

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION**

In re:

ISR GROUP, INCORPORATED,

Debtor.

Chapter 11

Case No. 14-11077 JLC

DEBTOR’S AMENDED MOTION FOR ENTRY OF AN ORDER APPROVING THE SALE OF SUBSTANTIALLY ALL OF THE DEBTOR’S ASSETS FREE AND CLEAR OF CLAIMS, LIENS, AND ENCUMBRANCES, AND GRANTING RELATED RELIEF

ISR Group, Incorporated (the “Debtor”) files this amended motion and brief (the “Motion”), under §§ 363, 365, 503, and 507 of title 11 of the United States Code, 11 U.S.C. §§ 101-1532, as amended (the “Bankruptcy Code”),¹ 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 Western District of Tennessee (the “Local Rules”) for the entry of: (i) an order approving the sale of substantially all of the Debtor’s assets and ownership interests (the “Assets”) and (ii) approving assumption and assignment of certain contracts (“Contracts”) to TCFI IG LLC (“TCFI” or the “Buyer”) and granting such other relief as this Court deems necessary, just and consistent with the Bankruptcy Code and Settlement Agreement, as defined herein. In support of this Motion, the Debtor states as follows:

¹ All of the statutory references contained in this Motion will be to the Bankruptcy Code, unless otherwise indicated.

I. Procedural Background

1. On April 29, 2014 (the “Petition Date”), the Debtor commenced this reorganization case by filing its voluntary petition for relief under chapter 11 of the Bankruptcy Code.

2. The Debtor is continuing in possession of its assets and property and is managing its business, as a debtor in possession, under §§ 1107(a) and 1108.

3. This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157(b)(1) and 1334(a). This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (N), and (O).

4. Venue is proper in this District and in this Court under 28 U.S.C. §§ 1408 and 1409.

II. Description of Debtor

A. The Debtor’s Business Operations

5. The Debtor was founded by Alfred Lumpkin and, prior to the Petition Date, was a veteran-owned business based in Savannah, Tennessee that provided a broad range of services in the unmanned vehicle systems industry. Unmanned vehicles, sometimes referred to as “drones,” are used for many different purposes, including security and surveillance, military and national defense operations, law enforcement and border patrol operations, maritime operations, and disaster relief operations. Although a great deal of publicity has been generated about unmanned aerial vehicles, land and water based unmanned vehicles are also used for military and police operations. Historically, the Debtor provided technical support, training, logistics and repair services for unmanned aircraft, marine vessels, and ground vehicles used in these and other industries.

6. The Debtor's operations were authorized by the Federal Aviation Administration and the Debtor was registered with the United States Department of State's Office of Defense Trades Controls Compliance as a Manufacturer and Exporter of defense articles and services.

B. Ownership and Capital Structure

7. As of the Petition Date, 100% of the equity in the Debtor is owned by ISR Group Holdings, Inc. ("ISR Holdings"). Based on information and belief, ISR Holdings has no assets other than ownership of all of the stock in the Debtor, which stock was pledged to PNC. ISR Holdings is principally owned by Alfred Lumpkin who, prior to the Petition Date, also served as the Debtor's sole director, President, and Chief Executive Officer. As discussed more fully below, Mr. Lumpkin resigned his positions with the Debtor and appointed John Stuecheli as the Debtor's sole director, President, and Chief Restructuring Officer.

C. Prepetition Secured Debt

8. Prior to the Petition Date, the Debtor and ISR Holdings entered into that certain Loan Agreement dated March 28, 2012, with PNC Bank, National Association ("PNC") (as amended, supplemented, modified, extended, renewed, restated and/or replaced at any time prior to the Petition Date, the "Existing Credit Agreement"). The Existing Credit Agreement provided for a \$22.5 million term loan and \$5 million line of credit. The obligations of the Debtor and ISR Holdings under the Existing Credit Agreement: (i) are secured by substantially all of the Debtor's assets (the "Prepetition Collateral"); (ii) are evidenced by an Amended and Restated Term Note in the amount of the aggregate outstanding principal amount of each advance, together with accrued but unpaid interest on the principal amount of each such advance (the line of credit having been previously terminated by PNC); and (iii) mature on March 31, 2017. PNC made loans, advances and provided other financial accommodations to the Debtor and ISR Holdings pursuant to the terms and conditions set forth in the Existing Credit Agreement and all

other agreements, documents and instruments executed and/or delivered with, to, or in favor of PNC, including, without limitation, ISDA Master Agreement (with associated schedule and confirmation), all security agreements, notes, guarantees, mortgages, Uniform Commercial Code financing statements and all other related agreements, documents and instruments executed and/or delivered in connection therewith or related thereto (all of the foregoing, together with the Existing Credit Agreement, as all of the same have heretofore been amended, supplemented, modified, extended, renewed, restated and/or replaced at any time prior to the Petition Date, are collectively referred to as the “Existing Credit Documents”).

III. Events Leading to the Debtor’s Bankruptcy

9. The Debtor primarily derived its revenue from providing support services, including development, training, and logistical services in connection with unmanned vehicle systems utilized by the United States military. For example, the Debtor provided training to the United States Armed Forces in connection with the use of unmanned aerial vehicles (drones) in Iraq and Afghanistan. Most of the Debtor’s pre-petition revenue was derived from these and other support services related to the Boeing Insitu “ScanEagle” unmanned aerial vehicle.

10. The Debtor’s revenues began to decline between late 2011-2012 as the United States reduced its overseas military activities. The Debtor lost certain key employees to competitors and was underbid by those competitors on several lucrative contracts. The reduction in revenue on existing business coupled with the failure to secure these new contracts crippled the Debtor’s cash flow. Not surprisingly, the decrease in revenue caused the Debtor to fall out of compliance with the covenants in the Existing Loan Documents. In late 2012, the Debtor fell below the total leverage ratio and the fixed charge ratio required by the Existing Loan Documents. On July 31, 2013, PNC notified the Debtor of the occurrence of an event of default (“Default Notice”) under the Existing Credit Documents. By letter dated August 16, 2013, PNC

informed the Debtor that, as a result of various events of default, PNC would no longer make any advances or provide any additional funds under the Existing Credit Documents. On or about October 2, 2013, PNC accelerated the amounts due under the Existing Credit Documents and exercised its rights to sweep the Debtor's bank accounts and seize control of the Debtor's accounts receivable. PNC subsequently directed all of the Debtor's customers to make payments directly to PNC. Without its cash and incoming revenue, the Debtor was unable to meet its operating expenses, including payroll, as those came due. As a result, the Debtor effectively ceased operations and shut down in late 2013.

IV. Pre-Petition Marketing Efforts Regarding Sale of the Assets

11. The Debtor's management considered a number of potential sales and restructuring alternatives in order to maintain the Debtor's operations, preserve value for its creditors and employees, and to ensure the long-term success of its business. In this regard, the Debtor's management retained a prominent investment banking firm and engaged in discussions with numerous prospective parties, including strategic partners, investors, and buyers to determine their interest in pursuing a transaction with the Debtor during the two years prior to the Petition Date. As part of these pre-petition marketing efforts, the Debtor established an electronic data room into which substantial information about the Debtor and its assets and business were deposited. Unfortunately, no potential purchaser or investor contacted by the Debtor ultimately consummated a transaction.

12. After receiving the Default Notice from PNC, the Debtor and its management team intensified their efforts to obtain additional capital either in the form of investment capital or new financing. The Debtor's management also sought potential purchasers to salvage its business operations. Given its operational and financial problems, the Debtor was unable to secure traditional bank financing. Despite management's all-consuming efforts to resurrect its

operations by obtaining a substantial capital infusion from an investor or a sale of the Debtor to a well-capitalized buyer, the Debtor was unsuccessful in consummating a transaction before the Petition Date. The Debtor's management had meetings with at least 17 potential buyers and sources of funding during the last quarter of 2013 and first quarter of 2014.

V. TCFI Purchases the PNC Indebtedness

13. The Debtor contacted TCFI, or its affiliate, in late 2013 (or perhaps early 2014) regarding a transaction with the Debtor. TCFI negotiated extensively with the Debtor and its principal, Alfred Lumpkin, regarding various means through which TCFI could acquire the Debtor and the Assets. TCFI proposed several alternatives that would have allowed the Debtor to resume operations, rehire its employees, and pay creditors in full. Ultimately, however, the Debtor declined TCFI's offers. Recognizing significant value in the Debtor's dormant business, TCFI proceeded with its efforts to acquire the Debtor. On or about April 22, 2014, TCFI reached an agreement to acquire the PNC indebtedness via an assignment of the Existing Loan Documents from PNC to TCFI. Upon receiving assignment of the Existing Loan Documents, TCFI notified the Debtor that it had acquired the PNC indebtedness and that it was instituting a proceeding to foreclose on the stock in the Debtor (the Lender's collateral under the Existing Loan Documents) via a public sale.

14. Upon acquiring the PNC indebtedness, TCFI reached an agreement with the Debtor and Alfred Lumpkin that allowed the Debtor to avoid liquidation, institute a new business plan, and restart operations upon the filing of the bankruptcy petition. TCFI agreed to provide the Debtor with short-term financing to enable the Debtor to resume operations and fund a bankruptcy sale process. As discussed more fully below, TCFI agreed to provide the Debtor with a debtor-in-possession loan ("DIP Loan") in the approximate amount of \$1,000,000.00 to protect the Debtor's Assets and fund the bankruptcy proceeding.

**VI. The Parties Reach a Global Settlement
in the Debtor's Chapter 11 Proceeding**

15. The Debtor filed its first day pleadings on May 4, 2014 and the Court held a hearing on certain first day pleadings on May 8, 2014. The Court granted the relief requested in the various first day pleadings, including approval of interim debtor-in-possession financing to cover certain critical costs and expenses to be incurred during the first four weeks of this chapter 11 bankruptcy proceeding. The Debtor filed its "Motion for Entry of Orders Approving Bidding Procedures, Approving the Sale of Substantially All of the Debtor's Assets Free and Clear of Claims, Liens and Encumbrances, and Granting Related Relief" [Docket No. 67] on May 13, 2014 and a hearing was held on May 29 and May 30, 2014. In addition, the Court held a final hearing on the Debtor's Motion to Approve Debtor-in Possession Financing on those dates. The Official Committee of Unsecured Creditors ("Committee") filed an objection to the proposed debtor-in-possession financing and to the terms of the bid procedures. *See* Docket No. 110.

16. As a result of extensive negotiations between the Committee, the Buyer and the Debtor, the parties reached an agreement ("Settlement Agreement") on the direction of this chapter 11 case, including the consideration to be paid by TCFI for the Debtor's Assets, the terms of the debtor-in-possession financing and the general terms of a consensual plan of reorganization. The Settlement Agreement will be attached to the Debtor's Motion Pursuant to Section 105 and Bankruptcy Rule 9019 To Approve Global Settlement Agreement ("Motion to Approve Settlement"), which will be filed separately with the Court and which will be heard on June 12, 2014 at 1:00 p.m. (CDT). Pursuant to the Settlement Agreement², TCFI will purchase

² The terms of the Settlement Agreement are complex and cannot be fairly summarized here without a full recitation of the Settlement Agreement itself. The Settlement Agreement provides the complete terms of the settlement and will govern and control with respect to all terms of the settlement.

the Assets of the Debtor in a private sale for the consideration set out in the Settlement Agreement, and the request for public bidding in connection with the Assets is withdrawn. The Chair of the Committee, Mike Maddox, who was one of the potential purchasers of the Debtor prior to the Petition Date, and who has an in-depth understanding of the Debtor's Assets, its business operations and the cost of resuscitating the Debtor's business operations, will provide a declaration in support of the sale to TCFI based upon his knowledge and the information that has been made available to him.

17. Based on the negotiations by the Committee, creditors will receive the highest and best recovery from the sale to TCFI on the amended sale terms (reflecting the concessions obtained by the Committee from TCFI). Approval of the sale to TCFI is in the best interests of the Debtor, its creditors, its former and current employees, the people of Hardin County, Tennessee and the Tri-State area.

**VII. The Purchase Price Paid by TCFI
Could Exceed Twenty Million Dollars**

18. Although the consideration to be paid by TCFI is more fully set out in the Settlement Agreement and will be considered independently in connection with the Debtor's "Motion To Approve Settlement", it is useful in the context of this Motion to set out a general framework of the Settlement Agreement, including the consideration to be paid by TCFI and the terms of the consensual plan of reorganization. At the outset, TCFI will increase the DIP Loan to increase the budget for professional fees of the Committee from \$25,000 (as set forth in the initial budget) to \$75,000. Likewise, the budget will be increased to cover various other cost and expenses required to take the bankruptcy estate to confirmation of a plan of reorganization consistent with the terms of the Settlement Agreement. Pursuant to the Settlement Agreement, TCFI will essentially credit bid its entire pre-petition secured debt as well as the DIP Loan to

acquire the Debtor's Assets. Hence, those secured claims will be deemed fully satisfied under the Debtor's proposed plan. In addition, TCFI will pay the Debtor \$374,769.91, which is the amount required to cover unpaid priority wage claims asserted against the Debtor under Bankruptcy Code section 507(a)(4). TCFI will also fund up to \$52,000.00 to cover property tax claims under a plan. The unpaid property tax claims based on the invoices received by the Debtor are less than \$52,000.00. In addition, any miscellaneous secured claims which are senior to TCFI will be either assumed by TCFI or, alternatively, the secured creditor's collateral will be returned under the proposed plan in full satisfaction of the allowed secured claim. TCFI will fund a minimum amount of \$100,000 to pay general unsecured claims, and holders of allowed unsecured claims will be entitled to receive a distribution based on the operating results of the post-effective date business. The Debtor's plan, pursuant to the Settlement Agreement, will include a Liquidation Trust set up for the benefit of unsecured creditors. Depending on the operating results of the new company, unsecured creditors could receive up to \$1,439,000.00, which is the total amount of unsecured debt owed by the Debtor according to its books and records. In addition, all causes of action belonging to the Debtor's bankruptcy estate will be retained by the Liquidation Trust for the benefit of unsecured creditors.

19. Put simply, the consideration paid by TCFI can potentially ensure that unsecured creditors would receive payment in full for their allowed claims. Obviously, there can be no guarantee that all allowed unsecured claims would be paid in full, but the Debtor believes that the consideration to be paid by TCFI pursuant to the Settlement Agreement, which was negotiated by the Committee, TCFI and the Debtor, provides creditors with the best opportunity to receive a substantial distribution within a reasonable time period after confirmation of the Debtor's proposed plan. Moreover, TCFI, by restarting the business operations, ensures the best

possible result for former employees as well as the people of Hardin County, Tennessee. The total purchase price to be paid by TCFI could easily exceed twenty million dollars and certainly provides creditors with the best opportunity for repayment of their allowed claims.

20. In addition, the terms and conditions of the proposed sale of the Debtor's Assets are set out in the Asset Purchase Agreement ("APA"), which will be provided as an exhibit at the hearing to consider this Motion. The APA, together with the Settlement Agreement, contains all salient terms and conditions of this proposed transaction.

VIII. Relief Requested and the Basis Therefor

21. By this Motion, the Debtor seeks, under §§ 363, 365, 503, and 507, entry of the order (the "Sale Order"), granting the relief sought herein.

IX. The Proposed Notice Procedures for the Executory Contracts and the Identification of Related Cure Amounts are Appropriate

22. In connection with the assumption and assignment of executory contracts and unexpired leases under the Sale, the Debtor believes that it is necessary to establish a process by which (i) the Debtor and the counterparties to executory contracts and unexpired leases that may be assumed can establish the cure obligations, if any, to be paid in accordance with § 365; (ii) the counterparties of such contracts and leases may assert any objection they may have to the assumption and assignment of such contracts and leases; and (iii) the Debtor can designate the specific contracts that it intends to assume and assign.

23. Attached to this Motion as Exhibit "A" is a list of the executory contracts ("Contract Schedule") to be assumed by TCFI and the amount currently owed under such contract ("Cure Amount") according to the Debtor's records. The Debtor shall also use its best efforts to notify personally any contact person responsible for communications between the counterparty and the Debtor of the proposed assumption and assignment of its contract, as well

as the Cure Amount listed in the Debtor's financial records. Any objections to the assumption and assignment of any executory contract including, but not limited to, objections relating to adequate assurance of future performance or to the Cure Amount set forth in the Contract Schedule must be filed with this Court and served upon the Debtor, counsel to the Debtor, counsel to TCFI, counsel to the Committee, and the U.S. Trustee on or before noon (CDT) on June 11, 2014 (the "Cure Objection Deadline"). In the event that the parties cannot agree on the Cure Amount, the Court may conditionally approve the assumption and assignment of a particular contract pending final resolution of the dispute over the Cure Amount. If TCFI does not agree to pay the Cure Amount, as decided by the Court, the contract shall be deemed rejected. Any objection based on adequate assurance of future performance or any other reason (other than a dispute over the Cure Amount) shall be determined at the hearing on this Motion (the "Sale Hearing"). If a counterparty to an executory contract fails to object, it shall be precluded from raising any subsequent objection or taking any action to terminate the assumed contract based on an objection relating to either the Cure Amount, adequate assurance of future performance or the pre-petition termination of the assumed contract, or any other objection it could or should have raised at the Sale Hearing.

24. As soon as practicable after any amendment to the Contract Schedule, including the inclusion of any additional executory contracts not listed on the original Contract Schedule, the Debtor shall provide notice of such amendment to TCFI, the Committee and each affected contract counterparty.

25. At the Sale Hearing, the Debtor shall advise the Court of the executory contracts that TCFI has designated for assumption and assignment (the "Designated Executory Contracts"), and the Debtor shall seek assumption and assignment of the Designated Executory

Contracts to TCFI as part of the hearing to approve the sale of the Assets to TCFI. Any and all contracts not assumed and assigned will likely be rejected under the Debtor's plan of reorganization.³

26. The Debtor requests that, if a counterparty to an executory contract does not (a) properly object to the applicable Cure Amounts and/or adequate assurance of future performance by TCFI on or before the Cure Objection Deadline, (b) set forth a specific default in any executory contract or unexpired lease and (c) claim a specific monetary amount that differs from the amount (if any) specified by the Debtor in the Contract Schedule, the Court enter an order deeming the amount set forth in the Contract Schedule to be the actual Cure Amount payable under section 365 and forever barring the counterparty to the executory contract from objecting to the Cure Amount and from asserting any additional cure or other amounts against either the Debtor or TCFI and from subsequently objecting to adequate assurance of future performance.

X. The Proposed Sale Satisfies the Requirements of § 363(f)

27. The Debtor further submits that it is appropriate to sell the Assets free and clear of liens under section 363(f), with any such liens attaching to the proceeds of the proposed Sale of the Assets to the extent applicable.

28. Under § 363(f), a debtor in possession may sell all or any part of its property free and clear of any and all liens, claims or interests in such property (collectively, the "Encumbrances") if (i) applicable nonbankruptcy law permits sale of the assets free and clear of such Encumbrance, (ii) such person or entity has consented to the sale and transfer, license and assignment, as applicable, free and clear of its Encumbrance, with such Encumbrance to attach to

³ If there are additional executory contracts which Debtor has failed to identify on Schedule G which are subsequently discovered by TCFI and are determined by TCFI as necessary for the go-forward business, upon request of TCFI, Debtor will file a motion to assume and assign the executory contact(s) subject to agreement of TCFI to pay all cure costs in accordance with the APA.

the net proceeds of such sale and transfer, license and assignment, as applicable, respectively, (iii) such Encumbrance is a lien and the price at which the property to be sold is greater than the aggregate value of all liens on the property, (iv) such Encumbrance is in *bona fide* dispute, or (v) such person or entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such Encumbrance.⁴ Except as otherwise provided in the APA and subject to the Assumed Obligations and Permitted Liens, the Debtor expects that it will satisfy the requirements of section 363(f).

29. TCFI would not have entered into the Settlement Agreement and would not consummate the transactions contemplated in the APA if the sale of the Assets to TCFI and the assumption, assignment and sale of certain executory contracts to TCFI were not free and clear of all Encumbrances of any kind or nature whatsoever, or if TCFI would, or in the future could, be liable for any of such Encumbrances, except as set out in the Settlement Agreement, or other future liabilities arising out of past conduct of the Debtors or the Debtors' past ownership of the Assets.

30. To sell its assets under section 363(f), the Debtor must only show that there is a sound business justification for the sale.⁵ Given the foregoing, the Debtor believes that the sale of the Debtor's Assets to TCFI as contemplated in this Motion is in the best interest of the Debtor, its creditors, and its estate and that a sound business purpose justifies the sale. Except as otherwise provided in the Settlement Agreement and subject to the Assumed Obligations and the

⁴ See 11 U.S.C. § 363(f); *Citicorp Homeowners Servs., Inc. v. Elliot (In re Elliot)*, 94 B.R. 343, 345 (E.D. Pa. 1988) (noting that section 363(f) is written in the disjunctive; therefore, a court may approve a sale "free and clear" provided at least one of the subsections is met).

⁵ *Stephens Indus., Inc. v. McClung*, 789 F.2d 386, 390 (6th Cir. 1986) ("[A] bankruptcy court can authorize a sale of all a Chapter 11 debtor's assets under Section 363(b)(1) when a sound business purpose dictates such action.").

Permitted Liens in the APA, the proposed Sale should be approved free and clear of all Encumbrances, as well as any other future liabilities arising out of conduct, acts or circumstances occurring before the Closing Date⁶, as being in the best interest of the Debtors, their estates and creditors, and all other parties in interest.

**XI. The Assumption and Assignment of the
Assigned Contracts Should be Approved**

31. By this Motion, the Debtor also seeks an order, under sections 365(a) and (f), authorizing the Debtor to assume and assign the Contracts. Section 365(a) provides, in pertinent part, that a debtor in possession “subject to the court’s approval, may assume or reject any executory contract or [unexpired] lease of the debtor.” The standard governing bankruptcy court approval of a debtor’s decision to assume or reject an executory contract or unexpired lease is whether the debtor’s reasonable business judgment supports assumption or rejection.⁷ 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, and 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.”⁸ 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.⁹ Moreover, under section 365(b)(1), for a debtor to assume an executory contract, it must “cure, or provide adequate assurance that the debtor will promptly

⁶ As defined in the APA.

⁷ See, e.g., *In re McLouth Steel Corp.*, 20 B.R. 688, 692 (Bankr. E.D. Mich. 1982).

⁸ *In re Wheeling-Pittsburgh Steel Corp.*, 72 B.R. 845, 846 (Bankr. W.D. Pa. 1987) (quoting *In re Stable Mews Assoc., Inc.*, 41 B.R. 594, 596 (Bankr. S.D.N.Y. 1984)).

⁹ See *Richmond Leasing Co. v. Capital Bank, N.A.*, 762 F.2d 1303, 1311 (5th Cir. 1985).

cure,” any default, including compensation for any “actual pecuniary loss” relating to such default.

32. Once an executory contract or unexpired lease is assumed, the trustee or debtor in possession may elect to assign such contract.¹⁰ Section 365(f)(2) provides, in relevant part, that the “trustee may assign an executory contract . . . only if the trustee assumes such contract . . . and adequate assurance of future performance is provided.” The meaning of “adequate assurance of future performance” depends on the facts and circumstances of each case, but should be given “practical, pragmatic construction.”¹¹ 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.¹² Here, the assigned contracts being assumed and assigned to TCFI will ensure those parties’ claims are paid and reduce the amount of unsecured claims in this Chapter 11 proceeding, and the assumption and assignment is therefore reasonable.

33. The proposed assumption and assignment of the Assigned Contracts under the terms of the assignment procedures is appropriate and reasonably tailored to provide the non-debtor parties to the proposed contracts to be assigned with adequate notice of the proposed assumption and assignment of their applicable contract or lease, the proposed Cure Amount, and the proposed assignee. Additionally, the Debtor believes that it can and will demonstrate that all

¹⁰ 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”); see also *In re Headquarters Dodge, Inc.*, 13 F.3d 674, 682 (3d Cir. 1994) (noting purpose of section 365(f) is to assist trustee in realizing the full value of the debtor’s assets).

¹¹ See *In re Carlisle Homes, Inc.*, 103 B.R. 524, 538 (Bankr. D. N.J. 1988); 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 make a profit).

¹² See, e.g., *In re Bygaph, Inc.*, 56 B.R. 596, 605-06 (Bankr. S.D.N.Y. 1986) (adequate assurance of future performance found where prospective assignee of lease from debtors had financial resources and had expressed willingness to devote sufficient funding to business in order to give it strong likelihood of succeeding).

requirements for assumption and assignment of the executory contracts will be satisfied at the Sale Hearing. The Debtor will provide all non-debtor counterparties to the contracts to be assigned to TCFI with notice of the proposed assignment and an opportunity to be heard. For the reasons stated throughout this Motion, the Debtor, in exercising its sound business judgment, believes that assuming and assigning the contracts on the Contract Schedule to TCFI is in the best interest of its estate and its creditors.

**XII. The Sale of the Assets is Proposed in
Good Faith Under § 363(m)**

34. The Debtor additionally requests that the Court find that TCFI is entitled to the protections provided by section 363(m) in connection with the proposed Sale. Section 363(m) provides, in relevant part: “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.”

35. Although the Bankruptcy Code does not specifically define the entities to which this section applies, courts have found that it encompasses “one who purchases in ‘good faith’ and for ‘value’.”¹³ 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.”¹⁴ Due to the absence of a bright

¹³ See *In re Abbotts Dairies of Pa., Inc.*, 788 F.2d 143, 147 (3d Cir. 1986).

¹⁴ *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).

line test for good faith, the determination is based on the facts of each case, concentrating on the “integrity of [an actor’s] conduct in the course of the sale proceedings.”¹⁵

36. As required by section 363(m), both the Debtor and TCFI have acted in good faith in negotiating the sale of the Assets. There is no evidence of fraud or collusion in the terms of the proposed Sale. To the contrary, as discussed throughout this Motion and as previously set out in the evidentiary record at earlier hearings, the proposed Sale is the culmination of a lengthy and vigorous arms-length negotiation process between the Debtor, TCFI, and the Committee. TCFI is not an insider of the Debtor as that term is defined in § 101(31), and all negotiations have been and will continue to be conducted on an arms-length, good faith basis. Likewise, no one can reasonably assert that the Committee’s involvement in these negotiations over the terms of the proposed Sale was not in good faith. The Committee, the Debtor and TCFI each negotiated aggressively over the terms of the Sale and the Settlement Agreement and acted in good faith. TCFI clearly deserves the protection of section 363(m).

XIII. Relief From the Fourteen Day Waiting Periods Under Bankruptcy Rules 6004(h) and 6006(d) is Appropriate

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

¹⁵ *In re Pisces Leasing Corp.*, 66 B.R. 671, 673 (E.D.N.Y. 1986) (quoting *Rock Indus. Machinery Corp.*, 572 F.2d 1195, 1198 (7th Cir. 1978)).

38. The purpose of Bankruptcy Rules 6004(h) and 6006(d) is to provide sufficient time for an objecting party to appeal before an order can be implemented.¹⁶ Although Bankruptcy Rules 6004(h) and 6006(d) and the Advisory Committee Notes are silent as to when a court should “order otherwise” and eliminate or reduce the fourteen day stay period, *Collier on Bankruptcy* suggests that the fourteen day stay period should be eliminated to allow a sale or other transaction to close immediately “where there has been no objection to the procedure.”¹⁷ Furthermore, *Collier on Bankruptcy* provides that if an objection is filed and overruled, and the objecting party informs the court of its intent to appeal, the stay may be reduced to the amount of time actually necessary to file such appeal.¹⁸

39. The Debtor requests that the Court waive the fourteen day stay periods under Bankruptcy Rules 6004(h) and 6006(d).

40. All parties in interest will receive notice of the proposed Sale and will be provided with an opportunity to be heard. Such notice is adequate for entry of the order approving this Motion and waiving the fourteen day waiting periods under Bankruptcy Rules 6004(h) and 6006(d).

XIV. Notice

41. Notice of this Motion has been provided to: (a) all creditors, including any counterparties to executory contracts with the Debtor, (b) all governmental units either requesting notice, filing a claim or required under the Bankruptcy Rules to receive notice, (c) counsel to the Committee; (d) the Office of the United States Trustee; (e) all parties that are known by the Debtor to claim interests in or liens upon the Debtor’s assets; and (f) all parties

¹⁶ See Advisory Committee Notes to FED. R. BANKR. P. 6004(h) and 6006(d).

¹⁷ 10 COLLIER ON BANKRUPTCY ¶6004.11 (Alan N. Resnick & Henry J. Sommer eds., 16th ed.).

¹⁸ *Id.*

requesting service in this case, and (g) any other party requesting a copy of this Motion. In light of the nature of the relief requested, the Debtor submits that no other or further notice is required.

XV. Prayer

The Debtor requests that the Court approve (i) the sale of the Assets to TCFI as set forth in this Motion and in the APA pursuant to the Sale Order, (ii) the assumption by the Debtor and assignment of the Designated Executory Contracts to TCFI, (iii) all other relief requested in this Motion, and (iv) such other and further relief to the Debtor as the Court may deem proper.

Dated: June 4, 2014

Respectfully submitted,

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and

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Attorneys For Debtor

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of June, 2014, a copy of the foregoing electronically filed Motion was served on the parties listed below and the parties listed on the attached Matrix by first-class mail, postage prepaid, unless said party is a registered CM/ECF participant who has consented to electronic notice, and the Notice of Electronic Filing indicates that Notice was electronically mailed to said party.

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Aaron M. Silver Honigman Miller Schwartz & Cohn LLP 660 Woodward Avenue 2290 First National Building Detroit, MI 48226	Monica M. Simmons-Jones Assistant United States Attorney 167 N. Main Street, Suite 800 Memphis, TN 38103
Robert Albergotti Haynes and Boone 2323 Victory Avenue, Suite 700 Dallas, TX 75219	Ian Peck Haynes and Boone 201 Main Street, Suite 2200 Fort Worth, TX 76102

/s/ E. Franklin Childress, Jr.
E. Franklin Childress, Jr.