

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

In re:

ISR GROUP, INCORPORATED,

Debtor.

Case No. 14-11077JLC

Chapter 11

**DEBTOR'S 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**

ISR Group, Incorporated (the “**Debtor**”) files this motion and brief (the “**Motion**”) under §§ 363, 365, 503, and 507 of title 11 of the United States Code (the “**Bankruptcy Code**”), Rules 2002, 6004, 6006, 9007, and 9014 of the Federal Rules of Bankruptcy Procedure (the “**Bankruptcy Rules**”),¹ 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: (A) an order, substantially in the form of **Exhibit A**, (the “**Bidding Procedures Order**”), (i) authorizing and approving the procedures that are attached as **Exhibit C** (the “**Bidding Procedures**”), for the sale of the Debtor’s assets and ownership interests (the “**Assets**”), (ii) approving and authorizing the Debtor to pay the Break-up Fee (as defined herein) in the event such Break-Up Fee becomes payable under the terms of the Stalking Horse APA (as defined herein), (iii) scheduling an auction (the “**Auction**”) in connection with the proposed sale of the Assets (the “**Sale**”), (iv) scheduling a hearing to approve the Sale of the Assets (the “**Sale Hearing**”), (v) approving the form and manner of notice of the Bidding Procedures, the Auction, and the Sale Hearing (the “**Auction and Sale Notice**”) attached as

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

Exhibit D, (vi) establishing procedures as set forth herein relating to determining the Cure Amounts (as defined herein) for the assumption and/or assignment of executory contracts and unexpired leases, including the form and manner of service of the notice (the “**Cure Notice**”) attached as **Exhibit E**, and (vii) granting certain related relief; and (B) an order, substantially in the form of **Exhibit B**, (the “**Sale Order**”) (i) authorizing and approving the asset purchase agreement substantially in the form of **Exhibit F** or such other form of asset purchase agreement between the Debtor and the “Successful Bidder” (as defined in the Bidding Procedures) at the Auction, (ii) authorizing and approving the sale of the Debtor’s Assets subject to such agreement free and clear of all liens, claims, encumbrances, and other interests, (iii) authorizing and approving the assumption and assignment of certain executory contracts and unexpired leases, and (iv) granting certain related relief. In support of the Motion, the Debtor states as follows:

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. This Court has jurisdiction to consider this matter under 28 U.S.C. §§ 157(b)(1) and 1334(a). This is a core proceeding under 28 U.S.C. § 157(b)(2)(A), (N), and (O).
3. Venue is proper in this District and in this Court under 28 U.S.C. §§ 1408 and 1409.
4. The Debtor is continuing in possession of its property and is managing its business, as debtor-in-possession, under Bankruptcy Code §§ 1107(a) and 1108.

5. Additional information about the Debtor's business and the events leading up to the Petition Date can be found in the Declaration of John Stuecheli in Support of Certain First Day Pleadings, which is incorporated herein by reference.

II. Pre-petition Marketing Efforts Regarding Sale of the Assets

6. Prior to the Petition Date, the Debtor diligently engaged in a process to sell some or all of the Debtor's assets and/or business operations. The Debtor considered a number of potential sales and restructuring alternatives in order to develop a plan that would maximize value for its creditors and/or to ensure the long-term continuity of its business. In this regard, the Debtor's representatives engaged in discussions with numerous prospective parties, including strategic partners, investors, and buyers to determine their interest in pursuing a transaction with the Debtor.

7. As part of this pre-petition marketing effort, the Debtor established an electronic data room into which substantial information about the Debtor and its assets and business were deposited (the "**Data Room**").

8. In March 2014, the Debtor initiated discussions with the Stalking Horse Bidder regarding a sale of substantially all of the Debtor's assets in the context of a chapter 11 reorganization.

III. The Asset Purchase Agreement

9. The Debtor and TCFI IG LLC (the "**Stalking Horse Bidder**"), have negotiated an Asset Purchase Agreement (the "**Stalking Horse APA**") through which the Stalking Horse Bidder agrees to acquire substantially all of the assets of the Debtor (the "**Acquired Assets**," as defined in the Stalking Horse APA) upon the terms of and subject to the Stalking Horse APA. A copy of the Stalking Horse APA is attached as **Exhibit F**.

10. Subject to certain adjustments, the Stalking Horse Bidder proposes to acquire the Acquired Assets for (i) a credit bid of \$18,207,179.54, consisting of the principal and estimated interest, costs, fees, charges, or other obligations accrued and unpaid under the Loan Agreement, dated as of March 28, 2012, by and among PNC Bank, Debtor and ISR Group Holdings, Inc. (as amended, modified or supplemented from time to time) (the “**Credit Agreement**”) and Debtor in Possession Financing Amendment and First Amendment to Loan Agreement (as amended, modified or supplemented from time to time) (the “**DIP Credit Agreement**”); (ii) a cash payment of \$300,000, provided that such cash shall be used exclusively for payments to creditors with unsecured priority claims under Sections 507(a)(4) and 507(a)(5) of the Bankruptcy Code who agree to work for Purchaser after the Closing on terms satisfactory to Purchaser; and (iii) the assumption of certain liabilities (the “**Assumed Obligations**” and the “**Permitted Liens**” each as defined in the Stalking Horse APA).² The Stalking Horse APA also contemplates that the Stalking Horse Bidder’s offer will be exposed, through a marketing and auction process, to potentially better bids. The Stalking Horse APA further provides that if Stalking Horse Bidder is the Successful Bidder at the conclusion of the auction process, then the Debtor will promptly seek entry of an order from this Court (the “**Sale Order**”) at the Sale Hearing to approve the Sale of the Acquired Assets.

11. The Stalking Horse APA includes certain protections for the Stalking Horse Bidder. In particular, upon Court approval of the Bidding Procedures Order, if the Stalking Horse Bidder is not selected as the Successful Bidder, the Debtor will be required to pay to the Stalking Horse Bidder expense reimbursement up to \$750,000 (the “**Break-Up Fee**”) to

² A more detailed description of the consideration being provided by the Stalking Horse Bidder, including any potential adjustments thereto, is available in section 2.6 of the Stalking Horse APA.

compensate the Stalking Horse Bidder and reimburse the Stalking Horse Bidder for its reasonable, actual out-of-pocket expenses incurred both pre and post-petition in connection with the due diligence, negotiation, preparation, execution, delivery, and attempted performance under the Stalking Horse APA and with this bankruptcy case.

12. Pursuant to the DIP Credit Agreement and/or the Stalking Horse APA, the Debtor is required to (i) obtain the entry of the Bidding Procedures Order in a form acceptable to the Stalking Horse Bidder within thirty (30) days of the Petition Date; (ii) obtain entry of the Sale Order in a form acceptable to Stalking Horse Bidder by within thirty (30) days of the entry of the Bidding Procedures Order; and (iii) close on the transaction within seventy-five (75) days of the Petition Date. The Stalking Horse Bidder's obligation to close on the Stalking Horse APA is conditioned on entry of the Sale Order.

IV. Relief Requested and the Basis Therefor

13. By this Motion, the Debtor seeks, under Bankruptcy Code sections 363, 365, 503, and 507, entry of the Bidding Procedures Order:

- a. authorizing and approving the proposed Bidding Procedures for the marketing and sale of the Debtor's Assets;
- b. approving and authorizing the Debtor to pay the Break-Up Fee in the event such Break-Up Fee becomes payable under the terms of the Stalking Horse APA;
- c. establishing **June 20, 2014 at 5:00 p.m., prevailing Central Time** (the "**Bid Deadline**") as the deadline for submitting a Qualified Bid (as such term is defined in the Bidding Procedures);
- d. scheduling the Auction, if necessary, on **June 25, 2014** beginning at **10 a.m.** prevailing Central Time at the offices of Baker Donelson, 165 Madison Ave, Suite 3000, Memphis, TN 38103, scheduling the Sale Hearing before this Court to consider entry of the Sale Order approving and authorizing the Sale of the Assets on **June 26, 2014 at 10 a.m., prevailing Central Time**, scheduling a deadline to object to the Sale of **June 20, 2014 at 5:00 p.m., prevailing Central Time** (the "**Sale Objection Deadline**"), and approving the Auction and Sale Notice to be provided in connection therewith; and

- e. establishing procedures as set forth herein relating to determining the Cure Amounts for the assumption and/or assignment of executory contracts and unexpired leases, including the form of the Cure Notice and the manner of service of the Cure Notice.

By this Motion, the Debtor also seeks entry of the Sale Order:

- a. authorizing and approving the Stalking Horse APA or such other form of asset purchase agreement between the Debtor and the Successful Bidder at the Auction;
- b. authorizing and approving the sale of the Debtor's Assets subject to the Stalking Horse APA or such other form of asset purchase agreement between the Debtor and the Successful Bidder at the Auction free and clear of all liens, claims, encumbrances, and other interests; and
- c. authorizing and approving the assumption and assignment of certain executory contracts and unexpired leases.

V. The Proposed Bidding Procedures

14. While the Debtor believes that the Stalking Horse APA is reasonable and reflects the best value for the Assets as of the date of this Motion, the Debtor nevertheless recognizes the prudence of placing the Stalking Horse APA to the test of the broader public marketplace in this bankruptcy such that better offers might be generated for the sale of the Debtor's Assets. The Debtor believes that the Bidding Procedures provide an appropriate framework for selling the Assets and will enable the Debtor to review, analyze, and compare all bids received to determine which bid is in the best interests of the Debtor's estate and creditors. Accordingly, the Debtor is requesting that the Court approve the Bidding Procedures for purposes of soliciting offers to acquire the Debtor's Assets, which acquisition would be consummated through a sale under Bankruptcy Code § 363.³

³ The proposed form of Bidding Procedures Order contains dates proposed by the Debtor. These dates are subject to the availability and approval of the Court and may change.

A. Summary of the Proposed Bid Procedures⁴

15. Marketing. As indicated below, the Debtor shall send the Auction and Sale Notice to, among others, all creditors and parties that expressed an interest in purchasing the Assets within the year before the Petition Date. The Debtor believes that by sending the Auction and Sale Notice to the list of creditors and interested parties, along with additional parties, it is alerting the vast majority of potential purchasers to the sale of the Assets.

16. Participation Requirements. To participate in the bidding process, each person or entity will be required to deliver (unless previously delivered) the following materials to the Debtor on or before the Bid Deadline: (a) an executed confidentiality agreement in form and substance satisfactory to the Debtor; and (b) a statement demonstrating to the Debtor's satisfaction a *bona fide* interest in purchasing, and the financial ability to purchase, the Debtor's Assets. Each person or entity that delivers such materials to the Debtor on or before the Bid Deadline in form reasonably acceptable to the Debtor is referred to as a "Potential Bidder." In accordance with the Bidding Procedures, after a Potential Bidder delivers all of the materials required above, the Debtor will provide each Potential Bidder satisfying the criteria enumerated herein access to the Data Room (as defined herein).

17. Determination by the Debtor. The Debtor, in consultation with any official committee of unsecured creditors appointed in this bankruptcy case (the "**Committee**"), shall (a) coordinate the efforts of Potential Bidders in conducting their respective due diligence, (b) evaluate bids from Potential Bidders, (c) negotiate any bid made to acquire the Assets, and (d) make such other determinations as are provided in the Bidding Procedures (collectively, the

⁴ While the Motion summarizes the Bidding Procedures generally, this summary is qualified, in its entirety, by the terms of the Bidding Procedures attached as **Exhibit C**.

“Bidding Process”). Neither the Debtor nor its representatives shall be obligated to furnish any information of any kind whatsoever relating to the Assets to any person who is not a Potential Bidder.

18. **Due Diligence.** To assist prospective purchasers in their evaluation of the Assets, the Debtor will provide access to information and documentation related to the Assets in an online virtual data room (the **“Data Room”**). All Potential Bidders will be granted access to the Data Room by the Debtor once the Court has entered the Bidding Procedures Order. The Debtor shall afford any Potential Bidder such additional due diligence access or additional information as may be reasonably requested by the Potential Bidder that the Debtor, in its business judgment, determines to be reasonable and appropriate. No additional due diligence will be made available to Potential Bidders after the Bid Deadline.

19. **Bid Deadline.** On or before the Bid Deadline, a Potential Bidder that desires to make a bid is required to deliver written copies of its bid by facsimile and email to the representatives of the Debtor, Debtor’s counsel, Stalking Horse Bidder’s counsel, and counsel to any Committee.

20. **Bid Requirements.** To be considered a “Qualifying Bid,” a bid must include: (a) an offer to acquire the Assets in the form of the Stalking Horse APA, marked to show any proposed amendments and modifications to such agreement (the **“Marked Agreement”**); (b) an agreement that the Potential Bidder’s offer is binding and irrevocable until forty-eight (48) hours after the earlier of (i) the closing of the Sale of the Assets, (ii) the withdrawal of the Assets from the Auction by the Debtor, or (iii) thirty (30) days after the Sale Hearing; (c) aggregate consideration of at least \$19,531,129.54 plus assumption of the Assumed Obligations (the

“Qualifying Overbid Amount”),⁵ and (d) a certified check or wire transfer in an amount equal to \$1,000,000 payable to the order of ISR Group, Inc. (a **“Good Faith Deposit”**) and written evidence of available cash or a commitment for financing if selected as the Successful Bidder and such other evidence of ability to consummate the transaction as the Debtor may reasonably request.

21. The Debtor, in consultation with any Committee, will review each bid received from a Potential Bidder to ensure that it meets the requirements set forth above. A bid received from a Potential Bidder that meets the above requirements will be considered a “Qualified Bid” and each Potential Bidder that submits a Qualified Bid will be considered a “Qualified Bidder.” The Debtor, in consultation with any Committee, will determine whether each bid meets the requirements of a Qualified Bid. The Debtor may value a Qualified Bid, in consultation with any Committee, based upon any and all factors that the Debtor deems pertinent, including, among others: (a) the amount of the Qualified Bid; (b) the risks and timing associated with consummating a transaction with the Potential Bidder; (c) the risks associated with any non-cash consideration in any Qualified Bid; (d) any excluded assets or executory contracts and leases; and (e) any other factors that the Debtor may deem relevant to the Sale. The Stalking Horse APA shall be deemed a Qualified Bid and the Stalking Horse Bidder shall be deemed a Qualified Bidder, for all purposes and requirements of the Bidding Procedures. Any subsequent credit bid by the Stalking Horse up to the aggregate outstanding amount of all outstanding principal, fees,

⁵ The Qualifying Overbid Amount is \$19,531,129.54. As provided below, if the Qualified Overbid Amount is received, subsequent bids will be in increments of \$100,000.

interest, costs and other charges outstanding under the Credit Agreement and DIP Credit Agreement shall be deemed a Qualified Bid.⁶

22. The Debtor, in its business judgment, and in consultation with any Committee, reserves the right to reject any bid if such bid (a) is on terms that are more burdensome or conditional than the terms of the Stalking Horse APA; (b) requires any indemnification of such Potential Bidder; (c) is not received by the Bid Deadline; (d) includes non-cash consideration; (e) is subject to any due diligence, financing condition, or other contingencies (including representations, warranties, covenants, consent of third parties, and timing requirements) of any kind or any other conditions precedent to such party's obligation to acquire the Assets other than entry of the order approving the Sale of the Assets; or (f) does not meet the requirements for a Qualified Bid as set forth above. Any bid rejected under to this paragraph shall not be deemed to be a Qualified Bid.

23. Auction. If at least one Qualified Bid other than the Stalking Horse APA is received by the Bid Deadline, the Debtor will conduct the Auction for the Sale of the Assets.⁷ If the Debtor does not receive any Qualified Bids other than the Stalking Horse APA, no Auction will be held and the Stalking Horse APA will be the Successful Bid (as defined below), and the Stalking Horse Bidder will be named the Successful Bidder. The Debtor proposes that the Auction take place at 10:00 a.m. (prevailing Central Time) on June 25, 2014 at the offices of Baker Donelson, 165 Madison Ave, Suite 3000, Memphis, TN 38103, or such later time or such other place as the Debtor shall designate and provide notice to all who have submitted Qualified

⁶ The Debtor estimates that the aggregated outstanding amounts owed under the Credit Agreement and the DIP Agreement at the time of the Auction will exceed \$18.5 million.

⁷ Each bidder participating at the Auction will be required to confirm that it has not engaged in any collusion with respect to the bidding or the sale, the Auction will be conducted openly and all Qualified Bidders will be permitted to attend the Auction, and bidding at the Auction will be transcribed or videotaped.

Bids. Only a Qualified Bidder who has submitted a Qualified Bid will be eligible to participate at the Auction. Representatives of any Committee and any other parties the Debtor deems appropriate shall be able to attend and observe the Auction. At the Auction, participants will be permitted to increase their bids in an “open outcry” auction. The bidding shall start at the amount offered in the best Qualifying Bid plus \$100,000, and will continue in increments of at least \$100,000 until the bidding ceases. In each bidding round, the Stalking Horse Bidder shall be entitled to bid its Break-Up Fee as part of any bid it submits. The Debtor may alter the Bidding Procedures at the Auction if, in its reasonable judgment, in consultation with any Committee, such alteration will better promote the goals of the Auction, and if such alteration is not inconsistent with the Stalking Horse Bidder’s rights under the Stalking Horse APA. Immediately prior to the conclusion of the Auction, the Debtor, in consultation with any Committee, will: (a) review each bid made at the Auction on the basis of financial and contractual terms and such factors relevant to the Sale process, including those factors affecting the speed and certainty of consummating the Sale; (b) identify the best bid (the “**Successful Bid**”) for the Assets of the Debtor at the Auction; and (c) notify all Qualified Bidders at the Auction, prior to its conclusion, of the name of the maker of the Successful Bid (the “**Successful Bidder**”), and the amount of the Successful Bid. All bidders at the Auction shall be deemed to have consented to the core jurisdiction of the Court and waived any right to jury trial in connection with any disputes relating to the Auction, the Sale of the Assets, and the construction and enforcement of the Stalking Horse APA or the Marked Agreement.

24. Implementation of the Successful Bid. The Debtor may (a) determine, in its reasonable business judgment, in consultation with any Committee, which Qualified Bid is the Successful Bid and the next best bid (the “**Next Best Bid**”) except that the Stalking Horse APA

shall not be considered a Next Best Bid; and (b) reject at any time before entry of the Sale Order any bid, other than the Stalking Horse APA, that, in the Debtor's reasonable judgment, is (i) inadequate or insufficient, (ii) not in conformity with the requirements of the Bankruptcy Code, the Bidding Procedures, or the terms and conditions of the Sale, or (iii) contrary to the best interests of the Debtor and its estate.

25. The Debtor and the Successful Bidder shall use reasonable efforts to close the Sale on or before three (3) business days after entry of the Sale Order, unless a later date is agreed to by the Debtor and the Successful Bidder. If the Successful Bidder does not close the Sale by such date as it may be extended, then the Debtor shall be authorized, but not required, to close with the party that submitted the Next Best Bid (the "**Next Best Bidder**"), without a further court order. If the Debtor decides to close with the Next Best Bidder, the Debtor and the Next Best Bidder will have an additional two (2) business days to close.

26. No Fees for Potential Bidders or Qualified Bidders. Except for the Stalking Horse Bidder, Potential Bidders or Qualified Bidders shall not be allowed any break-up, termination, or similar fee. Moreover, neither the tendering of a bid nor the determination that a bid is a Qualified Bid shall entitle a Potential Bidder or Qualified Bidder to any break-up, termination, or similar fee and all Potential Bidders and Qualified Bidders are deemed to have waived any right to seek a claim for substantial contribution or any other payment from the Debtor or its estate.

27. Return of the Good Faith Deposits. The Good Faith Deposits of all Potential Bidders shall be retained by the Debtor until forty-eight (48) hours after the earlier of (a) withdrawal of the Assets from the Auction by the Debtor and (b) ten (10) days after the Sale Hearing. In connection with consummation of the Sale, the Successful Bidder will be entitled to a credit for the amount of its Good Faith Deposit. If the Successful Bidder defaults in its

obligations to the Debtor under its bid, then the Debtor shall retain the Good Faith Deposit as liquidated damages.

B. The Bidding Procedures are Appropriate and will Maximize the Value Received for the Assets.

28. The proposed Bidding Procedures provide an appropriate framework for selling the Assets and will enable the Debtor to review, analyze, and compare all bids received to determine which bid is in the best interests of the Debtor's estate and creditors. The paramount goal in any proposed sale of property of the estate is to maximize the proceeds received by the estate.⁸

29. To that end, courts uniformly recognize that procedures intended to enhance competitive bidding are consistent with the goal of maximizing the value received by the estate and therefore are appropriate in the context of bankruptcy sales.⁹

30. The Debtor believes that the Bidding Procedures will establish a process through which the value of the Debtor's Assets may be thoroughly tested. Such procedures will increase the likelihood that the Debtor will receive the greatest possible consideration for its Assets because they will ensure a competitive and fair bidding process. The Bidding Procedures also

⁸ See, e.g., *In re Food Barn Stores, Inc.*, 107 F.3d 558, 564-65 (8th Cir. 1997) (noting that in bankruptcy sales, "a primary objective of the Code [is] to enhance the value of the estate at hand"); *In re Integrated Res., Inc.*, 147 B.R. 650, 659 (S.D.N.Y. 1992) ("It is a well-established principle of bankruptcy law that the . . . [debtor's] duty with respect to such sales is to obtain the highest price or greatest overall benefit possible for the estate.") (quoting *In re Atlanta Packaging Prods., Inc.*, 99 B.R. 124, 130 (Bankr. N.D. Ga. 1988)).

⁹ See, e.g., *In re Fin'l News Network, Inc.*, 126 B.R. 152, 156 (S.D.N.Y. 1991) (" . . . court-imposed rules for the disposition of assets . . . provide an adequate basis for comparison of offers, and [] provide for a fair and efficient resolution of bankrupt estates."). Furthermore, courts have made it clear that a debtor's business judgment is entitled to substantial deference with respect to procedures to be used in selling assets from the estate. See, e.g., *In re After Six, Inc.*, 154 B.R. 876, 881 (Bankr. E.D. Pa. 1993) (noting that courts should defer to debtor's business judgment with respect to bidding on assets).

provide for an auction to be held in as expeditious and efficient a manner as possible, which the Debtor believes is essential to maintaining and maximizing the value of its estate.

31. The Debtor also believes that the proposed Bidding Procedures will promote active bidding from seriously interested parties and will dispel any doubt as to the best offer reasonably available for the Debtor's Assets. In particular, the proposed Bidding Procedures will allow the Debtor to conduct an auction in a controlled, fair, and open fashion that will encourage participation by financially-capable bidders who demonstrate the ability to close a transaction. The Debtor believes that the Bidding Procedures will encourage bidding for its Assets and are consistent with the relevant standards governing auction proceedings and bidding incentives in bankruptcy proceedings.

32. Accordingly, the proposed Bidding Procedures are reasonable, appropriate and within the Debtor's sound business judgment under the circumstances.

VI. Proposed Bid Protections

33. As part of the Bidding Procedures Order, the Debtor is also requesting approval of the provisions of the Stalking Horse APA regarding the payment of the Break-Up Fee, on the terms and conditions set forth in the Stalking Horse APA. By subjecting its offer under the Stalking Horse APA to better offers through the Bidding Procedures, the Stalking Horse Bidder is serving as a stalking horse. The Stalking Horse Bidder conditioned its willingness to serve as a stalking horse on the inclusion of these bid protections in the Stalking Horse APA.

A. Summary of the Proposed Bid Protections

34. If approved by this Court, and if the Stalking Horse Bidder is not selected as the Successful Bidder, the Debtor would be required promptly to pay the Stalking Horse Bidder the Break-Up Fee.

35. In addition, the Bidding Procedures require an initial Qualifying Overbid Amount of \$19,531,129.54. If the Qualified Overbid Amount is received, subsequent bids will be in increments of \$100,000 (together with the Qualifying Overbid Amount, the “**Overbid Protections**” and together with the Break-Up Fee, the “**Bid Protections**”).

B. The Bid Protections are appropriate under the circumstances.

36. The Debtor submits that a break-up fee, expense reimbursement and overbid protections are a normal and oftentimes necessary component of sales outside the ordinary course of business under Bankruptcy Code § 363. In particular, a break-up fee encourages a potential purchaser to invest the requisite time, money and effort to conduct due diligence and sale negotiations with a debtor despite the inherent risks and uncertainties of the chapter 11 process.¹⁰

37. The Debtor believes that the Break-Up Fee is an actual and necessary cost and expense of preserving the Debtor’s estate under Bankruptcy Code §§ 503 and 507. The Break-Up Fee would be an allowed administrative expense against the estate, junior only to the claims of the Debtor’s secured lenders and any professionals retained by the Debtor or the Committee. Any payments of the Break-Up Fee under the Stalking Horse APA would be made by the Debtor from the proceeds of an Alternative Transaction (as defined in the Stalking Horse APA).

¹⁰ See, e.g., *In re Integrated Res., Inc.*, 147 B.R. 650, 660 (S.D.N.Y. 1992) (noting that break-up fees may be legitimately necessary to convince a “white knight” to offer an initial bid by providing some form of compensation for the expenses such bidder incurs and the risks such bidder faces by having its offer held open, subject to higher and better offers); *In re Hupp Indus., Inc.*, 140 B.R. 191, 194 (Bankr. N.D. Ohio 1992) (noting the argument that without break-up fees, “bidders would be reluctant to make an initial bid for fear that their first bid will be shopped around for a higher bid from another bidder who would capitalize on the initial bidder’s . . . due diligence”); *In re 995 Fifth Ave. Assocs., L.P.*, 96 B.R. 24, 28 (Bankr. S.D.N.Y. 1989) (“Breakup fees . . . may ‘be legitimately necessary to convince a white knight to enter the bidding by providing some form of compensation for the risks it is undertaking.’”) (citation omitted).

38. Bankruptcy Courts in the Sixth Circuit have ruled that such fees are necessary to preserve the value of, or provide some benefit to, the debtor's estate as required by the plain language of Bankruptcy Code § 503(b) governing the allowance of certain claims as administrative claims.¹¹ Courts in the Sixth Circuit consider the following factors in determining the propriety of allowing any reimbursement, including a break-up fee, to an initial bidder:

- a. whether the amount requested correlates with the maximization of value to the debtor's estate;
- b. whether the underlying negotiated agreement is an arm's-length transaction between the debtor's estate and the negotiating acquirer;
- c. whether the principal secured creditors and the official committee of unsecured creditors are supportive of the concession;
- d. whether the amount constitutes a fair and reasonable percentage of the proposed purchase price;
- e. whether the amount is so substantial that it provides a "chilling effect" on other potential bidders;
- f. the existence of available safeguards beneficial to the debtor's estate; and
- g. whether there exists a substantial adverse impact upon unsecured creditors, where such creditors are in opposition to the break-up fee.¹²

Here, these factors support approval of the Bid Protections.

39. First, the Debtor's offer of the Bid Protections induced the Stalking Horse Bidder to submit a bid that will serve as a minimum floor bid on which other bidders may rely. Therefore, the Stalking Horse Bidder has provided a material benefit to the Debtor, its estate and

¹¹ See *In re Nashville Senior Living*, 2008 Bankr. LEXIS 3197 (Bankr. M.D. Tenn. 2008).

¹² See, e.g., *In re Hupp Indus., Inc.*, 140 B.R. 191, 194 (Bankr. N.D. Ohio 1992).

its creditors by encouraging bidding and increasing the likelihood that the best possible price for the Assets will be received.¹³

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

41. Third, the principal secured creditor is the Stalking Horse Bidder and is therefore supportive of the Bid Procedures.

42. Fourth, the Debtor believes that the proposed Break-Up Fee is fair and reasonable. Indeed, the Break-Up Fee, in terms of its percentage, is comparable to break-up fees approved in other cases.¹⁴

43. Fifth, the Debtor believes that the Bid Protections will not have a chilling effect on the sale process. Rather, as discussed above, the Stalking Horse Bidder has increased the likelihood that the best possible price for the Assets will be received.

44. Finally, the Break-Up Fee will be paid only if, among other things, the Debtor consummates an Alternative Transaction. Accordingly, no Break-Up Fee will be paid unless the Debtor pursues and consummates such a transaction as a result of the sale process.

¹³ See, e.g., *In re Integrated Res., Inc.*, 147 B.R. 650, 659 (S.D.N.Y. 1992) ("Break-up fees are important tools to encourage bidding and to maximize the value of the debtor's assets.").

¹⁴ See, e.g., *In re Richfield Equities, L.L.C.*, Case No. 12-33788 (DSO) (Bankr. E.D. Mich. Oct. 26, 2012) (4% break-up fee); *In re Plastech Engineered Prods., Inc.*, Case No. 08-42417 (PJS) (Bankr. E.D. Mich. May 28, 2008) (2.5% break-up fee); *In re Pontiac Gen. Hosp. & Med. Ctr., Inc.*, Case No. 08-60731 (MBM) (Bankr. E.D. Mich. Sept. 23, 2008) (9.1% break-up fee); *In re Trim Trends Co., LLC*, Case No. 05-56108 (MBM) (Bankr. E.D. Mich. Oct. 31, 2005) (3% break-up fee); *In re Jacobs Indus., Inc.*, Case No. 05-72613 (TJT) (Bankr. E.D. Mich. Dec. 23, 2005) (2% break-up fee).

45. Likewise, the Overbid Protections are reasonable under the circumstances and will enable the Debtor to maximize the value for the Assets while limiting any chilling effect in the sale process. The Overbid Protections merely reflect the Bid Protections and an additional small increment above the Bid Protections, which is reasonable and less than increments in other similar situations.¹⁵ The Overbid Protections not only compensate the Debtor for the risk that it assumes in forgoing a known, willing, and able purchaser for a new potential acquirer, but also ensure that there is an increase in the net proceeds received by its estate, after deducting the Bid Protections to be paid to the Stalking Horse Bidder in the event of a prevailing overbid.

VII. The Proposed Notice of the Bidding Procedures, the Bid Deadline, the Auction, and the Sale Hearing is Appropriate.

46. Under Bankruptcy Rule 2002(a), absent an order of the Court shortening the time period, the Debtor is required to provide creditors with 21 days' notice of the Sale Hearing. Under Bankruptcy Rule 2002(c), such notice must include the date, time, and place of the Auction and the Sale Hearing, and the deadline for filing any objections to the proposed Sale. Within two (2) business days of the entry of the Bidding Procedures Order, the Debtor will cause the Auction and Sale Notice, in a form substantially similar to the form attached as **Exhibit D**, and the Bidding Procedures Order, to be sent by first class mail, postage-prepaid, to (i) all creditors, (ii) all interested parties that expressed an interest in purchasing the Assets within the year before the Petition Date; (iii) counsel to any Committee; (iv) the Office of the United States Trustee; (v) all parties that are known by the Debtor to claim interests in or liens upon the Debtor's assets; and (vi) all entities requesting service in this case. The Auction and Sale Notice

¹⁵ See, e.g., *In re Fin'l News Network, Inc.*, 126 B.R. 152, 154 (S.D.N.Y. 1991) (requiring minimum overbid of 9.5% in excess of the original purchase price); *In re Wintex, Inc.*, 158 B.R. 540, 543 (D. Mass. 1992) (finding that a 10% overbid increment is one example of a reasonable litmus test).

shall indicate that the Stalking Horse APA can be obtained without charge from counsel for the Debtor. The Auction and Sale Notice will include, among other things, the date, time, and place of the Auction and the Sale Hearing, as well as the Bid Deadline and the Sale Objection Deadline.

47. The Debtor submits that the foregoing notice complies fully with Bankruptcy Rule 2002 and is reasonably calculated to provide timely and adequate notice of the Bidding Procedures, the Auction, the Sale, and the Sale Hearing to the Debtor's creditors and other parties in interest, and also to those who have expressed an interest or are likely to express an interest, in bidding on the Assets.

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

48. 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 Bankruptcy Code § 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 designation by the Successful Bidder of the specific contracts that it intends to acquire.

49. Within two (2) business days following the entry of the Bidding Procedures Order, the Debtor shall (i) file a schedule of cure obligations (the “**Contract and Cure Schedule**”) for all executory contracts and unexpired leases to which the Debtor is a party (the “**Executory Contracts**”) and the amount, if any, necessary to cure such Executory Contracts under Bankruptcy Code § 365 (the “**Cure Amounts**”) and (ii) serve by first class mail, postage-prepaid, a copy of the Cure Notice, with the Contract and Cure Schedule attached on each of the

non-debtor parties listed on the Contract and Cure Schedule. 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 and Cure Schedule must be filed with this Court and served upon the Debtor, counsel to the Debtor, counsel to the Stalking Horse Bidder, the Committee (if any), and the U.S. Trustee on or before June 20, 2014 (the “**Cure Objection Deadline**”), except that if the Successful Bidder at the Auction is a party other than the Stalking Horse Bidder, the deadline for objecting to the assignment of the Executory Contracts to the Successful Bidder on the basis of adequate assurance of future performance will be the commencement of the Sale Hearing.

50. As soon as practicable after any amendment to the Contract and Cure Schedule, including the inclusion of any additional Executory Contracts not listed on the original Contract and Cure Schedule, the Debtor shall provide notice of such amendment to the Stalking Horse Bidder and each affected Executory Contract counterparty.

51. At the Sale Hearing, the Debtor shall advise the Court of the Executory Contracts that the Successful Bidder has designated for assumption and assignment (the “**Designated Executory Contracts**”), and the Debtor shall seek assumption and assignment of the Designated Executory Contracts to the Successful Bidder. The Debtor reserves all rights to assume, assign, or reject all Executory Contracts that are not Designated Executory Contracts.

52. 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 the Stalking Horse Bidder 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 Cure and Contract Schedule,

the Court may enter an order deeming the amount set forth in the Cure and Contract Schedule to be the actual Cure Amount payable under Bankruptcy Code § 365 and forever barring the counterparty to the Executory Contract from objecting to the Cure Amounts and from asserting any additional cure or other amounts against the Debtor, its estate, and the Stalking Horse Bidder with respect to such Executory Contract and from objecting to adequate assurance of future performance.

53. Where a counterparty to an Executory Contract timely files an objection asserting a higher cure amount than the Cure Amount identified by the Debtor and the parties are unable to consensually resolve the dispute prior to the Sale Hearing, the amount to be paid under Bankruptcy Code § 365 with respect to such objection will be determined at the Sale Hearing or such other date and time as may be fixed by this Court. All other objections to the proposed assumption and assignment of the Executory Contracts will be heard at the Sale Hearing.

54. Except as may otherwise be agreed to by any party to an Executory Contract, at the closing of the Sale, the Debtor or another Successful Bidder, as applicable, shall cure those defaults under the Executory Contracts that need to be cured in accordance with Bankruptcy Code § 365(b), by payment of the Cure Amounts or providing adequate assurance that the Debtor will promptly pay the Cure Amounts.

IX. The Stalking Horse APA and the Proposed Sale Have a Sound Business Justification, Were and Will be Arm's-length Transactions, and will Maximize the Return for Creditors.

55. The relief requested by this Motion is appropriate and within the Court's authority to approve transactions under Bankruptcy Code § 363(b). Section 363(b)(1) provides, in relevant part, that a debtor in possession, "after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate." Section 363 does not set forth a standard for determining when it is appropriate for a court to authorize the disposition of

a debtor's assets prior to confirmation of a plan. However, bankruptcy courts have required that the decision to sell assets outside the ordinary course of business be based upon the sound business judgment of the debtor.¹⁶

56. A debtor's showing of a sound business purpose need not be unduly exhaustive but, rather, a debtor is "simply required to justify the proposed disposition with sound business reasons."¹⁷ Whether or not there are sufficient business reasons to justify a transaction depends upon the facts and circumstances of each case.¹⁸

57. The Debtor submits that ample business justification exists to sell the Acquired Assets to the Stalking Horse Bidder, or any other Successful Bidder under the terms of the Bidding Procedures Order. The Debtor has carefully considered and analyzed the Stalking Horse Bidder's offer as set forth in the Stalking Horse APA, and in light of the circumstances described herein, has concluded that the proposed Sale presents the best opportunity to realize value for the Debtor's creditors. Thus a sound business purpose justifies the sale of the Assets. The Debtor will have the opportunity to market the Assets to other potential bidders. The Debtor, in the exercise of its business judgment, and in consultation with its professionals, believes that the proposed Sale to the Stalking Horse Bidder, or any other Successful Bidder, is in the best interest of its estate and will maximize the value of the Debtor's estate for the benefit of all creditors.

¹⁶ See *Stephens Indus., Inc. v. McClung*, 789 F.2d 386, 390 (6th Cir. 1986) ("We . . . conclude that a bankruptcy court can authorize a sale of all a Chapter 11 debtor's assets under § 363(b)(1) when a sound business purpose dictates such action."); *Myers v. Martin (In re Martin)*, 91 F.3d 389, 395 (3d Cir. 1996); *Committee of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1071 (2d Cir. 1983); *In re Montgomery Ward Holding Corp.*, 242 B.R. 147, 153 (D. Del. 1999).

¹⁷ *In re Baldwin United Corp.*, 43 B.R. 888, 906 (Bankr. S.D. Ohio 1984).

¹⁸ *Lionel*, 722 F.2d at 1071; see also *Montgomery Ward*, 242 B.R. at 155.

58. The sale of the Assets will be in exchange for fair and reasonable value. Under the Stalking Horse APA, the Stalking Horse Bidder has agreed to provide substantial consideration for the Assets in the form of a credit bid, and the proposed Sale is further subject to an open-market process through which competing bids will be solicited and evaluated. Under the Bidding Procedures Order, all potentially interested bidders will receive adequate and reasonable notice of the opportunity to submit a competing bid prior to the Auction, and the Bidding Procedures will facilitate an open and competitive bidding process in which all parties will participate in good faith.

59. Moreover, the Stalking Horse APA was the product of good faith, arm's length negotiations between the Debtor, on the one hand, and the Stalking Horse Bidder, on the other. The Stalking Horse Bidder does not, and will not, share any common incorporators, officers, or directors with the Debtor, and the Stalking Horse Bidder is not an insider of the Debtor.

60. The Debtor believes and therefore submits that the proposed Sale of the Assets to the Stalking Horse Bidder under the Stalking Horse APA is not the product of collusion or bad faith. The Stalking Horse Bidder does not share common ownership with the Debtor, and is independently controlled and operated. For these reasons, the proposed Sale satisfies the good faith element of the "sound business purpose" test.¹⁹

X. The proposed Sale Satisfies the Requirements of Bankruptcy Code section 363(f).

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

¹⁹ See *In re Abbotts Dairies of Pa., Inc.*, 788 F.2d 143, 147 (3d Cir. 1986) ("Typically, the misconduct that would destroy a purchaser's good faith status at a judicial sale involves fraud, collusion between the purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders.").

62. Under Bankruptcy Code § 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 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.²⁰ Except as otherwise provided in the Stalking Horse APA and subject to the Assumed Obligations and Permitted Liens, the Debtor expects that it will satisfy the requirements of §363(f).

63. The Stalking Horse Bidder would not have entered into the Stalking Horse APA and would not consummate the transactions contemplated thereby if the sale of the Acquired Assets to the Stalking Horse Bidder and the assumption, assignment and sale of the “Assigned Contracts” (as defined in the Stalking Horse APA) to the Stalking Horse Bidder were not (except as otherwise provided in the Stalking Horse APA and subject to the Assumed Obligations and the Permitted Liens) free and clear of all Encumbrances of any kind or nature whatsoever, or if the Stalking Horse Bidder would, or in the future could (except as provided in the Stalking Horse APA or any amendments and subject to the Assumed Obligations and the Permitted Liens), be

²⁰ 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).

liable for any of such Encumbrances or other future liabilities arising out of past conduct of the Debtor or the Debtor's past ownership of the Acquired Assets.

64. Except as otherwise provided in the Stalking Horse APA and subject to the Assumed Obligations and the Permitted Liens, the proposed Sale should be approved free and clear of Encumbrances, as being in the best interest of the Debtor, its estate and creditors, and all other parties in interest.

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

65. By this Motion, the Debtor also seeks an order under to Bankruptcy Code §§ 365(a) and (f), authorizing the Debtor to assume and assign the Assigned 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.²¹ 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."²² 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.²³ Moreover, under Bankruptcy Code §

²¹ See, e.g., *In re McLouth Steel Corp.*, 20 B.R. 688, 692 (Bankr. E.D. Mich. 1982).

²² *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)).

²³ See *Richmond Leasing Co. v. Capital Bank, N.A.*, 762 F.2d 1303, 1311 (5th Cir. 1985).

365(b)(1), 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.

66. Once an executory contract or unexpired lease is assumed, the trustee or debtor in possession may elect to assign such contract.²⁴ Bankruptcy Code 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.”²⁵ 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.²⁶

67. Here, the Assigned Contracts being assumed and assigned to the Stalking Horse Bidder or any other Successful Bidder, will enhance the value of the Debtor’s estate, and the assumption and assignment is therefore reasonable.

68. 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 Assigned Contracts with adequate notice of the proposed assumption and

²⁴ 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).

²⁵ 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).

²⁶ 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).

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 requirements for assumption and assignment of the Assigned Contracts will be satisfied at the Sale Hearing. The Debtor will provide all non-debtor counterparties to the Assigned Contracts an opportunity to be heard. Moreover, the Debtor, as required by the Bidding Procedures Order, will also evaluate the financial wherewithal of all potential bidders before qualifying such bidders to bid for the Assigned Contracts. For the reasons stated throughout this Motion, the Debtor, in exercising its sound business judgment, believes that assuming and assigning the Assigned Contracts to the Stalking Horse Bidder or any other Successful Bidder, as the case may be, is in the best interest of its estate. By the conclusion of the Sale Hearing, assumption and assignment of the Assigned Contracts should be approved under applicable bankruptcy law.

XII. The Sale of the Assets is Proposed in Good Faith under Bankruptcy Code §363(m).

69. The Debtor additionally requests that the Court find that the Stalking Horse Bidder or any other Successful Bidder, as the case may be, is entitled to the protections provided by Bankruptcy Code § 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.”

70. 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’.”²⁷ 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.”²⁸ 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 in the course of the sale proceedings.”²⁹

71. As required by Bankruptcy Code § 363(m), both the Debtor and the Stalking Horse Bidder have acted in good faith in negotiating the sale of the Acquired Assets. There is no evidence of fraud or collusion in the terms of the proposed Sale. To the contrary, as discussed throughout this Motion, the proposed Sale will be the culmination of a negotiation process. The Stalking Horse Bidder is not, nor would any other Successful Bidder likely be, an insider of the Debtor as that term is defined in Bankruptcy Code § 101(31), and all negotiations have been and will continue to be conducted on an arms-length, good faith basis. The Bidding Procedures are designed to ensure that no party is able to exert undue influence over the process. Furthermore, the Bidding Procedures are designed to prevent the Debtor, the Stalking Horse Bidder, or any other Successful Bidder from engaging in any conduct that would cause or permit the proposed Sale to be avoided, or costs or damages to be imposed under, Bankruptcy Code § 363(n).

72. All parties in interest will receive notice of the proposed Sale and will be provided an opportunity to be heard. Such notice is adequate for entry of the Sale Order and satisfies the requisite notice provisions required under Bankruptcy Code § 363(b). Under the circumstances,

²⁷ See *In re Abbotts Dairies of Pa., Inc.*, 788 F.2d 143, 147 (3d Cir. 1986)).

²⁸ *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).

²⁹ *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)).

the Stalking Horse Bidder or any other Successful Bidder, as the case may be, should be afforded the benefits and protections that Bankruptcy Code § 363(m) provides to a good faith purchaser.

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

73. 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.

74. 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.³⁰ 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.”³¹ 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.³²

³⁰ See Advisory Committee Notes to Fed. R. Bankr. P. 6004(h) and 6006(d).

³¹ 10 Collier on Bankruptcy ¶6004.11 (Alan N. Resnick & Henry J. Sommer eds., 16th ed.)

³² *Id.*

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

76. All parties in interest will receive notice of the proposed Sale or a competing transaction 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

77. Notice of this Motion has been provided to: (a) all creditors, (b) all interested parties that expressed an interest in purchasing the Assets within the year before the Petition Date; (c) counsel to any 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 entities requesting service in this case. 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 enter the Bidding Procedures Order and the Sale Order granting (i) the relief requested herein, and (ii) such other and further relief to the Debtor

as the Court may deem proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of May, 2014, a copy of the foregoing electronically filed Motion was served on the parties listed below 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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