

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEW HAMPSHIRE**

In re:

Kingsbury Corporation  
Donson Group, Ltd.  
Ventura Industries, LLC

Bk. No. 11-13671-JMD  
Bk. No. 11-13700-JMD  
Bk. No. 11-13687-JMD  
Jointly Administered

Debtors.

**MOTION FOR ORDER: (A) APPROVING BID PROCEDURES FOR THE SALE OF THE DEBTOR'S ASSETS; (B) SCHEDULING AN AUCTION; (C) APPROVING ASSUMPTION AND ASSIGNMENT PROCEDURES FOR CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES; (D) APPROVING BREAK-UP FEES, EXPENSE REIMBURSEMENTS AND OVERBID PROTECTIONS; (E) APPROVING A FORM OF NOTICE OF SALE; AND (F) APPROVING POST-PETITION LOAN**

**I. Introduction**

Kingsbury Corporation (the "Debtor"), the debtor and debtor in possession in the above-referenced, jointly administered Chapter 11 case, requests that this Court enter an order pursuant to sections 105, 363, 364 and 365 of the United States Bankruptcy Code (the "Bankruptcy Code"), in the form attached hereto: (i) approving the bid procedures attached hereto as **Exhibit A** (the "Bid Procedures"); (ii) scheduling an auction; (iii) approving the assumption and assignment procedures attached hereto as **Exhibit B** (the "Assumption and Assignment Procedures") under which the Debtor may assume and assign certain executory contracts and unexpired leases; (iv) approving proposed break-up fee, expense reimbursement and overbid provisions (as set forth herein); (v) approving the form of the sale notice attached hereto as **Exhibit C** (the "Sale Notice"), which establishes a hearing date, and objection and overbid deadlines with respect to such sale, and assumption and assignment of contracts and leases; and (vi) approving a post-petition loan to the Debtor pursuant to the terms set forth below. The Debtor has also filed the Motion of the Debtor for Authority to Sell Certain Assets of the Debtor

Free and Clear of Liens, Claims and Encumbrances and for Approval of the Assumption and Assignment of Certain Leases and Executory Contracts (the “Sale Motion”). Pursuant to the Sale Motion, the Debtor has requested that this Court enter an order authorizing the Debtor to consummate a sale of assets to Optimization Technology, Inc. (the “Stalking Horse”) in accordance with the terms of the Asset Purchase Agreement executed by that party (the “Stalking Horse Agreement”) and/or to such other party who has submitted a higher and better offer.

The Debtor states in support of this request the following:

## **II. Background**

1. On September 30, 2011, Kingsbury Corporation filed its petition for relief under chapter 11 of the United States Bankruptcy Code (the “Bankruptcy Code”). The Debtor remains in possession of its property as a debtor-in-possession pursuant to sections 1107 and 1108 of the Bankruptcy Code. An official committee of unsecured creditors (the “Committee”) was appointed on October 18, 2011.

2. The Debtor’s company has been in existence in one form or another since 1875, when David Piper founded a sewing machine and clothes wringer manufacturing and repair company in Keene, New Hampshire. Today, the Debtor is a recognized leader in the design and manufacture of premier, quality, special purpose, high production metal cutting, assembly equipment, turning, and machining centers. In the last fifteen years, Debtor has sold over \$145,000,000 of machine systems to Chrysler Group, LLC, Ford Motor Company and General Motors Corporation alone, and an additional \$50,000,000 to tiered suppliers to the Big Three. The Debtor operates in a 300,000 square foot facility located in Keene, New Hampshire, which includes extensive high-bay assembly areas and state-of-the-art manufacturing capabilities. Parts

machined and designed by the Debtor are used in everything from home appliances, to automobiles and jets.

3. The Debtor described the events leading to its voluntary petition in some detail in the Affidavit of Iris A. Mitropoulis in Support of First Day Motions. In summary, the Debtor's operations were generally profitable until early 2009, when the collapse of the United States auto industry, coupled with generally recessionary economic conditions, resulted in declining orders and the cancellation of several major manufacturing programs. By March 2009, the Debtor was forced to furlough many of its employees and to freeze payments to vendors. Given the nature of the Debtor's operations, it was difficult to reduce overhead rapidly enough to match declining business revenues. The Debtor's major lenders showed temporary patience, but by early 2011, the Debtor faced increasing pressure from its major equipment lender, Utica Leaseco, LLC.

4. The Debtor filed its chapter 11 case to preserve the going-concern value of its business. Based upon various circumstances, the Debtor has determined that a sale of its assets is likely to maximize the return to the Debtor's creditors.

### **III. Summary of Sale**

5. The Debtor intends to sell its Real Estate, M&E and Personal Property, as those terms are defined below (collectively referred to herein as the "Assets").

6. The Debtor received a preliminary offer from the Stalking Horse on December 13, 2011 for the purchase of the Debtor's M&E and Personal Property. Following brief but productive negotiations with the Stalking Horse, the Debtor agreed to present the Stalking Horse Agreement to this Court to establish the sales procedures associated with any sale as well as obtain approval of certain bid protections to the Stalking Horse.

7. The Stalking Horse Agreement is attached in its entirety to the Sale Motion and contains the material terms of the Stalking Horse's proposed purchase of the Debtor's M&E and Personal Property. Principally, the Stalking Horse proposes to pay \$2,600,000 in cash.

7. To attract higher and better offers for the sale of its business, the Debtor seeks Court approval of certain bid procedures with respect to the Auction (as defined herein) for the sale of the Assets and the assignment of certain contracts (the "Assigned Contracts"),<sup>1</sup> including approval of break-up fees and expense reimbursements, overbid protections, and the form of notice of sale to be disseminated to the various parties.

8. As noted, the Debtor has separately filed the Sale Motion which seeks approval of the sale of the M&E and Personal Property to the Stalking Horse, as well as the assumption and assignment of the Assigned Contracts by the Stalking Horse in accordance with the terms of the Stalking Horse Agreement, subject to higher and better bids.

#### **IV. Break-Up Fee and Overbid Protection**

9. The Stalking Horse Agreement provides for the payment of a break-up fee and expense reimbursement to the Stalking Horse, as well as overbid protections.

10. Such provisions provide the Stalking Horse with protection and compensation in consideration of its agreement to enter into a stalking horse agreement notwithstanding the uncertainties presented by a sale of this nature. The Stalking Horse requires the approval of its proposed break-up fee and expense reimbursement on an advance basis in order to proceed with its offer as set forth in the Stalking Horse Agreement, and thus the Debtor requests that the Court approve such provisions.

**A. Request for Approval of the Break-Up Fee Provisions.**

11. The Stalking Horse Agreement provides that upon the occurrence of certain events, the Debtor will be obligated to pay the Stalking Horse (i) a “break-up fee” equal to \$105,000, plus (ii) the amount of fees and expenses actually and reasonably incurred by the Stalking Horse in connection with the acquisition of the M&E and Personal Property, with such amount not to exceed \$25,000. The break-up fee and the expense reimbursement, in the aggregate, will not exceed 5% of the purchase price set out in the Stalking Horse Agreement.

12. The Stalking Horse has already incurred time, expense and cost in negotiating the terms of the Stalking Horse Agreement, as well as in conducting due diligence, and will continue to incur time, expense and costs as the parties move toward an auction. The Stalking Horse Agreement will serve as a basis by which other offers for the M&E and Personal Property, if any, will be measured. In light of these considerations, the Debtor believes that the break-up fee and expense reimbursement described above are reasonable and should be approved by this Court.

13. Break-up fees serve a number of useful functions: (1) they attract bidders; (2) they help to insure that a bidder does not withdraw its bid; and (3) they help to establish a bid standard for other bidders. In re Great Northern Paper, Inc., 299 B.R. 1 (D. Me. 2003). *See also*, In re Integrated Resources, Inc., 147 B.R. 650, 661-62 (S.D.N.Y. 1992); In re Hupp Industries, 140 B.R. 191, 194 (Bankr. N.D. Ohio 1991) (“without such fees, bidders would be reluctant to make an initial bid for fear that their first bid will be shopped around for a higher bid from another bidder who would capitalize on the initial bidder’s ... due diligence”); In re 995 Fifth Ave. Assocs., L.P., 96 B.R. 24, 28 (Bankr. S.D.N.Y. 1989) (“break up fees and other strategies

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<sup>1</sup> The term “Assets” shall include and collectively refer to the “Assigned Contracts.”

may be legitimately necessary to convince a ‘white knight’ bidder to enter the bid by providing some form of compensation for the risks it is undertaking”).

14. Courts consider three questions in assessing the appropriateness of break-up fees: (1) whether the relationship between the parties who negotiated the break-up fee is tainted by self-dealing or manipulation; (2) whether the fee hampers, rather than encourages, bidding; and (3) whether the amount of the break-up fee is reasonable relative to the proposed purchase price. See Integrated Resources, 147 B.R. at 657.

15. Applying this test to the break-up fee described above, it should first be noted that the break-up fee to be paid to the Stalking Horse is the product of arm’s length negotiations between unrelated parties. Second, the proposed break-up fee and accompanying provisions encourage meaningful bidding by: (i) retaining a stalking horse bid where no other party was willing to make a firm offer to acquire the Assets; and (ii) establishing a benchmark against which the Debtor can evaluate overbids. Third, the Debtor believes the combined proposed break-up fee and expense reimbursement is fair and reasonable relative to the amount to be paid to the Debtor if the Sale Motion is approved. Based on the Debtor’s preliminary analysis, the break-up fee and expense reimbursement constitutes no more than 5% of the value of the Stalking Horse’s offer.

16. Viewed in this light, the proposed break-up fees are extremely reasonable relative to the proposed purchase price.

**B. The Appropriateness of the Overbid Provision.**

17. The Bid Procedures contemplate that any competing offer for the Assets must contain an initial minimum overbid of no less than \$180,000 more than the Stalking Horse Bid.

The initial minimum overbid is inclusive of the maximum break-up fee and expense reimbursement payable to the Stalking Horse.

18. Subsequent bid increments must be no less than \$50,000. Given the size of the transaction concerning the Assets, subsequent bid increments in this amount will not discourage competing bids at an auction.

## V. Proposed Bid Procedures

### A. Pre-Auction Bidding

19. To ensure that the estate receives the highest and best offer for the Assets, the Debtor will solicit competing bids for the Assets pursuant to the proposed Bid Procedures. Court Approval of the Bid Procedures is appropriate. In re Food Barn Stores, Inc., 107 f. 3d 558, 564-68 (8<sup>th</sup> Cir. 1997); In re Jon J. Peterson, Inc., 411 B. R. 131, 135 (Bankr. W.D.N.Y. 2009). Bid procedures will be approved if they do not provide an undue advantage to a stalking horse bid, provide the same access to information to all potential bidders, provide the option to contain the same contingencies as any stalking horse bid, and promote overall fairness. Jon J. Peterson, Inc., 411 B.R. at 137. Of course, the primary goal of any sale process is to maximize the proceeds received by the estate, and clearly bid procedures promote that goal. Food Barn Stores, 107 F.3d at 564-65. *See also*, Lehigh Coal and Navigation Co., 2010 WL 2025211 (Bankr. M.D. Pa.) (example of bid procedures); In re Fortunoff Fine Jewelry & Silverware, LLC 2008 WL 618986 (Bankr. S.D.N.Y.) (same).

20. In summary, the Bid Procedures provide for the following process in connection with the sale of the Assets:

- a. Break-Up Fees and Expense Reimbursements. As consideration for the value of the Stalking Horse Bid, in the event that the Bankruptcy Court

should determine any third party's competitive bid as a higher or otherwise better offer than the Stalking Horse Bid, and the Debtor thereafter closes on a sale of the M&E and/or Personal Property to one or more third parties, then, subject to the Bankruptcy Court's approval, the Debtor proposes to pay to the Stalking Horse: (1) a break-up fee in the amount of \$105,000; and (2) an expense reimbursement for the Stalking Horse's reasonable expenses in an amount not to exceed \$25,000.

b. **Assets.** Prospective purchasers are invited to offer bids on any combination of the following three lots (each a "Lot") of assets:

i. **Real Estate:** the real property located at 80 Laurel Street in Keene, New Hampshire, including the land, fixtures, building improvements thereon, all plumbing, electrical, mechanical, heating and air conditioning equipment and systems that are permanently attached to the real property, and all easements, licenses, rights-of-way, permits, and other appurtenances thereto, and all purchase options, rights of first refusal and expansion rights relating thereto (including the Debtor's rights in and to public streets or railways), whether held by the Debtor directly or through a nominee or affiliate (collectively, the "Real Estate");

ii. **Machinery and Equipment:** the Debtor's machinery, equipment and rolling stock as listed on the attachment to Schedule B of the Debtor's Schedules and Statement of Financial Affairs filed with the Bankruptcy Court (collectively, the "M&E"); and



iii. **Personal Property:** the Debtor's personal property other than M&E, including, but not limited to, inventory, intellectual property and customer lists (collectively, the Personal Property").

Provided the bid constitutes a "Qualified Bid," as defined below, a bid on any combination of the Assets will be considered.

- b. **The Bidding Process.** The Debtor, in conjunction with its advisors and using reasonable discretion taking into account its fiduciary duties and after consultation with Utica LeaseCo, LLC, Diamond Business Credit, LLC and TD Bank, N.A., the Debtor's primary prepetition secured lenders (the "Prepetition Secured Lenders") and the Creditors Committee (the "Committee"), shall: (i) determine whether any person is a Potential Bidder (hereinafter defined); (ii) coordinate the efforts of Potential Bidders in conducting their respective due diligence investigations regarding the Debtor's business; (iii) receive offers from Qualified Bidders (hereinafter defined); and (iv) negotiate any offer made to purchase the Assets, together or separately (collectively, the "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.
- c. **Participation Requirements.** Unless otherwise ordered by the Bankruptcy Court, for cause shown, or as otherwise determined by the Debtor, in its reasonable discretion taking into account its fiduciary duties and after consultation with the Prepetition Secured Lenders and the Committee, in order

to participate in the Bidding Process each person (a "Qualified Bidder") must submit a bid that adheres to the following requirements (a "Qualified Bid"):

i. All Qualified Bids must be submitted to counsel for the Debtor:

Robert J. Keach, Esq., Bernstein, Shur, Sawyer & Nelson, P.A.,  
100 Middle Street, P.O. Box 9729, Portland, ME, 04104-5029  
(Fax: (207) 774-1127; email: rkeach@bernsteinshur.com) not  
later than 5:00 p.m. (prevailing Eastern Time) on January 23,  
2012 (the "Bid Deadline"). The Debtor shall immediately  
distribute any bid so submitted by facsimile transmission,  
electronic mail, or personal delivery to counsel for the Prepetition  
Secured Lenders and the Committee. Upon determination that  
any Bid is not a Qualified Bid, the Debtor shall notify such bidder  
of such determination forthwith, but in any event not later than  
5:00 p.m. (prevailing Eastern Time) on January 24, 2012, and  
shall provide such bidder with the basis for such determination.

ii. All Qualified Bids shall be in the form of an offer letter from a  
person or persons that the Debtor, in its reasonable discretion  
taking into account its fiduciary duties, deems financially able to  
consummate the purchase of the Assets on which that person or  
persons bid, which letter states:

1. that such Qualified Bidder offers to purchase some or all of  
the Assets upon the terms and conditions set forth in an  
executed asset purchase agreement (an electronic version in  
Word format and blacklined against the Stalking Horse  
Agreement) received on or before the Bid Deadline, with a  
hard copy to follow, together with its exhibits and schedules,  
including terms relating to price and the time of closing (the

"Proposed Agreement");

2. that such Qualified Bidder is prepared to consummate the transaction, following entry of an order of this Court approving the Sale to the Successful Bidder (the "Sale Order");
  3. that in the event such Qualified Bidder becomes the Successful Bidder (both the highest or otherwise best bid and second-highest bid), such Qualified Bidder's offer is irrevocable until two (2) business days after the closing of the Sale of the Assets;
  4. the actual value of such Qualified Bidder's bid to the Debtor's estate;
  5. which of the Debtor's leases and executory contracts are to be assumed in connection with the consummation of the Qualified Bidder's bid; and
  6. that the Qualified Bidder consents to the jurisdiction of the Bankruptcy Court.
- iii. All Qualified Bids: (i) for the M&E and Personal Property combined shall be accompanied by a deposit in escrow of \$300,000; (ii) for all Assets shall be accompanied by a deposit into escrow with the Debtor of an amount equal to the greater of five percent (5%) of the value of the bid or \$300,000; and (iii) as to bids for only an individual Lot, five percent (5%) of the value of such bid, provided however, that any combination of bids must be accompanied by a deposit or deposits that aggregate not less than the amount set forth in (i) and (ii), above (the "Good Faith Deposit").
- iv. All Qualified Bids shall be accompanied by satisfactory evidence,

in the reasonable opinion of the Debtor and its advisors, taking into account its fiduciary duties, of committed financing or other ability to perform all transactions contemplated by the Proposed Agreement.

- v. Qualified Bids should not contain any financing conditions or contingencies (other than those set forth in the Stalking Horse Agreement, if any); provided, however, that Qualified Bids for the Real Estate may contain an environmental due diligence contingency that terminates on or before thirty (30) days following the Auction.
  - vi. All Qualified Bids must provide adequate assurance of future performance to counterparties to any executory contracts and unexpired leases to be assumed by the Potential Bidder.
- e. **Due Diligence.** The Debtor shall afford each Potential Bidder (hereinafter defined) due diligence access to the Assets. Due diligence access may include management presentations as may be scheduled by the Debtor, access to data rooms, onsite inspections and such other matters which a Potential Bidder may request and as to which the Debtor may agree in its reasonable discretion taking into account its fiduciary duties, provided that all such information shall be made available to each Potential Bidder on an equal basis. Neither the Debtor nor any of its affiliates (nor any of its respective representatives) is obligated to furnish any information relating to the Assets to any person except to Potential Bidders and Qualified Bidders. Potential Bidders are

advised to exercise their own discretion before relying on any information regarding the Assets provided by anyone other than the Debtor or its representatives. To be a "Potential Bidder," each bidder must have delivered an executed confidentiality agreement in a form satisfactory to the Debtor in its reasonable discretion taking into account its fiduciary duties, provided that no Potential Bidder will be required to execute a confidentiality agreement more onerous in any material respect to the confidentiality agreements executed by other Potential Bidders. Each of the Prepetition Secured Lenders shall be deemed a Potential Bidder for all purposes.

- f. **"As Is, Where Is."** The sale of the Assets shall be on an "as is, where is" basis and without representations or warranties of any kind, nature, or description by the Debtor, its agents or estate, except to the extent set forth in the Proposed Agreement of the Successful Bidder. Except as otherwise provided in the Proposed Agreement, all of the Debtor's right, title and interest in and to the Assets to be acquired shall be sold free and clear of all liens, claims, charges, security interests, restrictions and other encumbrances of any kind or nature thereon and there against (collectively, the "Transferred Liens"), with such Transferred Liens to attach to the proceeds of the sale. Each bidder shall be deemed to acknowledge and represent that it has relied solely upon its own independent review, investigation and/or inspection of any documents and/or Assets in making its bid, and that it did not rely upon any written or oral statements, representations, promises, warranties or guaranties whatsoever, whether express, implied, by operation of law or

otherwise, regarding the Assets, or the completeness of any information provided in connection with the Assets, the Bidding Process or the Auction, except as expressly stated in these Bid Procedures or, as to the Successful Bidder, in the applicable Proposed Agreement.

- g. **The Stalking Horse.** The Stalking Horse has submitted a Qualified Bid pursuant to the Stalking Horse Agreement, which Qualified Bid shall serve as a stalking horse bid for the Assets (the "Stalking Horse Bid"). For purposes of these Bid Procedures, the Debtor currently values the Stalking Horse's Qualified Bid at \$2,600,000, excluding the value of the Debtor's accounts.
- h. **Credit Bid.** The Prepetition Secured Lenders, and any Newco created by any of the Prepetition Secured Lenders for such purpose, and which is the holder of the secured claim of such Prepetition Secured Lender(s), shall have the right to credit bid at the Auction and any credit bid submitted shall be a Qualified Bid to the extent it meets the other terms and conditions hereof.

21. If the Debtor does not receive any Qualified Bids, the Debtor will report the same to this Court and proceed to seek approval of a sale of the M&E and Personal Property on the terms set forth in the Stalking Horse Agreement.

22. **Auction.** If the Debtor receives more than one Qualified Bid prior to the Bid Deadline, the Debtor shall conduct an auction (the "Auction") at the offices of Bernstein Shur Sawyer & Nelson, P.A., 670 North Commercial Street, Suite 108, Manchester, NH, on January 26, 2012, beginning at 10:00 a.m. (prevailing Eastern Time) or such later time or other place as the Debtor shall notify all Qualified Bidders who have submitted Qualified Bids, provided, however, that the Auction shall be completed and the Successful Bid (as defined herein)

announced no later than January 27, 2012 at 3:00 p.m. (prevailing Eastern Time). Only representatives of the Stalking Horse, the Debtor, the Committee, the United States Trustee, the Prepetition Secured Lenders, and any Qualified Bidders who have timely submitted Qualified Bids shall be entitled to attend the Auction. A Qualified Bidder as to any portion of the Assets may also bid on any or all other Assets of the Debtor.

The Debtor, in its reasonable discretion taking into account its fiduciary duties, may announce at the Auction additional procedural rules that are reasonable under the circumstances (e.g., the amount of time allotted to make subsequent overbids) for conducting the Auction, so long as such rules are not inconsistent with these Bid Procedures. Based upon the terms of the Qualified Bids received, the number of Qualified Bidders participating in the Auction, and such other information as the Debtor, in its reasonable discretion, taking into account its fiduciary duties, determines is relevant, the Debtor, in its reasonable discretion taking into account its fiduciary duties, may conduct the Auction in the manner it determines will achieve the maximum value for the Assets.

At the Auction, the minimum initial bid against the Stalking Horse Bid must exceed the value of the Stalking Horse Bid by \$180,000. (Therefore, to be a Qualified Bid for the M&E and Personal Property, an initial bid (or any combination of bids) must have a value to the estate of not less than \$2,780,000; any bid for all of the Assets must allocate to the Personal Property and M&E not less than \$2,780,000). Subsequent bids on the combination of the M&E and Personal Property, or for all of the Assets, shall be made in minimum increments of not less than \$50,000 (unless such amount is increased or decreased as set forth below).

At the commencement of the Auction and at the conclusion of each round of bidding at the Auction, the Debtor, in its reasonable discretion taking into account its fiduciary duties and

after consultation with the Prepetition Secured Lenders and the Committee, shall announce the then highest or otherwise best offer or combination of offers for the Assets, or any combination of Lots, and the basis for such determination, including identifying any non-economic terms that form the basis for such determination.

Prior to concluding the Auction, the Debtor shall: (i) review each Qualified Bid on the basis of financial and contractual terms and the factors relevant to the sale process, including those factors affecting the speed and certainty of consummating the Sale or Sales; and (ii) using its reasonable discretion taking into account its fiduciary duties and after consultation with the Prepetition Secured Lenders and the Committee, identify and announce to all attending the Auction, the highest or otherwise best offer or combination of offers for the Assets (the "Successful Bid") and any second-highest offer (the "Back-up Bid") and the basis for such determination. The Debtor may, in consultation with the Prepetition Secured Lenders and the Committee, reject at any time before announcing the Successful Bid(s) at the Auction, any bid that, in the Debtor's reasonable discretion taking into account its fiduciary duties, is: (i) inadequate or insufficient; or (ii) not in conformity with the Bankruptcy Code or the Bid Procedures.

The Debtor and the Successful Bidder(s) shall be required to execute the asset purchase agreement(s) for the Successful Bid(s) at the conclusion of the Auction or immediately thereafter. The Debtor shall present the Successful Bid(s) to the Bankruptcy Court for approval at the Sale Hearing. The bidder as to any Back-up Bid shall also execute an asset purchase agreement, contingent on the failure to close of any Successful Bid.

23. **Acceptance of Qualified Bids.** The Debtor shall sell the Assets to the Stalking Horse and/or the Successful Bidder(s), as the case may be, submitting the highest or otherwise



best Qualified Bid(s) at the Auction, after approval of such Qualified Bid(s) by the Bankruptcy Court at the Sale Hearing. The Debtor's presentation to the Bankruptcy Court for approval of a particular Qualified Bid does not constitute the Debtor's acceptance of such Qualified Bid. The Debtor shall have accepted a Qualified Bid only when that Qualified Bid has been approved by the Bankruptcy Court at the Sale Hearing.

24. **The Sale Hearing.** After the conclusion of the Auction, the Bankruptcy Court shall conduct a hearing (the "Sale Hearing") to approve the Sale. At the Sale Hearing, the Debtor will seek entry of an order (the "Sale Order"), among other things, authorizing and approving the Sale or Sales to the Successful Bidder(s), as determined by the Debtor in accordance with the Bid Procedures, pursuant to the terms and conditions set forth in the Proposed Agreement(s) submitted by the Successful Bidder(s) (as such agreement may be modified prior to, during or after the Auction with the agreement of the Debtor). The Sale Hearing may be adjourned or rescheduled without notice other than by an announcement of the adjourned date in open court. Following the entry of the Sale Order approving the Sale or Sales, if a Successful Bidder fails to consummate an approved sale because of a breach or failure to perform on the part of such Successful Bidder, the Back-up Bid, as disclosed at the Sale Hearing, shall be deemed to be the Successful Bid and the Debtor shall be authorized to effectuate such sale without further order of the Bankruptcy Court.

25. **Return of Good Faith Deposit.** The Good Faith Deposits of the Qualified Bidders submitting a Successful Bid or Back-Up Bid shall be retained by the Debtor and such Successful Bid or Back-Up Bid will remain open and irrevocable, notwithstanding Bankruptcy Court approval of a sale pursuant to the terms of a Successful Bid by a Qualified Bidder, until two (2) business days after the closing of the Sale of the Assets. If a Successful Bidder fails to

consummate an approved sale because of a breach or failure to perform on the part of such Successful Bidder, the Debtor will not have any obligation to return the Good Faith Deposit deposited by such Successful Bidder, which shall be retained by the Debtor as liquidated damages to the extent the Debtor is entitled to such damages under the Proposed Agreement.

26. **Modifications.** The Debtor may: (i) determine, in its reasonable business judgment taking into account its fiduciary duties and after consultation with the Prepetition Secured Lenders and the Committee, which Qualified Bid, if any, is the highest or otherwise best offer; (ii) consult with the representatives of the Prepetition Secured Lenders and/or the Committee, or any other significant constituency in connection with the bidding process and Bid Procedures; and (iii) reject at any time before announcing the Successful Bid(s) at the Auction, any bid that, in the Debtor's reasonable discretion taking into account its fiduciary duties, is: (x) inadequate or insufficient; or (y) not in conformity with the Bankruptcy Code or the Bid Procedures.

27. **Reservation of Rights.** In addition to its rights set forth above, the Debtor may modify these Bid Procedures or impose, at or prior to the Auction, additional terms and conditions on the proposed Sale of the Assets if, in its reasonable judgment, taking into account its fiduciary duties and after consultation with the Prepetition Secured Lenders and the Committee, such modifications would be in the best interests of the Debtor's estate and promote an open and fair sale process. Without limitation, at any point during the Auction, the Debtor shall have the absolute right to convert the bidding process from an open auction to a "sealed bid auction," in which case all Qualified Bidders shall have one opportunity to make a final, sealed bid. If the Debtor exercises this option, then the Debtor shall collect all sealed bids, analyze them, and determine the highest and best bid and any Back-Up Bid, in consultation with the

Prepetition Secured Lenders and the Committee.

28. As a sale of the Assets is in the best interest of the Debtor's estate and the Bid Procedures are intended to foster bidding to maximize a return on the Assets, the Bid Procedures should be approved by this Court.

**VI. Proposed Procedures Relating to Executory Contracts and Unexpired Leases**

29. In connection with the Stalking Horse Agreement, the Stalking Horse has requested that the Debtor assume and assign the Assigned Contracts.

30. Section 365 of the Bankruptcy Code authorizes a debtor to assume and assign its executory contracts and unexpired leases, subject to approval of the Bankruptcy Court, and provided that certain defaults under such contracts or leases are cured and adequate assurance of future performance is provided. To avoid the time and expense of addressing cure issues on a piecemeal basis, the Debtor requests approval of procedures for objections to assumption and assignment, and to establish the cure amounts, if any, that are owed under their unexpired leases and executory contracts, as further set forth on **Exhibit B**.

31. To determine the amount that must be paid to each counter-party to an executory contract or unexpired lease (each, a "Counter-Party"), the Debtor needs to accurately determine the extent of its cure obligations, if any. The Debtor is currently preparing an exhibit (the "Contract & Cure Schedule") which shall provide a listing of the executory contracts and unexpired leases proposed to be assume and assigned, as well as the cure amounts, if any, that the Debtor believes is owed under each such contract or lease. The Contract & Cure Schedule will be submitted to the Court prior to the date that the Sale Notice is served on all required parties, and will be appended to the Bid Procedures attached hereto as **Exhibit A** (the "Cure

Procedures”(which Bid Procedures will be attached to the Sale Notice as an exhibit).<sup>2</sup> The Debtor requests that the Court require any Counter-Party to file and serve by a date established by the Court any objection to the cure amount asserted by the Debtor on the Contract and Cure Schedule in accordance with Assumption and Assignment Procedures. Any such objection should contain the cure amount such Counter-Party believes is owing. The failure of a Counter-Party to submit such objection will forever bar such Counter-Party from asserting any other cure amount or otherwise disputing such amounts with respect to the contracts and leases set forth on the Contract & Cure Schedule.

32. The Debtor requests that this Court hear any objection with respect to any cure amounts at the Sale Hearing or adjourn any hearing on such objection on the condition that the difference between the amount asserted by the Counter-Party and the Debtor, or such lower amount as the Court shall fix, shall be held in escrow from the sale proceeds, pending further order of the Court or mutual agreement of the parties. The Debtor submits that such an objection should not be deemed an objection to the assumption, assignment and sale of any Assigned Contract, but only as a reservation of the Counter-Party’s rights to request a subsequent determination as to the correct cure amount.

33. Adequate assurance of future performance depends on the facts and circumstances of each case, but should be given “practical, pragmatic construction.” See In re Carlisle Homes, Inc., 103 B.R. 524, 538 (Bankr. D.N.J. 1989). As necessary, the proposed assignee must demonstrate to the Court that it can provide adequate assurance of future performance in connection with any executory contract or unexpired lease to be assigned, or will have obtained any necessary consents of the counter-parties to such contract or lease. The Debtor requests that,

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<sup>2</sup> The Debtor believes that the Contract & Cure Schedule will be a complete list of its executory contracts and unexpired leases, but reserves the right to amend that list prior to the Sale Hearing.

in connection with the Sale Hearing, the Court determine that the applicable stalking horse, or the maker of the winning bid, has provided adequate assurance of future performance to each Counter-Party.

#### **VII. Post-Petition Loan**

34. The Debtor seeks authority to enter into a post-petition unsecured loan with the Stalking Horse. Specifically, under the terms of the Stalking Horse Agreement, the Stalking Horse would make a loan available to the Debtor of up to the sum of \$50,000 per month for two months (the "Post-Petition Loan"), or until closing, whichever is sooner, for the purpose of paying the Debtor's operating expenses. The Stalking Horse would be permitted to credit bid the balance due on the Post-Petition Loan under the Bid Procedures and any Successful Bidder must be obligated to repay the Loan in full, at the closing, in the event that the Stalking Horse is not the successful bidder. If the Stalking Horse is the successful bidder, the balance due on the Post-Petition Loan shall be credited against the purchase price at the closing.

35. The Debtor submits that approval of the Post-Petition Loan is beneficial to the Debtor's estate because it allows the Debtor to continue daily operations minimizes the risk of incurring post-petition administrative liabilities while the sale is pending.

#### **VIII. Proposed Form and Manner of Notice**

36. The proposed Sale Notice with respect to the sale of the Assets and the objection, overbid and hearing dates is attached hereto as Exhibit C. The Debtors respectfully request this Court approve such Sale Notice.

37. In accordance with Rules 2002, 6004, and 6006 of the Bankruptcy Rules, the Debtors intend, upon approval of this Motion, to:

- (a) serve copies of the Sale Motion and Sale Notice upon:

- (i) the United States Trustee;
- (ii) counsel to the Official Committee of Unsecured Creditors;
- (iii) local, state and federal taxing authorities for each jurisdiction in which the Assets are located;
- (iv) counsel to the Stalking Horse;
- (v) prospective bidders (or their counsel) that are known to the Debtor and its advisors;
- (vi) the Counter-Parties to the executory contracts and unexpired leases on the Contract & Cure Schedule;
- (vii) the National Labor Relations Board, United Auto Workers and Pension Benefit Guaranty Corporation, or their respective counsel, if any; and
- (viii) all parties known to the Debtor to have or assert any liens, claims and encumbrances or other interests against the Assets; and
- (ix) all parties having filed requests for notices in the Debtor's case;

and

- (b) serve a copy of the Sale Notice by first class mail, upon all creditors.

38. The Debtor submits that such notice constitutes good and sufficient notice of the competitive bid procedures, the Sale Motion and all proceedings to be held thereon and that no other further notice need be given.

### CONCLUSION

39. Approval of break-up fees, expense reimbursements and the Bid Procedures described herein are conditions precedent to the consummation of the sale of the Assets and will allow the Debtor to maximize the value of those Assets. Based upon the timing considerations and the requirements of the Stalking Horse, the Debtor requests that the terms of such provisions be approved by this Court.

WHEREFORE, the Debtor respectfully requests that this Court enter an order:

- A) Approving the Bid Procedures described herein, including, without limitation, the initial overbid amount and the subsequent bidding intervals;
- B) Approving the Assumption and Assignment Procedures as provided for herein;
- C) Approving the break-up fees and expense reimbursements described herein and authorizing the Debtor to pay the break-up fees and expense reimbursements in accordance with the terms of any applicable sale motion;
- D) Establishing January 30, 2011 at 10:00 a.m. as the date and time for the final hearing on Debtor's Sale Motion and setting January 23, 2012 at 5:00 p.m. as the deadline for objections or overbids;
- E) Approving the form and content of the Sale Notice attached hereto as **Exhibit C**;
- F) Approving the Post-Petition Loan on the terms set forth in the Stalking Horse Agreement; and
- G) Granting such other and further relief as seen just and equitable.

Dated: December 13, 2011

KINGSBURY CORPORATION

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