IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: F & H ACQUISITION CORP., et al., Debtors.	Chapter 11 Case No. 13-13220 (KG) Jointly Administered **Requested Sale Procedures Hearing Date:** **February 12, 2014 at 11:00 a.m. (ET)** **Requested Sale Procedures Objection Deadline:** **February 12, 2014 at 10:00 a.m. (ET)** **Requested Sale Hearing Date:** **February 28, 2014 at 2:00 p.m. (ET)** **Requested Sale Objection Deadline:** **February 25, 2014 at 4:00 p.m. (ET)**

DEBTORS' AMENDED MOTION REQUESTING (A) THE SCHEDULING OF A SALE HEARING IN CONNECTION WITH THE SALE OF SUBSTANTIALLY ALL OF THE DEBTORS' ASSETS, (B) APPROVAL OF THE FORM AND SCOPE OF NOTICE OF SALE HEARING, (C) APPROVAL OF PROCEDURES FOR THE ASSUMPTION, ASSIGNMENT AND SALE OF CONTRACTS AND LEASES TO BUYER, AND (D) APPROVAL OF ASSET PURCHASE AGREEMENT, MANAGEMENT AGREEMENT AND PRIVATE SALE OF SUBSTANTIALLY ALL OF THE DEBTORS' ASSETS TO BUYER FREE AND CLEAR OF LIENS, CLAIMS, ENCUMBRANCES AND OTHER INTERESTS

The above-captioned debtors and debtors in possession (collectively, the "Debtors") hereby move (the "Motion")[1] for entry of orders (a) scheduling a sale hearing in connection with the sale of substantially all of the Debtors' assets; (b) approving certain notices and procedures for the assumption, assignment, and sale of contracts and leases to Buyer; (c) approving the asset purchase agreement and management agreement with and private sale to Buyer; and (d) providing that such sale will be free and clear of certain liens, claims, encumbrances and other interests. This Motion amends and supersedes the Debtors' original motion, dated December 15,

[1] Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Asset Purchase Agreement (as defined below).

2013 [Docket No. 14] (the "Original Sale Motion"), seeking, inter alia, to sell their assets. In support of this Motion, the Debtors respectfully represent:

Preliminary Statement

1. With the assistance of their investment banker and other professional advisors, the Debtors have conducted a thorough, year-long marketing process for their assets. In the months leading to their December 15, 2013 chapter 11 filings, the Debtors sought to obtain a stalking horse for the sale of substantially all of their assets as a going concern. Consistent with their obligations under their DIP Credit Agreement (as defined below), the Debtors filed the Original Sale Motion together with their chapter 11 petitions seeking approval of bid and notice procedures. The Original Sale Motion further requested that this Court approve certain bid protections should the Debtors select a stalking horse ahead of the auction. The Debtors continued their heavily-marketed sale process postpetition. During this time, the Debtors negotiated the confines of the sale and related process with the DIP Agent (as defined below), the First Lien Agent (as defined below), the Second Lien Agent (as defined below), and the Creditors' Committee (as defined below) that was formed on January 3, 2014.

2. Ultimately, this process culminated in a global settlement among the Debtors, the DIP Agent, the First Lien Agent, the Second Lien Agent and the Creditors' Committee (the "Global Settlement"), which includes an agreement to dispense with further marketing of the Debtors' assets and to proceed directly to a private sale embodied in the Asset Purchase Agreement attached hereto as **Exhibit 4**. Indeed, the Debtors received only two other preliminary indications of interest during this postpetition period – each of which were subject to significant contingencies and neither of which would provide value to the Debtors' estates that is near the transaction value provided by the Asset Purchase Agreement and the Global Settlement.

3. The Asset Purchase Agreement is the result of the Debtors' negotiations with their key constituencies. It is contemplated as part of the Global Settlement with these constituencies, including the Creditors' Committee, which the Debtors seek approval of contemporaneously herewith. The Global Settlement contemplates proceeding with the Asset Purchase Agreement by a private sale to Buyer without auction. By avoiding an auction and going right to the private sale, the Debtors expect to shave approximately one month's time off the process and up to approximately $1 million in restructuring and other fees. The Debtors submit, within their business judgment, that ample marketing has shown that it is unlikely that an auction would lead to a higher and better bid for their assets.

4. Thus, the Debtors hereby seek entry of an order that schedules a sale hearing in connection with the sale of the Debtors' assets and approves certain notices and procedures for the assumption, assignment, and sale of contracts and leases to Buyer. Following the sale hearing, the Debtors hereby seek entry of a second order that approves the Asset Purchase Agreement and Management Agreement pursuant to a private sale to Buyer and provides that such sale will be free and clear of certain liens, claims, encumbrances and other interests.

Jurisdiction and Venue

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

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

7. The statutory bases for the relief requested herein are sections 105(a), 363, 365, 503 and 507 of the Bankruptcy 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 Rules 6004-1 and 9013-1(m) of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the "Local Bankruptcy Rules").

Background

8. On December 15, 2013 (the "Petition Date"), each of the Debtors filed a petition with the Court under chapter 11 of the Bankruptcy Code in order to permit the Debtors to restructure their balance sheets and operations to restore profitability. The Debtors are operating their businesses and managing their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No request for the appointment of a trustee or examiner has been made in these chapter 11 cases, and on January 3, 2014, the Office of the United States Trustee for the District of Delaware (the "U.S. Trustee") appointed the Official Committee of Unsecured Creditors (the "Creditors' Committee").

9. As of the Petition Date, the Debtors were parties to that certain Credit Agreement, dated as of March 19, 2012, by and among the Debtors as borrowers, General Electric Capital Corporation ("GECC" or the "First Lien Agent") as lender and as agent on behalf of itself and other lenders thereto (collectively, the "First Lien Lenders"), and the First Lien Lenders (as amended from time to time, the "First Lien Credit Agreement"). The First Lien Credit Agreement is secured by substantially all of the Debtors' assets. GECC also serves as DIP Agent under the DIP Credit Agreement (as such terms are defined in that certain Interim Order Pursuant to 11 U.S.C. §§ 105, 361, 362, 363, 364 and 507 (I) Authorizing Debtors to Obtain Postpetition Financing Pursuant to Section 364 of the Bankruptcy Code, (II) Authorizing the Use of Cash Collateral Pursuant to Section 363 of the Bankruptcy Code, (III) Granting Adequate Protection to the Prepetition Secured Parties Pursuant to Sections 361, 362, 363 and 364 of the

Bankruptcy Code, (IV) Granting Liens and Superpriority Claims, (V) Modifying Automatic Stay, and (VI) Scheduling a Final Hearing [Docket No. 55] (the "Interim DIP Order").

10. In addition, as of the Petition Date, the Debtors were parties to that certain Credit Agreement, dated as of March 19, 2012, by and among the Debtors as borrowers, Cerberus Business Finance, LLC (the "Second Lien Agent," and collectively with the First Lien Agent, the "Agents") as lender and as agent on behalf of itself and other lenders thereto (the "Second Lien Lenders," and together with the First Lien Lenders, the "Secured Lender Parties"), and the Second Lien Lenders (as amended from time to time, the "Second Lien Credit Agreement," and together with the First Lien Credit Agreement, the "Credit Agreements"). The Second Lien Credit Agreement is secured by substantially all of the Debtors' assets, junior in priority only to the liens granted pursuant to the First Lien Credit Agreement.

11. Additional information about the Debtors' businesses and the events leading up to the Petition Date can be found in the Declaration of James Zielke in Support of Debtors' Chapter 11 Petitions and First Day Motions [Docket No. 2], which is incorporated herein by reference. In addition, in support of this Motion, the Debtors further rely on the Declaration of Nicole Fry (the "Fry Declaration") of Imperial Capital, LLC filed contemporaneously herewith, attached hereto as **Exhibit 1**.

The Debtors' Sale Process

A. Prepetition Marking Efforts

12. In February 2013, the Debtors retained investment banker Imperial Capital, LLC ("Imperial"). Following an analysis of different strategic alternatives, Imperial prepared a "teaser" and a detailed confidential information memorandum and set up an electronic data room for interested parties to conduct due diligence. Beginning in March 2013, Imperial conducted an extensive process that reached out to approximately 164 parties, including strategic and financial

investors, resulting in the Debtors' entry into approximately 80 non-disclosure agreements. The Debtors received eight indications of interest from potential purchasers. The Debtors conducted five meetings with potential purchasers. This initial phase of the sale process did not lead to an acceptable bid.

13. Based on the responses received, beginning in August 2013, the Debtors and Imperial re-focused the marketing process on seeking a stalking horse bidder for a possible bankruptcy sale. Imperial then had a second round of discussions with seven parties which had previously expressed interest. Included in these discussions were negotiations with the ultimate Buyer for it to serve as stalking horse. None of these discussions, however, produced a stalking horse bidder.

14. Then, in October 2013, while still in discussions with Buyer, Imperial contacted nine new possible buyers and 22 previously-contacted buyers with the objective of finding a qualified stalking horse bidder. Despite extensive efforts, the Debtors were unable to secure a stalking horse offer. The Debtors thus determined that it was in their best interests to commence a sale process that would procure bids through an auction to be conducted under section 363 of the Bankruptcy Code.

B. Postpetition Marketing Efforts

15. On the Petition Date, the Debtors filed the Original Sale Motion, seeking to sell substantially all of their assets. Among other things, the Original Sale Motion called for auction procedures commensurate with the process and milestones required in the DIP Credit Agreement as of the Petition Date. Those proposed procedures contemplated a March 4, 2014 auction and sale hearing on March 6, 2014. The DIP Credit Agreement required that a sale order be entered on or prior to March 7, 2014, and the closing to occur on or prior to March 26, 2014.

16. The process sought in the Original Sale Motion was the final stage in the sale process that Imperial and the Debtors began in the spring of 2013. Subsequent to the Petition Date, with a firm set of deadlines imposed by the DIP Credit Agreement and the proposed auction procedures and bid protections, the Debtors and Imperial reached out again to the market in search of a stalking horse.

17. Specifically, Imperial contacted 31 parties, including 18 parties previously contacted and 13 new parties. Postpetition, 11 new parties signed confidentiality agreements and a total of 22 parties currently have data room access. Imperial has been working diligently on a daily basis, answering questions and setting up in-person and telephonic meetings between management and potential buyers.

18. Throughout the sale process (both prepetition and post), the Debtors, Imperial and the Debtors' legal advisors, have been in close consultation with the Debtors' key constituencies, including the Creditors' Committee following its January 3, 2014 formation. Ultimately, these constituencies executed a term sheet regarding the Global Settlement, which sets forth certain terms and conditions resolving key issues, such as the disposition of proceeds and the wind down of the Debtors' estates in these chapter 11 cases. Among other things, the Asset Purchase Agreement and the Global Settlement contemplate and involve:

- a private sale and the Debtors' entry into the Asset Purchase Agreement with Buyer;
- an agreement among the DIP Lenders, the First Lien Lenders, and the Second Lien Lenders regarding the assumption and restructuring of certain indebtedness by Buyer; and
- a settlement term sheet that provides for certain payments to be made by Buyer, including in respect of administrative claims and to provide a source of recovery for unsecured creditors, along with related releases and protocols that will avoid substantial litigation and the attendant costs.

The Debtors are seeking approval of the Global Settlement contemporaneously with the filing of this Motion.

19. Meanwhile, and while diligently seeking as many interested buyers as possible, throughout the months leading up to the Petition Date and again nearly every day thereafter, the Debtors, their legal advisors and Imperial, in consultation with their key constituencies had been negotiating the terms of an asset purchase agreement with the Second Lien Lenders, for a combination of cash, a partial credit bid and an assumption of liabilities in exchange for the purchase of substantially all of the Debtors' assets. In fact, over the last several months, the Debtors had been very close to agreeing upon terms with the Second Lien Lenders, working diligently, and at arm's length, to finalize certain open issues, originally under the notion that the Second Lien Lenders could, subject to finalization of certain open issues, become the stalking horse under the Original Sale Motion.

20. Throughout this time, the Debtors actively sought other bids. Notwithstanding the Debtors' and Imperial's extensive marketing efforts, no party other than Buyer has indicated any non-contingent offer to purchase the Debtors' assets Specifically, postpetition, only two parties other than Buyer have provided indications of interest. Yet, these parties' offers provided less value when compared to Buyer's offer and in any event, were subject to finance contingencies and to due diligence "outs." As stated below, Buyer is providing value in excess of $120 million in a combination of cash, a partial credit bid and assumed liabilities under the Asset Purchase Agreement.

21. This Motion amends the Original Sale Motion and instead seeks the relief set forth in the Original Sale Motion as hereby amended. As a result of marketing efforts by Imperial and arm's length negotiations with Buyer and other interested parties, the Debtors have

determined, in their reasonable business judgment, that the Asset Purchase Agreement is the highest and best offer and maximizes value for the Debtors' assets. Accordingly, and consistent with the Global Settlement, the Debtors seek instead to proceed directly with the private sale to Buyer. Pending consummation of the Sale Transaction, the Debtors will continue operating under the DIP Budget (as defined in the Interim DIP Order) and pay all of their obligations thereunder.

The Proposed Sale

22. As set forth above and in the Fry Declaration, the sale process commenced in March 2013. The process has been comprehensive and fully exhaustive. The Debtors, in their business judgment, believe that the Asset Purchase Agreement represents the highest and best offer for the sale of their businesses, and is the only realistic offer to maximize recoveries and preserve the Debtors' businesses. Moreover, the Debtors believe after having gone through this thorough marketing process that (a) proceeding with an auction is unlikely to result in a higher and better bid and (b) by forgoing an auction and proceeding to a close of the asset sale approximately one month ahead of schedule, the Debtors expect to save up to approximately $1 million, which the Secured Lender Parties have indicated was a significant factor in their willingness to enter into the Global Settlement. *See* Fry Decl. ¶15. Therefore, the Debtors hereby amend the Original Sale Motion and seek approval of the private sale to Buyer. Notably, GECC and the Creditors' Committee support the private sale as part of the Global Settlement.

23. The Debtors have decided to sell substantially all the Purchased Assets in a private sale pursuant to section 363 of the Bankruptcy Code for several important reasons. First, the Debtors believe that the nature of their business relationships with vendors is fragile and that it is therefore crucial for the business to emerge from chapter 11 as quickly as possible. Second,

a sale of the Debtors' assets will enable the Debtors' businesses to continue as going concerns, retain their existing customer base, and avoid an erosion of customer and vendor confidence that could result from a protracted chapter 11 process. Third, the Debtors do not have the financial resources for a protracted stay in chapter 11 and the Global Settlement is thus premised on a shorter timeframe. Finally, the Debtors' key constituencies support the process and are committed to a private sale.

I. Summary of Proposed Terms of the Sale[2]

24. Pursuant to the terms of the Sale, the Debtors propose to sell to Buyer substantially all of the Debtors' assets. The total transaction value provided by Buyer is in excess of $125 million, including (i) assumption of approximately $70 million of debt under the First Lien Credit Agreement; (ii) assumption of up to approximately $9.6 million of debt under the DIP Credit Agreement; (iii) rollover of $10 million of debt under the Second Lien Credit Agreement; (iv) a partial credit bid of debt under the Second Lien Credit Agreement of $19 million; (v) $14.5 million in cash, of which $4.5 million would be transferred to the Debtors for the purpose of the wind down; and (vi) an estimated $6.7 million in additional assumed liabilities. The material terms of the Asset Purchase Agreement are as follows:

Purchase Price	Section 3.1 of the Asset Purchase Agreement provides that the purchase price (the "Purchase Price") for the Purchased Assets (as defined below) shall be (i) the Cash Payment as set forth in Section 3.1(b), plus (ii) the assumption of the Assumed Liabilities by Buyer at Closing, plus (iii) Nineteen Million Dollars ($19,000,000) (the "Credit Bid Amount"), to be satisfied in the form of a credit against the Prepetition Second Lien Obligations pursuant to Section 363(k) of the Bankruptcy Code
Purchased Assets	Section 2.1 of the Asset Purchase Agreement lists the purchased assets, and provides that the Buyer shall acquire, free and clear of all liens,

[2] The following description of the Asset Purchase Agreement, the Global Settlement, and related agreements is a summary only. This summary does not supplement or alter the terms of the Asset Purchase Agreement or any other definitive transaction or settlement documents. In the event of any inconsistency between this Motion and the Asset Purchase Agreement, the Asset Purchase Agreement and other definitive documents shall govern.

claims, interests and encumbrances as set forth in the Sale Order, substantially all of the tangible and intangible assets, real property and personal property of the Debtors (collectively, the "Purchased Assets"); provided, however, that, the foregoing shall not include Excluded Assets, discussed below. The Purchased Assets shall include, without limitation, the following assets of the Debtors: (i) accounts receivable; (ii) all cash, cash equivalents, bank deposits, and similar cash items, other than the Cash Payment; (iii) all Purchased Inventory at the Purchased Restaurants other than alcohol beverage inventories in jurisdictions where the Law does not permit Buyer to take title to such inventory until it obtains requisite Liquor License Approvals from the pertinent Governmental Body; (iv) deposits, to the extent transferable to Buyer, and other prepaid charges, excluding Excluded Utility Deposits; (v) rights under specified leases of the Debtors; (vi) furniture, fixtures, and equipment at the Purchased Restaurants; (vii) intellectual property; (viii) the Purchased Contracts; (ix) documents, files, customer lists, permits, and supply lists that do not exclusively relate to any Excluded Asset and are not confidential personnel or medical records pertaining to any Employee, other books and records that Sellers are required by Law to retain or that Sellers determine are necessary to retain, minute books, stock or membership interest records and corporate seals, or documents relating to proposals to acquire the Business by Persons other than Buyer; (x) permits, including liquor licenses, to the extent transferable, other than alcohol permits (including liquor licenses) in jurisdictions where the Law does not permit Buyer to take title to such permits until it obtains requisite approvals from the pertinent Governmental Body; (xi) supplies owned by the Debtors, to the extent transferable, other than alcohol supplies in jurisdictions where the Law does not permit Buyer to take title to such supplies until it obtains requisite approvals from the pertinent Governmental Body; (xii) insurance policies or rights to proceeds relating to the Purchased Assets (other than any directors and officers or fiduciary insurance policy); (xiii) all rights under non-disclosure, confidentiality, non-compete, or non-solicitation agreements with employees and agents or third parties; (xiv) all rights pursuant to warranties, representations, and guarantees made by suppliers, manufacturers, and contractors to the extent assignable by operation of Law and to the extent affecting any Purchased Assets, other than any warranties, representations and guarantees pertaining exclusively to any Excluded Assets;, (xv) all goodwill and other intangible assets associated with the Business and/or the Purchased Assets, including customer and supplier lists and the goodwill associated with the Purchased Intellectual Property owned by Sellers; (xvi) all rights, claims, or interests in any refund, rebate, abatement or recovery for Taxes, together with any interest due thereon or penalty rebate arising therefrom with respect to Taxes paid on or prior to the Closing Date; (xvii) all Claims and causes of action of

	Sellers, including any Claims and causes of action arising under Chapter 5 of the Bankruptcy Code or any other Law; (xviii) to the extent transferable, all prepaid taxes and tax credits; (xix) all rights to telephone and facsimile numbers and email addresses used by the Sellers, as well as rights to receive mail and other communications addressed to Sellers; (xx) all other property and assets pertaining to or used or useful in the conduct of the Business or the ownership of the Purchased Assets as set forth a specified schedule to the Asset Purchase Agreement; and (xxi) all other assets, properties, rights, claims and causes of action of Sellers of any kind or nature whatsoever that are not otherwise expressly designated as Excluded Assets.
Excluded Assets	Section 2.2 of the Asset Purchase Agreement lists the excluded assets which the Debtors shall retain all right, title, and interest thereto (collectively, the "Excluded Assets"). The Excluded Assets include, without limitation, (i) the Cash Payment; (ii) deposits that are not transferable to Buyer; (iii) Excluded Contracts; (iv) all liabilities, indebtedness and other obligations, including any note indebtedness, owed to or by any Seller to or by any Affiliate of any Seller, in all cases, other than Liabilities specifically identified as Assumed Liabilities; (v) intellectual property rights not purchased by Buyer; (vi) confidential personnel and medical records pertaining to any Employee; other books and records that Sellers are required by Law to retain or that Sellers determine are necessary to retain, minute books, stock or membership interest records and corporate seals, documents relating to proposals to acquire the Business by Persons other than Buyer; (vii) all of the Debtors' rights under the Asset Purchase Agreement and/or other documents executed in connection therewith; (viii) assets set forth on Schedule 2.2(h); and (ix) equity interests in the Debtors.
Termination	Section 4.4 of the Asset Purchase Agreement sets forth circumstances under which the Asset Purchase Agreement may be terminated. Among other things, these provisions allow Buyer to terminate the Asset Purchase Agreement if (i) there is a material breach by the Debtors under certain circumstances; (ii) the Bankruptcy Court has not entered the Sale Order on or before March 8, 2014; or (iii) the Closing has not occurred on or before forty (40) days after the entry of the Sale Order.
Management Agreement	At the closing of the, the Debtors shall deliver to Buyer executed management agreement in the form attached to the Asset Purchase Agreement (the "Management Agreement").

25. Moreover, in addition to the above-described salient features of the Asset Purchase Agreement, in accordance with Local Rule 6004-1(b)(iv), the Debtors note the following with respect to the Asset Purchase Agreement and the Global Settlement:

(a) No Sale to an Insider. Buyer is not an insider of the Debtors within the meaning set forth in section 101(31) of the Bankruptcy Code.

(b) Agreements with Management. No agreements with management have been entered into in connection with the sale of the Purchased Assets.

(c) Releases. The Global Settlement will include usual and customary releases..

(d) Private Sale/No Competitive Bidding. As set forth in greater detail, the Debtors are pursuing a private sale of the Purchased Assets.

(e) Closing and Other Deadlines. Section 4.4 of the Asset Purchase Agreement provides that Buyer may terminate the Asset Purchase Agreement if, among other things, (i) the Bankruptcy Court has not entered the Sale Order on or before March 8, 2014; or (ii) the Closing has not occurred on or before forty (40) days after the entry of the Sale Order.

(f) Good Faith Deposit. Section 7.4 of the Asset Purchase Agreement provides that Buyer will deposit $1,500,000 in cash within three business days after execution of the Asset Purchase Agreement.

(g) Interim Arrangements with Proposed Buyer. Section 8.6 of the Asset Purchase Agreement requires the Debtors to continue to operate their business in the ordinary course until the Closing Date.

(h) Use of Proceeds. The Asset Purchase Agreement contemplates a schedule of Wind Down Payments as well as a Designation Rights Budget.

(i) Tax Exemption. No provision of the Asset Purchase Agreement addresses the use of tax exemptions.

(j) Record Retention. Section 8.4 of the Asset Purchase Agreement provides that the Debtors and Buyer agree that each of them shall preserve and keep the books and records held by it relating to the Debtors' pre-closing business for a period of twelve (12) months from the Closing Date and shall make such books and records available to the other parties (and permit such other party to make extracts and copies of such books and records at its own expense) as may be reasonably required by such party.

(k) Sale of Claims Section 2.1(q) of the Asset Purchase Agreement provides for the sale by the Debtors of all of their rights, claims or causes of action, including, but

not limited to, any rights or claims as arise under chapter 5 of the Bankruptcy Code.

(l) Sale Free and Clear of Liens, Claims, Encumbrances and Other Interests. Other than the real property subject to the Real Property Leases and the personal property subject to the Personal Property Leases, the Debtors shall transfer good title in, to and under all of the Purchased Assets, in each case free and clear of all Liens, other than specified exceptions in the Asset Purchase Agreement, to the fullest extent permissible under section 363(f) of the Bankruptcy Code.

(m) Credit Bid. Section 3.1 of the Asset Purchase Agreement provides that part of the Purchase Price shall be partially satisfied in the form of a $19 million credit against the amount of the Debtors' Second Lien Obligations pursuant to section 363(k) of the Bankruptcy Code.

26. The Debtors are proceeding with this Motion in order to create an appropriate process for the Sale.

27. Accordingly, to ensure that (a) the sale process, which commenced in March 2013, continues to move forward in a timely and efficiently manner under the facts and circumstances of these chapter 11 cases, and (b) they have obtained the necessary Court approval of the timeline and other provisions governing such process, the Debtors are hereby requesting the Court to enter an order, substantially in the form of **Exhibit 2** attached hereto (the "Sale Procedures Order"): (i) scheduling a hearing to approve the sale of the Purchased Assets (the "Sale Hearing") and to consider entry of an order, substantially in the form of **Exhibit 3** attached hereto, approving the Sale, on February 28, 2014; (ii) approving the Asset Purchase Agreement, a copy of which is attached hereto as **Exhibit 4** (the "Asset Purchase Agreement"); (iii) approving the form and manner of the notice of the Sale Hearing, substantially in the form annexed as Exhibit B to the Sale Procedures Order (the "Sale Notice"); (iv) approving certain procedures, set forth more fully below, for the assumption, assignment and sale of contracts and leases to Buyer and/or to resolve any objections thereto, and (v) approving the form and manner

of the notice of such procedures, substantially in the form annexed as Exhibit C to the Sale Procedures Order.

II. Assumption, Assignment, Sale and Cure of Contracts and Leases

28. To facilitate and effect the sale of the Purchased Assets, the Debtors seek to assume, assign and sell certain contracts and leases to Buyer. Therefore, the Debtors submit that it is necessary to establish (a) a process to determine and pay cure obligations, if any, pursuant to section 365 of the Bankruptcy Code, for those contracts and leases that the Debtors seek to assume, assign and sell to Buyer, and (b) a process for counterparties of such contracts and leases to object to such cure amounts as well as Buyer's proposed adequate assurance (together, the "Cure Procedures"). The Debtors propose the following Cure Procedures:

a. Notice of Sale and Sale Hearing: The Debtors (or their agents) shall:

i. within two (2) business days after entry of the Sale Procedures Order, provide notice, in substantially the form attached thereto as Exhibit B (the "Sale Notice"), of the Sale Procedures Order, the Motion, the Objection Deadline, and the Sale Hearing by first-class mail upon (a) all Persons known by the Debtors to have expressed an interest to the Debtors in a transaction with respect to the Debtors' assets or a portion thereof during the past six (6) months; (b) all Persons known by the Debtors to have asserted any Lien or interest in the Debtors' assets; (c) all Persons known by the Debtors to be counterparties to Contracts; (d) the U.S. Trustee; (e) the Committee and its counsel; (f) any Governmental Body known to have a claim in the Bankruptcy Cases; (g) all other known creditors and equity security holders of the Debtors; (h) all Persons that have requested special notice in the Bankruptcy Cases; and (i) all other Persons as directed by the Court; and

ii. cause the Sale Notice to be published on http://www.dm.epiq11.com/foxhound (the "Website") as soon as practicable after entry of this Order.

b. Assumption, Assignment, Sale and Cure Notice.

i. At least 14 days prior to the Sale Hearing (i.e., on or before February 14, 2014), the Debtors shall file with the Court and serve via first class mail on all Persons known by the Debtors to be a counterparty to a Contract, a notice of assumption, assignment, sale and cure substantially in the form attached to the Sale Procedures Order as Exhibit C (the "Notice of Assumption,

Assignment and Sale"). The Notice of Assumption, Assignment and Sale shall include (a) a statement that the Contracts listed therein may be treated as "Purchased Contracts" under the Asset Purchase Agreement by their inclusion on Schedule 1.1(b) to the Asset Purchase Agreement, (b) a statement that certain of the Contracts listed therein may be designated as "Designation Right Assets" under the Asset Purchase Agreement and thereafter rejected or assumed, assigned and sold at a date subsequent to the Closing Date, (c) the Debtors' calculation of the amount necessary, if any, to cure any and all defaults under the Contracts and compensate the counterparties thereto for pecuniary loss in respect of any such default(s) (the "Cure Amount") as a condition to assumption, assignment and sale of such Contract under Bankruptcy Code sections 363 and 365(b), and (d) evidence of Buyer's ability to provide adequate assurance of performance of such executory contracts or unexpired leases, **a copy of which is attached as Exhibit 2 to the Notice of Assumption, Assignment and Sale**.

ii. Any subsequent Notice of Assumption, Assignment and Sale that identifies a Contract that was not previously identified as being subject to assumption, assignment and sale under the Asset Purchase Agreement or that reduces the Debtors' calculation of the Cure Amount (an "Amended Notice of Assumption, Assignment and Sale") shall provide a deadline of not less than seven (7) days from the date of service of such Amended Notice of Assumption, Assignment and Sale by which the counterparty to any modification may object to (a) the assumption, assignment and sale of such Contract pursuant to the Asset Purchase Agreement; (b) the Debtors' calculation of the Cure Amount for such Contract; and (c) adequate assurance of performance, if such Contract was not previously identified as being subject to assumption, assignment and sale.

iii. The Notice of Assumption, Assignment and Sale and any Amended Notice of Assumption, Assignment and Sale will be posted on the Website.

iv. The Debtors reserve the right to (i) provide Amended Notices of Assumption, Assignment and Sale up to the Closing of the Asset Purchase Agreement; (ii) remove a Contract from the list of Purchased Contracts at any time prior to the Closing of such agreement, for any reason; and (iii) remove a Contract from the list of Purchased Contracts after the closing of the Asset Purchase Agreement, if the Court determines after such Closing that the Cure Amount for such Contract is in excess of the amount set forth on Exhibit 1 to the Notice of Assumption, Assignment and Sale or the Amended Notice of Assumption, Assignment and Sale, as applicable. The removal of any such Contract shall not reduce the purchase price to be paid by Buyer unless consented to by the DIP Agent and the Prepetition First Lien Agent. In addition, one or more of the Contracts listed on Exhibit 1 to the Notice of Assumption, Assignment and Sale may be designated as a Designation Right Asset at the Closing of the Asset Purchase Agreement and in such case may be assumed by the Debtors and assigned and sold to the designated Person, if it makes a written

election to accept an assignment of such Contract within to the time frame provided in the Asset Purchase Agreement.

v. Any counterparty to a Contract shall file and serve on the Objection Recipients any objections to (a) the proposed assumption, assignment and sale of its Contract to Buyer and must state in its objection, with specificity, the legal and factual basis of its objection) and (b) if applicable, the proposed Cure Amount (and must state in its objection, with specificity, what Cure Amount is required with appropriate documentation in support thereof), **no later than February 25, 2014 at 4:00 p.m. (prevailing Eastern Time)**; provided however, that the deadline to object to any information set forth for the first time in any Amended Notice of Assumption, Assignment and Sale shall be no earlier than seven (7) days after the date of service of such Amended Notice of Assumption, Assignment and Sale. If no objection is timely filed and served, (x) the counterparty to a Contract shall be deemed to have irrevocably consented to the assumption, assignment and sale of the Contract to Buyer and shall be forever barred from asserting any objection with regard to such assumption, assignment and sale, and (y) the Cure Amount set forth in the Notice of Assumption, Assignment and Sale (or Amended Notice of Assumption, Assignment and Sale) shall be controlling, notwithstanding anything to the contrary in any Contract, any other document or applicable law, and the counterparty to the Contract shall be deemed to have irrevocably consented to the Cure Amount and shall be forever barred from asserting any other claims related to such Contract against the Debtors or Buyer or the property of any of them.

III. The Sale Should be Approved

29. For the reasons explained herein, the Debtors believe that the approval of a private sale of the Purchased Assets to Buyer pursuant to the terms of the Asset Purchase Agreement is not only appropriate but in the best interest of the Debtors, their creditors, and these estates.

30. 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). Section 105(a) of the Bankruptcy Code provides: "The Court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). In pertinent part, Bankruptcy Rule 6004 states that, "all sales not in the ordinary course of business may be by private sale or by public auction."

Fed. R. Bankr. P. 6004(f)(1). With respect to the notice required in connection with a private sale, Bankruptcy Rule 2002(c)(1) states, in pertinent part, that,

> . . . the notice of a proposed use, sale or lease of property . . . shall include . . . the terms and conditions of any private sale and the deadline for filing objections. The notice of a proposed use, sale or lease of property, including real estate, is sufficient if it generally describes the property.

Fed. R. Bankr. P. 2002(c)(1).

31. To approve the use, sale, or lease of property out of the ordinary course of business, this Court must find some articulated business justification for the proposed action. *See In re Abbotts Dairies of Pa. Inc.*, 788 F.2d 143, 145-47 (3d Cir. 1986) (implicitly adopting the articulated business justification and good faith tests of *Committee of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1070 (2d Cir. 1983)); *see also In re Delaware & Hudson Ry. Co.*, 124 B.R. 169, 175-76 (D. Del. 1991) (concluding that the Third Circuit had adopted a "sound business purpose" test in *Abbotts Dairies*).

32. Generally, courts have applied four (4) factors in determining whether a sale of a debtor's assets should be approved: (a) whether a sound business reason exists for the proposed transaction; (b) whether fair and reasonable consideration is provided; (c) whether the transaction has been proposed and negotiated in good faith; and (d) whether adequate and reasonable notice is provided. *See Lionel*, 722 F.2d at 1071 (setting forth the "sound business purpose" test); *Abbotts Dairies*, 788 F.2d at 145-57 (implicitly adopting the articulated business justification test and adding the "good faith" requirement); *Delaware & Hudson Rv.*, 124 B.R. at 176 ("Once a court is satisfied that there is a sound business reason or an emergency justifying the pre-confirmation sale, the court must also determine that the trustee has provided the interested parties with adequate and reasonable notice, that the sale price is fair and reasonable and that the purchaser is proceeding in good faith.").

33. This fundamental analysis does not change if the proposed sale is private, rather than public. *See, e.g., In re Ancor Exploration Co.*, 30 B.R. 802, 808 (Bankr. N.D. Okla. 1983) ("[T]he bankruptcy court should have wide latitude in approving even a private sale of all or substantially all of the estate assets not in the ordinary course of business under § 363(b)"). The bankruptcy court "has ample discretion to administer the estate, including authority to conduct public or private sales of estate property." *In re WPRV-TV, Inc.*, 143 B.R. 315, 319 (D.P.R. 1991), vacated on other grounds, 165 B.R. 1 (D.P.R. 1992); *accord, In re Canyon P'ship*, 55 B.R. 520, 524 (Bankr. S.D. Cal. 1985). Here, the proposed private sale of the Purchased Assets to Buyer meets all of these requirements and should be approved.

A. Proceeding by Private Sale Reflects an Exercise of the Debtors' Business Judgment

34. There is a sound business justification for the Debtors' preference to proceed by private sale, rather than conducting a public auction and sale of the Purchased Assets. The Debtors engaged in a comprehensive, year-long marketing of their assets and have been unable to procure a qualified buyer other than Buyer. *See* Fry Decl. ¶¶ 13, 19. The Second Lien Agent is the logical purchaser of the Debtors' assets and the only one to make a binding postpetition offer that maximizes value to the Debtors. *See id*. ¶ 14.

35. The Debtors believe that no outside buyer would be willing to provide a combination of cash, a partial credit bid and assumed liabilities that provide consideration comparable with what is provided under the Asset Purchase Agreement.

36. The Debtors believe, in their business judgment, that selling the Purchased Assets is in the best interests of the Debtors' estates. The Debtors and their advisors have expended nearly a year marketing their assets. Indeed, in this year period, the Debtors have reached to well over 100 potential buyers and have conducted multiple marketing steps. *See* Fry Decl. ¶¶ 5-10. However, despite such efforts, postpetition, the Debtors only received two letters of interest to

purchase the assets, neither of which offered adequate consideration and both of which were subject to due diligence contingencies.

37. As explained, the Debtors, the First Lien Lenders and the Second Lien Lenders have engaged in extensive arms' length, good faith negotiations with the Creditors Committee, which culminated in the Global Settlement that fully and finally resolves the sale of the Debtors' assets and the disposition of proceeds and wind down of the estates, without the need for further cost or delay. The Global Settlement supports the Sale Transaction via a private sale to Buyer.

B. The Purchase Price is Fair and Reasonable

38. The Debtors believe that the Purchase Price is a fair and reasonable price for the Purchased Assets. The Purchase Price under the Asset Purchase Agreement was the result of extensive, good faith and arm's length negotiations. The transaction provides in excess of $120 million as follows: (i) assumption of approximately $70 million of debt under the First Lien Credit Agreement; (ii) assumption of up to $9.6 million of debt under the DIP Credit Agreement; (iii) rollover of $10 million of debt under the Second Lien Credit Agreement; (iv) a credit bid of debt under the Second Lien Credit Agreement of $19 million; (v) $14.5 million in cash, of which $4.5 million would be transferred to the Debtors for the purpose of the wind down; and (vi) an estimated $6.7 million in additional assumed liabilities. In addition, the Debtors believe that the sale process was fair and reasonable and that the Asset Purchase Agreement constitutes the highest and best offer for the Purchased Assets. While the Debtors received two other offers postpetition, these potential purchasers have not offered to acquire the Purchased Assets for as much value for the Debtors and the Debtors' creditors as is set forth in the Asset Purchase Agreement nor do they provide additional cash to fund the Debtors' remodel program as provided in the Asset Purchase Agreement. Moreover, and significantly, such potential

purchasers have not been able to satisfactorily demonstrate an ability to consummate a sale in a timely manner. Accordingly, the Debtors have carefully considered and analyzed Buyer's offer as set forth in the Asset Purchase Agreement and have concluded that a sale of the Purchased Assets pursuant to the Asset Purchase Agreement will result in obtaining maximum value for the Purchased Assets and is in the best interest of the estates. In consideration of the foregoing, the Debtors believe that the Purchase Price provides fair and reasonable value for the Purchased Assets.

C. The Sale is Proposed in Good Faith

39. The Sale has been proposed in good faith. The Asset Purchase Agreement (including the Management Agreement) was the product of extensive good faith, arm's length negotiations between the Debtors, on the one hand, and Buyer, on the other, and was negotiated with the active involvement of the Debtors' officers and professionals. The Debtors believe and submit that the sale of the Purchased Assets to Buyer pursuant to the terms and conditions of the Asset Purchase Agreement is not the product of collusion or bad faith. No evidence suggests that the Asset Purchase Agreement is anything but the product of arm's length negotiations between the Debtors, Buyer, and their respective professional advisors.

D. Adequate and Reasonable Notice of Sale Has Been Provided

40. The Debtors intend to provide adequate notice of the proposed Sale to all parties-in-interest, as provided for in the Sale Procedures Order. *See* Fed. R. Bankr. P. 2002(c)(1) (notice must contain "the terms and conditions of any private sale and the time fixed for filing objections."); *see also, Delaware & Hudson Ry.*, 124 B.R. at 180 (the disclosures necessary in such a sale notice need only include the terms of the sale and the reasons why such a sale is in the best interests of the estate and do not need to include the functional equivalent of a disclosure

statement). In addition, as provided for in the Sale Procedures Order, within two (2) business days after entry of the Sale Procedures Order, the Debtors will send the Sale Notice to all Persons known by the Debtors to have expressed an interest to the Debtors in a transaction with respect to the Debtors' assets or a portion thereof during the past six (6) months.

E. The Debtors may sell the Purchased Assets Free and Clear of Liens, Claims, Encumbrances and Other Interests

41. In accordance with section 363(f) of the Bankruptcy Code, a debtor in possession may sell property under section 363(b) "free and clear of any interest in such property of an entity other than the estate" if any one of the following conditions is satisfied: (a) such a sale is permitted under applicable non-bankruptcy law; (b) the party asserting such a lien, claim, or interest consents to such sale; (c) the interest is a lien and the purchase price for the property is greater than the aggregate amount of all liens on the property; (d) the interest is the subject of a bona fide dispute; or (e) the party asserting the lien, claim, or interest could be compelled, in a legal or equitable proceeding, to accept a money satisfaction for such interest. 11 U.S.C. § 363(f).

42. The First Lien Lenders have provided their consent to the sale pursuant to the terms set forth in the Committee Settlement and the Asset Purchase Agreement and as set forth herein. Furthermore, bankruptcy courts have held that they have the equitable power to authorize sales free and clear of interests that are not specifically covered by section 363(f). *See, e.g., In re Trans World Airlines, Inc.*, 2001 WL 1820325, at *3, 6 (Bankr. D. Del. Mar. 27, 2001); *Volvo White Truck Corp. v. Chambersburg Beverage, Inc. (In re White Motor Credit Corp.)*, 75 B.R. 944, 948 (Bankr. N.D. Ohio 1987). Considering that any remaining objections to this Motion must be resolved by consent of the objecting party or by the Court, the Debtors

expect that they can satisfy at least the second and fifth subsections of section 363(f) of the Bankruptcy Code.

43. Furthermore, courts have held that they have the equitable power to authorize sales free and clear of interests that are not specifically covered by section 363(f). *See, e.g., In re Trans World Airlines, Inc.*, 2001 WL 1820325, at *3 (Bankr. D. Del. Mar. 27, 2001); *Volvo White Truck Corporation* v. *Chambersburg Beverage, Inc. (In re White Motor Credit Corp.),* 75 B.R. 944, 948 (Bankr. N.D. Ohio 1987). The Debtors will serve notice of the Motion to holders of all such interests and each will have an opportunity to object to the sale. Accordingly, the Debtors request that the sale be approved "free and clear," with any liens, claims, encumbrances, and other interests to attach to the proceeds of the sale.

F. Assumption, Assignment and Sale of the Contracts Should be Approved

44. To facilitate and effectuate the sale of the Purchased Assets, the Debtors seek authority to assume, assign and sell the Purchased Contracts to Buyer. 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 Bankruptcy 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. *Lubrizol Enters., Inc. v. Richmond Metal Finishers, Inc.*, 756 F.2d 1043, 1046-47 (4th Cir. 1985). If the debtor's business judgment has been reasonably exercised, a court should approve the assumption or rejection of an unexpired lease or executory contract. *See Sharon Steel Corp. v. Nat'l Fuel Gas Distrib. Corp.*, 872 F.2d 36, 39-40 (3d Cir. 1989). The business judgment test "requires only that the trustee [or debtor-

in-possession] demonstrate that [assumption or] rejection of the contract will benefit the estate." Any more exacting scrutiny would slow the administration of a debtor's estate and increase costs, interfere with the Bankruptcy Code's provision for private control of administration of the estate, and threaten the court's ability to control a case impartially. *See Richmond Leasing Co. v. Capital Bank,* N.A., 762 F.2d 1303, 1311 (5th Cir. 1985). Moreover, pursuant to section 365(b)(1) of the Bankruptcy Code, for a debtor to assume an executory contract, it must "cure, or provide adequate assurance that the debtor will promptly cure," any default, including compensation for any "actual pecuniary loss" relating to such default. 11 U.S.C. § 365(b)(1).

45. Once an executory contract is assumed, the trustee or debtor in possession may elect to assign such contract. *See L.R.S.C. Co. v. Rickel Home Ctrs., Inc.* (*In re Rickel Home Ctrs., Inc.*), 209 F.3d 291, 299 (3d Cir. 2000) ("[t]he Code generally favors free assignability as a means to maximize the value of the debtor's estate"). Section 365(f) of the Bankruptcy Code provides that the "trustee may assign an executory contract . . . only if the trustee assumes such contract 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 "practical, pragmatic construction." *See Carlisle Homes. Inc. v. Azzari* (*In re Carlisle Homes, Inc.*), 103 B.R. 524, 538 (Bankr. D.N.J. 1989); *see also In re Natco Indus., Inc.*, 54 B.R. 436, 440 (Bankr. S.D.N.Y. 1985) (adequate assurance of future performance does not mean absolute assurance that debtor will thrive and pay rent). Among other things, adequate assurance may be given by demonstrating the assignee's financial health and experience in managing the type of enterprise or property assigned. *Accord In re Bygaph, Inc.*, 56 B.R. 596, 605-06 (Bankr. S.D.N.Y. 1986) (adequate assurance of future performance is present when prospective assignee of lease from debtors has financial resources and has

expressed willingness to devote sufficient funding to business in order to give it strong likelihood of succeeding).

46. The Debtors submit that the assumption, assignment and sale of the Purchased Contracts is necessary to the consummation of the Sale and is well within the Debtors' sound business judgment. As required by the Asset Purchase Agreement, Buyer has provided adequate assurance of future performance in the form attached as Exhibit 2 to the Notice of Assumption, Assignment and Sale. Additionally, pursuant to the Asset Purchase Agreement, Buyer has agreed to satisfy any Cure Amounts.[3] Accordingly, the Debtors submit that Buyer will be able to demonstrate adequate assurance of future performance under the Purchased Contracts at or before the hearing on the sale.

47. The Debtors assert that the procedures set forth above are reasonable and, that they ensure proper notice of the assumption, assignment and sale of the Purchased Contracts, and sufficient opportunity to resolve any issues arising as to disputed Cure Amounts or other objections to the assumption, assignment and sale of the Purchased Contracts. Thus, the Debtors submit that the assumption and assignment of the Purchased Contracts to Buyer, subject to the procedures set forth above, should be approved.

G. The Sale of Purchased Assets and Assumption, Assignment and Sale of the Purchased Contracts have Been Proposed in Good Faith

48. The Debtors additionally request that the Court find that Buyer be entitled to the protections provided by section 363(m) of the Bankruptcy Code in connection with the Sale of the Purchased Assets. Section 363(m) of the Bankruptcy Code provides, in pertinent part:

[3] "Cure Amounts" means any and all amounts required, as a condition to assumption and assignment, to be paid to a non-debtor party to a Purchased Contract pursuant to Section 365(b) of the Bankruptcy Code.

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

11 U.S.C. § 363(m).

49. Section 363(m) of the Bankruptcy Code thus protects the purchaser of assets sold pursuant to section 363 from the risk that it will lose its interest in the purchased assets if the order allowing the sale is reversed on appeal. By its terms, section 363(m) of the Bankruptcy Code applies to sales of interests in tangible assets. The Third Circuit has indicated that section 363(m) of the Bankruptcy Code also protects the assignee of a debtor's interest in executory contracts under section 365 of the Bankruptcy Code. *See Krebs Chrysler-Plymouth, Inc. v. Valley Motors, Inc.*, 141 F.3d 490, 497-98 (3rd. Cir. 1998).

50. Although the Bankruptcy Code does not define "good faith purchaser," the Third Circuit, construing section 363(m) of the Bankruptcy Code, has stated that "the phrase encompasses one who purchases in 'good faith' and for `value'." *Abbotts Dairies*, 788 F.2d at 147. To constitute lack of good faith, a party's conduct in connection with the sale must usually amount to "fraud, collusion between the purchaser and other bidders or the trustee or an attempt to take grossly unfair advantage of other bidders." *Id.* (citing *In re Rock Indus. Mach. Corp.*, 572 F.2d 1195, 1198 (7th Cir. 1978). *See also In re Bedford Springs Hotel, Inc.*, 99 B.R. 302, 305 (Bankr. W.D. Pa. 1989); *In re Perona Bros., Inc.*, 186 B.R. 833, 839 (D.N.J. 1995). Due to the absence of a bright line test for good faith, the determination is based on the facts of each case, concentrating on the "integrity of [an actor's] conduct during the sale proceedings." *In re Pisces Leasing Corp.*, 66 B.R. 671, 673 (E.D.N.Y. 1986) (quoting *Rock Indus. Machinery Corp.*, 572 F.2d at 1198 (7th Cir. 1978)).

51. As required by section 363(m) of the Bankruptcy Code, both the Debtors and Buyer have acted in good faith in negotiating the sale of the Purchased Assets and the assumption, assignment and sale of the Purchased Contracts. There is no evidence of fraud or collusion in the terms of the Asset Purchase Agreement and the assignment of the Purchased Contracts. To the contrary, as discussed throughout this Motion, the sale of the Purchased Assets will be the culmination of a lengthy negotiation process in which all parties are represented by sophisticated advisors. Buyer is not an insider of the Debtors as that term is defined in section 101(31) of the Bankruptcy Code, and all negotiations were conducted on an arm's length, good faith basis.

52. All parties with an interest in the Purchased Assets, and as required by Bankruptcy Rule 2002, will receive notice of the Sale and will be provided an opportunity to be heard, as provided for in the Sale Procedures Order. Additionally, all Counterparties to the Purchased Contracts will be provided with notice of the assumption, assignment and sale of such contracts and an opportunity to object, as provided for in the Sale Procedures Order. The Debtors submit that, under the facts and circumstances of these chapter 11 cases, such notice is adequate and satisfies the requisite notice provisions required under section 363(b) and 365 of the Bankruptcy Code. Under the circumstances, Buyer should be afforded the benefits and protections that section 363(m) of the Bankruptcy Code provides to a good faith purchaser.

Waiver of Bankruptcy Rules 6004(h) and 6006(d)

53. Bankruptcy Rule 6004(h) provides that an "order authorizing the use, sale, or lease of property . . . is stayed until the expiration of 14 days after entry of the order, unless the court orders otherwise." Bankruptcy Rule 6006(d) provides a similar fourteen-day stay of effectiveness for any order authorizing the assignment of an executory contract or lease.

54. Since timely consummation of the sale are of critical importance to Buyer and the Debtors' efforts to preserve and maximize the value of the estates, the Debtors hereby request that the Court waive the fourteen-day stay periods under Bankruptcy Rules 6004(h) and 6006(d).

Notice

55. The Debtors have provided notice of filing of the Motion to: (i) the U.S. Trustee; (ii) the United States Securities and Exchange Commission; (iii) the Office of the United States Attorney General for the District of Delaware; (iv) the Internal Revenue Service; (v) counsel to the First Lien Agent; (v) counsel to the Second Lien Agent; (vi) counsel to the Creditors' Committee; and (vii) all parties that, as of the filing of this Motion, have requested notice in these chapter 11 cases pursuant to Bankruptcy Rule 2002. Due to the nature of the relief requested, the Debtors respectfully submit that no further notice of this Motion is required.

No Prior Request

56. This Motion is an amendment to the Original Sale Motion. Except for the Original Sale Motion, which has not been heard by this or any court, no prior request for the relief sought in this Motion has been made to this or any other court.

Remainder of page intentionally left blank

Conclusion

WHEREFORE, the Debtors respectfully request that the Court grant the relief requested herein and such other and further relief as the Court may deem just and proper.

Dated: February 7, 2014

YOUNG CONAWAY STARGATT & TAYLOR, LLP

/s/ Robert F. Poppiti, Jr.

Robert S. Brady (No. 2847)
Robert F. Poppiti, Jr. (No. 5052)
Rodney Square
1000 North King Street
Wilmington, Delaware 19801
Telephone: (302) 571-6600
Facsimile: (302) 571-1253

and

Adam H. Friedman
Jordanna L. Nadritch
Jonathan T. Koevary
OLSHAN FROME WOLOSKY LLP
Park Avenue Tower
65 East 55th Street
New York, New York 10022
Telephone: (212) 451-2300
Facsimile: (212) 451-2222

Counsel to the Debtors