best bid (the "Back-Up Bid") after the Successful Bid, in accordance with the terms of the Successful Bidder's asset purchase agreement;
- (x) includes a signed writing stating that the Qualified Bidder's offer is irrevocable until the selection of the Successful Bidder, provided that if such Qualified Bidder is selected as the Successful Bidder (as defined below) or the Back-Up Bidder its offer shall remain irrevocable until the later of (i) the closing of the transaction with the Successful Bidder, and (ii) November 27, 2023;
- (xi) is accompanied by a cash deposit by wire transfer to an escrow agent selected by the Debtors (the "Deposit Agent") in an amount equal to ten percent of the Bid Value (any such deposit, a "Good

Faith Deposit”);⁵

- (xii) sets forth the representatives that are authorized to appear and act on behalf of the Qualified Bidder in connection with the proposed transaction;
- (xiii) indicates that the Qualified Bidder will not seek any transaction or break-up fee, expense reimbursement, or similar type of payment and that it waives any substantial contribution administrative expense claims under section 503(b) of the Bankruptcy Code;
- (xiv) includes evidence of the Qualified Bidder’s ability to comply with section 365 of the Bankruptcy Code (to the extent applicable), including providing adequate assurance of such Qualified Bidder’s ability to perform in the future the contracts and leases proposed in its bid to be assumed by the Debtors and assigned to the Qualified Bidder, in a form that will permit the Debtors to disseminate immediately such evidence to the non-Debtor counterparties to such contracts and leases;
- (xv) indicates whether or not the Qualified Bidder will assume all cure costs associated with any executory contracts and unexpired leases it intends to assume;
- (xvi) include written evidence of authorization and approval from the Qualified Bidder’s board of directors (or comparable governing body) with respect to the submission, execution, and delivery of the Qualified Bidder’s asset purchase agreement;
- (xvii) state or otherwise estimate the types of, and costs or charges for, transition services, if any, the Qualified Bidder would require of or provide to the Debtors, including an estimate of the time any such transition services would be required of or provided to the Debtors;
- (xviii) provide that in the event of the Qualified Bidder’s breach of, or failure to perform under, the Qualified Bidder’s asset purchase agreement, the Debtors and their estates shall be entitled to pursue all available legal and equitable remedies, including, without limitation, retention of the Good Faith Deposit as part of the damages resulting to the Debtors and their estates for such breach or failure to perform; and
- (xix) includes a commitment to close no later than the date that is 90 days

5. For the avoidance of doubt, the retention and return of the Deposit Amount (as defined in the Stalking Horse APA) by the Debtors shall be determined in accordance with the Stalking Horse APA.

following the Petition Date.

A bid from a Qualified Bidder satisfying all of the above requirements, as determined by the Debtors, in consultation with the Consultation Parties, shall constitute a Qualified Bid. The Debtors reserve the right to work with any Qualified Bidder in advance of the Auction to cure any deficiencies in a bid that is not initially deemed a Qualified Bid. The Debtors will be authorized to approve joint bids in their reasonable discretion, in consultation with the Consultation Parties, on a case-by-case basis.

Each Qualified Bidder submitting a bid shall be deemed to: (a) acknowledge and represent that it is bound by all of the terms and conditions of the Bidding Procedures; and (b) have waived the right to pursue a substantial contribution claim under section 503 of the Bankruptcy Code related in any way to the submission of its bid, the Bidding Procedures, and the Sale.

- (c) Bid Deadline. A Qualified Bidder, other than the Stalking Horse Bidder, that desires to make a bid shall deliver a written and electronic copy of its bid in both PDF and MS-WORD format to the Bid Notice Parties and the Consultation Parties so as to be received on or before **November 9, 2023 at 5:00 p.m. (prevailing Eastern Time)** (the “Bid Deadline”); *provided* that the Debtors may extend the Bid Deadline without further order of the Court, subject to the DIP Credit Agreement and the Stalking Horse APA and after consultation with the Consultation Parties. To the extent that the Bid Deadline is extended for all relevant parties, the Debtors shall file a notice on the docket of the Chapter 11 Cases indicating the same. **Any party that does not submit a bid by the Bid Deadline will not be allowed to (a) submit any offer after the Bid Deadline, or (b) participate in the Auction.**
- (d) Evaluation of Qualified Bids. The Debtors, in consultation with the Consultation Parties, shall make a determination regarding whether a timely submitted bid from a Qualified Bidder is a Qualified Bid.

No later than November 10, 2023 at 5:00 p.m. (prevailing Eastern Time), the Debtors shall: (i) notify all Qualified Bidders whether their respective bids have been determined to be Qualified Bids; and (ii) determine, in consultation with the Consultation Parties, which of the Qualified Bids, at such time, is the highest or best bid for purposes of constituting the opening bid at the Auction (the “Baseline Bid”), and shall promptly notify the Stalking Horse Bidder, the Bid Notice Parties and all Qualified Bidders with Qualified Bids of the Baseline Bid.

- (e) Auction. If the Debtors timely receive one or more Qualified Bids other than the Stalking Horse APA, then the Debtors shall conduct an auction (the “Auction”). Following the Auction, the Debtors will determine, in consultation with the Consultation Parties, which Qualified Bid is the highest or best bid for the Assets, which will be determined by considering, among other things, the following non-binding factors: (a) the transaction structure and execution risk, including

conditions to and certainty of closing, termination provisions, availability of financing, and financial wherewithal to meet all commitments and required governmental or other approvals, (b) the anticipated timing to closing; (c) if applicable, the number, type, and nature of any changes to the Stalking Horse APA requested by each Qualified Bidder; (d) the extent to which such modifications are likely to delay closing of the Sale and the cost to the Debtors and their estates of such modifications or delay; (e) in the case of a Chapter 11 Plan Transaction, the structure, confirmability, and feasibility of any proposed chapter 11 plan (including the proposed time and costs estimated to be necessary to negotiate, document, and obtain confirmation of such proposed chapter 11 plan); (f) the total consideration to be received by the Debtors and their estates; and (g) any other factors the Debtors may reasonably deem relevant.

The Auction shall be governed by the following procedures:

- (i) the Auction shall be held on **November 13, 2023 at 11:00 a.m. (prevailing Eastern Time)** at the offices of Hughes Hubbard & Reed LLP, One Battery Park Plaza, New York, NY 10004 or virtually via telephone or video conference pursuant to information to be timely provided by the Debtors to the Auction Participants (as defined below);
- (ii) only the Stalking Horse Bidder and the other Qualified Bidders with Qualified Bids (together, the “Auction Bidders”) shall be entitled to make any subsequent bids at the Auction;
- (iii) the Auction Bidders shall appear at the Auction, or through a duly authorized representative;
- (iv) only the Debtors, the Auction Bidders, the Consultation Parties, and any creditors of the Debtors, together with the professional advisors to each of the foregoing parties, may attend the Auction (collectively, the “Auction Participants”); *provided* that any such creditors provide counsel for the Debtors written notice of their intent to attend the Auction no later than 5:00 p.m. (ET) the day prior to the Auction;
- (v) the Debtors, with the assistance of their professional advisors, shall direct and preside over the Auction, which shall be transcribed;
- (vi) prior to start of the Auction, each of the Auction Bidders shall confirm that they have not engaged in any collusion with respect to the Bidding Procedures, the Auction, or the Sale;
- (vii) the Auction shall be conducted in an open-cry format (and not by way of sealed bids);
- (viii) during the Auction, bidding will begin initially with the Baseline

Bid and subsequently continue in minimum increments of at least \$250,000 in cash (each, an “Overbid”); *provided, however*, that the Stalking Horse Bidder may satisfy the minimum bid increment requirement by credit bidding at least \$250,000 of outstanding Prepetition 1L Obligations and DIP Obligations (each as defined in the DIP Motion) (up to the amount outstanding as of the projected closing date of the Sale (including but not limited to, principal, accrued and unpaid interest, and all outstanding fees and expenses and other amounts owed under the Prepetition 1L Credit Agreement and the DIP Documents (each as defined in the DIP Motion), respectively) that do not already form a part of the purchase price under the Stalking Horse APA as well as credit bidding the Expense Reimbursement (up to the amount of the Stalking Horse Bidder’s estimate of amount incurred as of the date of the Auction) . The Debtors will announce at the Auction the material terms of each Overbid, value each Overbid in accordance with these Bid Procedures and provide each Qualified Bidder with an opportunity to make a subsequent Overbid. Subject to the requirement (other than with regard to the Stalking Horse Bidder) that each Overbid include at least \$250,000 in cash more than the cash component of the Baseline Bid or prevailing Overbid, additional consideration in excess of the amount set forth in the Baseline Bid or the prevailing Overbid may include cash and/or other consideration in accordance with these procedures. To the extent that an Overbid has been accepted entirely or in part because of the addition, deletion, or modification of a provision or provisions in the applicable Transaction Documents or the Stalking Horse APA, the Debtors will provide notice to each participant of the value ascribed by the Debtors to any such added, deleted, or modified provision or provisions, with such value being determined by the Debtors in consultation with the Consultation Parties;

- (ix) any Overbid made from time to time by a Qualified Bidder must remain open and binding on the Qualified Bidder until and unless (i) the Debtors accept a bid submitted by another Qualified Bidder during the Auction as an Overbid and (ii) such prior Overbid is not selected as the Back-Up Bid. To the extent not previously provided (which will be determined by the Debtors in consultation with the Consultation Parties), a Qualified Bidder submitting an Overbid must submit at the Debtors’ request (in consultation with the Consultation Parties), as part of its Overbid, written evidence (in the form of financial disclosure or credit-quality support information or enhancement reasonably acceptable to the Debtors in consultation with the Consultation Parties) demonstrating such Qualified Bidder’s ability to close the transaction at the purchase price contemplated by such Overbid;

- (x) the Auction may include individual negotiations with any of the Auction Bidders, but all bids shall be made on the record and in the presence of all of the Auction Bidders;
- (xi) all material terms of the bid that is deemed to be the highest and best bid for each round of bidding shall be fully disclosed to the Auction Bidders, and the Debtors shall use reasonable efforts to address any and all questions that the Auction Bidders may have regarding the Debtors' announcement of the then-current highest and best bid;
- (xii) except as specifically set forth herein, for the purpose of evaluating the value of the purchase price for the Bid Assets provided by each successive bid (including any successive bid by the Stalking Horse Bidder), the Debtors, in consultation with the Consultation Parties, may give effect to any additional liabilities to be assumed by a Qualified Bidder, and any additional costs which may be imposed on the Debtors;
- (xiii) each Auction Bidder shall (i) be deemed to have waived any right to a jury trial in connection with, and consented and submitted to the exclusive jurisdiction of the Court over, any actions or proceedings arising from or relating the Bidding Procedures, the Sale, the Auction, and the construction and enforcement of the contemplated transaction documents of the Auction Bidders, (ii) bring any such action or proceeding in the Court, and (iii) be deemed to have consented to the Court entering a final judgment determining any such action or proceeding and that such final judgment in any such action or proceeding, including all appeals, shall be conclusive and may be enforced in other jurisdictions (including any foreign jurisdictions) by suit on the judgment or in any other manner provided by applicable law;
- (xiv) throughout the Auction, subject to section 363(k) of the Bankruptcy Code, the Stalking Horse Bidder (i) shall have the continuing right to credit bid DIP Obligations then outstanding, or any part thereof, to purchase the Assets, and (ii) shall have the continuing right to credit bid the Prepetition 1L Obligations then outstanding, or any part thereof, to purchase the Assets.
- (xv) the Auction Bidders shall have the right to make additional modifications to the Stalking Horse APA or any alternative asset purchase agreement, as applicable, in conjunction with each Qualified Bid submitted in each round of bidding during the Auction, provided that (i) any such modifications on an aggregate basis and viewed in whole, shall not, in the Debtors' discretion, in consultation with the Consultation Parties, be less favorable to the Debtors and their estates than the terms of the Stalking Horse APA,

and (ii) each Qualified Bid shall constitute an irrevocable offer and shall be binding on the Auction Bidder submitting such bid until such party shall have submitted a subsequent Qualified Bid at the Auction or the conclusion of the Sale Hearing, whichever occurs sooner, unless such bid is selected as the Successful Bid or the Back-Up Bid, which shall remain binding as provided for herein;

- (xvi) the Debtors and the Consultation Parties shall have the right to request any additional financial information that will allow the Debtors and the Consultation Parties to make a reasonable determination as to an Auction Bidder's financial and other capabilities to consummate the transactions contemplated by the Stalking Horse APA or any Alternative APA, as applicable, as may be amended during the Auction, and any further information that the Debtors may believe is reasonably necessary to clarify and evaluate any bid made by an Auction Bidder during the Auction;
- (xvii) upon the conclusion of the Auction, the Debtors shall determine, in consultation with the Consultation Parties, and subject to Court approval, the offer or offers for the Assets that is or are the highest or best from among the Qualified Bids submitted at the Auction (the "Successful Bid"). In making this decision, the Debtors shall consider, in consultation with the Consultation Parties, the amount of the purchase price, the assumption of liabilities, the likelihood of the bidder's ability to close a transaction and the timing thereof, the number, type, and nature of any changes to the Stalking Horse APA or other asset purchase agreement submitted with the Successful Bid, as applicable, requested by each bidder, and the net benefit to the Debtors' estates. The bidder submitting such Successful Bid at the Auction shall become the "Successful Bidder," and shall have such rights and responsibilities of the purchaser as set forth in the Stalking Horse APA or an alternative asset purchase agreement, as applicable. The Debtors shall designate a Back-Up Bid (and the corresponding Back-Up Bidder which may be the Stalking Horse Bidder subject to the Stalking Horse Bidder's consent), to purchase the Assets in the event that the Successful Bidder does not close the Sale;
- (xviii) without the written consent of the Agent, no bid may qualify as the Successful Bid unless such bid provides for cash consideration of an amount equal to or greater than the Prepetition IL Obligations and DIP Obligations that have been credit bid subject to section 363(k) of the Bankruptcy Code by the Stalking Horse Bidder;
- (xix) within one day after the conclusion of the Auction, the Debtors will file with the Court and serve on the Bid Notice Parties a notice setting forth the results of the Auction (the "Notice of Successful

Bidder”), which will (a) identify the Successful Bidder and the Backup Bidder; (b) include a copy of the Successful Bid and the Backup Bid or a summary of the material terms of such bids, including any proposed assumption and assignment of executory contracts and unexpired leases contemplated thereby; and (c) set forth the (1) Adequate Assurance Objection Deadline, (2) date, time, and location of the Sale Hearing, and (3) any other relevant dates or other information necessary to reasonably apprise the Bid Notice Parties of the outcome of the Auction;

- (xx) within one (1) business day of the close of the Auction, in the event the Stalking Horse Bidder is not the Successful Bidder, the Successful Bidder shall supplement the Successful Bidder’s Good Faith Deposit such that the deposit shall be equal to an amount that is ten percent (10%) of the Successful Bid; and
- (xxi) prior to the Sale Hearing, the Successful Bidder shall complete and execute all agreements, contracts, instruments, and other documents evidencing and containing the terms and conditions upon which the Successful Bid was made.

The Debtors reserve the right to make one or more adjournments in the Auction to, among other things (i) facilitate private discussions with individual Qualified Bidders and negotiate the terms of their Overbids, (ii) allow individual Qualified Bidders to consider how they wish to proceed, and (iii) give Qualified Bidders the opportunity to provide the Debtors with such additional evidence as the Debtors may require in their reasonable discretion (and in consultation with the Consultation Parties) to determine that the Qualified Bidder has sufficient internal resources, or has received sufficient non-contingent debt or equity funding commitments, to consummate the transaction.

THE SUCCESSFUL BID AND ANY BACK-UP BID AND THEIR RELATED TRANSACTION DOCUMENTS SHALL CONSTITUTE AN IRREVOCABLE OFFER AND BE BINDING ON THE SUCCESSFUL BIDDER AND THE BACK-UP BIDDER, RESPECTIVELY, FROM THE TIME THE BID IS SUBMITTED UNTIL TWO (2) BUSINESS DAYS AFTER THE SALE HAS CLOSED. EACH QUALIFIED BID THAT IS NOT THE SUCCESSFUL BID OR THE BACK-UP BID SHALL BE DEEMED WITHDRAWN AND TERMINATED AT THE CONCLUSION OF THE SALE HEARING.

- (f) Sale Hearing. The Successful Bid and any Back-Up Bid (or if no Qualified Bid other than that of the Stalking Horse Bidder is received, then the Stalking Horse APA) will be subject to approval by the Court. The Sale Hearing to approve the Successful Bid and any Back-Up Bid (or if no Qualified Bid other than that of the Stalking Horse Bidder is received, then the Stalking Horse APA) shall take place on **[November 16], 2023 at [●] (prevailing Eastern Time).** The Sale Hearing

may be adjourned by the Debtors, in consultation with the Consultation Parties or, in the event the Stalking Horse Bidder is not the Successful Bidder, then in consultation with the Consultation Parties and the Successful Bidder, from time to time without further notice to creditors or other parties in interest other than by announcement of the adjournment in open court on the date scheduled for the Sale Hearing, or by filing a hearing agenda or notice on the docket of the Chapter 11 Cases.

At the Sale Hearing, the Debtors will seek entry of an order, substantially in the form of the Sale Order that, among other things: (i) authorizes and approves the Sale to the Stalking Horse Bidder or, in the event the Stalking Horse Bidder is not the Successful Bidder, then to the Successful Bidder, pursuant to the terms and conditions set forth in the Stalking Horse APA or any alternative asset purchase agreement submitted by the Successful Bidder, as applicable, free and clear of all liens, claims, interests, and encumbrances, except certain permitted encumbrances as determined by the Debtors and any Successful Bidder; (ii) finds that the Stalking Horse Bidder or Successful Bidder, as applicable, is a good faith purchaser pursuant to section 363(m) of the Bankruptcy Code; (iii) authorizes the assumption and assignment of certain executory contracts and unexpired leases in connection with the Sale; (iv) as appropriate, exempts the Sale(s) and conveyance(s) of the Assets from any transfer tax, stamp tax, or similar tax, or deposit under any applicable bulk sales statute; and (v) in the event that the Stalking Horse Bidder is not the Successful Bidder, directs that all cash proceeds generated from the Sale shall be paid to the Agent on behalf of the DIP Lenders and the Prepetition 1L Lenders upon the closing of the Sale for application in accordance with the terms and conditions of the DIP Order, the DIP Documents, and the Prepetition 1L Documents (each as defined in the DIP Order), until the DIP Obligations and the Prepetition 1L Obligations (each as defined in the DIP Order) are paid in full.

- (g) Back-Up Bidder. Notwithstanding any of the foregoing, in the event that the Successful Bidder fails to close the Sale on or before November 27, 2023 (or such date as may be extended by the Debtors with the consent of the Agent and in consultation with the Consultation Parties), the Back-Up Bid will be deemed to be the Successful Bid, the Back-Up Bidder will be deemed to be the Successful Bidder, and the Debtors shall be authorized to close the Sale to the Back-Up Bidder subject to the terms of the Back-Up Bid without the need for further order of the Court and without the need for further notice to any interested parties.
- (h) Return of Good Faith Deposits. All Good Faith Deposits shall be returned to each bidder not selected by the Debtors as the Successful Bidder no later than five (5) business days following the closing of the Sale. The deposit of the Successful Bidder or, if the Sale is closed with the Back-Up Bidder, the deposit of the Back-Up Bidder, shall be applied to the purchase price for the Sale. If the Successful Bidder (or, if the Sale is to be closed with the Back-Up Bidder, then the Back-Up Bidder) fails to consummate the Sale because of a breach or failure to perform on the part of such bidder, then, subject to the terms of the Stalking Horse APA or any alternative asset purchase agreement, as applicable, the Debtors and their estates

shall be entitled to retain the Good Faith Deposit of the Successful Bidder (or, if the Sale is to be closed with the Back-Up Bidder, then the Back-Up Bidder) as part of the damages resulting to the Debtors and their estates for such breach or failure to perform. For the avoidance of doubt, the Debtors' retention of a Good Faith Deposit shall not constitute a waiver of any of the Debtors' legal or equitable rights relating to a Successful Bidder's or Back-Up Bidder's breach or failure to perform, and all such rights and remedies are preserved.

- (i) Notice and Consultation Parties. The term "Bid Notice Parties" as used in the Bidding Procedures shall mean: (a) the Debtors: 222 W. Las Colinas Boulevard, Suite 1650E, Irving, Texas 75039, (Attn: Diana P. Abril, Esq., Chief Legal Officer (diana.abril@agilethought.com)); (b) counsel to the Debtors, Hughes Hubbard & Reed LLP, One Battery Park Plaza, 16th Floor, New York, NY 10004 (Attn: Kathryn A. Coleman, Esq. (katie.coleman@hugheshubbard.com), Christopher Gartman, Esq. (chris.gartman@hugheshubbard.com), and Elizabeth A. Beitler, Esq. (elizabeth.beitler@hugheshubbard.com)); (c) co-counsel to the Debtors, Potter Anderson & Corroon LLP, 1313 North Market Street, Sixth Floor, P.O. Box 951, Wilmington, Delaware 19801 (Attn: Jeremy W. Ryan, Esq. (jryan@potteranderson.com)); (d) investment banker to the Debtors: Guggenheim Securities, LLC, 330 Madison Avenue, New York, NY 10017 (Attn: Stephen Preefer (Stephen.Preefer@guggenheimpartners.com), Jim Suprenant (Jim.Suprenant@guggenheimpartners.com), and Scott Green (Scott.Green@guggenheimpartners.com)); (e) counsel to any Official Committee of Unsecured Creditors appointed by the U.S. Trustee, if any (the "Committee"); (f) counsel to the Agent and Stalking Horse Bidder, Ropes & Gray LLP, 1211 Avenue of the Americas, New York, NY 10036-8704 (Attn: Gregg M. Galardi (Gregg.Galardi@ropesgray.com), Robb Tretter (Robb.Tretter@ropesgray.com), and Leonard Klingbaum (Leonard.Klingbaum@ropesgray.com)); and (g) co-counsel to the Agent and Stalking Horse Bidder, Chipman Brown Cicero & Cole, LLP, 1313 N. Market Street Suite 5400, Wilmington, DE 19801 (Attn: Mark L. Desgrosseilliers (desgross@chipmanbrown.com)).

The term "Consultation Parties" as used in the Bidding Procedures shall mean counsel to the Committee (if any), and the Agent.

18. As discussed throughout this Motion, the Bidding Procedures will provide potential bidders with ample time to thoroughly diligence the Assets before submitting binding bids. The Debtors, along with three different, nationally recognized investment banks since March 2023, have conducted a robust marketing and sale process to confirm the market value of the Debtors' assets. With this effort undertaken over the last six (6) months, the Debtors have now designed Bidding Procedures with the objective of generating the greatest level of interest in and

best value for the Assets, while allowing the Debtors to close the Sale in a timely and efficient manner. Moreover, the Debtors are confident that the Bidding Procedures and the other relief requested herein will preserve as many jobs as possible for their dedicated employees, afford the Debtors the best possible opportunity to continue their relationships with their customers and vendors, and otherwise maximize recoveries for all stakeholders through a value-maximizing transaction.

19. The following is a summary of the key dates established by the Bidding Procedures and the Assumption Procedures:

Event	Date
Deadline to file Cure Costs Motion	September 15, 2023 at 4:00 p.m. (prevailing Eastern Time)
Cure Objection Deadline	September 27, 2023 at 4:00 p.m. (prevailing Eastern Time)
Hearing on Cure Costs Motion	October 4, 2023 at 2:00 p.m. (prevailing Eastern Time)
Bid Deadline	November 9, 2023 at 5:00 p.m. (prevailing Eastern Time)
Deadline for Debtors to Designate Qualified Bids and Baseline Bid	November 10, 2023 at 5:00 p.m. (prevailing Eastern Time)
Auction	November 13, 2023 at 11:00 a.m. (prevailing Eastern Time)
Sale Objection Deadline	[November 2], 2023 at 4:00 p.m. (prevailing Eastern Time)
Debtors' Deadline to Reply to Sale Objections	[November 13], 2023 at 4:00 p.m. (prevailing Eastern Time)
Supplemental Sale Objection Deadline	[November 15], 2023 at 10:00 a.m. (prevailing Eastern Time)
Sale Hearing	[November 16], 2023 at [●] (prevailing Eastern Time)

20. The Debtors submit that it is critical that the sale process be consummated on the timeline set forth above, which is consistent with the requirements under the Debtors' DIP financing, but also that such timeline balances the dual goals of running a robust marketing process

to ensure that the Debtors secure the highest and best purchase price possible while also minimizing any potential business disruption. Such timeline provides an approximately 8-week period between the filing of this Motion and the Bid Deadline (which is a total of six (6) months since the Debtors first commenced marketing the Assets for sale), which will allow parties in interest sufficient time to formulate bids for the Assets. This timeline is particularly appropriate here, where the Debtors have already spent months marketing their assets with well-known investment bankers. Moreover, relevant information regarding the Debtors' business has been made available in the Data Room, allowing potential bidders (subject to the execution of a non-disclosure agreement) to immediately conduct diligence on the Debtors' Assets, and the Debtors, with the assistance of their advisors, began marketing the Assets prior to the filing of this Motion.

21. Finally, the Bidding Procedures recognize and comply with the Debtors' fiduciary obligations to maximize sale value, and, as such, do not impair the Debtors' ability to consider all qualified bid proposals and, as noted, preserve the Debtors' right to modify the Bidding Procedures as necessary or appropriate to maximize value for the Debtors' estates. The Debtors respectfully submit that the timeline set forth in the Bidding Procedures is reasonable and necessary under the circumstances of these Chapter 11 Cases.

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

22. The Debtors also request approval of the sale notice (the "Sale Notice"), substantially in the form attached to the Bidding Procedures Order as **Exhibit 3**.

23. Upon entry of the Bidding Procedures Order, the Debtors will serve the Sale Notice by regular mail on: (a) the U.S. Trustee for the District of Delaware; (b) counsel to the Committee, if any; (c) counsel to the Agent; (d) counsel to GLAS Americas LLC, as the administrative agent for the prepetition second lien lenders; (e) counsel to the Stalking Horse

Bidder; (f) the United States Attorney's Office for the District of Delaware; (g) the state attorneys general for all states in which the Debtors conduct business; (h) all parties to Potential Assigned Contracts; (i) all parties who have expressed to the Debtors or their professionals in writing an interest in acquiring some or all of the Assets; (j) all known holders of liens, encumbrances, and other claims secured by any of the Assets; (k) the Internal Revenue Service; (l) all applicable state and local taxing authorities; (m) the Federal Trade Commission; (n) each governmental agency that is an interested party with respect to the Sale and transactions proposed thereunder; (o) all of the Debtors' other known creditors and equity security holders; and (p) all parties that have requested or that are required to receive notice pursuant to Bankruptcy Rule 2002 (collectively, the "Sale Notice Parties").

24. The Debtors will also cause the Sale Notice to be published once in the national edition of *USA Today* or another nationally circulated newspaper, with any modifications necessary for ease of publication, and post the Sale Notice and the Bidding Procedures Order on the website of the Debtors' claims and noticing agent.

ASSUMPTION PROCEDURES

25. The Debtors seek entry of the Assumption Procedures to facilitate the fair and orderly assumption and assignment of the Assigned Contracts to the Stalking Horse Bidder or, in the event the Stalking Horse Bidder is not the Successful Bidder, then to the Successful Bidder.

26. The Assumption Procedures are as follows:

- a. **Motion to Set Cure Costs.** By no later than September 15, 2023, the Debtors shall file a motion (such motion the "Cure Costs Motion") through which the Debtors will seek entry of an order (the "Cure Costs Order") fixing monetary amounts that the Debtors would be obligated to pay in connection with the assumption or the assumption and assignment of all of the Debtors' executory contracts and unexpired leases (the "Potential Assigned Contracts") and to elicit any objection to the assumption and assignment of such Potential Assigned Contracts other than objections based on adequate assurance of future performance. The Debtors shall set the Cure Costs Motion for hearing no later than October 4, 2023. The Cure

Costs Motion shall include (i) the title of each Potential Assigned Contract, (ii) the name of the counterparty to the Potential Assigned Contract, (iii) Debtors' proposed Cure Costs (if any) required in connection with the Potential Assigned Contract, and (iv) the deadline to object to the Debtors' proposed Cure Costs.

- b. **Notice of Assumption, Assignment and Sale.** No later than three (3) business days prior to the Bid Deadline (the "Assumption, Assignment and Sale Service Deadline"), the Debtors shall serve the Notice of Assumption, Assignment and Sale via overnight delivery on all counterparties to executory contracts and unexpired leases of the Debtors designated as Assigned Contracts by the Stalking Horse Bidder (collectively, the "Assigned Contracts") and file the same with the Court. The Notice of Assumption, Assignment and Sale shall inform each recipient of (i) the timing and procedures relating to such assumption, assignment and sale, (ii) the title of the Potential Assigned Contract, and (iii) the name of the counterparty to the Potential Assigned Contract; provided, however, that service of a Notice of Assumption, Assignment and Sale does not constitute an admission that such Potential Assigned Contract is an executory contract or unexpired lease or that such stated Cure Cost constitutes a claim against the Debtors or a right against the Stalking Horse Bidder (or other Successful Bidder) and all rights with respect thereto shall be expressly reserved. Further, the inclusion of a Potential Assigned Contract on the Notice of Assumption, Assignment and Sale is not a guarantee that such Potential Assigned Contract will ultimately be assumed, assigned and sold.

As set forth above, within three (3) business days of the entry of this Order, the Debtors shall serve the Sale Notice on the Sale Notice Parties, including all parties to Potential Assigned Contracts. The Sale Notice, among other things, sets forth the timing and procedures for objecting to the assumption and assignment of the Potential Assigned Contracts on the basis of adequate assurance of future performance by the Stalking Horse Bidder or the Successful Bidder.

- c. **Objections.** Any counterparty to a Potential Assigned Contract shall file and serve objections with respect to the Cure Costs Motion in accordance with the Cure Costs Motion. Any counterparty to a Potential Assigned Contract shall file and serve on the Objection Notice Parties any objection to the proposed assumption and assignment of the Potential Assigned Contracts on the basis of adequate assurance of future performance to (i) the Stalking Horse Bidder by no later than the Sale Objection Deadline, and (ii) to any other Successful Bidder by no later than [November 15, 2023] at 10:00 a.m. (prevailing Eastern Time). If no objection is timely filed and served, (x) the counterparty to the Potential Assigned Contract shall be deemed to have consented to the assumption, assignment and sale of the Contract to the Successful Bidder pursuant to sections 363 and 365 of the Bankruptcy Code if such Potential Assigned Contract is designated by the Successful Bidder as an Assigned Contract, and shall be forever barred from asserting any objection with regard to such assumption, assignment and sale, except with respect to the adequate assurance of future performance by a Successful Bidder other than the Stalking Horse Bidder.
- d. **Supplemental Contract Assumption Notice.** To the extent the Stalking Horse Bidder, at any time after the Assumption, Assignment and Sale Service Deadline

(i) identifies additional Assigned Contracts, or (ii) removes Assigned Contracts from the list of executory contracts and unexpired leases ultimately selected as Assigned Contracts, the Debtors will promptly file with this Court and serve by overnight delivery a supplemental notice of contract assumption (a “Supplemental Assumption Notice”) on each of the counterparties to the affected Potential Assigned Contracts and their counsel of record, if any. Each Supplemental Assumption Notice will include the same information with respect to listed Potential Assigned Contracts as was included in the Notice of Assumption, Assignment and Sale. Each Supplemental Assumption Notice that identifies a Potential Assigned Contract that was not previously designated to be assumed, assigned and sold shall provide a deadline of not less than seven (7) business days from the date of service of such Supplemental Assumption Notice by which the counterparty to any such Potential Assigned Contract may object only to its listing as an Assigned Contract (if it was not previously designated to be assigned).

- e. **Supplemental Adequate Assurance Objection Deadline.** Following the Bid Deadline, in the event that the Debtors receive one or more Qualified Bids other than the Stalking Horse APA, upon request by any counterparty to a Potential Assigned Contract, the Debtors will send such party evidence that any Qualified Bidder that included such Potential Assigned Contract in its Bid has the ability to perform thereunder and otherwise complies with the requirements of adequate assurance of future performance under section 365(b)(1) of the Bankruptcy Code on a confidential basis for all nonpublic information. Consistent with Paragraph 17 of the Bidding Procedures Order, the Debtors shall file a Notice of Successful Bidder within twenty-four (24) hours of the conclusion of the Auction and send such notice by overnight mail to all counterparties of Potential Assigned Contracts, which shall set forth, among other things, (i) the Successful Bidder and Back-Up Bidder (if any) and the amount of each of the Successful Bid and the Back-Up Bid (if any), (ii) the Assigned Contracts the Successful Bidder intends to assume, and (iii) the proposed assignee(s) of such Assigned Contracts. To the extent the Successful Bidder is not the Stalking Horse Bidder, the non-debtor counterparties to the Assigned Contracts shall have until 10:00 a.m. on [November 15, 2023] to file any objections to adequate assurance of future performance by the Successful Bidder.
- f. **Contract Assumption.** No Assigned Contract shall be deemed assumed, assigned and sold pursuant to sections 365 and 363 of the Bankruptcy Code until the later of (i) the date the Court has entered an order assuming, assigning and selling such Assigned Contracts or (ii) the date the Sale has closed.

27. The inclusion of a Potential Assigned Contract on the Notice of Assumption, Assignment and Sale or any Supplemental Assumption Notice shall not: (a) obligate the Debtors to assume, assign or sell any executory contracts or unexpired leases listed thereon, (b) obligate any Qualified Bidder or the Successful Bidder to designate such Potential Assigned

Contract as an Assigned Contract or refrain from redesignating it to not be an Assigned Contract, or (c) constitute any admission or agreement of the Debtors that such Potential Assigned Contract is an executory contract or such lease is unexpired, as applicable. Only those Potential Assigned Contracts that are included on a schedule of Assigned Contracts (for which the Stalking Horse Bidder's or other Successful Bidder's, as applicable, designation rights with respect thereto have expired) attached to a final asset purchase agreement will be assumed, assigned and sold.

RELIEF REQUESTED

28. By this Motion, the Debtors seek entry of: (i) the Bidding Procedures Order, (a) scheduling a date for the Sale Hearing, (b) authorizing and approving the Bidding Procedures and the Assumption Procedures, and the form and manner of notice thereof, (c) authorizing and approving the Debtors' entry into the Stalking Horse APA, and (d) granting related relief; and (ii) the Sale Order, which shall be filed no later than twenty-one (21) days before the Sale Hearing, (a) authorizing and approving the Sale free and clear of all encumbrances other than assumed liabilities and permitted encumbrances, on the terms contemplated in the Stalking Horse APA or, in the event the Stalking Horse Bidder is not the Successful Bidder, then in the Alternative APA with the Successful Bidder, (b) authorizing and approving the assumption and assignment of executory contracts and unexpired leases to the Stalking Horse Bidder or, in the event the Stalking Horse Bidder is not the Successful Bidder, then to the Successful Bidder; and (c) granting related relief.

BASIS FOR RELIEF

A. Sufficient Business Justification Exists for Consummation of the Sale under Sections 105(a) and 363(b) of the Bankruptcy Code

29. Pursuant to section 105(a) of the Bankruptcy Code, a “[c]ourt may issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title.”

11 U.S.C. § 105(a). Section 363(b) of the Bankruptcy Code provides that a debtor, “after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.” 11 U.S.C. § 363(b). Although section 363(b) does not specify a standard for determining when it is appropriate for a court to authorize the use, sale or lease of property of the estate, courts have required that such use, sale or lease be based upon the sound business judgment of the debtor. *See, e.g., Myers v. Martin (In re Martin)*, 91 F.3d 389, 395 (3d Cir. 1996) (internal citation omitted); *Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1070–71 (2d Cir. 1983); *In re Abbotts Dairies of Pennsylvania, Inc.*, 788 F.2d 143, 147–48 (3d Cir. 1986) (implicitly adopting the “sound business judgment” test of *In re Lionel Corp.*); *In re Delaware & Hudson Ry. Co.*, 124 B.R. 169, 175–76 (D. Del. 1991) (holding that the Third Circuit adopted the “sound business judgment” test in *Abbotts Dairies*); *Dai-Ichi Kangyo Bank, Ltd. v. Montgomery Ward Holding Corp. (In re Montgomery Ward Holding Corp.)*, 242 B.R. 147, 153 (D. Del. 1999) (same).

30. The demonstration of a valid business justification by the debtor leads to a strong presumption “that in making [the] business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.” *Official Comm. of Subordinated Bondholders v. Integrated Res., Inc. (In re Integrated Res., Inc.)*, 147 B.R. 650, 656 (S.D.N.Y. 1992) (quoting *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985)).

31. The Debtors submit that their decision to pursue and, ultimately, consummate the Sale⁶ represents a reasonable exercise of the Debtors’ business judgment and,

6. The Bid Procedures also contemplate that Qualified Bidders may submit bids in the form of a proposed plan of reorganization.

accordingly, the Sale should be approved under sections 105(a) and 363(b) of the Bankruptcy Code. The proposed Bidding Procedures will allow the Debtors to conduct the Sale in a controlled, fair, and open fashion that will encourage participation by financially capable bidders who will offer the best package for the Debtors' assets and who can demonstrate the ability to close a transaction quickly. Specifically, the Bidding Procedures contemplate an open auction process with minimum barriers to entry and provide potential bidding parties with sufficient time to perform due diligence and acquire the information necessary to submit a timely and well-informed bid.

32. At the same time, the Bidding Procedures provide the Debtors with a robust opportunity to continue marketing the Assets and consider competing bids and select the highest or otherwise best offer for the completion of the Sale. Entering into the Stalking Horse APA with the Stalking Horse Bidder ensures that the Debtors obtain fair market value by setting a minimum purchase price for the Debtors' assets that will be tested in the marketplace. As such, creditors of the Debtors' estates can be assured that the consideration obtained will be fair and reasonable and at or above market.

33. The Debtors submit that the proposed Bidding Procedures will encourage competitive bidding, are appropriate under the relevant standards governing auction proceedings and bidding incentives in bankruptcy proceedings, and are consistent with other procedures previously approved by this Court

34. Additionally, the Debtors believe that the notice procedures described above are reasonable and adequate under the circumstances. Bankruptcy Rules 2002(a) and (c) require the Debtors to notify creditors of the Sale, the terms and conditions of the Sale, the time and place of the Auction, and the deadline for filing any objections. The Debtors believe that the

proposed notice procedures fully comply with Bankruptcy Rule 2002, and are reasonably calculated to provide timely and adequate notice of the Stalking Horse APA, the Bidding Procedures, the Auction, the Sale Hearing, and the Sale to the Debtors' creditors and all other parties in interest that are entitled to notice, as well as those parties that have expressed a *bona fide* interest in acquiring the Assets.

35. The Sale, conducted in accordance with the Bidding Procedures, will generate significant value for the Debtors' estates, and represents the best path forward for maximizing recoveries in connection with the Chapter 11 Cases. The Debtors submit that ample business justification exists for the consummation of the Sale, and therefore request that this Court approve such Sale.

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

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

(1) applicable nonbankruptcy law permits sale of such property free and clear of such interest; (2) such entity consents; (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property; (4) such interest is in bona fide dispute; or (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

11 U.S.C. § 363(f). This provision 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).

37. Because section 363(f) of the Bankruptcy Code is drafted in the disjunctive, satisfaction of any one of its five requirements will suffice to permit the sale of the Assets “free and clear” of liens and interests. *See Citicorp Homeowners Servs., Inc. v. Elliot (In re Elliot)*, 94 B.R. 343, 345 (E.D. Pa. 1988) (noting that because section 363(f) is written in the disjunctive, a

court may approve a sale free and clear if any one subsection is met); *see also 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 Bygaph, Inc.*, 56 B.R. 596, 606 n.8 (Bankr. S.D.N.Y. 1986) (same). Furthermore, a debtor possesses broad authority to sell assets free and clear of liens. *See In re Trans World Airlines, Inc.*, 322 F.3d 283, 289 (3d Cir. 2003).

38. The Debtors submit that, in the interest of attracting the best offers, it is appropriate to sell the Assets on a final “as is” basis, free and clear of any and all encumbrances other than assumed liabilities and permitted encumbrances (and except as otherwise expressly set forth in the Sale Order), in accordance with section 363(f) of the Bankruptcy Code because one or more of the tests of section 363(f) are satisfied with respect to such Sale. In particular, the Debtors believe that section 363(f)(2) of the Bankruptcy Code will be met because the Prepetition 1L Secured Parties have a valid, blanket security interest in substantially all of the Assets and have consented to the Sale to the Stalking Horse Bidder pursuant to the Stalking Horse APA, subject to higher or better terms as set forth in an Alternative APA.

39. Moreover, with respect to any other party asserting a lien, claim, encumbrance or the like against the Assets, the Debtors anticipate that they will be able to satisfy one or more of the conditions set forth in section 363(f) of the Bankruptcy Code. In particular, known lienholders will receive notice and will be given sufficient opportunity to object to the relief requested. Such lienholders that do not object to the Sale should be deemed to have consented. *See FutureSource LLC v. Reuters Ltd.*, 312 F.3d 281, 285-86 (7th Cir. 2002) (“[L]ack of objection (provided of course there is notice) counts as consent. It could not be otherwise; transaction costs would be prohibitive if everyone who might have an interest in the bankrupt’s assets had to execute a formal consent before they could be sold.”) (internal citations omitted); *Hargrave v. Twp. of*

Pemberton (In re Tabone, Inc.), 175 B.R. 855, 858 (Bankr. D.N.J. 1994) (holding that creditor's failure to object to sale free and clear of liens, claims and encumbrances satisfies section 363(f)(2)); *In re Elliot*, 94 B.R. at 345 (same). Consistent with the foregoing, the Bidding Procedures Order provides that the absence of a timely objection to the sale of the Assets in accordance therewith shall be "consent" to such sale within the meaning of section 363(f)(2) of the Bankruptcy Code.

40. Furthermore, the Debtors propose that any encumbrances asserted against the Assets be transferred to, and attach to, the proceeds of the Sale, and application of the proceeds generated by the Sale will be subject to any applicable provisions of the DIP Orders (as defined in the DIP Motion).

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

41. Section 363(m) of the Bankruptcy Code provides, in part, that the reversal or modification on appeal of an authorization of a sale pursuant to section 363(b) or section 363(c) of the Bankruptcy Code does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal. *See* 11 U.S.C. § 363(m).

42. Section 363(m) of the Bankruptcy Code thus protects the purchaser of assets sold pursuant to section 363 of the Bankruptcy Code from the risk that it will lose its interest in the purchased assets if the order allowing the sale is reversed on appeal, as long as such purchaser leased or purchased the assets in "good faith." While the Bankruptcy Code does not define "good faith," courts have held that a purchaser shows its good faith through the integrity of its conduct during the course of the sale proceedings, finding that where there is a lack of such integrity, a good-faith finding may not be made. *See, e.g., In re Abbotts Dairies of Pa., Inc.*, 788 F.2d 143 (3d

Cir. 1986) (“Typically, the misconduct that would destroy a [buyer’s] good faith status at a judicial sale involves fraud, collusion between the [proposed buyer] and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders.”); *In the Matter of Andy Frain Servs., Inc.*, 798 F.2d 1113, 1125 (7th Cir. 1986) (same); *In re Sasson Jeans, Inc.*, 90 B.R. 608, 610 (S.D.N.Y. 1988) (same).

43. The Debtors submit that the Stalking Horse Bidder, or any other Successful Bidder arising from the Auction, is or would be “good faith purchasers” within the meaning of section 363(m) of the Bankruptcy Code, and the Stalking Horse APA, or any marked version thereof, are or would be a good-faith agreement on arms’-length terms entitled to the protections of section 363(m) of the Bankruptcy Code.⁷ **First**, as set forth in more detail above, the consideration to be received by the Debtors pursuant to the Stalking Horse APA is substantial, fair, and reasonable. **Second**, the parties entered into the Stalking Horse APA in good faith and after extensive, arm’s-length negotiations, during which all parties were represented by competent counsel, and any sale agreement with a Successful Bidder will be the culmination of a competitive Auction process in which all parties will presumably be represented by counsel and all negotiations will be conducted on an arm’s-length, good-faith basis. **Third**, there is no indication of any “fraud, collusion between the purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders” or similar conduct that would cause or permit the Sale or Stalking Horse APA to be avoided under section 363(m) of the Bankruptcy Code. And, with

7. The Debtors believe that a finding of good faith within the meaning of section 363(m) of the Bankruptcy Code will be appropriate for any Successful Bidder arising from the Auction. Pursuant to the Bidding Procedures, any Successful Bidder will have had to present a proposal in accordance with the Bidding Procedures. In addition, the Debtors will not choose as the Successful Bidder or Backup Bidder (as defined in the Bidding Procedures) any entity whose good faith under section 363(m) of the Bankruptcy Code can reasonably be doubted, and will be prepared to present the Court with sufficient evidence to allow the Court to find that the “good faith” standard of section 363(m) of the Bankruptcy Code has been satisfied.

respect to potential bidders, the Bidding Procedures are designed to ensure that no party is able to exert undue influence over the process. **Finally**, the Debtors evaluated and approved the Stalking Horse Bidder's offer in consultation with their advisors, and any other bids that the Debtors ultimately determine to be a successful bid will have been evaluated in a similar fashion. Accordingly, the Debtors believe that the Stalking Horse Bidder (or other Successful Bidder arising from the Auction, if any) and Stalking Horse APA (or marked version thereof) should be entitled to the full protections of section 363(m) of the Bankruptcy Code.

D. The Court Should Approve the Bidding Procedures

44. The key objective in any sale of property of a debtor's estate is to maximize the value received by the estate. *See In re Mushroom Transp. Co.*, 382 F.3d 325, 339 (3d Cir. 2004) (finding that 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) (same). Procedures used to enhance competitive bidding support this objective and, therefore, are appropriate in the context of bankruptcy sales. *See In re O'Brien Envtl. Energy, Inc.*, 181 F.3d 527, 537 (3d Cir. 1999); *see also Integrated Res. Inc.*, 147 B.R. at 659 (stating that bidding procedures "encourage bidding and . . . maximize the value of the debtor's assets").

45. The Debtors, with the assistance of their professional advisors, including Guggenheim Securities, have designed the Bidding Procedures to promote a competitive and fair bidding process and, thus, to maximize value for the Debtors' estates and creditors. The Bidding Procedures will allow the Debtors to conduct the Auction in an orderly, fair and open fashion, which will encourage participation by financially capable bidders, thereby increasing the likelihood that the Debtors will receive the highest or best possible consideration for the Assets. Furthermore, the Bidding Procedures provide an appropriate framework for the Debtors, in consultation with their professional advisors, to review, analyze and compare any bids received to

determine which bids are in the best interests of the Debtors' estates and their creditors. The Debtors, in consultation with their investment bank, Guggenheim Securities, believe that the Bidding Procedures are appropriately crafted to, and will maximize, the value of the Assets. Moreover, the Debtors are required under the DIP Credit Agreement to complete the auction and sale process on the timetable set forth therein and contemplated by the Bidding Procedures, which timetable is fair and reasonable in light of the circumstances of the Chapter 11 Cases.

46. The Debtors submit that the Bidding Procedures are necessary and transparent and will derive the highest or best bids for the Assets. Therefore, the Debtors request the Court to approve the Bidding Procedures.

E. The Assumption and Assignment of Executory Contracts and Unexpired Leases in Connection with the Sale Satisfies Section 365 of the Bankruptcy Code

47. Section 365(a) of the Bankruptcy Code provides, in pertinent part, that a debtor in possession, "subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor." 11 U.S.C. § 365(a). The Second Circuit has stated that "[t]he purpose behind allowing the assumption or rejection of executory contracts is to permit the trustee or debtor-in-possession to use valuable property of the estate and to 'renounce title to and abandon burdensome property.'" *Orion Pictures Corp. v. Showtime Networks, Inc. (In re Orion Pictures Corp.)*, 4 F.3d 1095, 1098 (2d Cir. 1993) (quoting 2 COLLIER ON BANKRUPTCY ¶ 365.01[1] (15th ed. 1993)).

48. The standard applied to determine whether the assumption of a contract or an unexpired lease should be authorized is the "business judgment" standard. *See In re AbitibiBowater Inc.*, 418 B.R. 815, 831 (Bankr. D. Del. 2009) (finding that a debtor's decision to assume or reject an executory contract will stand so long as "a reasonable business person would make a similar decision under similar circumstances."); *In re HQ Global Holdings, Inc.*, 290 B.R.

507, 511 (Bankr. D. Del. 2003) (stating a debtor’s decision to reject an executory contract is governed by the business judgment standard and can only be overturned if the decision was the product of bad faith, whim, or caprice). As described above, “[t]he business judgment rule ‘is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interest of the company.’” *Integrated Res., Inc.*, 147 B.R. at 656 (quoting *Smith v. Van Gorkom*, 488 A.2d at 872). Indeed, “the sole issue is whether the rejection benefits the estate.” *In re HQ Global*, 290 B.R. at 511.

49. The business judgment rule is crucial in chapter 11 cases and shields a debtor’s management from judicial second-guessing. *See id.*; *see also Comm. of Asbestos Related Litigants and/or Creditors v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 60 B.R. 612, 615-16 (Bankr. S.D.N.Y. 1986) (“[T]he Code favors the continued operation of a business by a debtor and a presumption of reasonableness attaches to a debtor’s management decisions.”). Generally, courts defer to a debtor in possession’s business judgment to assume or reject an executory contract or lease. *See 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) (stating that the business judgment test “requires only that the trustee [or debtor in possession] demonstrate that [assumption or] rejection of the executory contract will benefit the estate.”); *see also N.L.R.B. v. Bildisco & Bildisco*, 465 U.S. 513, 523 (1984); *Control Data Corp. v. Zelman (In re Minges)*, 602 F.2d 38, 42-43 (2d Cir. 1979); *In re Riodizio, Inc.*, 204 B.R. 417, 424-25 (Bankr. S.D.N.Y. 1997); *In re G Survivor Corp.*, 171 B.R. 755, 757 (Bankr. S.D.N.Y. 1994).

50. Here, the Debtors have exercised their sound business judgment in determining that assumption and assignment of the Assigned Contracts is in the best interests of

the Debtors and their estates and, accordingly, the Debtors submit that the Court should approve the proposed assumption under section 365(a) of the Bankruptcy Code. *See, e.g., In re Philadelphia Newspapers, LLC*, 424 B.R. 178, 182-83 (Bankr. E.D. Pa. 2010) (stating that if a debtor's business judgment has been reasonably exercised, a court should approve the assumption or rejection of an executory contract or unexpired lease); *Westbury Real Estate Ventures, Inc. v. Bradlees, Inc. (In re Bradlees Stores, Inc.)*, 194 B.R. 555, 558 n.1 (Bankr. S.D.N.Y. 1996); *Summit Land Co. v. Allen (In re Summit Land Co.)*, 13 B.R. 310, 315 (Bankr. D. Utah 1981) (holding that, absent extraordinary circumstances, court approval of a debtor's decision to assume or reject an executory contract "should be granted as a matter of course").

51. As set forth above, the Sale will provide significant benefits to the Debtors' estates. To that end, the assumption, assignment and sale of the Assigned Contracts is necessary for the Debtors to obtain the benefits of the Stalking Horse APA or an Alternative APA, as applicable. In addition, under section 365(k) of the Bankruptcy Code, the assignment by a debtor to an entity of a contract or lease "relieves the trustee and the estate from any liability for any breach of such contract or lease occurring after such assignment." 11 U.S.C. § 365(k). Thus, following an assignment to the Successful Bidder of any Assigned Contract, the Debtors will be relieved from any liability for any subsequent breach associated therewith.

52. Furthermore, section 365(b)(1) of the Bankruptcy Code requires that any outstanding defaults under the Assigned Contracts must be cured or that adequate assurance be provided that such defaults will be promptly cured. 11 U.S.C. § 365(b)(1). The Debtors propose to file with the Court, and serve on each counterparty to an Assigned Contract, a Notice of Assumption, Assignment and Sale that indicates the proposed Cure Cost for each such contract. As such, each counterparty will have the opportunity to object to the proposed assumption and

assignment to the Successful Bidder and to the proposed Cure Cost, if applicable. Moreover, the payment or reserve of the applicable Cure Cost, as provided for in the Bidding Procedures, will be a condition to the Debtors' assumption and assignment of any Assigned Contract.

53. Relatedly, section 365(f)(2) of the Bankruptcy Code provides that a debtor may assign an executory contract or unexpired lease of nonresidential real property if “adequate assurance of future performance by the assignee of such contract or lease is provided.” 11 U.S.C. § 365(f)(2). The words “adequate assurance of future performance” must be given a “practical, pragmatic construction” in light of the facts and circumstances of the proposed assumption. *See In re Fleming Cos., Inc.*, 499 F.3d 300, 307 (3d Cir. 2007) (internal citation omitted); *Carlisle Homes, Inc. v. Azzari (In re Carlisle Homes, Inc.)*, 103 B.R. 524, 538 (Bankr. D.N.J. 1988) (same); *see also In re Natco Indus., Inc.*, 54 B.R. 436, 440 (Bankr. S.D.N.Y. 1985) (finding that adequate assurance of future performance does not mean absolute assurance that debtor will thrive and profit); *In re Bon Ton Rest. & Pastry Shop, Inc.*, 53 B.R. 789, 803 (Bankr. N.D. Ill. 1985) (“Although no single solution will satisfy every case, the required assurance will fall considerably short of an absolute guarantee of performance.”).

54. Specifically, adequate assurance may be given by demonstrating the assignee's financial health and experience in managing the type of enterprise or property assigned. *See In re Bygaph, Inc.*, 56 B.R. 596, 605-06 (Bankr. S.D.N.Y. 1986) (holding that adequate assurance of future performance is given where the assignee of lease has financial resources and expressed a willingness to devote sufficient funding to the business to ensure its success, and that in the leasing context, the chief determinant of adequate assurance is whether rent will be paid).

55. Here, the Successful Bidder will have provided adequate assurance of future performance with respect to any Assigned Contract. For its bid to be deemed a Qualified Bid,

each Qualified Bidder will be required to provide evidence supporting its ability to comply with the requirements of adequate assurance of future performance under section 365(f)(2)(B) and, if applicable, section 365(b)(3) of the Bankruptcy Code (the “Adequate Assurance Information”), including: (a) the bidder’s financial wherewithal and willingness to perform under any contracts that are assumed and assigned to such potential bidder; and (b) a contact person for the proposed assignee that the counterparty may directly contact in connection with the adequate assurance of future performance. To the extent that the Qualified Bidder is a newly formed acquisition entity or the like, the financial and other information supporting the Qualified Bidder’s financial wherewithal shall include financial and other information supporting the financial wherewithal of the Qualified Bidder’s parent company or sponsor. Furthermore, given that the Debtors will submit evidence that all requirements for the assumption and assignment of such contracts at the Sale Hearing, the Court and other interested parties will have the opportunity to evaluate the ability of each Successful Bidder to provide adequate assurance of future performance.

56. Therefore, the Debtors respectfully request the Court to (a) approve the proposed assumption and assignment of the Assigned Contracts, and (b) find that all anti-assignment provisions of such contracts to be unenforceable under section 365(f) of the Bankruptcy Code.⁸

8. Section 365(f)(1) provides 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). Section 365(f)(3) further provides that “notwithstanding 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).

F. The Stalking Horse Bidder Should Be Authorized to Credit Bid on the Assets Under Section 363(k) of the Bankruptcy Code

57. A secured creditor is allowed to “credit bid” the amount of its claim in a sale. Section 363(k) of the Bankruptcy Code provides, in relevant part, that unless the court for cause orders otherwise, the holder of a claim secured by property that is the subject of the 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 undersecured as determined in accordance with section 506(a) of the Bankruptcy Code, section 363(k) of the Bankruptcy Code allows such secured creditor to bid the total face value of its claim and does not limit the credit bid to the claim’s economic value. *See In re Submicron Sys. Corp.*, 432 F.3d 448, 459-60 (3d Cir. 2006) (explaining that “[i]t is well settled among district court and bankruptcy courts that creditors can bid the full face value of their secured claims under section 363(k)”).

58. Here, the Stalking Horse APA contemplates consideration in the form of a credit bid of certain of the outstanding obligations under both the Prepetition 1L Credit Facility and the postpetition DIP Facility (each as defined in the DIP Motion). The Agent, as collateral agent under both facilities holding claims secured by valid, binding, enforceable, non-avoidable and perfected liens on and security interests in substantially all of the Assets as provided for in the DIP Order, is entitled to credit bid some or all of the claims secured by its collateral pursuant to section 363(k) of the Bankruptcy Code. Accordingly, the credit bid contemplated by the Stalking Horse APA should be authorized.

G. The Expense Reimbursement Has a Sound Business Purpose and Should be Approved

59. The Debtors also request approval of the Stalking Horse Bidder’s expense reimbursement (the “Expense Reimbursement”). In accordance with the terms of the Stalking

Horse APA, the Debtors request authority to provide the Stalking Horse Bidder with an allowed administrative claim in the Chapter 11 Cases in an amount equal to the Expense Reimbursement. The Expense Reimbursement is an amount not to exceed \$2.5 million.

60. Generally, stalking horse expense reimbursements are a normal, and, in many cases, necessary component of significant sales conducted under section 363 of the Bankruptcy Code. For example, courts have found that because a “corporation [has] a duty to encourage bidding, [bid protections] can be necessary to discharge [such] duties to maximize value. . . . [Bid protections] may ‘be legitimately necessary to convince a white knight to enter the bidding by providing some form of compensation for the risks it is undertaking.’” *In re Integrated Res., Inc.*, 147 B.R. at 660– 61. As a result, courts routinely approve such bidding protections in connection with proposed bankruptcy sales where a proposed fee or reimbursement provides a benefit to the estate. *See In re Energy Future Holdings Corp.*, 904 F.3d 298 (3d Cir. 2018) (holding that “[T]he allowability of [bid protections] . . . depends upon the requesting party’s ability to show that the fees [a]re actually necessary to preserve the value of the estate.”) (internal quotations omitted) (alterations in original); *In re Reliant Energy Channelview LP*, 594 F.3d 200, 206 (3d Cir. 2010) (same); *In re O’Brien Env’t Energy, Inc.*, 181 F.3d 527, 533 (3d Cir. 1999) (same); *In re Women First Healthcare, Inc.*, 332 B.R. 115, 121–23 (Bankr. D. Del. 2005) (same). The Debtors believe that the allowance of the Expense Reimbursement is in the best interests of their estates and their creditors, as the Stalking Horse Bidder, if designated, will establish a floor for further bidding that may increase the consideration given in exchange for the applicable assets for the benefit of the Debtors’ estates.

61. In the Third Circuit, bidding protections, such as those proposed here, are subject to the general standard used for administrative expenses under section 503 of the

Bankruptcy Code. *Energy Future*, 904 F.3d at 313 (“[T]ermination fees are subject to the same general standard used for all administrative expenses under 11 U.S.C. § 503.”); *Women First Healthcare, Inc.*, 332 B.R. at 121–23 (holding that the general standard used for all administrative expenses applies to expense reimbursements). Thus, the allowability of expense reimbursements, “like that of other administrative expenses, depends upon the requesting party’s ability to show that the fees were actually necessary to preserve the value of the estate.” *Reliant Energy*, 594 F.3d at 206 (internal quotations omitted) (quoting *O’Brien*, 181 F.3d at 535).

62. The Expense Reimbursement provided to the Stalking Horse Bidder (i) is an actual and necessary cost and expense of preserving the Debtors’ estates within the meaning of sections 503(b) and 507(a)(2) of the Bankruptcy Code, (ii) is commensurate to the real and material benefits conferred upon the Debtors’ estates by the Progrexion Stalking Horse Bidder, and (iii) is fair, reasonable, and appropriate, including in light of the size and nature of the proposed sale of the applicable assets, the commitments that will be made, and the efforts that have been and will be expended by the Stalking Horse Bidder. The Expense Reimbursement is necessary to induce the Stalking Horse Bidder to pursue the sale of the Assets and to be bound by the Stalking Horse APA.

63. The Expense Reimbursement that may be granted to a Stalking Horse Bidder falls well within the range of bid protections typically approved by the bankruptcy courts in the Third Circuit. The Expense Reimbursement is consistent with the range of bid protections typically paid in sale transactions that have been recently approved. *See In re Virgin Orbit Holdings, Inc.*, No. 23-10405 (KBO) (Bankr. D. Del. May 1, 2023) (approving expense reimbursements equal to approximately 2% of the proposed purchase price); *In re American Eagle Del. Holding Co., LLC*, No. 22-10028 (JKS) (Bankr. D. Del. Aug. 12, 2022) (approving expense

reimbursements equal to approximately 1.25% of the proposed purchase price); *In re BHCosmetics Holdings, LLC*, No. 22-10050 (CSS) (Bankr. D. Del. Jan. 28, 2022) (approving expense reimbursements equal to approximately 3.5% of the proposed purchase price); *In re Gorham Paper & Tissue, LLC*, No. 20-11662 (KBO) (Bankr. D. Del. Nov. 19, 2020) (approving expense reimbursements equal to approximately 2% of the proposed purchase price).

64. Accordingly, for the reasons set forth above, the Debtors respectfully request that the Court grant the Debtors the authority to incur and pay the Expense Reimbursement to the extent the Expense Reimbursement is necessary to preserve the value of the Debtors' estates.

WAIVER OF STAY UNDER BANKRUPTCY RULE 6004(h) AND 6006(d)

65. Pursuant to Bankruptcy Rule 6004(h), “[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). Furthermore, Bankruptcy Rule 6006(d) provides that an “order authorizing the trustee to assign an executory contract or unexpired lease under § 365(f) is stayed until the expiration of 14 days after the entry of the order, unless the court orders otherwise.” Fed. R. Bankr. P. 6006(d). To maximize the value received for the assets, the Debtors seek to close the Sale as soon as possible after the Sale Hearing. Accordingly, the Debtors hereby request that the Court waive the fourteen-day stay period under Bankruptcy Rules 6004(h) and 6006(d), to the extent applicable.

NOTICE

66. Notice of this Motion will be provided to: (i) the U.S. Trustee for the District of Delaware; (ii) counsel for Blue Torch Finance LLC, as the administrative agent for the Prepetition 1L Lenders and the DIP Lenders (each as defined in the DIP Motion); (iii) counsel for GLAS Americas LLC, as the administrative agent for the prepetition second lien lenders; (iv) the United States Attorney's Office for the District of Delaware; (v) the Internal Revenue Service;

(vi) the state attorneys general for all states in which the Debtors conduct business; (vii) all parties who have expressed a written interest in some or all of the Assets; (viii) all known holders of liens, encumbrances, and other claims secured by the Assets; (ix) all parties to Potential Assigned Contracts; and (x) all parties that have filed a notice of appearance and request for service of papers pursuant to Bankruptcy Rule 2002. In light of the nature of the relief requested herein, the Debtors submit that no other or further notice is necessary.

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WHEREFORE, the Debtors request entry of the Bidding Procedures Order and the Sale Order, granting the relief requested herein and such other and further relief as is just and proper.

Dated: September 1, 2023
Wilmington, Delaware

Respectfully submitted,

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