

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

In re:

CALIFORNIA PROTON TREATMENT  
CENTER, LLC,<sup>1</sup>

Debtor.

Chapter 11

Case No. 17-10477-LSS

**Hearing Date: April 12, 2017 at 10:00 a.m.**

**Objection Deadline: April 5, 2017 at 4:00 p.m.**

**MOTION OF THE DEBTOR FOR ENTRY OF  
(I) AN ORDER (A) APPROVING BIDDING PROCEDURES IN CONNECTION WITH  
THE SALE OF SUBSTANTIALLY ALL OF THE DEBTOR'S ASSETS,  
(B) APPROVING THE FORM AND MANNER OF NOTICE THEREOF,  
(C) SCHEDULING AN AUCTION AND SALE HEARING, (D) APPROVING  
PROCEDURES FOR THE ASSUMPTION AND ASSIGNMENT OF CONTRACTS, AND  
(E) GRANTING RELATED RELIEF; AND (II) AN ORDER (A) APPROVING THE  
ASSET PURCHASE AGREEMENT BETWEEN THE DEBTOR AND THE  
SUCCESSFUL BIDDER, AND (B) AUTHORIZING THE SALE OF SUBSTANTIALLY  
ALL OF THE DEBTOR'S ASSETS FREE AND CLEAR OF LIENS, CLAIMS,  
ENCUMBRANCES, AND INTERESTS, (C) AUTHORIZING THE ASSUMPTION AND  
ASSIGNMENT OF CONTRACTS, AND (D) GRANTING RELATED RELIEF**

California Proton Treatment Center, as a debtor and debtor in possession in the above-captioned chapter 11 case (the “*Debtor*”) hereby moves this Court (this “*Motion*”) and respectfully states as follows:

**Preliminary Statement**

1. As set forth in greater detail in the *Declaration of J. Jette Campbell, in Support of Chapter 11 Petition and First-Day Motions* [Docket No. 2] (the “*First-Day Declaration*”), the Debtor operates a freestanding healthcare center in San Diego, California providing proton radiation treatment services for patients with cancerous solid tumors (the “*Proton Center*”). It is an approximately 100,000 square foot purpose-built facility that is unique to the region, housing proton therapy equipment, as well as diagnostic, planning, and treatment equipment. It is staffed

---

<sup>1</sup> The last four digits of the Debtor's federal tax identification number are: 9073. The location of the Debtor's place of business is 9730 Summers Ridge Road, San Diego, California 92121, Attn: Wilson Williams, Manager.

with full-time physicians and medical support personnel experienced in the use of proton therapy.

2. The Proton Center opened in February 2014 and is staffed pursuant to a management agreement (the “*Scripps Management Agreement*”) between the Debtor and Scripps Clinic Medical Group, Inc. (“*Scripps*”) pursuant to which the Debtor is generally responsible for maintaining the non-medical aspects of the Proton Center’s operations (such as utilities, maintenance, property taxes, property management, etc.), and for supplying and maintaining the proton systems equipment necessary to deliver proton therapy to patients, while Scripps, in turn, is responsible for delivering the actual medical care to the patients. In such capacity, Scripps is responsible for hiring physicians and other health care personnel (all of whom are employees of Scripps, not the Debtor), maintaining the patients’ medical records, and facilitating medical billing and revenue collection. The agreement provides for an allocation of revenue generated in connection with the Proton Center—following the payment of specified expenses.

3. Since its opening in February 2014, the Proton Center has not attracted a sufficient number of patients to operate on a break-even or profitable basis and has incurred substantial operating losses. As a result, the Debtor has relied on continual funding from its prepetition lenders to maintain operations at the Proton Center. Given the financial underperformance of the Proton Center, the Debtor has concluded that to maximize the value of its assets, the Debtor should pursue a sale of the Proton Center — with such sale to be free and clear of the Scripps Management Agreement if the buyer so requests.

4. Scripps has a contractual right to provide health care services at the Proton Center but does not have property rights in the Proton Center itself. To resolve an actual controversy

with Scripps on this subject, the Debtor filed its *Complaint for Declaratory and Related Relief* (the “**Complaint**”) against Scripps on March 21, 2017. The Debtor has commenced this chapter 11 case and has filed this Motion and the Complaint to facilitate a sale of the Proton Center and the other Assets. Either the parties will reach agreement on a sale subject to the Scripps Management Agreement, or else the Court can order that the Proton Center and the other Assets be sold free and clear of all interests, including Scripps’ alleged claims and interests under the Scripps Management Agreement, pursuant to section 363(f) of the Bankruptcy Code (as defined below), and any claim Scripps may assert to adequate protection can be resolved through a reserve from the sale proceeds.

### **Relief Requested**

5. By this Motion, the Debtor seeks entry of an order, substantially in the form attached hereto as **Exhibit A** (the “**Bidding Procedures Order**”):

- (a) authorizing and approving the Bidding Procedures attached to the Bidding Procedures Order as **Exhibit 1** in connection with the sale of substantially all of the Debtor’s assets (the “**Assets**”);
- (b) approving the form and manner of notice attached to the Bidding Procedures Order as **Exhibit 2** (the “**Sale Notice**”) of an auction (the “**Auction**”) and sale hearing (the “**Sale Hearing**”) with respect to the sale of the Assets free and clear of liens, claims, encumbrances, and other interests (the “**Sale**”);
- (c) scheduling the Auction and Sale Hearing;
- (d) approving procedures for the assumption and assignment (as set forth in the Bidding Procedures Order, the “**Assumption Procedures**”) of certain executory contracts and unexpired leases in connection with the Sale (collectively, the “**Contracts**”) and
- (e) granting related relief.

6. The Debtor and its professionals will market the Assets prior to the Auction, in the manner set forth in the Bidding Procedures Order. During this marketing process, the Debtor

reserves the right, subject to consultation with the Agent, to enter into a Stalking Horse agreement (the “***Stalking Horse Agreement***”) with a bidder if the Debtor believes that such an agreement will further the purposes of the Auction by, among other things, enticing value-maximizing bids. Accordingly, the Debtor requests authority, in the exercise of its reasonable business judgment and after consultation with the Agent, to offer a Stalking Horse bidder (the “***Stalking Horse Bidder***”) any or all of the following as part of a Stalking Horse Agreement:

- (a) a break-up fee (the “***Break-Up Fee***”) in an amount to be determined by the Debtor, not to exceed 3 percent of the total purchase price offered by the Stalking Horse Bidder in the Stalking Horse Agreement;
- (b) reimbursement of the Stalking Horse Bidder’s reasonable and actual fees and expenses incurred as the Stalking Horse Bidder up to \$250,000 (the “***Expense Reimbursement***”);
- (c) initial overbid protection in the amount of \$100,000 (the “***Initial Overbid***” and, together with the Break-Up Fee and the Expense Reimbursement, the “***Bid Protections***”).

7. The Debtor also requests that, to the extent the Debtor enters into a Stalking Horse Agreement, any Break-Up Fee and/or Expense Reimbursement be granted administrative expense priority under sections 503(b) and 507(a)(2) of the Bankruptcy Code.

8. Furthermore, the Debtor will seek entry of an order at the conclusion of the Sale Hearing, substantially in the form attached hereto as **Exhibit B** (the “***Sale Order***”):

- (a) authorizing and approving the Sale of the Assets to the Successful Bidder (as defined in the Bidding Procedures) on the terms substantially set forth in the Successful Bid;
- (b) authorizing and approving the Sale of all or substantially all of the Assets free and clear of liens, claims, encumbrances, and other interests, including, without limitation, Scripps’ claimed interests in the Proton Center, all in accordance with the Successful Bid;
- (c) authorizing the assumption and assignment of the Contracts; and granting any related relief.

9. The Debtor reserves the right to file and serve any supplemental pleading or declaration that the Debtor deems appropriate or necessary in its reasonable business judgment, including any pleading summarizing the competitive bidding and sale process and the results thereof, in support of its request for entry of the Sale Order before the Sale Hearing.

#### **Jurisdiction and Venue**

10. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334 and the *Amended Standing Order of Reference from the United States District Court for the District of Delaware*, date February 29, 2012.

11. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2). The Debtor confirms its 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 this Court in connection with this Motion, to the extent that it is later determined that the Court, absent the consent of the parties, cannot enter final orders or judgments consistent with Article III of the United States Constitution.

12. Venue is proper in this District pursuant to 28 U.S.C. § 1408.

13. The bases for the relief requested in this Motion are sections 105(a), 363, 365, 503(b), and 507(a)(2) of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (the “**Bankruptcy Code**”), Rules 2002, 6004, and 6006(a) of the Federal Rules of Bankruptcy Procedure (the “**Bankruptcy Rules**”), and Local Rules 2002-1, 6004-1, and 9013-1(m).

#### **General Background**

14. The Debtor operates an approximately 100,000 square-foot, purpose-built proton therapy facility in San Diego California.

15. A detailed description of the Debtor's business, and the facts and circumstances surrounding the Debtor's chapter 11 case, is set forth in greater detail in the First-Day Declaration.

16. On March 1, 2017 (the "***Petition Date***"), the Debtor filed a voluntary petition for relief pursuant to chapter 11 of the Bankruptcy Code. The Debtor is operating its business and managing its property as a debtor in possession pursuant to section 1107(a) and 1108 of the Bankruptcy Code.

17. No request for the appointment of a trustee or an examiner has been made in these chapter 11 cases, and no committees have been appointed or designated.

#### **The Debtor's Sale Efforts**

18. As set forth in the First-Day Declaration, the Debtor's prepetition lenders were unwilling to lend any further amounts to the Debtor without reasonable certainty of a successful sale process by the Debtor once the chapter 11 case commenced. Therefore, one of the conditions to the Debtor's use of debtor-in-possession financing is the pursuit of an expedited sale process. To that end, the Debtor has hired Cain Brothers & Company, LLC ("***Cain***") to serve as its investment banker. On March 3, 2017, the Bankruptcy Court entered an order (the "***Interim DIP Order***") approving the postpetition financing package (the "***DIP Facility***") offered by the Debtor's prepetition lenders, with ORIX Capital Markets, LLC serving as the administrative agent (the "***Agent***") for the lenders under the DIP Facility (the "***DIP Lenders***"). The DIP Facility requires that (a) a motion for authority to sell substantially all of the Debtor's assets pursuant to section 363 of the Bankruptcy Code be filed no later than 30 days after the filing of the Debtor's bankruptcy petition, (b) the Court enter an order approving sale motion on terms acceptable to the Required DIP Lenders (as defined in the DIP Facility) under the DIP Facility within 21 days of filing the sale motion, (c) the bidding procedures order must specify

the DIP Lenders' unconditional right to credit bid for the Assets, (d) any sale will pay the DIP Facility in full, (d) all bids will be due within 60 days after the entry of the order approving the bidding procedures, (e) the Debtor will commence an auction within 3 business days after the deadline for submitting bids, (f) an order approving a sale pursuant to section 363 of the Bankruptcy Code will be entered within 10 business days after the deadline for submitting bids, and (g) within 25 days after the deadline for submitting bids or 5 calendar days after all necessary regulatory approvals are completed, the Debtor will have consummated the sale.

19. As part of the proposed sale process, the Debtor, Cain, and the Debtor's other advisors will engage in a robust marketing effort for the Debtor's assets, contacting both financial and strategic investors regarding a potential sale process. Cain will place no conditions on potentially interested parties regarding bid levels, structure, financing, or management in connection with the solicitation of indications of interest. All interested parties will be given an opportunity to execute a confidentiality agreement. Those parties that execute a confidentiality agreement will be provided with substantial due diligence information concerning, and access to, the Debtor, including, without limitation, presentations by the Debtor and its advisors, and access to financial, operational, and other detailed information.

### **The Proposed Sale**

20. The Debtor believes a prompt sale of the Assets represents the best option available for all stakeholders in this chapter 11 case. Moreover, it is critical for the Debtor to execute on a sale transaction within the timeframe contemplated by the Debtor's agreements with its postpetition lender as embodied in the proposed debtor-in-possession financing order (the "***DIP Order***"), otherwise the Debtor will trigger a default under the DIP Order.

21. By this Motion, the Debtor requests that the Court approve the following general timeline, with the assumption that the Bankruptcy Court will enter an order granting this motion

at the April 12, 2017 omnibus hearing for this bankruptcy case. These dates are subject to change in the event that the Bankruptcy Court does not enter an order at that hearing:

- (a) ***Contract Cure Objection Deadline:*** Objections to the potential assumption and assignment of any Contract will be filed and served no later than 4:00 p.m. (prevailing Eastern Time) on the day that is fourteen (14) calendar days after the service of the Cure and Possible Assumption and Assignment Notice (as defined below).
- (b) ***Bid Deadline:*** Bids for the Assets, including a marked-up form of the Stalking Horse Agreement, if one has been accepted by the Debtor as contemplated by the Bidding Procedures Order, as well as the deposit and the other requirements for a bid to be considered a Qualified Bid (as defined in the Bidding Procedures) must be received by no later than June 12, 2017 at 11:59 p.m. (prevailing Eastern Time) (the “***Bid Deadline***”).
- (c) ***Auction:*** The Auction, if necessary, will be held at the offices of Polsinelli PC, 222 Delaware Avenue, Suite 1101, Wilmington, Delaware 19801 on June 15, 2017 at 10:00 a.m. (prevailing Eastern Time), or such other location as identified by the Debtor after notice to all Qualified Bidders.
- (d) ***Sale Objection Deadline:*** Objections to the Sale will be filed and served no later than 4:00 p.m. (prevailing Eastern Time) on June 19, 2017.
- (e) ***Sale Hearing:*** Consistent with the Court’s availability and schedule, the Sale Hearing will commence on or before June 22, 2017 at 10:00 a.m. (prevailing Eastern Time).

22. The Debtor believes that this timeline maximizes the prospect of receiving a higher or otherwise better offer without unduly prejudicing these chapter 11 estates. To further ensure that the Debtor’s proposed Auction and Sale process maximizes value for the benefit of the Debtor’s estate, the Debtor and its professionals will use the time following entry of the Bidding Procedures Order to actively market the Assets in an attempt to solicit the highest or otherwise best bids available. The Debtor believes the relief requested by this Motion is in the best interests of its creditors, its other stakeholders, and all other parties in interest, and should be approved.



## **The Bidding Procedures Order**

### **I. The Bidding Procedures**

23. To optimally and expeditiously solicit, receive, and evaluate bids in a fair and accessible manner, the Debtor has developed and proposed the Bidding Procedures, attached as **Exhibit 1** to the Bidding Procedures Order. The Bidding Procedures were developed to permit an expedited sale process, to promote participation and active bidding, and to ensure that the Debtor receives the highest or otherwise best offer for the Assets. Given the terms and conditions of the DIP Facility, the Debtor believes that the timeline for consummating the sale process established pursuant to the Bidding Procedures is in the best interest of its estate and all parties in interest.

24. The Bidding Procedures describe, among other things, the requirements for prospective purchasers to participate in the bidding process, the availability and conduct of due diligence, the deadline for submitting a competing bid, the method and factors for determining qualifying bids, the criteria for selecting a successful bidder, and the ability of the Debtor to select a Stalking Horse Bidder and to award certain Bid Protections if the Debtor believes, in the exercise of its business judgment, that selecting a Stalking Horse Bidder and awarding Bid Protections will enhance the Debtor's efforts to maximize the value of the Assets.

25. The following summary describes the salient points of the Bidding Procedures and discloses certain information required pursuant to Local Rule 6004-1:<sup>2</sup>

- (a) **Qualification of Bidders (Local Bankr. R. 6004-1(c)(i)(A)).** To be eligible to participate in the Auction, each offer, solicitation or proposal (each, a "***Bid***"), and

---

<sup>2</sup> This summary of the Bidding Procedures is qualified in its entirety by the Bidding Procedures attached as **Exhibit 1** to the Bidding Procedures Order. All capitalized terms that are used in this summary but not otherwise defined herein shall have the meanings set forth in the Bidding Procedures. To the extent there are any conflicts between this summary and the Bidding Procedures, the terms of the Bidding Procedures shall govern.

each party submitting such a Bid (each, a “**Bidder**”), must be determined by the Debtor to satisfy each of the following conditions:

- (i) **Corporate Authority.** Written evidence reasonably acceptable to the Debtor demonstrating appropriate corporate authorization to consummate the Sale; *provided, however*, that, if the Bidder is an entity specially formed for the purpose of effectuating the Sale, then the Bidder must furnish written evidence reasonably acceptable to the Debtor of the approval of the Sale by the equity holder(s) of such Bidder. *See* Bidding Procedures § III(C)(3).
- (ii) **Proof of Financial Ability to Perform.** Written evidence that the Debtor reasonably concludes demonstrates that the Bidder has the necessary financial ability to close the Sale and provide adequate assurance of future performance under all Assigned Contacts. Such information should include, *inter alia*, the following:
  - contact names, email addresses and telephone numbers for verification of financing sources;
  - evidence of the Bidder’s internal resources and proof of any debt or equity funding commitments that are needed to close the Sale;
  - the Bidder’s current financial statements (audited if they exist); and
  - any such other form of financial disclosure or credit-quality support information or enhancement reasonably acceptable to the Debtor demonstrating that such Bidder has the ability to close the Sale; *provided, however*, that the Debtor shall determine, in its sole discretion, in consultation with the Consultation Parties (as defined in the Bidding Procedures), whether the written evidence of such financial wherewithal is reasonably acceptable, and shall not unreasonably withhold acceptance of a Bidder’s financial qualifications.

*See* Bidding Procedures § III(C)(4).

- (b) **Qualified Bids (Local Bankr. R. 6004-1(c)(i)(B)).** Each Bid must be determined by the Debtor to satisfy each of the following conditions:
  - (i) **Good Faith Deposit.** Each Bid must be accompanied by a deposit paid in cash or by wire transfer in immediately available funds, into an interest bearing escrow account to be identified and established by the Debtor in an amount equal to ten percent (10%) of the proposed purchase price, (the “**Good Faith Deposit**”). *See* Bidding Procedures § III(C)(1).

- (ii) **Terms.** A Bid must include executed transaction documents pursuant to which the Bidder proposes to effectuate the Sale (the “**Transaction Documents**”). A Bid should propose a Sale involving substantially all of the Debtor’s Assets. The Debtor shall evaluate all Bids to determine whether such Bid(s) maximizes the value of the Debtor’s estate as a whole. The Transaction Documents shall also identify any executory contracts and unexpired leases of the Debtor that the Bidder wishes to have assumed and assigned to it (collectively, the “**Assigned Contracts**”). The Debtor will consider proposals for less than substantially all of the Debtor’s assets or operations. A bid to purchase only certain assets of the Debtor shall include a purchase price determined by such bidder but shall be reviewed by the Debtor in consultation with the Consultation Parties to evaluate the sufficiency of the purchase price. *See* Bidding Procedures § III(C)(2).
- (iii) **Contingencies.** A Bid may not be conditioned on obtaining financing or any internal approval, or on the outcome or review of due diligence, but may be subject to the accuracy in all material respects at the closing of specified representations and warranties. *See* Bidding Procedures § III(C)(5).
- (iv) **Irrevocable.** A Bid must be irrevocable until the closing of the Auction; *provided, however*, that if such Bid is accepted as the Successful Bid or the Backup Bid (as defined in the Bidding Procedures), such bid shall continue to remain irrevocable, subject to the terms and conditions of the Bidding Procedures. *See* Bidding Procedures § III(C)(6).
- (v) **Disclaimer of Fees.** Each Bid (other than a Stalking Horse Bid, if any) must disclaim any right to receive a fee analogous to a break-up fee, expense reimbursement, termination fee, or any other similar form of compensation. For the avoidance of doubt, no Qualified Bidder will be permitted to request, nor be granted by the Debtor, at any time, whether as part of the Auction or otherwise, a break-up fee, expense reimbursement, termination fee, or any other similar form of compensation, except as the Debtor may agree with a Stalking Horse Bidder pursuant to the Bidding Procedures Order. By submitting its Bid, each bidder is agreeing to refrain from and waive any assertion or request for reimbursement on any basis, including pursuant to section 503(b) of the Bankruptcy Code. *See* Bidding Procedures § III(C)(7).
- (vi) **Bid Deadline.** The Debtor must receive a Bid in writing, on or before the Bid Deadline, **June 12, 2017 at 11:59 p.m. (prevailing Eastern Time)** or such later date as may be agreed to by the Debtor. *See* Bidding Procedures § III(C)(8).
- (c) **Right to Credit Bid (Local Bankr. R. 6004-1(b)(iv)(N)).** The Agent shall be deemed to be a Qualified Bidder and is not required to make any Good Faith Deposit. The Agent may participate in the Auction and credit bid at any time up to the conclusion of the Auction, in its sole and absolute discretion, any portion

and up to the entire amount of the Agent's and the Lenders' respective claims, including, without limitation, both the Lenders' prepetition claims and all obligations under the DIP Order and the DIP Loan Documents (as defined in the DIP Order), at any time, on any individual Asset, portion of the Assets, or all Assets constituting their respective Collateral (as defined in the DIP Order) in conjunction with any sale of the Debtor's assets (the "**Credit Bid**"). Upon exercise of a Credit Bid, the Agent shall not be required to take title to or ownership of, or have any obligation in connection with (in each case, legal, equitable, or otherwise), or be deemed to have taken title to or ownership of, or have any obligation in connection with (in each case, legal, equitable, or otherwise), any individual Asset, portion of the Assets, or all of the Assets, and the Agent shall have the right to designate any person or entity in its sole and absolute discretion that shall take title to the individual Asset, portion of the Assets, or all of the Assets that are subject to the Credit Bid. Except for the holders of any Permitted Exceptions (as defined in the DIP Order), no other person may credit bid unless the entire amount of the Lenders' claims (including all prepetition and debtor in possession financing claims) will be indefeasibly paid in full in cash on the closing of the proposed sale. In the event the Agent exercises the Credit Bid, and the amount of the Credit Bid of the Agent exceeds the total amount of the highest bids for the Assets subject to the Credit Bid, such Credit Bid will be deemed the highest and best bid and such Credit Bid will be accepted by the Debtor and be presented for approval to the Bankruptcy Court. The Agent will not be a Backup Bidder unless the Agent consents in writing otherwise.

Subject to the prior paragraph, the Stalking Horse Bidder shall have the right (including as part of any Overbid) to credit bid all or a portion of its Bid Protections (if any) pursuant to section 363(k) of the Bankruptcy Code.

See Bidding Procedures § IV(D); Bidding Procedures Order ¶¶ 10 and 11.

- (d) **Cancellation of the Auction.** If the Debtor does not receive a Qualified Bid (other than the Credit Bid) or otherwise determines, after consultation with the Consultation Parties, not to proceed with the Sale, the Debtor may elect not to conduct the Auction and may cancel the Auction. If the Debtor has received only the Credit Bid, the Debtor may declare the Credit Bid the Successful Bid without conducting the Auction. See Bidding Procedures § IV.
- (e) **Bidding Increments and Overbid (Local Bankr. R. 6004-1(c)(i)(C)).** At the Auction, the Debtor will announce the leading Qualified Bid (the "**Auction Baseline Bid**"). Bidding on the Assets beyond the Auction Baseline Bid will be done in increments of \$100,000 (the "**Minimum Overbid Increment**"); *provided* that the Debtor shall retain the right to modify the bid increment requirements at the Auction in consultation with the Consultation Parties. Additional consideration may include cash, the assumption of debt or marketable securities, a credit bid under section 363(k) of the Bankruptcy Code of an allowed

secured claim, other consideration as the Debtor may permit and value in its sole discretion, or any combination thereof. *See* Bidding Procedures § IV(B)(1).

- (f) **Backup Bidder (Local Bankr. R. 6004-1(c)(i)(C)).** Notwithstanding anything in the Bidding Procedures to the contrary, if an Auction is conducted, the party with the next highest or otherwise best Qualified Bid(s) at the Auction (other than a Credit Bid submitted by the Agent or the Lenders), as determined by the Debtor, in the exercise of its business judgment, shall be required to serve as a backup bidder (the “**Backup Bidder**”). The Backup Bidder shall be required to keep its initial Bid (or if the Backup Bidder submitted one or more overbids at the Auction, its final overbid) (the “**Backup Bid**”) open and irrevocable until the earlier of 5:00 p.m. (prevailing Eastern Time) on the date that is twenty five (25) days after entry of the Sale Order (the “**Outside Backup Date**”) or the closing of the transaction with the Successful Bidder. Following entry of the Sale Order, if the Successful Bidder fails to consummate an approved transaction because of a breach or failure to perform on the part of such Successful Bidder, the Debtor may designate the Backup Bidder to be the new Successful Bidder, and the Debtor will be authorized, but not required, to consummate the transaction with the Backup Bidder without further order of the Bankruptcy Court. In such case, the defaulting Successful Bidder’s deposit, if any, shall be forfeited to the Debtor’s estate, and the Debtor specifically reserves the right to seek all available damages from the defaulting Successful Bidder. The closing date to consummate the transaction with the Backup Bidder shall be no later than the later of twenty five (25) days after the date that the Debtor provides notice to the Backup Bidder that the Successful Bidder failed to consummate a Sale and that the Debtor desires to consummate the transaction with the Backup Bidder or five (5) calendar days after necessary regulatory approvals are completed by the Backup Bidder and/or the Debtor. The deposit, if any, of the Backup Bidder shall be held by the Debtor until the earlier of two (2) business days after (i) the closing of the Sale with the Successful Bidder or (b) the Outside Backup Date; *provided, however*, that in the event the Successful Bidder does not consummate the transaction as described above and the Debtor provides notice to the Backup Bidder, the Backup Bidder’s deposit shall be held until the closing of the transaction with the Backup Bidder. In the event that the Debtor fails to consummate a transaction with the Backup Bidder as described above, the Backup Bidder’s deposit shall be forfeited to the Debtor’s estate, and the Debtor specifically reserves the right to seek all available damages from the defaulting Backup Bidder. *See* Bidding Procedures § IV(D).
- (g) **Diligence Materials and Data Room.** Any person or entity that wishes to conduct due diligence with respect to the Assets (the “**Diligence Materials**”) must deliver to the Debtor an executed confidentiality agreement, the form of which is attached as **Attachment A** to the Bidding Procedures (it being understood that any person or entity that previously signed a confidentiality agreement in a form satisfactory to the Debtor shall not be required to execute a new confidentiality agreement). The executed confidentiality agreement must be

signed and transmitted by the person or entity wishing to have access to the Debtor's data room (the "**Data Room**") and other Diligence Materials. *See* Bidding Procedures § III(B).

- (h) **Reservation of Rights (Local Bankr. R. 6004-1(c)(i)(D)).** The Debtor reserves its rights to modify these Bidding Procedures in its reasonable business judgment in any manner that will best promote the goals of the bidding process or impose, at or prior to the Auction, additional customer terms and conditions on the sale of the Assets, including, without limitation: (a) extending the deadline set forth in these Bidding Procedures; (b) adjourning the Auction at the Auction and/or adjourning the Sale Hearing (as defined below) in open court without further notice; (c) reopening the Auction to consider further Bids or Overbids; (d) adding procedural rules that are reasonably necessary or advisable under the circumstances for conducting the Auction (*e.g.*, the amount of time to make subsequent overbids, whether a non-conforming Bid constitutes a Qualified Bid); (e) canceling the Auction; and (f) rejecting any or all Bids or Qualified Bids; *provided, however*, that nothing herein or in the Bidding Procedures modifies, nor shall be deemed consent by the Agent or any Lenders to a modification of, the 363 Sale Milestones set forth in the DIP Term Sheet or any other term, condition, provision, or milestone set forth in the DIP Order or the DIP Loan Documents. *See* Bidding Procedures § VIII.

26. Importantly, the Bidding Procedures recognize the Debtor's fiduciary obligations to maximize sale value and, as such, do not impair the Debtor's ability to consider all qualified bid proposals. Additionally, as noted above, the Bidding Procedures preserve the Debtor's right to modify the Bidding Procedures as necessary or appropriate to maximize value of the Debtor's estate.

## **II. The Auction and Sale.**

27. If one or more Qualified Bids are received by the Bid Deadline, the Debtor will conduct an Auction to determine the highest and best Qualified Bid. This determination shall take into account any factors the Debtor reasonably deems relevant to the value of the Qualified Bid to the Debtor's estate, including, without limitation, the following: (a) the amount and nature of the consideration; (b) the proposed assumption of any liabilities and/or executory contracts or unexpired leases, if any; (c) the ability of the Qualified Bidder to close the proposed transaction; (d) the proposed closing date and the likelihood, extent and impact of any potential delays in

closing, including delays owing to regulatory uncertainty; (e) any purchase price adjustments; (f) the impact of the transaction on any actual or potential litigation; and (g) the net after-tax consideration to be received by the Debtor's estate (collectively, the "***Bid Assessment Criteria***"). If no Qualified Bid other than the Credit Bid is received by the Bid Deadline, the Debtor may determine not to conduct the Auction and deem the Credit Bid to be the Successful Bid without conducting the Auction. The Debtor seeks authority from the Court to schedule the Auction on a date as further described in the Bidding Procedures.

### III. Form and Manner of Sale Notice

28. On or within two business days after entry of the Bidding Procedures Order, the Debtor will cause the Sale Notice to be served on the following parties or their respective counsel, if known: (a) the United States Trustee for the District of Delaware (the "***U.S. Trustee***"); (b) counsel to the Agent; (c) counterparties to the Contracts (the "***Contract Counterparties***"); (d) all parties who have expressed a written interest in the Assets; (e) all parties who are known or reasonably believed, after reasonable inquiry, to have asserted any lien, encumbrance, claim, or interest in the Assets, including Scripps; (f) the Internal Revenue Service; (g) the California Franchise Tax Board; (h) all other applicable state and local taxing authorities; (i) all the Debtor's other creditors; (j) each governmental agency that is an interested party with respect to the Sale and transactions proposed thereunder; and (k) all parties that have requested or that are required to receive notice pursuant to Bankruptcy Rule 2002.

29. The Debtor (or its agents) shall also serve a notice in substantially the form as that appearing in **Exhibit C** (the "***Creditor Notice***") upon all of the parties set forth on the Debtor's creditor matrix who were not served with a Sale Notice. Finally, the Debtor proposes to publish the notice attached hereto as **Exhibit D** (the "***Bidding Procedures Notice***") once in *The USA*

*Today (National Edition)* and *Modern Healthcare Magazine* within five business days after entry of the Bidding Procedures Order.

#### **IV. Summary of the Assumption Procedures.**

30. The Debtor is also seeking approval of certain procedures to facilitate the fair and orderly assumption and assignment of the Contracts in connection with the Sale (the “*Assumption Procedures*”). Pursuant to the Bidding Procedures Order, notice of the proposed assumption and assignment of the Contracts to the Successful Bidder, the proposed cure amounts related thereto, and the right, procedures, and deadlines for objecting thereto, will be provided in separate notices, attached to the Bidding Procedures Order as **Exhibit 3** (the “*Cure and Possible Assumption and Assignment Notice*”) and **Exhibit 4** (the “*Assumption Notice*”) to be sent to the applicable Contract Counterparties. Because the Bidding Procedures Order sets forth the Assumption Procedures in detail, they are not restated herein. Generally, however, the Assumption Procedures: (a) outline the process by which the Debtor will serve notice to all Contract Counterparties regarding the proposed assumption and assignment and related cure amounts, if any, informing such parties of their right, and the procedures, to object thereto; and (b) establish objection and other relevant deadlines and the manner for resolving disputes relating to the assumption and assignment of the Contracts to the extent necessary.

#### **Basis for Relief**

##### **I. The Relief Sought in the Bidding Procedures Order Is in the Best Interests of the Debtor’s Estate and Should Be Approved.**

##### **A. The Proposed Notice of the Bidding Procedures and the Sale Process Is Appropriate.**

31. The Debtor seeks to sell the Assets through an Auction and asset sale. The Debtor and its advisors, led by the Debtor’s investment banker, will conduct an extensive marketing process. The Debtor will develop a list of “Contact Parties” who will receive a copy



of the “Information Package” (both as defined in the Bidding Procedures). The list of Contact Parties will encompass those parties whom the Debtor believes may be potentially interested in pursuing a Sale and whom the Debtor reasonably believes may have the financial resources to consummate such a transaction. The Bidding Procedures are designed to elicit bids from one or more parties and to encourage a robust auction of the Assets, thus maximizing the value of the Debtor’s estate for the benefit of its creditors.

32. Under Bankruptcy Rule 2002(a) and (c), the Debtor is required to notify creditors of the proposed sale of the Assets, including a disclosure of the time and place of any auction, the terms and conditions of a sale, and the deadline for filing any objections.

33. The Debtor respectfully submits that the Sale Notice is reasonably calculated to provide all interested parties with timely and proper notice of the proposed Sale, including: (a) the date, time, and place of the Auction (if one will be held); (b) the Bidding Procedures; (c) the deadline for filing objections to the Sale and entry of the Sale Order, and the date, time, and place of the Sale Hearing; (d) a reasonably specific identification of the Assets; (e) a description of the Sale as being free and clear of liens, claims, interests, and other encumbrances, with all such liens, claims, interests, and other encumbrances attaching with the same validity and priority to the Sale proceeds; and (f) notice of the proposed assumption and assignment of the Contracts to the Successful Bidder.

34. The Debtor further submits that notice of this Motion and the related hearing to consider entry of the Bidding Procedures Order, coupled with service of the Sale Notice, the Cure and Possible Assumption and Assignment Notice, and the Assumption Notice, and publication of the Bidding Procedures Notice, as provided for herein, constitutes good and adequate notice of the Sale and the proceedings with respect thereto in compliance with, and

satisfaction of, the applicable requirements of Bankruptcy Rule 2002. The Debtor further submits that the proposed notice procedures are designed to maximize the chance of obtaining the broadest possible participation in the Debtor's marketing process, while minimizing costs to the estates. Accordingly, the Debtor respectfully requests that the Court find that the proposed notice procedures set forth in this Motion are sufficient, and that no other or further notice of the Bidding Procedures, Auction, Sale, or Sale Hearing is required.

**B. The Bidding Procedures Are Appropriate and Will Maximize Value.**

35. Bidding procedures should be approved when they provide a benefit to the debtor's estate by maximizing the value of the debtor's assets. *See In re Edwards*, 228 B.R. 552, 361 (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."). 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 an estate's assets. *See, e.g., In re Schipper*, 933 F.2d 513, 515 (7th Cir. 1991) ("Under Section 363, the debtor in possession can sell property of the estate . . . if he has an 'articulated business justification'") (internal citations omitted); *In re Martin*, 91 F.3d 389, 395 (3d Cir. 1996) (quoting *Schipper*); *In re Montgomery Ward Holding Corp.*, 242 B.R. 147, 153 (D. Del. 1999) (same); *see also In re Integrated Resources, Inc.*, 147 B.R. 650, 656-57 (S.D.N.Y. 1992) (noting that bidding procedures that have been negotiated by a trustee are to be reviewed in accordance with the deferential "business judgment" standard, under which such procedures and arrangements are "presumptively valid").

36. The paramount goal in any proposed sale of property of the estate is to maximize the proceeds received by the estate. *See Mushroom Transp. Co., Inc.*, 382 F.3d 325, 339 (3d Cir. 2004); *Official Comm. of Unsecured Creditors of Cybergenics, Corp. v. Chinery*, 330 F.3d 548, 573 (3d Cir. 2003); *see also In re Food Barn Stores, Inc.*, 101 F.3d 558, 564-65 (8th Cir. 1997)

(in bankruptcy sales, “a primary objective of the Code [is] to enhance the value of the estate at hand”); *Integrated Resources*, 147 B.R. at 659 (“[I]t is a well-established principle of bankruptcy law that the objective of the bankruptcy rules and the trustee’s duty with respect to such sales is to obtain the highest price or greatest overall benefit possible for the estate.”) (internal citations omitted); *Edwards*, 228 B.R. at 561.

37. 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 appropriate in the context of bankruptcy transactions. *See, e.g., In re O’Brien Envtl. Energy, Inc.*, 181 F.3d 527, 537 (3d Cir. 1999); *Integrated Resources*, 147 B.R. at 659 (bidding procedures “are important tools to encourage bidding and to maximize the value of the debtor’s assets”); *In re Fin. News Network, Inc.*, 126 B.R. 152, 156 (Bankr. S.D.N.Y.1991) (“court-imposed rules for the disposition of assets . . . [should] provide an adequate basis for comparison of offers, and [should] provide for a fair and efficient resolution of bankrupt estates”).

38. The Debtor believes that the Bidding Procedures will establish the parameters under which the value of the Sale may be tested at the Auction. The Bidding Procedures will increase the likelihood that the Debtor will receive the greatest possible consideration because they will ensure a competitive and fair bidding process.

39. The Debtor believes that the proposed Bidding Procedures will promote active bidding from seriously interested parties and will elicit the highest or otherwise best offers available for the Assets. The proposed Bidding Procedures will enable the Debtor 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 Assets and who can demonstrate the ability to close the transaction.

40. 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.

41. At the same time, the Bidding Procedures provide the Debtor with a robust opportunity to consider competing bids and select the highest or otherwise best offer for the completion of the Sale. Additionally, if the Debtor selects a Stalking Horse Bid, entering into the Stalking Horse Agreement with the Stalking Horse Bidder ensures that the Debtor obtains fair market value by setting a minimum purchase price for the Assets that will be tested in the marketplace. As such, creditors of the Debtor's estate can be assured that the consideration obtained will be fair and reasonable and at or above the market.

42. The Debtor submits 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 in this District. *See, e.g., In re Emerald Oil, Inc.*, No. 16-10704 (KG) (Bankr. D. Del. July 28, 2016); *In re Quicksilver Res. Inc.*, No. 15-10585 (LSS) (Bankr. D. Del. Oct. 6, 2015); *In re Source Home Entm't LLC*, No. 14-11553 (KG) (Bankr. D. Del. July 21, 2014); *In re Palm Harbor Homes, Inc.*, No. 10-13850 (Bank. D. Del. Jan. 6, 2011); *In re Ultimate Escapes Hldgs, LLC*, No. 10-12915 (Bankr. D. Del. Oct. 8, 2010); *In re PTC Alliance Corp.*, No. 09-13395 (Bankr. D. Del. Nov. 6, 2009); *In re Hayes Lemmerz Int'l, Inc.*, No. 09-11655 (Bankr. D. Del. Sept. 22, 2009); *In re VeraSun Energy Corp.*, No. 08-12606 (Bankr. D. Del. Feb. 19, 2009); *see also In re Dura Auto. Sys., Inc.*, Case No. 06-11202 (KJC) (Bankr. D.

Del. July 14, 2007); *In re New Century TRS Holdings, Inc.*, Case No. 07-10416 (KJC) (Bankr D. Del. Apr. 20, 2007); *In re Three A's Holdings, L.L.C.*, Case No. 06-10886 (BLS) (Bankr. D. Del. Sept. 7, 2006).<sup>3</sup>

43. Thus, the Bidding Procedures are reasonable, appropriate and within the Debtor's sound business judgment under the circumstances because the Bidding Procedures are designed to maximize the value to be received by the Debtor's estate.

**C. The Overbid Increment Is Appropriate.**

44. One important component of the Bidding Procedures is the "Overbid" provision. Once the Debtor determines the Auction Baseline Bid and holds the Auction, all subsequent Overbids must be made in increments of at least \$100,000 more than the Auction Baseline Bid (the "*Initial Minimum Overbid*") and then continue in minimum increments of at least \$100,000; provided that the Debtor shall retain the right to modify the bid increment requirements at the Auction.

45. The Debtor believes that such Initial Minimum Overbid is reasonable under the circumstances, and will enable the Debtor to maximize the value received for the Assets while limiting any chilling effect in the marketing process. The Overbid increment is also well within the increment level previously approved by courts in this District. *See In re Emerald Oil, Inc.*, No. 16-10704 (KG) (Bankr. D. Del. July 28, 2016) (approving \$500,000 bid increment); *In re Dura Auto. Sys., Inc.*, Case No. 06-11202 (KJC) (Bankr. D. Del. July 24, 2007) (approving \$750,000 increment); *In re New Century TRS Holdings, Inc.*, Case No. 07-10416 (KJC) (Bankr D. Del. Apr. 20, 2007) (approving \$500,000 increment); *In re Three A's Holdings, L.L.C.*, Case No. 06-10886 (BLS) (Bankr D. Del. Sept. 7, 2006) (approving \$500,000 increment).

---

<sup>3</sup> Because the number of orders cited is voluminous, individual orders have not been attached to this Motion. Copies of these orders are available upon request to the Debtor's proposed counsel.

**D. The Ability to Enter into a Stalking Horse Agreement with Bid Protections Has a Sound Business Purpose and Should Be Approved.**

46. Pursuant to the Motion, the Debtor is seeking the pre-approval of this Court to allow the Debtor to choose, subject to consultation with the Agent, a Stalking Horse Bidder at any time after entry of the Bidding Procedures Order, and to offer that bidder the Bid Protections without the need to return to court for further approval. The Debtor believes that, in this case, such relief is warranted to ensure the Debtor's ability to take advantage of a potentially value-maximizing bid. The ability of the Debtor to offer a Stalking Horse Bidder the Bid Protections is beneficial to the Debtor's estate and creditors in that, by providing these incentives, the Debtor will have an opportunity to induce a Potential Bidder to submit or increase its bid prior to the Auction. To the extent bids can be improved prior to the Auction, a higher floor is established by the Stalking Horse Bid. Thus, even if a Stalking Horse Bidder is offered the Bidding Protections and ultimately is not the Successful Bidder, the Debtor and its estate will have benefited from the higher floor established by the improved bids. The Debtor will exercise prudent business judgment before offering or agreeing to any of the Bid Protections, and will only do so if such protections, in the reasonable business judgment of the Debtor, will likely result in the result in the realization of greater value for the Debtor and its estate.

47. Indeed, break-up fees and other forms of bidding protections are a normal and, in many cases, necessary component of significant sales conducted pursuant to section 363 of the Bankruptcy Code: "Break-up fees are important tools to encourage bidding and to maximize the value of the debtor's assets . . . . In fact, because the . . . corporation has a duty to encourage bidding, break-up fees can be *necessary* to discharge [such] duties to maximize value." *Integrated Resources*, 147 B.R. at 659-60 (emphasis added). Specifically, bid protections "may be legitimately necessary to convince a 'white knight' bidder to enter the bidding by providing

some form of compensation for the risks it is undertaking.” *995 Fifth Ave.*, 96 B.R. at 28 (quotation omitted); *see also Integrated Resources*, 147 B.R. at 660-61 (bid protections can prompt bidders to commence negotiations and “ensure that a bidder does not retract its bid”); *In re Hupp Int’l Indus., Inc.*, 140 B.R. 191, 194 (Bankr. N.D. Ohio 1992) (“[W]ithout such fees, bidders would be reluctant to make an initial bid for fear that their first bid will be shopped around for a higher bid from another bidder who would capitalize on the initial bidder’s . . . due diligence.”).

48. As a result, courts routinely approve bid protections similar to the Bid Protections in connection with proposed bankruptcy sales where a proposed fee or reimbursement provides a benefit to the estate. *See In re O’Brien Envtl. Energy, Inc.*, 181 F.3d 527 (3d Cir. 1999). The Debtor believes that the allowance of the Bid Protections is in the best interests of the Debtor’s estate and its creditors, as these protections will only be employed where a Stalking Horse Bid will establish a floor for further bidding that may increase the consideration given in exchange for the Assets for the benefit of the Debtor’s estate.

49. Any Stalking Horse Bidder will have expended, and will continue to expend, time and resources negotiating, drafting, and performing due diligence activities necessitated by the Sale transactions, despite the fact that the Debtor will maintain a fiduciary out, and its bid will be subject not only to Court approval, but also to overbidding by third parties. Any Bid Protections granted to a Stalking Horse Bidder will be negotiated in good faith and at arm’s length, with significant give-and-take with respect to those Bid Protections. The Debtor will only agree to the Bid Protections where it will ensure that the Debtor will have the benefit of the transaction with the Stalking Horse Bidder, without sacrificing the potential for interested parties to submit overbids at the Auction.

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

50. As set forth above, the Sale contemplates the potential assumption and assignment of the Contracts to the Successful Bidder arising from the Auction, if any. In connection with this process, the Debtor believes it is necessary to establish a process by which: (a) the Debtor and the Contract Counterparties can reconcile cure obligations, if any, in accordance with sections 105(a) and 365 of the Bankruptcy Code; and (b) such counterparties can object to the potential assumption and assignment of the Contracts and/or related cure amounts (the “*Assumption Procedures*”).

51. The Bidding Procedures specify the process by which the Debtor will serve Cure and Possible Assumption and Assignment Notices and the procedures and deadline for Contract Counterparties to Assigned Contracts to file and serve Cure or Assignment Objections.

52. Except as may otherwise be agreed to in the Successful Bid or by the parties to an Assigned Contract, at the closing of the Sale, the Successful Bidder shall cure those defaults under the Assigned Contracts that need to be cured in accordance with section 365(b) of the Bankruptcy Code, by (a) payment of the undisputed cure amount (the “*Cure Amount*”) and/or (b) reserving amounts with respect to any disputed cure amounts.

53. As set forth in the Bidding Procedures Order, the debtor also requests that any party that fails to object to the proposed assumption and assignment of any Contract be deemed to consent to the assumption and assignment of the applicable Contract pursuant to section 365 of the Bankruptcy Code on the terms set forth in the Sale Order, along with the Cure Amounts identified in the Cure and Possible Assumption and Assignment Notice. *See, e.g., In re Tabone, Inc.*, 175 B.R. 855, 858 (Bankr. D.N.J. 1994) (by not objecting to the Motion, a creditor is



deemed to consent); *Pelican Homestead v. Wooten (In re Gabel)*, 61 B.R. 661, 667 (Bankr. W.D. La. 1985) (same).

54. The Debtor believes that the Assumption Procedures are fair and reasonable, provide sufficient notice to the Contract Counterparties of the potential assumption and assignment of its Contracts, and provide certainty to all parties in interest regarding their obligations and rights with respect thereof. Accordingly, the Debtor requests that the court approve the Assumption Procedure set forth in the Bidding Procedures Order.

## **II. Approval of the Proposed Sale Is Appropriate and in the Best Interests of the Estate.**

### **A. The Sale of the Assets Should Be Authorized Pursuant to Section 363 of the Bankruptcy Code as a Sound Exercise of the Debtor's Business Judgment.**

55. Section 363(b)(1) 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)(1). A sale of the debtor’s assets should be authorized pursuant to section 363 of the Bankruptcy Code if a sound business purpose exists for the proposed transaction. *See, e.g., Meyers v. Martin (In re Martin)*, 91 F.3d 389, 395 (3d Cir. 1996) (“Under Section 363, the debtor-in-possession can sell property of the estate . . . if he has an ‘articulated business justification’ . . . .”); *In re Montgomery Ward Holding Corp.*, 242 B.R. 147, 153 (Bankr. D. Del. 1999); *In re Del. & Hudson Ry. Co.*, 124 B.R. 169, 174 (Bankr. D. Del. 1991); *see also In re Schipper*, 933 F.2d 513, 515 (7th Cir. 1991) (same); *Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1070 (2d Cir. 1983); *In re Telesphere Commc’ns, Inc.*, 179 B.R. 544, 552 (Bankr. N.D. Ill. 1999).

56. Courts typically consider the following factors in determining whether a proposed sale satisfies this standard: (a) whether a sound business justification exists for the sale; (b) whether adequate and reasonable notice of the sale was given to interested parties;

(c) whether the sale will produce a fair and reasonable price for the property; and (d) whether the parties have acted in good faith. *See Del. & Hudson*, 124 B.R. at 176; *In re Phoenix Steel Corp.*, 82 B.R. 334, 335-36 (Bankr. D. Del. 1987).

57. A sound business purpose for the sale of a debtor's assets outside the ordinary course of business may be found where such a sale is necessary to preserve the value of assets for the estate, its creditors or interest holders. *See, e.g., In re Abbotts Dairies of Pa, Inc.*, 788 F.2d 143 (3d Cir. 1986); *In re Lionel Corp.*, 722 F.2d 1063 (2d Cir. 1983).

58. "Where the debtor articulates a reasonable basis for its business decisions (as distinct from a decision made arbitrarily or capriciously), courts will generally not entertain objections to the debtor's conduct." *Comm. of Asbestos-Related Litigants and/or Creditors v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 60 B.R. 612, 616 (Bankr. S.D.N.Y. 1986). There 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 was in the best interests of the company." *In re Integrated Res.*, 147 B.R. at 656 (quoting *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985)); *see also In re S.N.A. Nut Co.*, 186 B.R. 98, 102 (Bankr. N.D. Ill. 1995) ("The business judgment rule 'is a 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 was in the best interests of the company.'" (citations omitted); *In re Filene's Basement, LLC*, No. 11-13511 (KJC), 2014 WL 1713416, at \*12 (Bankr. D. Del. Apr. 29, 2014) ("If a valid business justification exists, then a strong presumption follows that the agreement at issue was negotiated in good faith and is in the best interests of the estate.") (citations omitted). Thus, if a debtor's actions satisfy the business judgment rule, then the transaction in question should be approved under section 363(b)(1) of the Bankruptcy Code. Indeed, when applying the

business judgment standard, courts show great deference to a debtor's business decisions. *See Pitt v. First Wellington Canyon Assocs. (In re First Wellington Canyon Assocs.)*, 1989 WL 106838, at \*3 (N.D. Ill. 1989) ("Under this test, the debtor's business judgment . . . must be accorded deference unless shown that the bankrupt's decision was taken in bad faith or in gross abuse of the bankrupt's retained discretion.").

59. As set forth above, the Debtor has a sound business justification for selling the Assets. **First**, the Debtor believes that the Sale will maximize the Assets' going-concern value by allowing a party to bid on business assets that would have substantially less value on a stand-alone basis. Moreover, to the extent that the Successful Bidder assumes certain of the Contracts, it will result in payment in full for a number of the Debtor's creditors.

60. **Second**, the sale of the Assets will be subject to competing bids, enhancing the Debtor's ability to receive the highest or otherwise best value for the Assets. The value of the Assets will be tested through the Auction conducted pursuant to and according to the Bidding Procedures. Ultimately, the Successful Bid, after being subject to a "market check" in the form of the Auction and accepted by the Debtor in the exercise of its reasonable business judgment, will constitute the highest or otherwise best offer for the Assets and will provide a greater recovery for its estate than any known or practically available alternative. *See, e.g., In re Trans World Airlines, Inc.*, No. 01-00056, 2001 WL 1820326, at \*4 (Bankr. D. Del. 2001) (while a "section 363(b) sale transaction does not require an auction procedure . . . the auction procedure has developed over the years as an effective means for producing an arm's-length fair value transaction"). Consequently, the fairness and reasonableness of the consideration to be paid by the Successful Bidder ultimately will be demonstrated by adequate "market exposure" and an

open and fair auction process — the best means for establishing whether a fair and reasonable price is being paid.

61. Thus, the Debtor submits that the Successful Bidder's purchase agreement will constitute the highest or otherwise best offer for the Assets and will provide a greater recovery for the Debtor's estate than would be provided by any other available alternative. As such, the Debtor's determination to sell the Assets through an Auction process and subsequently to enter into the purchase agreement with the Successful Bidder will be a valid and sound exercise of the Debtor's business judgment. The Debtor will submit evidence at the Sale Hearing to support these conclusions. Therefore, the Debtor requests that the Court make a finding that the proposed sale of the Assets is a proper exercise of the Debtor's business judgment and is rightly authorized.

**B. Sale Provisions Highlighted Pursuant to Local Rule 6004-1(b)(iv).<sup>4</sup>**

62. Pursuant to Local Rule 6004(b)(iv)(C), a sale motion must highlight any provisions pursuant to which an entity is being released or claims against any entity are being waived or otherwise satisfied. The Sale Order provides that certain claims against the Debtor and/or Purchaser are barred or otherwise waived. *See* Sale Order, ¶¶ 21, 22 and 25.

63. Pursuant to Local Rule 6004(b)(iv)(E), a sale motion must highlight any deadlines for the closing of the proposed sale or deadlines that are conditions to closing the proposed transaction. As set forth above, the Debtor is subject to the deadlines under the DIP Facility, among which include the condition that this Motion be approved within 21 days of filing of this Motion and that the Sale will be consummated within 25 days after the deadline for submitting

---

<sup>4</sup> If a provision of Local Rule 6004-1(b)(iv) is not discussed in this section, it means that the provisions governing the sale of the Assets do not contain a provision that triggers disclosure under that rule.

bids to participate at the Auction or 5 calendar days after all necessary approvals for the Sale are completed. *See* DIP Facility, pages 14-15.

64. Pursuant to Local Rule 6004(1)(b)(iv)(J), a sale motion must highlight whether, if the debtor proposes to sell substantially all of its assets, the debtor will retain or have reasonable access to its books and records to enable it to administer its bankruptcy case. The proposed Sale Order provides that the Debtor shall have reasonable access to their books and records. *See* Sale Order, ¶ 28.

65. Pursuant to Local Rule 6004-1(b)(iv)(L), a sale motion should highlight any provision limiting the proposed purchaser's successor liability. The proposed Sale Order provides that Purchaser shall not have any successor liability related to the Debtor or the transferred Assets. *See* Sale Order ¶¶ DD, JJ, 25, and 26.

66. Pursuant to Local Rule 6004-1(b)(iv)(N), a sale motion must highlight any provision by which the debtor seeks to allow credit bidding pursuant to Bankruptcy Code section 363(k). The Bidding Procedures allow the Agent to credit bid the full amount of the obligations under the DIP Order and the DIP Loan Documents and all prepetition claims of the Agent and Lenders in connection with each round of bidding at the Auction. *See* Bidding Procedures § IV(G).

67. Pursuant to Local Rule 6004-1(b)(iv)(O), a sale motion must highlight any provision whereby the debtor seeks relief from the ten-day stay imposed by Bankruptcy Rule 6004(h). As explained in further detail below, to maximize the value received for the Assets (and consistent with the DIP Facility deadlines), the Debtor seeks to close the Transaction as soon as possible after the Sale Hearing. Accordingly, the Debtor has requested that the Court

waive the ten-day stay period under Bankruptcy Rules 6004(h) and 6006(d). *See* Bidding Procedures Order ¶ 29; Sale Order ¶ 27.

**C. Adequate and Reasonable Notice of the Sale Will Be Provided.**

68. As described above, the Sale Notice: (a) will be served in a manner that provides at least 21-days' notice of the date, time, and location of the Sale Hearing; (b) informs parties in interest of the deadlines for objecting to the Sale or the assumption and assignment of the Contract; and (c) otherwise includes all information relevant to parties interested in or affected by the Sale. Significantly, the form and manner of the Sale Notice will have been approved by this Court pursuant to the Bidding Procedures Order, after notice and a hearing, before it is served on parties in interest.

**D. The Sale and Purchase Price Will Reflect a Fair-Value Transaction.**

69. It is well-settled that, where there is a court-approved auction process, a full and fair price is presumed to have been obtained for the assets sold, as the best way to determine value is exposure to the market. *See Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 457 (1999). The Debtor will continue to market the Assets and solicit offers consistent with the Bidding Procedures, including, without limitation, by providing acceptable bidders with access to the Data Room and requested information. In this way, the number of bidders that are eligible to participate in the competitive Auction process will be maximized. On the other hand, if the Debtor enters into a Stalking Horse Agreement and no auction is held because no auction is necessary, the Stalking Horse Agreement's purchase price conclusively will have been demonstrated to be fair value.

**E. The Sale of the Assets Should Be Free and Clear of Interests Pursuant to Section 363(f) of the Bankruptcy Code.**

70. The Debtor further submits that it is appropriate to sell the Assets free and clear of all liens, claims, encumbrances, and interests (collectively, the “*Interests*”) pursuant to section 363(f) of the Bankruptcy Code, with any such Claims and Interests attaching to the net sale proceeds of the Transferred Assets, as and to the extent applicable.

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

72. Section 363(f) is drafted in the disjunctive. Thus, satisfaction of any of the requirements enumerated therein will suffice to permit the Debtor’s sale of the Assets free and clear of all interests (*i.e.*, all liens, claims, rights, interests, charges, or encumbrances), except with respect to any interests that may be assumed liabilities under the applicable purchase agreement. *See In re Kellstrom Indus., Inc.*, 282 B.R. 787, 793 (Bankr. D. Del. 2002) (“[I]f any of five conditions are met, the debtor has the authority to conduct the sale free and clear of all liens.”); *see also In re Dundee Equity Corp.*, 1992 Bankr. LEXIS 436, at \*12 (Bankr. S.D.N.Y. March 6, 1992) (“[s]ection 363(f) is in the disjunctive, such that the sale free of the interest concerned may occur if any one of the conditions of § 363(f) have been met.”); *Citicorp Homeowners Servs., Inc. v. Eliot (In re Eliot)*, 94 B.R. 343, 345 (E.D. Pa. 1988) (same); *Michigan Employment Sec. Comm’n v. Wolverine Radio Co. (In re Wolverine Radio Co.)*, 930 F.2d 1132, 1147 n.24 (6th Cir. 1991) (stating that section 363(f) of the Bankruptcy Code is

written in the disjunctive; holding that the court may approve the sale “free and clear” provided that at least one of the subsections of section 363(f) of the Bankruptcy Code has been satisfied).

73. The Debtor submits that, excluding assumed agreements, the Assets may be sold free and clear of liens, claims, encumbrances, and other interests—all in accordance with at least one of the five conditions of section 363(f) of the Bankruptcy Code. Consistent with section 363(f)(2) of the Bankruptcy Code, each of the parties holding liens on the Assets, if any, will consent, or absent any objection to this Motion, will be deemed to have consented to, the Sale and transfer of the Assets. Furthermore, any party holding a valid lien against the Assets will be adequately protected by having its liens, if any, attach to the sale proceeds received by the Debtor from the sale of the Assets to the Successful Bidder, in the same order of priority, with the same validity, force and effect that such creditor had prior to such sale, subject to any claims and defenses the Debtor and its estate may possess with respect thereto. Accordingly, section 363(f) of the Bankruptcy Code authorizes the sale and transfer of the Assets free and clear of any such Interests.

**F. The Assets May Be Sold Free and Clear of the Scripps Management Agreement.**

74. While the Debtor believes that Scripps may object to any proposed sale of the Assets on account of its claimed interest in the Proton Center pursuant to the Scripps Management Agreement, that agreement itself poses no barrier to completing a sale.

75. In its Complaint the Debtor alleges that Scripps has neither ownership, leasehold, nor lien rights in the Proton Center. The Debtor further alleges that its agreement with Scripps is subject to termination based upon the Proton Center’s poor operating performance. Any interests Scripps claims in the Assets (including the Proton Center) are the subject of a bona fide dispute.



Accordingly, the Assets may be sold free and clear of such interests pursuant to section 363(f)(4) of the Bankruptcy Code.

76. Moreover, the Scripps Management Agreement itself contemplates and allows for the sale of the Proton Center free and clear of Scripps supposed interests. [REDACTED]

[REDACTED]

[REDACTED]

77. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

**(i) The Assets May Be Sold Subject to Scripps' Management of the Proton Center Pursuant to the Scripps Management Agreement or the Scripps Management Agreement May Be Terminated at the Close of a Sale.**

78. By its very terms, the Scripps Management Agreement provides that the Proton Center may be sold either subject to the Scripps Management Agreement or free of the Scripps Management Agreement. [REDACTED]

---

<sup>5</sup> Subject to the resolution of the issues addressed in the Complaint, the Debtor has additional means to sell free and clear of any alleged interests of Scripps, including pursuant to [REDACTED] and rejection of the Scripps Agreement. The Debtor is reserving all of these rights and may rely on any of the applicable legal means to sell free and clear.

<sup>6</sup> The Debtor, of course, reserves its right to sell the Proton Center pursuant to [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

79. [REDACTED]

[REDACTED]

[REDACTED] Thus, to the extent that a Bidder desires to purchase the Proton Center subject to Scripps' interests under the Scripps Management Agreement, it may do so [REDACTED]

[REDACTED]

80. If, on the other hand, a Bidder determines that it does not want to retain Scripps' in its role under the Scripps Management Agreement, the Scripps Management Agreement provides that the Debtor may terminate the agreement and transfer the Assets (including the Proton Center) free and clear of Scripps interests. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

81. If the Debtor wishes to sell the Assets (including the Proton Facility) and terminate the Scripps Management Agreement, [REDACTED]

[REDACTED] provides a mechanism [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

**(ii) Alternatively, the Assets May Be Sold Free and Clear of the Scripps Management Agreement Pursuant to Sections 365(a) and 363(f) of the Bankruptcy Code.**

82. [REDACTED] the Scripps Management Agreement clearly contemplates the sale of the Assets free of any interest Scripps may have by virtue of the Scripps Management Agreement. But Section 363(f) of the Bankruptcy Code also permits the sale of the Proton Center free and clear of Scripps' purported interests, regardless of whether or not Scripps consents to the Sale. As set forth in the Complaint, Scripps' interests in the Proton Facility, if any, are the subject of a *bona fide* dispute among Scripps and the Debtor. *See* 11 U.S.C. § 363(f)(4). Where, as here, there are objective factual and legal bases to contest a non-debtor's purported interest in a debtor's property, section 363(f)(4) of the Bankruptcy Code provides a mechanism for the debtor to maximize the value of that asset for the estate, while the parties resolve their competing claims. *See* 11 U.S.C. § 363(f)(4); *Revel*, 802 F.3d at 573 (to

demonstrate a *bona fide* dispute to permit a free-and-clear sale of a debtor's property, the debtor need only show an objective basis in law or fact to contest the non-debtor party's interest in the property).

83. Moreover, Scripps can be compelled to accept a monetary satisfaction for the Scripps Management Agreement and the related agreements, including whatever interest Scripps may have in the Proton Center. *See* 11 U.S.C. § 363(f)(5); *see also Qualitech*, 327 F.3d at 548 (holding that a possessory interest extinguished under section 363(f) may be compensated from the proceeds of the sale). Indeed, as discussed above, [REDACTED] of the Scripps Management Agreement specifically provides for the sale that is contemplated by the Motion.

**G. The Assets and the Assigned Contacts Should Be Sold Free and Clear of Successor Liability.**

84. The Sale Order provides that Purchaser shall not have any successor liability related to Seller or the Transferred Assets to the maximum extent permitted by law. *See* Sale Order, ¶ 22. Extensive case law establishes that claims against a winning bidder may be directed to the proceeds of a free and clear sale of property, and may not subsequently be asserted against that buyer.

85. Although section 363(f) of the Bankruptcy Code provides for the sale of assets “free and clear of any interests,” the term “any interest” is not defined anywhere in the Bankruptcy Code. *Folger Adam Security v. DeMatteis/MacGregor JV*, 209 F.3d 252, 257 (3d Cir. 2000). In the case of *In re Trans World Airlines, Inc.*, 322 F.3d 283, 288-89 (3d Cir. 2003), the Third Circuit specifically addressed the scope of the term “any interest.” The Third Circuit observed that while some courts have “narrowly interpreted that phrase to mean only in rem interests in property,” the trend in modern cases is towards “a more expansive reading of ‘interests in property’ which ‘encompasses other obligations that may flow from ownership of

the property.” *Id.* at 289 (citing 3 Collier on Bankruptcy 363.06[1]). As determined by the Fourth Circuit in *In re Leckie Smokeless Coal Co.*, 99 F.3d 573, 581-82 (4th Cir. 1996), a case cited approvingly and extensively by the Third Circuit in *Folger*, the scope of section 363(f) is not limited to in rem interests. Thus, the Third Circuit in *Folger* cited *Leckie* for the proposition that the debtors “could sell their assets under § 363(f) free and clear of successor liability that otherwise would have arisen under federal statute.” *Folger*, 209 F.3d at 258.

86. Courts have consistently held that a buyer of a debtor’s assets pursuant to a section 363 sale takes free from successor liability resulting from pre-existing claims. *See The Ninth Avenue Remedial Group v. Allis-Chalmers Corp.*, 195 B.R. 716, 732 (Bankr. N.D. Ind. 1996) (stating that a bankruptcy court has the power to sell assets free and clear of any interest that could be brought against the bankruptcy estate during the bankruptcy); *MacArthur Co. v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 837 F.2d 89, 93-94 (2d Cir. 1988) (channeling of claims to proceeds consistent with intent of sale free and clear under section 363(f) of the Bankruptcy Code); *In re New England Fish Co.*, 19 B.R. 323, 329 (Bankr. W.D. Wash. 1982) (transfer of property in free and clear sale was free and clear of Title VII employment discrimination and civil rights claims of debtor’s employees); *In re Hoffman*, 53 B.R. 874, 876 (Bankr. D.R.I. 1985) (transfer of liquor license free and clear of any interest permissible even though the estate had unpaid taxes); *American Living Systems v. Bonapfel (In re All Am. of Ashburn, Inc.)*, 56 B.R. 186, 190 (Bankr. N.D. Ga. 1986) (product liability claims precluded from being asserted against his successor in a sale of assets free and clear); *WBQ P’ship v. Virginia Dept. of Medical Assistance Services (In re WBQ P’ship)*, 189 B.R. 97, 104-05 (Bankr E D. Va. 1995) (Commonwealth of Virginia’s right to recapture depreciation is an “interest” as used in section 363(f)).

87. The purpose and value of an order authorizing the transfer of the Assets would be frustrated if claimants thereafter could use the transfer as a basis to assert claims against Purchaser. Under section 363(f) of the Bankruptcy Code, Purchaser is entitled to know that the Assets are not tainted by latent claims that could be asserted against Purchaser after the proposed transaction is completed. Absent that ruling, the value of the Assets could be severely compromised.

88. Accordingly, consistent with the above-cited case law, the order approving the sale of the Assets should state that Purchaser is not liable as a successor under any theory of successor liability, for Interests that encumber or relate to the Assets.

**H. The Sale Has Been Proposed in Good Faith and Without Collusion, and the Successful Bidder Will Be a “Good-Faith Purchaser” Entitled to the Full Protection of Section 363(m) of the Bankruptcy Code; and the Sale of the Assets Does Not Violate Section 363(n) of the Bankruptcy Code.**

89. The Debtor requests that the Court find that the Successful Bidder is entitled to the benefits and protections provided by section 363(m) of the Bankruptcy Code in connection with the sale of the Assets.

90. Section 363(m), of the Bankruptcy Code provides, in pertinent part:

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

11 U.S.C. § 363(m).

91. 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 purchased or

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., Abbotts Dairies of Pa.*, 788 F.2d at 147 (“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 (7th Cir. 1986) (same); *In re Sasson Jeans, Inc.*, 90 B.R. 608, 610 (S.D.N.Y. 1988) (same).

92. The Debtor submits that the Stalking Horse Bidder, if any, or any other Successful Bidder arising from the Auction would be a “good faith purchaser” within the meaning of section 363(m) of the Bankruptcy Code, and the resulting purchase agreement would be a good-faith agreement on arm’s-length terms entitled to the protections of section 363(m) of the Bankruptcy Code.<sup>7</sup> **First**, as set forth in more detail above, the consideration to be received by the Debtor pursuant to the Sale will be subject to a market process by virtue of Debtor’s marketing efforts, led by its investment banker, and the Auction and will be substantial, fair, and reasonable. **Second**, the purchase agreement entered into by the Debtor and the Successful Bidder will be the result of extensive arm’s-length negotiations, during which all parties will have the opportunity to be, and the Debtor will be, represented by competent counsel, and any

---

<sup>7</sup> The Debtor believes 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, if any, and the Bidding Procedures. Pursuant to the Bidding Procedures, any Successful Bidder will have had to present a proposal in accordance with the Bidding Procedures. In addition, the Debtor will not choose as the Successful Bidder or the 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.

purchase agreement with a Successful Bidder will be the culmination of the Debtor's competitive market process and, if necessary, the Auction, in which all negotiations will be conducted on an arm's-length, good-faith basis. *Third*, where—as the Debtor anticipates will be the case here—there is no indication of any “fraud or collusion between the purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders” or similar conduct, there is no cause that would permit the Sale to be avoided pursuant to section 363(n) of the Bankruptcy Code. Moreover, with 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 Successful Bidder's offer will be evaluated and approved by the Debtor in consultation with its advisors and the Consultation Parties. Accordingly, the Debtor believes that the Successful Bidder and the resulting purchase agreement should be entitled to the full protections of section 363(m) of the Bankruptcy Code.

93. Moreover, because there will be absolutely no fraud or improper insider dealing of any kind, the Sale does not constitute an avoidable transaction pursuant to section 363(n) of the Bankruptcy Code, and, as a result, Purchaser should receive the protections afforded good faith purchasers by section 363(m) of the Bankruptcy Code. Accordingly, the Debtor requests that the Court make a finding at the Sale Hearing that the agreement reached with the Successful Bidder was at arm's length and is entitled to the full protections of section 363(m) of the Bankruptcy Code. The Debtor will submit evidence at the Sale Hearing to support these conclusions.

**I. Credit Bidding Should Be Authorized Pursuant to Section 363(k) of the Bankruptcy Code.**

94. A secured creditor is allowed to “credit bid” the amount of its claims in a sale of assets in which it has a security interest. 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) allows such secured creditor to bid the total face value of its claim and does not limit the credit bid to the creditor’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 . . . that creditors can bid the full face value of their secured claims under section 363(k)”).

95. In this District, absent cause for restriction on credit bidding, courts have consistently ruled in favor of reserving a secured creditor’s right to credit bid its claim. *See In re Source Home Entm’t, LLC*, No. 14-115533 (KG) (Bankr. D. Del. July 21, 2014) (order approving Bidding Procedures which authorized parties with secured claims to credit bid); *In re Fisker Auto. Hldgs, Inc.*, No. 13-13087 (KG) (Bankr. D. Del. Jan. 23, 2014) (order authorizing secured creditors to exercise right under Bankruptcy Code section 363(k) to make a credit bid); *In re PTC Alliance Corp.*, No. 09-13395 (Bankr. D. Del. Nov. 6, 2009) (order authorizing, but not directing, the administrative agent to credit bid); *In re Hayes Lemmerz Int’l, Inc.*, No. 09-11655 (Bankr. D. Del. Sept. 22, 2009) (order authorizing interested party to exercise its right under Bankruptcy Code section 363(k) to make a credit bid); *In re Foamex Int’l Inc.*, 09-10560, (Bankr. D. Del. May 27, 2009) (order authorizing the sale of substantially all of the debtor’s assets in a \$155 million credit bid over a \$151.5 million all-cash bid); *see also Cohen v. KB Mezzanine Fund II, LP (In re SubMicron Sys. Corp.)*, 432 F.3d 448, 459-60 (3d Cir. 2006) (citations omitted). As provided in the DIP Order, in the event that the Agent—for itself and for

and on behalf of the lenders—elects, it is entitled to credit bid some or all of the claim secured by its collateral pursuant to section 363(k) of the Bankruptcy Code.

### **III. The Assumption and Assignment of the Contracts Should Be Approved.**

#### **A. The Assumption and Assignment of the Contracts Reflects the Debtor's Reasonable Business Judgment.**

96. To facilitate and effectuate the sale of the Assets, the Debtor is seeking authority to assign the Assigned Contracts to the Successful Bidder to the extent required by such Successful Bidder.

97. Section 365 of the Bankruptcy Code authorizes a debtor to assume and/or assign its executory contracts and unexpired leases, subject to the approval of the court, provided that the defaults under such contracts and leases are cured and adequate assurance of future performance is provided. *See* 11 U.S.C. § 365(b)(1).

98. The standard applied by the Third Circuit in determining 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 Sharon Steel Corp. v. Nat’l Fuel Gas Distrib. Corp.*, 872 F.2d 36, 40 (3d Cir. 1989); *see also NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 523 (1984) (describing business judgment test as “traditional”) (superseded in part by 11 U.S.C. § 1113).

99. Courts generally will not second-guess a debtor’s business judgment concerning the assumption of an executory contract. *See In re Decora Indus., Inc.*, 2002 WL 32332749, at \*8 (D. Del. 2002); *Official Comm. for Unsecured Creditors v. Aust (In re Network Access Solutions, Corp)*, 330 B.R. 67, 75 (Bankr. D. Del. 2005) (“The standard for approving the assumption of an executory contract is the business judgment rule”); *In re Exide Techs.*, 340 B.R. 222, 239 (Bankr. D. Del. 2006) (“The propriety of a decision to reject an executory contract

is governed by the business judgment standard”); *see also Phar Mor, Inc. v. Strouss Bldg. Assocs.*, 204 B.R. 948, 952 (N.D. Ohio 1997) (“Courts should generally defer to a debtor’s decision whether to reject an executory contract.”) (citation omitted). A debtor’s decision to assume or reject an executory contract or expired lease will not be subject to review unless such decision is clearly an unreasonable exercise of such judgment. *See, e.g., Group of Institutional Investors v. Chicago, Milwaukee, St. Paul & Pac. Ry. Co.*, 318 U.S. 523 (1943) (applying Bankruptcy Act section 77(b), predecessor to section 365 of the Bankruptcy Code, and rejecting a test of whether an executory contract was burdensome in favor of determining whether rejection is within the debtor’s business judgment); *see also Sharon Steel*, 872 F.2d at 40 (describing deference to a debtor’s business judgment as “breathing space afforded [to] the debtor to consider whether to reject or assume executory contracts under the Code”); *Network Access Solutions*, 330 B.R. at 75; *Exide Techs.*, 340 B.R. at 239.

100. Here, the Court should approve the decision to assume and assign the Assigned Contacts in connection with the Sale as a sound exercise of the Debtor’s business judgment. **First**, the Assigned Contacts are necessary to operate the Assets and, as such, they are essential to inducing the best offer for the Assets. **Second**, it is unlikely that any purchaser would want to acquire the Assets unless a significant number of the contracts and leases needed to manage the day-to-day operations were included in the transaction. **Third**, the Assigned Contacts will be assumed and assigned as part of a process approved by the Court pursuant to the Bidding Procedures Order and, thus, will be reviewed by key constituents in this chapter 11 case. Accordingly, the Debtor submits that the assumption and assignment of the Assigned Contacts, if required by the Successful Bidder, should be approved as a sound exercise of the Debtor’s business judgment.

101. A debtor in possession may assign an executory contract or an unexpired lease of the debtor if it assumes the agreement in accordance with section 365(a) of the Bankruptcy Code, and provides adequate assurance of future performance by the assignee, whether or not there has been a default under the agreement. *See* 11 U.S.C. § 365(f)(2). Significantly, among other things, adequate assurance may be provided by demonstrating the assignee's financial health and experience in managing the type of enterprise or property assigned. *See, e.g., In re Bygaph, Inc.*, 56 B.R. 596, 605-06 (Bankr. S.D.N.Y. 1986) (stating that adequate assurance of future performance is present when the prospective assignee of a lease from the debtor has financial resources and has expressed willingness to devote sufficient funding to the business in order to give it a strong likelihood of succeeding).

102. The meaning of "adequate assurance of future performance" depends on the facts and circumstances of each case, but should be given "practical, pragmatic construction." *EBG Midtown South Corp. v. McLaren/Hart Envtl. Eng' g Corp. (In re Sanshoe Worldwide Corp.)*, 139 B.R. 585, 592 (S.D.N.Y. 1992) (citations omitted), *aff'd*, 993 F.2d 300 (2d Cir. 1993); *Carlisle Homes, Inc. v. Azzari (In re Carlisle Homes, Inc.)*, 103 B.R. 524, 538 (Bankr. D.N.J. 1988).

103. Counterparties to Assigned Contracts will have the opportunity to object to adequate assurance of future performance by any of the Bidders. Accordingly, the Debtor submits that the assumption and assignment of the Assigned Contracts as set forth herein should be approved.

104. To assist in the assumption, assignment and sale of the Assigned Contracts, the Debtor also requests that the Sale Order approving the sale of the Assets 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 section 365(f) of the Bankruptcy Code.

105. Section 365(f)(1) of the Bankruptcy Code permits a debtor to assign unexpired leases and contracts free from such anti-assignment restrictions, providing, in pertinent part, that:

[N]otwithstanding 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 under paragraph (2) of this subsection . . . .

11 U.S.C. § 365(f)(1).

106. Section 365(f)(1) of the Bankruptcy Code, by operation of law, invalidates provisions that prohibit, restrict, or condition assignment of an executory contract or unexpired lease. *See, e.g., Coleman Oil Co., Inc. v. The Circle K Corp. (In re The Circle K Corp.)*, 127 F.3d 904, 910-11 (9th Cir. 1997) (“no principle of bankruptcy or contract law precludes us from permitting the Debtors here to extend their leases in a manner contrary to the leases’ terms, when to do so will effectuate the purposes of section 365”), *cert. denied*, 522 U.S. 1148 (1998). Section 365(f)(3) of the Bankruptcy Code goes beyond the scope of section 365(f)(1) of the Bankruptcy Code by prohibiting enforcement of any clause creating a right to modify or terminate the contract or lease upon a proposed assumption or assignment thereof. *See, e.g., In re Jamesway Corp.*, 201 B.R. 73 (Bankr. S.D.N.Y. 1996) (section 365(f)(3) of the Bankruptcy Code prohibits enforcement of any lease clause creating right to terminate lease because it is being assumed or assigned, thereby indirectly barring assignment by debtor; all lease provisions, not merely those entitled anti-assignment clauses, are subject to court’s scrutiny regarding anti-assignment effect).

107. Other courts have recognized that provisions that have the effect of restricting assignments cannot be enforced. *See In re Rickel Home Ctrs., Inc.*, 240 B.R. 826, 831 (D. Del. 1998) (“In interpreting Section 365(f) [*sic*], courts and commentators alike have construed the terms to not only render unenforceable lease provisions which prohibit assignment outright, but also lease provisions that are so restrictive that they constitute de facto anti-assignment provisions.”). Similarly, in *In re Mr. Grocer., Inc.*, the court noted that:

[the] case law interpreting § 365(f)(1) of the Bankruptcy Code establishes that the court does retain some discretion in determining that lease provisions, which are not themselves ipso facto anti-assignment clauses, may still be refused enforcement in a bankruptcy context in which there is no substantial economic detriment to the landlord shown, and in which enforcement would preclude the bankruptcy estate from realizing the intrinsic value of its assets.

77 B.R. 349, 354 (Bankr. D.N.H. 1987). Thus, the Debtor requests that any anti-assignment provisions be deemed not to restrict, limit or prohibit the assumption, assignment and sale of the Assigned Contacts, and be deemed and found to be unenforceable anti-assignment provisions within the meaning of section 365(f) of the Bankruptcy Code.

#### **IV. Relief Pursuant to Bankruptcy Rules 6004(h) and 6006(d) Is Appropriate.**

108. Bankruptcy Rule 6004(h) provides that an “order authorizing the use, sale, or lease of property . . . is stayed until the expiration of 14 days after the entry of the order, unless the court orders otherwise.” Additionally, Bankruptcy Rule 6006(d) provides that an “order authorizing the trustee to assign an executory contract or unexpired lease . . . is stayed until the expiration of 14 days after the entry of the order, unless the court orders otherwise.” The Debtor requests that the Sale Order be effective immediately upon its entry by providing that the 14-day stays under Bankruptcy Rules 6004(h) and 6006(d) be waived.

109. The purpose of Bankruptcy Rules 6004(h) and 6006(d) is to provide sufficient time for objecting party to appeal before an order can be implemented. *See* Advisory Committee

Notes to Fed. R. Bankr. P. 6004(h) and 6006(d). Although Bankruptcy Rules 6004(h) and 6006(d) and the Advisory Committee Notes are silent as to when a court should “order otherwise” and eliminate or reduce the 14-day stay periods, the leading treatise on bankruptcy suggests that the 14-day stay periods should be eliminated to allow a sale or other transaction to close immediately “where there has been no objection to procedure.” 10 *Collier on Bankruptcy* ¶ 6004.10 (15th rev. ed. 2006). Furthermore, if an objection is filed and overruled, and the objecting party informs the court of its intent to appeal, stay may be reduced to the amount of time actually necessary to file such appeal. *Id.*

110. To maximize the value received from the Assets, and to ensure that they are in compliance with the requirements of the DIP Order, the Debtor seeks to close the Sale as soon as possible after the Sale Hearing. Accordingly, the Debtor hereby requests that the Court waive the 14-day stay periods under Bankruptcy Rules 6004(h) and 6006(d).

### **Notice**

111. The Debtor will provide notice of this Motion to: (a) the U.S. Trustee; (b) the holders of the 20 largest unsecured claims against the Debtor; (c) counsel to the administrative agent for the Debtor’s prepetition postpetition secured Lenders; (d) the United States Attorney’s Office for the District of Delaware; (e) the Internal Revenue Service; (f) the Securities and Exchange Commission; (g) the California Franchise Tax Board; (h) all other applicable state and local taxing authorities; (i) the Contract Counterparties; (j) all parties who have expressed a written interest in the Assets; (k) all parties who are known or reasonably believed, after reasonable inquiry, to have asserted any Interest in the Assets; (k) each governmental agency that is an interested party with respect to the Sale and transactions proposed thereunder; and (m) all parties that have requested notice pursuant to Bankruptcy Rule 2002. The Debtor submits that, in light of the nature of the relief requested, no other or further notice need be given.

**No Prior Request**

112. No prior request for the relief sought in this Motion has been made to this or any other court.

WHEREFORE, the Debtor respectfully requests that this Court: (a) enter the Bidding Procedures Order, the form of which is attached as **Exhibit A** hereto; (b) enter the Sale Order, the form of which is attached as **Exhibit B** hereto; and (c) grant such other and further relief as is just and proper.

POLSINELLI PC

Dated: March 24, 2017  
Wilmington, Delaware

/s/ Christopher A. Ward  
Christopher A. Ward (Del. Bar No. 3877)  
Justin K. Edelson (Del. Bar No. 5002)  
222 Delaware Avenue, Suite 1101  
Wilmington, Delaware 19801  
Telephone: (302) 252-0920  
Facsimile: (302) 252-0921  
Email: cward@polsinelli.com  
jedelson@polsinelli.com

– and –

LOCKE LORD LLP  
David W. Wirt (*pro hac vice*)  
Aaron C. Smith (*pro hac vice*)  
Phillip W. Nelson (*pro hac vice*)  
Brian A. Raynor (*pro hac vice*)  
111 S. Wacker Drive  
Chicago, Illinois 60606-4410  
Telephone: (312) 443-0700  
Facsimile: (312) 443-0336  
Email: dwirt@lockelord.com  
asmith@lockelord.com  
phillip.nelson@lockelord.com  
braynor@lockelord.com

Proposed Counsel to the Debtor



**Exhibit A to Motion**

**Proposed Bidding Procedures Order**

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

In re:

CALIFORNIA PROTON TREATMENT  
CENTER, LLC,<sup>1</sup>

Debtor.

Chapter 11

Case No. 17-10477-LSS

Re: Docket No. \_\_\_\_

**ORDER (A) APPROVING BIDDING PROCEDURES  
AND BID PROTECTIONS IN CONNECTION WITH THE SALE  
OF SUBSTANTIALLY ALL OF THE DEBTOR'S ASSETS, (B) APPROVING THE  
FORM AND MANNER OF NOTICE THEREOF, (C) SCHEDULING AN AUCTION  
AND A SALE HEARING, (D) APPROVING PROCEDURES FOR THE ASSUMPTION  
AND ASSIGNMENT OF CONTRACTS, AND (E) GRANTING RELATED RELIEF**

---

Upon the motion (the “*Motion*”)<sup>2</sup> of the above-captioned debtor as debtor in possession (the “*Debtor*”) for entry of an order (this “*Order*”) (a) authorizing and approving the bidding procedures attached hereto as **Exhibit 1** (the “*Bidding Procedures*”) in connection with the sale of substantially all of the Debtor’s assets (the “*Assets*”), (b) approving the form and manner of notice attached as **Exhibit 2** to the Bidding Procedures Order (the “*Sale Notice*”) of an auction (the “*Auction*”) and sale hearing (the “*Sale Hearing*”) with respect to the sale of the Assets free and clear of liens, claims, encumbrances, and other interests (the “*Sale*”), (c) scheduling the Sale Hearing, (d) approving procedures for the possible assumption and assignment of certain executory contracts and unexpired leases in connection with the Sale (collectively, the “*Contracts*”) and (e) authorizing the Debtor, in the exercise of its reasonable business judgment to (i) enter into a Stalking Horse agreement (the “*Stalking Horse Agreement*”) if the Debtor believes that such an agreement will further the purposes of the

---

<sup>1</sup> The last four digits of the Debtor’s federal tax identification number are: 9073. The location of the Debtor’s place of business is 9730 Summers Ridge Road, San Diego, California 92121, Attn: Wilson Williams, Manager.

<sup>2</sup> Capitalized terms used as defined terms herein but not otherwise defined shall have the meanings ascribed to them in the Motion. In the event there is a conflict between this Order and the Motion, this Order shall control and govern.

Auction by, among other things, enticing value-maximizing bids, and (ii) offer a Stalking Horse bidder (the “***Stalking Horse Bidder***”) any or all of the following (A) the Break-Up Fee (as defined below) in an amount to be determined by the Debtor, not to exceed 3 percent of the total purchase price offered by the Stalking Horse Bidder in the Stalking Horse Agreement, (B) the Expense Reimbursement (as defined below) of the Stalking Horse Bidder’s reasonable and actual fees and expenses incurred as the Stalking Horse Bidder, subject to a cap of \$250,000, and (C) initial overbid protection in an amount to be determined by the Debtor, to be announced prior to the Auction (the “***Initial Overbid***” and, together with the Break-Up Fee and the Expense Reimbursement, the “***Bid Protections***”); this Court having jurisdiction over this matter pursuant to 28 U.S.C. § 1334 and the *Amended Standing Order of Reference from the United States District Court for the District of Delaware*, dated February 29, 2012; this Court having found that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); this Court having found that it may enter a final order consistent with Article III of the United States Constitution; this Court having found that venue of this proceeding and the Motion in this District is proper pursuant to 28 U.S.C. § 1408; this Court having found that the relief requested in the Motion is in the best interests of the Debtor’s estate, its creditors, and other parties in interest; this Court having found that the Debtor’s notice of the Motion and opportunity for a hearing on the Motion were appropriate under the circumstances and no other notice need be provided; this Court having reviewed the Motion and having heard the statements in support of the relief requested therein at a hearing before this Court (the “***Hearing***”); this Court having determined that the legal and factual bases set forth in the Motion and at the Hearing establish just cause for the relief granted herein; and upon all of the proceedings had before this Court; and after due deliberation and sufficient cause appearing therefor, THE COURT FINDS THAT:

A. The findings and conclusions set forth in here constitute the Court's findings of fact and conclusions of law pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure (the "**Bankruptcy Rules**"), made applicable to this proceeding pursuant to Bankruptcy Rule 9014. To the extent that any of the following findings of fact constitute conclusions of law, they are adopted as such. To the extent that any of the following conclusions of law constitute findings of fact, they are adopted as such.

B. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334 and the *Amended Standing Order of Reference from the United States District Court for the District of Delaware*, date February 29, 2012.

C. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2). The Debtor has confirmed its 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 this Court in connection with this Motion, to the extent that it is later determined that the Court, absent the consent of the parties, cannot enter final orders or judgments consistent with Article III of the United States Constitution.

D. Venue is proper in this District and in this Court pursuant to 28 U.S.C. § 1408.

E. The bases for the relief requested in this Motion are sections 105(a), 363, 365, 503(b), and 507(a)(2) of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (the "**Bankruptcy Code**"), Bankruptcy Rules 2002, 6004, and 6006(a), 9007 and 9014, and Local Rules 2002-1, 6004-1, and 9013-1(m).

F. Notice of the Motion has been given to: (a) the United States Trustee for the District of Delaware (the "**U.S. Trustee**"); (b) counsel to the administrative agent (the "**Agent**")

for the Debtor's prepetition and postpetition secured Lenders; (c) counterparties to the Contracts (the "***Contract Counterparties***"); (d) all parties who have expressed a written interest in the Assets; (e) all parties who are known or reasonably believed, after reasonable inquiry, to have asserted any lien, encumbrance, claim, or interest in the Assets; (f) the Internal Revenue Service; (g) the California Franchise Tax Board; (hi) all other applicable state and local taxing authorities; (i) all the Debtor's other creditors; (j) each governmental agency that is an interested party with respect to the Sale and transactions proposed thereunder; and (k) all parties that have requested or that are required to receive notice pursuant to Bankruptcy Rule 2002.

G. The Debtor has articulated good and sufficient reasons for this Court to (a) approve the Bidding Procedures; (b) schedule the Auction and Sale Hearing and approve the manner of notice of the Auction and Sale Hearing; (c) approve procedures for the assumption and assignment of the Contracts, including notice of the proposed cure amounts; (d) authorizing the Debtor, subject to consultation with the Agent, to enter into a Stalking Horse Agreement and extend to a Stalking Horse Bidder the Bid Protections in the exercise of its reasonable business judgment.

H. The Break-Up Fee and the Expense Reimbursement: (a) shall, if triggered, be deemed an actual and necessary cost and expense of preserving the Debtor's estate, within the meaning of sections 503(b) and 507(a)(2) of the Bankruptcy Code; (b) are commensurate to the real and substantial benefit conferred upon the Debtor's estate by the Stalking Horse Bidder; (c) are reasonable and appropriate, including in light of the size and nature of the proposed Sale and comparable transactions, the commitments that have been made, and the efforts that have been and will be expended by the Stalking Horse Bidder, notwithstanding that the proposed Sale

is subject to better and higher offers; and (d) were necessary to induce the Stalking Horse Bidder to pursue the Sale and to be bound by the Stalking Horse Agreement.

I. The Bidding Procedures are reasonable and appropriate and represent the best method for maximizing the value of the Assets for the benefit of the Debtor and its estate.

J. ***Assumption and Assignment Procedures.*** The Motion, this Order, and the assumption and assignment procedures (the “***Assignment Procedures***”) set forth herein are reasonably calculated to provide counterparties to any Contracts to be assumed by the Debtor and assigned to the Successful Bidder with proper notice of the intended assumption and assignment of their Contracts, the procedures in connection therewith, and any cure amounts relating thereto.

K. ***Sale Notice.*** The Sale Notice is reasonably calculated to provide interested parties with timely and proper notice of the proposed Sale, including, without limitation: (a) the date, time, and place of the Auction (if one is held); (b) the Bidding Procedure; (c) the deadline for filing objections to the Sale and entry of the Sale Order, and the date, time, and place of the Sale Hearing; (d) reasonably specific identification of the Assets to be sold; (e) a description of the Sale as being free and clear of liens, claims, encumbrances, and other interests (collectively, “***Interests***”), with all such Interests attaching with the same validity and priority to the Sale proceeds; (f) notice of the proposed assumption and assignment of Contracts to the Successful Bidder. No other or further notice of the Sale shall be required.

IT IS HEREBY ORDERED THAT:

1. The Motion is granted as set forth herein.

2. All objections to the relief requested in the Motion with respect to the Bidding Procedures that have not been withdrawn, waived, or settled as announced to the Court at the hearing on the Motion or by stipulation filed with the Court, or overruled.

3. The Bidding Procedures, substantially in the form attached hereto as **Exhibit 1**, are hereby approved in their entirety, and the Bidding Procedures shall govern the submission, receipt, and analysis of all Bids relating to the proposed sale of the Assets. Any party desiring to bid on the asset shall comply with the Bidding Procedures in this Order. The Debtor is authorized to take any and all actions necessary to implement the Bidding Procedures.

**I. Break-Up Fee and Expense Reimbursement**

4. The Debtor is authorized, subject to the reasonable exercise of its business judgment and consultation with the Agent, to designate an agreement a “Stalking Horse Agreement” and enter into a Stalking Horse Agreement with the Qualified Bidder (the “***Stalking Horse Bidder***”) prior to the Auction and to offer the Stalking Horse Bidder any or all of the following protections:

- (a) a break-up fee (the “***Break-Up Fee***”) in an amount to be determined by the Debtor, not to exceed 3 percent of the total purchase price offered by the Stalking Horse Bidder in the Stalking Horse Agreement; and
- (b) reimbursement of the Stalking Horse Bidder’s reasonable and actual fees and expenses incurred as the Stalking Horse Bidder up to \$250,000 (the “***Expense Reimbursement***”).

5. The Debtor’s obligation to pay the Break-Up Fee and the Expense Reimbursement shall survive the termination of the Stalking Horse Agreement and shall be payable only by the Debtor upon the closing of a Sale for the Assets with a Successful Bidder other than the Stalking Horse Bidder. The Break-Up Fee and the Expense Reimbursement shall be paid immediately upon consummation of the Sale out of the proceeds of the Sale and shall

have priority as an administrative expense in the Debtor's chapter 11 case pursuant to section 503(b) and 507(a) of the Bankruptcy Code.

## **II. The Auction**

6. As further described in the Bidding Procedures, if a Qualified Bid, other than the Credit Bid (as defined below), is received by the Bid Deadline, the Debtor will conduct the Auction at 10:00 a.m.. (prevailing Eastern Time) on June 12, 2017, at the offices of the Debtor's Delaware counsel, Polsinelli PC, 222 Delaware Avenue, Suite 1101, Wilmington DE 19801 or such later time on such day or other place as the Debtor shall notify all Qualified Bidders who have submitted Qualified Bids, if a Qualified Bid is timely received.

7. If the Debtor does not receive a Qualified Bid (other than the Credit Bid); (a) the Debtor may, in consultation with the Consultation Parties, cancel the Auction; and (b) the Credit Bid may be deemed by the Debtor to be the Successful Bid for the Assets; and (c) the Debtor shall be authorized to seek approval of the Credit Bid as the Successful Bid at the Sale Hearing.

8. If the Debtor receives a Qualified Bid (in addition to the Credit Bid), then the Debtor shall conduct the Auction in accordance with the Bidding Procedures.

9. Pursuant to Local Rule 6004-1(c)(ii): (a) each bidder participating at the Auction shall be required to confirm that it is not engaged in any collusion with respect to the bidding, the Auction, or the Sale, as set forth in the Bidding Procedures; (b) the Auction shall be conducted openly; and (c) the Auction shall be transcribed or videotaped.

10. The Agent shall be deemed to be a Qualified Bidder and is not required to make any Good Faith Deposit. The Agent may participate in the Auction and may credit bid at any time up to the conclusion of the Auction, in its sole and absolute discretion, any portion and up to the entire amount of the Agent's and the Lenders' respective claims, including, without limitation, both the Lenders' prepetition claims and all obligations under the DIP Order, at any



time on any individual Asset, portion of the Assets, or all Assets constituting their respective Collateral (as defined in the DIP Order) in conjunction with any sale of the Debtor's assets (the "**Credit Bid**"). Upon exercise of a Credit Bid, the Agent shall not be required to take title to or ownership of, or have any obligation in connection with (in each case, legal, equitable, or otherwise), or be deemed to have taken title to or ownership of, or have any obligation in connection with (in each case, legal, equitable, or otherwise), any individual Asset, portion of the Assets, or all of the Assets, and the Agent shall have the right to designate any person or entity in its sole and absolute discretion that shall take title to the individual Asset, portion of the Assets, or all of the Assets that are subject to the Credit Bid. Except for the holders of any Prior Liens (as defined in the DIP Order), no other person may credit bid unless the entire amount of the Lenders' claims (including all prepetition and debtor in possession financing claims) will be indefeasibly paid in full in cash on the closing of the proposed sale. In the event the Agent exercises the Credit Bid, and the amount of the Credit Bid of the Agent exceeds the total amount of the highest bids for the Assets subject to the Credit Bid, such Credit Bid will be deemed the highest and best bid and such Credit Bid will be accepted by the Debtor and be presented for approval to the Bankruptcy Court. The Agent will not be a Backup Bidder unless the Agent consents in writing otherwise.

11. Subject to the prior paragraph, the Stalking Horse Bidder, if any, shall have the right (including as part of any Overbid) to credit bid all or a portion of its Bid Protections (if any) pursuant to section 363(k) of the Bankruptcy Code.

12. In the event of a competing Qualified Bid, all Qualified Bidders will be entitled, but not obligated, to submit Overbids.

13. The Debtor may (a) determine which Qualified Bid (including the Credit Bid) is the highest or otherwise best offer; (b) reject at any time before the entry of the Sale Order any Bid (other than the Credit Bid) that, in the discretion of the Debtor, is (i) inadequate or insufficient, (ii) not in conformity with the requirements of the Bankruptcy Code or the Bidding Procedures, or (iii) contrary to the best interest of the Debtor's estate and its creditors; (c) at or before the conclusion of the Auction may impose such other terms and conditions upon Qualified Bidders as the Debtor determines to be in the best interest of the Debtor's estate; and (d) prior to the entry of the Sale Order, may re-open the Auction to consider further Bids, in its reasonable business judgment.

14. No person or entity, other than the Stalking Horse Bidder, if any, shall be entitled to any expense reimbursement, breakup fee, topping or termination fee, or other similar fee or payment, and by submitting a Bid, such person or entity is deemed to have waived its right to request or file with this Court any request for expense reimbursement or any other fee of any nature in connection with the Auction and the Sale, whether by virtue of section 503(b) of the Bankruptcy Code or otherwise.

### **III. Assumption and Assignment Notices & Procedures**

15. As soon practicable, the Debtor shall serve on all non-Debtor counterparties (each a "***Contract Counterparty***" and, together, the "***Contract Counterparties***") to any Contract (the "***Cure and Possible Assumption and Assignment Notice Parties***") that may be assumed by the Debtor and assigned to the Successful Bidder, which notice shall be substantially in the form attached hereto as **Exhibit 3** (a "***Cure and Possible Assumption and Assignment Notice***"), setting forth the Debtor's calculation of the cure amount, if any, that would be due and owing to such Contract Counterparty if the Debtor decided to assume or assume and assign such executory

contract or unexpired lease, and alerting such Contract Counterparty that their contract may be assumed and assigned to the Successful Bidder.

16. The presence of a Contract on the Cure and Possible Assumption and Assignment Notice does not constitute an admission that such Contract is an executory contract or unexpired lease, and the presence of a Contract on any notice shall not prevent the Debtor from subsequently withdrawing such request for assumption or rejecting such Contract any time before such Contract is actually assumed and assigned pursuant to the Sale Order.

17. As soon as reasonably practicable after the Bid Deadline, the Debtor shall file with the Court and serve on the Cure and Possible Assumption and Assignment Notice Parties who are parties to a Contract to be assumed and assigned a further notice substantially in the form attached hereto as **Exhibit 4** (the “***Assumption Notice***”) identifying all Qualified Bidders, each of whom will be permitted to participate in the Auction, stating which Contracts may be assumed and assigned, and providing such parties with the Qualified Bidders’ assurance of future performance.

18. Any Contract Counterparty that objects to the cure amount set forth on the Cure and Possible Assumption and Assignment Notice or the possible assignment of their executory contract or unexpired lease must file an objection with the Bankruptcy Court (a “***Contract Objection***”) on or before 4:00 p.m. (prevailing Eastern Time) on the day that is fourteen (14) calendar days after the service of the Cure and Possible Assumption and Assignment Notice, which Contract Objection must also be served on (a) counsel for the Debtor, Locke Lord LLP, 111 S. Wacker Drive, Chicago, IL 60606, Attn.: David W. Wirt (dwirt@lockelord.com) and Aaron C. Smith (asmith@lockelord.com), and Polsinelli PC, 222 Delaware Avenue, Suite 1101, Wilmington, Delaware 19801, Attn Christopher A. Ward (cward@polsinelli.com), (b) counsel to

the Agent, Milbank, Tweed, Hadley & McCloy LLP, 2029 Century Park East, 33rd Floor, Los Angeles, California 90067, Attn: Gregory A. Bray (gbray@milbank.com) and Haig M. Maghakian (hmaghakian@milbank.com), and Richards, Layton & Finger, P.A., 920 North King Street, Wilmington, Delaware 19801, Attn: Mark D. Collins (collins@rlf.com), and (c) the Office of the United States Trustee for the District of Delaware, J. Caleb Boggs Federal Building, 844 King Street, Ste. 2008 – Lockbox #35, Wilmington, DE 19801, Attn: Linda J. Casey (linda.casey@usdoj.gov).

19. If a Contract Counterparty does not timely file and serve a Contract Objection, that party will be forever barred from objecting to (a) the Debtor's proposed cure amount, or (b) the assignment of that party's executory contract or unexpired lease to the Successful Bidder. Where a Contract Counterparty to an Assigned Contract files a timely Contract Objection asserting a higher cure amount than the amount listed in the Cure and Possible Assumption and Assignment Notice, or objecting to the possible assignment of that Contract Counterparty's executory contract or unexpired lease, and the parties are unable to consensually resolve the dispute, the amount to be paid under section 365 of the Bankruptcy Code (if any) or, as the case may be, the Debtor's ability to assign the executory contract or unexpired lease to the Successful Bidder will be determined at the Sale Hearing.

#### **IV. Notice of the Sale Process**

20. The Sale Notice, the Cure and Possible Assumption and Assignment Notice, and the Assumption Notice, in substantially the forms as annexed to this Order as **Exhibit 2**, **Exhibit 3**, and **Exhibit 4**, respectively, and the Creditor Notice and Bidding Procedures Notice, in substantially the forms as annexed to the Motion as **Exhibit C** and **Exhibit D**, respectively, are hereby approved.

21. Within two (2) business days after the entry of this Order, the Debtor (or its agents) shall serve the Sale Notice by first-class mail upon: (a) the U.S. Trustee; (b) counsel to the Agent to the Debtor's prepetition and postpetition Lenders; (c) the Contract Counterparties; (d) all parties who have expressed a written interest in the Assets; (e) all parties who are known or reasonably believed, after reasonable inquiry, to have asserted any lien, encumbrance, claim, or interest in the Assets; (f) the Internal Revenue Service; (g) the California Franchise Tax Board; (h) all other applicable state and local taxing authorities; (i) all the Debtor's other creditors; (j) each governmental agency that is an interested party with respect to the Sale and transactions proposed thereunder; and (k) all parties that have requested or that are required to receive notice pursuant to Bankruptcy Rule 2002.

22. In addition, the Debtor are authorized to publish Bidding Procedures Notice in *The USA Today (National Edition)* and *Modern Healthcare Magazine* within five (5) business days after entry of this Order.

23. Within two (2) business days after entry of this Order, the Debtor (or its agents) shall serve the Creditor Notice on all of the parties set forth on the Debtor's creditor matrix who were not served with the Sale Notice.

## **V. The Sale Hearing**

24. The Sale Hearing will be conducted on June 22, 2017 at [\_\_\_\_] a.m/p.m. (prevailing Eastern Time). The Debtor will seek entry of an order of the Court at the Sale Hearing approving and authorizing the sale of the Assets to the Successful Bidder. Upon entry of this Order, the Debtor is authorized to perform any obligation intended to be performed prior to the Sale Hearing or entry of the Sale Order with respect thereto. The Sale Hearing may be continued from time to time without further notice other than such announcement being made in open court or a notice of adjournment filed with the Court and served on the Notice Parties.

**VI. Objections to the Sale**

25. Objections, if any, to the relief requested in the Motion relating to the Asset Sale (except for any objection that arises at the Auction) must: (a) be in writing and filed with the Court no later than 4:00 p.m. (prevailing Eastern Time) on June 19, 2015, 2017; and (b) be served so that it is actually received no later than 4:00 p.m. (prevailing Eastern Time) on June 19, 2017 by (i) counsel for the Debtor, Locke Lord LLP, 111 S. Wacker Drive, Chicago, IL 60606, Attn.: David W. Wirt ([dwirt@lockelord.com](mailto:dwirt@lockelord.com)) and Aaron C. Smith ([asmith@lockelord.com](mailto:asmith@lockelord.com)), and Polsinelli PC, 222 Delaware Avenue, Suite 1101, Wilmington, Delaware 19801, Attn Christopher A. Ward ([cward@polsinelli.com](mailto:cward@polsinelli.com)), and (ii) counsel to the Agent, Milbank, Tweed, Hadley & McCloy LLP, 2029 Century Park East, 33rd Floor, Los Angeles, California 90067, Attn: Gregory A. Bray ([gbray@milbank.com](mailto:gbray@milbank.com)) and Haig M. Maghakian ([hmaghakian@milbank.com](mailto:hmaghakian@milbank.com)), and Richards, Layton & Finger, P.A., 920 North King Street, Wilmington, Delaware 19801, Attn: Mark D. Collins ([collins@rlf.com](mailto:collins@rlf.com)), and (iv) the Office of the United States Trustee for the District of Delaware, J. Caleb Boggs Federal Building, 844 King Street, Ste. 2008 – Lockbox #35, Wilmington, DE 19801, Attn: Linda J. Casey ([linda.casey@usdoj.gov](mailto:linda.casey@usdoj.gov)). A party's failure to timely file or make an objection in accordance with this Order shall forever bar the assertion of any objection to the Sale, entry of the Sale Order, and/or consummation of the Sale with the Successful Bidder pursuant to the applicable purchase agreement, including, without limitation, the assumption and assignment of the Contracts to the Successful Bidder pursuant to the applicable purchase agreement, and shall be deemed to constitute such party's consent to entry of the Sale Order and consummation of the Sale and all transactions related thereto, including, without limitation such assumption and assignment.

## VII. Other Relief Granted

26. To the extent that any chapter 11 plan confirmed in this case or any order confirming any such plan or any other order in this case (including any order entered after any conversion of these cases to cases under chapter 7 of the Bankruptcy Code) alters, conflicts with or derogates from the provisions of this Order, the provisions of this Order shall control; *provided* that in the event of a conflict with any interim or final orders approving the Debtor's postpetition financing agreement and governing the Debtor's use of cash collateral, including the budget approved in connection therewith (in either case, the "**DIP Order**"), such interim or final DIP Order, as applicable, shall control. The Debtor's obligations under this Order, the provision of the Order and the Bidding Procedures shall survive confirmation of any plan of reorganization or discharge of claims thereunder and shall be binding upon the Debtor, and the reorganized or reconstituted debtors, as the case may, after the effective date of a confirmed plan or plans in the Debtor's case.

27. Nothing in this Order, the Stalking Horse Agreement (if any) or the Motion shall be deemed to or constitute the assumption or assignment of an executory contract or unexpired lease.

28. Notwithstanding anything to the contrary in the Motion, the Bidding Procedures, or this Order, the right of the Agent, on behalf of itself and each of the Lenders, to object to any proposed sale of any Assets that is not acceptable to the Lenders and the rights and defenses of the Agent with respect to the form and substance of the Sale Order are hereby reserved.

29. All time periods set forth in this Order shall be calculated in accordance with Bankruptcy Rule 9006(a).

30. The Debtor is hereby authorized to conduct the Asset Sale without the necessity of complying with any state or local bulk transfer laws or requirements.

31. The Debtor is authorized to take all actions necessary to effectuate the relief granted pursuant to this Order in accordance with the Motion.

32. The terms and conditions of this Order shall be immediately effective and enforceable upon its entry, notwithstanding any provision in the Federal Rules of Bankruptcy Procedure or the Local Bankruptcy Rules to the contrary, and the Debtor may, in their discretion and without further delay, take any action and perform any act authorized under this Order.

33. The Court retains jurisdiction with respect to all matters arising from or related to the implementation of this Order.

Dated: \_\_\_\_\_, 2017

---

JUDGE LAURIE SELBER SILVERSTEIN  
UNITED STATES BANKRUPTCY JUDGE



**Exhibit 1 to Bidding Procedures Order**

**Bidding Procedures**

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

In re:

CALIFORNIA PROTON TREATMENT  
CENTER, LLC,<sup>1</sup>

Debtor.

Chapter 11

Case No. 17-10477-LSS

**Re: Docket No. \_\_\_\_\_**

**BIDDING PROCEDURES**

Set forth below are the bidding procedures (the “***Bidding Procedures***”)<sup>2</sup> to be employed with respect to the proposed sale (the “***Sale***”) of substantially all of the assets and operations of the above-captioned debtor as debtor in possession (the “***Debtor***”). It is contemplated that the sale will be implemented through a purchase agreement, subject to the receipt of higher and better bids at an auction (the “***Auction***”) and the corresponding entry into a sale agreement with a Successful Bidder (as defined below) according to these Bidding Procedures.

**I. Important Dates**

- (All times are prevailing Eastern Time)
- \_\_\_\_\_ at \_\_\_\_\_ a.m./p.m.: Debtor to send Cure Notices to All Contract Counterparties and Notice of the Sale
- \_\_\_\_\_ at \_\_\_\_\_ a.m./p.m.: Cure Objection Deadline
- \_\_\_\_\_ at \_\_\_\_\_ a.m./p.m.: Deadline to submit Bid to be considered for the Auction
- \_\_\_\_\_ at \_\_\_\_\_ a.m./p.m.: Proposed date of Auction
- \_\_\_\_\_ at \_\_\_\_\_ a.m./p.m.: Debtor to file notice of Successful Bidder and Contract Assignment Notices
- \_\_\_\_\_ at \_\_\_\_\_ a.m./p.m.: Deadline to file and serve objections to relief requested at Sale Hearing (except for any objection that arises at the Auction)
- \_\_\_\_\_ at \_\_\_\_\_ a.m./p.m.: Proposed date of Sale Hearing

<sup>1</sup> The last four digits of the Debtor’s federal tax identification number are: 9073. The location of the Debtor’s place of business is 9730 Summers Ridge Road, San Diego, California 92121, Attn: Wilson Williams, Manager.

<sup>2</sup> Capitalized terms used as defined terms herein but not otherwise defined have the meanings ascribed to them in the Bidding Procedures Order.

## II. Approval of Bidding Procedures

On \_\_\_\_\_, 2017, the Bankruptcy Court entered an order approving these bidding procedures (these “**Bidding Procedures**” and such order, the “**Bidding Procedures Order**”), in furtherance of the Sale. The Bankruptcy Court has jurisdiction with respect to any dispute that may arise with respect to these Bidding Procedures. These Bidding Procedures set forth the process (the “**Bidding Process**”) by which the Debtor is authorized to conduct the Auction for the Sale of its Assets.

## III. Marketing Process

### A. Contact Parties

The Debtor, in consultation with Cain Brothers & Company, LLC (“**Cain**”) its other advisors developed a list of parties who the Debtor believes may potentially be interested in and who the Debtor reasonably believes would have the financial resources to consummate a Sale, which list includes both potential strategic investors and liquidators (each, individually, a “**Contact Party**”, and collectively, the “**Contact Parties**”). The Debtor shall consult with the Agent (but only if the Agent, on behalf of the Lenders, has delivered a written notice to the Debtor that it will not be submitting a Bid, including a Credit Bid (both as defined herein) on the Assets or, if any such Bid has been submitted, the Agent has delivered a written notice to the Debtor that it has withdrawn such Bid) on all aspects of the asset sale process (the “**Consultation Parties**”). Cain have or will contact the Contact Parties to explore their interest in pursuing a Sale. The Contact Parties may include parties whom the Debtor or its advisors have previously contacted regarding a Sale, regardless of whether such parties expressed any interest, at such time, in pursuing a Sale. The Debtor will continue to discuss and may supplement the list of Contact Parties throughout the marketing process, as appropriate.

The Debtor may distribute to each Contact Party an “**Information Package**,” which is comprised of:

- (a) a cover letter;
- (b) a copy of these Bidding Procedures; and
- (c) a copy of the confidentiality agreement attached hereto as **Attachment A** (the “**Confidentiality Agreement**”).

### B. Access to Diligence Materials

To participate in the Bidding Process and to receive access to any materials relating to the Assets (the “**Diligence Materials**”), a party must submit to the Debtor an executed Confidentiality Agreement (it being understood that any person or entity that previously signed a confidentiality agreement in a form satisfactory to the Debtor shall not be required to execute a new confidentiality agreement). The executed Confidentiality Agreement must be signed and transmitted by the person or entity wishing to have access to the Debtor’s data room (the “**Data Room**”) and any other Diligence Materials.

A party who qualifies for access to the Diligence Materials shall be a “**Preliminarily Interested Investor**.” All due diligence requests must be directed to Cain.

For any Preliminary Interested Investor who is a competitor of the Debtor or is affiliated with any competitor of the Debtor, the Debtor reserves the right to withhold any Diligence Materials that the Debtor determines are business-sensitive or otherwise not appropriate for disclosure to such Preliminary Interested Investor.

### C. Auction Qualification Process

To be eligible to participate in the Auction, each offer, solicitation or proposal (each, a “**Bid**”), and each party submitting such a Bid (each, a “**Bidder**”), must be determined by the Debtor, to satisfy each of the following conditions:

- (1) **Good Faith Deposit:** Each Bid must be accompanied by a deposit in the amount of ten percent (10%) of the Bid’s proposed purchase price to an interest bearing escrow account to be identified and established by the Debtor (the “**Good Faith Deposit**”).
- (2) **Terms:** A Bid must include executed transaction documents pursuant to which the Bidder proposes to effectuate the Sale, including an assets purchase agreement (the “**Transaction Documents**”). A Bid should propose a transaction involving substantially all, or a portion of, the Debtor’s Assets or operations. The Debtor shall evaluate all Bids to determine whether such Bid(s) maximizes the value of the Debtor’s estate as a whole. The Transaction Documents shall also identify any executory contracts and unexpired leases of the Debtor that the Bidder wishes to have assumed and assigned to it pursuant to the Sale (collectively, the “**Assigned Contracts**”). The Debtor will consider proposals for less than substantially all of the Debtor’s assets or operations. A Bid to purchase only certain assets of the Debtor shall propose a purchase price determined by such Bidder but shall be reviewed by the Debtor to determine if it is acceptable in consultation with the Consultation Parties.
- (3) **Corporate Authority:** Written evidence reasonably acceptable to the Debtor demonstrating appropriate corporate authorization to consummate the proposed transaction; *provided, however*, that, if the Bidder is an entity specially formed for the purpose of effectuating the transaction, then the Bidder must furnish written evidence reasonably acceptable to the Debtor, in consultation with the Consultation Parties, of the approval of the transaction by the equity holder(s) of such Bidder.
- (4) **Proof of Financial Ability to Perform:** Written evidence that the Debtor, in consultation with the Consultation Parties, reasonably conclude demonstrates that the Bidder has the necessary financial ability to close the transaction and provide adequate assurance of future performance under all contracts to be assumed and assigned in such transaction. Such information should include, *inter alia*, the following:

- (a) contact names and numbers for verification of financing sources,
  - (b) evidence of the Bidder's internal resources and proof of any debt or equity funding commitments that are needed to close the transaction;
  - (c) the Bidder's current financial statements (audited if they exist); and
  - (d) any such other form of financial disclosure or credit-quality support information or enhancement reasonably acceptable to the Debtor demonstrating that such Bidder has the ability to close the transaction; *provided, however*, that the Debtor shall determine, in its reasonable discretion, in consultation with the Debtor's advisors and the Consultation Parties, whether the written evidence of such financial wherewithal is reasonably acceptable, and shall not unreasonably withhold acceptance of a Bidder's financial qualifications.
- (5) **Contingencies:** A Bid may not be conditioned on obtaining financing or any internal approval, or on the outcome or review of due diligence, but may be subject to the accuracy in all material respects at the closing of specified representations and warranties.
- (6) **Irrevocable:** A Bid must be irrevocable through the Auction; *provided, however*, that if such Bid is accepted as the Successful Bid or the Backup Bid (as defined herein), such bid shall continue to remain irrevocable, subject to the terms and conditions of the Bidding Procedures.
- (7) **Disclaimer of Fees.** Each Bid (other than a Stalking Horse Bid, if any) must disclaim any right to receive a fee analogous to a break-up fee, expense reimbursement, termination fee, or any other similar form of compensation. For the avoidance of doubt, no Qualified Bidder will be permitted to request, nor be granted by the Debtor, at any time, whether as part of the Auction or otherwise, a break-up fee, expense reimbursement, termination fee, or any other similar form of compensation, *except* as the Debtor may agree with a Stalking Horse Bidder pursuant to the Bidding Procedures Order. By submitting its Bid, each bidder is agreeing to refrain from and waive any assertion or request for reimbursement on any basis, including pursuant to section 503(b) of the Bankruptcy Code.
- (8) **Bid Deadline:** Regardless of when a party qualifies as a Preliminarily Interested Investor, the Debtor must receive a Bid in writing, on or before \_\_\_\_\_, 2017 at 4:00 p.m. (prevailing Eastern Time) or such later date as may be agreed to by the Debtor (the "**Bid Deadline**"). Bids must be sent to the following by the Bid Deadline to be considered: counsel for the Debtor, Locke Lord LLP, 111 S. Wacker Drive, Chicago, IL 60606, Attn: David W. Wirt (dwirt@lockelord.com) and Aaron C. Smith (asmith@lockelord.com), and Polsinelli PC, 222 Delaware Avenue, Suite 1101, Wilmington, Delaware 19801, Attn: Christopher A. Ward (cward@polsinelli.com); investment banker for the Debtor, Cain Brothers &

Company, LLC, 601 California Street, Suite 1505, San Francisco, California 94108, Attn: James Moloney (jmoloney@cainbrothers.com).

A Bid received from a Bidder before the Bid Deadline that meets the above requirements shall constitute a “**Qualified Bid**,” and such Bidder shall constitute a “**Qualified Bidder**.”

#### **D. Credit Bid**

The Agent shall be deemed to be a Qualified Bidder and is not required to make any Good Faith Deposit. The Agent may participate in the Auction and may credit bid at any time up to the conclusion of the Auction, in its sole and absolute discretion, any portion and up to the entire amount of the Agent’s and the Lenders’ respective claims, including, without limitation, both the Lenders’ prepetition claims and all obligations under the DIP Order, at any time on any individual Asset, portion of the Assets, or all Assets constituting their respective Collateral (as defined in the DIP Order) in conjunction with any sale of the Debtor’s assets (the “**Credit Bid**”). Upon exercise of a Credit Bid, the Agent shall not be required to take title to or ownership of, or have any obligation in connection with (in each case, legal, equitable, or otherwise), or be deemed to have taken title to or ownership of, or have any obligation in connection with (in each case, legal, equitable, or otherwise), any individual Asset, portion of the Assets, or all of the Assets, and the Agent shall have the right to designate any person or entity in its sole and absolute discretion that shall take title to the individual Asset, portion of the Assets, or all of the Assets that are subject to the Credit Bid. Except for the holders of any Prior Liens (as defined in the DIP Order), no other person may credit bid unless the entire amount of the Lenders’ claims (including all prepetition and debtor in possession financing claims) will be indefeasibly paid in full in cash on the closing of the proposed sale. In the event the Agent exercises the Credit Bid, and the amount of the Credit Bid of the Agent exceeds the total amount of the highest bids for the Assets subject to the Credit Bid, such Credit Bid will be deemed the highest and best bid and such Credit Bid will be accepted by the Debtor and be presented for approval to the Bankruptcy Court. The Agent will not be a Backup Bidder unless the Agent consents in writing otherwise.

#### **IV. Auction**

If one or more Qualified Bids is received by the Bid Deadline (other than the Credit Bid), the Debtor will conduct the Auction to determine the highest and best Qualified Bid. This determination shall take into account any factors the Debtor, upon consultation with the Consultation Parties, reasonably deem relevant to the value of the Qualified Bid to the estate, including, *inter alia*, the following: (a) the amount and nature of the consideration; (b) the proposed assumption of any liabilities and/or executory contracts or unexpired leases, if any; (c) the ability of the Qualified Bidder to close the proposed Transaction; (d) the proposed closing date and the likelihood, extent and impact of any potential delays in closing; (e) any purchase price adjustments; (f) the impact of the Transaction on any actual or potential litigation; and (g) the net after-tax consideration to be received by the Debtor’s estate (collectively, the “**Bid Assessment Criteria**”). If no Qualified Bid (other than the Credit Bid) is received by the Bid Deadline, the Debtor may determine not to conduct the Auction.

The Auction shall take place at \_\_\_\_\_ a.m./p.m. (prevailing Eastern Time) on \_\_\_\_\_, 2017, at the offices of Debtor’s Delaware counsel, Polsinelli PC, 222 Delaware Avenue, Suite

1101, Wilmington, DE 19801 or such later time on such day or other place as the Debtor shall notify all Bidders who have submitted Qualified Bids. The Auction shall be transcribed or videotaped, and shall be conducted according to the following procedures:

**A. The Debtor Shall Conduct the Auction.**

The Debtor and its professionals shall direct and preside over the Auction in consultation with the Consultation Parties. At the start of the Auction the Debtor shall describe the terms of the highest and best Bid(s) is received, such Qualified Bid(s) (the “**Auction Baseline Bid**”). The Debtor’s assets will be auctioned both in lots and for all of the assets in bulk at the Auction to determine the highest and best Bid(s).

All Bids made thereafter shall be Overbids (as defined below), and shall be made and received on an open basis, and all material terms of each Overbid shall be fully disclosed to all Bidders who have submitted Qualified Bids. The Debtor shall maintain a transcript of all bids made and announced at the Auction, including the Auction Baseline Bid and all Overbids.

**B. Terms of Overbids.**

An “**Overbid**” is any Bid made at the Auction subsequent to the Debtor’s announcement of the Auction Baseline Bid. To submit an Overbid for purposes of this Auction, a Bidder must comply with the following conditions:

**(1) Minimum Overbid Increment.**

Any Overbid after the Auction Baseline Bid shall be made in increments of at least \$[100,000] (the “**Minimum Overbid Increment**”) for a bid for all of the Debtor’s Assets, and in an amount to be determined by the Debtor, in consultation with the Consultation Parties at the Auction, for lots; *provided* that the Debtor shall retain the right to modify the bid increment requirements at the Auction in consultation with the Consultation Parties. Additional consideration in excess of the amount set forth in the Auction Baseline Bid may include only cash, the assumption of debt or marketable securities, or a credit bid under section 363(k) of the Bankruptcy Code of an allowed secured claim of the Debtor’s prepetition and postpetition secured lenders (the “**Lenders**”), in any combination.

**(2) Remaining Terms are the Same as for Qualified Bids.**

Except as modified herein, an Overbid must comply with the conditions for a Qualified Bid set forth above; *provided, however*, that the Bid Deadline shall not apply. Any Overbid must remain open and binding on the Bidder until and unless the Debtor, in consultation with the Consultation Parties, accepts a higher Overbid.

To the extent not previously provided (which shall be determined by the Debtor in consultation with the Consultation Parties), a Bidder submitting an Overbid must submit, as part of its Overbid, written evidence (in the form of financial disclosure or credit-quality support information or enhancement reasonably acceptable to the Debtor in consultation with the Consultation Parties) demonstrating such Bidder’s ability to close the transaction proposed by such Overbid.

(3) **Announcing Overbids.**

The Debtor shall announce at the Auction the material terms of each Overbid, the basis for calculating the total consideration offered in each such Overbid and the resulting benefit to the Debtor's estate based on, *inter alia*, the Bid Assessment Criteria.

(4) **Consideration of Overbids.**

The Debtor reserves the right, in its reasonable business judgment, to make one or more adjournments in the Auction to, among other things: facilitate discussions between the Debtor and individual Bidders; allow individual Bidders to consider how they wish to proceed; and give Bidders the opportunity to provide the Debtor with such additional evidence as the Debtor in its reasonable business judgment and in consultation with the Consultation Parties, may require, that the Bidder has sufficient internal resources, or has received sufficient non-contingent debt and/or equity funding commitments, to consummate the proposed transaction at the prevailing Overbid amount.

**C. No Collusion; Good-Faith *Bona Fide* Offer**

Each Qualified Bidder participating at the Auction will be required to confirm on the record at the Auction that (i) it has not engaged in any collusion with respect to the Sale or bidding (including that it has no agreement with any other Bidder or Qualified Bidder to control the price) and (ii) its Qualified Bid is the good-faith *bona fide* offer and it intends to consummate the proposed transaction if selected as the Successful Bidder.

**D. Backup Bidder.**

Notwithstanding anything in the Bidding Procedures to the contrary, if an Auction is conducted, the party with the next highest or otherwise best Qualified Bid(s) at the Auction, as determined by the Debtor, in the exercise of its business judgment, shall be required to serve as a backup bidder (the "**Backup Bidder**"). The Backup Bidder shall be required to keep its initial Bid (or if the Backup Bidder submitted one or more Overbids at the Auction, its final Overbid) (the "**Backup Bid**") open and irrevocable until the earlier of 5:00 p.m. (prevailing Eastern Time) on the date that is twenty five (25) days after the date of the Sale Hearing (the "**Outside Backup Date**") or the closing of the transaction with the Successful Bidder. Following entry of the Sale Order, if the Successful Bidder fails to consummate an approved transaction because of a breach or failure to perform on the part of such Successful Bidder, the Debtor may designate the Backup Bidder to be the new Successful Bidder, and the Debtor will be authorized, but not required, to consummate the transaction with the Backup Bidder without further order of the Bankruptcy Court. In such case, the defaulting Successful Bidder's deposit, if any, shall be forfeited to the Debtor's estates, and the Debtor specifically reserve the right to seek all available damages from the defaulting Successful Bidder. The closing date to consummate the transaction with the Backup Bidder shall be no later than the later of twenty five (25) days after the date that the Debtor provides notice to the Backup Bidder that the Successful Bidder failed to consummate a sale and that the Debtor desires to consummate the transaction with the Backup Bidder or five (5) calendar days after necessary regulatory approvals are completed by the Backup Bidder and/or the Debtor. The deposit, if any, of the Backup Bidder shall be held by the Debtor until the earlier of two (2) business days after (a) the



closing of the Sale with the Successful Bidder and (b) the Outside Backup Date; *provided, however*, that in the event the Successful Bidder does not consummate the transaction as described above and the Debtor provides notice to the Backup Bidder, the Backup Bidder's deposit shall be held until the closing of the transaction with the Backup Bidder. In the event that the Debtor fails to consummate a transaction with the backup Bidder as described above, the Backup Bidder's deposit shall be forfeited to the Debtor's estate, and the Debtor specifically reserves the right to seek all available damages from the defaulting Backup Bidder.

**E. Additional Procedures.**

The Debtor may announce at the Auction additional procedural rules that are reasonable under the circumstances (*e.g.*, the amount of time to make subsequent Overbids) for conducting the Auction so long as such rules are not inconsistent with these Bidding Procedures.

**F. Consent to Jurisdiction as Condition to Bidding.**

All Qualified Bidders, and all Bidders at the Auction shall be deemed to have consented to the core jurisdiction of the Bankruptcy Court and waived any right to a jury trial in connection with any disputes relating to the Stalking Horse Agreement, the Auction or the construction and enforcement of any Transaction Documents.

**G. Rights of the Agent/Other Rights to Credit Bid**

The Agent shall have the right to Credit Bid as set forth in the Bidding Procedures Order. If there is a Stalking Horse Bidder, the Stalking Horse Bidder shall have the right (including as part of any Overbid) to credit bid all or a portion of the value of its Bid Protections (if any) for the assets pursuant to section 363(k) of the Bankruptcy Code.

**H. Closing the Auction**

The Auction shall continue until there is only one or more Qualified Bid(s) that the Debtor determines in its reasonable business judgment, after consultation with its financial and legal advisors and the Consultation Parties, is the highest and best Qualified Bid(s) at the Auction (the “**Successful Bid**” and the Bidder submitting such Successful Bid, the “**Successful Bidder**”). In making this decision, the Debtor, in consultation with its financial and legal advisors and the Consultation Parties, shall consider the Bid Assessment Criteria. The Auction shall not close unless and until all Bidders who have submitted Qualified Bids have been given a reasonable opportunity to submit an Overbid at the Auction to the then-existing Overbid and the Successful Bidder has submitted fully executed Transaction Documents memorializing the terms of the Successful Bid(s).

**I. Break-Up Fee and Expense Reimbursement.**

If the Debtor enters into a Stalking Horse Agreement and the Stalking Horse Bidder attends the Auction with its Bid in place, and the Stalking Horse Purchaser is outbid, and the Successful Bidder is a party other than Stalking Horse Bidder, the Stalking Horse Bidder shall, subject to further court order, be entitled to receive, to the extent set forth in the Stalking Horse Agreement: (i) a break-up fee (the “**Break-Up Fee**”) not to exceed 3 percent of the total purchase price offered by the Stalking Horse Bidder in the Stalking Horse Agreement; and (ii)

the reimbursement of the reasonable, actual, out-of-pocket costs and expenses paid or incurred by Stalking Horse Bidder directly incident to, under, or in connection with the negotiation, execution and performance under the Stalking Horse Agreement and the transactions contemplated thereunder (including travel expenses and reasonable fees and disbursements of counsel, accountants and financial advisors, excluding any charges for the time or services of the Stalking Horse Bidder's employees) in an amount not to exceed \$250,000 in the aggregate (the "**Expense Reimbursement**"). The Break-Up Fee and Expense Reimbursement, if any, shall be paid immediately upon consummation of the Sale transaction out of the proceeds of the Sale and shall have priority as an administrative expense in the Debtor's case under Sections 503(b)(6) and 507(a) of the Bankruptcy Code.

#### **V. Procedures for Determining Cure Amounts and Adequate Assurance for Contract Counterparties to Assigned Contracts.**

By \_\_\_\_\_, 2017, the Debtor shall send a notice to each counterparty to an executory contract or unexpired lease (each a "**Contract Counterparty**") setting forth the Debtor's calculation of the cure amount, if any, that would be owing to such Contract Counterparty if the Debtor decided to assume or assume and assign such executory contract or unexpired lease, and alerting such Contract Counterparty that their contract may be assumed and assigned to the Successful Bidder (the "**Cure and Possible Assumption and Assignment Notice**"), a copy of which is attached to the Bidding Procedures Order as **Exhibit 3**. Any Contract Counterparty that objects to the cure amount set forth in the Cure and Possible Assumption and Assignment Notice or the possible assignment of their executory contract or unexpired lease must file an objection (a "**Contract Objection**") on or before 4:00 p.m. prevailing Eastern Time on \_\_\_\_\_, 2017, which Contract Objection must be served on counsel for the Debtor, Locke Lord LLP, 111 S. Wacker Drive, Chicago, IL 60606, Attn: David W. Wirt (dwirt@lockelord.com) and Aaron C. Smith (asmith@lockelord.com), and Polsinelli PC, 222 Delaware Avenue, Suite 1101, Wilmington, Delaware 19801, Attn: Christopher A. Ward (cward@polsinelli.com), so that it is actually received no later than 4:00 p.m. prevailing Eastern Time on \_\_\_\_\_, 2017. If a Contract Counterparty does not timely file and serve a Contract Objection, that party will be forever barred from objecting to (a) the Debtor's proposed cure amount, or (b) the assignment of that party's executory contract or unexpired lease to the Successful Bidder. Where a Contract Counterparty to an Assigned Contract files a timely Contract Objection asserting a higher cure amount than the amount listed in the Cure and Possible Assumption and Assignment Notice, or an objection to the possible assignment of that Contract Counterparty's executory contract or unexpired lease, and the parties are unable to consensually resolve the dispute, the amount to be paid under section 365 of the Bankruptcy Code (if any) or, as the case may be, the Debtor's ability to assign the executory contract or unexpired lease to the Successful Bidder will be determined at the Sale Hearing.

#### **VI. Sale Hearing**

The Bankruptcy Court has scheduled a hearing (the "**Sale Hearing**") on \_\_\_\_\_, 2017, at \_\_\_\_:\_\_\_\_.m. (prevailing Eastern Time), at which hearing the Debtor will seek approval of the Sale with the Successful Bidder. Objections to the sale of the Assets to the Successful Bidder or Back-Up Bidder must be filed and served so that they are actually received by the Debtor no later than 4:00 p.m. (prevailing Eastern Time) on \_\_\_\_\_, 2017 (except for any objection that

arises at the Auction) on the following: counsel for the Debtor, Locke Lord LLP, 111 S. Wacker Drive, Chicago, IL 60606, Attn: David W. Wirt ([dwirt@lockelord.com](mailto:dwirt@lockelord.com)) and Aaron C. Smith ([asmith@lockelord.com](mailto:asmith@lockelord.com)), and Polsinelli PC, 222 Delaware Avenue, Suite 1101, Wilmington, Delaware 19801, Attn: Christopher A. Ward ([cward@polsinelli.com](mailto:cward@polsinelli.com)).

## **VII. Return of Good Faith Deposit**

The Good Faith Deposits of all Qualified Bidders shall be held in one or more interest-bearing escrow accounts by the Debtor, but shall not become property of the Debtor's estate absent further order of the Court. The Good Faith Deposits of any Qualified Bidder that is neither the Successful Bidder nor the Backup Bidder shall be returned to such Qualified Bidder not later than two (2) business days after the Sale Hearing. The Good Faith Deposit of the Backup Bidder shall be returned to the Backup Bidder on the date that is the earlier of (i) two (2) business days after the Acquired Assets have been sold pursuant to the closing of a sale approved by the Bankruptcy Court and (ii) twenty (20) days after conclusion of the Sale Hearing. Upon the return of the Good Faith Deposits, their respective owners shall receive any and all interest that will have accrued thereon. If the Successful Bidder timely closes the winning transaction, its Good Faith Deposit shall be credited towards its purchase price.

## **VIII. Reservation of Rights**

The Debtor reserves its rights to modify these Bidding Procedures in its reasonable business judgment in any manner that will best promote the goals of the bidding process or impose, at or prior to the Auction, additional customer terms and conditions on the sale of the Assets, including, without limitation: (a) extending the deadline set forth in these Bidding Procedures; (b) adjourning the Auction at the Auction and/or adjourning the Sale Hearing (as defined below) in open court without further notice; (c) reopening the Auction to consider further Bids or Overbids; (d) adding procedural rules that are reasonably necessary or advisable under the circumstances for conducting the Auction (*e.g.*, the amount of time to make subsequent overbids, whether a non-conforming Bid constitutes a Qualified Bid); (e) canceling the Auction; and (f) rejecting any or all Bids or Qualified Bids; *provided, however*, that nothing herein modifies, nor shall be deemed consent by the Agent or any Lenders to a modification of, the 363 Sale Milestones set forth in the DIP Term Sheet or any other term, condition, provision, or milestone set forth in the DIP Order or the DIP Loan Documents.

Notwithstanding the foregoing and subject in all respects to the Stalking Horse Agreement, if any, the Debtor may not impair or modify the Stalking Horse Bidder's rights and obligations under the Stalking Horse Agreement or the Stalking Horse Bidder's right to credit bid the Bid Protections as part of any Bid at the Auction.

Notwithstanding anything to the contrary in the Motion, these Bidding Procedures, or the Bidding Procedures Order, the right of the Agent, on behalf of itself and each of the Lenders, to object to any proposed sale of any Assets if the sale proceeds are not sufficient to satisfy the Agent's prepetition or postpetition Liens on such Assets and the rights and defenses of the Agent with respect to the form and substance of the Sale Order are hereby reserved.

**Attachment A to Bidding Procedures**

**Form of Confidentiality Agreement**

[Date]

[POTENTIAL PURCHASER]

To Whom It May Concern:

1. **Possible Transaction.** You have requested or may request certain information which is non-public, confidential or proprietary in nature from California Proton Treatment Center LLC, having its principal offices at 9730 Summers Ridge Road, San Diego, California 92121 (the “**Company**”) in order to assist in your evaluation of a possible transaction with the Company involving the purchase of certain assets of the Company (a “**Possible Transaction**”). Subject to your delivery of a signed copy of this letter agreement (this “**Confidentiality Agreement**”), the Company or its representatives will deliver or make available to you, upon the terms and subject to the conditions set forth in this Confidentiality Agreement, certain information about the assets.

2. **Evaluation Material.** All information about the Company or the Possible Transaction furnished or made available by the Company, its managing members, officers, employees, agents, consultants, financiers, investors or advisers (legal, financial, accounting or otherwise) (such persons collectively referred to herein as “**Representatives**”), including, without limitation any third-party reports or materials that are subject to a confidentiality agreement between Company or any of its affiliates and a third party, whether furnished before or after the date hereof, whether tangible or intangible and in whatever form or medium provided, whether written or orally furnished or made available, together with all notes, analysis, compilations, studies, summaries, data, interpretations, documents and other materials which contain, reflect or are generated or otherwise derived from such information, are referred to in this Confidentiality Agreement as “**Evaluation Material**”. Evaluation Material does not include, however, information which: (a) is or becomes generally available to the public other than as a result of a disclosure by you or your Representatives; (b) is or becomes available to you on a nonconfidential basis from a source (other than the Company or its Representatives) not known by you to be prohibited from disclosing such information to you by a legal, contractual or fiduciary obligation, provided that such latter information shall become Evaluation Material at such time as you or your Representatives become aware that the source of such Evaluation Material was prohibited from disclosing the same to you or your Representatives; or (c) you have the Company’s prior written consent to disclose to the identified recipient thereof. As used in this Confidentiality Agreement, the term “person” shall be broadly interpreted to include, without limitation, the media and any companies, partnership, group, limited liability companies, trust, other entity or individual.

3. **Confidentiality Undertaking.** You agree: (a) except as required by law (including legal or judicial process), the requirements or procedures of any regulatory or government authority or of any recognized securities exchange or listing authority and subject to the provisions of paragraph 5 below, to keep all Evaluation Material strictly confidential and not to disclose or reveal any Evaluation Material to any person other than to those of your Representatives with a need to know the information contained therein for the sole purpose of assisting you in the evaluation, analysis, negotiation, development or consummation of a Possible Transaction and to ensure that those persons are aware of the confidential nature of the Evaluation Material and of the terms of this Confidentiality Agreement; provided, that such Representatives shall have been provided with a copy of this Confidentiality Agreement; and provided, further, that you shall not use Evaluation Material

for any purpose other than solely in connection with the evaluation, analysis, negotiation, development or consummation of a Possible Transaction. You agree to take all reasonable measures to restrain your Representatives from prohibited or unauthorized disclosure or use of the Evaluation Material.

4. **Use.** You shall use the Evaluation Material only for the purpose of the Possible Transaction, or the evaluation thereof. No other rights or licenses to trademarks, inventions, copyrights, patents, or any other intellectual property are implied or granted under this Confidentiality Agreement or by the conveying or disclosure of the Evaluation Material. All Evaluation Material, unless otherwise specified in writing, shall be and remain the property of the Company; *provided, however*, that in the event a Possible Transaction is consummated with you, all Evaluation Material shall become yours. The Evaluation Material supplied to you shall not be reproduced in any form except as required to accomplish the intent of this Confidentiality Agreement.

5. **Notice of Required Disclosure.** In the event that you or any of your Representatives are required (by deposition, interrogatories, requests for information or documents in legal or regulatory proceedings, by regulatory or governmental authorities, subpoena, civil investigative demand, regulatory process, compliance with listing or securities exchange laws or other similar process or applicable law) to disclose all or any part of the Evaluation Material or the information contained therein, you shall provide the Company with prompt written notice of the existence, terms and circumstances surrounding any such request or requirement so that the Company may seek a protective order or other appropriate remedy and/or waive compliance with the provisions of this Confidentiality Agreement (and if the Company seeks such an order, to provide such cooperation as the Company shall reasonably request at the Company's expense). If, in the absence of a protective order or other remedy or the receipt of a waiver by the Company, you or any of your Representatives are nonetheless, in the reasonable opinion of your counsel, legally compelled to disclose Evaluation Material to any such tribunal, you or your Representatives may, without liability hereunder (unless such disclosure was caused by or resulted from a previous disclosure by you or any of your Representatives that was not permitted by this Confidentiality Agreement), disclose to such tribunal only that portion of the Evaluation Material which such counsel reasonably advises you is legally required to be disclosed, provided that you exercise your reasonable efforts to preserve the confidentiality of the Evaluation Material in making such disclosure, including without limitation, by using reasonable attempts to obtain assurance that confidential treatment will be accorded the Evaluation Material by such tribunal.

6. **Return or Destruction of Evaluation Material.** At any time upon the Company's request, you will, at the election of the Company, promptly (and in any case within 7 days of any such request) deliver to the Company or destroy all of the Evaluation Material without retaining any copy thereof and cause any remaining notes, photocopies and other materials derived from the Evaluation material to be destroyed, and provide to the Company a written certification of an authorized executive officer as to such return and/or destruction. Notwithstanding the foregoing, any Evaluation Material prepared by you and incorporated into your corporate governance documents may be kept for corporate archive purposes only, provided that all such information shall continue to be kept confidential pursuant to the terms of this Confidentiality Agreement. Your return, destruction or retention of any such Evaluation Material will not affect any of your other obligations

under this Confidentiality Agreement, including, but not limited to, your obligations under paragraph 3 above.

7. **No Representations or Liability.** Neither the Company nor any of its Representatives makes any representation or warranty, express or implied, as to the accuracy or completeness of the Evaluation Material. Neither the Company nor any of its Representatives shall have any liability to you or to any of your Representatives, affiliates or stockholders on any basis (including, without limitation, in contract, tort, under federal or state securities laws or otherwise), and neither you nor your Representatives will make any claims whatsoever against the Company or its Representatives, with respect to or arising out of or relating to: (a) the Possible Transaction involving the parties, as a result of this Confidentiality Agreement; (b) the participation of such party and its Representatives in evaluating the Possible Transaction involving the parties; (c) the review of or use or content of the Evaluation Material or any errors therein or omissions therefrom; or (d) any action taken or any inaction occurring in reliance on the Evaluation Material. The Company will have the exclusive authority to determine what (if any) Evaluation Material is to be made available to you and your Representatives.

8. **No Solicitations for Employment.** Except as may be contemplated or required in the consummation of a Possible transaction, for a period of two years following the date hereof, you and your controlled affiliates will not, directly or indirectly, solicit for employment or hire any officer of the Company or any of its subsidiaries or divisions with whom you have had contact or who became known to you in connection with your consideration of the Possible Transaction, except that you and your affiliates shall not be precluded from hiring any such employee who: (a) initiates discussions regarding such employment without any direct or indirect solicitation by you, any of your controlled affiliates or your Representatives; or (b) responds to any public advertisement or general solicitation placed or made by you; or (c) has been terminated by the Company or their subsidiaries prior to commencement of employment discussions between you and such officer.

9. **Remedies.** You agree that money damages would not be a sufficient remedy for any breach of this Confidentiality Agreement by you or your Representatives, that in addition to all other remedies the Company shall be entitled to specific performance and injunctive and other equitable relief as a remedy for any such breach, that such remedy shall not be deemed to be the exclusive remedy for breach of this Confidentiality Agreement but shall be in addition to all other remedies available at law or equity, and you further agree to waive, and to use your best efforts to cause your Representatives to waive, any requirement for the securing or posting of any bond in connection with such remedy. Notwithstanding anything appearing to the contrary in this Confidentiality Agreement, no direct or indirect partner, member or shareholder of either party hereto (or any officer, director, agent, member, manager, personal representative, trustee or employee of any such direct or indirect partner, member or shareholder) shall be personally liable for the performance of such party's obligations under this Confidentiality Agreement.

10. **Miscellaneous.** Except as may be provided in that certain Letter Agreement to which this Confidentiality Agreement is attached:

(a) neither the Company nor you shall have any obligation to negotiate or enter into a definitive agreement in relation to the Possible Transaction as a result of this Confidentiality Agreement.

(b) The Company reserves the right, in their sole and absolute discretion: (i) to conduct any process they deem appropriate with respect to any Possible Transaction or any other proposed transaction involving the Company, and to modify any procedures relating to any such process without giving notice to you or any other person; (ii) to reject any proposal made by you or any of your affiliates or Representatives with respect to a transaction involving the Company; and (iii) to terminate discussion and negotiations with respect to the Possible Transaction with you at any time.

(c) You recognize that, except as may be expressly provided in any definitive agreement between you or any of your affiliates and the Company: (x) the Company and their affiliates and Representatives will be free to negotiate with, and to enter into any agreement or transaction with, any other person; and (y) you will not have any rights or claims against the Company or any of its Representatives arising out of or relating to any Possible Transaction or other transaction involving the Company. Any decision to proceed with negotiations or to consummate an agreement pertaining to the Possible Transaction shall be in each party's sole discretion and this Confidentiality Agreement creates no obligation on any party with respect thereto. Each party shall bear its own costs and expenses in connection with the activities contemplated by this Confidentiality Agreement.

(d) No failure or delay by a party hereto in exercising any right, power or privilege hereunder shall operate as a waiver thereof, nor shall any single or partial exercise thereof preclude any other or further exercise thereof, or the exercise of any right, power or privilege hereunder.

(e) This Confidentiality Agreement shall be governed by and construed in accordance with the laws of the State of New York, without giving effect to its principles or rules regarding conflicts of laws. EACH PARTY ACKNOWLEDGES AND AGREES THAT ANY CONTROVERSY WHICH MAY ARISE UNDER THIS CONFIDENTIALITY AGREEMENT IS LIKELY TO INVOLVE COMPLICATED AND DIFFICULT ISSUES, AND THEREFORE EACH PARTY HEREBY IRREVOCABLY WAIVES ANY RIGHT SUCH PARTY MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY LITIGATION DIRECTLY OR INDIRECTLY ARISING OUT OF OR RELATING TO THIS LETTER AGREEMENT OR THE TRANSACTIONS CONTEMPLATED HEREBY.

(f) Notwithstanding anything to the contrary contained herein, your obligations with respect to Evaluation Material disclosed pursuant to this Confidentiality Agreement shall (unless extended by mutual agreement) expire or terminate upon the earlier of: (i) three (3) years after the date of this Confidentiality Agreement or (ii) the consummation with of a Possible Transaction with you.

(g) The provisions of this Confidentiality Agreement are severable and, if any provisions are determined to be void or unenforceable in whole or in part, the remaining provisions shall be binding and enforceable.

(h) This Confidentiality Agreement may not be amended except in writing and signed by an authorized representative of each party, and this Confidentiality Agreement shall be



binding upon all employees, agents, subcontractors, subsidiaries, and affiliates of each party as provided herein.

(i) The provisions of this Confidentiality Agreement shall inure to the benefit of and be binding upon the parties and their respective successors and assigns. All modifications of, waivers of and amendments to this Confidentiality Agreement must be in writing and signed on behalf of you and the Company.

(j) This Confidentiality Agreement expresses the entire agreement of the parties with respect to its subject matter. All prior or contemporaneous agreements or negotiations, written or oral, are hereby superseded.

Please confirm your agreement with the foregoing by signing where indicated below and returning a copy of this Confidentiality Agreement.

CALIFORNIA PROTON TREATMENT CENTER LLC

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Accepted and Agreed as of the date first written above:

[POTENTIAL PURCHASER]

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

**Exhibit 2 to Bidding Procedures Order**

**Sale Notice**

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

In re:

CALIFORNIA PROTON TREATMENT  
CENTER, LLC,<sup>1</sup>

Debtor.

Chapter 11

Case No. 17-10477-LSS

Re: Docket No. \_\_\_\_

**NOTICE OF BID PROCEDURES,  
AUCTION, HEARING AND DEADLINES RELATING  
TO THE SALE OF SUBSTANTIALLY ALL OF THE ASSETS OF THE DEBTORS**

**PLEASE TAKE NOTICE** that on \_\_\_\_\_, 2017,, California Proton Treatment Center LLC, as a debtor and debtor in possession (the “**Debtor**”) in the above-captioned case (the “**Bankruptcy Case**”), filed a *Motion of the Debtor for Entry of (I) an Order (A) Approving Bidding Procedures in Connection with the Sale of Substantially All of the Debtor’s Assets, (B) Approving the Form and Manner of Notice thereof, (C) Scheduling an Auction and Sale Hearing, (D) Approving Procedures for the Assumption and Assignment of Contracts, and (E) Granting Related Relief; and (II) an Order (A) Approving the Asset Purchase Agreement Between the Debtor and the Successful Bidder, and (B) Authorizing the Sale of Substantially All of the Debtor’s Assets Free and Clear of Liens, Claims, Encumbrances, and Interests, (C) Authorizing the Assumption and Assignment of Contracts, and (D) Granting Related Relief* [Docket No. \_\_\_\_] (the “**Bidding Procedures and Sale Motion**”).<sup>2</sup> The Debtor seeks to complete a sale (the “**Transaction**”) of substantially all its assets (the “**Transferred Assets**”) to a prevailing bidder or bidders (the “**Successful Bidder**”) at an auction free and clear of all liens, claims, encumbrances and other interests pursuant to section 363 of the Bankruptcy Code (the “**Auction**”).

**PLEASE TAKE FURTHER NOTICE** that, on [\_\_\_\_], 2017 the Bankruptcy Court entered an order [Docket No. \_\_\_\_] (the “**Bidding Procedures Order**”) approving the bidding procedures set forth in the Bidding Procedures and Sale Motion (the “**Bidding Procedures**”), which set the key dates and times related to the sale of the Debtor’s Transferred Assets under the asset purchase agreement with the Successful Bidder. **All interested bidders should carefully read the Bidding Procedures**. To the extent that there are any inconsistencies between the Bidding Procedures and the summary description of its terms and conditions contained in this notice, the terms of the Bidding Procedures shall control.

**PLEASE TAKE FURTHER NOTICE** that, pursuant to the Bidding Procedures, the Debtor must receive a Qualified Bid from interested bidders in writing, on or before [\_\_\_\_],

<sup>1</sup> The last four digits of the Debtor’s federal tax identification number are: 9073. The location of the Debtor’s place of business is 9730 Summers Ridge Road, San Diego, California 92121, Attn: Wilson Williams, Manager.

<sup>2</sup> Capitalized terms not otherwise defined herein shall have the meanings set forth in the Bidding Procedures and Sale Motion.

**2017] at 4:00 p.m. (prevailing Eastern Time)** or such later date as may be agreed to by the Debtor (the “**Bid Deadline**”). To be considered, Qualified Bids must be sent to the following at or before the Bid Deadline: (i) counsel for the Debtor, Locke Lord LLP, 111 S. Wacker Drive, Chicago, IL 60606, Attn: David W. Wirt (dwirt@lockelord.com) and Aaron C. Smith (asmith@lockelord.com), and Polsinelli PC, 222 Delaware Avenue, Suite 1101, Wilmington, Delaware 19801, Attn: Christopher A. Ward (cward@lockelord.com); and (ii) investment bankers for the Debtor, Cain Brothers & Company, LLC, 601 California Street, Suite 1505, San Francisco, California 94108, Attn: James Moloney (jmoloney@cainbrothers.com).

**PLEASE TAKE FURTHER NOTICE** that, pursuant to the terms of the Bidding Procedures, if the Debtor receives one or more Qualified Bids (other than the Credit Bid) by the Bid Deadline, the Auction will be conducted on [\_\_\_\_\_] at [\_\_\_\_\_] **a.m./p.m.** (prevailing Eastern Time) at Polsinelli PC, 222 Delaware Avenue, Suite 1101, Wilmington, Delaware 19801, or at such other place, date and time as may be designated by the Debtor.

**PLEASE TAKE FURTHER NOTICE** that, pursuant to the terms of the Bidding Procedures, the Debtor has designated certain Assigned Contracts that may be assumed or assumed and assigned to the Successful Bidder. By \_\_\_\_\_, 2017, the Debtor shall send a notice to each counterparty to an Assigned Contract setting forth the Debtor’s calculation of the cure amount, if any, that would be owing to such counterparty if the Debtor decided to assume or assume and assign such Assigned Contract, and alerting such nondebtor party that their contract may be assumed and assigned to the Successful Bidder (the “**Cure and Possible Assumption and Assignment Notice**”).

**PLEASE TAKE FURTHER NOTICE** that, pursuant to the terms of the Bidding Procedures, any counterparty that objects to the cure amount set forth in the Cure and Possible Assumption and Assignment Notice or the possible assignment of their Assigned Contract(s) must file with the Bankruptcy Court and serve an objection (a “**Cure or Assignment Objection**”) so that it is actually received on or before **4:00 p.m. prevailing Eastern Time on \_\_\_\_\_, 2017**, by (i) counsel for the Debtor, Locke Lord LLP, 111 S. Wacker Drive, Chicago, IL 60606, Attn.: David W. Wirt (dwirt@lockelord.com) and Aaron C. Smith (asmith@lockelord.com), and Polsinelli PC, 222 Delaware Avenue, Suite 1101, Wilmington, Delaware 19801, Attn: Christopher A. Ward (cward@polsinelli.com), (ii) counsel to the Agent, Milbank, Tweed, Hadley & McCloy LLP, 2029 Century Park East, 33rd Floor, Los Angeles, California 90067, Attn: Gregory A. Bray (gbray@milbank.com) and Haig M. Maghakian (hmaghakian@milbank.com), and Richards, Layton & Finger, P.A., 920 North King Street, Wilmington, Delaware 19801, Attn: Mark D. Collins (collins@rlf.com), (iii) the Office of the United States Trustee for the District of Delaware, J. Caleb Boggs Federal Building, 844 King Street, Ste. 2008 – Lockbox #35, Wilmington, DE 19801, Attn: Linda J. Casey (linda.casey@usdoj.gov), and (iv) the Clerk of the Bankruptcy Court for the District of Delaware, 824 North Market Street, 3rd Floor, Wilmington, DE 19801. Where a counterparty to an Assigned Contract files a timely Cure or Assignment Objection asserting a higher cure amount than the amount listed in the Cure and Possible Assumption and Assignment Notice, or an objection to the possible assignment of that counterparty’s Assigned Contract, and the parties are unable to consensually resolve the dispute, the amount to be paid under section 365 of the Bankruptcy Code

(if any) or, as the case may be, the Debtor's ability to assign the Assigned Contract to the Successful Bidder will be determined at the Sale Hearing (as defined below).

**PLEASE TAKE FURTHER NOTICE** that a hearing will be held to approve the sale of the Transferred Assets to the Successful Bidder (the "***Sale Hearing***") before the Honorable [\_\_\_\_], U.S. Bankruptcy Court for the District of Delaware, 824 Market Street, Wilmington, Delaware 19801, 6th Floor, Courtroom [\_\_\_\_], on [\_\_\_\_], **2017 at [\_\_\_\_] a.m./p.m.** (prevailing Eastern Time), or at such time thereafter as counsel may be heard or at such other time as the Bankruptcy Court may determine. The Sale Hearing may be adjourned from time to time without further notice to creditors or parties in interest other than by announcement of the adjournment in open court on the date scheduled for the Sale Hearing or on the agenda for such Sale Hearing. Objections to the sale of the Transferred Assets to the Successful Bidder must be filed and served so that they are received no later than 4:00 p.m. (prevailing Eastern Time) on [\_\_\_\_], **2017** by (i) counsel for the Debtor, Locke Lord LLP, 111 S. Wacker Drive, Chicago, IL 60606, Attn.: David W. Wirt (dwirt@lockelord.com) and Aaron C. Smith (asmith@lockelord.com), and Polsinelli PC, 222 Delaware Avenue, Suite 1101, Wilmington, Delaware 19801, Attn Christopher A. Ward (cward@polsinelli.com), (ii) counsel to the Agent, Milbank, Tweed, Hadley & McCloy LLP, 2029 Century Park East, 33rd Floor, Los Angeles, California 90067, Attn: Gregory A. Bray (gbray@milbank.com) and Haig M. Maghakian (hmaghakian@milbank.com), and Richards, Layton & Finger, P.A., 920 North King Street, Wilmington, Delaware 19801, Attn: Mark D. Collins (collins@rlf.com), (iv) the Office of the United States Trustee for the District of Delaware, J. Caleb Boggs Federal Building, 844 King Street, Ste. 2008 – Lockbox #35, Wilmington, DE 19801, Attn: Linda J. Casey (linda.casey@usdoj.gov), and (v) the Clerk of the Bankruptcy Court for the District of Delaware, 824 North Market Street, 3rd Floor, Wilmington, DE 19801.

**PLEASE TAKE FURTHER NOTICE** that the Debtor is seeking to waive the fourteen-day stay period under Bankruptcy Rules 6004(h) and 6006(d) in order for the Sale to close immediately upon entry of the Sale Order by this Court.

**PLEASE TAKE FURTHER NOTICE** that this notice is subject to the full terms and conditions of the Bidding Procedures and Sale Motion, the Bidding Procedures Order and the Bidding Procedures, which shall control in the event of any conflict, and the Debtor encourages parties in interest to review such documents in their entirety. A copy of the Bidding Procedures and Sale Motion, the Bidding Procedures and the Bidding Procedures Order may be obtained (i) by contacting counsel for the Debtor, Locke Lord LLP, 111 S. Wacker Drive, Chicago, IL 60606, Attn: David W. Wirt (dwirt@lockelord.com) and Aaron C. Smith (asmith@lockelord.com), and Polsinelli PC, 222 Delaware Avenue, Suite 1101, Wilmington, Delaware 19801, Attn: Christopher A. Ward (cward@polsinelli.com), or (ii) for a fee via PACER at <http://www.deb.uscourts.gov>.

Dated: Wilmington, Delaware  
[ ], 2017

LOCKE LORD LLP  
David W. Wirt  
Aaron C. Smith  
111 S. Wacker Drive  
Chicago, Illinois 60606-4410  
Telephone: (312) 443-0700  
Fax: (312) 443-0336

COUNSEL FOR THE DEBTOR

POLSINELLI PC  
Christopher A. Ward (Del. Bar No. 3877)  
Justin K. Edelson (Del. Bar No. 5002)  
222 Delaware Avenue, Suite 1101  
Wilmington, Delaware 19801  
Telephone: (302) 252-0920  
Fax: (302) 252-0921

COUNSEL FOR THE DEBTOR

**Exhibit 3 to Bidding Procedures Order**

**Cure and Possible Assumption and Assignment Notice**

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

In re:  CALIFORNIA PROTON TREATMENT CENTER, LLC, <sup>1</sup>  <div style="text-align: center;">Debtor.</div>	Chapter 11  Case No. 17-10477-LSS  <b>Re: Docket No. _____</b>
--	--

**NOTICE TO COUNTERPARTIES TO POTENTIALLY ASSUMED  
EXECUTORY CONTRACTS AND UNEXPIRED LEASES REGARDING CURE  
AMOUNTS AND POSSIBLE ASSIGNMENT TO SUCCESSFUL BIDDER AT AUCTION**

**PLEASE TAKE NOTICE** that on \_\_\_\_\_, 2017, the above-captioned debtors and debtors in possession (the “*Debtor*”) filed a motion (the “*Bidding Procedures and Sale Motion*”) with the United States Bankruptcy Court for the District of Delaware (the “*Bankruptcy Court*”).

**PLEASE TAKE FURTHER NOTICE** that on \_\_\_\_\_, 2017, the Bankruptcy Court entered an order [Docket No. \_\_\_\_\_] (the “*Bidding Procedures Order*”) approving Bidding Procedures (the “*Bidding Procedures*”), which set key dates, times and procedures related to the sale of substantially of the Debtor’s assets (the “*Acquired Assets*”). To the extent that there are any inconsistencies between the Bidding Procedures and the summary description of the terms and conditions contained in this Notice, the terms of the Bidding Procedures shall control.

**YOU ARE RECEIVING THIS NOTICE BECAUSE YOU OR ONE OF YOUR AFFILIATES IS A COUNTERPARTY TO AN EXECUTORY CONTRACT OR UNEXPIRED LEASE LISTED BELOW WITH ONE OR MORE OF THE DEBTORS:**<sup>2</sup>

[Counterparty Name]	[Contract/Lease]	Cure Amount
---------------------	------------------	-------------

**Pursuant to the Bidding Procedures, the Debtor may assume the Executory Contract(s) or Unexpired Lease(s) listed above to which you are a counterparty. Also pursuant to the Bidding Procedures, the Debtor may assign the Executory Contract(s) or Unexpired Lease(s) to the successful bidder (the “Successful Bidder”) at an auction of substantially all of the Debtor’s assets currently scheduled for \_\_\_\_\_, 2017.** The Debtor has conducted a review of its books and records and have determined that the cure amount for unpaid monetary obligations under such contract or lease is \$[AMOUNT] (the “*Cure Amount*”). If you (a) object to the proposed assumption or disagree with the proposed Cure

<sup>1</sup> The last four digits of the Debtor’s federal tax identification number are: 9073. The location of the Debtor’s place of business is 9730 Summers Ridge Road, San Diego, California 92121, Attn: Wilson Williams, Manager.

<sup>2</sup> This Notice is being sent to counterparties to Executory Contracts and Unexpired Leases. This Notice is not an admission by the Debtor that such contract or lease is executory or unexpired.



Amount, or (b) object to the possible assignment of such Executory Contract(s) or Unexpired Lease(s) to the Successful Bidder, **you must file an objection with the Bankruptcy Court no later than \_\_\_\_\_ 2017**, (the “**Objection Deadline**”) and serve such objection on the following parties:

LOCKE LORD LLP	POLSINELLI PC
David W. Wirt Aaron C. Smith 111 S. Wacker Drive Chicago, Illinois 60606-4410 Telephone: (312) 443-0700 Fax: (312) 443-0336	Christopher A. Ward (Del. Bar No. 3877) Justin K. Edelson (Del. Bar No. 5002) 222 Delaware Avenue, Suite 1101 Wilmington, Delaware 19801 Telephone: (302) 252-0920 Fax: (302) 252-0921
<i><b>Co-Counsel to the Debtor</b></i>	

MILBANK, TWEED, HADLEY & MCCLOY LLP	RICHARDS, LAYTON & FINGER, P.A.
Gregory A. Bray Haig M. Maghakian 2029 Century Park East, 33rd Floor Los Angeles, California 90067 Telephone: (424) 386-4000 Facsimile: (213) 629-5063	Mark D. Collins 920 North King Street Wilmington, Delaware 19801 Telephone: (302) 651-7700 Facsimile: (302) 651-7701
<i><b>Co-Counsel to the Agent</b></i>	

CLERK OF THE BANKRUPTCY COURT United States Bankruptcy Court for the District of Delaware 824 North Market Street, 3rd Floor Wilmington, DE 19801	OFFICE OF THE UNITED STATES TRUSTEE FOR THE DISTRICT OF DELAWARE J. Caleb Boggs Federal Building 844 King Street, Suite 2008 – Lockbox #35 Wilmington, DE 19801
---	--

If no objection to the Cure Amount or the assignment of your Executory Contract(s) or Unexpired Lease(s) to the Successful Bidder is filed by the Objection Deadline, **you will be deemed to have stipulated that the Cure Amount as determined by the Debtor and set forth above is correct and you shall be forever barred, estopped and enjoined from (a) asserting any additional cure amount under the above-listed Executory Contract(s) and Unexpired Lease(s) or (b) objecting to the assumption and assignment of the above-listed Executory Contract(s) and Unexpired Lease(s) to the Successful Bidder.**

**Exhibit 4 to Bidding Procedures Order**

**Assumption Notice**

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

In re:

CALIFORNIA PROTON TREATMENT  
CENTER, LLC,<sup>1</sup>

Debtor.

Chapter 11

Case No. 17-10477-LSS

Re: Docket No. \_\_\_\_

**NOTICE OF PROPOSED ASSIGNMENT  
OF EXECUTORY CONTRACTS AND UNEXPIRED LEASES**

**PLEASE TAKE NOTICE** that on \_\_\_\_\_, 2017, the above-captioned debtor as debtor in possession (the “**Debtor**”) filed for relief pursuant to chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (the “**Bankruptcy Code**”) in the United States Bankruptcy Court for the District of Delaware (the “**Bankruptcy Court**”), and also filed a motion (the “**Sale Motion**”)<sup>2</sup> to sell substantially all of its assets (the “**Assets**”) free and clear of all liens, claims, encumbrances, and other interests (the “**Sale**”) and assume and assign certain of its executory contracts and unexpired leases (collectively, the “**Contracts**”) to the purchaser of the Assets.<sup>3</sup>

**PLEASE TAKE FURTHER NOTICE** that the Debtor is soliciting offers for the purchase of the Assets of the Debtor consistent with the bidding procedures (the “**Bidding Procedures**”) approved by the Court by the entry of an order on \_\_\_\_\_, 2017 (the “**Bidding Procedures Order**”).<sup>4</sup> The Bidding Procedures include, among other things, procedures for the assumption and assignment of the Contracts (the “**Assumption Procedures**”).

**PLEASE TAKE FURTHER NOTICE** that, accordingly, pursuant to the Assumption Procedures, and by this written notice, the Debtor hereby notifies you that they have determined, in the exercise of their business judgment, that the Contracts and any modifications thereto set

<sup>1</sup> The last four digits of the Debtor’s federal tax identification number are: 9073. The location of the Debtor’s place of business is 9730 Summers Ridge Road, San Diego, California 92121, Attn: Wilson Williams, Manager.

<sup>2</sup> *Motion of the Debtor for Entry of (I) an Order (A) Approving Bidding Procedures in Connection with the Sale of Substantially All of the Debtor’s Assets, (B) Approving the Form and Manner of Notice thereof, (C) Scheduling an Auction and Sale Hearing, (D) Approving Procedures for the Assumption and Assignment of Contracts, and (E) Granting Related Relief; and (II) an Order (A) Approving the Asset Purchase Agreement Between the Debtor and the Successful Bidder, and (B) Authorizing the Sale of Substantially All of the Debtor’s Assets Free and Clear of Liens, Claims, Encumbrances, and Interests, (C) Authorizing the Assumption and Assignment of Contracts, and (D) Granting Related Relief* [Docket No. \_\_\_\_]

<sup>3</sup> Capitalized terms used as defined terms but not defined herein shall have all the meanings ascribed to them in the Sale Motion.

<sup>4</sup> *Order (A) Approving Bidding Procedures and Bid Protections in Connection with the Sale of Substantially All of the Debtor’s Assets, (B) Approving the Form and Manner of Notice Thereof, (C) Scheduling an Auction and a Sale Hearing, (D) Approving Procedures for the Assumption and Assignment of Contracts, and (E) Granted Related Relief* [Docket No. \_\_\_\_].

forth on **Schedule 1** attached hereto (collectively, the “*Assigned Contracts*”) shall be assumed and assigned to the Successful Bidder, subject to the Successful Bidder’s payment of the cure amount set forth on **Schedule 1**, or such other cure amounts as are agreed by the parties.

**PLEASE TAKE FURTHER NOTICE** that the Successful Bidder has the right under certain circumstances to designate additional Contracts as Assigned Contracts or remove certain Contracts from the list of Assigned Contracts prior to closing.

**PLEASE TAKE FURTHER NOTICE** that copies of the Sale Motion, the Bidding Procedures, and the Bidding Procedures Order, as well as all related exhibits, including the proposed Sale Order, are available: (a) upon request from the proposed counsel to the Debtor, Locke Lord LLP, 111 South Wacker Drive, Chicago, Illinois 60606, Attn: David W. Wirt and Aaron C. Smith; and (b) for a fee via PACER by visiting <http://www.deb.uscourts.gov>.

**PLEASE TAKE FURTHER NOTICE** that, except as otherwise provided by the Bidding Procedures order, the time for filing objections to (a) the cure amounts related to the Assigned Contracts, (b) the Debtor’s ability to assume and assign the Assigned Contracts, and (c) adequate assurance of future performance of the Assigned Contract by the Successful Bidder has passed and no further notice or action is necessary with respect to such matters.

Dated: Wilmington, Delaware  
[\_\_\_\_], 2017

LOCKE LORD LLP  
David W. Wirt  
Aaron C. Smith  
111 S. Wacker Drive  
Chicago, Illinois 60606-4410  
Telephone: (312) 443-0700  
Fax: (312) 443-0336

COUNSEL FOR THE DEBTOR

POLSINELLI PC  
Christopher A. Ward (Del. Bar No. 3877)  
Justin K. Edelson (Del. Bar No. 5002)  
222 Delaware Avenue, Suite 1101  
Wilmington, Delaware 19801  
Telephone: (302) 252-0920  
Fax: (302) 252-0921

COUNSEL FOR THE DEBTOR

**Schedule 1 to Assumption Notice****Assigned Contracts<sup>1</sup>**

<b>Counterparty</b>	<b>Description of Assigned Contracts or Leases</b>	<b>Cure Amount</b>

---

<sup>1</sup> The presence of a contract or lease on this **Schedule 1** does not constitute an admission by the Debtor that such contract is an executory contract or such lease is an unexpired lease pursuant to section 365 of the Bankruptcy Code or any other applicable law, and the Debtor reserves all rights to withdraw any proposed assumption and assignment or to reject any contract or lease at any time before such contract or lease is assumed and assigned pursuant to an order of the Court.