

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF DELAWARE**

In re:	)	Chapter 11
	)	
EXTREME PLASTICS PLUS, INC., <i>et al.</i> , <sup>1</sup>	)	Case No. 16-10221 (CSS)
	)	(Jointly Administered)
Debtors.	)	
	)	<b>Objection Deadline: September 28, 2016</b>
	)	<b>Hearing Date (if necessary): October 5, 2016 at</b>
	)	<b>10:00 a.m. (Eastern Time)</b>

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**DEBTORS' MOTION FOR ORDERS: (I) (A) APPROVING BIDDING PROCEDURES, (B) APPROVING FORM AND MANNER OF NOTICES, (C) APPROVING FORM OF ASSET PURCHASE AGREEMENT AND BID PROTECTIONS, (D) SCHEDULING DATES TO CONDUCT AUCTION AND HEARING FOR APPROVAL OF SALE, INCLUDING ASSUMPTION AND ASSIGNMENT OF EXECUTORY CONTRACTS AND UNEXPIRED LEASES, AND (E) GRANTING RELATED RELIEF; AND (II) (A) APPROVING SALE OF SUBSTANTIALLY ALL OF DEBTORS' ASSETS FREE AND CLEAR OF LIENS, CLAIMS, ENCUMBRANCES, AND INTERESTS, (B) AUTHORIZING ASSUMPTION AND ASSIGNMENT OF EXECUTORY CONTRACTS AND UNEXPIRED LEASES, AND (C) GRANTING RELATED RELIEF**

Extreme Plastics Plus, Inc. and EPP Intermediate Holdings, Inc., as debtors and debtors in possession in the above-captioned chapter 11 cases (collectively, the “Debtors”), hereby move (the “Motion”), pursuant to 105(a), 363, and 365 of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (the “Bankruptcy Code”), Rules 2002, 6004, 6006, 9007, and 9014 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), and Rule 6004-1 of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the “Local Rules”), for the entry of an order (the “Bidding Procedures Order”), substantially in the form attached hereto as **Exhibit A**: (a) approving bidding procedures substantially in the form attached to the Bidding Procedures Order as **Exhibit 2** (the “Bidding Procedures”) to govern the sale of substantially all of the Debtors’ assets as set forth in the Asset

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<sup>1</sup> The Debtors in these chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number, are Extreme Plastics Plus, Inc. (6913) and EPP Intermediate Holdings, Inc. (6129). The location of the Debtors’ corporate headquarters and service address is: 360 Epic Circle Dr., Fairmont, WV 26554.

Purchase Agreement (as defined herein); (b) approving the form and manner of notices in connection with Bidding Procedures; (c) approving the form of asset purchase agreement for the sale of substantially all of the Debtors' assets and the Bid Protections (as defined herein); (d) scheduling dates to conduct an auction to sell substantially all of the Debtors' assets (the "Auction") and a hearing (the "Sale Hearing") for approval of the sale of the Debtors' assets free and clear of liens, claims, encumbrances, and interests (the "Sale"), including the assumption and assignment of executory contracts and unexpired leases; and (e) granting related relief. By the Motion, the Debtors also seek, pursuant to sections 105, 363, and 365 of the Bankruptcy Code and Bankruptcy Rules 2002, 6004, and 6006, entry of an order, attached hereto as **Exhibit B** (the "Sale Order"): (a) approving the sale of substantially all of the Debtors' assets free and clear of all liens, claims, encumbrances, and interests; (b) authorizing the assumption and assignment of executory contracts and unexpired leases; and (c) granting related relief.<sup>2</sup> The Motion requests approval of certain dates and deadlines, including the following, as described more fully herein:

<b>Event</b>	<b>Date or Deadline</b>
Serve Sale Notice (as defined herein) / file and serve Cure Notice (as defined herein)	Five calendar days after entry of the Bidding Procedures Order
Publish Publication Notice (as defined herein)	Seven calendar days after entry of the Bidding Procedures Order
Bid Deadline (as defined in the Bidding Procedures)	Two to three business days before the Auction
Sale Objection Deadline (as defined in the Bidding Procedures Order) / Deadline for counterparties to Assigned Contracts (as defined herein) to object to cure, assignment, and adequate assurance	Nineteen calendar days after entry of the Bidding Procedures Order
Auction	Two to four business days before the Sale Hearing
Auction Objection Deadline (as defined in the	One business day after the close of Auction

<sup>2</sup> This Motion contains the Debtors' request for entry of the Bidding Procedures Order and the Sale Order. The Debtors are seeking entry of the Bidding Procedures Order at the initial hearing to be conducted on this Motion. The Debtors request that the Court enter the Sale Order at the Sale Hearing.

Bidding Procedures Order); announcement of Successful Bid (as defined in the Bidding Procedures)	
Sale Hearing	On or about November 8, 2016
File list of Assigned Contracts assumed and assigned in connection with sale of the Debtors' assets	Five business days after the Closing Date

In support of the Motion, the Debtors respectfully state as follows:

### **JURISDICTION AND VENUE**

1. The United States Bankruptcy Court for the District of Delaware (the “Court”) has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).

2. Pursuant to Local Rule 9013–1(f), the Debtors consent to the entry of a final order by the Court in connection with this Motion to the extent that it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments consistent with Article III of the United States Constitution.

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

4. The statutory bases for the relief requested herein are sections 105, 363, and 365 of the Bankruptcy Code, Bankruptcy Rules 2002, 6004, 6006, 9007, and 9014, and Local Rule 6004-1.

### **BACKGROUND**

#### **A. Procedural Background**

5. On January 31, 2016 (the “Petition Date”), each of the Debtors filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code with the Court commencing the above-captioned chapter 11 cases (the “Chapter 11 Cases”). By order of the Court, the Chapter 11 Cases have been consolidated for procedural purposes only and are being jointly

administered. The Debtors have continued in possession of their respective properties and have continued to operate and maintain their business as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

6. On February 10, 2016, the Office of the United States Trustee for the District of Delaware (the “U.S. Trustee”) appointed an official committee of unsecured creditors (the “Creditors’ Committee”) in the Chapter 11 Cases under section 1102(a)(1) of the Bankruptcy Code. No trustee or examiner has been appointed in the Chapter 11 Cases.

7. A description of the Debtors and their business is set forth in greater detail in the *Declaration of Ryan Bouley in Support of Chapter 11 Petitions and First Day Pleadings* [Docket No. 12].

8. On July 17, 2016, the Court entered its *Amended and Restated Final Order Authorizing the Use of Cash Collateral and Granting Adequate Protection* [Docket No. 423] (the “Final Cash Collateral Order”), which establishes certain milestones associated with the Sale and provides for the allocation of certain of the proceeds from the Sale. Final Cash Collateral Order ¶¶ 14, 17. The milestones are being amended to be consistent with the relief requested in the Motion.

9. On July 18, 2016, the Court entered its *Order Approving Settlement Stipulation by and Among the Debtors, the Creditors’ Committee, and the Agent* [Docket No. 424], which approves a settlement (the “Global Settlement”) resolving certain disputes between key stakeholders in the Chapter 11 Cases. The Global Settlement eliminates potential costly and distracting litigation while providing meaningful payments to unsecured creditors if the Debtors’ assets are sold as a going concern. The Global Settlement has enabled the parties to focus on the marketing and sale process.

10. On September 8, 2016, the Court entered its *Second Order, Pursuant to Section 1121(d)(1) of the Bankruptcy Code, Extending the Debtors' Exclusive Periods to File a Chapter 11 Plan and Solicit Acceptances Thereof* (the "Second Exclusivity Order") [Docket No. 489]. The Second Exclusivity Order grants an extension of the periods in which the Debtors have the exclusive right to: (a) file a chapter 11 plan by 60 days, through and including October 30, 2016, and (b) solicit acceptances of a chapter 11 plan by 60 days, through and including December 29, 2016. These extensions will provide the Debtors with additional time to complete their marketing and sale process and develop a consensual restructuring proposal.

**B. Marketing and Sale Process**

11. Since the commencement of the Chapter 11 Cases, the Debtors have been investigating and analyzing potential transactions to effectuate a successful restructuring. On March 24, 2016, the Debtors executed an engagement letter with FTI Consulting, Inc. ("FTI") to obtain FTI's assistance, as their investment banker, with these efforts. The Debtors and their advisors subsequently determined that a robust marketing and sale process would be the most effective way to maximize the value of the Debtors' assets.

12. With their advisors, and after consulting with the Lenders (as defined herein) and the Creditors' Committee, the Debtors developed a teaser that summarized their business, financial history, and industry. The teaser was distributed to more than 200 parties who may be interested in purchasing some or substantially all of the Debtors' assets. The Debtors and their advisors also drafted a 73-page confidential information memorandum for distribution to parties who executed the Debtors' non-disclosure agreement. A significant number of parties—41 in total—expressed interest in engaging in due diligence and signed non-disclosure agreements. To provide these parties with access to due diligence materials, the Debtors and their advisors

created a virtual data room that was accessible on April 25, 2016. The Debtors also established May 16, 2016, as the deadline for potential buyers to submit non-binding indications of interest. The Debtors received non-binding indications of interest from 14 parties who reviewed the confidential information memorandum and conducted due diligence.

13. After consulting with Citizens Bank, as agent (the “Agent”) for the Debtors’ pre-petition secured lenders (the “Lenders”) and the Creditors’ Committee, the Debtors and their advisors solicited potential stalking horse bids from the parties that submitted nonbinding indications of interest.

14. The Debtors focused their efforts on working with the parties who provided the best indications of interest. These parties continued their due diligence and engaged in on-site visits with the Debtors’ management team and advisors. After continued negotiations, the Debtors identified the offer of BW EPP Holdings LLC (the “Stalking Horse Purchaser”) as the highest and best offer for the sale of the Debtors’ assets. As such, the Debtors finalized that certain Asset Purchase and Sale Agreement, by and among Extreme Plastics Plus, Inc. and BW EPP Holdings, Inc., dated as of September 14, 2016, attached to the Bidding Procedures Order as **Exhibit 1**, including the exhibits and schedules thereto (each as may be amended or supplemented from time to time, the “Asset Purchase Agreement”). The transaction contemplated by the Asset Purchase Agreement will be subject to competitive bidding, as set forth herein.

### **C. The Asset Purchase Agreement and the Bidding Procedures**

15. A summary of the Asset Purchase Agreement, including the terms that are required to be highlighted pursuant to Local Rule 6004-1(b), is set forth as follows:<sup>3</sup>

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<sup>3</sup> The following table is a summary and is qualified in full by the Asset Purchase Agreement, attached to the Bidding Procedures Order as **Exhibit 1**, the Bidding Procedures, and the Bidding Procedures Order, as

<p><u>Purchase Price:</u></p> <p>Asset Purchase Agreement Article 3</p>	<p>The aggregate purchase price for the Purchased Assets will be \$22,500,000, subject to certain adjustments and payments set forth in the Asset Purchase Agreement, including, without limitation, a “working capital adjustment.”</p> <p>The Agent has agreed (for itself and on behalf of the Lenders and any successors or assigns of the Agent or the Lenders) that it will not, and shall not, credit bid any of its outstanding claims against the Debtors in connection with the sale process contemplated in the Bidding Procedures, so long as the Stalking Horse Purchaser is willing to acquire substantially all of the assets set forth in the Asset Purchase Agreement for a price greater than or equal to the purchase price set forth therein.</p>
<p><u>Purchased Assets:</u></p> <p>Asset Purchase Agreement Section 2.1</p>	<p>The Purchased Assets include:</p> <p>(a) all accounts and notes receivable and other rights to payment arising primarily from the conduct of the Business, other than any accounts and notes receivable or other rights to payment arising out of or relating to any Excluded Asset;</p> <p>(b) other than tangible personal property described in another subsection of Section 2.1 of the Asset Purchase Agreement, all tangible personal property owned by Seller primarily related to or primarily held for use in the conduct of the Business, including supplies, equipment, tools, machinery, dies, molds, computers, hardware, electronics, file servers, scanners, printers, networks, copiers, furniture, furnishings, fixtures, telephone lines, telecopy machines, telecommunication equipment, spare parts, shipping materials, packaging materials, raw materials, and other consumables relating to or available for sale or use in connection with the Business;</p> <p>(c) all rights, title, and interest of Seller in each Owned Property and under each Real Property Lease that is a Purchaser Assumed Contract, together with all of Seller’s right, title, and interest in and to all improvements, fixtures, and other appurtenances thereto and rights in respect thereof;</p> <p>(d) all rights, title, and interest of Seller in and to any property subject to (i) a Personal Property Lease or (ii) a collateralized debt obligation of the Seller (other than the debt obligations of the Seller under the Citizens Facility) that is primarily related to or primarily held for use in the conduct of the Business, to the extent any such Personal Property Lease or collateralized debt obligation is a Purchaser Assumed Contract;</p> <p>(e) the Purchased Intellectual Property;</p> <p>(f) to the extent transferrable and/or assignable, after giving effect to the Sale Order, all of the rights and benefits accruing from and after the Closing under any of the Purchaser Assumed Contracts, including each Real Property Lease, Personal Property Lease, collateralized debt obligation, or Intellectual Property License that is a Purchaser Assumed Contract;</p>

applicable. To the extent that there are any inconsistencies between the summary description of terms in this table and the Asset Purchase Agreement, the terms of the Asset Purchase Agreement shall control. Capitalized terms used but not otherwise defined in this table shall have the meanings ascribed to them in the Asset Purchase Agreement, the Bidding Procedures, or the Bidding Procedures Order, as applicable.

	<p>(g) all Documents that are primarily used in, primarily held for use in, or arise primarily out of, the Business, including Documents relating to marketing, advertising, promotional materials, Purchased Intellectual Property, and all files, customer files and documents (including credit information), supplier lists, records, literature, and correspondence, whether or not physically located on any of the premises referred to in clause (e) above, but excluding (i) personnel files for Employees who are not Transferred Employees, (ii) such files as may not be transferred under Applicable Law regarding privacy, (iii) Documents that Seller is not permitted to transfer pursuant to any contractual confidentiality obligation owed to any third party, and (iv) Documents relating to an Excluded Asset or Excluded Liability;</p> <p>(h) all of the rights and benefits accruing under any Permits primarily held, primarily used, or primarily made by Seller in the Business to the extent assignable, except any such Permit that is an Excluded Contract;</p> <p>(i) all warranties and guarantees primarily related to the Purchased Assets, to the extent assignable, including warranties and guarantees made by suppliers, manufacturers, and contractors under the Purchased Assets, and claims against suppliers and other third parties in connection with the Purchaser Assumed Contracts;</p> <p>(j) any rights, demands, claims, causes of action, rights of recovery, credits, allowances, rebates, or rights of setoff or subrogation primarily arising out of or primarily relating to any of the Purchased Assets or the Business;</p> <p>(k) all Transferred Deposits;</p> <p>(l) all inventory of Seller, wherever located, including all finished goods, work-in-process and raw materials, pre-paid parts and packaging; and</p> <p>(m) all goodwill and other intangible assets primarily associated with the Business, including customer and supplier lists and the goodwill associated with the Purchased Intellectual Property.</p>
<p><u>Excluded Assets:</u></p> <p>Asset Purchase Agreement Section 2.2</p>	<p>“Excluded Assets” include:</p> <p>(a) all Cash and all rights of Seller in respect of bank and brokerage accounts and lock boxes in its name or held on its behalf;</p> <p>(b) all restricted cash of Seller relating to cash collateralized letters of credit and/or Excluded Liabilities;</p> <p>(c) any accounts and notes receivable or other rights to payment arising out of or relating to any Excluded Asset;</p> <p>(d) the Excluded Contracts, including any accounts receivable arising out of or in connection with any Excluded Contract;</p> <p>(e) all equity interests in Seller;</p> <p>(f) any (i) confidential personnel and medical records pertaining to any Employee of Seller not permitted to be transferred to Purchaser under Applicable Law, (ii) books and records that Seller is required by Law to retain or that relate exclusively to the Excluded Assets or the Excluded Liabilities, including Tax Returns, financial statements, and corporate or</p>



	<p>other entity filings; <u>provided, however</u>, that Purchaser shall have the right to make copies of any portions of such retained books and records that relate to the Business or any of the Purchased Assets or Assumed Liabilities, and (iii) corporate charters, qualifications to do business, taxpayer, and other identification numbers, corporate seals, minute books, stock ledgers, stock certificates, and any other documentation related to governance, organization, maintenance, or existence of Seller; provided, that Purchaser shall have the right to make copies of any portions of such documents and records;</p> <p>(g) any claim, right, or interest of Seller in or to any refund, rebate, abatement, or other recovery for Taxes, together with any interest due thereon or penalty rebate arising therefrom, for any Tax period (or portion thereof) ending on or before the Closing Date;</p> <p>(h) all rights and claims of Seller under the Transaction Documents;</p> <p>(i) all Debtor Benefit Plans (and any trusts, 501(c)(9) organizations, insurance (including fiduciary insurance), assets, administrative, or other service contracts relating thereto);</p> <p>(j) all deposits with respect to any professional retainers (including all legal, accounting, financial advisory, valuation, investment banking, and other third party advisory or consulting fees and expenses) incurred by or on behalf of Seller or its Affiliates before the commencement of the Chapter 11 Case or in connection with the Chapter 11 Case or the Transactions;</p> <p>(k) all insurance policies and all rights to applicable claims and proceeds thereunder, including rights to prepaid insurance premiums or insurance refunds or rebates;</p> <p>(l) all deposits (including security deposits for rent, electricity, telephone, or otherwise, but excluding all Transferred Deposits) and prepaid or deferred charges and expenses of Seller;</p> <p>(m) the assets, properties, and rights set forth on Schedule 2.2(m) to the Asset Purchase Agreement; and</p> <p>(n) all rights, claims, and causes of action of Seller under the Bankruptcy Code (including chapter 5 thereof) and any similar claims and causes of action for avoidance, preference, or fraudulent conveyance under applicable state law and all rights, claims, and causes of action of Seller against any Employee, officer, or director of the Seller; provided that the Sale Order shall include a waiver and release of all such rights, claims, and causes of action except to the extent such rights, claims, and causes of action are preserved in paragraph 8 of the <i>Settlement Stipulation by and among the Debtors, the Committee, and the Agent attached to, and authorized and approved by, the Order Approving Settlement Stipulation by and among the Debtors, the Creditors' Committee, and the Agent</i> [Docket No. 424].</p>
<p><u>Termination Rights Under Asset Purchase Agreement:</u></p> <p>Asset Purchase Agreement</p>	<p>The obligation of Purchaser to consummate the transactions contemplated by the Asset Purchase Agreement is subject to the fulfillment, on or prior to the Closing Date, of each of the following conditions (any or all of which may be waived by Purchaser, in its sole discretion, in whole or in part to the extent permitted by Applicable Law):</p>

Sections 4.4; 10.1	<p>(a) the representations and warranties of Seller set forth in the Asset Purchase Agreement shall be true and correct in all material respects (and in all respects, in the case of any representations and warranties qualified by materiality) as of the date of the Asset Purchase Agreement and as of the Closing as if then made, except to the extent such representations and warranties expressly relate to an earlier date (in which case such representations and warranties shall be true and correct in all material respects on and as of such earlier date, and true and correct in all respects on and as of such earlier date as to any such representations and warranties qualified by materiality), without giving effect to any supplement to the Schedules;</p> <p>(b) Seller shall have performed and complied in all material respects (and in all respects, where such performance and compliance is qualified by materiality) with all obligations and agreements required in this Agreement to be performed or complied with by it at or prior to the Closing Date, including those obligations and agreements pursuant to Article 8 of the Asset Purchase Agreement, and Purchaser shall have received a certificate signed by an authorized officer of Seller, dated the Closing Date, to the foregoing effect;</p> <p>(c) no Seller Material Adverse Effect shall have occurred at any time on or prior to the Closing Date since July 31, 2016;</p> <p>(d) From and after the date of the Asset Purchase Agreement, Seller shall not have entered into an agreement for the Disposition of any of the Fixed Assets, other than the Fixed Assets that are the subject of a transaction described in Schedule 5.5(c) to the Asset Purchase Agreement, without Purchaser's prior written consent; and</p> <p>(e) Seller shall have delivered, or caused to be delivered, to Purchaser all of the items set forth in Section 4.2 of the Asset Purchase Agreement.</p> <p>In addition, the Asset Purchase Agreement may be terminated prior to the Closing Date as follows:</p> <p>(a) at any time prior to the Closing Date by the joint written consent of Seller, Purchaser and Agent;</p> <p>(b) by Seller (with the written consent of the Agent) or Purchaser if the Closing has not occurred on or before November 30, 2016 (as may be extended by written agreement of the Parties with the consent of the Agent, the "<u>Outside Date</u>"); <u>provided, however</u>, that a Party may not terminate this Agreement pursuant to Section 4.4(b) of the Asset Purchase Agreement if such Party is in breach of its obligations hereunder in any material respect and such breach is the sole reason that the Closing has not occurred by such date;</p> <p>(c) by the Purchaser or Seller prior to entry of the Sale Order, if: (i) the Bankruptcy Court enters an Order approving an Alternative Bid; or (ii) if Purchaser is not the successful bidder at the Auction; provided that, if Purchaser is the Backup Bidder, then Purchaser shall not be permitted to terminate this Agreement pursuant to Section 4.4(c) of the Asset Purchase</p>
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	<p>Agreement until after the earlier of (A) the closing of an Alternative Transaction and (B) the Outside Date;</p> <p>(d) by Seller (with the written consent of the Agent) or Purchaser, if an Order is entered by a Governmental Authority of competent jurisdiction having valid enforcement authority permanently restraining, prohibiting, or enjoining either Party from consummating the Transactions and such Order shall have become final and non-appealable or shall not have been vacated prior to the Outside Date;</p> <p>(e) by Purchaser if the Bidding Procedures Hearing has not been held by October 5, 2016 or if the Bidding Procedures Order has not been entered by the Bankruptcy Court within two (2) Business Days after the conclusion of the Bidding Procedures Hearing, provided that such termination occurs within five Business Days of such applicable date;</p> <p>(f) by Purchaser if the Sale Order has not been entered by the Bankruptcy Court on or before the date that is forty-five (45) days after the date the Bidding Procedures Order is entered by the Bankruptcy Court, provided that such termination occurs within five Business Days of such date;</p> <p>(g) by Purchaser, if the Chapter 11 Case is dismissed or converted to a case under chapter 7 of the Bankruptcy Code for any reason;</p> <p>(h) by Purchaser, so long as Purchaser is not in breach of its obligations under this Agreement in any material respect, upon a material breach of any covenant or agreement of Seller set forth in this Agreement, or if any representation or warranty of Seller shall have been or becomes untrue in any material respect, in each case such that the conditions set forth in Section 10.1(a) or Section 10.1(b) of the Asset Purchase Agreement, as the case may be, would not be satisfied and such breach or untruth cannot be cured by the Outside Date;</p> <p>(i) by Seller (with the written consent of the Agent), so long as Seller is not in breach of its obligations under this Agreement in any material respect, upon a material breach of any covenant or agreement of Purchaser set forth in this Agreement, or if any representation or warranty of Purchaser shall have been or becomes untrue in any material respect, in each case such that the conditions set forth in Section 10.2(a) or Section 10.2(b) of the Asset Purchase Agreement, as the case may be, would not be satisfied and such breach or untruth cannot be cured by the Outside Date; or</p> <p>(j) by Purchaser if, Purchaser, or one of its Affiliates, has not entered into an employment agreement with each of Bennie Wharry, Wade Holt and Kiel Wirgau, in such form and on such terms as are reasonably acceptable to Purchaser and such individuals, by the first Business Day immediately prior to the date on which the Bidding Procedures Hearing commences (the “<u>Bidding Procedures Hearing</u>”). The right of the Purchaser to terminate the Asset Purchase Agreement pursuant to this subsection (j) shall expire and be of no further force or effect if not exercised prior to the commencement of the Bidding Procedures Hearing.</p> <p>Notwithstanding anything in Section 4.4 of the Asset Purchase Agreement to the contrary, the consent of the Agent shall not be required for any termination by Seller if the board of directors of Seller determines that the</p>
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	failure to exercise such right to terminate this Agreement would result in the breach of its fiduciary duties under applicable Law.
<u>Sale to Insider / Agreements with Management:</u>  Asset Purchase Agreement Section 4.4(j)	<p>Subject to the disclosure immediately below, the Asset Purchase Agreement does not contemplate the sale of the Purchased Assets to an insider as defined in section 101(31) of the Bankruptcy Code. The Asset Purchase Agreement is the product of arms'-length negotiations.</p> <p>The Asset Purchase Agreement may be terminated prior to the Closing Date by the Stalking Horse Purchaser if the Stalking Horse Purchaser, or one of its Affiliates, has not entered into an employment agreement with each of Bennie Wharry, Wade Holt and Kiel Wirgau, in such form and on such terms as are reasonably acceptable to the Stalking Horse Purchaser and such individuals, by the first Business Day immediately prior to the date on which the Bidding Procedures Hearing commences. Although these agreements have not been finalized yet, it is the Debtors' understanding that they will include provisions whereby Bennie Wharry, Wade Holt, and Kiel Wirgau will be required to invest capital in the Stalking Horse Purchaser if it is the Successful Bidder.</p>
<u>Releases:</u>  Asset Purchase Agreement Section 2.2(n)	<p>The Sale Order provides for a release and waiver of all rights, claims, and causes of action of Seller under the Bankruptcy Code (including chapter 5 thereof) and any similar claims and causes of action for avoidance, preference, or fraudulent conveyance under applicable state law and all rights, claims, and causes of action of Seller against any Employee, officer, or director of the Seller except to the extent such rights, claims, and causes of action are preserved in paragraph 8 of the <i>Settlement Stipulation by and among the Debtors, the Committee, and the Agent attached to, and authorized and approved by, the Order Approving Settlement Stipulation by and among the Debtors, the Creditors' Committee, and the Agent</i> [Docket No. 424].</p>
<u>Private Sale/No Competitive Bidding:</u>  Asset Purchase Agreement Section 8.12	<p>The Debtors intend to execute a public auction process for the assets subject to the Motion.</p> <p>As set forth in the Asset Purchase Agreement, the Debtors, in order to induce Purchaser to enter into this Agreement and consummate the Transactions, agree that, from the date of the Asset Purchase Agreement until the date that the Bid Procedures Order is entered by the Bankruptcy Court, the Debtors shall not (and shall ensure that none of its controlled affiliates, officers, directors, advisors, agents, and representatives, including, without limitation, investment bankers), directly or indirectly, (a) negotiate the terms of an Alternative Transaction, or (b) enter into any agreements regarding an Alternative Transaction.</p>
<u>Expense Reimbursement and Overbid Protections:</u>  Asset Purchase Agreement Sections 4.4, 4.5  Bidding Procedures at 2-6	<p>A Bid (or any combination of other Bids) must propose a minimum purchase price, or otherwise have value for the benefit of the Debtors' estates sufficient to satisfy (without duplication):</p> <ul style="list-style-type: none"> <li>(a) the Cash Purchase Price; plus</li> <li>(b) the dollar value of the Bid Protections in cash; plus</li> <li>(c) an assumption of the Assumed Liabilities (as defined in the Asset Purchase Agreement) or the dollar value of any such Assumed Liabilities</li> </ul>

	<p>that are not “assumed liabilities” in such Bid or Bids; plus</p> <p>(d) \$400,000 in cash.</p> <p>An “<u>Overbid</u>” is any bid made at the Auction subsequent to the Debtors’ announcement of the respective Auction Baseline Bid for such Auction. Any Overbid after and above the respective Auction Baseline Bid shall be made in increments of cash of not less than \$250,000.</p> <p>As set forth in the Asset Purchase Agreement, the Stalking Horse Purchaser is, in certain circumstances, entitled to reimbursement for the actual out-of-pocket legal, accounting and other third party advisory or service costs and expenses of the Stalking Horse Purchaser in connection with the Transactions and the Transaction Documents in an amount not to exceed \$450,000 (the “<u>Expense Reimbursement</u>”) and Breakup Fee (as defined in the Asset Purchase Agreement and, together with the Expense Reimbursement, the “<u>Bid Protections</u>”) equal to \$675,000.</p> <p>The Breakup Fee amounts to 3% of the cash purchase price to be paid by the Stalking Horse Purchaser pursuant to the Asset Purchase Agreement. The Expense Reimbursement amounts to a maximum of 2% of the cash purchase price to be paid by the Stalking Horse Purchaser pursuant to the Asset Purchase Agreement.</p> <p>The Debtors’ obligation to pay the Breakup Fee and the Expense Reimbursement pursuant to Section 4.5(a) of the Asset Purchase Agreement shall (i) survive termination of the Asset Purchase Agreement, (ii) constitute a super priority administrative expense, which, except as set forth in the final sentence of this paragraph, shall be payable ahead of any other administrative claims, and (iii) not be discharged, modified, or otherwise affected by any Chapter 11 plan or by any other Order of the Bankruptcy Court. Any Breakup Fee or Expense Reimbursement that becomes payable under the Asset Purchase Agreement shall be paid either (x) out of the proceeds of an Alternative Bid at the time such proceeds are delivered by the purchaser thereunder, (y) from other Cash of the Seller, or (z) from the Agent in the event the assets of Seller are transferred to Agent via credit bid or otherwise. Nothing in Section 4.5(b) of the Asset Purchase Agreement shall prevent any party from receiving payment pursuant to the “Carve-Out” as defined in and set forth in the <i>Amended and Restated Final Order Authorizing the Use of Cash Collateral and Granting Adequate Protection</i> [Docket No 423].</p>
<p><u>Closing Deadlines and Milestones:</u></p> <p>Asset Purchase Agreement Sections 4.1, 10.1, 10.2, and 10.3</p> <p>Bidding Procedures Order at ¶¶ 5-17</p>	<p>The deadlines related to the Closing and other milestones are set forth in the Asset Purchase Agreement, the Bidding Procedures Order, and the Bidding Procedures.</p>

Bidding Procedures at 5-8	
<u>Good Faith Deposit:</u> Asset Purchase Agreement Section 3.2 Bidding Procedures at 3	The Stalking Horse Purchaser is required to provide a good faith deposit in connection with the Asset Purchase Agreement in the amount of \$1,125,000.  Entities seeking to submit a “Qualified Bid” are required to submit a deposit of no less than 5% of the total purchase price of their Bid (excluding any “assumed liabilities” (as defined in the Asset Purchase Agreement)).
<u>Interim Arrangement with Proposed Buyer:</u>	The Debtors have not entered into any interim arrangements with the Stalking Horse Purchaser in connection with the Asset Purchase Agreement.
<u>Use of Proceeds:</u> Asset Purchase Agreement Section 2.3 Final Cash Collateral Order ¶ 14 Global Settlement ¶¶ 5-6	Pursuant to the Asset Purchase Agreement, the Stalking Horse Purchaser will assume certain administrative expenses as Assumed Liabilities. In accordance with the Final Cash Collateral Order and Global Settlement, the Debtors will pay certain proceeds from the sale to the Agent and set aside a portion of the proceeds to, among other things, administer and wind down the Debtors’ estates and fund the Carve-Out for unsecured creditors under the Global Settlement.
<u>Tax Exemptions Under Section 1146(a) of the Bankruptcy Code:</u>	Not applicable.
<u>Record Retention:</u> Asset Purchase Agreement Sections 2.2 and 8.5	As more fully set forth in the Asset Purchase Agreement, the Debtors and the Stalking Horse Purchaser shall (and shall cause their controlled Affiliates to) preserve and keep in their possession all records held by them on and after the date hereof relating to the Purchased Assets for a period of two (2) years or such longer period as may be required by Applicable Law ( <u>provided, however</u> , that in no event shall Seller be required to preserve such records after the Chapter 11 Case is closed, converted, or dismissed).  Certain records are Excluded Assets under the Asset Purchase Agreement.
<u>Sale of Avoidance Actions:</u> Asset Purchase Agreement Section 2.2	As set forth above, avoidance actions are Excluded Assets under the Asset Purchase Agreement, provided that the Sale Order shall include a waiver and release of all such rights, claims, and causes of action except to the extent such rights, claims, and causes of action are preserved in paragraph 8 of the Settlement Stipulation by and among the Debtors, the Creditors’ Committee, and the Agent attached to, and authorized and approved by, the <i>Order Approving Settlement Stipulation by and among the Debtors, the Creditors’ Committee, and the Agent</i> [Docket No. 424].
<u>Requested Findings as to Successor Liability:</u> Asset Purchase Agreement	The Asset Purchase Agreement requires that the Court shall have entered the Sale Order. The Sale Order contemplates, as set forth more fully therein, that except to the extent the Stalking Horse Purchaser assumes the Assumed Liabilities (as defined in the Asset Purchase Agreement), or as

Section 10.3 Sale Order ¶¶ 13-14	otherwise expressly set forth in the Asset Purchase Agreement, the Stalking Horse Purchaser shall not have any successor, transferee, derivative or vicarious liabilities of any kind or character for any 363 Interests or Claims (as defined in the Sale Order), including under any theory of successor or transferee liability, <i>de facto</i> merger or continuity.
<u>Sale Free and Clear of Unexpired Leases:</u> Asset Purchase Agreement Section 2.5	The Asset Purchase Agreement allows the Stalking Horse Purchaser to select which, if any, unexpired leases to assume and for the Stalking Horse Purchaser to take assignment of the same. Any such assumption and assignment will be pursuant to section 365 of the Bankruptcy Code.
<u>Credit Bid</u> Bidding Procedures Order at ¶ L	As noted herein, the Agent has agreed (for itself and on behalf of its constituent lenders and any successors or assigns of the Agent or its constituent lenders) that it will not, and shall not, credit bid any of its outstanding claims against the Debtors in connection with the sale process contemplated in the Bidding Procedures, so long as the Stalking Horse Purchaser is willing to acquire substantially all of the assets set forth in the Asset Purchase Agreement for a price greater than or equal to the purchase price set forth therein.
<u>Credit Bid of Bid Protections</u> Bidding Procedures at 7	The Stalking Horse Purchaser shall be permitted to include the full amount of the Bid Protections in each bid by the Stalking Horse Purchaser (as a “credit bid”) for the purposes of comparison to any Overbid in connection with each round of bidding in the Auction.
<u>Waiver of Bankruptcy Rules 6004(h) and 6006(d):</u> Asset Purchase Agreement Section 10.3	The Asset Purchase Agreement requires that the Court shall have entered the Bidding Procedures Order and the Sale Order. The Bidding Procedures Order and Sale Order contemplate a waiver of the stay provisions in Bankruptcy Rules 6004(h) and 6006(d).

16. A summary of the following provisions set forth in the Bidding Procedures Order and the accompanying Bidding Procedures is set forth below, pursuant to Local Rule 6004-1(c):<sup>4</sup>

<u>Provisions Governing the Qualification of Bidders:</u> Bidding Procedures at 5	A Bid (or combination of Bids) that is actually received from a Bidder before the Bid Deadline and that meets the below requirements shall collectively constitute a “ <u>Qualified Bid</u> ”, and such Bidder (or combination of Bidders) shall collectively constitute a “ <u>Qualified Bidder</u> .”
<u>Provisions Governing Qualified Bids:</u>	To be eligible to participate in the Auction (as defined in the Bidding Procedures), each offer, solicitation, or proposal (each, a “ <u>Bid</u> ”), and

<sup>4</sup>

The following table is a summary and is qualified in full by the Asset Purchase Agreement, the Bidding Procedures, and the Bidding Procedures Order, as applicable. To the extent that there are any inconsistencies between the summary description of terms in this table and the Bidding Procedures, the terms of the Bidding Procedures shall control. Capitalized terms used but not otherwise defined in this table shall have the meanings ascribed to them in the Bidding Procedures or the Bidding Procedures Order, as applicable.

Bidding Procedures at 2-5	<p>each party submitting such a Bid (each, a “<u>Bidder</u>”), must be determined by the Debtors to satisfy each of the conditions set forth below. A Bid will not be considered qualified for the Auction if such Bid does not satisfy each of the following conditions:</p> <p>(a) <u>Identity of Bidder</u>: Each Bid shall identify the potential Bidder and the potential Bidder’s sponsors and other representatives that are authorized to appear and act on their behalf for all purposes regarding the contemplated transaction</p> <p>(b) <u>Good Faith Deposit</u>: Each Bid (other than any Bid by the Stalking Horse Purchaser, which shall be as set forth in the Asset Purchase Agreement) must be accompanied by a deposit of no less than 5% of the total purchase price of such Bid (excluding any “assumed liabilities” (as defined in the asset purchase agreement submitted by the Bidder)) to an escrow account to be identified and established by the Debtors (the “<u>Good Faith Deposit</u>”).</p> <p>(c) <u>Same or Better Terms</u>: Each Bid must be on terms that, in the Debtors’ business judgment, after consulting with their advisors, the Agent, and the Creditors’ Committee, are the same or better than the terms of the Asset Purchase Agreement (taken as a whole)..</p> <p>(d) <u>Executed Agreement</u>: Each Bid must be based on the Asset Purchase Agreement and must include executed transaction documents, signed by an authorized representative of such Bidder, pursuant to which the Bidder proposes to effectuate an Alternative Transaction (the “<u>Modified Asset Purchase Agreement</u>”). A Bid shall also include a copy of the Modified Asset Purchase Agreement marked against the Asset Purchase Agreement to show all changes requested by the Bidder, including those related to purchase price and to remove all provisions that apply only to the Stalking Horse Purchaser (e.g., the Breakup Fee and the Expense Reimbursement (the “<u>Bid Protections</u>”)). The Debtors may conclude, in their reasonable business judgment, that any changes to the Asset Purchase Agreement are detrimental to their estates, and based on such determination, decline to designate the potential Bidder as qualified to participate in the Auction, unless such requested changes are acceptably modified or eliminated.</p> <p>(e) <u>Bids for Portions of Debtors’ Assets</u>: A Bid may offer to purchase substantially all of the Debtors’ assets or only a portion of such assets.</p> <p>(f) <u>Minimum Bid</u>: A Bid (or any combination of other Bids) must propose a minimum purchase price, or otherwise have value for the benefit of the Debtors’ estates sufficient to satisfy (without duplication):</p> <ol style="list-style-type: none"> <li>(1) the Cash Purchase Price; plus</li> <li>(2) the dollar value of the Bid Protections in cash; plus</li> <li>(3) an assumption of the Assumed Liabilities (as defined in the Asset Purchase Agreement) or the dollar value of any such Assumed Liabilities that are not “assumed liabilities” in such Bid or Bids; plus</li> </ol>
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(4) \$400,000 in cash.

(g) Designation of Assigned Contracts: A Bid must identify any and all Assigned Contracts that the Bidder wishes to have assumed and assigned to it at closing pursuant to the Bid.

(h) Corporate Authority: A Bid must include written evidence reasonably acceptable to the Debtors, demonstrating appropriate corporate authorization to consummate the proposed Alternative Transaction; provided, however, that, if the Bidder is an entity specially formed for the purpose of effectuating the Bid, then the Bidder must furnish written evidence reasonably acceptable to the Debtors of the approval of the Alternative Transaction by the equity holder(s) of such Bidder.

(i) Proof of Financial Ability to Perform: A Bid must include written evidence that the Debtors conclude, after consulting with their advisors, the Agent, and the Creditors' Committee, demonstrates that the Bidder has the necessary financial ability and/or has received debt and/or equity funding commitments (or has cash) sufficient in the aggregate to finance and consummate the Alternative Transaction contemplated thereby and provide adequate assurance of future performance under all Assigned Contracts to be assumed and assigned in such Alternative Transaction (including the Adequate Assurance Information), including proof of the Good Faith Deposit in cash and one of (1) evidence of sufficient cash to consummate the Bid, (2) an unconditional lending commitment from a recognized banking institution in the amount of any cash portion of the purchase price of such Bid, (3) the posting of an unconditional, irrevocable letter of credit from a recognized banking institution issued in favor of the Debtors in the amount of any cash portion of the purchase price of such Bid, or (4) a guarantee from another person or entity in favor of the Debtors in the amount of any cash portion of the purchase price of such Bid (with such person or entity providing written evidence of its financial wherewithal reasonably acceptable to the Debtors). Such information shall include the following:

(1) contact names and numbers for verification of financing sources;

(2) the Bidder's current financial statements (audited if they exist) or other similar financial information reasonably acceptable to the Debtors; and

(3) any such other form of financial disclosure or credit-quality support information or enhancement reasonably acceptable to the Debtors.

(j) Contingencies: Each Bid (1) may not contain representations and warranties, covenants, or termination rights more onerous than those set forth in the Asset Purchase Agreement (when considering all such provisions as a whole) and (2) may not be conditioned on financing or due diligence contingencies of any kind or any other conditions precedent to such Bidder's obligation to purchase the Debtors' assets subject to such Bid other than as may be included in the Asset Purchase Agreement.

	<p>(k) <u>Irrevocable</u>: Each Bid must be irrevocable through the close of the Auction, <u>provided</u> that if such Bid is accepted as the Successful Bid or the Backup Bid (each as defined herein), such Bid shall continue to remain irrevocable, subject to the terms and conditions of the Bidding Procedures</p> <p>(l) <u>Bid Deadline</u>: The Bid must be received, in writing, on or before _____, 2016 at 4:00 p.m. (prevailing Eastern time).</p>
<p><u>Stalking Horse Bid Protections</u>:</p> <p>Bidding Procedures at 3 Bidding Procedures Order at ¶ 19</p>	<p>The Stalking Horse Purchaser is entitled to the Bid Protections (the Breakup Fee and the Expense Reimbursement, subject to the conditions set forth in the Asset Purchase Agreement). There are other “bid protections.” A Qualified Bid must meet or exceed the Minimum Bid amount, which includes the Bid Protections. In addition to the Bid Protections, the Bidding Procedures require minimum overbid increments in the amount of \$250,000.</p>
<p><u>Modifications of Bidding Qualifications or Auction Procedures</u>:</p> <p>Bidding Procedures at 8</p>	<p>The Debtors reserve their rights, in the exercise of their fiduciary obligations and after consulting with the Agent and the Creditors’ Committee, to modify the Bidding Procedures or impose, at or prior to the Auction, different and/or additional terms and conditions on the sale subject to the Bidding Procedures, provided that such rules are not inconsistent in any material respect with the Bidding Procedures (provided that no such changes shall impair or modify the Bid Protections afforded to the Stalking Horse Purchaser).</p>
<p><u>Closing with Alternative Backup-Bidders</u>:</p> <p>Bidding Procedures at 7-8</p>	<p>Notwithstanding anything in the Bidding Procedures to the contrary, if an Auction is conducted, the Bidder (or Bidders) with the next highest or otherwise best Bid or combination of Bids at the Auction, as determined by the Debtors, after consulting with the Agent and the Creditors’ Committee, in the exercise of their reasonable business judgment, after consulting with their advisors, will be designated as the potential backup bidder (collectively, the “<u>Potential Backup Bidder</u>”). In the event that a Bidder or Bidders are identified by the Debtors, after consulting with the Agent and the Creditors’ Committee, as the Potential Backup Bidder, such Bidder or Bidders shall be required to serve as the backup bidder or backup bidders (collectively, the “<u>Backup Bidder</u>”). The Backup Bidder shall be required to keep its initial Bid or combination of Bids (or if the Backup Bidder submitted one or more Overbids at the Auction, the final respective Overbid) (the “<u>Backup Bid</u>”) open and irrevocable until the earlier of (a) 4:00 p.m. (prevailing Eastern time) on the date that is forty-five (45) calendar days after the date of the Auction (the “<u>Outside Backup Date</u>”) and (b) the closing of the transaction with the Successful Bidder (as defined herein).</p>
<p><u>Provisions Governing the Auction</u>:</p> <p>Bidding Procedures at 5-8</p>	<p>The Auction shall take place on _____, 2016 at 10:00 a.m. (prevailing Central time) at the offices of counsel for the Debtors at Paul Hastings LLP, 71 South Wacker Drive, 45th Floor, Chicago, Illinois 60606, or such other place and time as the Debtors shall notify all Qualified Bidders, including the Stalking Horse Purchaser, the Agent, the Creditors’ Committee, and any other invitees.</p>

	The Debtors, the Agent, the Creditors' Committee, the Stalking Horse Purchaser, and any other Qualified Bidder, in each case, along with their representatives, financial advisors, and counsel, may attend the Auction in person, and only the Stalking Horse Purchaser and such other Qualified Bidders will be entitled to make any Bids at the Auction. Bidding at the auction will be transcribed.
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### **RELIEF REQUESTED**

17. By this Motion, the Debtors first request entry of the Bidding Procedures Order, which will, among other things, (a) approve the Bidding Procedures in connection with the sale of the Debtors' assets, (b) approve the form and manner of notices of the Bidding Procedures and sale of the Debtors' assets, (c) approve the Asset Purchase Agreement of the Stalking Horse Purchaser, including the Bid Protections, (d) schedule the Auction and the Sale Hearing to consider the Sale, including assumption and assignment of executory contracts and unexpired leases, and (e) grant related relief.

18. Second, at the Sale Hearing, the Debtors will request entry of the Sale Order, which will, among other things, (a) approve the sale of the Debtors' assets in accordance with the asset purchase agreement between the Debtors and designate the Stalking Horse Purchaser or such other entity or entities submitting the highest or otherwise best Qualified Bid (as defined in the Bidding Procedures) (the "Successful Bid") as the "Successful Bidder," which Sale shall be free and clear of all liens, claims, encumbrances, and other interests (other than expressly specified permitted encumbrances and assumed liabilities, all as more specifically set forth in the Successful Bid), (b) approve the assumption and assignment of certain executory contracts and unexpired leases related to the Debtors' assets and the Sale, and (c) grant related relief.

**BASIS FOR RELIEF**

**A. The Sale Is Necessary**

19. The Bidding Procedures allow the Debtors to continue a thorough and ongoing sale process to maximize of the value of their estates for the benefit of all creditor constituencies and the Debtors' other stakeholders. Ultimately, the Debtors and their advisors have concluded that the sale strategy outlined herein is the best available strategy for realizing the full value for the Debtors' assets, while maximizing certainty of an orderly sale process and closings. With respect to the Debtors' assets, the Debtors submit that the marketing window will provide ample opportunity for third parties to conduct diligence and obtain financing to put forward Qualified Bids.

20. Without the process described in the Motion and Bidding Procedures, the Debtors believe, in the exercise of their business judgment, that the Debtors' creditors and stakeholders are unlikely to receive maximum value for the Debtors' assets.

**B. Approval of the Bidding Procedures**

21. The Bidding Procedures are designed to maximize the value of the Debtors' estates, while ensuring an orderly sale process. The Bidding Procedures describe, among other things, the procedures for interested parties to access and conduct due diligence, the manner in which bidders will become "qualified," the conduct of the Auction, selection and approval of the Successful Bidder and the Backup Bidder, and key deadlines. The Debtors believe that the Bidding Procedures afford them the best possible opportunity to maximize the amount received in the Sale for the Debtors' assets, by setting the baseline for additional bids, while facilitating robust bidding by qualified entities.

**C. Expense Reimbursement and Breakup Fee**

22. Following significant arms'-length negotiations with multiple interested parties, the Debtors and the Stalking Horse Purchaser executed the Asset Purchase Agreement, and the Debtors agreed to provide the Stalking Horse Purchaser with the Bid Protections payable under the circumstances described above and as described more fully in the Asset Purchase Agreement. The Bid Protections consist of (a) the Breakup Fee (as defined in the Asset Purchase Agreement) in the amount of 3% of the cash purchase price to be paid by the Stalking Horse Purchaser pursuant to the Asset Purchase Agreement and (b) the Expense Reimbursement (as defined in the Asset Purchase Agreement) of up to 2% of the cash purchase price to be paid by the Stalking Horse Purchaser pursuant to the Asset Purchase Agreement.

23. Under Section 4.5 of the Asset Purchase Agreement, and subject to the conditions set forth therein, the Stalking Horse Purchaser is entitled to be paid the Bid Protections under certain circumstances. If a Breakup Fee, Expense Reimbursement, or both, become payable under Section 4.5(a) of the Asset Purchase Agreement; then, at the time of the closing of an Alternative Transaction (as such term is defined in the Asset Purchase Agreement) or other transfer or transaction giving rise to such Breakup Fee, Expense Reimbursement, or both, first proceeds from such Alternative Transaction or other transfer or transaction shall be indefeasibly and directly paid to the Stalking Horse Purchaser in an amount equal to the Breakup Fee, Expense Reimbursement, or both, payable to the Stalking Horse Purchaser pursuant to Sections 4.5(a) and 4.5(b) of the Asset Purchase Agreement.

24. The Debtors believe that the Bid Protections are fair and reasonable and were necessary inducements to convince the Stalking Horse Purchaser to enter into the Asset Purchase Agreement and subject its offer to higher or otherwise better offers. Without these inducements,

the Debtors believe that it would not have been possible to obtain an initial bid of similar quality, certainty, and amount to the bid embodied in the Asset Purchase Agreement.

**D. Assumption and Assignment Procedures**

25. The Debtors propose the following procedures for notifying counterparties to executory contracts and unexpired leases of potential amounts that must be paid and obligations that otherwise must be performed or satisfied pursuant to section 365(b)(1)(A) and (B) of the Bankruptcy Code, in connection with the assumption and/or assignment of any Assigned Contract (as defined herein) that is assumed by the Debtors (the “Cure Costs”).

26. Schedules to the Asset Purchase Agreement will list executory contracts and unexpired leases that may be included in the Purchased Assets (as defined in the Asset Purchase Agreement) subject to the right of the Stalking Horse Purchaser or other Successful Bidder to determine whether such executory contract or unexpired lease shall be assumed and assigned under section 365 of the Bankruptcy Code in accordance with the relevant purchase agreement (the “Assigned Contracts”). On or before five (5) calendar days after the Court enters the Bidding Procedures Order, the Debtors propose to file with the Court a notice, substantially in the form attached to the Bidding Procedures Order as **Exhibit 3** (the “Cure Notice”) of Cure Costs for each of the Assigned Contracts and serve the Cure Notice on all counterparties listed on the Cure Notice (each a “Contract Party” and, collectively, the “Contract Parties”).

27. Unless the Contract Party to any Assigned Contract files an objection to its scheduled Cure Cost or to the assumption and assignment of an Assigned Contract and serves a copy of such objection so as to be received no later than the Sale Objection Deadline (as defined in the Bidding Procedures Order) by the Notice Parties (as defined in the Bidding Procedures Order), such Contract Party shall be forever barred, estopped, and enjoined from objecting (a) to

the Cure Cost and from asserting that any additional amounts are due or defaults exist, (b) that any conditions to assumption and assignment must be satisfied under such Assigned Contract before it can be assumed and assigned or that any required consent to assignment has not been given, or (c) that the Successful Bidder has not provided adequate assurance of future performance.

28. The Debtors propose that, in the event of a timely filed objection and dispute regarding: (a) any Cure Cost with respect to any of the Assigned Contracts; (b) the ability of the Successful Bidder to provide adequate assurance of future performance as required by section 365 of the Bankruptcy Code, if applicable, under any of the Assigned Contracts; or (c) any other matter pertaining to assumption or assignment of any of the Assigned Contracts, the Cure Cost shall be paid as soon as reasonably practicable after the Closing (as defined in the Asset Purchase Agreement), in accordance with the applicable asset purchase agreement following the entry of a final order resolving the dispute and approving the assumption and assignment of such Assigned Contract; provided that the Debtors (with the reasonable consent of the Successful Bidder) are authorized to consensually resolve with an applicable counterparty any dispute regarding the amount of any Cure Cost or assignment to the Successful Bidder without any further notice to or action, order, or approval of the Bankruptcy Court.

29. The Debtors propose that the Successful Bidder should be permitted, from the date the Court enters the Bidding Procedures Order to five days prior to the Auction, by written notice to the Debtors and, with respect to removal, with the written consent of the Agent, to either (a) designate any Assigned Contract not already so designated to be a Purchaser Assumed Contract (as defined in the Asset Purchase Agreement) or (b) remove any Assigned Contract (other than an Extended Real Property Lease (as defined in the Asset Purchase Agreement)) from

the schedule of Purchaser Assumed Contracts. To the extent identified, the Debtors will file a list of all Assigned Contracts assigned to such Successful Bidder no later than five business days following the “closing date” (as that term is defined in the applicable asset purchase agreement) or as soon thereafter as is practicable. The Debtors propose that payment to satisfy all Cure Costs be made as soon as reasonably practicable after the effectiveness of the assumption and assignment of Assigned Contracts assigned to the Successful Bidder or on such other terms as the parties to each such Assigned Contract may otherwise agree without any further notice to or action, order, or approval of the Bankruptcy Court.

**E. Notice Provisions**

30. On or before five (5) calendar days after the Court enters the Bidding Procedures Order, the Debtors propose to serve the sale notice, substantially in the form attached to the Bidding Procedures Order as **Exhibit 4** (the “Sale Notice”), on: (a) all creditors or their counsel known to the Debtors; (b) the U.S. Trustee; (c) counsel for the Creditors’ Committee; (d) all applicable federal, state, and local taxing and regulatory authorities of the Debtors or recording offices or any other governmental authorities that, as a result of the sale of the Purchased Assets, are reasonably expected by the Debtors to have claims, contingent or otherwise, in connection with the Debtors’ ownership of the Purchased Assets or have any known interest in the relief requested by the Motion; (e) counsel for the Stalking Horse Purchaser; (f) those parties who have formally filed requests for notice in the Chapter 11 Cases pursuant to Bankruptcy Rule 2002; (g) all known parties to any filed or threatened litigation involving the Debtors; (h) all Contract Parties; and (i) all entities that have expressed an interest to the Debtors’ investment bankers in purchasing the assets subject to the Bidding Procedures Order.



31. The Debtors also propose, pursuant to Bankruptcy Rules 2002 and 6004, to publish a version of the Sale Notice, substantially in the form attached to the Bidding Procedures Order as **Exhibit 5** (the “Publication Notice”) in the *Oil & Gas Journal* seven (7) calendar days after the Court enters the Bidding Procedures Order, or as soon as practicable thereafter.

**F. Appointment of Consumer Privacy Ombudsman Is Not Required**

32. No Debtor has, in connection with offering a product or a service, disclosed to any individual a policy prohibiting the transfer of personally identifiable information about individuals to persons that are not affiliated with the Debtors, and no such policy is in place as of the date the Motion was filed. *See* 11 U.S.C. § 363(b)(1)(B). As such, there is no need for the Court to appoint a consumer privacy ombudsman, in accordance with section 332 of the Bankruptcy Code.

**APPLICABLE AUTHORITY**

33. The Debtors have conducted a comprehensive process to obtain bids for their assets, with the assistance of highly skilled advisors. Thus, this Court should grant the relief requested in this Motion if the Debtors demonstrate a sound business justification therefor. *See In re Del. & Hudson Ry. Co.*, 124 B.R. 169, 179 (D. Del. 1991).

**A. Approval of the Sale of the Debtors’ Assets to the Successful Bidder Is Warranted Under Section 363(b) of the Bankruptcy Code.**

34. Following the auction process described herein, the Debtors seek authority to sell their assets to the Successful Bidder on the terms set forth in the Successful Bid. Section 363(b)(1) of the Bankruptcy Code provides: “The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.” 11 U.S.C. § 363(b)(1).

35. Courts routinely authorize a debtor to sell assets outside of the ordinary course of business pursuant to section 363 of the Bankruptcy Code and prior to confirming a plan of reorganization if it demonstrates a sound business purpose for doing so. *See In re ICL Holding Co., Inc.*, 802 F.3d 547, 551 (3d Cir. 2015) (noting that bankruptcy courts use the “‘sound business purpose’ test . . . to decide whether to approve a . . . [section] 363 sale”); *Meyers v. Martin (In re Martin)*, 91 F.3d 389, 395 (3d Cir. 1996) (stating that, where section 363 of the Bankruptcy Code is implicated, courts normally “defer to the trustee’s judgment so long as there is a legitimate business justification”); *In re Abbotts Dairies of Penn., Inc.*, 788 F.2d 143, 147-49 (3d Cir. 1986) (implicitly adopting the “sound business purpose” test); *In re Dura Auto. Sys, Inc.*, No. 06-11202 (KJC), 2007 WL 7728109, at \*5 (Bankr. D. Del. Aug. 15, 2007) (finding that “[t]he Debtors have demonstrated compelling circumstances and a good, sufficient, and sound business purpose and justification for the Sale prior to, and outside of, a plan of reorganization”); *Dai-Ichi Kangyo Bank Ltd. v. Montgomery Ward Holding Corp. (In re Montgomery Ward Holding Corp.)*, 242 B.R. 147, 153 (D. Del. 1999) (“In determining whether to authorize the use, sale or lease of property of the estate under [section 363(b)], courts require the debtor to show that a sound business purpose justifies such actions.”); *Del. & Hudson Ry. Co.*, 124 B.R. 169 at 176 (sale of substantially all of debtor’s assets outside of reorganization plan is appropriate when a sound business reason justifies such a sale). Once a court has determined that a sound business justification exists for a sale outside of a plan, the court must also determine that (a) “the debtor has provided the interested parties with adequate and reasonable notice,” (b) “the sale price is fair and reasonable,” and (c) “the purchaser is proceeding in good faith.” *Del. & Hudson*, 124 B.R. at 176.

36. The sale of the Debtors' assets is based on the sound business judgment of the Debtors. The Debtors have determined, after consulting with their advisors, the Agent, and the Committee, and in consideration of the ongoing market exploration and the Debtors' current circumstances, that such sale represents the best possible strategy for maximizing the recoveries of all creditors.

37. As noted herein, the Debtors conducted significant arms'-length negotiations with multiple parties before executing the Asset Purchase Agreement. The Debtors only entered into the Asset Purchase Agreement after this marketing of their assets and subsequent negotiations of offers received. The fairness and reasonableness of the consideration to be paid by the Successful Bidder 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.

38. Furthermore, the Stalking Horse Purchaser has proceeded in good faith. Both the Debtors and the Stalking Horse Purchaser were represented by experienced advisors in the arms'-length negotiation of the Asset Purchase Agreement. Under these circumstances, the sale of the Debtors' assets to the Stalking Horse Purchaser or such other Successful Bidder as may be identified is fully consistent with the exercise of sound business judgment and should be approved by the Court pursuant to section 363 of the Bankruptcy Code.

**B. The Bidding Procedures Are Fair and Are Designed to Maximize the Value Received for the Debtors' Assets.**

39. To ensure a fair auction process for the Debtors' assets, the Debtors will provide adequate notice of the sale to interested parties and will solicit interest from numerous potential purchasers. The Debtors submit that the Bidding Procedures are appropriate under section 363 of the Bankruptcy Code to ensure that the bidding process is fair and reasonable and to yield

maximum value. The Bidding Procedures establish a competitive bidding process through which all potential bidders are encouraged to participate and submit competing bids for the Debtors' assets. The Bidding Procedures also provide potential bidders with sufficient notice and an opportunity to acquire information necessary to submit a timely and informed bid. Thus, the Debtors and all parties in interest can be assured that the consideration ultimately received for the Debtors' assets will be fair and reasonable.

40. At the same time, the Bidding Procedures provide the Debtors with the opportunity to consider all competing offers and to select, in their reasonable business judgment, the highest or otherwise best offer for the Debtors' assets with minimal execution risk to the deal in hand with the Stalking Horse Purchaser.

41. Similar procedures have been previously approved by other courts in this District. *See, e.g., In re Parallel Energy, L.P.*, No. 15-12263 (KG) (Bankr. D. Del. Dec. 10, 2015); *In re Taylor-Wharton Int'l LLC*, No. 15-12075 (BLS) (Bankr. D. Del. Oct. 29, 2015); *In re Malibu Lighting Corp.*, No. 15-12080 (KG), No. 15-12082 (Bankr. D. Del. Oct. 27, 2015).<sup>5</sup> Accordingly, the Court should approve the Bidding Procedures.

### **C. The Bid Protections Should Be Authorized.**

42. The Asset Purchase Agreement provides for an Expense Reimbursement and/or Breakup Fee for the Stalking Horse Purchaser in the event that the Asset Purchase Agreement is terminated pursuant to the terms and under the conditions set forth therein. The Debtors seek authorization to pay the Expense Reimbursement and the Breakup Fee if and when required by the terms of the Asset Purchase Agreement.

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<sup>5</sup> Because of the voluminous nature of the orders cited herein, they have not been attached to the Motion. Copies of the orders are available upon request to the Debtors' counsel.

43. The propriety of bidding incentives in the bankruptcy context requires a showing of some postpetition benefit to the debtor's estate. *Calpine Corp. v. O'Brien Env'tl. Energy, Inc. (In re O'Brien Env'tl. Energy, Inc.)*, 181 F.3d 527, 535 (3d Cir. 1999); *see also In re Reliant Energy Channelview LP*, 594 F.3d 200, 206 (3d Cir. 2010). In *O'Brien*, the Third Circuit held that breakup fees and expense reimbursements could be paid to a stalking horse bidder if they were necessary to preserve the value of the estate. *O'Brien*, 181 F.3d at 535. The court determined that breakup fees and expense reimbursements provide benefits to estates when they promote competitive bidding or induce bidders to research the value of the debtors and increase the likelihood that the selling price reflects the true value of their assets. *Id.* at 537. The Debtors believe that the Bid Protections satisfy *O'Brien* and will create a competitive bidding process.

44. First, the Breakup Fee and Expense Reimbursement induced the Stalking Horse Purchaser to submit a bid that will serve as a minimum floor bid upon which other bidders may rely. The Stalking Horse Purchaser communicated that it would not enter into the Asset Purchase Agreement without the Breakup Fee and Expense Reimbursement. Therefore, the Stalking Horse Purchaser has provided a material benefit to the Debtors, their estates, and their creditors, by encouraging bidding and increasing the likelihood that the best possible price for the Debtors' assets will be received.

45. Second, the proposed Bid Protections are the result of an arms'-length negotiated agreement between the Debtors and the Stalking Horse Purchaser. There is no evidence or reason to believe that the relationship between the Debtors and the Stalking Horse Purchaser has been tainted by self-dealing or manipulation.

46. Third, the Debtors believe that the proposed Expense Reimbursement is fair and reasonably compensates the Stalking Horse Purchaser for taking actions that will benefit the

Debtors' estates. The Expense Reimbursement compensates the Stalking Horse Purchaser for diligence and professional fees incurred in negotiating the terms of the Asset Purchase Agreement on an expedited timeline, while at the same time ensuring that the Debtors will be able to conduct a "market-exposed" auction to maximize the benefit of the proposed sale for creditors. Without such efforts, the Debtors believe that it is likely that certain potential bidders would not come forward without the implicit assurance provided by the Stalking Horse Purchaser's diligence.

47. Fourth, the Debtors do not believe that the Bid Protections will have a chilling effect on the sale process. Rather, the Stalking Horse Purchaser has increased the likelihood that the best possible price for the Debtors' assets will be received, by permitting other qualified bidders to rely on the diligence performed by the Stalking Horse Purchaser, and moreover, by allowing qualified bidders to utilize the Asset Purchase Agreement as a platform for negotiations and modifications in the context of a competitive bidding process.

48. The Bid Protections, which represent approximately 5% (in the aggregate) of the cash amounts to be paid by the Stalking Horse Purchaser in the Asset Purchase Agreement, are reasonable and consistent with the range of bid protections typically approved by bankruptcy courts in this district. *See, e.g., In re Cal Dive Int'l, Inc.*, No. 15-10458 (Bankr. D. Del. Jun. 22, 2016) (CSS) (approving breakup fee in the amount of up to 3% of the cash purchase price and expense reimbursement in the amount of up to 2.9% of cash purchase price); *In re ZLOOP, Inc.*, No. 15-11660 (KJC) (Bankr. D. Del. May 16, 2016) (approving breakup fee and expense reimbursement in the amount of up to 8.35% of cash purchase price); *In re Taylor-Wharton Int'l LLC*, No. 15-12075 (BLS) (Bankr. D. Del. Oct. 29, 2015) (approving breakup fee in the amount of 3.64% of cash purchase price); *In re Malibu Lighting Corp.*, No. 15-12080 (KG), No. 15-

12082 (Bankr. D. Del. Oct. 27, 2015) (KG) (approving breakup fee and expense reimbursement in the amount of up to 3.64% of cash purchase price, exclusive of assumed liabilities); *In re Old FOH, Inc.*, No. 15-10836 (KG) (Bankr. D. Del. May 6, 2015) (approving breakup fee and expense reimbursement in the amount of up to 4.78% of cash purchase price, exclusive of certain revenue sharing payments, assumed liabilities, and certain other adjustments); *In re Constar Int'l Holdings LLC*, No. 13-13281 (CSS) (Bankr. D. Del. Jan. 10, 2014) (approving breakup fee in the amount of 3% of base purchase price and expense reimbursement in the amount of up to 2.9% of base purchase price).<sup>6</sup> Accordingly, the Court should approve the Bid Protections.

**D. The Debtors' Assets Should Be Sold Free and Clear of Liens, Claims, Encumbrances, and Interests Pursuant to Section 363(f).**

49. The Debtors seek authority to sell their assets free and clear of any liens, claims, encumbrances, and interests in such property. Section 363(f) of the Bankruptcy Code provides:

The Trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if-

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

11 U.S.C. § 363(f).

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<sup>6</sup> Because of the voluminous nature of the orders cited herein, they have not been attached to the Motion. Copies of the orders are available upon request to the Debtors' counsel.

50. As section 363(f) of the Bankruptcy Code is phrased in the disjunctive, when proceeding pursuant to section 363(b), it is only necessary to meet one of the five conditions of section 363(f). The Lenders have consented to the proposed sale of the Debtors' assets to the Stalking Horse Purchaser (and of the Debtors' assets to another Successful Bidder if consistent with the Final Cash Collateral Order) under the terms described in the Motion; accordingly, the Debtors have satisfied the requirements of section 363(f) with respect to them. With respect to any other entity asserting a lien, claim, encumbrance, or interest against or in the Debtors' assets, the Debtors anticipate that they will be able to satisfy one or more of the conditions set forth in section 363(f) of the Bankruptcy Code. Any entities holding liens on the Debtors' assets will receive notice of this Motion and the Sale Notice, and such entities will be deemed to consent if they do not object. *See Hargrave v. Township of Pemberton (In re Tabone, Inc.)*, 175 B.R. 855, 858 (Bankr. D.N.J. 1994) (failure to object to sale free and clear of liens, claims and encumbrances satisfies section 363(f)(2)); *Citicorp Homeowners Serv., Inc. v. Elliot (In re Elliot)*, 94 B.R. 343, 345 (E.D. Pa. 1988) (same). Furthermore, any such lien will attach to the proceeds of the sale; to the extent such proceeds are in an amount greater than the aggregate value of all liens, section 363(f)(3) is likewise satisfied. Therefore, the Debtors may sell their assets free and clear of all liens, claims, encumbrances, and interests.

51. Moreover, the Debtors submit that it is appropriate to sell their assets free and clear of successor liability. Such a provision ensures that the Successful Bidder is protected from any claims or lawsuits premised on the theory that the Successful Bidder is a successor in interest to one or more of the Debtors. Courts frequently hold that a buyer of a debtor's assets pursuant to a sale under section 363 of the Bankruptcy Code takes free and clear from successor liability relating to the debtor's business. *See, e.g., In re Trans World Airlines, Inc.*, 322 F.3d 283, 288-



90 (3d Cir. 2003) (sale of assets pursuant to section 363(f) barred successor liability claims for employment discrimination and rights under travel voucher program); *In re Leckie Smokeless Coal Co.*, 99 F.3d 573, 585-87 (4th Cir. 1996) (affirming the sale of debtors' assets free and clear of certain taxes); *Amphenol Corp. v. Shandler (In re Insilco Techs., Inc.)*, 351 B.R. 313, 322 (Bankr. D. Del. 2006) (stating that a section 363 sale permits a buyer to take ownership of property without concern that a creditor will file suit based on a successor liability theory).

52. The purpose of an order purporting to authorize the transfer of assets free and clear of all liens, claims, encumbrances, and other interests would be frustrated if claimants could thereafter use the transfer as a basis to assert claims against a purchaser arising from a seller's pre-sale conduct. Moreover, without such assurances, the Debtors run the risk that potential bidders may not enter the Auction or, if they did, would do so with reduced bid amounts. To that end, the Successful Bidder should not be liable under any theory of successor liability relating to the Debtors' businesses but should hold the Debtors' assets free and clear following successful transition of the assets.

**E. A Successful Bidder Is Entitled to the Protections of Section 363(m).**

53. The Successful Bidder for the Debtors' assets will be entitled to an order incorporating the protection of section 363(m) of the Bankruptcy Code. That subsection protects a good faith purchaser as "one who buys property in good faith and for value, without knowledge of adverse claims." *Mark Bell Furniture Warehouse, Inc. v. D.M. Reid Assocs., Ltd (In re Mark Bell Furniture Warehouse, Inc.)*, 992 F.2d 7, 9 (1st Cir. 1993); *Willemain v. Kivitz (In re Willemain)*, 764 F.2d 1019, 1023 (4th Cir. 1985); *In re Congoleum Corp.*, No. 03-51524, 2007 WL 1428477, at \*2 (Bankr. D.N.J. May 11, 2007); *In re Abbotts Dairies of Penn.*, 788 F.2d 143, 147 (3d Cir. 1986).

54. Assuming the Stalking Horse Purchaser is the Successful Bidder, the Asset Purchase Agreement was negotiated at arms' length, with both parties represented by their own counsel. Similarly, the Debtors expect to show at the Sale Hearing that any other Successful Bidder similarly conducted itself in good faith. Accordingly, the Debtors request that the Sale Order include a provision that the Successful Bidder for the Debtors' assets is a "good faith" purchaser within the meaning of section 363(m) of the Bankruptcy Code. The Debtors submit that such protection will ensure that the maximum price will be received for their assets.

**F. Assumption and Assignment of Executory Contracts and Unexpired Leases Should Be Authorized.**

55. The Debtors seek authority to assume and assign those executory contracts and unexpired leases designated by the Successful Bidder. 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. A debtor's decision to assume or reject an executory contract or unexpired lease must only satisfy the "business judgment rule" and will not be subject to review unless such decision is clearly an unreasonable exercise of such judgment. *See, e.g., In re HQ Global Holdings, Inc.*, 290 B.R. 507, 511 (Bankr. D. Del. 2003) (debtor's decision to assume or reject executory contract is governed by business judgment standard and "can only be overturned if the decision was the product of bad faith, whim or caprice"); *see also In re Market Square Inn, Inc.*, 978 F.2d 116, 121 (3d Cir. 1992) (assumption or rejection of lease "will be a matter of business judgment by the bankruptcy court"); *see also Sharon Steel Corp. v. Nat'l Fuel Gas Distrib. Corp.*, 872 F.2d 36, 39-40 (3d Cir. 1989) (same).

56. Once an executory contract or unexpired lease is assumed, the trustee or debtor in possession may elect to assign such contract or lease. *See In re Rickel Home Ctrs. Inc.*, 209

F.3d 291, 299 (3d Cir. 2000) (“The Code generally favors free assignability as a means to maximize the value of the debtor’s estate.”); *Leonard v. Gen. Motors Corp. (In re Headquarters Dodge, Inc.)*, 13 F.3d 674, 682 (3d Cir. 1993) (noting purpose of section 365(f) is to assist trustee in realizing the full value of the debtor’s assets).

57. Section 365(f) of the Bankruptcy Code provides that the “trustee may assign an executory contract or unexpired lease . . . only if the trustee assumes such contract or lease . . . and adequate assurance of future performance. . . . is provided.” 11 U.S.C. § 365(f)(2). The meaning of “adequate assurance of future performance” depends on the facts and circumstances of each case, but should be given a “practical, pragmatic construction.” *In re DBSI, Inc.*, 405 B.R. 698, 708 (Bankr. D. Del. 2009); *EBG Midtown S. Corp. v. McLaren/Hart Envtl. Eng’g Corp. (In re Sanshoe Worldwide Corp.)*, 139 B.R. 585, 592-93 (S.D.N.Y. 1992); *see also In re Decora Indus. Inc.*, No. 00-4459, 2002 WL 32332749 at \*8 (D. Del. May 20, 2002) (“[A]dequate assurance falls short of an absolute guaranty of payment.”); *Carlisle Homes, Inc. v. Azzari (In re Carlisle Homes, Inc.)*, 103 B.R. 524, 538 (Bankr. D.N.J. 1988).

58. Adequate assurance may be provided by demonstrating the assignee’s financial health and experience in managing the type of enterprise or property assigned. *See In re Bygaph, Inc.*, 56 B.R. 596, 605-06 (Bankr. S.D.N.Y. 1986) (adequate assurance is present when prospective assignee of lease from debtor has financial resources and has “expressed willingness to devote sufficient funding” to business to give it a “strong likelihood of succeeding”).

59. To facilitate and effect the sale of the Debtors’ assets, the Debtors request approval under section 365 of the Bankruptcy Code for the assumption and assignment of certain Assigned Contracts to the Successful Bidder under the terms and subject to the conditions set forth in the Bidding Procedures Oder and what will be included in the Sale Order. The Debtors

further request that the Sale Order provide that the Assigned Contracts to be assumed and assigned to the Successful Bidder will be transferred to, and remain in full force and effect for the benefit of, the Successful Bidder, notwithstanding any provisions in such Assigned Contracts, including those described in sections 365(b)(2) and (f)(1) and (3) of the Bankruptcy Code, that prohibit such assignment.

60. The Stalking Horse Purchaser will have the financial resources required to complete the Sale, including the assumption of the Assigned Contracts at the closing of the Asset Purchase Agreement. Moreover, the Debtors contemplate that the Successful Bidder, if an entity other than the Stalking Horse Purchaser, will be able to provide adequate assurance of future performance in connection with any assigned executory contracts and unexpired leases because such Successful Bidder must submit evidence sufficient to demonstrate its financial wherewithal and ability to consummate the sale. Furthermore, to the extent that any defaults exist under any executory contract or unexpired lease that is to be assumed and assigned in connection with the sale of the Debtors' assets, the Debtors or the Successful Bidder will cure any such default prior to such assumption and assignment.

61. To the extent necessary, the Debtors will present facts at the Sale Hearing to show the financial credibility, willingness, and ability of the Successful Bidder to perform under the Assigned Contracts to be assumed and assigned to the Successful Bidder. The Sale Hearing thus will afford the Court and other interested parties the opportunity to evaluate the ability of the Successful Bidder to provide adequate assurance of future performance under the Assigned Contracts to be assumed and assigned to the Successful Bidder, as required under section 365(b)(1)(C) of the Bankruptcy Code.

62. Accordingly, the Debtors submit that it is appropriate to implement the proposed assumption and assignment procedures in the Chapter 11 Cases. The Court, therefore, will have a sufficient basis to authorize the Debtors to reject or assume and assign contracts and leases.

**G. It Is Appropriate for the Sale Order to Provide that Liabilities Associated with Capital Leases Are Assumed.**

63. Pursuant to the Asset Purchase Agreement, the Stalking Horse Purchaser has agreed to assume identified real property and personal property leases that would constitute capital leases in accordance with Generally Accepted Accounting Principles. Correspondingly, in accordance with the Asset Purchase Agreement, the Stalking Horse Purchaser will assume the liabilities associated with those capital leases. The Debtors expect that other Qualified Bids will include similar provisions. The Sale Order will include provisions that approve the transfer of any such capital leases and the assumption of the liabilities associated with such capital leases. The Court should approve this relief to ensure that the Debtors and the Successful Bidder receive the benefit of their bargain, which relieves the Debtors of any obligation for liabilities associated with such capital leases and provides that the Successful Bidder is obligated to honor such amounts.

**H. If Necessary, the Sale Order Will Seek Approval of a Transition Services Agreement Between the Debtors and the Successful Bidder, Which the Court Should Approve.**

64. The Asset Purchase Agreement does not currently provide for the Debtors and the Stalking Horse Purchaser to enter into a transition services agreement or other similar agreement that would address shared services between the parties after a closing. In the abundance of caution, the Debtors seek approval to enter into a transition services agreement with the Stalking Horse Purchaser or another Successful Bidder in the event that the Debtors or the Successful Bidder determine to enter into a transition services agreement. In that situation, the Debtors entry into such an agreement would be in further support of maximizing the value of their assets

and distributing consideration to creditors. As such, the Court should approve this relief for the benefit of the Debtors, its creditors, and its estates.

**I. In Accordance with the Final Cash Collateral Order and Global Settlement, the Court Should Authorize the Debtors to Distribute Sale Proceeds at Closing.**

65. The Final Cash Collateral Order and Global Settlement have been approved and entered in the Chapter 11 Cases. Reaching consensus regarding the Debtors' use of cash collateral and resolving the disputes addressed in the Global Settlement have eliminated potential litigation and provided beneficial stability in the Chapter 11 Cases, allowing the Debtors and key stakeholders to focus on maximizing the value of the Debtors' estates through the marketing and sale process. These benefits are due, in part, to the agreements reached between the Debtors and key stakeholders with regard to the use of proceeds from the Sale. Both the Final Cash Collateral Order and the Global Settlement provide for the allocation and distribution of such proceeds. Final Cash Collateral Order ¶ 14; Global Settlement ¶¶ 5-6. To effectuate the allocation and distribution of Sale proceeds as contemplated by the parties and ordered by the Court, the Debtors request authority to make distributions and set aside reserves at Closing (as defined in the Asset Purchase Agreement) or in connection with Closing in a manner consistent with the Final Cash Collateral Order and Global Settlement, and as set forth more fully in the Sale Order.

**J. The Court Should Authorize the Debtors to Change Their Corporate Names and the Case Caption Upon Closing.**

66. In accordance with Section 8.13 of the Asset Purchase Agreement, the Debtors request authority to effectuate a change of the corporate name of Extreme Plastics Plus, Inc. to one not using the words "Extreme Plastics Plus," or any derivation or variation thereof, consistent with applicable law. The Debtors propose to file a notice setting forth a new case

caption and the proposed new name of Extreme Plastics Plus, Inc. within one (1) business day of the Closing (as defined in the Asset Purchase Agreement).

**K. The Stays Provided by Bankruptcy Rule 6004(h) and 6006(d) Should Be Waived.**

67. Pursuant to Bankruptcy Rule 6004(h), an “order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of 14 days after entry of the order, unless the court orders otherwise.” Under Bankruptcy Rule 6006(d), an “order authorizing the trustee to assign an executory contract or unexpired lease under §365(f) is stayed until the expiration of 14 days after the entry of the order, unless the court orders otherwise.” Here, the Court should waive both stays because the Bidding Procedures and other relief requested afford the Debtors the best possible opportunity to maximize the amount received in the Sale for the Debtors’ assets, and waiver of the stays will allow the Stalking Horse Purchaser or other Successful Bidder to promptly close the Sale. Prompt closing will allow the Debtors to obtain and distribute the proceeds of the Sale in accordance with the Final Cash Collateral Order and Global Settlement, allowing key stakeholders to receive their agreed-upon recoveries.

**NOTICE**

68. The Debtors have provided notice of this Motion by either electronic mail, facsimile, or overnight delivery to: (a) the U.S. Trustee; (b) counsel for the Creditors’ Committee; (c) counsel for Citizens Bank, as Agent for the Lenders; (d) the Internal Revenue Service; (e) the United States Department of Justice; (f) any parties entitled to notice pursuant to Local Rule 2002–1(b); (g) counsel for the Stalking Horse Purchaser; and (h) all entities that have expressed an interest to the Debtors’ investment bankers in purchasing the Debtors’ assets.

**NO PRIOR REQUEST**

69. No previous request for the relief sought herein has been made to this Court or any other court.

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WHEREFORE, the Debtors respectfully request entry of an order: (i)(a) approving the Bidding Procedures in connection with the sale of the Debtors' assets, (b) approving the form and manner of notices of the Bidding Procedures and sale of the Debtors' assets, (c) approving the Asset Purchase Agreement of the Stalking Horse Purchaser, including the Bid Protections, (d) scheduling the Auction and the Sale Hearing to consider the Sale, including assumption and assignment of executory contracts and unexpired leases, and (e) granting related relief; and (ii)(a) approving the sale of substantially all of the Debtors' Assets free and clear of liens, claims, encumbrances and interests, (b) authorizing the assumption and assignment of certain executory contracts and unexpired leases, and (c) granting related relief.

Date: September 14, 2016  
Wilmington, Delaware

**SULLIVAN • HAZELTINE • ALLINSON LLC**

/s/ William A. Hazeltine

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**Exhibit A**

**Bidding Procedures Order**

**Exhibit B**

**Sale Order**

**EXHIBIT 2**

**Bidding Procedures**

## **BIDDING PROCEDURES**

By the Motion dated as \_\_\_\_\_, 2016, Extreme Plastics Plus, Inc. and EPP Intermediate Holdings, Inc., as debtors and debtors in possession (collectively, the "Debtors") sought approval of, among other things, the procedures through which they will determine the highest or otherwise best offer for their assets.

On \_\_\_\_\_, 2016, the United States Bankruptcy Court for the District of Delaware (the "Court") entered the *Order (a) Approving Bidding Procedures, (b) Approving Form and Manner of Notices, (c) Approving Form of Asset Purchase Agreement and Bid Protections, (d) Scheduling Dates to Conduct Auction and Hearing for Approval of Sale, Including Assumption and Assignment of Executory Contracts and Unexpired Leases, and (e) Granting Related Relief* (the "Bidding Procedures Order"),<sup>1</sup> which, among other things, authorized the Debtors to determine the highest or otherwise best offer for their assets through the process and procedures set forth below (the "Bidding Procedures").

### **Marketing Process**

#### ***Contact Parties.***

The Debtors, after consulting with their advisors, Citizens Bank, as agent (the "Agent") for the Debtors' pre-petition secured lenders, and the Official Committee of Unsecured Creditors (the "Creditors' Committee"), have and will continue to develop, after consulting with the Creditors' Committee, a list of parties (in addition to the Stalking Horse Purchaser) who the Debtors believe may potentially be interested in and who the Debtors reasonably believe would have the financial resources to consummate an Alternative Transaction (as defined in the Asset Purchase Agreement) (each, individually, a "Contact Party" and, collectively, the "Contact Parties"). The Debtors and their advisors have, and will continue to, contact the Contact Parties to explore their interest in pursuing an Alternative Transaction. The Contact Parties may include parties whom the Debtors or their advisors have previously contacted regarding a transaction, regardless of whether such parties expressed any interest, at such time, in pursuing a transaction. The Debtors will continue to discuss and may supplement the list of Contact Parties throughout the marketing process, as appropriate.

The Debtors shall distribute to each Contact Party an "Information Package," which may comprise:

- (a) a cover letter;
- (b) a copy of these Bidding Procedures and the Bidding Procedures Order;
- (c) a copy of a confidentiality agreement; and

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<sup>1</sup> Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Bidding Procedures Order.

- (d) such other materials as the Debtors, after consulting with their advisors, deem appropriate under the circumstances.

Any entity desiring to obtain a copy of the Asset Purchase Agreement may do so by accessing the website of the Debtors' notice and claims agent at <http://dm.epiq11.com/epi/project>. A copy may also be obtained by contacting: (a) the Debtors' investment banking advisor, FTI Consulting, Inc., 227 West Monroe Street, Suite 900, Attn: Ben Goren, Telephone (312) 759-8100, Email: [ben.goren@fticonsulting.com](mailto:ben.goren@fticonsulting.com); or (b) the Debtors' counsel at Paul Hastings LLP, 71 South Wacker Drive, 45th Floor, Chicago, Illinois 60606, Attn: Marc J. Carmel, Telephone (312) 499-6040, Email: [marccarmel@paulhastings.com](mailto:marccarmel@paulhastings.com).

### *Access to Diligence Materials.*

To participate in the bidding process and to receive access to due diligence (the "Diligence Materials"), a Contact Party must submit to the Debtors an executed confidentiality agreement in form and substance satisfactory to the Debtors and evidence demonstrating the party's financial capability with respect to an Alternative Transaction as determined by the Debtors.

A Contact Party who qualifies for access to Diligence Materials shall be a "Preliminary Interested Party." All requests for Diligence Materials must be directed to FTI Consulting, Inc.

For any Preliminary Interested Party who is a competitor of the Debtors or is affiliated with any competitor of the Debtors, the Debtors reserve the right to withhold any Diligence Materials that the Debtors determine are business-sensitive or otherwise not appropriate for disclosure to such Preliminary Interested Party.

### *Due Diligence from Bidders.*

Each Preliminary Interested Party and Qualified Bidder (as defined herein) shall comply with all reasonable requests for additional information and due diligence access by the Debtors or their advisors regarding such Bidder (as defined herein) and its contemplated transaction. Failure by a Preliminary Interested Party to comply with such reasonable requests for additional information and due diligence access may be a basis for the Debtors to determine, after consulting with the Agent and the Creditors' Committee, that such bidder (other than the Stalking Horse Purchaser) is not a Qualified Bidder. Failure by a Qualified Bidder (other than the Stalking Horse Purchaser) to comply with requests for additional information and due diligence access may be a basis for the Debtors, after consulting with the Agent and the Creditors' Committee, to determine that a bid made by such Qualified Bidder (other than the Stalking Horse Purchaser) is not a Qualified Bid.

### Auction Qualification Process

To be eligible to participate in the Auction (as defined herein), each offer, solicitation, or proposal (each, a "Bid"), and each party submitting such a Bid (each, a "Bidder"), must be determined by the Debtors to satisfy each of the conditions set forth below. A Bid will not be considered qualified for the Auction if such Bid does not satisfy each of the following conditions:

- (a) Identity of Bidder: Each Bid shall identify the potential Bidder and the potential Bidder's sponsors and other representatives that are authorized to appear and act on their behalf for all purposes regarding the contemplated transaction.
- (b) Good Faith Deposit: Each Bid (other than any Bid by the Stalking Horse Purchaser, which shall be as set forth in the Asset Purchase Agreement) must be accompanied by a deposit of no less than 5% of the total purchase price of such Bid (excluding any "assumed liabilities" (as defined in the asset purchase agreement submitted by the Bidder)) to an escrow account to be identified and established by the Debtors (the "Good Faith Deposit").
- (c) Same or Better Terms: Each Bid must be on terms that, in the Debtors' business judgment, after consulting with their advisors, the Agent, and the Creditors' Committee, are the same or better than the terms of the Asset Purchase Agreement (taken as a whole).
- (d) Executed Agreement: Each Bid must be based on the Asset Purchase Agreement and must include executed transaction documents, signed by an authorized representative of such Bidder, pursuant to which the Bidder proposes to effectuate an Alternative Transaction (the "Modified Asset Purchase Agreement"). A Bid shall also include a copy of the Modified Asset Purchase Agreement marked against the Asset Purchase Agreement to show all changes requested by the Bidder, including those related to purchase price and to remove all provisions that apply only to the Stalking Horse Purchaser (e.g., the Breakup Fee and the Expense Reimbursement (the "Bid Protections")). The Debtors may conclude, in their reasonable business judgment, that any changes to the Asset Purchase Agreement are detrimental to their estates, and based on such determination, decline to designate the potential Bidder as qualified to participate in the Auction, unless such requested changes are acceptably modified or eliminated.
- (e) Bids for Portions of Debtors' Assets: A Bid may offer to purchase substantially all of the Debtors' assets or only a portion of such assets.
- (f) Minimum Bid: A Bid (or any combination of other Bids) must propose a minimum purchase price, or otherwise have value for the benefit of the Debtors' estates sufficient to satisfy (without duplication):
  - (1) the Cash Purchase Price; plus
  - (2) the dollar value of the Bid Protections in cash; plus
  - (3) an assumption of the Assumed Liabilities (as defined in the Asset Purchase Agreement) or the dollar value of any such Assumed Liabilities that are not "assumed liabilities" in such Bid or Bids; plus
  - (4) \$400,000 in cash.

- (g) Designation of Assigned Contracts: A Bid must identify any and all Assigned Contracts (as defined in the Motion) that the Bidder wishes to have assumed and assigned to it at closing pursuant to the Bid.
- (h) Corporate Authority: A Bid must include written evidence reasonably acceptable to the Debtors, demonstrating appropriate corporate authorization to consummate the proposed Alternative Transaction; provided, however, that, if the Bidder is an entity specially formed for the purpose of effectuating the Bid, then the Bidder must furnish written evidence reasonably acceptable to the Debtors of the approval of the Alternative Transaction by the equity holder(s) of such Bidder.
- (i) Proof of Financial Ability to Perform: A Bid must include written evidence that the Debtors conclude, after consulting with their advisors, the Agent, and the Creditors' Committee, demonstrates that the Bidder has the necessary financial ability and/or has received debt and/or equity funding commitments (or has cash) sufficient in the aggregate to finance and consummate the Alternative Transaction contemplated thereby and provide adequate assurance of future performance under all Assigned Contracts to be assumed and assigned in such Alternative Transaction (including the Adequate Assurance Information), including proof of the Good Faith Deposit in cash and one of (1) evidence of sufficient cash to consummate the Bid, (2) an unconditional lending commitment from a recognized banking institution in the amount of any cash portion of the purchase price of such Bid, (3) the posting of an unconditional, irrevocable letter of credit from a recognized banking institution issued in favor of the Debtors in the amount of any cash portion of the purchase price of such Bid, or (4) a guarantee from another person or entity in favor of the Debtors in the amount of any cash portion of the purchase price of such Bid (with such person or entity providing written evidence of its financial wherewithal reasonably acceptable to the Debtors). Such information shall include the following:
  - (1) contact names and numbers for verification of financing sources;
  - (2) the Bidder's current financial statements (audited if they exist) or other similar financial information reasonably acceptable to the Debtors; and
  - (3) any such other form of financial disclosure or credit-quality support information or enhancement reasonably acceptable to the Debtors.
- (j) Contingencies: Each Bid (1) may not contain representations and warranties, covenants, or termination rights more onerous than those set forth in the Asset Purchase Agreement (when considering all such provisions as a whole) and (2) may not be conditioned on financing or due diligence contingencies of any kind or any other conditions precedent to such Bidder's obligation to purchase the Debtors' assets subject to such Bid other than as may be included in the Asset Purchase Agreement.



- (k) Irrevocable: Each Bid must be irrevocable through the close of the Auction, provided that if such Bid is accepted as the Successful Bid or the Backup Bid (each as defined herein), such Bid shall continue to remain irrevocable, subject to the terms and conditions of the Bidding Procedures.
- (l) Bid Deadline: The following parties must receive a Bid in writing, on or before \_\_\_\_\_, 2016 at 4:00 p.m. (prevailing Eastern time) (the "Bid Deadline"): (1) the Debtors, Attn: Ryan Bouley, Email: rbouley@opportune.com; (2) counsel for the Debtors, Paul Hastings LLP, Attn: Chris L. Dickerson, Email: chrisdickerson@paulhastings.com, and Marc J. Carmel, Email: marccarmel@paulhastings.com; (3) FTI Consulting, Inc., Attn: Ben Goren, Email: ben.goren@fticonsulting.com, and Jeffrey Spittel, Email: jeffrey.spittel@fticonsulting.com; (4) counsel for the Agent, Jones Day, Attn: Brad B. Erens, Email: bberens@jonesday.com, and Timothy Hoffmann, Email: thoffmann@jonesday.com; and (5) counsel for the Creditors' Committee, Reed Smith LLP, Attn: Kurt F. Gwynne, Email: kgwynne@reedsmith.com, and Claudia Z. Springer, Email: cspringer@reedsmith.com

A Bid (or combination of Bids) that is actually received from a Bidder before the Bid Deadline and that meets the above requirements for the Debtors' assets shall collectively constitute a "Qualified Bid" for the Debtors' assets, and such Bidder (or combination of Bidders) shall collectively constitute a "Qualified Bidder" for the Debtors' assets. The Debtors shall, within one (1) business day after qualifying a Bid as a Qualifying Bid, transmit a copy of such Qualified Bid and its corresponding asset purchase agreement to the Stalking Horse Purchaser, any other Qualified Bidder, and counsel to the Stalking Horse Purchaser and any other Qualified Bidder. Notwithstanding anything herein to the contrary, the Asset Purchase Agreement submitted by the Stalking Horse Purchaser shall be deemed a Qualified Bid, and the Stalking Horse Purchaser shall be deemed a Qualified Bidder. Further, in order to induce the Stalking Horse Purchaser to participate in the sale process, the Agent agrees (for itself and on behalf of its constituent lenders and any successors or assigns of the Agent or its constituent lenders) that it will not, and shall not, credit bid any of its outstanding claims against the Debtors in connection with the sale process contemplated in these Bidding Procedures, so long as the Stalking Horse Purchaser is willing to acquire substantially all of the assets set forth in the Asset Purchase Agreement for a price greater than or equal to the purchase price set forth therein.

### Auction

If one or more Qualified Bids for the Debtors' assets (other than the Asset Purchase Agreement submitted by the Stalking Horse Purchaser) are received, the Debtors will conduct an auction (the "Auction") to determine, after consulting with the Agent and the Creditors' Committee, the highest or otherwise best Qualified Bid for the Debtors' assets. This determination shall take into account any factors the Debtors reasonably deem relevant to the value of the Qualified Bid to their estates and may include, among other things, the following: (a) the number, type, and nature of any changes to the Asset Purchase Agreement requested by each Bidder; (b) the extent to which such modifications are likely to delay closing of the sale of the Debtors' assets and the cost to the Debtors of such modifications or delay; (c) the total consideration to be received by the Debtors; (d) the likelihood of the Bidder's ability to close a

transaction and the timing thereof; and (e) the net benefit to the Debtors' estate, taking into account the Stalking Horse Purchaser's rights to the Bid Protections (collectively, the "Bid Assessment Criteria").

If no Qualified Bid (other than the Asset Purchase Agreement) is received, the Debtors shall not conduct the Auction. Only parties that the Debtors, after consulting with the Agent and the Creditors' Committee, determine in accordance with these Bidding Procedures are Qualified Bidders may participate in the Auction.

#### **Procedures for Auction**

The Auction shall take place on \_\_\_\_\_, 2016 at 10:00 a.m. (prevailing Central time) at the offices of counsel for the Debtors at Paul Hastings LLP, 71 South Wacker Drive, 45th Floor, Chicago, Illinois 60606, or such other place and time as the Debtors shall notify all Qualified Bidders, including the Stalking Horse Purchaser, the Agent, the Creditors' Committee, and any other invitees.

The Debtors, the Agent, the Creditors' Committee, the Stalking Horse Purchaser, and any other Qualified Bidder, in each case, along with their representatives, financial advisors, and counsel, may attend the Auction in person, and only the Stalking Horse Purchaser and such other Qualified Bidders will be entitled to make any Bids at the Auction. Bidding at the Auction will be transcribed.

#### ***The Debtors Shall Conduct the Auction.***

The Debtors and their advisors, after consulting with the Agent and the Creditors' Committee, shall direct and preside over the Auction. The Debtors, after consulting with the Agent, the Stalking Horse Purchaser, and the Creditors' Committee, may conduct the Auction in the manner they determine will result in the highest, best, or otherwise superior offer for any of the Debtors' assets. At or before the start of the Auction, the Debtors, after consulting with the Agent and the Creditors' Committee, shall describe the terms of the highest or otherwise best Qualified Bid or Qualified Bids received prior to the Bid Deadline (each such highest or otherwise best Qualified Bid, the "Auction Baseline Bid"). The Debtors shall advise each Qualified Bidder regarding which Qualified Bid shall be the Auction Baseline Bid as soon as reasonably practicable prior to the commencement of the Auction. Each Qualified Bidder participating in the Auction must confirm that it (a) has not engaged in any collusion with respect to the bidding or sale of the Debtors' assets and (b) has reviewed and understands and accepts the Bidding Procedures.

#### ***Overbids.***

An "Overbid" is any bid made at the Auction subsequent to the Debtors' announcement of the respective Auction Baseline Bid for such Auction. To submit an Overbid for purposes of this Auction, a Bidder must comply with the following conditions:

- (a) Minimum Overbid Increments: Any Overbid after and above the respective Auction Baseline Bid shall be made in increments of cash of not less than \$250,000.

- (b) Bids: All Qualified Bidders attending the Auction shall be permitted to bid at the Auction. For the avoidance of doubt, the Stalking Horse Purchaser shall be permitted to include the full amount of the Bid Protections in each bid by the Stalking Horse Purchaser (as a “credit bid”) for the purposes of comparison to any Overbid in connection with each round of bidding in the Auction.
- (c) Remaining Terms Are the Same as for Qualified Bids: Except as modified herein, an Overbid at the Auction 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 Debtors accept a higher or otherwise better Overbid from such Bidder.

To the extent not previously provided, if requested by the Debtors, a Bidder submitting an Overbid at the Auction 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 Debtors) demonstrating such Bidder’s ability to close the Bid proposed by such Overbid.
- (d) Announcement of Overbids: The Debtors shall announce at the Auction the material terms of each Overbid and the basis for calculating the total consideration offered in each such Overbid.

#### *Closing the Auction.*

The Auction shall continue until there is only one Qualified Bid (or combination of Qualified Bids) for the Debtors’ assets that the Debtors determine, after consulting with the Agent and the Creditors’ Committee, in their reasonable business judgment, after consulting with their advisors, is the highest or otherwise best Qualified Bid (or combination of Bids) at the Auction for the Debtors’ assets. Thereafter, the Debtors, after consulting with the Agent and the Creditors’ Committee, shall select the Qualified Bid that produces the highest or otherwise best recovery to the estates, as the overall highest or otherwise best Qualified Bid (such Qualified Bid, a “Successful Bid,” and each Bidder submitting such Successful Bid, a “Successful Bidder”).

The Auction shall close when the Successful Bidder and the Backup Bidder submit fully executed sale and transaction documents memorializing the terms of its respective Successful Bid and the Backup Bid, respectively, in form and substance acceptable to the Debtors (after consulting with the Agent and the Creditors’ Committee), and the Debtors shall execute such sale and transaction documents with the Successful Bidder.

Promptly following the Debtors’ selection of the Successful Bid (and in no event later than one (1) business day after the close of the Auction), the Debtors shall announce the Successful Bid and Successful Bidder and shall file with the Court notice of the Successful Bid and Successful Bidder.

***Backup Bidder.***

Notwithstanding anything in the Bidding Procedures to the contrary, if an Auction is conducted, the Bidder (or Bidders) with the next highest or otherwise best Bid or combination of Bids at the Auction, as determined by the Debtors, after consulting with the Agent and the Creditors' Committee, in the exercise of their reasonable business judgment, after consulting with their advisors, will be designated as the potential backup bidder (collectively, the "Potential Backup Bidder"). In the event that a Bidder or Bidders are identified by the Debtors, after consulting with the Agent and the Creditors' Committee, as the Potential Backup Bidder, such Bidder or Bidders shall be required to serve as the backup bidder or backup bidders (collectively, the "Backup Bidder"). The Backup Bidder shall be required to keep its initial Bid or combination of Bids (or if the Backup Bidder submitted one or more Overbids at the Auction, the final respective Overbid) (the "Backup Bid") open and irrevocable until the earlier of (a) 4:00 p.m. (prevailing Eastern time) on the date that is forty-five calendar (45) days after the date of the Auction (the "Outside Backup Date") and (b) the closing of the transaction with the Successful Bidder (as defined herein).

**Sale Hearing**

The Successful Bid will be subject to approval by the Court. The hearing to approve the sale of the assets subject to the Bidding Procedures Order to the Successful Bidder (including to the Stalking Horse Purchaser, if the Stalking Horse Purchaser is the Successful Bidder or the only bidder) (the "Sale Hearing") is scheduled to take place on \_\_\_\_\_, 2016 at \_\_\_\_:\_\_\_\_ a./p.m. (prevailing Eastern time)] (prevailing Eastern time). The Debtors, after consulting with the Agent, Stalking Horse Purchaser, and the Creditors' Committee, may adjourn the Sale Hearing from time to time without further notice to parties in interest other than by announcement of the adjournment in open court on the date scheduled for the Sale Hearings or a notice filed with the Court, as applicable.

Following the Sale Hearing, if the Successful Bidder fails to consummate its transaction, the Debtors, after consulting with the Agent and the Creditors' Committee, may designate the Backup Bidder to be the new Successful Bidder, in which case the Backup Bidder shall be deemed to be the "Successful Bidder," and the Debtors will be authorized to consummate the transaction or transactions with the Backup Bidder (as the Successful Bidder) without further order of the Court. In such case, (a) the defaulting Successful Bidder's deposit shall be forfeited to the Debtors, and the Debtors specifically reserve the right to seek all available damages from the defaulting Successful Bidder and (b) the Backup Bidder shall become the Successful Bidder and subject to all the responsibilities and obligations of being the Successful Bidder.

***Additional Procedures.***

The Debtors reserve their rights, in the exercise of their fiduciary obligations and after consulting with the Agent and the Creditors' Committee, to modify the Bidding Procedures or impose, at or prior to the Auction, different and/or additional terms and conditions on the sale subject to the Bidding Procedures, provided that such rules are not inconsistent in any material respect with the Bidding Procedures (provided that no such changes shall impair or modify the Bid Protections afforded to the Stalking Horse Purchaser).

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

The Stalking Horse Purchaser and all other Qualified Bidders at the Auction shall be deemed to have (a) consented to the core jurisdiction of the Court to enter an order or orders, which shall be binding in all respects, in any way related to the Debtors, the Chapter 11 Cases, the Bidding Procedures, the Asset Purchase Agreement, the Auction, or the construction and enforcement of any Qualified Bid or related documents and (b) waived any right to a jury trial in connection with any disputes relating to the Debtors, the Chapter 11 Cases, the Bidding Procedures, the Asset Purchase Agreement, the Auction, or the construction and enforcement of any Qualified Bid or related documents.

**Bid Protections**

Pursuant to the Bidding Procedures Order, the Stalking Horse Purchaser is entitled to the Bid Protections in accordance with the terms of the Asset Purchase Agreement and the Bidding Procedures Order.

Pursuant to the Bidding Procedures Order, except for the Stalking Horse Purchaser, no other party submitting an offer or Bid or a Qualified Bid shall be entitled to any expense reimbursement or breakup, termination, or similar fee, or post-petition claim, including any administrative expense claim or substantial contribution claim under section 503 of the Bankruptcy Code or otherwise, and by submitting a Bid, a Bidder (other than the Stalking Horse Purchaser) shall be deemed to waive any right with respect thereto.

**Return of Good Faith Deposits**

The Good Faith Deposits of all Qualified Bidders shall be held in one or more escrow accounts by the Debtors, but shall not become property of the Debtors' estates absent further order of the Court except as set forth herein. The Good Faith Deposit of any Qualified Bidder that is neither a Successful Bidder nor a Backup Bidder shall be returned to such Qualified Bidder not later than five (5) calendar days after the Sale Hearing. The Good Faith Deposit of each Backup Bidder, if any, shall be returned to the respective Backup Bidder on the date that is the earlier of seventy-two (72) hours after (a) the closing of the transaction with the Successful Bidder or Successful Bidders (as defined herein) for the assets bid upon by such Backup Bidder and (b) the Outside Backup Date. If a Successful Bidder or Successful Bidders timely closes their winning transactions, their respective Good Faith Deposits shall be credited towards their respective purchase prices.

*[Remainder of page intentionally left blank.]*

Date: [•], 2016  
Wilmington, Delaware

**SULLIVAN · HAZELTINE · ALLINSON LLC**

---

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*Attorneys for Debtors and Debtors in Possession*

**EXHIBIT 1**

**Asset Purchase Agreement**

**EXECUTION VERSION**

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**ASSET PURCHASE AND SALE AGREEMENT**

**BY AND AMONG**

**EXTREME PLASTICS PLUS, INC.,**

**AND**

**BW EPP HOLDINGS LLC**

**Dated as of September 14, 2016**

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## ASSET PURCHASE AND SALE AGREEMENT

THIS ASSET PURCHASE AND SALE AGREEMENT, dated as of September 14, 2016 (this "Agreement"), is made and entered into by and among EXTREME PLASTICS PLUS, INC., a Delaware corporation ("Seller"), and BW EPP HOLDINGS LLC, a Delaware limited liability company ("Purchaser"). Seller and Purchaser are sometimes herein referred to collectively as the "Parties" and each individually as a "Party." Capitalized terms shall have the meaning set forth in Article 1 unless otherwise defined herein.

### WITNESSETH:

WHEREAS, Seller has filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code, 11 U.S.C. § 101 et seq. (the "Bankruptcy Code"), commencing the chapter 11 case (the "Chapter 11 Case") in the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court");

WHEREAS, Seller is engaged in providing environmental lining used for environmental containment, above-ground storage tanks, composite rig mats, and secondary steel wall containment systems (such business and all other businesses conducted by Seller, the "Business");

WHEREAS, on the terms and subject to the conditions hereinafter set forth, the Parties desire to enter into this Agreement pursuant to which, among other things, Seller shall sell to Purchaser, and Purchaser shall purchase from Seller, all of Seller's right, title, and interest in and to the Purchased Assets and Purchaser shall assume from Seller and thereafter pay, discharge, and perform the Assumed Liabilities subject to the entry of a Sale Order;

WHEREAS, in light of the current circumstances, a sale of Seller's assets is in the best interest of Seller and its creditors; and

WHEREAS, the Transactions contemplated by this Agreement are subject to the approval of the Bankruptcy Court and would be consummated only pursuant to a Sale Order to be entered by the Bankruptcy Court in accordance with applicable provisions of the Bankruptcy Code.

NOW, THEREFORE, in consideration of the premises and of the mutual covenants, representations, warranties, and agreements herein contained, and intending to be legally bound hereby, the Parties hereby agree as follows:

## ARTICLE 1

### DEFINITIONS

1.1 Definitions. For the purposes of this Agreement, the following terms shall have the meanings specified in this Section 1.1:

"Action" means any action, suit, arbitration, claim, inquiry, proceeding, or investigation by or before any Governmental Authority of any nature, civil, criminal, regulatory, or otherwise, in law or in equity.

“Affiliate” (and, with a correlative meaning “affiliated”) means, with respect to any Person, any direct or indirect subsidiary of such Person, and any other Person that directly, or through one or more intermediaries, controls, is controlled by, or is under common control with such first Person. As used in this definition, “control” (including with correlative meanings, “controlled by” and “under common control with”) means possession, directly or indirectly, of power to direct or cause the direction of the management or policies (whether through ownership of securities or partnership or other ownership interests, by Contract or otherwise).

“Agent” means Citizens Bank of Pennsylvania in its capacity as Administrative Agent for the Lenders under the Citizens Facility and as such terms are defined in the Credit Agreement.

“Alternative Bid” means a higher or better competing bid, including any credit bid by Agent or any other Person, or any other offer or treatment under a plan of reorganization, in each case in consideration of any sale, transfer, liquidation, or disposition of the Business or assets of Seller whether pursuant to a sale or a plan of reorganization or liquidation with respect to the Business or assets of Seller.

“Alternative Transaction” means one or more agreements or treatment under a plan of reorganization in consideration of a sale, transfer, or other disposition of any material portion of the Purchased Assets in a transaction or series of transactions (other than in the ordinary course of business) with one or more Persons, other than Purchaser, pursuant to an Alternative Bid that actually closes.

“Applicable Law” means, with respect to any Person, any Law applicable to such Person or its business, properties, or assets.

“Assumed Capital Lease” means any vehicle installment contract and any lease of any property (whether real, personal or mixed) by Seller as lessee described on Exhibit E which is, in accordance with GAAP, required to be accounted for as a capital lease on the balance sheet of Seller, each of which will be assumed by Purchaser in connection with the Transactions.

“Assumed Capital Lease Amount” means the aggregate amount of indebtedness to be assumed by Purchaser at Closing in connection with the Assumed Capital Leases.

“Auction” shall mean any auction conducted in connection with the Sale Motion and Bidding Procedures Order.

“Backup Bidder” shall have the meaning specified in the Bidding Procedures Order.

“Bidding Procedures Hearing” means the hearing for consideration by the Bankruptcy Court of the entry of the Bidding Procedures Order.

“Bidding Procedures Order” means a Final Order of the Bankruptcy Court setting forth the bidding procedures for the Auction substantially in the form of Exhibit A hereto with such modifications as are consented to by Purchaser, Seller, and the Agent, all of which consent shall not be unreasonably withheld, delayed, or conditioned.



“Business Day” means a day other than a Saturday, Sunday, or other day on which commercial banks in Wilmington, Delaware are authorized or required by Law to close. Any event the scheduled occurrence of which would fall on a day that is not a Business Day shall be deferred until the next succeeding Business Day.

“Cash” means all cash, cash equivalents and freely marketable securities held by Seller as of 11:59 p.m. (prevailing Eastern time) on the date immediately preceding the Closing Date.

“Citizens Facility” means the credit facility for the benefit of the Seller provided pursuant to that certain Amended and Restated Credit Agreement dated as of September 3, 2014 (the “Credit Agreement”) by and among the Seller, the lenders party thereto, and Citizens Bank, National Association, as the Issuing Bank and Swingline Lender, together with the other Loan Documents (as such terms are defined in the Credit Agreement).

“Claim” means any claim within the meaning of section 101(5) of the Bankruptcy Code.

“COBRA” means the Consolidated Omnibus Budget Reconciliation Act of 1985, as amended.

“Code” means the U.S. Internal Revenue Code of 1986, as amended.

“Contract” means any written and binding contract, indenture, note, bond, loan, instrument, lease, commitment, or other agreement.

“Cure Costs” means the amounts that must be paid and obligations that otherwise must be performed or satisfied pursuant to section 365(b)(1)(A) and (B) of the Bankruptcy Code, in connection with the assumption and/or assignment of any Purchaser Assumed Contracts.

“Current Assets” means, as of the date of calculation, the following categories of assets reflected on Seller’s July 31, 2016 balance sheet as “Current Assets”: “Accounts Receivable”, “Inventory”, “Deposits – Lease” and “Other Receivables”, prepared in accordance with GAAP using, to the extent in accordance with GAAP, the same accounting methods, principles, policies, practices, and procedures, with consistent classifications, judgments, and estimation methodology, as were used in the determination of the current assets in the preparation of the estimated calculation set forth on Exhibit C.

“Current Liabilities” means, as of the date of calculation, the category of liabilities shown on Seller’s July 31, 2016 balance sheet as “Accounts Payable - Post Petition” that are included in Assumed Liabilities, prepared in accordance with GAAP using, to the extent in accordance with GAAP, the same accounting methods, principles, policies, practices, and procedures, with consistent classifications, judgments, and estimation methodology, as were used in the determination of the current liabilities in the preparation of the estimated calculation set forth on Exhibit C.

“Debtor Benefit Plans” means the Employee Benefit Plans.

“Disposition” means, as to any Fixed Asset, any sale or disposition other than a transfer to or for the benefit of a creditor with a claim secured by such asset in exchange for the full or partial satisfaction of such claim.

“Documents” means all files, documents, instruments, papers, books, reports, manuals, records, tapes, microfilms, hard drives, databases, compilations of information, photographs, letters, budgets, accounts, forecasts, ledgers, journals, title policies, customer and supplier lists, regulatory filings, operating data and plans, technical documentation (design specifications, functional requirements, operating instructions, logic manuals, flow charts, etc.), user documentation (installation guides, user manuals, training materials, release notes, working papers, etc.), marketing documentation (including sales brochures, flyers, pamphlets, web pages, etc.), and other similar materials related to the Business and the Purchased Assets in each case whether or not in electronic form that are owned by Seller and can reasonably be identified, located and provided.

“Employee” means any employee of Seller who performs work primarily related to the operation of the Business.

“Encumbrance” means charge, claim, community or other marital property interest, condition, equitable interest, lien, option, pledge, security interest, mortgage, deed of trust, right of way, easement, encroachment, servitude, right of first option, right of first refusal or similar restriction, including any restriction on use, voting (in the case of any security or equity interest), transfer, receipt of income or exercise of any other attribute of ownership.

“Employee Benefit Plans” means all employee benefit plans (as defined in Section 3(3) of ERISA), all employment or individual compensation agreements, and all other plans, policies, agreements, payroll practices or arrangements providing any bonus, incentive, retention, equity or equity-based compensation, deferred compensation, stock purchase, severance pay, sick leave, vacation pay, salary continuation, disability, welfare benefit, pension benefit, life insurance, medical insurance, fringe benefits, educational assistance, tax gross up, change in control, or other material employee benefit, in each case as to which Seller has any Liability with respect to any current or former officers, employees, or directors of Seller or any Subsidiary.

“Environmental Law” means all Applicable Laws in effect on the date hereof relating to the environment, natural resources, health, and safety or the protection thereof, including any applicable provisions of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601 et seq., the Hazardous Materials Transportation Act, 49 U.S.C. § 5101 et seq., the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 et seq., the Clean Water Act, 33 U.S.C. § 1251 et seq., the Clean Air Act, 42 U.S.C. § 7401 et seq., the Toxic Substances Control Act, 15 U.S.C. § 2601 et seq., the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 et seq., the Occupational Safety and Health Act, 29 U.S.C. § 651 et seq., and the Oil Pollution Act of 1990, 33 U.S.C. § 2701 et seq., and the regulations promulgated pursuant thereto, and all analogous state or local statutes.

“Environmental Liabilities and Obligations” means all Liabilities arising from any impairment or damage to the environment or failure to comply with Environmental Laws in connection with the ownership or operation of the Business, including Liabilities related to: (i) the transportation, storage, use, arrangement for disposal, or disposal of Hazardous Materials or

waste; (ii) the Release of Hazardous Materials or waste; (iii) any other pollution or contamination of the surface, substrata, soil, air, ground water, surface water, or marine environments; (iv) any other obligations imposed under Environmental Laws with respect to the Business; and (v) all obligations with respect to personal injury, property damage, wrongful death, and other damages and losses arising under Applicable Law as a result of any of the matters identified in clauses (i)-(iv) of this definition.

“ERISA” means the Employee Retirement Income Security Act of 1974, as amended.

“Expense Reimbursement” means the actual out-of-pocket legal, accounting and other third party advisory or service costs and expenses of the Purchaser in connection with the Transactions and the Transaction Documents in an amount not to exceed \$450,000.

“Extended Real Property Lease” means any Real Property Lease on Schedule 5.4(b) that is marked with an asterisk.

“Final Order” means an action taken or order issued by a Governmental Authority as to which no stay is in effect and, as to any order, such order shall be fully effective and enforceable.

“Fixed Assets” means, (i) the manufactured composite rig mats used in the Seller’s business and owned by the Seller on June 10, 2016 as more fully described on Exhibit D-1, (ii) the equipment and fixtures owned by the Seller on June 10, 2016 as more fully described on Exhibit D-2, and (iii) each of the other fixed assets described on Exhibit D-3 having a book value of \$500 or more.

“GAAP” means generally accepted accounting principles in the United States as in effect from time to time.

“Governmental Authority” means any entity exercising executive, legislative, judicial, regulatory, or administrative functions of or pertaining to the United States or to a foreign federal, state, or local government, any governmental authority, agency, department, board, commission, or instrumentality or any political subdivision thereof, and any tribunal or court or arbitrator(s) of competent jurisdiction, and shall include the Bankruptcy Court.

“Hazardous Materials” means all substances defined as “hazardous substances,” “hazardous wastes,” “hazardous materials,” “pollutants,” “toxic wastes,” “toxic substances,” or “contaminants” or otherwise regulated under Environmental Laws or with respect to which liability or standards of conduct are imposed under Environmental Laws.

“Indebtedness” of any Person means, without duplication: (i) the principal of and premium (if any) in respect of (A) indebtedness of such Person for money borrowed and (B) indebtedness evidenced by notes, debentures, and other similar instruments (including capital leases other than the Assumed Capital Leases) for the payment of which such Person is responsible or liable; and (ii) all obligations of the type referred to in clause (i) of any Persons for the payment of which such Person is responsible or liable, directly or indirectly, as obligor, guarantor, surety, or otherwise.

“Intellectual Property” means all intellectual property rights arising from or in respect of the following: all (i) inventions, discoveries, industrial designs, business methods, patents, and patent applications; (ii) Seller’s name, all fictional business names, trading names, trademarks, service marks, certification marks, collective marks, trade names, trade dress, and Internet domain names, whether registered, unregistered or arising by Law, and all applications, registrations, and renewals for any of the foregoing, together with the goodwill associated with and symbolized by each of the foregoing; (iii) published and unpublished works of authorship in any medium, whether copyrightable or not (including databases, computer software, and Internet website content), copyrights and moral rights therein and thereto, and registrations and applications therefor, and all issuances, renewals, extensions, restorations, and reversions thereof; and (iv) Trade Secrets.

“Intellectual Property Licenses” means (i) any Contract that contains any grant by Seller to any third Person of any right to use, publish, perform, or exploit any of the Purchased Intellectual Property and (ii) any material Contract that contains any grant by any third Person to Seller of any right to use, publish, perform, or exploit any Intellectual Property of such third Person concerning or relating to the Business.

“Interest” means any interest within the meaning of section 363(f) of the Bankruptcy Code, including any interest of a Governmental Authority, and all other interests, pledges, security interests, rights of setoff, restrictions or limitations on use, successor liabilities, conditions, rights of first refusal, options to purchase, obligations to allow participation, agreements or rights, rights asserted in litigation matters, competing rights of possession, obligations to lend, matters filed of record that relate to, evidence or secure an obligation of the Seller (and all created expenses and charges) of any type under, among other things, any document, instrument, agreement, affidavit, matter filed of record, cause, or state or federal law, whether known or unknown, legal or equitable, and all liens, rights of offset, replacement liens, adequate protection liens, charges, obligations, or claims granted, allowed or directed in any order.

“IRS” means the United States Internal Revenue Service.

“Knowledge” (and derivations thereof) means the actual knowledge (without any duty to investigate) of: Bennie M. Wharry, Wade Holt, Robbie Keefover or Kiel Wirgau, when used with respect to Seller and Kevin Kuykendall, Aakash Patel or Charlie Miller, when used with respect to Purchaser.

“Law” means any foreign, federal, state, or local law (including common law), statute, code, ordinance, rule, regulation, or other requirement enacted, promulgated, issued, or entered by a Governmental Authority.

“Legal Proceeding” means any judicial, administrative, or arbitral Actions or proceeding (public or private) by or before a Governmental Authority.

“Liabilities” means any and all debts, losses, liabilities, claims (including claims as defined in section 101(5) of the Bankruptcy Code), damages, expenses, fines, costs, royalties, proceedings, deficiencies, or obligations (including those arising out of any action, such as any settlement or compromise thereof or judgment or award therein), of any nature, whether known

or unknown, absolute, contingent, accrued or unaccrued, liquidated or unliquidated, or otherwise and whether due or to become due, and whether in contract, tort, strict liability, or otherwise, and whether or not resulting from third party claims, and any reasonable out-of-pocket costs and expenses in connection therewith (including reasonable legal counsels', accountants', or other fees and expenses incurred in defending any action or in investigating any of the same or in asserting any rights thereunder or hereunder).

"Lien" means any lien, pledge, mortgage, deed of trust, security interest, claim, lease, charge, option, right of first refusal, right of first offer, easement, servitude, transfer restriction under any shareholder or similar agreement, encumbrance, or any other restriction or limitation whatsoever. For clarity, licenses to Intellectual Property are not and shall not be deemed to be Liens.

"Net Working Capital" means the difference as of 12:01a.m. (prevailing eastern time) between (i) Current Assets, and (ii) Current Liabilities, in each case, prepared in accordance with GAAP using, to the extent in accordance with GAAP, the same accounting methods, principles, policies, practices, and procedures, with consistent classifications, judgments, and estimation methodology, as were used in the determination of the current assets or current liabilities, as applicable, in the preparation of the estimated calculation set forth on Exhibit C.

"Net Working Capital Target" means \$7,900,000.

"Order" means any order, injunction, judgment, decree, ruling, writ, assessment, or arbitration award.

"Permits" means any approvals, authorizations, consents, licenses, franchises, permits, or certificates.

"Permitted Liens" means:

(a) with respect to any real property and to the extent that they do not materially interfere with the ownership, occupancy, use, or operation of the affected Owned Properties or Real Property Leases in the manner and for the purposes heretofore used by Seller in connection with the Business, easements, restrictive covenants, and rights-of-way on, over, or in respect of any Owned Property or Real Property Lease, servitudes, permits, surface leases, and other rights with respect to surface operations;

(b) all rights reserved to or vested in any Governmental Authority to control or regulate the Purchased Assets and all obligations and duties under all Applicable Laws or under any permit issued by any Governmental Authority;

(c) statutory Liens for current Taxes not yet delinquent or the amount or validity of which is being contested in good faith;

(d) mechanics', carriers', workmen's, repairmen's, or other like Liens arising or incurred in the ordinary course of business;

(e) other than with respect to Owned Properties, Liens arising under original purchase price conditional sales contracts and equipment leases with third parties entered into in the ordinary course of business;

(f) Liens arising under the Assumed Capital Leases or collateralized debt obligations;

(g) any Lien that pursuant to section 363(f) of the Bankruptcy Code will be released from the Purchased Assets upon entry of the Sale Order;

(h) the Liens set forth on Schedule 1.1(a); and

(i) other Liens that will be released on or prior to Closing at no cost or expense to Purchaser.

“Person” means and includes natural persons, corporations, limited partnerships, limited liability companies, general partnerships, joint stock companies, joint ventures, associations, companies, trusts, banks, trust companies, land trusts, business trusts, or other organizations, whether or not legal entities, and all Governmental Authorities.

“Petition Date” means the date on which the Chapter 11 Case commenced.

“Purchased Intellectual Property” means all Intellectual Property owned by Seller.

“Purchaser Assumed Contracts” means, to the extent assignable pursuant to section 363 or 365 of the Bankruptcy Code or otherwise, all Capital Leases, Personal Property Leases, Real Property Leases, Assumed Capital Leases and all Contracts set forth on Schedule 1.1(c) (as may be modified prior to the Closing pursuant to Section 2.5) to be assumed by Seller and assigned by Purchaser under section 363 or 365 of the Bankruptcy Code or pursuant to their terms.

“Purchaser Material Adverse Effect” means any change, circumstance, fact, condition, or event that individually or in the aggregate with any other change, circumstance, fact, condition, or event, would materially impair the ability of Purchaser to perform its obligations under this Agreement.

“Release” means any release, spill, emission, discharge, migration, leaking, leaching, pumping, pouring, emitting, emptying, injecting, dumping, deposit, or disposal of Hazardous Materials into or through the environment.

“Representatives” of a Person means its officers, directors, managers, members, shareholders, partners, employees, agents, representatives, and advisors (including financial advisors, consultants, attorneys, investment bankers, and accountants).

“Sale Motion” means one or more motions to be filed by Seller with the Bankruptcy Court seeking entry of the Bidding Procedures Order and the Sale Order, which shall be in form and substance consented to by Purchaser, Seller, and the Agent, all of which consent shall not be unreasonably withheld, delayed, or conditioned.

“Sale Order” means a Final Order of the Bankruptcy Court issued pursuant to sections 105, 363, and 365 of the Bankruptcy Code, substantially in the form of Exhibit B, approving this Agreement and the terms and conditions hereof, and approving and authorizing Seller to consummate the Transactions and enter into the Transaction Documents with such modifications as are consented to by Purchaser, Seller, and the Agent.

“Seller LCs” means, collectively, all letters of credit, guarantees, financial assurance, surety bonds, performance bonds and other contractual obligations entered into by or on behalf of Seller or any of its Affiliates in connection with the Business.

“Seller LC Cash Proceeds” means any cash collateral, cash deposits, or cash proceeds resulting from the draw upon any Seller LC, excluding any such cash that has been paid over to the Seller following such draw, whether in exchange for a replacement Seller LC or otherwise.

“Seller Material Adverse Effect” means any change, circumstance, fact, condition, or event that, individually or in the aggregate with any other change, circumstance, fact, condition, or event, that has, or would reasonably be expected to have, a materially adverse effect on (a) the Business, condition (financial or otherwise), results of operations, properties, or assets of Seller (taken as a whole) as the same shall have existed as of the date hereof or (b) the ability of Seller to perform its obligations under this Agreement, in each case other than an Excluded Matter that shall not be taken into account in determining whether there has been a Seller Material Adverse Effect. “Excluded Matter” means any adverse change, circumstance, fact, condition, or event resulting from one or more of the following: (i) the condition of the economy or the securities markets in general, or any outbreak of hostilities, terrorist activities, or war; (ii) the announcements, pendency, or consummation of the sale of the Purchased Assets, or any other action by Purchaser or its Affiliates contemplated or required hereunder; (iii) any changes in general economic, political, or regulatory conditions; (iv) any changes in Applicable Laws or accounting rules; (v) conditions generally affecting the industries in which the Business operates; or (vi) any matter relating to the Excluded Assets.

“Seller Transfer Tax Amount” means one-half (1/2) of all Transfer Taxes.

“Sold Fixed Assets Amount” means the aggregate amount of money received by Seller in connection with the Disposition of any Fixed Assets between June 10, 2016 and the Closing Date.

“Straddle Period” means any Tax period beginning on or before, and ending after, the Closing Date.

“Subsidiary” or “subsidiary” means, with respect to any Person, any corporation, limited liability company, joint venture, or partnership of which such Person (i) beneficially owns, either directly or indirectly, at least fifty percent (50%) of (a) the total combined voting power of all classes of voting securities of such entity entitled, under ordinary circumstances, to vote in the election of directors or other governing body of such Person, (b) the total combined equity interests, or (x) the capital or profit interests, in the case of a partnership; or (ii) otherwise has the power to vote or to direct the voting of sufficient equity interests to elect a majority of the board of directors or similar governing body of such Person.

“Target Assumed Capital Lease Amount” means the aggregate dollar amount of indebtedness to be assumed by Purchaser at Closing in connection with the Assumed Capital Leases as set forth on Exhibit E.

“Tax” means all federal, state, provincial, territorial, municipal, local, or foreign income, profits, franchise, gross receipts, environmental (including taxes under Code Section 59A), customs, duties, net worth, sales, use, goods and services, withholding, value added, ad valorem, employment, social security, disability, occupation, pension, real property, personal property (tangible and intangible), stamp, transfer, conveyance, severance, production, excise, and other taxes, withholdings, duties, levies, imposts, and other similar charges and assessments (including any and all fines, penalties, and additions attributable to or otherwise imposed on or with respect to any such taxes, charges, fees, levies, or other assessments, and interest thereon) imposed by any Taxing Authority.

“Tax Returns” means any report, return, declaration, claim for refund, information report, or return or statement required to be supplied to a Taxing Authority in connection with Taxes, including any schedule or attachment thereto or amendment thereof.

“Taxing Authority” means any Governmental Authority exercising any authority to impose, regulate, levy, assess, or administer the imposition of any Tax.

“Trade Secrets” means know-how, methods, processes, business plans, recipes, schematics, concepts, software, databases, formulae, drawings, prototypes, models, designs, devices, technology, customer information and lists, and other information, in each case that (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other Persons who can obtain economic value from its disclosure or use, and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

“Transaction Documents” means this Agreement, the Escrow Agreement, the Adjustment Escrow Agreement, the Assignment and Assumption Agreement, the Assignments and Assumption of Leases and Related Agreements, and all other Contracts and agreements necessary to effectuate the Transactions.

“Transactions” means the transactions contemplated by this Agreement and the other Transaction Documents.

“Transferred Deposits” means any deposits related to any of the Purchased Assets as to which the Purchaser requests the transfer at Closing of Purchaser’s rights in and to such deposit.

“Transferred Deposits Statement” means a statement to be prepared by Purchaser and delivered to Seller at least five (5) Business Days prior to Closing reflecting the Transferred Deposits.

“United States” and “U.S.” means United States of America.

“WARN Act” means the federal Worker Adjustment and Retraining Notification Act, 29 U.S.C. § 2101 et seq. (1988) and any similar state or local “mass layoff” or “plant closing” laws.



1.2 Terms Defined Elsewhere in this Agreement. For purposes of this Agreement, the following terms have meanings set forth in the sections indicated:

<u>Term</u>	<u>Section</u>
Accounting Referee	Section 3.10
Adjustment Escrow Agreement	Section 3.3(b)
Adjustment Escrow Amount	Section 3.3(b)
Adjustment Escrow Funds	Section 3.3(b)
Agreement	Preamble
Asset Acquisition Statement	Section 3.12
Assignment and Assumption Agreement	Section 4.2(c)
Assignment and Assumption of Leases and Related Agreements	Section 4.2(e)
Assumed Capital Lease Amount Difference	Section 3.11(b)(i)
Assumed Liabilities	Section 2.3
Bankruptcy Code	Recitals
Bankruptcy Court	Recitals
Breakup Fee	Section 4.5(a)
Business	Recitals
Capital Leases	Section 5.5(b)
Carve-Out	Section 4.5(b)
Cash Purchase Price	Section 3.1
Chapter 11 Case	Recitals
Closing	Section 4.1
Closing Date	Section 4.1
Confidentiality Agreement	Section 8.4
Credit Agreement	Section 1.1 (in Citizens Facility definition)
Deficiency	Section 3.11(c)
Deposit	Section 3.2(a)
Estimated Cure Costs Statement	Section 3.6
Escrow Agent	Section 3.2(a)
Escrow Agreement	Section 3.2(a)
Estimated Assumed Capital Lease Amount	Section 3.7
Estimated Assumed Capital Lease Amount Statement	Section 3.7
Estimated Fixed Assets Sales Statement	Section 3.5
Estimated Net Working Capital	Section 3.4
Estimated Seller Cure Costs Amount	Section 3.6
Estimated Seller Other Taxes Amount	Section 9.3(f)
Estimated Seller Transfer Tax Proration Amount	Section 9.3(a)
Estimated Sold Fixed Assets Amount	Section 3.5
Excluded Assets	Section 2.2
Excluded Contract	Section 2.5(b)
Excluded Liabilities	Section 2.4

<u>Term</u>	<u>Section</u>
Excluded Matter	Section 1.1 (in Seller Material Adverse Effect definition)
Executive Order	Section 6.9
Final Assumed Capital Lease Amount	Section 3.9
Final Assumed Capital Lease Amount Statement	Section 3.8
Final Cure Costs Statement	Section 3.8
Final Fixed Assets Amount	Section 3.10
Final Net Working Capital	Section 3.10
Final Seller Cure Costs Amount	Section 3.10
Final Seller Other Taxes Amount	Section 3.10
Final Tax Statement	Section 3.8
Final Fixed Assets Statement	Section 3.8
Material Contracts	Section 5.7(a)
Net Working Capital Difference	Section 3.11(a)(i)
Net Working Capital Schedule	Section 3.5
Non-Transfer Taxes	Section 9.3(f)
Nonassignable Assets	Section 2.6(c)
OFAC	Section 6.9
Other Final Adjustments Difference	Section 3.11(b)(i)
Outside Date	Section 4.4(b)
Owned Property or Owned Properties	Section 5.4(a)
Party or Parties	Preamble
Personal Property Leases	Section 5.5(a)
Proposed Allocation	Section 3.12
Protest Notice	Section 3.9
Purchase Price	Section 3.1
Purchased Assets	Section 2.1
Purchaser	Preamble
Purchaser Documents	Section 6.2
Real Property Lease or Real Property Leases	Section 5.4(b)
Revised Statements	Section 3.12
Schedules	Article 5
Seller	Preamble
Seller Cure Costs Amount	Section 2.4(k)
Seller Documents	Section 5.3
Seller Other Taxes Amount	Section 9.3(f)
Tax Claim	Section 9.3(c)
Taxable Consideration	Section 3.12
Transfer Taxes	Section 9.3(a)
Transferred Employees	Section 9.1(a)

### 1.3 Other Definitional and Interpretative Provisions.

(a) The words “hereof,” “herein,” and “hereunder” and words of similar import, when used in this Agreement, refer to this Agreement as a whole and not to any particular provision of this Agreement.

(b) The definitions contained in this Agreement are applicable to the singular as well as the plural forms of such terms and to the masculine as well as to the feminine and neuter genders of such term.

(c) Whenever the words “include,” “includes,” or “including” are used in this Agreement, they shall be deemed to be followed by the words “without limitation.”

(d) Any reference in this Agreement to “\$” shall mean United States dollars.

(e) When calculating the period of time before which, within which, or following which any act is to be done or step taken pursuant to this Agreement, the date that is the reference date in calculating such period shall be excluded. If the last day of such period is a non-Business Day, the period in question shall end on the next succeeding Business Day.

(f) Any agreement, instrument, statute, or regulation defined or referred to herein or in any agreement or instrument that is referred to herein means such agreement, instrument, statute, or regulation as from time to time amended, modified, or supplemented, including (in the case of agreements or instruments) by waiver or consent and (in the case of statutes or regulations) by succession of comparable successor statutes or regulations and references to all attachments thereto and instruments incorporated therein. References to a Person are also to its successors and permitted assigns.

(g) All Article and Section references herein are to Articles and Sections of this Agreement, unless otherwise specified.

(h) All Exhibits and Schedules annexed hereto or referred to herein are hereby incorporated in and made a part of this Agreement as if set forth in full herein. Any capitalized terms used in any Schedule or Exhibit but not otherwise defined therein shall be defined as set forth in this Agreement.

(i) This Agreement shall not be construed as if prepared by one of the Parties, but rather according to its fair meaning as a whole, as if all Parties had prepared it and, in the event an ambiguity or question of intent or interpretation arises, this Agreement shall be construed as jointly drafted by the Parties, and no presumption or burden of proof shall arise favoring or disfavoring any Party by virtue of the authorship of any provision of this Agreement.

## ARTICLE 2

### **PURCHASE AND SALE**

2.1 Purchase and Sale of Assets. On the terms and subject to the conditions set forth in this Agreement, at the Closing, Seller shall sell, transfer, assign, convey, and deliver to

Purchaser (or its designee), and Purchaser (or its designee) shall purchase, acquire, and accept from Seller, free and clear of any and all Liens (other than Liens created by Purchaser and Permitted Liens), Claims, Encumbrances, or Interests, all of Seller's right, title, and interest in, to, and under any and all of the assets, properties, rights, and claims of any kind or nature, whether tangible or intangible, real, personal, or mixed, wherever located and whether or not carried or reflected on the books and records of Seller, which are primarily used or primarily held for use in connection with the operation of the Business, excluding the Excluded Assets expressly identified in Section 2.2 (such assets, properties, rights, and claims to be acquired hereunder, collectively, the "Purchased Assets"). The Purchased Assets shall constitute, including without limitation, the following assets of Seller:

(a) all accounts and notes receivable and other rights to payment arising primarily from the conduct of the Business, other than any accounts and notes receivable or other rights to payment arising out of or relating to any Excluded Asset;

(b) other than tangible personal property described in another subsection of this Section 2.1, all tangible personal property owned by Seller primarily related to or primarily held for use in the conduct of the Business, including supplies, equipment, tools, machinery, dies, molds, computers, hardware, electronics, file servers, scanners, printers, networks, copiers, furniture, furnishings, fixtures, telephone lines, telecopy machines, telecommunication equipment, spare parts, shipping materials, packaging materials, raw materials, and other consumables relating to or available for sale or use in connection with the Business;

(c) all rights, title, and interest of Seller in each Owned Property and under each Real Property Lease that is a Purchaser Assumed Contract, together with all of Seller's right, title, and interest in and to all improvements, fixtures, and other appurtenances thereto and rights in respect thereof;

(d) all rights, title, and interest of Seller in and to any property subject to (i) a Personal Property Lease or (ii) a collateralized debt obligation of the Seller (other than the debt obligations of the Seller under the Citizens Facility) that is primarily related to or primarily held for use in the conduct of the Business, to the extent any such Personal Property Lease or collateralized debt obligation is a Purchaser Assumed Contract;

(e) the Purchased Intellectual Property;

(f) to the extent transferrable and/or assignable, after giving effect to the Sale Order, all of the rights and benefits accruing from and after the Closing under any of the Purchaser Assumed Contracts, including each Real Property Lease, Personal Property Lease, collateralized debt obligation, or Intellectual Property License that is a Purchaser Assumed Contract;

(g) all Documents that are primarily used in, primarily held for use in, or arise primarily out of, the Business, including Documents relating to marketing, advertising, promotional materials, Purchased Intellectual Property, and all files, customer files and documents (including credit information), supplier lists, records, literature, and correspondence, whether or not physically located on any of the premises referred to in

clause (e) above, but excluding (i) personnel files for Employees who are not Transferred Employees, (ii) such files as may not be transferred under Applicable Law regarding privacy, (iii) Documents that Seller is not permitted to transfer pursuant to any contractual confidentiality obligation owed to any third party, and (iv) Documents relating to an Excluded Asset or Excluded Liability;

(h) all of the rights and benefits accruing under any Permits primarily held, primarily used, or primarily made by Seller in the Business to the extent assignable, except any such Permit that is an Excluded Contract;

(i) all warranties and guarantees primarily related to the Purchased Assets, to the extent assignable, including warranties and guarantees made by suppliers, manufacturers, and contractors under the Purchased Assets, and claims against suppliers and other third parties in connection with the Purchaser Assumed Contracts;

(j) any rights, demands, claims, causes of action, rights of recovery, credits, allowances, rebates, or rights of setoff or subrogation primarily arising out of or primarily relating to any of the Purchased Assets or the Business;

(k) all Transferred Deposits;

(l) all inventory of Seller, wherever located, including all finished goods, work-in-process and raw materials, pre-paid parts and packaging; and

(m) all goodwill and other intangible assets primarily associated with the Business, including customer and supplier lists and the goodwill associated with the Purchased Intellectual Property.

2.2 Excluded Assets. Nothing herein contained shall be deemed to sell, transfer, assign, or convey the Excluded Assets to Purchaser, and Seller shall retain all right, title, and interest to, in, and under the Excluded Assets. "Excluded Assets" shall mean only the following assets:

(a) all Cash and all rights of Seller in respect of bank and brokerage accounts and lock boxes in its name or held on its behalf;

(b) all restricted cash of Seller relating to cash collateralized letters of credit and/or Excluded Liabilities;

(c) any accounts and notes receivable or other rights to payment arising out of or relating to any Excluded Asset;

(d) the Excluded Contracts, including any accounts receivable arising out of or in connection with any Excluded Contract;

(e) all equity interests in Seller;

(f) any (i) confidential personnel and medical records pertaining to any Employee of Seller not permitted to be transferred to Purchaser under Applicable Law; (ii) books and records that Seller is required by Law to retain or that relate exclusively to the Excluded Assets or the Excluded Liabilities, including Tax Returns, financial statements, and corporate or other entity filings; provided, however, that Purchaser shall have the right to make copies of any portions of such retained books and records that relate to the Business or any of the Purchased Assets or Assumed Liabilities; and (iii) corporate charters, qualifications to do business, taxpayer, and other identification numbers, corporate seals, minute books, stock ledgers, stock certificates, and any other documentation related to governance, organization, maintenance or existence of Seller; provided, that Purchaser shall have the right to make copies of any portions of such documents and records;

(g) any claim, right, or interest of Seller in or to any refund, rebate, abatement, or other recovery for Taxes, together with any interest due thereon or penalty rebate arising therefrom, for any Tax period (or portion thereof) ending on or before the Closing Date;

(h) all rights and claims of Seller under the Transaction Documents;

(i) all Debtor Benefit Plans (and any trusts, 501(c)(9) organizations, insurance (including fiduciary insurance), assets, administrative, or other service contracts relating thereto);

(j) all deposits with respect to any professional retainers (including all legal, accounting, financial advisory, valuation, investment banking, and other third party advisory or consulting fees and expenses) incurred by or on behalf of Seller or its Affiliates before the commencement of the Chapter 11 Case or in connection with the Chapter 11 Case or the Transactions;

(k) all insurance policies and all rights to applicable claims and proceeds thereunder, including rights to prepaid insurance premiums or insurance refunds or rebates;

(l) all deposits (including security deposits for rent, electricity, telephone, or otherwise, but excluding all Transferred Deposits) and prepaid or deferred charges and expenses of Seller;

(m) the assets, properties, and rights set forth on Schedule 2.2(m); and

(n) all rights, claims, and causes of action of Seller under the Bankruptcy Code (including chapter 5 thereof) and any similar claims and causes of action for avoidance, preference, or fraudulent conveyance under applicable state law and all rights, claims, and causes of action of Seller against any Employee, officer, or director of the Seller; provided that the Sale Order shall include a waiver and release of all such rights, claims, and causes of action except to the extent such rights, claims, and causes of action are preserved in paragraph 8 of the Settlement Stipulation by and among the Debtors, the Committee, and the Agent attached to, and authorized and approved by, the Order

Approving Settlement Stipulations by and among the Debtors, the Creditors' Committee, and the Agent [Docket No. 424].

2.3 Assumption of Liabilities. Except as otherwise provided in this Agreement, Purchaser shall assume certain Liabilities of Seller primarily related to or arising out of the Business or the Purchased Assets on or after the Petition Date (collectively, the "Assumed Liabilities"). On the terms and subject to the conditions set forth in this Agreement, at the Closing, Purchaser shall assume the Assumed Liabilities and shall agree to pay, discharge, perform, and otherwise satisfy such Assumed Liabilities in accordance with their respective terms, subject to any defenses or claimed offsets asserted in good faith against the obligee to whom such Liabilities of Seller is owed. Except as otherwise provided in this Agreement, the Assumed Liabilities shall include the following Liabilities:

(a) all Liabilities of Seller under the Purchaser Assumed Contracts arising after the Closing Date, including one-half (½) of all Cure Costs relating to the Purchaser Assumed Contracts; provided, however, that all amounts paid by Purchaser relating to such Cure Costs shall not exceed \$100,000;

(b) all trade accounts and other payables and expenses, including for utilities, owed to third parties in the ordinary course of business and that were incurred on or after the Petition Date;

(c) all Liabilities of Seller with respect to accrued and unpaid wages, accrued and unused vacation, sick days, unpaid health and welfare benefits and personal days, and the employer's share of any payroll Taxes, in each case with respect to Transferred Employees who accept Purchaser's offer of employment and commence employment with Purchaser; and

(d) 50% of all Transfer Taxes and those Taxes of Seller allocated to Purchaser in accordance with Section 2.3(c) and Section 9.3; and

(e) all Liabilities set forth on Schedule 2.3(e).

2.4 Excluded Liabilities. Purchaser shall not assume or in any manner whatsoever be liable or responsible for any Liabilities of Seller arising out of, relating to or otherwise in respect of the Business, the Employees, or the Purchased Assets prior to the Petition Date, other than the Assumed Liabilities. Without limiting the foregoing, Purchaser will not be obligated to assume, and does not assume, and hereby disclaims all of the following Liabilities of Seller (collectively, the "Excluded Liabilities"):

(a) all Liabilities of Seller to the extent specifically provided in Article 9;

(b) all Environmental Liabilities and Obligations, and all other Liabilities relating to any Laws in connection with any environmental, health, or safety matters based on facts arising or existing during Seller's operation of the Business prior to the Closing Date;

(c) 50% of all Transfer Taxes and all Liabilities for any other Taxes of Seller arising prior to the Closing Date except those allocated to Purchaser in accordance with Section 2.3(d) and Section 9.3;

(d) all Liabilities for accrued expenses and accounts payable incurred prior to the Petition Date, except to the extent that the same constitute Assumed Liabilities pursuant to Section 2.3;

(e) all Liabilities arising out of any of the Excluded Assets, including Excluded Contracts;

(f) all Liabilities arising as a result of any Action initiated at any time, to the extent related to the Business or the Purchased Assets, including any shareholder Actions, Actions for breach of contract, any tort Actions or failure to comply with "bulk-transfer" Laws;

(g) except as set forth in Section 2.3(c) or as provided in Article 9, all Liabilities of Seller with respect to its employment or termination of its employees before the Closing Date

(h) all Liabilities arising under any Indebtedness of Seller and any obligations or Liabilities to equity holders;

(i) all Liabilities with respect to any costs and expenses (including all professionals, legal, accounting, financial advisory, valuation, investment banking, and other third party advisory or consulting fees and expenses) incurred by or on behalf of Seller or its Affiliates in connection with the Chapter 11 Case or the Transactions;

(j) all other Liabilities arising out of or relating to the ownership or operation of the Business and the Purchased Assets prior to the Closing Date that are not Assumed Liabilities; and

(k) all Cure Costs relating to the Purchaser Assumed Contracts not otherwise assumed by the Purchaser pursuant to Section 2.3(a) (the "Seller Cure Costs Amount").

## 2.5 Assumed Contracts.

(a) At the Closing and pursuant to section 363 or 365 of the Bankruptcy Code and the Sale Order, Seller shall assign to Purchaser, and Purchaser shall assume and consent to such assignment from Seller, the Purchaser Assumed Contracts. All Cure Costs with respect to the Purchaser Assumed Contracts shall be paid in full by Purchaser on or after the Closing Date and the Purchase Price shall be adjusted pursuant to Sections 3.6 and 3.10(b).

(b) From the date hereof through the date that is five (5) Business Days prior to Auction, Purchaser shall have the right, by written notice to Seller and, with respect to removal, with the written consent of the Agent, to either (i) designate any Contract not already so designated to be a Purchaser Assumed Contract or (ii) remove any Contract



(other than an Extended Real Property Lease) from Schedule 1.1(c). Schedule 1.1(c) shall be amended to include or remove any such Contract as a Purchaser Assumed Contract. Any Contract removed from Schedule 1.1(c) with the consent of the Agent shall not be designated as a Purchaser Assumed Contract (each, an "Excluded Contract") for all purposes of this Agreement and all liabilities and obligations under such Contract shall be Excluded Liabilities for all purposes of this Agreement.

(c) Seller may in its sole and absolute discretion, subject to Applicable Laws, assume, assign, or reject any Contract other than a Purchaser Assumed Contract at any time; provided, however, that in the event Seller intends to do so prior to Closing, Seller shall notify Purchaser of such intent and Purchaser shall have five (5) Business Days to agree to treat said Contract as a Purchaser Assumed Contract. In the event Purchaser does not agree in writing to treat said Contract as a Purchaser Assumed Contract within said period, Seller may assume, assign, or reject such Contract in its sole and absolute discretion at any time thereafter; provided, however, Purchaser shall have no obligation or Liability on account of such assumed Contract unless Purchaser affirmatively designates such Contract as a Purchaser Assumed Contract.

## 2.6 Further Conveyances and Assumptions.

(a) From time to time following the Closing and except as prohibited by Law, Seller shall, or shall cause its Affiliates to, at Purchaser's expense, make available to Purchaser such non-confidential data in personnel records of its Employees to the extent that Purchaser intends to transition any such Employees into Purchaser's records.

(b) From time to time following the Closing, Seller and Purchaser shall, and shall cause their respective controlled Affiliates to, exercise commercially reasonable efforts to, execute, acknowledge, and deliver all such further conveyances, notices, assumptions, releases, and acquittances and such other instruments, and shall take such further actions, as may be reasonably necessary or appropriate to assure fully to Purchaser and its respective successors or assigns, all of the properties, rights, titles, interests, estates, remedies, powers, and privileges intended to be conveyed to Purchaser under this Agreement and the Seller Documents and to assure fully to Seller and its respective Affiliates and their respective successors and assigns, the assumption of the Assumed Liabilities assumed by Purchaser under this Agreement and the Seller Documents, and to otherwise make effective the transactions contemplated hereby and thereby.

(c) Nothing in this Agreement nor the consummation of the Transactions shall be construed as an attempt or agreement to transfer or assign any Purchased Asset, including any Contract, Permit, certificate, approval, authorization, or other right, that is not capable of being assigned pursuant to section 365 of the Bankruptcy Code or transferred pursuant to section 363 of the Bankruptcy Code to Purchaser at the Closing ("Nonassignable Assets") unless and until such assignment or transfer shall be permitted. Seller and Purchaser each shall use commercially reasonable efforts, at Purchaser's sole cost and expense, to cooperate with the other in endeavoring to obtain any required consent or relieve any applicable restriction; provided that no Party shall be obligated to

incur any costs or expenses or provide any financial accommodation or other consideration of any nature to any Person to facilitate the assignment or transfer of any Nonassignable Asset. Notwithstanding the foregoing, Seller shall not have any obligation to renew any Nonassignable Asset upon the expiration or termination thereof. In addition, to the extent that any Nonassignable Asset contains an "evergreen" provision that automatically renews such Nonassignable Asset unless terminated or cancelled by either party thereto, Seller shall not be prohibited from terminating or canceling such Nonassignable Asset as permitted pursuant to the terms thereof.

2.7 Bulk Sales Laws. Purchaser hereby waives compliance by Seller with the requirements and provisions of any "bulk-transfer" Laws of any jurisdiction that may otherwise be applicable with respect to the sale and transfer of any or all of the Purchased Assets to Purchaser.

2.8 Receivables. If, following the Closing, (a) Seller shall receive payment in respect of accounts receivable or other amounts or assets that are included in the Purchased Assets, then Seller shall hold such amounts in trust for Purchaser and shall promptly forward such payment to Purchaser and (b) Purchaser shall receive payment in respect of the Excluded Assets, then Purchaser shall hold such amounts in trust for Seller and shall promptly forward such payment to Seller.

2.9 Purchased Assets Sold "As Is, Where Is". PURCHASER ACKNOWLEDGES AND AGREES THAT THE PURCHASED ASSETS SOLD PURSUANT TO THIS AGREEMENT ARE SOLD, CONVEYED, TRANSFERRED, AND ASSIGNED ON AN "AS IS, WHERE IS" BASIS "WITH ALL FAULTS" AND THAT, NOTWITHSTANDING ANYTHING SET FORTH HEREIN OR IN ANY OTHER TRANSACTION DOCUMENT TO THE CONTRARY, SELLER MAKES NO REPRESENTATIONS OR WARRANTIES, TERMS, CONDITIONS, UNDERSTANDINGS, OR COLLATERAL AGREEMENTS OF ANY NATURE OR KIND, EXPRESS OR IMPLIED, BY STATUTE OR OTHERWISE CONCERNING THE PURCHASED ASSETS OR THE CONDITION, DESCRIPTION, QUALITY, USEFULNESS, QUANTITY, OR ANY OTHER THING AFFECTING OR RELATING TO THE PURCHASED ASSETS INCLUDING ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, WHICH WARRANTIES ARE ALSO HEREBY EXPRESSLY DISCLAIMED. SELLER FURTHER MAKES NO REPRESENTATIONS OR WARRANTIES, TERMS, CONDITIONS, UNDERSTANDINGS, OR COLLATERAL AGREEMENTS OF ANY NATURE OR KIND, EXPRESS OR IMPLIED, BY STATUTE OR OTHERWISE CONCERNING THE CONDITION OF ANY REAL PROPERTY OWNED, LEASED OR USED IN THE BUSINESS OR WITH REGARD TO THE USE, EXISTENCE OR RELEASE OF ANY HAZARDOUS MATERIALS AT, ON, UNDER OR AROUND ANY REAL PROPERTY OWNED, LEASED OR USED IN THE BUSINESS.

EXCEPT AS EXPLICITLY SET FORTH IN ARTICLE 5, SELLER MAKES NO REPRESENTATIONS OR WARRANTIES, AND PURCHASER SPECIFICALLY DISCLAIMS THAT IT IS RELYING UPON OR HAS RELIED UPON ANY OTHER REPRESENTATIONS OR WARRANTIES THAT MAY HAVE BEEN MADE BY SELLER OR ANY OTHER PERSON, AND PURCHASER ACKNOWLEDGES AND AGREES THAT

SELLER HAS SPECIFICALLY DISCLAIMED AND DOES HEREBY SPECIFICALLY DISCLAIM ANY SUCH OTHER REPRESENTATION OR WARRANTY MADE BY SELLER OR ANY OTHER PERSON.

PURCHASER ACKNOWLEDGES THAT IT IS A SOPHISTICATED PURCHASER WHO HAS HERETOFORE HAD OPEN ACCESS TO, AND SUFFICIENT TIME TO REVIEW, ALL INFORMATION, DOCUMENTS, AGREEMENTS, STUDIES, AND TESTS RELATING TO THE PURCHASED ASSETS THAT PURCHASER DEEMED OR DEEMS NECESSARY TO REVIEW, AND HAS CONDUCTED A COMPLETE AND THOROUGH INSPECTION, ANALYSIS, AND EVALUATION OF THE PURCHASED ASSETS, INCLUDING ENVIRONMENTAL TESTING. PURCHASER, FOR ITSELF AND ON BEHALF OF ITS SUCCESSORS AND ASSIGNS, HEREBY FOREVER RELEASES AND DISCHARGES SELLER, ITS CONSTITUENT OWNERS, AND THEIR RESPECTIVE TRUSTEES, AGENTS, AND EMPLOYEES, FROM ANY AND ALL LIABILITY, RESPONSIBILITY, CLAIMS, DAMAGES, LOSSES, AND EXPENSES, KNOWN OR UNKNOWN, FORESEEN OR UNFORESEEN, ARISING OUT OF OR RELATED IN ANY WAY TO THE CONDITION OF THE PURCHASED ASSETS OR THEIR SUITABILITY FOR ANY PURPOSE.

PURCHASER HAS UNDERTAKEN SUCH INVESTIGATION AS PURCHASER DEEMED NECESSARY TO MAKE PURCHASER FULLY AWARE OF THE CONDITION OF THE PURCHASED ASSETS AS WELL AS ALL FACTS, CIRCUMSTANCES, AND INFORMATION THAT MAY AFFECT THE USE AND OPERATION OF THE PURCHASED ASSETS AND THE BUSINESS, AND PURCHASER COVENANTS AND WARRANTS TO SELLER THAT PURCHASER HAS RELIED AND SHALL RELY SOLELY ON PURCHASER'S OWN DUE DILIGENCE INVESTIGATION IN DETERMINING TO PURCHASE THE PURCHASED ASSETS. THE PROVISIONS OF THIS SECTION 2.9 SHALL SURVIVE THE CLOSING OR EARLIER TERMINATION OF THIS AGREEMENT AND SHALL BE INCORPORATED INTO THE CLOSING DOCUMENTS TO BE DELIVERED AT CLOSING.

### ARTICLE 3

#### **PURCHASE PRICE**

3.1 Purchase Price. The aggregate consideration for the Purchased Assets (the "Purchase Price") shall be:

(a) payment of an amount in cash at Closing equal to \$22,500,000 (the "Cash Purchase Price"); plus or minus (i) the adjustments under Sections 3.4(a) and 3.4(b), as applicable; minus (ii) the Estimated Sold Fixed Assets Amount calculated pursuant to Section 3.5; minus (iii) the Estimated Seller Cure Costs Amount calculated pursuant to Section 3.6, plus or minus (iv) the adjustments under Sections 3.7(a) and 3.7(b), as applicable; plus (v) the Seller LC Payment pursuant to Section 8.9, if any; minus (vi) the Estimated Seller Transfer Tax Amount calculated pursuant to Section 9.3(a), if any; minus (vii) the Estimated Seller Other Taxes Amount calculated pursuant to Section

9.3(f), if any, plus (viii) the aggregate amount of the Transferred Deposits pursuant to the Transferred Deposits Statement; and

(b) the assumption of Assumed Liabilities.

### 3.2 Deposit.

(a) Upon the execution of this Agreement, Purchaser shall deposit with Chicago Title Insurance Company, a Nebraska corporation, as escrow agent (the "Escrow Agent"), pursuant to that certain Escrow Agreement, dated as of the date hereof, among Seller, Purchaser, the Agent and the Escrow Agent (the "Escrow Agreement"), by certified check or wire transfer of immediately available funds, an amount equal to \$1,125,000 (the "Deposit"). Purchaser, on the one hand, and Seller, on the other hand, shall each be liable for one-half (½) of the fees and expenses of the Escrow Agent.

(b) The Parties agree that the Deposit shall not accrue interest and shall (i) be applied as a deposit towards the Cash Purchase Price and delivered to Seller at Closing as provided in Section 3.3(c), (ii) be returned to Purchaser (less Purchaser's half of the Escrow Agent's fees and expenses) in the event that this Agreement is terminated pursuant to any provision of Section 4.4 other than by Seller (A) pursuant to Section 4.4(i) or (B) pursuant to Section 4.4(b) in the event that Closing does not occur on or before the Outside Date as a result of Purchaser's material breach of its obligations under this Agreement (including non-payment of the Cash Purchase Price pursuant to Section 3.3), or (iii) be paid to Seller (less Seller's half of the Escrow Agent's fees and expenses) in the event that this Agreement is properly terminated by Seller (A) pursuant to Section 4.4(i) or (B) pursuant to Section 4.4(b) in the event that Closing does not occur on or before the Outside Date as a result of Purchaser's material breach of its obligations under this Agreement (including non-payment of the Cash Purchase Price pursuant to Section 3.3).

### 3.3 Payment of Purchase Price.

(a) At the Closing, Purchaser shall deliver, or cause to be delivered, to Seller an amount equal to the Cash Purchase Price (as adjusted pursuant to Section 3.1(a)) minus the Deposit (less the Escrow Agent's fees and expenses) and minus the Adjustment Escrow Amount by wire transfer of immediately available funds.

(b) At the Closing, Purchaser shall deposit an amount equal to \$750,000 (the "Adjustment Escrow Amount") with the Escrow Agent pursuant to an Escrow Agreement, dated as of the Closing, among Seller, Purchaser, and the Escrow Agent (the "Adjustment Escrow Agreement"), by certified check or wire transfer of immediately available funds, and such funds plus all income accrued thereon (the "Adjustment Escrow Funds") shall be maintained by the Escrow Agent and administered and payable in accordance with the Adjustment Escrow Agreement.

(c) At the Closing, Seller and Purchaser shall jointly instruct the Escrow Agent to transfer to Seller an amount equal to the Deposit less the Escrow Agent's fees

and expenses, by wire transfer of immediately available funds into an account designated in writing by Seller.

3.4 Estimated Net Working Capital Adjustment. At least two (2) Business Days prior to the Closing, the Seller shall deliver to the Purchaser an estimate of the Net Working Capital (the "Estimated Net Working Capital") which shall be reasonably acceptable to Purchaser.

(a) If the Estimated Net Working Capital is less than the Net Working Capital Target, the cash consideration to be paid to Seller at the Closing shall be reduced by such difference; or

(b) If the Estimated Net Working Capital is greater than the Net Working Capital Target, the cash consideration to be paid to Seller at the Closing shall be increased by such difference.

3.5 Fixed Assets Adjustment. At least two (2) Business Days prior to the Closing, the Seller shall deliver to the Purchaser an accurate and complete statement setting forth an estimate of the Sold Fixed Assets Amount and the terms of each Disposition by the Seller since June 10, 2016 (the "Estimated Fixed Assets Sales Statement") that is acceptable to Purchaser in its sole discretion. Upon receipt of the Estimated Fixed Assets Sales Statement, Purchaser and its accountants will be given reasonable access upon reasonable notice to Seller's relevant books, records, work papers, and personnel during business hours for the purpose of verifying the information in the Estimated Fixed Assets Sales Statement. The Sold Fixed Assets Amount set forth on the Estimated Fixed Assets Sales Statement accepted by Purchaser shall be a deduction from the cash consideration to be paid to Seller at the Closing (the "Estimated Sold Fixed Assets Amount").

3.6 Cure Costs Adjustment. At least two (2) Business Days prior to the Closing, the Seller shall deliver to the Purchaser an accurate and complete statement that describes all Cure Costs relating to the Purchaser Assumed Contracts and an estimate of the Seller Cure Costs Amount (the "Estimated Cure Costs Statement") that is acceptable to Purchaser in its sole discretion. Upon receipt of the Estimated Cure Costs Statement, Purchaser and its accountants will be given reasonable access upon reasonable notice to Seller's relevant books, records, work papers, and personal during business hours for the purpose of verifying the information in the Estimated Cure Costs Statement. The cash consideration to be paid to Seller at the Closing shall be reduced by the Seller Cure Costs Amount described in the Estimated Cure Costs Statement accepted by Purchaser (the "Estimated Seller Cure Costs Amount").

3.7 Assumed Capital Lease Adjustment. At least two (2) Business Days prior to the Closing, the Seller shall deliver to the Purchaser an accurate and complete statement (the "Estimated Assumed Capital Lease Amount Statement") that sets forth an estimate of the Assumed Capital Lease Amount (the "Estimated Assumed Capital Lease Amount") that is acceptable to Purchaser in its sole discretion. Upon receipt of the Estimated Assumed Capital Lease Amount Statement, Purchaser and its accountants will be given reasonable access upon reasonable notice to Seller's relevant books, records, work papers, and personal during business hours for the purpose of verifying the information in the Estimated Assumed Capital Lease Amount Statement.

(a) If the Estimated Assumed Capital Lease Amount is greater than the Target Assumed Capital Lease Amount, the cash consideration to be paid to Seller at the Closing shall be reduced by such difference; or

(b) If the Estimated Assumed Capital Lease Amount is less than the Target Assumed Capital Lease Amount, the cash consideration to be paid to Seller at the Closing shall be increased by such difference.

Notwithstanding the foregoing, Seller and Purchaser agree that if, between the date of this agreement and the Closing Date, any Purchased Asset are returned or disposed of such that Seller is unable to deliver such Purchased Assets to Purchaser at Closing, including if the Bankruptcy Court determines that any Assumed Capital Leases relating to any such Purchased Assets are not assignable, Purchaser shall not assume the Assumed Capital Leases relating to such Purchased Assets, and the Target Assumed Capital Lease Amount shall be decreased by the amount of the indebtedness set forth on Exhibit E relating to such Assumed Capital Leases.

3.8 Final Adjustment Statements. On or before the date that is sixty (60) days following the Closing Date, Purchaser or its representatives shall prepare: (i) a statement in the form of Exhibit C setting forth its determination of Net Working Capital (the "Final Net Working Capital Statement"); (ii) a statement setting forth its determination of the Sold Fixed Assets Amount (the "Final Fixed Assets Statement"); (iii) a statement setting forth its determination of the Seller Cure Costs Amount (the "Final Cure Costs Statement"); (iv) a statement setting forth its determination of the Assumed Capital Lease Amount (the "Final Assumed Capital Lease Amount Statement"); (v) a statement setting forth its determination of the Seller Transfer Tax Amount (the "Final Transfer Tax Statement"); and (vi) a tax statement setting forth its determination of the Seller Other Taxes Amount (the "Final Tax Statement"), and collectively with the Final Net Working Capital Statement, the Final Fixed Assets Statement, the Final Cure Costs Statement, Final Assumed Capital Lease Amount Statement and the Final Transfer Tax Statement, the "Final Adjustment Statements", and shall deliver each of the Final Adjustment Statements to Seller and Agent. Upon receipt of the Final Adjustment Statements, Seller and Agent and their respective accountants will be given reasonable access upon reasonable notice to Purchaser's relevant books, records, work papers, tax invoices, appraisals and personnel during business hours for the purpose of verifying the proposed, or otherwise determining the appropriate, final Net Working Capital, Sold Fixed Assets Amount, Seller Cure Costs Amount, Assumed Capital Lease Amount, Seller Transfer Tax Amount, and Seller Other Taxes Amount, as applicable.

3.9 Protest Notice. Within forty-five (45) days of Purchaser's delivery of the Final Adjustment Statements, Seller or Agent may deliver one or more written notices (each a "Protest Notice") to Purchaser of any objections, specifying in reasonable detail any contested amounts and the basis therefor, which Seller or Agent may have to any of the Final Adjustment Statements, including a statement in the form of Exhibit C setting forth Seller's or Agent's determination of Net Working Capital. The failure of Seller or Agent to deliver such Protest Notice within the prescribed time period will constitute Seller's or Agent's, as applicable, acceptance as final of any of the following that are not included in a Protest Notice: (i) the Net Working Capital as set forth on the Final Net Working Capital Statement, and such amount shall thereupon be deemed the "Final Net Working Capital" for purposes of this Agreement; (ii) the

Sold Fixed Assets Amount as set forth on the Final Fixed Assets Statement, and such amount shall thereupon be deemed the "Final Sold Fixed Assets Amount" for purposes of this Agreement; (iii) the Seller Cure Costs Amount as set forth on the Final Cure Costs Statement, and such amount shall thereupon be deemed the "Final Seller Cure Costs Amount" for purposes of this Agreement; (iv) the Assumed Capital Lease Amount as set forth on the Final Assumed Capital Lease Amount Statement, and such amount shall thereupon be deemed the "Final Assumed Capital Lease Amount" for purposes of this Agreement; (v) the Seller Transfer Tax Amount as set forth on the Final Transfer Tax Statement, and such amount shall thereupon be deemed the "Final Seller Transfer Tax Amount" for purposes of this Agreement; and (vi) the Seller Other Taxes Amount as set forth on the Final Tax Statement, and such amount shall thereupon be deemed the "Final Seller Other Taxes Amount" for purposes of this Agreement. Any amounts not disputed in a Protest Notice (if one or more are delivered) shall be deemed to be accepted by Seller and Agent as final.

3.10 Resolution of the Protest. If Purchaser and Seller or Agent, if applicable, are unable to resolve any disagreement with respect to any of the Final Adjustment Statements within thirty (30) days following Purchaser's receipt of the Protest Notice or, if more than one, receipt of the latest in time Protest Notice (which negotiations shall not be discoverable by the Accounting Referee), then only the amounts in dispute will be referred to an independent accountant to be mutually agreed upon by Seller (or Agent, if applicable) and Purchaser (the "Accounting Referee") for final determination within thirty (30) days after such referral. The determinations by the Accounting Referee of the amounts in dispute shall be based on the respective claims set forth in the respective presentations by Purchaser and Seller (or Agent, if applicable), and no additional claims shall be introduced by the Accounting Referee. For the avoidance of doubt, the Accounting Referee shall be entitled, in making such determinations, to utilize and rely upon his skills and experience applying generally accepted accounting principles, including without limitation promulgations of the Financial Accounting Standards Board. Any determination by the Accounting Referee shall not be outside the range of the amounts proposed by Purchaser and Seller or Agent, if applicable, in the applicable Final Adjustment Statements and in any applicable Protest Notice, and such determination shall be final, binding, and non-appealable upon the Parties (absent fraud or manifest clerical error). Each of Purchaser, on the one hand, and Seller on the other hand, shall bear that percentage of the fees and expenses of the Accounting Referee equal to the proportion (expressed as a percentage) of the dollar value of the disputed amounts determined in favor of the other party by the Accounting Referee. For purposes of this Agreement, "Final Net Working Capital", "Final Sold Fixed Assets Amount", "Final Seller Cure Costs Amount", "Final Assumed Capital Lease Amount", "Final Seller Transfer Tax Amount" and "Final Seller Other Taxes Amount" mean respectively, the Net Working Capital, Sold Fixed Assets Amount, Seller Cure Costs Amount, Assumed Capital Lease Amount, Seller Transfer Tax Amount and Seller Other Taxes Amount as finally determined pursuant to this Section 3.10 or Section 3.9.

3.11 Final Adjustments. Within ten (10) days of the determination of the Final Net Working Capital, Final Sold Fixed Assets Amount, Final Seller Cure Costs Amount, Final Assumed Capital Lease Amount, Final Seller Transfer Tax Amount and Final Seller Other Taxes Amount, as applicable:

(a) Final Net Working Capital Adjustments.

(i) If the Estimated Net Working Capital is greater than the Final Net Working Capital, Seller and Purchaser will deliver a joint written instruction to the Escrow Agent to promptly deliver to Purchaser the amount of such difference (the "Net Working Capital Difference") from the Adjustment Escrow Funds (and to Seller any amounts remaining in the Adjustment Escrow Funds after the Net Working Capital Difference has been paid in full to Purchaser, and after taking into account the other final adjustments in Sections 3.11(b) and 3.11(c)).

(ii) If the Estimated Net Working Capital is less than the Final Net Working Capital, Purchaser shall pay to Seller an amount equal to such difference by wire transfer in immediately available funds, and Seller and Purchaser will deliver a joint written instruction to the Escrow Agent to promptly deliver to Seller the Adjustment Escrow Funds.

(b) Final Assumed Capital Lease Amount Adjustments.

(i) If the Estimated Assumed Capital Lease Amount is less than the Final Assumed Capital Lease Amount, Seller and Purchaser will deliver a joint written instruction to the Escrow Agent to promptly deliver to Purchaser the amount of such difference (the "Assumed Capital Lease Amount Difference") from the Adjustment Escrow Funds (and to Seller any amounts remaining in the Adjustment Escrow Funds after the Assumed Capital Lease Amount Difference has been paid in full to Purchaser, and after taking into account the other final adjustments in Sections 3.11(a) and 3.11(c)).

(ii) If the Estimated Assumed Capital Lease Amount is greater than the Final Assumed Capital Lease Amount, Purchaser shall pay to Seller an amount equal to such difference by wire transfer in immediately available funds, and Seller and Purchaser will deliver a joint written instruction to the Escrow Agent to promptly deliver to Seller the Adjustment Escrow Funds.

(c) Other Final Adjustments.

(i) If the aggregate amount of the Estimated Sold Fixed Assets Amount, Estimated Seller Cure Costs Amount, Estimated Seller Transfer Tax Amount and Estimated Seller Other Taxes Amount is less than the aggregate amount of the Final Sold Fixed Assets Amount, Final Seller Cure Costs Amount, Final Seller Transfer Tax Amount and Final Seller Other Taxes Amount, Seller and Purchaser will deliver a joint written instruction to the Escrow Agent to promptly deliver to Purchaser the amount of such difference (the "Other Final Adjustments Difference") from the Adjustment Escrow Funds (and to Seller any amounts remaining in the Adjustment Escrow Funds after such Other Final Adjustments Difference has been paid in full to Purchaser, and after taking into account the net working capital adjustments in Sections 3.11(a) and 3.11(b)).

(ii) If the aggregate amount of the Estimated Sold Fixed Assets Amount, Estimated Seller Cure Costs Amount, Estimated Seller Transfer Tax Amount and Estimated Seller Other Taxes Amount is greater than the aggregate



amount of the Final Sold Fixed Assets Amount, Final Seller Cure Costs Amount, Final Seller Transfer Tax Amount and Final Seller Other Taxes Amount, Purchaser shall pay to Seller an amount equal to such difference by wire transfer in immediately available funds, and Seller and Purchaser will deliver a joint written instruction to the Escrow Agent to promptly deliver to Seller the Adjustment Escrow Funds.

(d) If the Adjustment Escrow Funds are insufficient to pay to Purchaser the full amounts of any Net Working Capital Difference, Assumed Capital Lease Amount Difference and any Other Final Adjustments Difference (collectively the “Deficiency”), Seller shall not be further obligated to pay to Purchase an amount equal to such Deficiency and any claim of the Purchaser against the Seller in respect of such Deficiency shall be deemed released in full by the Purchaser upon payment to the Purchaser of the Adjustment Escrow Funds.

3.12 Allocation of Purchase Price. No later than thirty (30) days after determination of the final adjustments pursuant to Section 3.11, Purchaser shall prepare and deliver to Seller an allocation of the Cash Purchase Price (as adjusted pursuant to Section 3.1(a)), the Assumed Liabilities and any other items that are treated as additional purchase price for Tax purposes (the “Taxable Consideration”) among the Purchased Assets in accordance with Section 1060 of the Code (the “Proposed Allocation”). Seller shall have thirty (30) days after receipt of the Proposed Allocation to notify Purchaser in writing of any items of the Proposed Allocation that are not reasonable in Seller’s view. If Seller does not object in writing during such thirty (30) day period, then the Proposed Allocation shall be final and binding on all Parties. If Seller objects in writing during such thirty (30) day period, then the Parties shall cooperate in good faith to reach a mutually agreeable allocation of the Taxable Consideration, which allocation shall be binding on all Parties. If the Parties are unable to reach an agreement within sixty (60) days of Seller’s receipt of the Proposed Allocation, then any disputed items shall be referred to the Accounting Referee for resolution, and the determination of the Accounting Referee shall be final and binding on the Parties. The fees and expenses of the Accounting Referee shall be paid fifty percent (50%) by Purchaser and fifty percent (50%) by Seller. In accordance with such binding allocation, Purchaser shall prepare and deliver to Seller copies of Form 8594 and any required exhibits thereto (the “Asset Acquisition Statement”). Purchaser shall prepare and deliver to Seller (or its designated successors) from time to time revised copies of the Asset Acquisition Statement (the “Revised Statements”) so as to report any matters on the Asset Acquisition Statement that need updating, consistent with the agreed upon allocation. The Parties shall, and shall cause their respective controlled Affiliates to, use the allocations set forth in the Asset Acquisition Statement or, if applicable, the last Revised Statement, for all Tax purposes and to file all Tax Returns in a manner consistent with such allocation statement and take no position contrary thereto, in each case, unless required to do so by applicable Tax Laws or good faith resolution of a Tax contest.

## ARTICLE 4

### CLOSING AND TERMINATION

4.1 Closing Date. Subject to the satisfaction of the conditions set forth in Section 10.1, Section 10.2, and Section 10.3 (or the waiver thereof by the Party entitled to waive each such condition coupled with the consent of the Agent as to any such waiver by the Seller), the closing of the purchase and sale of the Purchased Assets and the assumption of the Assumed Liabilities provided for in Article 2 (the "Closing") shall take place at the offices of Paul Hastings LLP located at 71 South Wacker Drive, Suite 4500, Chicago, Illinois 60606 (or at such other place as the Parties may designate in writing) at 10:00 a.m. (prevailing Central time) on the date that is two (2) Business Days following the satisfaction or waiver of the conditions set forth in Article 10 (other than conditions that by their nature are to be satisfied at the Closing, but subject to the satisfaction or waiver of such conditions), unless another time or date, or both, are agreed to in writing by the Parties. The date on which the Closing shall be held is referred to in this Agreement as the "Closing Date." Unless otherwise agreed by the Parties in writing, the Closing shall be deemed effective and all right, title, and interest of Seller to be acquired by Purchaser hereunder shall be considered to have passed to Purchaser as of 12:01 a.m. (prevailing Central time) on the Closing Date.

4.2 Deliveries by Seller. At the Closing, Seller shall deliver, or cause to be delivered, to Purchaser:

- (a) for each Owned Property listed on Schedule 5.4(a), a general warranty deed duly executed by the Seller;
- (b) a duly executed bill of sale in the form attached as Exhibit F hereto;
- (c) a duly executed assignment and assumption agreement in the form attached as Exhibit G hereto (the "Assignment and Assumption Agreement");
- (d) duly executed assignments transferring all of Seller's rights, titles, and interests in and to the Intellectual Property included in the Purchased Intellectual Property, in a form suitable for recording in the U.S. Patent and Trademark Office and U.S. Copyright Office;
- (e) duly executed assignment and assumption agreements with respect to the leases being assigned (the "Assignments and Assumption of Leases and Related Agreements");
- (f) a certificate of non-foreign status pursuant to Section 1445 of the Code and Treasury Regulation Section 1.1445-2(b);
- (g) a copy of the Sale Order entered by the Bankruptcy Court
- (h) a duly executed Adjustment Escrow Agreement; and

(i) a certificate signed by an authorized officer of Seller (in form and substance reasonably satisfactory to Purchaser) pursuant to Section 10.1(a) and Section 10.1(b).

4.3 Deliveries by Purchaser. At the Closing, Purchaser shall deliver, or cause to be delivered, to Seller or to its respective designees:

(a) the Cash Purchase Price (as adjusted pursuant to Section 3.1(a)), as provided in Section 3.3(a);

(b) a duly executed copy of the Assignment and Assumption Agreement;

(c) duly executed Assignments and Assumption of Leases and Related Agreements;

(d) all state, county, and municipal transfer tax forms that are legally or customarily required to be executed by Purchaser to effectuate the real property transfers;

(e) irrevocable letters of credit or other form of surety, in form and substance satisfactory to the applicable holder, in substitution for the applicable letters of credit set forth on Schedule 4.3(e);

(f) a duly executed Adjustment Escrow Agreement; and

(g) a certificate signed by an authorized officer of Purchaser (in form and substance reasonably satisfactory to Seller) pursuant to Section 10.2(a) and Section 10.2(b).

4.4 Termination of Agreement. This Agreement may be terminated prior to the Closing Date as follows:

(a) at any time prior to the Closing Date by the joint written consent of Seller, Purchaser and Agent;

(b) by Seller (with the written consent of the Agent) or Purchaser if the Closing has not occurred on or before November 30, 2016 (as may be extended by written agreement of the Parties with the consent of the Agent, the "Outside Date"); provided, however, that a Party may not terminate this Agreement pursuant to this Section 4.4(b) if such Party is in breach of its obligations hereunder in any material respect and such breach is the sole reason that the Closing has not occurred by such date;

(c) by the Purchaser or Seller prior to entry of the Sale Order, if: (i) the Bankruptcy Court enters an Order approving an Alternative Bid; or (ii) if Purchaser is not the successful bidder at the Auction; provided that, if Purchaser is the Backup Bidder, then Purchaser shall not be permitted to terminate this Agreement pursuant to this Section 4.4(c) until after the earlier of (A) the closing of an Alternative Transaction and (B) the Outside Date;

(d) by Seller (with the written consent of the Agent) or Purchaser, if an Order is entered by a Governmental Authority of competent jurisdiction having valid enforcement authority permanently restraining, prohibiting, or enjoining either Party from consummating the Transactions and such Order shall have become final and non-appealable or shall not have been vacated prior to the Outside Date;

(e) by Purchaser if the Bidding Procedures Hearing has not been held by October 5, 2016 or if the Bidding Procedures Order has not been entered by the Bankruptcy Court within two (2) Business Days after the conclusion of the Bidding Procedures Hearing, provided that such termination occurs within five Business Days of such applicable date;

(f) by Purchaser if the Sale Order has not been entered by the Bankruptcy Court on or before the date that is forty-five (45) days after the date the Bidding Procedures Order is entered by the Bankruptcy Court, provided that such termination occurs within five Business Days of such date;

(g) by Purchaser, if the Chapter 11 Case is dismissed or converted to a case under chapter 7 of the Bankruptcy Code for any reason;

(h) by Purchaser, so long as Purchaser is not in breach of its obligations under this Agreement in any material respect, upon a material breach of any covenant or agreement of Seller set forth in this Agreement, or if any representation or warranty of Seller shall have been or becomes untrue in any material respect, in each case such that the conditions set forth in Section 10.1(a) or Section 10.1(b), as the case may be, would not be satisfied and such breach or untruth cannot be cured by the Outside Date;

(i) by Seller (with the written consent of the Agent), so long as Seller is not in breach of its obligations under this Agreement in any material respect, upon a material breach of any covenant or agreement of Purchaser set forth in this Agreement, or if any representation or warranty of Purchaser shall have been or becomes untrue in any material respect, in each case such that the conditions set forth in Section 10.2(a) or Section 10.2(b), as the case may be, would not be satisfied and such breach or untruth cannot be cured by the Outside Date; or

(j) by Purchaser if, Purchaser, or one of its Affiliates, has not entered into an employment agreement with each of Bennie Wharry, Wade Holt and Kiel Wirgau, in such form and on such terms as are reasonably acceptable to Purchaser and such individuals, by the first Business Day immediately prior to the date on which the Bidding Procedures Hearing commences (the "Bidding Procedures Hearing"). The right of the Purchaser to terminate this Agreement pursuant to this subsection (j) shall expire and be of no further force or effect if not exercised prior to the commencement of the Bidding Procedures Hearing.

Notwithstanding anything in this Section 4.4 to the contrary, the consent of the Agent shall not be required for any termination by Seller if the board of directors of Seller determines that the failure to exercise such right to terminate this Agreement would result in the breach of its fiduciary duties under applicable Law.

#### 4.5 Breakup Fee and Expense Reimbursement.

(a) In the event that the Bankruptcy Court approves and Seller consummates an Alternative Bid received in connection with the Auction, Seller shall promptly, after receipt of cash consideration in connection with the closing of such Alternative Bid, pay to Purchaser by wire transfer of immediately available funds a breakup fee equal to \$675,000 (the “Breakup Fee”) together with the Expense Reimbursement; provided, however, that the Breakup Fee and Expense Reimbursement shall not be payable if this Agreement is terminated pursuant to Section 4.4(a), 4.4(b), 4.4(d), 4.4(e), 4.4(f), 4.4(g), 4.4(i) or 4.4(j). Notwithstanding the foregoing, (i) if this Agreement is terminated pursuant to Section 4.4(h), Purchaser shall be entitled to the Expense Reimbursement and (ii) if this Agreement is terminated pursuant to Section 4.4(h) and only upon the occurrence of one of the following events, either of which must occur within thirty (30) days of such termination: (A) an Alternative Transaction is consummated; or (B) the assets of Seller are transferred to Agent (via credit bid or otherwise), Purchaser shall be entitled to the Breakup Fee.

(b) Seller’s obligation to pay the Breakup Fee and the Expense Reimbursement pursuant to Section 4.5(a) shall (i) survive termination of this Agreement, (ii) constitute a super priority administrative expense, which, except as set forth in the final sentence of this Section 4.5(b), shall be payable ahead of any other administrative claims, and (iii) not be discharged, modified, or otherwise affected by any Chapter 11 plan or by any other Order of the Bankruptcy Court. Any Breakup Fee or Expense Reimbursement that becomes payable under this Agreement shall be paid either (x) out of the proceeds of an Alternative Bid at the time such proceeds are delivered by the purchaser thereunder, (y) from other Cash of the Seller, or (z) from the Agent in the event the assets of Seller are transferred to Agent via credit bid or otherwise. Nothing in this Section 4.5(b) shall prevent any party from receiving payment pursuant to the “Carve-Out” as defined in and set forth in the Amended and Restated Final Order Authorizing the Use of Cash Collateral and Granting Adequate Protection [Docket No 423].

#### 4.6 Effect of Termination.

(a) No termination of this Agreement pursuant to Section 4.4 shall be effective until notice thereof is given to the non-terminating Party specifying the provision hereof pursuant to which such termination is made. In the event that this Agreement is validly terminated as provided herein, this Agreement shall become wholly void and of no further force and effect without liability to Purchaser or Seller, or any of their respective Representatives, and each shall be fully released and discharged from any Liability or obligation after the date of such termination and such termination shall be without liability to Purchaser or Seller; provided, however, that (i) if this Agreement is properly terminated by Seller (A) pursuant to Section 4.4(i), or (B) pursuant to Section 4.4(b) in the event that Closing does not occur on or before the Outside Date as a result of Purchaser’s material breach of its obligations under this Agreement (including non-payment of the Cash Purchase Price pursuant to Section 3.3), the sole and exclusive remedy of Seller against Purchaser with respect to this Agreement shall be the right to

receive the Deposit and (ii) the obligations of the Parties under the Escrow Agreement and Sections 3.2(b), 4.5, 4.6, 8.4, and Article 12 of this Agreement shall survive any such termination and shall be enforceable hereunder. Seller and Purchaser acknowledge that the agreements contained in Section 4.5 are an integral part of the transaction contemplated by this Agreement that the Deposit is not a penalty, but rather is liquidated damages in a reasonable amount that will compensate Seller for the substantial costs and expenses that Seller has incurred, and will incur prior to Closing, and the efforts and resources expended and opportunities foregone while negotiating this Agreement and in reliance on this Agreement on the expectation of the consummation of the transactions contemplated hereby, which amount would otherwise would be impossible to calculate with precision.

(b) In the event this Agreement is properly terminated by Purchaser in accordance with the terms hereof, the sole and exclusive remedy of Purchaser against Seller with respect to this Agreement shall be Purchaser's right to return of the Deposit as provided in Sections 3.2(b)(ii) and 12.2 and to the Breakup Fee or the Expense Reimbursement, if earned in accordance with Section 4.5(a). Under no circumstance shall Seller have any other or further liability to Purchaser for termination of this Agreement, regardless of the reason. Seller and Purchaser acknowledge that the agreements contained in Section 4.5 are an integral part of the transaction contemplated by this Agreement that the Breakup Fee is not a penalty, but rather is liquidated damages in a reasonable amount that will compensate Purchaser for the substantial costs and expenses that Purchaser has incurred, and will incur prior to Closing, and the efforts and resources expended and opportunities foregone while negotiating this Agreement and in reliance on this Agreement on the expectation of the consummation of the transactions contemplated hereby, which amount would otherwise would be impossible to calculate with precision.

## ARTICLE 5

### **REPRESENTATIONS AND WARRANTIES OF SELLER**

Seller hereby represents and warrants to Purchaser as true and correct as follows as of the date of this Agreement, except as set forth in the disclosure schedules delivered by Seller to Purchaser on the date hereof (the "Schedules"). The inclusion of any information in the Schedules will not be deemed an admission or acknowledgment that such information is material. The Schedules are arranged in sections corresponding to the sections contained in the Agreement merely for convenience, and the disclosure of an item in one section of the Schedules as an exception to a particular covenant, agreement, representation, or warranty shall be deemed adequately disclosed as an exception with respect to all other covenants, agreements, representations, and warranties to the extent that the relevance of such item to such other covenants, representations, agreements, or warranties is reasonably apparent on the face of such disclosure, notwithstanding the presence or absence of a specific cross-reference thereto. None of the representations and warranties in this ARTICLE 5, nor any claim based thereon, shall survive the Closing or the termination of this Agreement, as the case may be.

5.1 Organization and Good Standing. Seller is duly organized, validly existing, in good standing, and duly qualified to transact business under the laws of the jurisdiction of its formation, and is duly qualified or licensed to do business in each jurisdiction in which the nature of its business or the ownership or leasing of its properties makes such qualification or licensing necessary, except as described on Schedule 5.1 or where the failure to be so qualified would not reasonably be expected to have, individually or in the aggregate, a Seller Material Adverse Effect, and, subject to the limitations imposed on Seller as a result of having filed petitions for relief under the Bankruptcy Code, or pursuant to any Order entered by the Bankruptcy Court, Seller has the requisite power and authority to own, lease, and operate its properties and to carry on its business as now conducted.

5.2 Assets. Seller owns the Purchased Assets and, upon consummation of the Transactions, Purchaser will be delivered good and valid title (or a valid lease interest) to such Purchased Assets, free and clear of all Liens (other Liens created by Purchaser and Permitted Liens), Claims, Encumbrances, Interests and Excluded Liabilities. Exhibits D-1, D-2, D-3 and E are true, accurate and complete in all respects.

5.3 Authorization of Agreement. Subject to the entry of the Sale Order, Seller has all requisite power and authority to execute and deliver this Agreement and each other Transaction Document, agreement, document, instrument, or certificate contemplated by this Agreement or to be executed by Seller in connection with the consummation of the transactions contemplated by this Agreement (the "Seller Documents"), to perform its respective obligations hereunder and thereunder and to consummate the transactions contemplated hereby and thereby. The execution and delivery of this Agreement and the Seller Documents and the consummation of the transactions contemplated hereby and thereby have been duly authorized by all requisite corporate action on the part of Seller. This Agreement has been, and each of the Seller Documents will be at or prior to the Closing, duly and validly executed and delivered by Seller, and (assuming the due authorization, execution and delivery by the other parties hereto and thereto and the entry of the Sale Order) this Agreement constitutes, and each of the Seller Documents when so executed and delivered will constitute, legal, valid, and binding obligations of Seller enforceable against Seller in accordance with their respective terms, subject to applicable bankruptcy, insolvency, reorganization, moratorium, and similar laws affecting creditors' rights and remedies generally, and subject, as to enforceability, to general principles of equity, including principles of commercial reasonableness, good faith, and fair dealing (regardless of whether enforcement is sought in a proceeding at law or in equity).

5.4 Real Property.

(a) Schedule 5.4(a) sets forth a complete list of all real property and interests in real property that Seller owns and intends to transfer to Purchaser (individually, an "Owned Property" and collectively, the "Owned Properties"). Seller has good and marketable fee title to the Owned Properties, free and clear of all Liens (except for Permitted Liens), Claims, Encumbrances, Interests and Excluded Liabilities. Except as set forth on Schedule 5.4(a), the Owned Properties are not subject to any leases or tenancies or other rights of occupancy. Seller has not received notice that any of the improvements comprising the Owned Properties or the business conducted by the Seller

thereon is in material violation of any use or occupancy restriction limitation easement, condition or covenant of record.

(b) Schedule 5.4(b) sets forth a complete list of all leases or other occupancy agreements entered into by Seller (individually, a “Real Property Lease” and collectively, the “Real Property Leases”) as (i) lessor and relating to the real property described in Schedule 5.4(a) or (ii) lessee. Seller has provided Purchaser with, or access to, true, correct, accurate, and complete copies of all leases and other instruments and agreements (together with all amendments, modifications, supplements, and restatements thereto, if any) in Seller’s possession pertaining to the Real Property Leases.

#### 5.5 Tangible Personal Property; Capital Leases; Fixed Assets.

(a) Schedule 5.5(a) sets forth all leases of personal property that (i) relate to vehicles or (ii) involve payment in excess of \$10,000 annually (“Personal Property Leases”) and relate to personal property used by Seller in connection with the Business or to which Seller is a party or by which the properties or assets of Seller is bound.

(b) Schedule 5.5(b) sets forth all capital leases or vehicle installment contracts (“Capital Leases”) and relate to property used by Seller in connection with the Business or to which Seller is a party or by which the properties or assets of Seller is bound.

(c) There have been no Dispositions since June 10, 2016 except for sales in exchange for current or deferred payment of money that are the basis for the Sold Fixed Assets Amount. Seller is not obligated under any contract or other agreement, or otherwise considering any Disposition, of any Fixed Assets except for this Agreement and as set forth on Schedule 5.5(c).

#### 5.6 Intellectual Property.

(a) Schedule 5.6(a) sets forth a true and complete list of all issuances and registrations and applications for issuance or registration included in the Purchased Intellectual Property.

(b) Schedule 5.6(b) sets forth a true and complete list of all Intellectual Property Licenses that are Purchaser Assumed Contracts.

#### 5.7 Material Contracts.

(a) Schedule 5.7(a) sets forth all of the following Contracts to which Seller is a party or by which Seller is bound in connection with the Business or by which the Purchased Assets may be bound or affected and that are Purchaser Assumed Contracts (collectively with the Personal Property Leases, the Capital Leases, and the Intellectual Property Licenses related to or affecting the Business, in each case that are Purchaser Assumed Contracts, the “Material Contracts”):



(i) Any Contract whereby the Seller purchased more than \$25,000 over the last twelve months prior to the date hereof in products, materials, supplies, goods, equipment, or other assets or services;

(ii) All existing master services agreement entered into with customers of Seller;

(iii) Contracts with any Affiliate or current or former officer or director of Seller;

(iv) Contracts pursuant to which Seller grants to any Person any rights to represent Seller with respect to any product or act as agent for Seller in connection with the marketing, distribution, or sale of any Business product;

(v) Contracts for the sale of any of the assets of the Business, other than in the ordinary course of business;

(vi) Contracts relating to the acquisition by Seller of any operating business or the capital stock of any other Person;

(vii) Contracts containing a covenant that restricts Seller or any Affiliate of Seller from engaging in any line of business, conducting the Business in any geographic area, competing with any Person, or hiring any Person;

(viii) Contracts relating to incurrence of Indebtedness or the making of any loans;

(ix) Contracts relating to a joint venture of the Business or Seller; and

(x) Contracts for the employment of any individual on a full-time, part-time, or consulting or other basis providing annual compensation in excess of \$50,000.

(b) Each of the Material Contracts is in full force and effect and is the legal, valid, and binding obligation of Seller, enforceable against it in accordance with its terms, subject to applicable bankruptcy, insolvency, reorganization, moratorium, and similar laws affecting creditors' rights and remedies generally and subject, as to enforceability, to general principles of equity (regardless of whether enforcement is sought in a proceeding at law or in equity).

#### 5.8 Employee Matters.

(a) Schedule 5.8(a) separately lists all Debtor Benefit Plans.

(b) True, correct, and complete copies of each of the Employee Benefit Plans have been made available to Purchaser.

(c) Each Debtor Benefit Plan that is intended to qualify under Code Section 401(a) has received a favorable determination letter from the IRS or is in the form of a

master or prototype plan that is the subject of a favorable opinion letter from the IRS, upon which the adopting employer is entitled to rely.

(d) Except as set forth on Schedule 5.8(d), neither the execution and delivery of this Agreement nor the consummation of the Transactions contemplated hereby will (i) result in any payment becoming due to any Employee of Seller; (ii) increase any benefits otherwise payable under any Employee Benefit Plan; or (iii) result in the acceleration of the time of payment or vesting of any such benefits, in each case, that would be required to be satisfied by Purchaser following the Closing.

(e) Except as set forth on Schedule 5.8(e), there are no accrued and unpaid bonuses owed to any Employee of Seller.

5.9 Labor. Except as set forth on Schedule 5.9, Seller is not a party to any labor or collective bargaining agreement.

5.10 Litigation. Except (a) as set forth on Schedule 5.10, (b) for matters before the Bankruptcy Court involving Seller or any of its Affiliates, and (c) any matters that will otherwise be resolved by the Sale Order without any Liability or restriction applicable to Purchaser or the Purchased Assets, there are no Legal Proceedings pending or threatened against Seller or relating to the Business or any of the Purchased Assets or Assumed Liabilities, before any Governmental Authority

5.11 Environmental Matters. Except as set forth on Schedule 5.11, (a) the Purchased Assets and Seller with respect to the Purchased Assets are in compliance in all material respects with all Environmental Laws; (b) there has been no Release or, to Seller's Knowledge any threat of Release, of any Hazardous Materials at or from the Owned Properties or at any other locations where any Hazardous Materials were generated, manufactured, refined, transferred, produced, imported, used, or processed by Seller, or from or by any other properties and assets (whether real, personal, or mixed) owned or operated by Seller; (c) Seller has obtained and is in material compliance with all permits, licenses, approvals, consents, certificates and other authorizations required by Environmental Laws with respect to the ownership or operation of the Purchased Assets (the "Environmental Permits"); (d) with respect to the Purchased Assets, Seller has not entered into, or is subject to, any agreements, consents, orders, decrees, judgments, or other written directives of any Governmental Authority, that are a result of a violation of Environmental Laws, that relate to the future use of any of the Purchased Assets and that require any change in the present conditions of any of the Purchased Assets; and (e) as of the date of this Agreement there is no suit, action or litigation by any third party before any Governmental Authority, and no legal, administrative, or arbitration proceeding, (in each case) pending or threatened against the Purchased Assets or Seller with respect to the Purchased Assets under any Environmental Law or relating to Hazardous Materials.

5.12 Financial Advisors. Except as set forth on Schedule 5.12, no Person has acted, directly or indirectly, as a broker, finder, or financial advisor for Seller in connection with the transactions contemplated by this Agreement. No Person is entitled to any fee or commission or like payment from Purchaser in respect thereof.

ARTICLE 6

**REPRESENTATIONS AND WARRANTIES OF PURCHASER**

Purchaser hereby represents and warrants as true and correct to Seller as follows as of the date of this Agreement:

6.1 Organization and Good Standing. Purchaser is a limited liability company duly organized, validly existing, in good standing, and duly qualified to transact business under the laws of the State of Delaware and has the requisite power and authority to own, lease, and operate its properties and to carry on its business as now conducted.

6.2 Authorization of Agreement. Purchaser has all requisite power, authority, and legal capacity to execute and deliver this Agreement, the other Transaction Documents and each other agreement, document, instrument or certificate contemplated by this Agreement or to be executed by Purchaser in connection with the consummation of the Transactions (the "Purchaser Documents"), to perform its obligations hereunder and thereunder and to consummate the Transactions. The execution, delivery, and performance by Purchaser of this Agreement and each Purchaser Document have been, or will be, duly authorized by all necessary limited liability company action on behalf of Purchaser. This Agreement has been, and each Purchaser Document will be at or prior to the Closing, duly executed and delivered by Purchaser, and (assuming the due authorization, execution, and delivery by the other parties hereto and thereto) this Agreement constitutes, and each Purchaser Document when so executed and delivered will constitute, the legal, valid, and binding obligations of Purchaser, enforceable against Purchaser in accordance with their respective terms, subject to applicable bankruptcy, insolvency, reorganization, moratorium, and similar laws affecting creditors' rights and remedies generally, and subject, as to enforceability, to general principles of equity, including principles of commercial reasonableness, good faith, and fair dealing (regardless of whether enforcement is sought in a Legal Proceeding at law or in equity).

6.3 No Violation; Consents. None of the execution and delivery by Purchaser of this Agreement or the Purchaser Documents, the consummation of the Transactions, or the compliance by Purchaser with any of the provisions hereof or thereof will conflict with, or result in any violation of or default (with or without notice or lapse of time, or both) under, or give rise to a right of termination or cancellation under any provision of (a) the organizational documents of Purchaser, (b) any Order of any Governmental Authority applicable to Purchaser, or (c) any Applicable Law, except in the case of any of clauses (a), (b), and (c) as would not have, individually or in the aggregate, a Purchaser Material Adverse Effect.

6.4 Litigation. There are no Legal Proceedings pending against Purchaser, or to which Purchaser is otherwise a party before any Governmental Authority, which, if adversely determined, would reasonably be expected to have a Purchaser Material Adverse Effect.

6.5 Financial Capability. Purchaser (a) will have at the Closing sufficient funds available to pay the Purchase Price and any expenses incurred by Purchaser in connection with the Transactions contemplated by this Agreement and (b) will have at the Closing the resources and capabilities (financial or otherwise) to perform its obligations hereunder.

6.6 Bankruptcy. There are no bankruptcy, reorganization, or arrangement proceedings pending against, being contemplated by, or to the Knowledge of Purchaser, threatened against, Purchaser.

6.7 Financial Advisors. Except as set forth on Schedule 6.7, no Person has acted, directly or indirectly, as a broker, finder, or financial advisor for Purchaser in connection with the Transactions contemplated hereunder, and no Person is entitled to any fee or commission or like payment in respect thereof that would be payable by Seller.

6.8 Condition of the Business and Purchased Assets. Purchaser acknowledges and agrees that Seller is not making any representations or warranties whatsoever, express or implied, beyond those expressly given by Seller in this Agreement (as modified by the Schedules hereto as supplemented or amended in accordance with Section 8.7) and the other Transaction Documents, and Purchaser acknowledges and agrees that, except for the representations and warranties contained therein, the Purchased Assets are being transferred on a “where is” and, as to condition, “as is” basis as described in Section 2.9. Purchaser further represents that none of Seller, any of its Affiliates or any other Person has made any representation or warranty, express or implied, as to the accuracy or completeness of any information regarding Seller or any of its Affiliates, the Business, or the Transactions contemplated by this Agreement not expressly set forth in this Agreement, and no Seller, nor any of its Affiliates, nor any other Person will have or be subject to any liability to Purchaser or any other Person resulting from the distribution to Purchaser or its Representatives or Purchaser’s use of, any such information, including any confidential memoranda distributed on behalf of Seller relating to the Business or other publications or data room information provided to Purchaser or its Representatives, in connection with the sale of the Business and the Transactions. Purchaser acknowledges that it has conducted to its satisfaction its own independent investigation of the Business and, in making the determination to proceed with the Transactions, Purchaser has relied on the results of its own independent investigation. Purchaser specifically disclaims that it is relying upon or has relied upon any other representations or warranties that may have been made by Seller or any other Person, and acknowledges and agrees that Seller has specifically disclaimed and does hereby specifically disclaim any such other representation or warranty made by Seller or any other Person.

6.9 OFAC. Purchaser is not acting, directly or indirectly for, or on behalf of, any person, group, entity or nation named by any federal executive order (including the September 24, 2001, Executive Order Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten to Commit, or Support Terrorism (the “Executive Order”)) or the United States Treasury Department as a terrorist, “Specially Designated National and Blocked Person,” or other banned or blocked person, entity, or nation pursuant to any law that is enforced or administered by the Office of Foreign Assets Control (“OFAC”), and is not engaging in this transaction, directly or indirectly, on behalf of, or instigating or facilitating this transaction, directly or indirectly, on behalf of, any such person, group, entity, or nation. Purchaser is in compliance with all laws, statutes, rules, and regulations of any federal, state, or local governmental authority in the United States of America applicable to Purchaser and all beneficial owners of Purchaser with respect to or arising out of the requirements of the Executive Order and other similar requirements contained in the rules and regulations of OFAC and in enabling legislation or other federal executive orders in respect thereof.

ARTICLE 7

**BANKRUPTCY COURT MATTERS**

7.1 Alternative Transaction. This Agreement (and payment of the Breakup Fee and the Expense Reimbursement) is subject to approval by the Bankruptcy Court and the consideration by Seller of an Alternative Bid. From the date hereof (and any prior time) and until the earlier of: (i) the consummation of the Transactions and (ii) the conclusion of any bid process described in the Bidding Procedures Order, Seller is permitted to cause its Representatives and Affiliates to initiate contact with, solicit, and encourage submission of any inquiries, proposals, or offers by any Person (in addition to Purchaser and its Affiliates, agents, and Representatives) in connection with any sale or other disposition of the Purchased Assets and the Business. In addition, Seller shall have the responsibility and obligation to respond to any inquiries or offers to purchase all or any part of the Purchased Assets or the Business and perform any and all other acts related thereto that are required under the Bankruptcy Code or other Applicable Law, including supplying information relating to the Business and the assets of Seller to prospective purchasers.

7.2 Bankruptcy Notices. As soon as practicable after the execution of this Agreement (and in no event later than two (2) Business Days after the execution of this Agreement), Seller shall file and serve the Sale Motion and appropriate notice thereof as required by the Bankruptcy Code and Federal Rules of Bankruptcy Procedure to all parties entitled to notice.

7.3 Bankruptcy Court Approval. Seller and Purchaser acknowledge that this Agreement and the consummation of the Transactions are subject to Bankruptcy Court approval. Seller and Purchaser acknowledge that (a) each must comply with the Bidding Procedures Order and (b) Purchaser must provide adequate assurance of future performance within the meaning of section 365(f)(2)(B) of the Bankruptcy Code with respect to the Purchaser Assumed Contracts. With respect to each Purchaser Assumed Contract, Purchaser shall provide adequate assurance as required under the Bankruptcy Code of the future performance by Purchaser of each Purchaser Assumed Contract. Purchaser agrees that it will reasonably promptly take all actions reasonably required to assist in obtaining a Bankruptcy Court finding that there has been an adequate demonstration of adequate assurance of future performance under the Purchaser Assumed Contracts, including furnishing timely requested and factually accurate affidavits, non-confidential financial information, and other documents or information for filing with the Bankruptcy Court and making Purchaser's Representatives available to testify before the Bankruptcy Court.

7.4 Sale Order. Subject to Seller's right to pursue an Alternative Transaction, Seller will use its best efforts to consummate the transactions contemplated hereby by seeking entry of the Sale Order, with one or more appropriate motion or motions and the entry of appropriate Orders of the Bankruptcy Court (all such motions and Orders being in form and substance consented to by Purchaser, Seller, and the Agent), such Orders, among other things, approving the Bidding Procedures Order, this Agreement, and the purchase of the Purchased Assets by Purchaser, free and clear of all Liens, Claims, Encumbrances or Interests, and the assumption of the Assumed Liabilities, which orders shall include the Sale Order.

## ARTICLE 8

### **COVENANTS**

Except as otherwise expressly provided in a section of this Article 8, none of the covenants set forth in this Article 8, nor any claim based thereon, shall survive the Closing.

8.1 Access to Information. Seller agrees, prior to the Closing Date, to give Purchaser, through its Representatives, reasonable access during normal business hours to (a) make such investigation of the properties, businesses, and operations of the Business and (b) make such examination of the books and records of the Business, the Purchased Assets, and the Assumed Liabilities, in each case, as Purchaser may reasonably request upon reasonable advance notice. Purchaser and its Representatives shall cooperate with Seller and its Representatives and shall use their reasonable efforts to minimize any disruption to the Business in connection with such investigation and examination. Notwithstanding anything herein to the contrary, no such investigation or examination shall be permitted to the extent that it would require Seller to disclose information subject to attorney-client privilege or conflict with any confidentiality obligations to which Seller is bound. Purchaser shall not contact any vendor or other strategic partner of Seller prior to Closing without Seller's prior written consent.

#### 8.2 Conduct of the Business Pending the Closing.

(a) Subject to Seller's duties and obligations under the Bankruptcy Code, from and after the date of this Agreement and until the Closing, except (1) as set forth on Schedule 8.2(a), (2) as required by Applicable Law or by Order of the Bankruptcy Court (including pursuant to an Alternative Bid), (3) as otherwise expressly contemplated by this Agreement, or (4) with the prior written consent of Purchaser (which consent, except as set forth in Section 8.2(a)(iii), shall not be unreasonably withheld, delayed, or conditioned), Seller shall:

(i) use commercially reasonable efforts to conduct the Business in the ordinary course of business in all material respects;

(ii) use commercially reasonable efforts to (A) preserve the present business operations, organization, and goodwill of the Business and (B) preserve the present relationships with Persons having business dealings with Seller (including customers and suppliers of the Business);

(iii) not transfer, exchange, return, sell or otherwise dispose of any Fixed Assets without Purchaser's prior written consent (which consent may be withheld in Purchaser's sole discretion) except those set forth on Schedule 5.5(c);

(iv) pay all employee wages, compensation, benefits and bonuses, as applicable, to its employees in the ordinary course of business and pursuant to its customary payroll practices;

(v) comply with all Applicable Laws, other than Environmental Laws, in all material respects; and

(vi) comply with Environmental Laws in all material respects.

(b) Subject to Seller's duties and obligations under the Bankruptcy Code, except (1) as set forth on Schedule 8.2(b), (2) as required by Applicable Law or Order of the Bankruptcy Court, (3) as otherwise contemplated by this Agreement, or (4) with the prior written consent of Purchaser (which consent shall not be unreasonably withheld, delayed, or conditioned), Seller shall not:

(i) subject any of the Purchased Assets to any Lien, except for Permitted Liens; or

(ii) agree to do anything prohibited by this Section 8.2.

8.3 Appropriate Action; Filings. Through the Closing Date, Seller and Purchaser shall cooperate with each other and use (and shall cause their respective controlled Affiliates to use) commercially reasonable efforts: (a) to take, or to cause to be taken, all actions, and to do, or to cause to be done, all things reasonably necessary, proper, or advisable on its part under this Agreement, Applicable Law, or otherwise to consummate and make effective the Transactions; (b) to obtain promptly from any Governmental Authority any Orders or Permits required to be obtained by Seller or Purchaser or any of their respective Affiliates in connection with the authorization, execution, delivery and performance of this Agreement and the consummation of the Transactions; (c) to promptly make all necessary filings and thereafter make any other required submissions with respect to this Agreement and prompt consummation of the Transactions required under any Applicable Law; (d) to defend any and all Actions by or before any Governmental Authority challenging this Agreement or the consummation of the Transactions; (e) to cause to be lifted or rescinded any injunction, decree, ruling, order, or other action of any Governmental Authority adversely affecting the ability of any of the Parties to consummate the Transactions; and (f) to provide prompt notification to the other Party of any actions pursuant to clauses (a)-(e) of this Section 8.3; provided, however, that nothing in this Section 8.3 shall be construed as altering the rights or obligations of Seller under Section 7.1.

8.4 Confidentiality. Purchaser acknowledges that Confidential Information (as defined in the Confidentiality Agreement) has been, and in the future will be, provided to it in connection with this Agreement, including under Section 8.1, and is subject to the terms of the confidentiality agreement between Seller and Purchaser, dated as of May 10, 2016 (the "Confidentiality Agreement"), the terms of which are incorporated herein by reference. Purchaser acknowledges and understands that this Agreement may be made available by Seller to prospective bidders, the Agent, any other Lender under the Citizens Facility, and the Official Committee of the Unsecured Creditors appointed in the Chapter 11 Case, and that no such disclosure shall be deemed to violate any confidentiality obligations owing to Purchaser, whether pursuant to this Agreement, the Confidentiality Agreement or otherwise. Effective upon, and only upon, the Closing, the Confidentiality Agreement shall terminate. The provisions of this Section 8.5 shall survive the Closing.

8.5 Preservation of Records; Cooperation. Seller and Purchaser shall (and shall cause their controlled Affiliates to) preserve and keep in their possession all records held by them on and after the date hereof relating to the Purchased Assets for a period of two (2) years or such longer period as may be required by Applicable Law (provided, however, that in no event shall

Seller be required to preserve such records after the Chapter 11 Case is closed, converted, or dismissed) and shall make such records and personnel available to the other Party as may reasonably be required by such Party, including in connection with any insurance claims or Legal Proceedings involving the Purchased Assets, or any governmental investigations of Seller or Purchaser or any of their respective Affiliates related to the Purchased Assets or in order to enable Seller or Purchaser or any of their respective Affiliates to comply with their respective obligations hereunder and each other agreement, document, or instrument contemplated hereby or thereby or otherwise; provided, further, that in no event shall either Party be obligated to provide any information the disclosure of which would jeopardize any privilege available to such Party or any of its Affiliates relating to such information or which would cause such Party or any of its Affiliates to breach a confidentiality obligation to which it is bound. Purchaser further acknowledges that Seller shall be entitled to copy any such records, at Purchaser's sole cost and expense, and to retain copies of such records. After the expiration of any applicable retention period, before Purchaser shall dispose of any of such records, at least sixty (60) calendar days' prior written notice to such effect shall be given by Purchaser to Seller or its successors (or a Person designated by Seller) and Seller or its successors (or a Person designated by Seller) shall have the opportunity (but not the obligation), at their sole cost and expense, to remove and retain all or any part of such records as they may in their sole discretion select. In the event Seller wishes to destroy any records after the Chapter 11 Case is closed, before Seller shall dispose of any of such records, at least thirty (30) calendar days' prior written notice to such effect shall be given by Seller to Purchaser or its successors (or a Person designated by Purchaser) and Purchaser or its successors (or a Person designated by Purchaser) shall have the opportunity (but not the obligation), at its sole cost and expense, to remove and retain all or any part of such records as it may in its sole discretion select. Notwithstanding anything to the contrary in this Section 8.5, the provisions of this Section 8.5 shall in all respects be subject, as to Seller, to the last clause of Section 12.1 of this Agreement.

8.6 Supplements to Schedules. Seller may, by written notice to Purchaser from time to time prior to the Closing Date, supplement or amend the Schedules provided pursuant to Article 5, including in response to any changes or updates to Schedule 1.1(c) made by Purchaser. Such supplements or amendments shall be effective to cure and correct, for all purposes, any breach of any representation or warranty which would have existed if Seller had not made such supplements or amendments. All references to Schedules that are supplemented or amended pursuant to this Section 8.6 shall be deemed to be a reference to such Schedule as supplemented or amended. For the avoidance of doubt, no such supplement or amendment shall operate to override the provisions of ARTICLE 5 with respect to survival of the Seller's representations and warranties.

8.7 Further Assurances. Seller and Purchaser shall use their commercially reasonable efforts to (a) take all actions necessary or appropriate to consummate the Transactions and (b) cause the fulfillment at the earliest practicable date of all of the conditions to their respective obligations to consummate the Transactions, subject to the Seller's obligations as debtor and debtor in possession.

8.8 Bankruptcy Actions. Seller will provide Purchaser with a reasonable opportunity to review and comment upon motions, applications, and supporting papers that relate directly to the approval of the Transactions contemplated by this Agreement prepared by Seller (including



forms of orders and notices to interested parties) prior to the filing thereof in the Chapter 11 Case. Purchaser will provide Seller with a reasonable opportunity to review and comment upon motions, applications, and supporting papers that relate directly to the approval of the Transactions contemplated by this Agreement prepared by Purchaser (including forms of orders and notices to interested parties) prior to the filing thereof in the Chapter 11 Case.

8.9 Letters of Credit. At or before the Closing, Purchaser shall (a) arrange for substitute letters of credit, Purchaser guarantees, surety bonds, performance bonds, and other obligations to replace (i) any Seller LCs outstanding as of the date hereof and (ii) any Seller LCs entered into in the ordinary course of business between the date hereof and the Closing; (b) if and to the extent expressly consented to in writing by the issuer of any such Seller LC, and subject to the satisfaction of such additional conditions, if any, as such issuer shall require, including without limitation the provision of cash collateral for any such Seller LC in an amount of up to 110% of the maximum amount available to be drawn under such Seller LC, assume all obligations under each Seller LC, obtaining from the creditor or other counterparty a full release (in a form satisfactory to Seller) of all parties (other than the Purchaser) liable, directly or indirectly, for reimbursement to the creditor or fulfillment of other obligations to a counterparty in connection with amounts drawn under such Seller LCs; and (c) pay to Seller an amount equal to the sum of (i) the aggregate maximum amount available to be drawn under all Seller LCs that are not replaced or assumed pursuant to subsections (a) and (b) of this Section 8.9 and (ii) the aggregate amount of Seller LC Cash Proceeds as of the Closing (the "Seller LC Payment"). Seller shall in good faith cooperate with Purchaser and provide Purchaser all information with respect to the Business reasonably requested by Purchaser to facilitate the performance of Purchaser's obligations pursuant to this Section 8.9, including by providing information that is necessary for Purchaser to reconcile the information provided by Seller with respect to any Seller LCs with the indicated creditor or other counterparty. In the event that a beneficiary or counterparty under any Seller LC does not accept any such substitute letter of credit, Purchaser guarantee, surety bond, performance bond or other obligation proffered by Purchaser pursuant to this Section 8.9, then Purchaser shall indemnify, defend, and hold harmless Seller against, and reimburse Seller for, all amounts paid, including costs or expenses in connection with such Seller LC, including Seller's expenses in maintaining such Seller LCs, whether or not any such Seller LC is drawn upon or required to be performed, and shall in any event promptly reimburse Seller to the extent any Seller LC is called upon and Seller or its Affiliates make any payment or are obligated to reimburse the party issuing the Seller LC.

8.10 Consents. At or before the Closing, Seller shall use commercially reasonable efforts to obtain all approvals and consents and give all notices required for Seller to assign the Purchaser Assumed Contracts to Purchaser (including the Capital Leases) to the extent not assignable without any such approval, consent or notice pursuant to section 363 or section 365 of the Bankruptcy Code.

8.11 Notices. Between the date of this Agreement and the Closing Date, Seller will promptly notify Purchaser in writing if Seller becomes aware of any fact or condition that causes or constitutes a material breach of any of Seller's representations and warranties as of the date of this Agreement, or if Seller becomes aware of the occurrence after the date of this Agreement of any fact or condition that would (except as expressly contemplated by this Agreement) cause or

constitute a material breach of any such representation or warranty had such representation or warranty been made as of the time of occurrence or discovery of such fact or condition.

8.12 Exclusivity. In order to induce Purchaser to enter into this Agreement and consummate the Transactions, the Seller hereby agrees that, from the date hereof until the date that the Bid Procedures Order is entered by the Bankruptcy Court (the "Exclusivity Period"), the Seller shall not (and shall ensure that none of its controlled affiliates, officers, directors, advisors, agents, and representatives, including, without limitation, investment bankers), directly or indirectly, (a) negotiate the terms of an Alternative Transaction, or (b) enter into any agreements regarding an Alternative Transaction.

8.13 Seller's Name. Within five (5) Business Days of the Closing, Seller shall provide documentation to Purchaser showing that it has effectuated a change of the corporate name of Seller to one not using the words "Extreme Plastics Plus," or any derivation or variation thereof, in the state of Seller's incorporation and in all other states wherein Seller is qualified to do business as a foreign corporation, in each case, effective as of the Closing Date. From and after the Closing Date, Seller shall cease using the name "Extreme Plastics Plus", and shall have no right to the use of such name after the Closing Date, except, in each case, as required by law or by any applicable rule or regulation.

## ARTICLE 9

### **EMPLOYEE AND EMPLOYEE BENEFITS MATTERS; TAX MATTERS; OTHER AGREEMENTS**

#### 9.1 Employment.

(a) Transferred Employees. No later than two (2) Business Days following the Auction, Purchaser will offer employment to at least 90% of all Employees of Seller in connection with the Business as of the Closing Date, and any such offer shall be (i) contingent upon the issuance of the Sale Order of the Bankruptcy Court and (ii) based on terms and conditions of employment substantially similar to those provided by Seller prior to Closing (with credit for past service with respect to title, compensation, and benefits). Employees who accept such offer of employment with Purchaser and commence employment with Purchaser are hereinafter referred to as the "Transferred Employees." Purchaser shall continue to employ the Transferred Employees for a period of at least ninety (90) calendar days after the Closing; provided, however, nothing contained herein shall be construed to limit or restrict Purchaser from terminating the employment of a Transferred Employee "for cause." Nothing herein shall create any third party beneficiary or other rights or confer upon any employee or former employee of Seller any rights or remedies of any nature or kind whatsoever, under or by reason of this Agreement, and the provisions contained herein are not intended to be for the benefit of or enforceable by any third party, including any employee or former employee of Seller.

(b) Standard Procedure. Pursuant to the “Standard Procedure” provided in Section 4 of Revenue Procedure 2004-53, 2004-2 C.B. 320, (i) Purchaser and Seller shall report on a predecessor/successor basis as set forth therein; (ii) Purchaser will undertake to file (or cause to be filed) a Form W-2 for each such Transferred Employee with respect to the portion of the year including and after the Closing Date; and (iii) Seller will undertake to file (or cause to be filed) and deliver to each Transferred Employee a Form W-2 for such Transferred Employee with respect to the portion of the year prior to the Closing Date within thirty (30) days of the Closing Date, provided, however, that Purchaser shall provide Seller reasonable access to the Transferred Employees to assist Seller with its obligations under subsection (iii).

## 9.2 Employee Matters.

(a) Accrued Vacation. Purchaser shall be responsible for all Liabilities with respect to Transferred Employees attributable to their accrued and unused vacation, sick days, and personal days through the Closing Date.

(b) Accrued Wages. Purchaser shall assume and pay all accrued and unpaid wages of Transferred Employees through the Closing Date.

(c) COBRA. As of the Closing Date, Purchaser shall offer each M&A Qualified Beneficiary as defined under 26 C.F.R. § 54.4980B-9, Q/A-4(a) (and if elected by such qualified beneficiary, provide) continuation coverage under its group medical plan pursuant to ERISA or Section 4980B of the Code for the entire period COBRA coverage is required to be provided under ERISA or Section 4980B.

(d) 401(k). Purchaser agrees to use commercially reasonable efforts to cause the Purchaser’s 401(k) plan to accept a “direct rollover” to Purchaser’s 401(k) plan of each Transferred Employee’s account balances (including promissory notes evidencing all outstanding loans) under Seller’s 401(k) plans if such rollover is elected in accordance with applicable Law by such Transferred Employee.

(e) WARN Act. Within the first ninety (90) calendar days following the Closing, Purchaser shall not terminate any Transferred Employee, change any terms and conditions of employment for any Transferred Employee, or take any other action that could require Seller to have provided notice to its employees under the WARN Act. Purchaser shall indemnify and hold Seller harmless from any Liability arising under the WARN Act from or following the Closing Date.

## 9.3 Tax Matters.

### (a) Transfer Taxes.

(i) Transfer Tax Allocation. All sales, transfer, filing, recordation, registration, documentary, stamp, value-added, goods and services and similar Taxes and fees arising from or associated with the Transactions (collectively, “Transfer Taxes”), whether levied on Purchaser or Seller, shall be allocated one-half (½) to Purchaser and one-half (½) to Seller. On or before the Closing Date,

Purchaser shall prepare, with Seller's cooperation, any necessary Tax Returns and other documentation with respect to any Transfer Taxes, and the Party required by law to file such Tax Return and other documentation shall timely do so. All Transfer Taxes shall be paid in full by Purchaser on or after the Closing Date and the Purchase Price shall be adjusted pursuant to Sections 9.3(a)(ii) and 3.10(b). Purchaser, on the one hand, and Seller, on the other hand, shall each be liable for one-half ( $\frac{1}{2}$ ) of the fees and expenses incurred in connection with such preparation.

(ii) Estimated Seller Transfer Tax Amount and Purchase Price Adjustment. At least two (2) Business Days prior to the Closing, the Seller shall deliver to the Purchaser a good faith estimate of the Seller Transfer Tax Amount (the "Estimated Seller Transfer Tax Amount") and all tax invoices, appraisals and other information used by Seller in determining the Estimated Seller Transfer Tax Amount, all of which shall be reasonably acceptable to Purchaser, and the Purchase Price shall be reduced by such amount.

(b) Tax Returns. After the Closing, Seller shall prepare and file (or cause to be prepared and filed) all Tax Returns required to be filed with respect to the Purchased Assets. Whenever it is necessary to determine liability for Taxes in respect of Seller or the Purchased Assets for a Straddle Period, the portion of such Tax which relates to the portion of the Straddle Period ending on the Closing Date shall (i) in the case of any Taxes, other than Taxes based upon or related to income, receipts, sales, or payroll, be deemed to be the amount of such Tax for the entire Straddle Period multiplied by a fraction, the numerator of which is the number of days in the portion of the Straddle Period ending on the Closing Date and the denominator of which is the number of days in the entire Straddle Period; and (ii) in the case of any Tax based upon or related to income, receipts, sales, or payroll be deemed equal to the amount which would be payable on the basis of an interim closing of the books as of the end of the Closing Date. The dispute resolution provisions of Section 3.11 shall apply in the case of any disagreement with respect to any Tax Returns governed under this Section 9.3(b).

(c) Tax Claims. Seller, at its expense, shall have the right, but not the obligation, to control the conduct of the portion of the defense of any audit, claim, proceeding, investigation, or other controversy relating solely to Taxes ("Tax Claim") for which Seller is liable pursuant to Section 2.4(c); provided, however, that Seller will not have the right to settle any such Tax Claim if the resolution or determination of such Tax Claim is reasonably likely to adversely affect Purchaser without first obtaining Purchaser's written consent, such consent to not be unreasonably withheld, conditioned, or delayed. Purchaser shall control the conduct of all other Tax Claims; provided, however, that if such Tax Claim, if successful, could reasonably be expected to result in any Tax for which Seller may be responsible, Purchaser shall (i) promptly notify Seller in writing of such claim, (ii) notify Seller of any significant developments regarding such claim, (iii) consider in good faith recommendations of Seller in connection with such claim, and (iv) not settle any such claim without first obtaining Seller's written consent, such consent to not be unreasonably withheld, conditioned, or delayed.

(d) Cooperation. Seller, on the one hand, and Purchaser will provide each other with such cooperation and information as either of them reasonably may request of the other in filing any Tax Return, amended Tax Return, or claim for refund, determining a liability for Taxes or a right to a refund of Taxes, or participating in or conducting any audit or other proceeding in respect of Taxes. Such cooperation and information shall include providing copies of relevant Tax Returns or portions thereof, together with accompanying schedules, related work papers, and documents relating to rulings and other determinations by Taxing Authorities. Any information obtained under this Section 9.3 shall be kept confidential except to the extent disclosure of such information may be necessary or appropriate in connection with the filing of Tax Returns or claims for refund or in conducting any audit or other proceeding. All obligations of the Seller herein shall be subject to the last clause of Section 12.1.

(e) Effect of Tax Payments. Any reimbursement payment to be made pursuant to this Agreement shall be treated by the Parties as an adjustment to the Cash Purchase Price (as adjusted pursuant to Section 3.1(a)) for all Tax purposes.

(f) Taxes Other than Transfer Taxes.

(i) Tax Proration. All Taxes related to the Purchased Assets other than Transfer Taxes ("Non-Transfer Taxes") shall be allocated based on the Closing Date such that Seller shall pay all such Taxes allocable to any period prior to the Closing Date and Purchaser shall pay all such Taxes allocable to the period from and after the Closing Date. With respect to the amount of any Non-Transfer Taxes arising during a Straddle Period that are unpaid on the Closing Date, Purchaser shall pay the amount allocable to the period prior to the Closing Date and the Purchase Price will be reduced at Closing by such amount (the "Seller Other Taxes Amount"). The allocation of unpaid Non-Transfer Taxes during a Straddle Period shall be based on tax invoices for such Straddle Period, and, if a tax invoice for such Straddle Period is not available, the parties will use the most recent assessed value or other reasonable determination of taxable value available and the most recent tax rates available to determine the allocation of unpaid Non-Transfer Taxes arising during the Straddle Period.

(ii) Estimated Seller Other Taxes Amount and Purchase Price Adjustment. At least two (2) Business Days prior to the Closing, the Seller shall deliver to the Purchaser a good faith estimate of the Seller Other Taxes Amount (the "Estimated Seller Other Taxes Amount") and all tax invoices, appraisals and other information used by Seller in determining the Estimated Tax Proration Amount, all of which shall be reasonably acceptable to Purchaser, and the Purchase Price shall be reduced by such amount.

## ARTICLE 10

### **CONDITIONS TO CLOSING**

10.1 Conditions Precedent to Obligations of Purchaser. The obligation of Purchaser to consummate the transactions contemplated by this Agreement is subject to the fulfillment, on or prior to the Closing Date, of each of the following conditions (any or all of which may be waived

by Purchaser, in its sole discretion, in whole or in part to the extent permitted by Applicable Law):

(a) the representations and warranties of Seller set forth in this Agreement shall be true and correct in all material respects (and in all respects, in the case of any representations and warranties qualified by materiality) as of the date of this Agreement and as of the Closing as if then made, except to the extent such representations and warranties expressly relate to an earlier date (in which case such representations and warranties shall be true and correct in all material respects on and as of such earlier date, and true and correct in all respects on and as of such earlier date as to any such representations and warranties qualified by materiality), without giving effect to any supplement to the Schedules;

(b) Seller shall have performed and complied in all material respects (and in all respects, where such performance and compliance is qualified by materiality) with all obligations and agreements required in this Agreement to be performed or complied with by it at or prior to the Closing Date, including those obligations and agreements pursuant to Article 8, and Purchaser shall have received a certificate signed by an authorized officer of Seller, dated the Closing Date, to the foregoing effect;

(c) no Seller Material Adverse Effect shall have occurred at any time on or prior to the Closing Date since July 31, 2016;

(d) From and after the date of this Agreement, Seller shall not have entered into an agreement for the Disposition of any of the Fixed Assets, other than the Fixed Assets that are the subject of a transaction described in Schedule 5.5(c), without Purchaser's prior written consent; and

(e) Seller shall have delivered, or caused to be delivered, to Purchaser all of the items set forth in Section 4.2.

10.2 Conditions Precedent to Obligations of Seller. The obligations of Seller to consummate the transactions contemplated by this Agreement are subject to the fulfillment, prior to or on the Closing Date, of each of the following conditions (any or all of which may, with the written consent of the Agent, be waived by Seller, in its sole discretion, in whole or in part to the extent permitted by Applicable Law):

(a) the representations and warranties of Purchaser set forth in this Agreement shall be true and correct in all material respects on the date of this Agreement and as of the Closing as if then made, except to the extent such representations and warranties expressly relate to an earlier date (in which case such representations and warranties shall be true and correct on and as of such earlier date);

(b) Purchaser shall have performed and complied in all material respects with all obligations and agreements required by this Agreement to be performed or complied with by Purchaser on or prior to the Closing Date, and Seller shall have received a certificate signed by an authorized officer of Purchaser, dated the Closing Date, to the foregoing effect; and

(c) Purchaser shall have delivered, or caused to be delivered, to Seller all of the items set forth in Section 4.3.

10.3 Conditions Precedent to Obligations of Purchaser and Seller. The respective obligations of Purchaser and Seller to consummate the transactions contemplated by this Agreement are subject to the fulfillment, on or prior to the Closing Date, of each of the following conditions (any or all of which may be waived by Purchaser and Seller, with the written consent of the Agent, in whole or in part to the extent permitted by Applicable Law):

(a) there shall not be in effect any Law or Order by a Governmental Authority of competent jurisdiction restraining, enjoining, or otherwise prohibiting the consummation of the Transactions;

(b) the Bankruptcy Court shall have entered the Bidding Procedures Order and such Order shall be a Final Order; and

(c) the Bankruptcy Court shall have entered the Sale Order and such Order shall be a Final Order.

10.4 Frustration of Closing Conditions. Neither Seller nor Purchaser may rely on the failure of any condition set forth in Section 10.1, Section 10.2, or Section 10.3, as the case may be, if such failure was caused by such Party's failure to comply with any provision of this Agreement.

## ARTICLE 11

### **LIMITATIONS**

#### 11.1 Purchaser's Review.

(a) No Reliance. Purchaser has had the opportunity to ask questions, and has received sufficient answers, in connection with its decision to enter into this Agreement and to consummate the Transactions. In connection with the execution and delivery of this Agreement and the consummation of the Transactions, Purchaser has not relied upon, and Purchaser expressly waives and releases Seller from any Liability for any claims relating to or arising from, any representation, warranty, statement, advice, document, projection, or other information of any type provided by Seller or its Affiliates or any of their respective Representatives, except for those representations and warranties expressly set forth in Article 5. In deciding to enter into this Agreement, and to consummate the Transactions, Purchaser has relied solely upon its own knowledge, investigation, judgment, and analysis (and that of its Representatives) and not on any disclosure or representation made by, or any duty to disclose on the part of, Seller or its Affiliates or any of their respective Representatives, other than the express representations and warranties of Seller set forth in Article 5.

(b) Limited Duties. Any and all duties and obligations that any Party may have to any other Party with respect to or in connection with the Purchased Assets, this Agreement or the Transactions are limited to those specifically set forth in this

Agreement. Neither the duties nor obligations of any Party, nor the rights of any Party, shall be expanded beyond the terms of this Agreement on the basis of any legal or equitable principle or on any other basis whatsoever.

11.2 No Consequential or Punitive Damages. NO PARTY (OR ITS AFFILIATES OR REPRESENTATIVES) SHALL, UNDER ANY CIRCUMSTANCE, BE LIABLE TO THE OTHER PARTY (OR ITS AFFILIATES OR REPRESENTATIVES) FOR ANY CONSEQUENTIAL, EXEMPLARY, SPECIAL, INCIDENTAL, OR PUNITIVE DAMAGES CLAIMED BY SUCH OTHER PARTY UNDER THE TERMS OF OR DUE TO ANY BREACH OF THIS AGREEMENT, INCLUDING LOSS OF REVENUE OR INCOME, DAMAGES BASED ON ANY MULTIPLIER OF PROFITS OR OTHER VALUATION METRIC, COST OF CAPITAL, DIMINUTION OF VALUE, OR LOSS OF BUSINESS REPUTATION OR OPPORTUNITY.

## ARTICLE 12

### MISCELLANEOUS

12.1 Survival of Representations, Warranties, Covenants and Agreements. The representations and warranties of Seller made in this Agreement, in any other Transaction Document, or in any other instrument delivered pursuant to this Agreement, and all claims based thereon, shall terminate at the Closing, or upon termination of this Agreement pursuant to Section 4.4, and, following the Closing or the termination of this Agreement, as the case may be, and notwithstanding anything to the contrary contained herein or pursuant to Applicable Law, there shall be no Liability in respect thereof on the part of any Party or any of its Representatives. None of the covenants or agreements that are to be performed on or prior to the Closing shall survive Closing nor shall any claim based thereon. As to specific covenants and agreements contained in this Agreement to be performed by Seller after Closing (the "Surviving Covenants"), such Surviving Covenants, and any claim based thereon, shall survive and be binding on Seller only until the earlier of (i) having been performed in accordance with their terms and (ii) 90 days after Closing.

12.2 Remedies. The Parties acknowledge and agree that the following remedies shall be available upon the following occurrences:

(a) Solely with respect to the Parties' respective covenants under this Agreement that survive the Closing, and solely to the extent to be performed after the Closing, (i) each Party recognizes that if such Party breaches or refuses to perform any such covenant, monetary damages alone would not be adequate to compensate the non-breaching Party or Parties for their injuries, (ii) the non-breaching Party or Parties shall therefore be entitled, in addition to any other remedies that may be available, to obtain specific performance of, or to enjoin the violation of, the terms of such covenants, (iii) if any Action is brought by the non-breaching Party or Parties to enforce such covenants, the Party in breach shall waive the defense that there is an adequate remedy at law, (iv) each Party agrees to waive any requirement for the security or posting of any bond in connection with any Action seeking specific performance of, or to enjoin the violation of, such covenants, and (v) each Party agrees that the only permitted objection that it may



raise in response to any action for specific performance of such covenants is that it contests the existence of a breach or threatened breach of such covenants. Except as set forth in Section 12.2(b), and notwithstanding any other provision of this Agreement to the contrary, (A) Purchaser shall not be entitled to any equitable remedy, including an injunction or order for specific performance, to enforce any provision of this Agreement prior to the Closing, and (B) Seller shall be entitled to any equitable remedy, including an injunction or order for specific performance, to enforce any provision of this Agreement prior to the Closing.

(b) In the event of any breach prior to the Closing by Seller of any of Seller's agreements, representations, or warranties contained herein or in the Bidding Procedures Order or the Sale Order, including any breach that is material or willful, Purchaser's sole and exclusive remedies shall be (i) to exercise Purchaser's rights to terminate this Agreement pursuant to Section 4.4, in accordance with the terms of such Section 4.4, (ii) the return of the Deposit as provided in Section 3.2(b)(ii), and (iii) to the Breakup Fee or the Expense Reimbursement, if earned in accordance with Section 4.5(a), and Purchaser shall not have any further cause of action for damages, specific performance, or any other legal or equitable relief against Seller with respect thereto.

12.3 Expenses. Except as otherwise set forth in this Agreement, each Party shall bear its own expenses (including attorneys' fees) incurred in connection with the negotiation and execution of this Agreement and each other agreement, document, and instrument contemplated hereby and the consummation of the Transactions contemplated hereby and thereby; provided, however, Seller shall bear sole responsibility for any governmental charges relating to any UCC-3 filing fees, and Purchaser shall bear sole responsibility for any governmental charges (other than 50% of the Transfer Taxes) relating to any DOT, real estate, title recording, or filing fees and other amounts payable in respect of transfer filings in connection with the transactions contemplated by this Agreement.

12.4 Non-Recourse. The Parties acknowledge and agree that no past, present, or future Representative or Affiliate of the Parties to this Agreement, in such capacity, shall have any liability for any obligations or liabilities of Purchaser or Seller, as applicable, under this Agreement or for any claim based on, in respect of, or by reason of, the Transactions.

12.5 Submission to Jurisdiction.

(a) Without limiting any Party's right to appeal any Order of the Bankruptcy Court, (i) the Bankruptcy Court shall retain exclusive jurisdiction to enforce the terms of this Agreement and to decide any claims or disputes among the Parties that may arise or result from, or be connected with, this Agreement, any breach or default hereunder, or the Transactions, and (ii) any and all Actions related to the foregoing shall be filed and maintained only in the Bankruptcy Court, and the Parties hereby consent to and submit to the jurisdiction and venue of the Bankruptcy Court for such purposes and shall receive notices at such locations as indicated in Section 12.10; provided, however, that if the Chapter 11 Case has been fully and finally dismissed and the Bankruptcy Court declines jurisdiction, the Parties agree to and hereby unconditionally and irrevocably submit to the exclusive jurisdiction of the United States District Court for the District of Delaware.

(b) The Parties hereby unconditionally and irrevocably waive, to the fullest extent permitted by Applicable Law, any objection that they may now or hereafter have to the laying of venue of any dispute arising out of or relating to this Agreement or any of the Transactions brought in any court specified in subsection (a) above, or any defense of inconvenient forum for the maintenance of such dispute. Each of the Parties agrees that a judgment in any such dispute may be enforced in other jurisdictions by suit on the judgment or in any other manner provided by Law.

(c) Each of the Parties hereby consents to process being served by any Party in any suit, Action, or proceeding by the mailing of a copy thereof in accordance with the provisions of Section 12.10; provided, however, that such service shall not be effective until the actual receipt thereof by the Party being served.

12.6 Waiver of Jury Trial. THE PARTIES HEREBY IRREVOCABLY AND UNCONDITIONALLY WAIVE, TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, ANY RIGHT THAT THEY MAY HAVE TO TRIAL BY JURY OF ANY CLAIM OR CAUSE OF ACTION, OR IN ANY PROCEEDING, DIRECTLY OR INDIRECTLY BASED UPON OR ARISING OUT OF THIS AGREEMENT OR THE TRANSACTIONS CONTEMPLATED HEREBY (WHETHER BASED ON CONTRACT, TORT, OR ANY OTHER THEORY). EACH PARTY (A) CERTIFIES THAT NO REPRESENTATIVE, AGENT, OR ATTORNEY OF ANY OTHER PARTY HAS REPRESENTED, EXPRESSLY OR OTHERWISE, THAT SUCH OTHER PARTY WOULD NOT, IN THE EVENT OF LITIGATION, SEEK TO ENFORCE THE FOREGOING WAIVER AND (B) ACKNOWLEDGES THAT IT AND THE OTHER PARTY HAVE BEEN INDUCED TO ENTER INTO THIS AGREEMENT BY, AMONG OTHER THINGS, THE MUTUAL WAIVERS AND CERTIFICATIONS IN THIS SECTION 12.6.

12.7 Time of Essence. With regard to all dates and time periods set forth or referred to in this Agreement, time is of the essence.

12.8 Entire Agreement; Amendments and Waivers. This Agreement (including the Schedules and Exhibits hereto) and the other Transaction Documents represent the entire understanding and agreement between the Parties with respect to the subject matter hereof and supersede all prior discussions and agreements between the Parties with respect to the subject matter hereof. This Agreement can be amended, supplemented, or changed, and any provision hereof can be waived, only by written instrument making specific reference to this Agreement consented to in writing by the Agent and signed by the Party against whom enforcement of any such amendment, supplement, modification, or waiver is sought. No action taken pursuant to this Agreement, including any investigation by or on behalf of any Party, shall be deemed to constitute a waiver by the Party taking such action of compliance with any representation, warranty, covenant, or agreement contained herein. The waiver by any Party of a breach of any provision of this Agreement shall not operate or be construed as a further or continuing waiver of such breach or as a waiver of any other or subsequent breach. No failure on the part of any Party or the Agent to exercise, and no delay in exercising, any right, power, or remedy hereunder shall operate as a waiver thereof, nor shall any single or partial exercise of such right, power, or remedy by such Party or the Agent preclude any other or further exercise thereof or the exercise of any other right, power or remedy.

12.9 Governing Law. THIS AGREEMENT, THE RIGHTS AND OBLIGATIONS OF THE PARTIES HEREUNDER, AND ANY CLAIM OR CONTROVERSY (WHETHER BASED ON CONTRACT, TORT, OR ANY OTHER THEORY) DIRECTLY OR INDIRECTLY BASED UPON OR ARISING OUT OF THIS AGREEMENT OR THE NEGOTIATION, EXECUTION, OR PERFORMANCE OF THIS AGREEMENT (INCLUDING ANY CLAIM OR CAUSE OF ACTION BASED UPON, ARISING OUT OF OR RELATED TO ANY REPRESENTATION OR WARRANTY MADE IN OR IN CONNECTION WITH THIS AGREEMENT OR AS AN INDUCEMENT TO ENTER INTO THIS AGREEMENT), INCLUDING ALL MATTERS OF CONSTRUCTION, VALIDITY, AND PERFORMANCE, SHALL IN ALL RESPECTS BE GOVERNED BY AND INTERPRETED, CONSTRUED, AND DETERMINED IN ACCORDANCE WITH THE INTERNAL LAWS OF THE STATE OF DELAWARE (WITHOUT REGARD TO ANY CONFLICT OF LAWS PROVISION THAT WOULD REQUIRE THE APPLICATION OF THE LAW OF ANY OTHER JURISDICTION) AND, TO THE EXTENT APPLICABLE, THE BANKRUPTCY CODE.

12.10 No Other Representations or Warranties; Schedules. Except for the representations and warranties contained in Article 5 (as modified by the Schedules hereto) and the other Transaction Documents, neither Seller nor any other Person makes any express or implied representation or warranty with respect to Seller, the Business, the Purchased Assets, the Assumed Liabilities, or the Transactions contemplated by this Agreement, and Seller disclaims any other representations or warranties, whether made by Seller, any Affiliate of Seller or any of their respective Representatives. Except for the representations and warranties contained in Article 5 (as modified by the Schedules hereto), Seller expressly disclaims and negates any representation or warranty, expressed or implied, at common law, by statute, or otherwise, relating to the condition of the Purchased Assets (including any implied or express warranty of merchantability or fitness for a particular purpose). Seller makes no representations or warranties to Purchaser regarding the probable success or profitability of the Business. Except for the specific representations and warranties expressly made by Seller in Article 5 or in the other Transaction Documents, Purchaser specifically disclaims that it is relying upon or has relied upon any other representations or warranties that may have been made by Seller or any other Person, and acknowledges and agrees that Seller has specifically disclaimed and does hereby specifically disclaim any such other representation or warranty made by Seller or any other Person.

12.11 Notices. All notices, requests, consents, claims, demands, waivers, and other communications hereunder shall be in writing and shall be deemed to have been given: (a) when delivered by hand (with written confirmation of receipt); (b) when received by the addressee if sent by a nationally recognized overnight courier (receipt requested); (c) on the date sent by facsimile or e-mail of a PDF document (with confirmation of transmission) if sent during normal business hours of the recipient, and on the next Business Day if sent after normal business hours of the recipient; or (d) on the third day after the date mailed, by certified or registered mail, return receipt requested, postage prepaid. Such communications must be sent to the respective Parties at the addresses indicated below (or at such other address for a Party as shall be specified in a notice given in accordance with this Section):

If to Seller:

Extreme Plastics Plus, Inc.  
360 Epic Circle Drive  
Fairmont, West Virginia 26554  
Attention: Bennie M. Wharry  
Phone: (304) 534-3600  
Fax: (304) 534-3604  
Email: bennie@extremeplasticsplus.com

With a copy to:

Paul Hastings LLP  
71 South Wacker Drive  
Suite 4500  
Chicago, Illinois 60606  
Attention: Amit Mehta  
Chris Dickerson  
Marc Carmel  
Phone: (312) 499-6000  
Fax: (312) 499-6100  
E-mail: amitmehta@paulhastings.com  
chrisdickerson@paulhastings.com  
marccarmel@paulhastings.com

If to Purchaser:

BW EPP Holdings LLC  
c/o Blue Wolf Capital Partners  
One Liberty Plaza, 52nd Floor  
New York, New York 10006  
Attention: Chief Compliance Officer  
Fax: (917) 677-8233  
Email: charlie@bluewolfcapital.com

With a copy to:

Holland & Knight LLP  
200 Crescent Court, Suite 1600  
Dallas, Texas 75201  
Attention: Fred Stovall  
Brent McIlwain  
Phone: (214) 964-9500  
Fax: (214) 964-9501  
Email: fred.stovall@hklaw.com  
brent.mcilwain@hklaw.com

12.12 Severability. If any term or provision of this Agreement is invalid, illegal, or incapable of being enforced by Law or public policy, all other terms and provisions hereof shall nevertheless remain in full force and effect so long as the legal substance of the Transactions is

not affected in any manner materially adverse to any Party. Upon such determination that any term or provision is invalid, illegal, or incapable of being enforced, the Parties shall negotiate in good faith to modify this Agreement so as to effect the original intent of the Parties as closely as possible in an acceptable manner in order that the Transactions are consummated as originally contemplated to the greatest extent possible.

12.13 No Right of Set-Off. Purchaser for itself and for its Affiliates, successors, and assigns hereby unconditionally and irrevocably waives any rights of set-off, netting, offset, recoupment, or similar rights that Purchaser or any of its Affiliates, successors, and assigns has or may have with respect to the payment of the Purchase Price or any other payments to be made by Purchaser pursuant to this Agreement or any other document or instrument delivered by Purchaser in connection herewith. Seller, for itself and for its Affiliates, successors, and assigns hereby unconditionally and irrevocably waives any rights of set-off, netting, offset, recoupment, or similar rights that Seller or any of its Affiliates, successors and assigns have or may have with respect to any payments to be made by Seller pursuant to this Agreement or any other document or instrument delivered by Seller in connection herewith.

12.14 Binding Effect; Assignment. Except with respect to the Agent and the Lenders, who are intended third party beneficiaries of this Agreement, this Agreement shall be binding solely upon and inure to the benefit of the Parties and their respective successors and permitted assigns. Except with respect to the Agent and the Lenders, who are intended third party beneficiaries of this Agreement, nothing in this Agreement shall create or be deemed to create any third party beneficiary rights in any Person not a Party to this Agreement except to the extent provided in Section 12.4. No assignment of this Agreement or of any rights or obligations hereunder may be made by any Party (by operation of law or otherwise) without the prior written consent of the other Party and the Agent and any attempted assignment without the required consents shall be void; provided, however, that (a) prior to the Closing, Purchaser may assign this Agreement and any or all rights or obligations hereunder (including Purchaser's right to purchase the Purchased Assets and assume the Assumed Liabilities) to any Affiliate of Purchaser and (b) after or in connection with the Closing, Purchaser (or its permitted assignee) shall have the right to assign its rights and/or delegate its obligations hereunder (i) to any Affiliates, (ii) to any financing sources for collateral purposes, or (iii) to any subsequent purchaser of all or any portion of the stock or assets of Purchaser or the Business. Upon any such permitted assignment, the references in this Agreement to Purchaser shall also apply to any such assignee unless the context otherwise requires. No assignment shall relieve the assigning party of any of its obligations hereunder, nor shall any rights of the Agent or the Lenders be affected or diminished thereby. For the avoidance of doubt, the joinder of the Agent in the signature pages hereof for purposes of consenting to the provisions of this Agreement, and the provisions hereof granting the Agent certain consent rights, are not intended, and shall not be construed, to cause the Agent or any of the Lenders to become a party to this Agreement or to impose upon the Agent or any of the Lenders any duty or other obligation under or with respect to this Agreement, the Transactions or any of the other Transaction Documents.

12.15 Publicity. Except as required by law or in connection with the Chapter 11 Case, neither Seller nor Purchaser shall issue any press release or public announcement concerning this Agreement or the transactions contemplated hereby without obtaining the prior written approval of the other Parties relating to the contents and manner of presentation and publication thereof,

which approval will not be unreasonably withheld, delayed, or conditioned. Prior to making any public disclosure required by Applicable Law, the disclosing parties shall give the other party a copy of the proposed disclosure and reasonable opportunity to comment on the same.

12.16 Headings. The Article and Section headings in the Agreement are for reference purposes only and shall not affect the meaning or interpretation of this Agreement.

12.17 Counterparts. This Agreement may be executed and delivered (including by electronic transmission) in any number of counterparts, including via electronic transmission, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

12.18 Attorneys' Fees. In the event of any dispute related to or based upon this Agreement, the prevailing party (i.e., Seller, on the one hand, or Purchaser, on the other) shall be entitled to recover from the other party (i.e., Seller, on the one hand, or Purchaser, on the other) its reasonable attorneys' fees and costs.

[The Remainder of This Page Is Intentionally Left Blank]

IN WITNESS WHEREOF, each of the Parties has caused this Agreement to be executed by its respective officers thereunto duly authorized, as applicable, all as of the date first above written.

SELLER:

EXTREME PLASTICS PLUS, INC.

By: Bennie M. Wharry  
Name: Bennie M. Wharry  
Title: President

**PURCHASER:**

BW EPP HOLDINGS LLC

By: 

Name: Charles P. Miller

Title: Secretary



IN WITNESS WHEREOF, each of the Parties has caused this Agreement to be executed by its respective officers thereunto duly authorized, as applicable, all as of the date first above written.

**SELLER:**

EXTREME PLASTICS PLUS, INC.

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

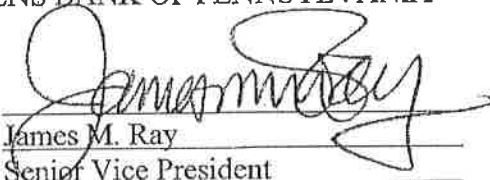
**PURCHASER:**

BW EPP HOLDINGS LLC

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

The undersigned hereby consents to the terms of this Agreement, and acknowledges and agrees to Section 8.12:

CITIZENS BANK OF PENNSYLVANIA

By:   
Name: James M. Ray  
Title: Senior Vice President

**EXHIBIT 4**

**Sale Notice**

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF DELAWARE

In re: ) Chapter 11  
)  
EXTREME PLASTICS PLUS, INC., *et al.*,<sup>1</sup> ) Case No. 16-10221 (CSS)  
) (Jointly Administered)  
Debtors. )  
)  
)  
)

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**NOTICE OF BID DEADLINE, PUBLIC AUCTION, AND  
SALE HEARING IN CONNECTION WITH THE SALE OF ALL OR  
SUBSTANTIALLY ALL OF THE DEBTORS' ASSETS**

**PLEASE TAKE NOTICE THAT**, on \_\_\_\_\_, 2016, Extreme Plastics Plus, Inc. and EPP Intermediate Holdings, Inc., as debtors and debtors in possession in the above-captioned chapter 11 cases (collectively, the "Debtors"),<sup>2</sup> filed their motion [Docket No. \_\_] (the "Motion") for entry of an order, among other things: (i)(a) approving the Bidding Procedures in connection with the sale of the Debtors' assets, (b) approving the form and manner of notices of the Bidding Procedures and sale of the Debtors' assets, (c) approving the form of Asset Purchase Agreement, (d) scheduling the Auction and the Sale Hearing to consider the Sale, including assumption and assignment of executory contracts and unexpired leases, and (e) granting related relief; and (ii)(a) approving the sale of substantially all of the Debtors' assets free and clear of liens, claims, encumbrances and interests; (b) authorizing the assumption and assignment of certain executory contracts and unexpired leases; and (c) granting related relief.

**PLEASE TAKE FURTHER NOTICE THAT**, on \_\_\_\_\_, 2016, the United States Bankruptcy Court for the District of Delaware (the "Court") entered the *Order (a) Approving Bidding Procedures, (b) Approving Form and Manner of Notices, (c) Approving Form of Asset Purchase Agreement and Bid Protections, (d) Scheduling Dates to Conduct Auction and Hearing for Approval of Sale, Including Assumption and Assignment of Executory Contracts and Unexpired Leases, and (e) Granting Related Relief* (the "Bidding Procedures Order"). Pursuant to the Bidding Procedures Order, the Auction for the Debtors' assets subject to the Bidding Procedures Order shall take place on \_\_\_\_\_, 2016 at 10:00 a.m.

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<sup>1</sup> The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are Extreme Plastics Plus, Inc. (6913) and EPP Intermediate Holdings, Inc. (6129). The location of the Debtors' corporate headquarters and service address is: 360 Epic Circle Dr., Fairmont, WV 26554.

<sup>2</sup> Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in that certain Asset Purchase and Sale Agreement, by and among Extreme Plastics Plus, Inc. and [buyer], dated as of [ ], 2016, and the exhibits and schedules thereto (each as may be amended or supplemented from time to time, collectively, the "Asset Purchase Agreement"), the Bidding Procedures, or the Bidding Procedures Order, as applicable. 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 Order shall control.

(prevailing Central time) at the offices of counsel for the Debtors at Paul Hastings LLP, 71 South Wacker Drive, 45th Floor, Chicago, Illinois 60606 or such other place and time as the Debtors shall notify all Qualified Bidders, the Creditors' Committee, counsel for the Stalking Horse Purchaser, the Agent, and any other invitees. The Bidding Procedures Order requires that Qualified Bids must be submitted in accordance with the Bidding Procedures, attached to the Bidding Procedures Order as Exhibit 2, by no later than \_\_\_\_\_, 2016 at 4:00 p.m. (prevailing Eastern time) (the "Bid Deadline") to participate at the Auction. Entities interested in receiving information regarding the sale of the Debtors' assets should contact the Debtors' investment banking advisor, FTI Consulting, Inc., Attn: Ben Goren, Email: ben.goren@fticonsulting.com, Telephone: (312) 252-9361, and Jeffrey Spittel, Email: jeffrey.spittel@fticonsulting.com, Telephone: (832) 667-5140.

**PLEASE TAKE FURTHER NOTICE THAT** the Sale Hearing to consider approval of the sale of the Debtors' assets to a Successful Bidder or Successful Bidders free and clear of all liens, claims, encumbrances, and interests will be held before the Court on \_\_\_\_\_, 2016 at \_\_\_\_ a./p.m. (prevailing Eastern time). The Sale Hearing may be continued from time to time, in accordance with the Bidding Procedures Order, without further notice to creditors or parties in interest other than by announcement of the continuance in open court on the date scheduled for the Sale Hearing (or in a filed agenda).

**PLEASE TAKE FURTHER NOTICE THAT** objections, if any, to the sale of the Debtors' assets and the transactions contemplated by the asset purchase agreement of the Successful Bidder, or the relief requested in the Motion must: (a) be in writing; (b) comply with the Bankruptcy Rules and the Local Rules; (c) be filed with the clerk of the Court (or filed electronically via CM/ECF with the Court) on or before 4:00 p.m. (prevailing Eastern time) on [\_\_\_\_], 2016 (the "Sale Objection Deadline"); and objections, if any, to the conduct of the Auction and/or the selection of the highest or otherwise best Bid at the Auction must: (a) be in writing; (b) comply with the Bankruptcy Rules and the Local Rules; (c) be filed with the clerk of the Court (or filed electronically via CM/ECF with the Court) on or before 12:00 p.m. (prevailing Eastern time) on \_\_\_\_\_, 2016 the "Auction Objection Deadline"; and any such objections must be served such that they are actually received by the Sale Objection Deadline or the Auction Objection Deadline, as applicable, by: (a) counsel for the Debtors, (i) Paul Hastings LLP, 71 South Wacker Drive, 45th Floor, Chicago, Illinois 60606, Attn: Chris L. Dickerson and Marc J. Carmel and (ii) Sullivan Hazeltine Allinson, LLC, 901 North Market Street, Suite 1300, Wilmington, Delaware 19801, Attn: William D. Sullivan and William A. Hazeltine; (b) counsel for the Agent, (i) Jones Day, 77 West Wacker Drive, Chicago, Illinois, 60601, Attn: Brad B. Erens and Timothy W. Hoffmann and (ii) Richards, Layton & Finger P.A., One Rodney Square, 920 North King Street, Wilmington, Delaware, 19801, Attn: Daniel J. Defrancheschi and Zachary I. Shapiro; (c) counsel for the Creditors' Committee, Reed Smith LLP, 1717 Arch Street, Suite 1300, Philadelphia, Pennsylvania 19103, Attn: Claudia Z. Springer and Lauren S. Zabel and 1201 Market Street, Suite 1500, Wilmington, Delaware 19801, Attn: Kurt F. Gwynne and Emily K. Devan; (d) counsel for the Stalking Horse Purchaser, Holland & Knight LLP, Attn: Fred Stovall and Brent McIlwain, 200 Crescent Court, Suite 1600, Dallas, Texas 75201; and (e) the Office of the United States Trustee for the District of Delaware, 844 King Street, Suite 2207, Lockbox 35, Wilmington, Delaware 19801, Attn: David Gerardi.

**PLEASE TAKE FURTHER NOTICE THAT** the failure of any entity to file an objection on or before the Sale Objection Deadline shall (a) be deemed to constitute consent to the sale of the Debtors' assets subject to the Bidding Procedures Order free and clear of liens, claims, encumbrances, and interests to the Stalking Horse Purchaser or other Successful Bidder (including any Backup Bidder) and the other relief requested in the Sale Motion and (b) be a bar to the assertion, at the Sale Hearing or thereafter, of any objection to the Sale Motion, the Auction, the sale of the Debtors' assets subject to the Bidding Procedures Order free and clear of liens, claims, encumbrances, and interests, or the Debtors' consummation and performance of the terms of the asset purchase agreement entered into with the Stalking Horse Purchaser or other Successful Bidder (including any Backup Bidder).

**PLEASE TAKE FURTHER NOTICE THAT** the Debtors reserve their rights, in the exercise of their fiduciary obligations and after consulting with the Agent and the Creditors' Committee, to modify the Bidding Procedures or impose, at or prior to the Auction, different and/or additional terms and conditions on the sale subject to the Bidding Procedures, provided that such rules are not inconsistent in any material respect with the Bidding Procedures (provided that no such changes shall impair or modify the Bid Protections afforded to the Stalking Horse Purchaser).

**PLEASE TAKE FURTHER NOTICE THAT** this Notice is subject to the full terms and conditions of the Bidding Procedures Order and the Bidding Procedures, which shall control in the event of any conflict, and the Debtors encourage parties in interest to review such documents in their entirety. A copy of the Sale Motion, the Asset Purchase Agreement, the Bidding Procedures, and/or the Bidding Procedures Order, in addition to any related motions that may be filed, may be viewed by accessing the website of the Debtors' notice and claims agent at <http://dm.epiq11.com/epi/project>. The documents may also be obtained by accessing the Court's internet site: <https://ecf.deb.uscourts.gov>, for a fee, through an account obtained from the PACER website at <http://www.pacer.gov>.

Date: [•], 2016  
Wilmington, Delaware

SULLIVAN · HAZELTINE · ALLINSON LLC

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William D. Sullivan (No. 2820)  
William A. Hazeltine (No. 3294)  
901 North Market Street, Suite 1300  
Wilmington, DE 19801  
Tel: (302) 428-8191  
Fax: (302) 428-8195

and

Chris L. Dickerson  
Marc J. Carmel  
Paul Hastings LLP  
71 South Wacker Drive, 45th Floor  
Chicago, IL 60606  
Tel: (312) 499-6000  
Fax: (312) 499-6100

*Attorneys for Debtors and Debtors in Possession*