

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

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In re:	:	Chapter 11
	:	
BIND THERAPEUTICS, INC., <i>et al.</i> , ¹	:	Case No. 16-11084 (BLS)
	:	
Debtors.	:	(Jointly Administered)
	:	
	:	Proposed Hearing Date: July 7, 2016 at 10:00 a.m. (ET)
	:	Proposed Obj. Deadline: At the Proposed Hearing (ET)
	X	

**MOTION, PURSUANT TO BANKRUPTCY CODE SECTIONS 105(a), 363, 365, 503, AND
507 AND BANKRUPTCY RULES 2002, 3007, 6004, 6006, 9007, AND 9014,
FOR ENTRY OF: (A) ORDER (I) APPROVING BIDDING PROCEDURES IN
CONNECTION WITH SALE OF ASSETS OF THE DEBTORS, (II) APPROVING
FORM AND MANNER OF NOTICE, (III) SCHEDULING AUCTION
AND SALE HEARING, (IV) AUTHORIZING PROCEDURES GOVERNING
ASSUMPTION AND ASSIGNMENT OF CERTAIN CONTRACTS AND UNEXPIRED
LEASES, AND (V) GRANTING RELATED RELIEF AND
(B) ORDER (I) APPROVING PURCHASE AGREEMENT, (II) AUTHORIZING
SALE FREE AND CLEAR OF ALL LIENS, CLAIMS, ENCUMBRANCES,
AND OTHER INTERESTS, AND (III) GRANTING RELATED RELIEF**

The above-captioned debtors and debtors-in-possession (together, the “**Debtors**”) hereby move (the “**Motion**”) for entry of: (A) an order, in substantially the form attached hereto as **Exhibit A** (the “**Bidding Procedures Order**”), (i) approving certain bidding procedures, substantially in the form attached to the Bidding Procedures Order as **Exhibit 1** (the “**Bidding Procedures**”), to govern the sale of certain assets of the Debtors (the “**Seller Assets**”) to (a) Pfizer, Inc., a Delaware corporation (the “**Stalking Horse Buyer**”), pursuant to its bid in accordance with that certain Asset Purchase Agreement between the Debtors and the Stalking

¹ The Debtors, together with the last four digits of each Debtor’s U.S. federal tax identification number, are: BIND Therapeutics, Inc. (6148) and BIND Biosciences Security Corporation (3208). The address for the Debtors is 325 Vassar Street, Cambridge, MA 02139.

Horse Buyer (the “**Stalking Horse Agreement**”),² or (b) such other Prevailing Purchaser (as defined in the Bidding Procedures), (ii) approving certain bid protections in connection therewith, (iii) approving the form and manner of notice of the proposed sale transactions, the Bidding Procedures, the Auction, and the Sale Hearing, (iv) authorizing the Debtors to schedule an auction to sell the Seller Assets (the “**Auction**”), (v) scheduling the hearing to approve a sale of the Seller Assets (the “**Sale Hearing**”) for a date that is on or before July 27, 2016, (vi) authorizing procedures governing the assumption and assignment of certain executory contracts and unexpired leases (the “**Assigned Contracts**”) by the Stalking Horse Buyer or the Prevailing Purchaser, and (vii) granting related relief; and (B) an order (the “**Sale Order**”) (i) approving the Stalking Horse Agreement, or such other form of purchase agreement between the Debtors and the Prevailing Purchaser, (ii) authorizing the sale (the “**Sale**”) of the Seller Assets and the assumption and assignment of the Assigned Contracts (as defined herein) to the Stalking Horse Buyer or such other Prevailing Purchaser at the Auction free and clear of all liens, claims, encumbrances, and other interests (collectively, “**Liens**”), other than (a) any Permitted Encumbrances as set forth in the Stalking Horse Agreement or (b) any permitted Liens as set forth in the purchase agreement with the Prevailing Purchaser, and (iii) granting related relief. In support of this Motion, the Debtors, by and through their undersigned counsel, respectfully represent as follows:

² The Stalking Horse Agreement is substantially in the form attached hereto as **Exhibit B**. The Stalking Horse Agreement and related schedules and exhibits may be added, supplemented, amended or otherwise modified prior to the hearing to consider the entry of the Bidding Procedures Order, and the Debtors will file a final Stalking Horse Agreement with all schedules and exhibits prior to such hearing. Capitalized terms used herein and not otherwise defined shall have the meanings set forth in the Stalking Horse Agreement.

BACKGROUND

I. The Debtors' Chapter 11 Cases

1. On May 1, 2016 (the "**Petition Date**"), the Debtors filed voluntary petitions in this Court commencing cases for relief (the "**Chapter 11 Cases**") under Chapter 11 of Title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (the "**Bankruptcy Code**").³

2. The Debtors continue to manage and operate their business as debtors-in-possession pursuant to Bankruptcy Code Sections 1107 and 1108. No trustee or examiner has been requested in the Chapter 11 Cases, and no committees have yet been appointed. The Chapter 11 Cases are jointly administered for procedural purposes only pursuant to Federal Rule of Bankruptcy Procedure 1015(b).

3. Prior to the Petition Date, the Debtors retained Cowen and Company, LLC ("**Cowen**") to serve as their investment banker. Since that time, Cowen has worked with the Debtors and their other professionals on a sale process.

II. The Pre-Petition Credit Agreement

4. Debtor BIND Therapeutics, Inc. (the "**Prepetition Borrower**") is party to that certain Amended and Restated Loan and Security Agreement, dated as of June 12, 2013 (as the same has been and may be amended, restated, supplemented or otherwise modified from time to time, the "**Prepetition Credit Agreement**"), together with all other loan documents, security instruments and other documents related to, referenced in or executed in connection with the Prepetition Credit Agreement prior to the Petition Date, the "**Prepetition Documents**"), with

³ Information regarding the Debtors' business, capital structure, and the circumstances leading to this Chapter 11 filing is set forth in the *Declaration of Andrew Hirsch, President and Chief Executive Officer of BIND Therapeutics, Inc., in Support of Chapter 11 Petitions and First Day Pleadings* [D.I. 11] (the "**Hirsch Declaration**"), which was filed on the Petition Date and is incorporated herein by reference.

Hercules Technology III, L.P. (the “**Prepetition Lender**”), pursuant to which the Prepetition Lender provided loans to the Prepetition Borrower (the “**Prepetition Facility**”).

5. As of the Petition Date, the principal amount outstanding under the Prepetition Documents was not less than \$13.2 million (together with any amounts incurred or accrued but unpaid prior to the Petition Date in accordance with the Prepetition Documents, including, without limitation, accrued and unpaid interest (including at applicable default rates), any fees, expenses and disbursements (including, without limitation, reasonable attorneys’ and other professionals’ fees, related expenses and disbursements), reimbursement obligations, indemnification obligations, and other charges, amounts and costs of whatever nature owing, whether or not contingent, whenever arising, accrued, accruing, due, owing, or chargeable in respect of the Prepetition Borrower’s obligations pursuant to the Prepetition Documents relating solely to the loans provided thereunder, the “**Prepetition Obligations**”).

6. To secure the Prepetition Obligations, and pursuant to the Prepetition Documents, the Prepetition Borrower granted to the Prepetition Lender security interests in and liens on certain assets of the Prepetition Borrower as described in the Prepetition Documents (the “**Prepetition Liens**”) including, without limitation, (a) Receivables⁴; (b) Equipment; (c) Fixtures; (d) General Intangibles; (e) Inventory; (f) Investment Property; (g) Deposit Accounts; (h) Cash; (i) Goods; and (j) other tangible and intangible personal property of the Prepetition Borrower owned, leased, consigned by or to, or acquired by the Prepetition Borrower wherever located; and, to the extent not otherwise included, all Proceeds of each of the forgoing and all

⁴ Capitalized terms used but not defined herein shall have the definition ascribed to such terms in the Prepetition Documents.

accessions to, substitutions and replacements for, and rents, profits and products of each of the foregoing.

III. The Marketing Process

7. Cowen was engaged by the Debtors prior to the Petition Date, beginning in or around March 2016, to, among other things:

- Review and analyze the Debtors' operations, properties, financial condition and prospects;
- Assist the Debtors in evaluating potential Transaction alternatives and strategies;
- Assist the Debtors in preparing documentation within Cowen's area of expertise that is required in connection with a Transaction;
- Assist the Debtors in identifying financial and/or strategic institutional investors or other investors ("Interested Parties") who may be interested in participating in a Transaction;
- On behalf of the Debtors, contact Interested Parties which Cowen, after consultation with the Debtors' management, believes meet certain industry, financial and strategic criteria and assist the Debtors in negotiating and structuring a Transaction;
- Advise the Debtors as to potential mergers or acquisitions, and the sale or other disposition of any of the Debtors' businesses or assets;
- Advise the Debtors on the timing, nature and terms of any new securities, other considerations or other inducements to be offered in connection with any Transaction; and
- Participate in the Debtors' board of directors meetings as determined by the Debtors to be appropriate, and, upon request, provide periodic status reports and advice to the board with respect to matters falling within the scope of Cowen's retention.

8. Over the last several months, Cowen has engaged in an extensive marketing process, both before and after the Petition Date, in an effort to locate a potential buyer for the Debtors' assets. During the marketing process, 130 potential buyers were contacted, 14 of which executed non-disclosure agreements and six of which participated in management presentations in May and June 2016. Following substantial due diligence efforts and extensive discussions, the

Debtors ultimately received letters of intent from two potential buyers, including from the Stalking Horse Buyer on June 27, 2016. The Debtors determined that the letter of intent provided by the other entity had significant deficiencies that made the Stalking Horse Buyer's offer substantially more attractive and, therefore, the Debtors accepted the bid of the Stalking Horse Buyer, subject to better and higher offers. Because the Debtors and Cowen have been actively engaged in the sale process for more than three months and have spoken with more than 100 different potential purchasers during that time, the Debtors do not believe that additional marketing efforts would be fruitful and, in fact, are concerned that a further significant delay in the closing of a sale could adversely affect the sale process and the Stalking Horse Buyer's interest in purchasing the Seller Assets. The Stalking Horse Agreement contemplates that the Sale to the Stalking Horse Buyer will close no later than August 15, 2016. In addition, the Debtors currently do not have the Prepetition Lender's consent to use its cash collateral beyond July 8, 2016 and the Debtors' value would diminish substantially if it were forced to cease operations due to a lack of funding in advance of the closing of a sale.

9. Accordingly, with a stalking horse bidding floor and the Stalking Horse Agreement in place (the key terms of which have already been subject to a fulsome market test), the Debtors now seek to promptly effectuate the sale transaction to the Stalking Horse Buyer, subject to a competitive bidding process that is consistent with both the timing of these Chapter 11 Cases and the Debtors' fiduciary duties to maximize value for their estates, stakeholders and parties in interest. Upon the Court's entry of the Bidding Procedures Order, the Debtors intend to provide notice of the Bidding Procedures, the Auction date, the deadline to object to the proposed Sale of the Debtors' assets, and the Sale Hearing to all potential purchasers of the

Debtors' assets that have contacted, or been contacted by, Cowen during the marketing process to date.

IV. The Stalking Horse Agreement

10. Subsequent to the Petition Date, the Debtors and their advisors negotiated the terms of a bid with the Stalking Horse Buyer whereby the Stalking Horse Buyer would be designated the stalking horse purchaser for the Debtors' assets subject to higher or otherwise better offers to be determined through the continuation of the marketing process being conducted by Cowen.

11. On July 1, 2016, the Debtors and the Stalking Horse Buyer substantially finalized the Stalking Horse Agreement, which is subject to higher and better offers through an auction process and the Court's approval. Local Rule 6004-1(b)(iv) provides, among other things, that a sale motion "must highlight material terms" of the Stalking Horse Agreement and the Sale Order. The Stalking Horse Agreement, in substantially final form, is attached hereto as **Exhibit B**. The Debtors submit that the description of the material terms of the Stalking Horse Agreement and the Sale Order set forth herein complies with Local Rule 6004-1(b)(iv). However, to the extent necessary, the Debtors reserve the right to supplement this description at a later date.

12. The following sets forth a summary of the material terms and conditions of the Stalking Horse Agreement.⁵

⁵ If there are any inconsistencies between the summary set forth herein and the Stalking Horse Agreement, the terms and conditions of the Stalking Horse Agreement shall govern. Capitalized terms not otherwise defined herein shall have the meanings ascribed to such terms in the Stalking Horse Agreement.

Seller	BIND Therapeutics, Inc., a Delaware corporation (“ <u>Seller</u> ”).
Stalking Horse Buyer	Pfizer, Inc., a Delaware corporation.
Consideration (§§ 3.1, 3.3)	<p>The aggregate consideration (collectively, the “<u>Purchase Price</u>”) to be paid for the acquisition of the Seller Assets shall be an amount in cash equal to \$19,750,000, inclusive of Cure Costs not to exceed \$5,000,000, and subject to a Holdback until December 1, 2016 of \$1,975,000.</p> <p>In addition to the foregoing consideration, as consideration for the grant, sale, assignment, transfer and delivery of the Seller Assets, the Stalking Horse Buyer shall assume and discharge the Assumed Liabilities as set forth in Section 2.3 of the Stalking Horse Agreement.</p>
Acquired Assets (§ 2.1)	<p>The Stalking Horse Agreement sets forth the assets to be purchased by the Stalking Horse Buyer, including, without limitation, all of Seller’s right, title and interest, free and clear of all Liens (other than Liens included in the Assumed Liabilities and Permitted Encumbrances) in and to all of the Seller’s properties, assets and rights of every nature, kind and description, tangible and intangible, that are used in the operation of the Business, other than Excluded Assets, including (a) the Real Estate Lease and certain rights thereunder; (b) Seller’s rights, title and interests to the buildings, improvements and furnishings, fixtures and equipment located on the Leased Real Property, subject to limitations set forth in the Real Estate Lease; (c) Seller’s equipment, security devices, furniture, fixtures, tools and other personal property owned or held by Seller, but excluding any of the foregoing items under leases or similar contracts not constituting Assigned Contracts; and any rights of Seller to the warranties and licenses received from manufacturers and sellers of the Equipment, Improvements or any component thereof; (d) all of Seller’s rights and interests the Assigned Contracts; (e) all of Seller’s rights and interests: (i) in the Inventory; and (ii) in and to the warranties received from vendors or suppliers with respect to such Inventory; (f) all Seller Intellectual Property Rights (including for the avoidance of doubt the Acquired Names), together with all of Seller’s documentation (in any form or medium) relating thereto, and all of Seller’s physical embodiments thereof; (g) all Software owned by Seller; (h) all rights and interests of Seller under any Permits (to the extent transferable); (i) all of Seller’s instruments, Accounts Receivable (whether current or noncurrent), rebates, refunds, unbilled costs and fees attributable to the Business or the Acquired Assets and all causes of action specifically pertaining to the collection of the foregoing, and any other receivables of Seller, in each case arising prior to or on the Closing Date; (j) all Documents, copies of all Tax Returns and Tax records of Seller related to Taxes arising in connection with the Acquired Assets, and all books and records of Seller relating to any Acquired Asset or Assumed Liability; (k) any claim, right or interest of Seller in or to any refund, rebate, abatement or other recovery for</p>

	Taxes, together with any interest due thereon or penalty rebate arising therefrom, for any Tax Period (or portion thereof) ending on or before the Closing Date; (l) all office supplies, stationary, forms, labels, shipping materials, brochures, art work, photographs, production supplies, other miscellaneous supplies, and other tangible property of any kind wherever located, including all property of any kind located in any building, office or other space leased, owned, or occupied by Seller or in any warehouse where any of Seller's properties and assets may be situated; (m) the right to receive and retain mail and other communications; (n) all goodwill and other intangible assets including correspondence with present or prospective customers and suppliers, advertising materials, software programs, telephone exchange numbers, and other similar intangible assets associated with the Business and the Acquired Assets (to the extent transferable), including customer and supplier lists; (o) all rights under or pursuant to all warranties, representations and guarantees made by suppliers, manufacturers, contractors and any other person or entity to the extent relating to products sold, or services provided, to Seller or to the extent affecting any Acquired Assets, other than any warranties, representations and guarantees relating solely to any Excluded Assets; and (p) all telephone numbers, fax numbers, e-mail addresses, websites, URLs and internet domain names.
Transfer of the Seller Assets (§§ 2.1, 2.3)	The Stalking Horse Buyer agrees to purchase, acquire, and accept all of the Debtors' right, title, and interest in the Seller Assets. In addition, the Stalking Horse Buyer will assume and pay, perform, and discharge the Assumed Liabilities.
Excluded Assets and Liabilities (§§ 2.2, 2.4)	The Sale shall not include the Excluded Assets or the Excluded Liabilities.
Agreements with Management (§§ 1.1(kk), 10.3)	The Stalking Horse Buyer is permitted to designate no later than July 11, 2016 those Employees that are critical to the ongoing operation of the Business after Closing and entry of employment agreements between such employees and the Stalking Horse Buyer is a condition precedent to the Stalking Horse Buyer's obligation to consummate the transactions contemplated by the Staking Horse Agreement.
Representations and Warranties; Covenants (Articles V, VI, and IX)	The representations and warranties and covenants include: (a) representations and warranties regarding (i) organization of the Debtors and the Stalking Horse Buyer, (ii) authorization to enter into and the validity of the transactions contemplated by the Stalking Horse Agreement, (iii) the absence of conflicts and/or breaches resulting from entry into the Stalking Horse Agreement and the transactions contemplated thereby, (iv) permits, (v) law and legal proceedings, (vi) environmental matters, (vii) material contracts, (viii) intellectual property, (ix) title to assets, (x) no brokers or finders, (xi) financial statements, (xii) compliance with laws and regulatory matters, (xiii) absence of undisclosed liabilities, (xiv) absence of certain developments, (xv) preemptive rights, (xvi) taxes, (xvii) employees, (xviii) adequate assurances regarding assigned contracts; and (b) covenants

	regarding (i) conduct of business of the Debtors, (ii) access to information, (iii) rejected contracts, (iv) further agreements, (v) further assurances, (vi) preservation of records, (vii) publicity, (viii) notification of certain matters, (ix) regulatory affairs, (x) recharacterization, and (xi) sale process.
Good Faith Deposit (§ 3.2)	The Stalking Horse Buyer is required to deposit Nine Hundred Eighty Seven Thousand Five Hundred Dollars (\$987,500) into an escrow account by July 6, 2016. If the Stalking Horse Agreement is terminated by Seller due to a breach by the Stalking Horse Buyer or due to the Stalking Horse Buyer's failure to deliver the Purchase Price, then the Deposit Escrow, together with all accrued investment income or interest thereon, will be delivered to Seller as liquidated damages.
Record Retention (§ 9.2(c))	Although the Stalking Horse Agreement contemplates that substantially all of the Debtors' books and records will be transferred to the Stalking Horse Buyer at Closing, the Stalking Horse Agreement entitles the Debtors to reasonable access to such records as they pertain to the conduct of the Business or ownership of the Acquired Assets prior to the Closing Date or to the Excluded Assets or Excluded Liabilities for up to one year after the Closing.
Relief from Bankruptcy Rule 6004(h) (§ 4.1)	The Stalking Horse Agreement provide that, subject to the satisfaction of all other conditions set forth in Sections 10.1, 10.2 and 10.3 thereof or the waiver thereof by the party entitled to the benefit of the applicable condition, the Closing shall take place within one business day of entry of the Sale Order if the Bankruptcy Court permits waiver of the notice requirements under Federal Rule of Bankruptcy Procedure 6004(h), as requested herein.
Bidding Procedures (§ 8.1)	The Stalking Horse Agreement contemplates the approval of bidding procedures to govern an auction process. The Bidding Procedures are substantially in the form attached to the Bidding Procedures Order as Exhibit 1.
Closing Deadlines (§ 4.4(b), (e))	The Stalking Horse Buyer may terminate the Stalking Horse Agreement if the Closing has not occurred prior to August 15, 2016,
Bid Protections (§ 8.3)	Expense reimbursement upon certain triggering conditions shall not to exceed \$250,000. The Stalking Horse Buyer is also entitled to a breakup fee of 3% of the Purchase Price (the " Breakup Fee "), which shall have administrative priority pursuant to Bankruptcy Code Sections 503(b) and 507(b).

V. Proposed Bidding Procedures

13. The Sale of the Seller Assets pursuant to the Stalking Horse Agreement is subject to higher and better offers. To ensure that the highest or otherwise best offer is received for the

Seller Assets, the Debtors established the proposed Bidding Procedures to govern the submission of competing bids at an Auction. Accordingly, the Debtors seek the Court's approval of the Bidding Procedures set forth in Exhibit 1 to the Bidding Procedures Order and incorporated herein in their entirety by this reference.

14. The Debtors' proposed timeline with respect to the Bidding Procedures, the Auction, the Sale Hearing, and the Sale is as follows:⁶

- Entry of the Bidding Procedures Order on or prior to July 8, 2016;
- Submission of additional bids by July 22, 2016 at 4:00 p.m. (Prevailing Eastern Time);
- Conduct the Auction on July 25-26, 2016;
- Entry of the Sale Order on or prior to July 27, 2016; and
- Closing of the Sale on or before August 15, 2016.

15. As noted above, the Debtors believe that the forgoing proposed timeline provides more than sufficient time to consummate a sale that will provide the Debtors' estates with the highest price for the Seller Assets given the fulsome marketing process that has already taken place.

16. Certain of the key terms of the Bidding Procedures are highlighted below, in accordance with Local Rule 6004-1(c):

Assets to be Sold (Local Rule 6004-1(c)(i)(B)(2))	The Auction shall consist of substantially all of the assets owned by the Debtors excluding only the Excluded Assets (as defined in the Stalking Horse Agreement); <i>provided, however</i> , that the Debtors reserve the right to accept bids for less than substantially all of the Assets. A bidder may offer to purchase all or substantially all of the Seller Assets or only a portion of the Seller Assets; <i>provided</i> that the Debtors determine that the aggregate consideration offered by any bid or combination of bids for all
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⁶ The dates in this timeline are subject to the terms of the Bidding Procedures Order and the Bidding Procedures.

	or substantially all of the Seller Assets satisfies the “Minimum Bid” requirements set forth in the Bidding Procedures.
Stalking Horse Bid	The Purchase Price to be paid for the acquisition of the Seller Assets shall be an amount in cash equal to \$19,750,000, inclusive of Cure Costs not to exceed \$5,000,000, and subject to a Holdback until December 1, 2016 of \$1,975,000.
Due Diligence	<p>Upon execution of a confidentiality agreement, in form and substance satisfactory to the Debtors, any qualified party that wishes to conduct due diligence on the Seller Assets may be granted access to information that has been or will be provided to other bidders subject to these Bidding Procedures.</p> <p>For a party to be considered a “qualified party,” such party must demonstrate to the Debtors a reasonable likelihood of an ability to close on a purchase of the Seller Assets in a timely manner in accordance with the terms of the Bidding Procedures. The Debtors may, in their discretion and in the exercise of their business judgment, require that such parties demonstrate the legitimacy of their interest by, among other things, requiring them to (a) submit a binding letter of intent signed by an authorized representative of such party and (b) provide proof of access to funds and/or committed capital sufficient to finance the proposed transaction. Additionally, the “material information” to be provided to such qualified parties will be information that the Debtors reasonably believe is appropriate in light of the Debtors’ need to protect its trade secrets and confidential research, development, and commercial information.</p>
Required Bid Materials (Local Rule 6004-1(c)(i)(A), (B))	<p>To participate in the bidding process and be deemed a “<u>Qualified Bidder</u>,” each potential bidder (or group acting together as a bidder) other than the Stalking Horse Buyer must deliver a written offer, that:</p> <ol style="list-style-type: none"> 1. states that such bidder offers to purchase all or certain of the Seller Assets, with a specific indication of which Seller Assets are subject to the bid; 2. is based on the Stalking Horse Agreement and includes executed transaction documents (including a definitive purchase agreement and all schedules and exhibits thereto), signed by an authorized representative of such bidder, pursuant to which the bidder proposes to effectuate an alternate transaction (the “<u>Bidder Agreement</u>”), and such Bidder Agreement shall also include a copy of the Bidder Agreement marked against the Stalking Horse Agreement to show all changes requested by the bidder (including those related to the consideration to be paid for the Seller Assets and to remove all provisions that apply only to the Stalking Horse Buyer as the stalking horse bidder);

	<p>3. includes a summary term sheet with the material terms of the bid;</p> <p>4. for any bid for the Seller Assets, or any portion of the Seller Assets, proposes a Purchase Price (as defined in the Stalking Horse Agreement) that is a higher and/or better offer for the Seller Assets or the applicable portion thereof (as compared to the offer of the Stalking Horse Buyer). In addition, any bid for the Seller Assets must also provide either (1) the identical assumption of Assumed Liabilities as the Stalking Horse Buyer has offered or (2) cash in an amount equal to the Assumed Liabilities that will be assumed and/or paid by the Stalking Horse Buyer, respectively (the “<u>Cash Portion</u>”).</p> <p>5. is irrevocable until and unless the Debtors accept a higher or otherwise better Qualified Bid and the bidder is not selected as the Back-Up Bidder (as defined in the Bidding Procedures);</p> <p>6. does not request any expense reimbursement, break-up fee, “topping,” termination, contribution, or other similar fee or payment;</p> <p>7. contains such financial and other information that will reasonably allow the Debtors to make a determination as to the bidder’s financial and other capabilities to consummate the transactions contemplated by the Bidder Agreement, including:</p> <ul style="list-style-type: none"> (i) contact names and numbers for verification of financing sources; (ii) evidence of such bidder’s internal resources and proof of unconditional debt or equity funding commitments from a recognized financial institution in the amount of the cash portion of such bid or the posting of an irrevocable letter of credit from a recognized financial institution issued in favor of the Debtors in the amount of the cash portion of such bid, in each case, as are needed to consummate the Bidder Agreement; (iii) such bidder’s current financial statements (audited if they exist) or other similar financial information reasonably acceptable to the Debtors; (iv) such financial and other information setting forth adequate assurance of future performance under Bankruptcy Code Section 365 in a form requested by the Debtors to allow the Debtors to serve on counterparties to any contracts or leases being assigned or both assumed and assigned in connection with the proposed sale in a timely manner so as to not disrupt the sale process; and
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	<p>(v) any such other form of financial disclosure or credit-quality support information or enhancement reasonably acceptable to the Debtors, demonstrating that such Bidder has the ability to consummate the Bidder Agreement;</p> <p>8. contains such information requested by the Debtors, including any and all executory contracts and unexpired leases of the Debtors that the bidder wishes to have assumed and assigned to it pursuant to the Bidder Agreement and the corresponding Cure Amounts, which information is satisfactory to the Debtors;</p> <p>9. contains such information requested by the Debtors regarding the identity of each entity that will be bidding for the Seller Assets or otherwise participating in connection with such bid, and the complete terms of any such participation, which information is satisfactory to the Debtors;</p> <p>10. includes evidence of authorization and approval from the bidder's board of directors (or comparable governing body) with respect to the submission, execution, delivery, and closing of the Bidder Agreement, which evidence is satisfactory to the Debtors;</p> <p>11. includes covenants and conditions, if any, reasonably acceptable to the Debtors, but under no circumstances shall a bid be conditioned on the obtaining or the sufficiency of financing or any internal or credit committee approval, syndication requirements, or on the outcome or review of due diligence, but may be subject to the accuracy at the closing of specified representations and warranties or the satisfaction at the closing of specified conditions, all of such shall be specifically set forth in the Bidder Agreement and shall not be more burdensome to the Debtors' estate than those set forth in the Stalking Horse Agreement; and</p> <p>12. is accompanied by a good faith cash deposit in an amount no less than 10% of the Purchase Price set forth in the Bidder Agreement, which shall be deposited in an escrow account to be established by the Debtors subject to an escrow agreement satisfactory to the Debtors, and which shall be credited against the Purchase Price.</p> <p>A competing bid meeting the above requirements, as may be supplemented by the Debtors shall constitute a Qualified Bid.</p>
Modifications of Bids (Local Rule 6004-1(c)(i)(B), (E))	Between the date that the Debtors notify a bidder that it is a Qualified Bidder and the Auction, the Debtors may discuss, negotiate, or seek clarification of any Qualified Bid from a Qualified Bidder. Without the written consent of the Debtors, a Qualified Bidder may not modify, amend, or withdraw its Qualified Bid, except for proposed amendments to increase the consideration contemplated by, or otherwise improve the terms of, the Qualified Bid, during

	the period of time such Qualified Bid remains binding as specified in the Stalking Horse Agreement; <i>provided</i> that any Qualified Bid may be improved at the Auction.
Deposits and Back-Up Bids (Local Rule 6004-1(c)(i)(B))	Following the Sale Hearing, if the Prevailing Purchaser fails to consummate a sale in accordance with the Prevailing Bid because of a breach or failure to perform on the part of such Prevailing Purchaser, the Debtors are authorized to deem the Back-Up Bidder to be the new “Prevailing Purchaser,” and the Debtors will be authorized, but not required, to consummate a sale with the Back-Up Bidder as contemplated by the Back-Up Bid without further order of the Bankruptcy Court. In such case, (a) the defaulting Prevailing Purchaser’s deposit, if any, shall be forfeited to the Debtors and (b) all parties in interest, and the Debtors specifically, reserve the right to seek all available damages from the defaulting Prevailing Purchaser.
Breakup Fee and Expense Reimbursement (Local Rule 6004-1(c)(2))	Expense reimbursement for the benefit of the Stalking Horse Buyer is permitted upon certain triggering conditions, not to exceed \$250,000. The Stalking Horse Buyer is also entitled to a Breakup Fee of 3% of the Purchase Price, which shall have administrative priority pursuant to Bankruptcy Code Sections 503(b) and 507(b).
Bidding Increments (Local Rule 6004-1(c)(3))	For any bid for the Seller Assets, or any portion of the Seller Assets, bidder must propose a Purchase Price that is a higher and/or better offer for the Seller Assets or the applicable portion thereof (as compared to the offer of the Stalking Horse Buyer), and such offer shall not be considered a higher and/or better offer unless such offer proposes a minimum cash Purchase Price equal to or greater than (i) the Purchase Price set forth in the Stalking Horse Agreement, plus (ii) \$1,000,000. In addition, any bid for the Seller Assets must also provide either (1) the identical assumption of Assumed Liabilities as the Stalking Horse Buyer has offered or (2) cash in an amount equal to the Assumed Liabilities that will be assumed and/or paid by the Stalking Horse Buyer, respectively (the “ Cash Portion ”). Any Overbid after and above the Auction Baseline Bid shall be made in increments valued at not less than \$500,000.00 of the Auction Baseline Bid.
Modification to Bidding Procedures (Local Rule 6004-1(c)(i)(D))	The Debtors reserve their rights, in the exercise of their fiduciary obligations, (a) to modify the Bidding Procedures or impose, at or prior to the Auction, different and/or additional terms and conditions on the sale of the Seller Assets and (b) to announce at the Auction additional procedural rules that are reasonable under the circumstances for conducting the Auction; <i>provided</i> that, in the case of both (a) and (b), such modifications or rules (i) are not inconsistent in any material respect with, and do not violate, the Bidding Procedures or the Stalking Horse Agreement and (ii) do not impair or modify the Stalking Horse Buyer’s rights and obligations hereunder or under the Stalking Horse Agreement (unless the Stalking Horse Buyer provides written consent to such modifications or rules); <i>provided further</i> , that neither the Creditor Constituencies nor the Debtors may waive any conditions to a bid being a Qualified Bid set forth in Section 4 above without the prior consent of

	the Stalking Horse Buyer, such as not to be unreasonably withheld, conditioned, or delayed.
Qualified Bidder (Local Rule 6004-1(c)(i)(B))	A Potential Bidder that submits a Qualified Bid (a “ Qualified Bidder ”) shall be entitled to participate in the Auction. The Debtors reserve the right to contact bidders before or after the Bid Deadline to discuss or clarify the terms of their bid and to indicate any terms which may need to be modified in order to conform the bid to a Qualified Bid or otherwise evaluate the bid. The Debtors further reserve the right, after consultation with the Consultation Parties, to waive any of the requirements for a Qualified Bid. Within two (2) business days after the Bid Deadline, the Debtors shall inform each Potential Bidder that has submitted a bid whether it is a Qualified Bidder. For the avoidance of doubt, (i) the Stalking Horse Buyer shall be considered both a Potential Bidder and a Qualified Bidder, (ii) the Stalking Horse Agreement shall constitute a Qualified Bid for all purposes under these Bid Procedures, and (iii) the Stalking Horse Buyer shall not be required to make a Deposit.
Back-Up Bidder (Local Rule 6004-1(c)(i)(E))	<p>If an Auction is conducted, the party with the Qualified Bid that is next highest or otherwise best to the Prevailing Bid at the Auction, as determined by the Debtors, shall be required to serve as a back-up bidder (the “Back-Up Bid” and the “Back-Up Bidder,” respectively) and keep such bid open and irrevocable until 11:59 p.m. (Prevailing Eastern Time) on the date that is the earliest of (a) sixty (60) days after the date of the Sale Hearing, (b) such date upon which the Debtors, in consultation with the Creditor Constituencies, will notify the Back-Up Bidder, and (c) the closing of the sale transaction with the Prevailing Purchaser.</p> <p>Following the Sale Hearing, if the Prevailing Purchaser fails to consummate a sale in accordance with the Prevailing Bid because of a breach or failure to perform on the part of such Prevailing Purchaser, the Debtors are authorized to deem the Back-Up Bidder to be the new “Prevailing Purchaser,” and the Debtors will be authorized, but not required, to consummate a sale with the Back-Up Bidder as contemplated by the Back-Up Bid without further order of the Bankruptcy Court.</p>

VI. Proposed Assumption Procedures

17. To facilitate and effect the sale of the Seller Assets, the Debtors seek authority to assume and assign certain of the Debtors’ contracts and unexpired leases (each, a “**Contract or Lease**” and, collectively, the “**Contracts and Leases**”), consistent with the procedures established in the Bidding Procedures Order and the Stalking Horse Agreement

(the “**Assumption Procedures**”). The Debtors propose that the Assumption Procedures apply whether the Stalking Horse Buyer or another party is the Prevailing Purchaser.

18. The proposed Assumption Procedures are as follows:

- (a) **Notice.** Within one business day after entry of the Bidding Procedures Order, the Debtors will serve the notice attached as **Exhibit C** to the Motion (the “**Cure Notice**”) on all non-Debtor counterparties to the Debtors’ Contracts and Leases (the “**Contract Parties**”).
- (b) **Content of the Cure Notice.** The Cure Notice will include the following information: (i) the title of the Contract or Lease to be assumed; (ii) the name of the counterparty to the Contract or Lease; (iii) any applicable cure amounts, whether arising prepetition or post-petition (the “**Cure Amount**”); and (iv) the deadline by which any such Contract Party must object to the assumption or assignment of such Contract or Lease.
- (c) **Objections.** Objections to the proposed Cure Amount and adequate assurance of future performance obligations to the Contract Parties must: (i) be in writing; (ii) set forth the nature of the objector’s claims against or interests in the Debtors’ estate and the basis for the objection and the specific grounds therefor; (iii) comply with the Federal Rules of Bankruptcy Procedure (the “**Bankruptcy Rules**”) and orders of this Court; and (iv) be filed with the Court and served upon the Debtors, the Stalking Horse Buyer, the United States Trustee for the District of Delaware, and counsel for any statutory committee appointed in the Chapter 11 Cases so as to be received by the Sale Objection Deadline (or the 14th day after the date of serving the Cure Notice if the applicable Contract or Lease is added later).
- (d) **Effects of Objecting to a Cure Notice.** A properly filed and served objection to a Cure Notice will reserve such objecting party’s rights against the Debtors with respect to the relevant cure objection but will not constitute an objection to the remaining relief requested in the Motion.

JURISDICTION

19. The Court has jurisdiction to consider this Motion pursuant to 28 U.S.C. §§ 157 and 1334(b), and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware dated as of February 29, 2012. This is a core proceeding pursuant to 28 U.S.C. § 157(b) and the Court may enter a final order consistent with Article III of the United States Constitution. Venue of these cases and this Motion in this district is proper

under 28 U.S.C. §§ 1408 and 1409. The statutory and legal predicates for the relief requested herein are Bankruptcy Code Sections 105(a), 363, and 365 and Bankruptcy Rules 2002, 3007, 6004, 6006, 9007, and 9014.

RELIEF REQUESTED

20. By this Motion, the Debtors seek entry of the Bidding Procedures Order (a) approving the Bidding Procedures, (b) approving certain bid protections in connection therewith, (c) approving the form and manner of notice of the proposed sale transactions, the Bidding Procedures, the Auction, and the Sale Hearing, (d) authorizing the Debtors to hold the Auction, (e) scheduling the Sale Hearing, (f) authorizing procedures governing the assumption and assignment of the Assigned Contracts, and (g) granting related relief.

21. The Debtors also seek entry of the Sale Order (a) approving the Stalking Horse Agreement or such other purchase agreement between the Debtors and the Prevailing Purchaser at the Auction, (b) authorizing the Sale of the Seller Assets and the assumption and assignment of the Assigned Contracts to the Stalking Horse Buyer (or its designee) or such other Prevailing Purchaser at the Auction free and clear of all Liens, other than any Permitted Encumbrances, as set forth in the Stalking Horse Agreement, or any permitted Liens, as set forth in the purchase agreement with the Prevailing Purchaser, and (c) granting related relief.

BASIS FOR RELIEF

I. Approval of the Bidding Procedures is Appropriate and in the Best Interests of the Debtors' Estate.

A. The Proposed Notice of Sale, Bidding Procedures, Auction, and Sale Hearing are Appropriate.

22. Under Bankruptcy Rule 2002(a) and (c), the Debtors are required to notify creditors of the proposed sale of the Seller Assets, including disclosure regarding the Auction, the terms and conditions of the Sale, and the deadline for filing any objections. The Debtors

request notice of the Sale, the Auction, the Sale Hearing, and the Bidding Procedures Order be deemed adequate and sufficient if:

- (a) No later than one (1) business day after the entry of the Bidding Procedures Order, the Debtors (or its agent) serve by first class mail, postage prepaid, copies of (i) the Bidding Procedures Order, (ii) the Bidding Procedures, and (iii) a notice regarding the Sale (the “**Sale Notice**”), substantially in the form attached hereto as **Exhibit D**,⁷ on the following entities (collectively, the “**Notice Parties**”) and those entities and individuals appearing on the Debtors’ creditor matrix:
 - (1) the Office of the United States Trustee for the District of Delaware;
 - (2) the creditors listed on the Consolidated List of Creditors Holding 30 Largest Unsecured Claims appended to the Debtors’ Chapter 11 petitions;
 - (3) counsel to the Prepetition Lender;
 - (4) counsel to the Stalking Horse Buyer;
 - (5) counsel for any statutory committee appointed in the Chapter 11 Cases;
 - (6) the United States Attorney for the District of Delaware;
 - (7) the attorneys general for each of the states in which the Debtors conduct a substantial amount of business operations;
 - (8) the Internal Revenue Service;
 - (9) all known taxing authorities for the jurisdictions to which the Debtors are subject;
 - (10) the United States Department of Justice;
 - (11) all entities known or reasonably believed to have asserted a Lien on any of the Seller Assets;

⁷ In accordance with Bankruptcy Rule 2002(c)(1), the Sale Notice will include, among other things: (a) a description of how the Auction will be scheduled and the date, time, and place of the Sale Hearing; (b) a summary of certain of the terms and conditions of the Sale; (c) the time fixed for filing objections to the Sale; and (d) a description that the Sale of the Seller Assets is free and clear of all Liens other than (a) any Permitted Encumbrances as set forth in the Stalking Horse Agreement or (b) any permitted Liens as set forth in the purchase agreement with the Prevailing Purchaser. The Sale Notice and Publication Notice (as defined herein) also will direct parties to access the website of the Debtors’ claims and noticing agent, Prime Clerk, LLC, <https://cases.primeclerk.com/BIND>. The Sale Notice and Publication Notice will provide that any party that wishes to obtain a copy of this Motion (and any related documents) may make such a request in writing to Latham & Watkins LLP, 355 South Grand Avenue, Los Angeles, CA 90071-1560 (Attn: Kathryn Bowman).

- (12) all creditors who are known to have or have asserted in writing secured claims;
 - (13) counterparties to the Debtors' Contracts and Leases;
 - (14) all persons that have expressed to the Debtors or Cowen an interest in a transaction with respect to the Seller Assets during the past six (6) months; and
 - (15) those parties who have formally filed a request for notice in the Chapter 11 Cases pursuant to Bankruptcy Rule 2002.
- (b) No later than ten (10) business days after the entry of the Bidding Procedures Order, the Debtors also will publish a notice (the "**Publication Notice**"), substantially in the form of **Exhibit E** hereto, in the *Boston Globe*.

23. In addition, the Debtors request the establishment of an objection deadline prior to the Sale Hearing such that that any objections related to the proposed Sale be served upon (such as to be **received** by) the following parties (the "**Objection Notice Parties**") **on or before 4:00 p.m. (Prevailing Eastern Time) on July 20, 2016** (the "**Sale Objection Deadline**"):

- (a) counsel to the Debtors, (i) Latham & Watkins LLP, 355 South Grand Avenue, Los Angeles, CA 90071-1560 (Attn: Peter M. Gilhuly, Esq.), and (ii) Richards Layton & Finger, P.A., One Rodney Square, 920 North King Street, Wilmington, DE 19801 (Attn: John H. Knight, Esq.);
- (b) the Office of the United States Trustee for the District of Delaware, 844 King Street, Suite 2207, Lockbox 35, Wilmington, DE 19801 (Attn: Mark Kenny);
- (c) counsel to the Prepetition Lender, Cole Schotz P.C., 25 Main Street, Hackensack, NJ 07601 (Attn: Stuart Komrower);
- (d) counsel to the Stalking Horse Buyer, DLA Piper, 1251 Avenue of the Americas, New York, NY 10020-1104 (Attn: Thomas Califano, Esq.);
- (e) counsel to the statutory committee appointed in the Chapter 11 Cases, if one is appointed; and
- (f) those parties who have formally filed requests for notice in the Chapter 11 Cases pursuant to Bankruptcy Rule 2002.

24. The Debtors submit that the foregoing notice and Sale Objection Deadline comply fully with Bankruptcy Rule 2002 and are reasonably calculated to provide timely and adequate

notice of the Bidding Procedures, the Auction, the Sale Hearing, and the Sale to the Debtors' creditors and other parties in interest, and, if the Debtors believe that additional entities have a legitimate interest, then also to those who have expressed an interest, or may express an interest, in bidding on the Seller Assets. Based upon the foregoing, the Debtors respectfully request that this Court approve the notice procedures and the Sale Objection Deadline proposed above.

B. The Bidding Procedures are Appropriate and Will Maximize Value Received in Sale of Seller Assets.

25. Courts have made clear that a debtor's business judgment is entitled to substantial deference with respect to the procedures to be used in selling assets from the estate. *See, e.g., In re Efoora, Inc.*, 472 B.R. 481, 488 (Bankr. N.D. Ill. 2012) ("A trustee has considerable discretion when it comes to the sale of estate assets, and that discretion is entitled to great judicial deference as long as a sound business reason is given.") (internal quotations and citations omitted).

26. The paramount goal in any proposed sale of property of the estate is to maximize the proceeds received by the estate. *See, e.g., Corp. Assets, Inc. v. Paloian*, 368 F.3d 761, 765 (7th Cir. 2004) (in a bankruptcy sale, the "governing principle . . . is to secure the highest price for the benefit of the estate and creditors").

27. To that end, courts uniformly recognize that procedures intended to enhance competitive bidding are consistent with the goal of maximizing the value received by the estate and, therefore, are appropriate in the context of bankruptcy sales. *See, e.g., Calpine Corp. v. O'Brien Env'tl. Energy, Inc. (In re O'Brien Env'tl. Energy, Inc.)*, 181 F.3d 527, 537 (3d Cir. 1999); *Official Comm. of Subordinated Bondholders v. Integrated Res. Inc. (In re Integrated Res. Inc.)*, 147 B.R. 650, 659 (S.D.N.Y. 1992) (observing that bidding procedures "encourage bidding and . . . maximize the value of the debtor's assets").

28. The Debtors believe that the Bidding Procedures will establish sound parameters by which the proffered sale price of the Seller Assets may be tested at the Auction, as well as the ensuing Sale Hearing, and evaluated as described herein. Such procedures will increase the likelihood that the Debtors will receive the greatest possible consideration for the Seller Assets in a sale because they will ensure a competitive and fair bidding process. The Bidding Procedures will also allow the Debtors to undertake the Auction process in an orderly fashion, which the Debtors believe is essential to maintaining and maximizing the value of its estate.

29. The Debtors believe that the Auction and proposed Bidding Procedures promote active bidding from seriously interested parties and will dispel any doubt as to the best or otherwise highest offer reasonably available at this time for the purchase of the Seller Assets. Moreover, the proposed Bidding Procedures will allow the Debtors to conduct the Auction in a controlled, fair, and open fashion that will encourage participation by financially capable bidders who demonstrate the ability to close a transaction. The Debtors believe that the Bidding Procedures will encourage bidding for the Seller Assets, are consistent with other procedures previously approved by courts in this and other circuits, and are appropriate under the relevant standards governing auction proceedings and bidding incentives in bankruptcy proceedings.

30. Thus, the proposed Bidding Procedures are reasonable, appropriate, and within the Debtors' sound business judgment under the circumstances because they will serve to maximize the value that the Debtors will obtain on account of the Sale of the Seller Assets.

C. The Initial and Subsequent Overbid Amounts are Appropriate.

31. One important component of the Bidding Procedures is the "overbid" provision. For a bid to be considered a Qualified Bid (as defined in the Bidding Procedures), it must be in a cash amount equal to or in excess of (i) the Purchase Price set forth in the Stalking Horse

Agreement, *plus* (ii) \$1,000,000.00 (such amounts, in the aggregate, the “**Initial Minimum Overbid**”). Courts frequently authorize debtors to require bidders to submit minimum initial bids to ensure that the debtors receive the highest and best offers possible in asset sales. *See, e.g., In re Grede Foundries, Inc.*, Case No. 09-14337 (RDM) (Bankr. W.D. Wis. Nov. 25, 2009) (authorizing minimum initial bid of \$500,000, or .47% of purchase price, plus break-up fees and certain other costs and expenses of approximately \$1.95 million).

32. In addition, the Debtors intend to conduct the Auction such that each bid at the Auction is higher or otherwise better than the previous bid. To this end, incorporating the concept of overbids in the Bidding Procedures is reasonable under the circumstances and will enable the Debtors to maximize the value for the sale of their assets while limiting any chilling effect on the Sale process.

D. The Bid Protections Have a Sound Business Purpose and Should be Approved.

33. The Debtors are also requesting approval of a Breakup Fee in the amount of \$592,500 and up to \$250,000 in expense reimbursement to reimburse the Stalking Horse Buyer for its reasonable out-of-pocket costs and expenses incurred in connection with the Sale (the “**Expense Reimbursement**” and, together with the Breakup Fee, the “**Bid Protections**”); *provided* that, the Expense Reimbursement shall only be paid upon the occurrence of certain “triggering events,” which are described in the Stalking Horse Agreement and which are typical and customary for transactions of this kind,.

34. Bidding procedures should be approved when they provide a benefit to the estate by maximizing the value of the assets. *See Calpine Corp.*, 181 F.3d at 535-37 (detailing situations where bidding incentives are appropriate in bankruptcy because they provide a benefit to the estate.); *In re Edwards*, 228 B.R. 552, 561 (Bankr. E.D. Pa. 1998) (“The purpose of

procedural bidding orders is to facilitate an open and fair public sale designed to maximize value for the estate.”).

35. The paramount goal in any proposed sale of property of a debtor’s estate is to maximize the proceeds received by the estate. *See In re Mushroom Transp. Co., Inc.*, 382 F.3d 325, 339 (3d Cir. 2004) (debtor-in-possession “had a fiduciary duty to protect and maximize the estate’s assets”); *Official Comm. of Unsecured Creditors of Cybergenics Corp., v. Chinery*, 330 F.3d 548, 573 (3d Cir. 2003) (same).

36. To that end, procedures intended to enhance competitive bidding are consistent with the goal of maximizing the value received by the estate and therefore are appropriate in the context of bankruptcy sales. *See Calpine Corp.*, 181 F.3d at 537; *Integrated Res., Inc.*, 147 B.R. at 659 (bidding procedures “encourage bidding and . . . maximize the value of the debtor’s assets”).

37. The Debtors seek court approval to pay the Stalking Horse Buyer the Breakup Fee and Expense Reimbursement in the event that the Stalking Horse Buyer is not the Prevailing Purchaser. The Breakup Fee is payable solely out of the sale proceeds at the time of the closing of a transaction to the Prevailing Purchaser. The Debtors submit that the Breakup Fee and Expense Reimbursement are actual, necessary costs of preserving their estates. *See In re Dura Auto. Sys.*, No. 06-11202 (KJC), 2007 Bankr. LEXIS 2764, *255-257 (Bankr. D. Del. Aug. 15, 2007).

38. The Debtors believe that the Bid Protections induced two serious bids, despite a compressed timeframe for substantial due diligence and negotiations. From 14 indications of interest, the Debtors narrowed their focus on 9 potential bidders, which parties then conducted significant additional due diligence, and 2 of which submitted formal offers. In the final asset

purchase negotiations, the parties proceeded through vigorous and competitive negotiations without any assurance of compensation for their efforts. Without the Bid Protections, participation in the diligence, bidding and negotiation processes would likely have been significantly reduced. The Bid Protections were not used by the Debtors to favor one bidder over another, nor to favor one bidder over participants in the Auction. In addition, the Bid Protections played a material role in inducing the Stalking Horse Buyer to enter into the binding Stalking Horse Agreement, thereby, in addition to setting a minimum price for the Seller Assets, providing a baseline asset purchase agreement upon which other bidders can rely.

39. Courts in this district have approved bidding protections in other Section 363 asset sales. *See, e.g., In re Allied Nevada Gold Corp.*, Case No. 15-10503 (MFW) (Bankr. D. Del. Apr. 24, 2015) (combined breakup fee and expense reimbursement of 2.5% of purchase price); *In re A123 Sys., Inc.*, Case No. 12-12859 (KJC) (Bankr. D. Del. Nov. 8, 2012) (breakup fee of approximately 3% of sale price); *In re Lang Holdings, Inc.*, Case No. 09-12543 (KJC) (Bankr. D. Del. Oct 1, 2009) (approving a combined break-up fee and expense reimbursement of 5% of the purchase price); *In re Global Motorsport Grp., Inc.*, Case No. 08-10192 (KJC) (Bankr. D. Del. Feb. 14, 2008) (breakup fee of approximately 4% of sale price); *In re New Century TRS Holdings, Inc.*, Case No. 07-10416 (KJC) (Bankr. D. Del. Apr. 12, 2007) (approximately 2% breakup fee awarded on \$47.25 million stalking horse bid); *In re Tweeter Home Entertainment Group, Inc.* Case No. 07-10787 (PJW) (Bankr. D. Del. June 26, 2007) (authorizing Debtors to offer up to 3% breakup fee if asset purchase agreement executed by a deadline).

40. The Bid Protections enable the Debtors to secure an adequate floor for the Seller Assets, thereby ensuring that competing bids will be materially higher or otherwise better than consideration provided for in the Stalking Horse Agreement – a clear benefit to the Debtors’

estates. Without the Stalking Horse Buyer, the bids received at the Auction for the Seller Assets could be substantially lower than the Stalking Horse Buyer's offer, especially if no (or few) other Qualified Bidders appear at the Auction. In addition, payment of the Bid Protections will not diminish the Debtors' estates to the extent the Breakup Fee becomes payable only as a result of the Debtors' consummation of an Alternative Transaction, as the Bidding Procedures require that any initial Qualified Bid exceed the bid of the Stalking Horse Buyer by an amount in excess of the Bid Protections.

41. The Stalking Horse Buyer requires the Bid Protections as a precondition to entering into the Stalking Horse Agreement, and the Debtors believe offering the Bid Protections to the Stalking Horse Buyer will likely maximize the realizable value of the Seller Assets for the benefit of the Debtors' estate, their creditors, and other parties in interest. Accordingly, the Debtors believe that the Bid Protections are fair and appropriate under the circumstances and should be approved.

E. The Proposed Notice Procedures for the Assigned Contracts and Leases and the Identification of Related Cure Amounts are Appropriate.

42. As part of the Motion, the Debtors also seek authority to assume and assign the Assigned Contracts to the Stalking Horse Buyer or such other Prevailing Purchaser. Except as may otherwise be agreed to in the Prevailing Bid (as defined in the Bidding Procedures) or by the Contract Parties, at the Closing of the Sale, the Stalking Horse Buyer or the Prevailing Purchaser shall cure those defaults under the Assigned Contracts that need to be cured in accordance with Bankruptcy Code Section 365(b) by payment of such Cure Amount.

43. In addition, the Debtors request the authority to determine which of the Contracts and Leases not included as Assigned Contracts that it will assume and assign or reject. Pursuant to the Stalking Horse Agreement, no later than two days after entry of the Bidding Procedures

Order, the Debtors will deliver to the Stalking Horse Buyer a complete list of all Contracts and Leases (the “**Contract List**”) which relate to the Seller Assets and which shall describe corresponding cure amounts (the “**Proposed Cure Costs**”). In addition, no later than one (1) business day after entry of the Bidding Procedures Order, the Debtors will serve a copy of the Contract List on the Notice Parties, and, as stated herein, the Cure Notice will be served upon the Contract Parties as soon as is practical after the entry of the Bidding Procedures Order. To the extent that there are disputes regarding any of the Proposed Cure Costs included in the Contract List, the Stalking Horse Buyer and the Debtors may resolve such dispute by mutual agreement with the non-Debtor contract party and entry of an order of the Court regarding the same or by seeking recourse from the Court.

44. The Stalking Horse Buyer or other Prevailing Purchaser may designate in writing any Contract or Lease to be assigned to it under the Stalking Horse Agreement or the purchase agreement with the Prevailing Purchaser by the date that is three (3) calendar days before the Auction, and the Debtors shall file, but not serve, a list of all such designated Contracts or Leases no later than three (3) calendar days prior to the Auction; *provided, however*, that the foregoing shall not restrict the Stalking Horse Buyer’s or other Prevailing Purchaser’s ability to designate additional Contracts or Leases.

45. In the event of a timely filed objection by a Contract Party regarding: (a) any Cure Amount with respect to any of the Contracts and Leases; (b) the ability of the Prevailing Purchaser(s) (including the Stalking Horse Buyer or such other Prevailing Purchaser) to provide adequate assurance of future performance as required by Bankruptcy Code Section 365, if applicable, under a Contract or Lease; or (c) any other matter pertaining to assumption or assignment, the Cure Amounts owed to such Contract Party shall be paid as soon as reasonably

practicable after the later of (i) the effective date of the assumption and assignment of such Contract or Lease and (ii) the entry of a final order that resolves the dispute and approves the assumption and assignment of such Contract or Lease.

46. If a Contract Party does not object to: (a) the Cure Amount for its Contracts and Leases; (b) the ability of the Prevailing Purchaser(s) (including the Stalking Horse Buyer or such other Prevailing Purchaser) to provide adequate assurance of future performance as required by Bankruptcy Code Section 365; or (c) any other matter pertaining to assumption or assignment, then the Cure Amounts owed to such Contract Party shall be paid as soon as reasonably practicable after the effective date of the assumption and assignment of such Contract or Lease.

47. Further, no later than the earlier of (a) the Closing Date and (b) the deadline ordered by the Court to assume or reject such Contract or Lease, the Stalking Horse Buyer or other Prevailing Purchaser may designate additional Contracts or Leases, which had not previously been designated for assumption and assignment, to be assumed and assigned to the Stalking Horse Buyer or other Prevailing Purchaser. If the Stalking Horse Buyer or other Prevailing Purchaser designates a Contract or Lease for assumption and assignment after the Closing, the Stalking Horse Buyer or other Prevailing Purchaser shall file and serve the applicable Contract Party with notice of the proposed assumption and assignment and the proposed Cure Amount for such Contract or Lease. The Contract Party shall have fourteen (14) calendar days from such date to serve upon the Objection Notice Parties an objection to amounts that became Cure Amounts after the date the Cure Notice was served on the applicable Contract Party only. If the Contract Party does not serve a timely objection upon the Objection Notice Parties, then the Contract or Lease can be assumed and assigned with no further notice or hearing before this Court, and such Contract Party shall forever be barred and estopped from objecting (i)

to the proposed Cure Amount as the amount to cure all defaults to satisfy Bankruptcy Code Section 365 and from asserting that any additional amounts are due or defaults exist; (ii) that any conditions to assumption and assignment must be satisfied under such Contract or Lease before it can be assumed and assigned or that any required consent to assignment has not been given; or (iii) that the Stalking Horse Buyer or other Prevailing Purchaser has not provided adequate assurance of future performance as contemplated by Bankruptcy Code Section 365.

48. The Proposed Cure Costs associated with the assumption and assignment of such additional Contracts or Leases shall be paid by the Debtors, up to \$5,000,000 under the Stalking Horse Agreement, as soon as practicable (a) after such Proposed Cure Costs are finally determined by the Bankruptcy Court or (b) after the effectiveness of the assumption and assignment of such Assigned Contract, whichever is later.

II. Approval of the Proposed Sale Transaction is Appropriate and in Best Interest of the Debtors' Estates.

49. In accordance with Bankruptcy Rule 6004(f)(1), sales of property rights outside the ordinary course of business may be by private sale or public auction. The Debtors determined that a public Auction of the Seller Assets will enable the Debtors to obtain the highest or otherwise best offer in a sale of their assets at this time and is in the best interests of the Debtors, their estate, and their creditors.

A. The Sale of Seller Assets and Assigned Contracts Free and Clear of Liens is Authorized by Bankruptcy Code Section 363(f).

50. The Debtors further submit that it is appropriate to sell the Seller Assets and to assign the Assigned Contracts free and clear of all Liens, other than (a) any Permitted Encumbrances as set forth in the Stalking Horse Agreement or (b) any permitted Liens as set forth in the purchase agreement with the Prevailing Purchaser pursuant to Bankruptcy Code

Section 363(f), with any such Liens attaching to the net sale proceeds of the Seller Assets, as and to the extent applicable.

51. Bankruptcy Code Section 363(f) 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 interests;
- (2) such entity consents;
- (3) such interest is a lien and the price at which such property is to be sold is greater than the 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.

52. The Debtors believe that one or more of the tests of Bankruptcy Code Section 363(f) are satisfied with respect to the transfer of the Seller Assets and the assignment of the Assigned Contracts pursuant to the Stalking Horse Agreement. In particular, the Debtors believe that at least Bankruptcy Code Section 363(f)(2) will be met in connection with the transactions proposed under the Stalking Horse Agreement because the Debtors expect that the party holding Liens on the Seller Assets, the Prepetition Lender, will consent, or, absent any objection to this Motion, will be deemed to have consented to, the Sale.

B. If the Debtors Consummate a Sale of the Seller Assets, Such Assets Should be Sold or Assumed Free and Clear of Successor Liability.

53. The purchaser of the Seller Assets is unlikely to be liable for any of the Debtors' liabilities as a successor to the Debtors' business or otherwise, unless the purchaser expressly assumes such liabilities. Extensive case law exists providing that claims against the winning bidder are directed to the proceeds of a free and clear sale of property and may not subsequently be asserted against a buyer.

C. The Stalking Horse Buyer is a Good Faith Purchaser and is Entitled to the Full Protection of Bankruptcy Code Section 363(m) and the Transfer and Sale of Seller Assets Does Not Violate Bankruptcy Code Section 363(n).

54. The Debtors believe that the Stalking Horse Agreement has been submitted in good faith and has been, and will continue to be, negotiated in good faith and at arm's-length. Thus, the Stalking Horse Buyer is entitled to the full protections of Bankruptcy Code Section 363(m), which provides:

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

55. While the Bankruptcy Code does not define "good faith," several Circuit Courts have determined that:

The requirement that a purchaser act in good faith . . . speaks to the integrity of his conduct in the course of the sale proceedings. Typically, the misconduct that would destroy a purchaser's good faith status at a judicial sale involves fraud, collusion between the purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders.

In re Andy Frain Servs., Inc., 798 F.2d 1113, 1125 (7th Cir. 1986) (quoting *In re Rock Industries Machinery Corp.*, 572 F.2d 1195, 1198 (7th Cir. 1978); *In re Abbotts Dairies of Pennsylvania, Inc.*, 788 F.2d 143, 147 (3d Cir. 1986). There has been no fraud, improper insider dealing, or collusion in connection with the negotiation or submission of the Stalking Horse Agreement.

56. The Stalking Horse Buyer or other Prevailing Purchaser should receive the protections afforded good faith purchasers by Bankruptcy Code Section 363(m). Accordingly, the Debtors request that the Court make a finding at the Sale Hearing and in the Sale Order that

the purchase agreement reached with the Stalking Horse Buyer or other Prevailing Purchaser was at arm's-length and is entitled to the full protections of Bankruptcy Code Section 363(m).

D. Credit Bidding Should be Authorized Under Bankruptcy Code Section 363(k)

57. A secured creditor is allowed to “credit bid” the amount of its claim in a sale. Bankruptcy Code Section 363(k) 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 Bankruptcy Code Section 506(a), Section 363(k) 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.

58. Because the Prepetition Lender holds claims that are secured by the Seller Assets, the Prepetition Lender should be allowed to credit bid up to the face value of its secured claims if it chooses to bid on the Seller Assets. However, since the value of the Stalking Horse Buyer’s bid exceeds the amount of the Prepetition Lender’s claim and it is contemplated that the Prepetition Lender will be paid in full from the proceeds of the Sale, it is not expected that a credit bid will be made here.

E. Assumption and Assignment of the Assigned Contracts is Authorized by Bankruptcy Code Section 365.

59. Bankruptcy Code Sections 365(a) and (b) authorize a debtor-in-possession to assume, subject to the court’s approval, executory contracts or unexpired leases of the debtor. Under Bankruptcy Code Section 365(a), a debtor, “subject to the court’s approval, may assume or reject any executory contract or unexpired lease of the debtor.” 11 U.S.C. § 365(a).

Bankruptcy Code Section 365(b)(1), in turn, codifies the requirements for assuming an unexpired lease or executory contract of a debtor, providing that:

If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee —

- (A) cures, or provides adequate assurance that the trustee will promptly cure, such default . . . ;
- (B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and
- (C) provides adequate assurance of future performance under such contract or lease.

11 U.S.C. § 365(b)(1).

60. The standard applied by courts to determine whether an executory contract or unexpired lease should be assumed is the “business judgment” test, which requires a debtor to determine that the requested assumption or rejection would be beneficial to its estate. *See ReGen Capital I, Inc. v. UAL Corp. (In re UAL Corp.)*, 635 F.3d 312, 319 (7th Cir. 2011) (“The bankruptcy court reviews the debtor’s business judgment with respect to the proposed assumption to determine if it would be beneficial or burdensome to assume the executory contract by evaluating whether assumption would serve the reorganization or whether it would take away funds available to other creditors.”) (citing *Orion Pictures Corp. v. Showtime Networks, Inc. (In re Orion Pictures Corp.)*, 4 F.3d 1095, 1099 (2d Cir. 1993)); *In re Network Access Solutions, Corp.*, 330 B.R. 67, 75 (Bankr. D. Del. 2005).

61. To assist in the assumption, assignment, and sale of the Assigned Contracts, the Debtors also request that the Sale Order provide that anti-assignment provisions in the Assigned Contracts shall not restrict, limit, or prohibit the assumption, assignment, and sale of the

Assigned Contracts and are deemed and found to be unenforceable anti-assignment provisions within the meaning of Bankruptcy Code Section 365(f).

WAIVER OF BANKRUPTCY RULES 6004(a) AND 6004(h)

62. To implement the foregoing successfully, the Debtors seek a waiver of the notice requirements under Bankruptcy Rule 6004(a) and the 14-day stay of an order authorizing the use, sale, or lease of property under Bankruptcy Rule 6004(h). The Debtors and the Stalking Horse Buyer, if it is the Prevailing Purchaser and all other conditions precedent have been satisfied or waived, intend to seek authorization to close the sale of the Seller Assets within one (1) business day of entry of the Sale Order if there are no substantive objections to this Motion.

RESERVATION OF RIGHTS

63. Nothing contained herein is intended or should be construed as an admission of the validity of any claim against the Debtors, a waiver of the Debtors' rights to dispute any claim, or an approval or assumption of any agreement, contract, or lease under Bankruptcy Code Section 365. The Debtors expressly reserve their right to contest any invoice or claim related to the relief requested herein in accordance with applicable law.

CONSENT TO JURISDICTION

64. Pursuant to Local Rule 9013-1(f), the Debtors consent to the entry of a final judgment or order with respect to this Motion if it is determined that the Court would lack Article III jurisdiction to enter such final order or judgment absent consent of the parties.

NOTICE

65. The Debtors have provided notice of this Motion by either electronic mail, facsimile, or overnight mail to: (a) the Office of the United States Trustee for the District of Delaware; (b) the creditors listed on the Consolidated List of Creditors Holding 30 Largest Unsecured Claims appended to the Debtors' Chapter 11 petitions; (c) counsel to the Prepetition

Lender, (d) counsel to the Stalking Horse Buyer, (e) the United States Attorney for the District of Delaware; (f) the attorneys general for each of the states in which the Debtors conduct a substantial amount of business operations; (g) the Internal Revenue Service; and (h) those parties who have formally filed request for notice in the Chapter 11 Cases pursuant to Bankruptcy Rule 2002.

66. In addition, copies of the Sale Notice, the Bidding Procedures, and the Bidding Procedures Order will be served on the Notice Parties no later than one (1) business day after entry of the Bidding Procedures Order by this Court. In light of the nature of the relief requested herein, the Debtors submit that no other or further notice is required. A copy of the Motion also is available on the website of the Debtors' notice and claims agent, Prime Clerk, LLC at <https://cases.primeclerk.com/BIND>.

NO PRIOR REQUEST

67. No previous request for the relief sought herein has been made by the Debtors to this or any other court.

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WHEREFORE, the Debtors respectfully request that the Court enter an order, substantially in the form attached hereto as **Exhibit A**, granting the relief requested in the Motion and such other and further relief as may be just and proper.

Dated: July 1, 2016
Wilmington, Delaware

/s/ Amanda R. Steele

RICHARDS, LAYTON & FINGER, P.A.

John H. Knight (No. 3848)

Amanda R. Steele (No. 5530)

Brett M. Haywood (No. 6166)

One Rodney Square

920 North King Street

Wilmington, DE 19801

Telephone: (302) 651-7700

Facsimile: (302) 651-7701

Email: knight@rlf.com

steele@rlf.com

haywood@rlf.com

- and -

LATHAM & WATKINS LLP

Peter M. Gilhuly (admitted *pro hac vice*)

Kimberly A. Posin (admitted *pro hac vice*)

Adam E. Malatesta (admitted *pro hac vice*)

355 South Grand Avenue

Los Angeles, CA 90071-1560

Telephone: (213) 485-1234

Fax: (213) 891-8763

Email: peter.gilhuly@lw.com

kim.posin@lw.com

adam.malatesta@lw.com

Counsel for Debtors and Debtors-in-Possession