

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

<p><b>In re:</b></p> <p><b>MFM DELAWARE, INC.,</b></p> <p><b>MFM INDUSTRIES, INC.,<sup>1</sup></b></p> <p style="text-align: center;"><b>Debtors.</b></p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p><b>Chapter 11</b></p> <p><b>Case No. 13-11359 (PJW)</b></p> <p><b>Case No. 13-11360 (PJW)</b></p> <p><b>Jointly Administered</b></p>
---	---	---

---

**EMERGENCY MOTION OF MFM INDUSTRIES, INC. FOR ENTRY OF ORDERS PURSUANT TO 11 U.S.C. §§ 105, 363, AND 365 (A) AUTHORIZING AND SCHEDULING AN AUCTION AT WHICH INDUSTRIES WILL SOLICIT THE HIGHEST OR BEST BID FOR THE SALE OF SUBSTANTIALLY ALL OF ITS ASSETS; (B) APPROVING BIDDING PROCEDURES RELATED TO CONDUCT OF AUCTION; (C) APPROVING BREAKUP FEE; (D) APPROVING THE FORM AND MANNER OF NOTICES OF (I) PROPOSED SALE OF ASSETS, THE AUCTION AND THE APPROVAL HEARING, AND (II) PROPOSED ASSUMPTION AND ASSIGNMENT OF EXECUTORY CONTRACTS AND LEASES; (E) APPROVING THE SALE OF THE ASSETS TO THE PARTY SUBMITTING THE HIGHEST OR BEST BID; AND (F) GRANTING RELATED RELIEF**

**(Expedited Hearing Requested)**

**Basis for Expedited Relief**

The Debtors request an emergency hearing in this matter on October 10, 2013. As is more fully described below, in light of the financial exigencies facing the Debtors, and in an attempt to preserve and maximize the recovery of the Debtors’ assets, the Debtors must proceed with the disposition of substantially all of their assets on an expedited basis. A copy of this Emergency Motion and the attached Exhibit A has been served upon all parties in interest and those entitled to notice, as set forth in the Certificate of Service.

MFM Industries, Inc. (“Industries”) files this motion (the “Motion”), pursuant to sections 105(a), 363 and 365 of title 11 of the United States Code (11 U.S.C. §§ 101 *et seq.*, the “Bankruptcy Code”) and Rules 2002 and 6004 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), for entry of (i) following an initial hearing (the “Bidding Procedures

---

<sup>1</sup> The last four digits of the taxpayer identification numbers of the Debtors follow in parentheses: (i) MFM Delaware, Inc. (3784); and (ii) MFM Industries, Inc. (6720).

Hearing”), an order (the “Bidding Procedures Order”) (a) authorizing and scheduling an auction at which Industries will solicit the highest or best bid for the sale of substantially all of Industries’ assets; (b) approving the bidding procedures related to the conduct of the auction; (c) approving the break-up fee payable to any stalking horse purchaser (the “Stalking Horse Purchaser”) with whom Industries may sign an asset purchase agreement prior to the Bidding Procedures Hearing; and (d) approving the form and manner of the notices of (1) the proposed sale of Industries’ assets, the Auction and the Approval Hearing (each as defined below), and (2) the proposed assumption and assignment of designated Industries’ executory contracts and unexpired leases and proposed cure costs related thereto; and (ii) following a subsequent hearing (the “Approval Hearing”), an order (the “Sale Order”) which, among other things, approves the sale by Industries of the Purchased Assets (as defined below) to the Stalking Horse Purchaser or to the bidder submitting the highest or best bid for the Purchased Assets in connection with the sale and bidding process (the “Highest Bidder”), approves the form of the sale agreement submitted by the Highest Bidder, and approves the assignment of the designated executory contracts and leases to the Highest Bidder. In support of this Motion, Industries respectfully shows the Court as follows:

**Jurisdiction and Venue**

1. This Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334. Venue is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). The statutory predicates for the relief requested herein are Sections 105(a), 363 and 365 of the Bankruptcy Code and Bankruptcy Rules 2002 and 6004.

**Background**

2. On May 28, 2013 (the "Petition Date"), each of the Debtors filed a voluntary petition with the United States Bankruptcy Court for the District of Delaware (the "Court") under chapter 11 of the Bankruptcy Code.

3. The Debtors' bankruptcy cases are being jointly administered pursuant to Bankruptcy Rule 1015(b).

4. The factual background relating to the Debtors' commencement of these cases is set forth in detail in the *Declaration of Matthew A. Crane in Support of First Day Motions and Applications* filed on the Petition Date and incorporated herein by reference. [Docket No. 3].

5. The Debtors have continued in possession of their properties and have operated and managed their businesses as debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

6. On June 6, 2013, the United States Trustee appointed the Official Committee of Unsecured Creditors (the "Committee"). As of the date of this filing, no request has been made for the appointment of a trustee or an examiner.

**Relief Requested**

7. By this Motion, Industries requests that the Court enter:
- (a) following the Bidding Procedures Hearing, the Bidding Procedures Order substantially in the form attached hereto as Exhibit A
    - (i) authorizing and scheduling the Auction;
    - (ii) approving the Proposed Sale Process and Bidding Procedures (each as defined below);
    - (iii) approving the Breakup Fee (as defined below) payable to the Stalking Horse Purchaser; and

- (iv) approving the form and manner of the notices of (1) the proposed sale of Industries' assets, the Auction and the Approval Hearing, and (2) the proposed assumption and assignment of Industries' designated executory contracts and unexpired leases and proposed cure costs related thereto; and
- (b) following the Approval Hearing, the Sale Order substantially in the form attached hereto as Exhibit B approving the sale by Industries of the Purchased Assets to the Stalking Horse Purchaser or to the Highest Bidder, finding that the Stalking Horse Purchaser or the Highest Bidder is not a "successor" to Industries or its estate, approving the terms of the sale agreement submitted by the Highest Bidder, and approving the assignment of the designated executory contracts and unexpired leases to the Highest Bidder.

### **Basis for Relief**

8. Industries' business activities are conducted within the cat litter industry segment (collectively, the "Business"). Industries has traditionally focused its efforts on the production and sale of private label cat litters. Industries' control brand products are sold to smaller retailers, while its private label cat litters are sold primarily to regional and national grocery and retail chain operators.

9. Due to the business challenges facing Industries, and after evaluating its strategic alternatives, Industries has determined that a sale of its assets will likely result in the best recovery for all of its stakeholders. A sale of the Business will permit Industries to monetize the Purchased Assets and make substantial distributions to creditors and other stakeholders.

10. In connection with a potential sale of the Business, on or about July 16, 2013, the Debtors retained Pharus Securities, LLC ("Pharus") as their investment banker to market Industries' assets and began a sale process. In connection with this sale process, approximately twenty-one potential buyers were contacted by Pharus, including sixteen strategic buyers (i.e., entities that are already operating cat litter production businesses) and three financial buyers (i.e., private equity firms, hedge funds or other investment firms). Approximately ten parties entered

into confidentiality agreements with Industries and conducted due diligence regarding a potential investment in the Business.

11. Industries remains in active negotiations with one of those parties. Assuming Industries enters into an asset purchase agreement with that party it will file a copy of the asset purchase agreement with the Court prior to the Bidding Procedures Hearing. If Industries does not enter an agreement with the party, Industries will file a form asset purchase agreement with the Court prior to the Bidding Procedure Hearing. In either case, any such asset purchase agreement (the "Agreement")<sup>2</sup> shall contain certain material terms and, pursuant to Rule 6004-1 of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the "Local Rules"), the following is a summary of those material terms:

- Purchased Assets – The "Purchased Assets" will include substantially all of Industries' assets including, but not limited to, all of Industries' owned real property, inventory, Assumed Contracts (as defined below), supplies, furniture, fixtures and equipment, deposits (other than amounts posted as adequate assurance of future performance), intellectual property, goodwill, books and records, permits (to the extent assignable), licenses, vehicles and other items presently used in the Business; the Purchased Assets will not include (among other things) Industries' cash, accounts receivable, third party claims unrelated to the Business, avoidance claims, or insurance policies.
- Purchase Price – To be determined (the "Purchase Price").
- Assumed Liabilities – The Purchaser will assume certain post-closing obligations and liabilities arising from the Purchased Assets, including any leases assigned or transferred to the Purchaser and known warranty claims. The Purchaser will also assume the pre-petition "cure" payments required to be paid as a condition to the assumption of the Assumed Equipment Leases (as

---

<sup>2</sup> The following description of the Agreement is qualified in its entirety by the language of the Agreement. In the event there is any conflict between the description of the Agreement contained in this Motion and the provisions of the Agreement, the provisions of the Agreement shall govern and control.

defined in the Agreement), and the Purchaser's one half share of any stamp or transfer taxes, and certain customary pro-rated costs, expenses and liabilities.

- Cure Costs – The Purchaser will be responsible for paying all pre-petition “cure” amounts related to the Assumed Equipment Leases. Industries shall be responsible for paying all post-petition “cure” amounts related to the Assumed Equipment Leases and shall be responsible for paying all “cure” amounts relating to all other designated executory contracts assumed by Industries and assigned to the Purchaser pursuant to the Agreement (collectively with the Assumed Equipment Leases, the “Assumed Contracts”).
- Deposit – 10% of the Purchase Price.
- End Date – Either party may terminate the Agreement if the closing has not occurred on or before October 31, 2013.
- Proposed Breakup Fee – 3% of the Purchase Price.
- Record Retention – Industries will have reasonable access to its books and records to enable it to administer its bankruptcy case.

12. Industries intends to “test” the marketplace by the sale and bidding process described below so as to ensure that Industries realizes the maximum value for the Purchased Assets (the “Proposed Sale Process”). In connection therewith, Industries requests that this Court approve the Proposed Sale Process, including the following bidding procedures (the “Bidding Procedures”):

Assuming there is a Stalking Horse Purchaser

- (i) Bid Deadline for Initial Overbids. In the event there is a Stalking Horse Purchaser, any third party (other than the Stalking Horse Purchaser) that is interested in acquiring the Purchased Assets must submit an “Initial Overbid” by not later than 5:00 p.m. local time in Wilmington, Delaware on October 21, 2013 (the “Bid Deadline”). A bid received after the Bid Deadline shall not constitute an Initial Overbid. Any such Initial Overbid must:
  - (a) Contain a signed definitive asset purchase agreement with the exhibits and schedules thereto (together with a copy of the signed agreement that is marked to show changes from the Agreement) with, at a minimum, the following requirements: (i) having substantially similar terms and conditions as the Agreement except with higher and better consideration; (ii) containing terms and conditions in the aggregate no less favorable to

Industries' estate than the terms and conditions in the Agreement (provided that no Initial Overbid shall provide for the payment to the overbidder of any breakup fee, topping fee, termination fee, expense reimbursement or other similar arrangement); (iii) provide for a purchase price in an amount equal to or greater than the sum of (1) the Purchase Price, (2) the Breakup Fee, and (3) \$100,000; and (iv) not be subject to any (1) financing contingency, (2) contingency relating to the completion of unperformed due diligence, (3) contingency relating to the approval of the overbidder's board of directors or other internal approvals or consents, or (4) any conditions precedent to the overbidder's obligation to purchase the Purchased Assets other than those included in the Agreement;

- (b) Include a cashiers' or certified check in the amount of ten percent (10%) of the purchase price set forth in such Initial Overbid to be held as a deposit (it being understood that the deposit may also be sent by wire transfer of immediately available funds to Industries' counsel to be held in its escrow account);
  - (c) To the extent not previously provided to Industries, be accompanied by evidence satisfactory to Industries in its commercially reasonable discretion (after consulting with the Committee) that the overbidder is willing, authorized, capable and qualified financially, legally and otherwise, of unconditionally performing all obligations under the Agreement (or its equivalent) in the event that it submits the Prevailing Bid (as defined below) at the Auction;
  - (d) Remain open and irrevocable until twenty (20) days after the entry of an order by the Court approving a definitive agreement providing for the sale of the Purchased Assets; and
  - (e) Be submitted to (i) MFM Industries, Inc., 3300 Southwest 34th Avenue, Suite 112, Ocala, Florida, 34474, Attention: Matthew A. Crane (Facsimile: (404) 350-9605), (ii) co-counsel to the Debtors, King & Spalding LLP, 1185 Avenue of the Americas, New York, New York 10036, Attention: Arthur Steinberg (Facsimile: (212) 556-2222), and (iii) Pharus Securities, LLC, 551 5th Avenue, 11th Floor, New York, New York, 10176, Attention: Gregg Mockenhaupt (Facsimile: (215) 243-8233), in each case so as to be received not later than the Bid Deadline. Industries shall provide copies of the Initial Overbids to the Committee's counsel and financial adviser and the Stalking Horse Purchaser's counsel within 24 hours after the Bid Deadline.
- (ii) Assuming there is no Stalking Horse Purchaser

Bid Deadline for Initial Bids. In the event there is no Stalking Horse Purchaser, any party that is interested in acquiring the Purchased Assets must submit an “Initial Bid” by the Bid Deadline. Any such Initial Bid must:

- (a) Contain a signed definitive asset purchase agreement with the exhibits and schedules thereto (together with a copy of the signed agreement that is marked to show changes from the Agreement) with, at a minimum, the following requirements: (i) having substantially similar terms and conditions as the Agreement (provided that no Initial Bid shall provide for the payment to the initial bidder of any breakup fee, topping fee, termination fee, expense reimbursement or other similar arrangement); and (ii) not be subject to any (1) financing contingency, (2) contingency relating to the completion of unperformed due diligence, (3) contingency relating to the approval of the initial bidder’s board of directors or other internal approvals or consents, or (4) any conditions precedent to the initial bidder’s obligation to purchase the Purchased Assets other than those included in the Agreement;
- (b) Include a cashiers’ or certified check in the amount of ten percent (10%) of the purchase price set forth in such Initial Bid to be held as a deposit (it being understood that the deposit may also be sent by wire transfer of immediately available funds to Industries’ counsel to be held in its escrow account);
- (c) To the extent not previously provided to Industries, be accompanied by evidence satisfactory to Industries in its commercially reasonable discretion (after consulting with the Committee) that the initial bidder is willing, authorized, capable and qualified financially, legally and otherwise, of unconditionally performing all obligations under the Agreement (or its equivalent) in the event that it submits the Prevailing Bid (as defined below) at the Auction;
- (d) Remain open and irrevocable until twenty (20) days after the entry of an order by the Court approving a definitive agreement providing for the sale of the Purchased Assets; and
- (e) Be submitted to (i) MFM Industries, Inc., 3300 Southwest 34th Avenue, Suite 112, Ocala, Florida, 34474, Attention: Matthew A. Crane (Facsimile: (404) 350-9605), (ii) co-counsel to the Debtors, King & Spalding LLP, 1185 Avenue of the Americas, New York, New York 10036, Attention: Arthur Steinberg (Facsimile: (212) 556-2222), and (iii) Pharus Securities, LLC, 551 5th Avenue, 11th Floor, New York, New York, 10176, Attention: Gregg Mockenhaupt (Facsimile: (215) 243-8233), in each case so as to be received not later than the Bid Deadline. Industries shall provide copies of the Initial Overbids to the Committee’s counsel and

financial adviser and the Stalking Horse Purchaser's counsel within 24 hours after the Bid Deadline.

- (iii) Auction. In the event that Industries timely receives either a conforming Initial Overbid (assuming a Stalking Horse Purchaser) or a conforming Initial Bid (assuming no Stalking Horse Purchaser) from a prospective purchaser as described above (a "Qualified Bidder"), then Industries will conduct an auction (the "Auction") with respect to the sale of the Purchased Assets. Industries shall hold the Auction for the Purchased Assets at the offices of King & Spalding LLP, 1180 Peachtree Street, N.E., Atlanta, Georgia 30309, commencing on October 25, 2013 at 10:00 a.m. local time, or at such other time and location as may be designated by Industries. Based upon the terms of the qualified bids received and such other information as Industries determines is relevant in the sound exercise of its business judgment, Industries may conduct the Auction in the manner Industries determines will achieve the maximum realizable value for the Purchased Assets and that is not inconsistent with any of the provisions of the Bidding Procedures Order or the Agreement. In order to participate in the Auction, each prospective purchaser shall be required to comply with the requirements of the Bidding Procedures. At the Auction, Qualified Bidders and/or the Stalking Horse Purchaser may submit successive bids in increments of at least \$50,000 in cash greater than the prior bid (the "Incremental Bid Amount") (provided that at the Auction, Industries shall have the discretion, after consulting with the Committee, to modify the Incremental Bid Amount) for the purchase of the Purchased Assets until there is only one offer that Industries determines, subject to Court approval, is the highest or best offer for the Purchased Assets (the "Prevailing Bid"). If bidding at the Auction, the Stalking Horse Purchaser shall receive a "credit" in the amount of the Breakup Fee. All bidding for the Purchased Assets will be concluded at the Auction and there will be no further bidding at the Approval Hearing. In the event there is a Stalking Horse Purchaser, if no conforming Initial Overbid from a Qualified Bidder shall have been received at or prior to the Bid Deadline, the Auction will not be held and the Approval Hearing will proceed with respect to the Agreement. In determining the Prevailing Bid, Industries will consider, among other things: (i) the number, type and nature of any changes to the Agreement requested by each bidder; (ii) the extent to which such modifications are likely to delay closing of the sale of the Purchased Assets and the cost to Industries of such modifications or delay; (iii) the total consideration to be received by Industries; (iv) the nature of the consideration to be received by Industries; (v) the likelihood of the bidder's ability to close a transaction and the timing thereof; and (vi) the net benefit to Industries' estate.
- (iv) Breakup Fee. In the event there is a Stalking Horse Purchaser, upon the consummation of a sale of all or substantially all of the Purchased Assets to any third party (other than the Stalking Horse Purchaser) who submits a Prevailing Bid for the Purchased Assets, or if Industries unilaterally abandons the consummation of the transactions contemplated by the Agreement, Industries shall pay to the Stalking Horse Purchaser cash or other immediately available funds in an amount

equal to 3% of the Purchase Price, inclusive of any out-of-pocket expenses incurred by the Stalking Horse Bidder in connection with the negotiation of the Agreement (the “Breakup Fee”); provided, however, the Breakup Fee shall not be due and payable if the Stalking Horse Purchaser has committed a material breach of the Agreement prior to the consummation of such sale to the third party. The Breakup Fee shall be treated as an administrative expense claim pursuant to Sections 503(b)(1) and 507(a)(2) of the Bankruptcy Code, shall be paid to the Stalking Horse Purchaser within three (3) business days following the closing of such sale to any third party (other than the Stalking Horse Purchaser), and shall be paid to the Stalking Horse Purchaser prior to the payment of the proceeds of such sale to any third party asserting a Lien on the Purchased Assets (and no Lien of any third party shall attach to the portion of the sale proceeds representing the Breakup Fee).

- (v) Approval Hearing. The Approval Hearing will be conducted at 11:30 a.m. local time, on October 28, 2013, in Courtroom #2, United States Courthouse, 824 North Market Street, 6th Floor, Wilmington, Delaware 19801, at which time Industries intends to present the Prevailing Bid for approval by the Court pursuant to the provisions of sections 105, 363(b), 363(f), 363(m), 363(n) and 365 of the Bankruptcy Code. Industries shall be deemed to have accepted a bid only when the bid has been approved by the Court at the Approval Hearing. The Court will not consider any bids from entities that did not participate in the Auction, or from any Qualified Bidder that did participate at the Auction but that did not submit such bid at the Auction. Upon the failure to consummate a sale of the Purchased Assets after the Approval Hearing because of the occurrence of a breach or default under the terms of the Prevailing Bid, the next highest or otherwise best bid (the “Backup Bid”), as determined as soon as practicable after the conclusion of the Auction, and as disclosed at the Approval Hearing, shall be deemed the Prevailing Bid without further order of the Court and the parties shall be authorized to consummate the transactions contemplated by the Backup Bid. The party submitting the Backup Bid may be required by Industries to close on such Backup Bid within 20 days after the conclusion of the Auction.
- (vi) Highest and/or Best Bid. At all times during the sale process, Industries shall retain full discretion and right to determine, in the sound exercise of its business judgment, which bid constitutes the highest or otherwise best offer for the purchase of the Purchased Assets, and which bid should be selected as the Prevailing Bid, if any, all subject to final approval by the Court pursuant to the provisions of section 363(b) of the Bankruptcy Code. Without limiting the generality of the foregoing, Industries may, at any time before entry of an order of the Court approving a Prevailing Bid, reject any bid that Industries determines is (i) inadequate or insufficient, (ii) contrary to the requirements of the Bankruptcy Code or the Bidding Procedures, or (iii) contrary to the best interests of Industries, its estate, its creditors or its other stakeholders. Industries may adopt rules for the Auction that, in the sound exercise of its business judgment, will better promote

the goals of the Auction (provided that such rules shall not be materially inconsistent with the Bidding Procedures Order or the Agreement).

- (vii) Sale Implementation. Following the approval of the Prevailing Bid at the Approval Hearing, Industries will be authorized to take all commercially reasonable and necessary steps to complete and implement the transaction(s) contemplated by the Prevailing Bid.

13. Industries believes that the Proposed Sale Process offers the best opportunity for Industries to maximize the value of the Business and the Purchased Assets for the benefit of its estate following reasonable and appropriate marketing efforts and, therefore, Industries believes that implementation of the Proposed Sale Process is in the best interests of the estate herein, and should be approved.

#### Argument

14. As stated above, Industries currently believes that the Proposed Sale Process provides Industries with its best opportunity to preserve and maximize the value of the Business and the Purchased Assets for the benefit of its estate and, therefore, Industries believes that implementation of the Proposed Sale Process, and approval of any sale that is presented in accordance therewith, is in the best interests of Industries' creditors, employees, estate and other stakeholders.

#### **A. Section 363(b) Authorizes the Proposed Sale and Sale Process.**

15. Section 363(b)(1) of the Bankruptcy Code provides, in relevant part, that “[t]he trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.” 11 U.S.C. § 363(b)(1). Although Section 363 of the Bankruptcy Code does not set forth a standard for determining when it is appropriate for a court to authorize the sale or disposition of a debtor's assets, in applying this section, courts have required that the proposed sale be supported by a sound business purpose. See, e.g., Meyers v.

Martin (In re Martin), 91 F.3d 389, 395 (3d Cir. 1996); Dai-Ichi Kangyo Bank Ltd. v. Montgomery Ward Holding Corp. (In re Montgomery Ward Holding Corp.), 242 B.R. 147, 153 (D. Del. 1999); In re Del. & Hudson Ry. Co., 124 B.R. 169, 176 (D. Del. 1991); In re Trans World Airlines, Inc., No. 01-00056 (PJW), 2001 WL 1820326, at \*10 (Bankr. D. Del. Apr. 2, 2001); In re Phoenix Steel Corp., 82 B.R. 334, 335-36 (Bankr. D. Del. 1987) (stating that judicial approval of a § 363 sale requires a showing that the proposed sale is fair and equitable, a good business reason exists for completing the sale and that the transaction is in good faith).

16. Although Industries cannot predict the results of the Proposed Sale Process and the Auction, Industries respectfully submits that the proposed sale and Proposed Sale Process fit squarely within the parameters of the sound business judgment test articulated in the above-referenced authorities.

17. First and foremost, Industries has articulated a sound business purpose for any transaction emanating from the Auction. In order to monetize the Purchased Assets for distribution to creditors and other stakeholders, it is critical that Industries be permitted to consummate a sale of the Purchased Assets pursuant to the Proposed Sale Process. Industries believes that the Proposed Sale Process will result in a successful sale for a purchase price and on terms that are fair and reasonable.

18. Industries respectfully submits that the notice and timing of the Proposed Sale Process are adequate and fair, and are reasonably calculated to elicit the highest levels of interest in acquiring the Purchased Assets. As described above, Industries has engaged in reasonable and appropriate marketing of the Business and the Purchased Assets and strongly believes that its efforts, coupled with the Proposed Sale Process outlined above, will garner the highest and best possible value for the Purchased Assets. As noted above, in light of the financial exigencies facing

the Debtors, the Proposed Sale Process must proceed on expedited basis in order to preserve and maximize the recovery of the Debtors' assets. The Debtors are hopeful they will be in a position to file an executed Agreement with a Stalking Horse Purchaser prior to the Bidding Procedures Hearing and that the Agreement will reflect a fair and reasonable sale transaction that Industries would be prepared to close even if no Initial Overbid is submitted by a competing bidder.

19. Industries has made, and will continue to make, diligent efforts to seek out all potentially credible buyers, having already contacted numerous parties. The substantial solicitation and marketing efforts of Industries support the proposed process and the reasonableness of any offer ultimately presented through that process.

20. Moreover, because the Proposed Sale Process will create a fair and reasonable environment in which all legitimate and qualified interest in the Business and Purchased Assets can be presented in a competitive, open and level playing field, any offer presented in accordance with the terms of the Proposed Sale Process will necessarily be negotiated and presented in good faith. In connection therewith, Industries will be prepared to present further evidence of good faith during the course of the Sale Hearing that will satisfy this Court and the mandates of Section 363(m) of the Bankruptcy Code.

21. Industries intends to give notice of the Bidding Procedures Hearing, Auction, the Proposed Sale Process, the Sale Hearing and the proposed sale by Industries of the Purchased Assets via electronic e-mail and/or hand delivery, as applicable, to (i) the United States Trustee; (ii) counsel to the Committee; (iii) the Debtors' secured lenders and their counsel; (iv) any parties that have filed notices of appearance and requested service of pleadings in these cases pursuant to Bankruptcy Rule 2002; (v) any parties who previously have expressed serious interest in acquiring all or substantially all of the Purchased Assets; and (vi) all parties known by Industries to assert a

lien or security interest in the Purchased Assets (the persons listed in clauses (i) through (vi) are referred to collectively as the “Notice Parties”). In addition to the foregoing, Industries also proposes to give additional notice by mailing: (a) a copy of any Bidding Procedures Order entered by the Court within three (3) business days of its entry to each of the Notice Parties, (b) a copy of the Auction Notice (as such term is defined in the Bidding Procedures Order) within three (3) business days of entry of the Bidding Procedures Order to all non-debtor parties to Industries’ designated executory contracts and unexpired leases, all entities (including governmental entities) known to Industries that may have the right to file a fine, penalty or lien against the Purchased Assets or Industries, and all creditors known to Industries, and (c) a copy of the Cure Notice (as such term is defined in the Bidding Procedures Order) within three (3) business days of entry of the Bidding Procedures Order to all non-debtor parties to Industries’ designated executory contracts and unexpired leases. Industries submits that the foregoing is sufficient notice of the Auction, the Proposed Sale Process (if and in whatever form approved at the Bidding Procedures Hearing), the Sale Hearing and the proposed sale by Industries of the Purchased Assets.

22. Industries submits that the Proposed Sale Process, and any sale presented in accordance therewith, is warranted and appropriate under the terms and provisions of Section 363(b) of the Bankruptcy Code.

**B. Section 363(f) Authorizes the Sale Free and Clear of Liens and Other Claims.**

23. Industries requests that the sale and transfer of the Purchased Assets be approved free and clear of all Liens, other than those specifically permitted by the Prevailing Bid. Such relief is consistent with the provisions of Section 363(f) of the Bankruptcy Code.

24. Section 363(f) provides that a debtor in possession may sell property free and clear of any lien, claim or interest of another entity in such property if any of the following circumstances pertain:

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

11 U.S.C. § 363(f).

25. As indicated by the use of the disjunctive term “or,” satisfaction of any one of the five requirements listed in Section 363(f) is sufficient to permit the sale of assets free and clear of Liens. See In re Kellstrom Indus., Inc., 282 B.R. 787, 793 (Bankr. D. Del. 2002) (“Section 363(f) is written in the disjunctive, not the conjunctive, and if any of the five conditions are met, the debtor has the authority to conduct the sale free and clear of all liens.” (citing Citicorp Homeowners Servs., Inc. v. Elliot (In re Elliot), 94 B.R. 343, 345 (E.D. Pa. 1988))).

26. In this instance, Industries believes that Bibby Financial Services (Midwest), Inc., Crossroads Financial, LLC, Palmer Resources, LLC, Thomas Kraatz, and certain entities asserting security interests in certain equipment owned by Industries are the only entities holding or asserting a security interest in the Purchased Assets, and Industries anticipates that they will (i) consent to the transaction presented for approval at the Sale Hearing, and (ii) be paid in full (in cash) from the sale proceeds. In this case, Industries proposes that any Liens against the Purchased Assets (other than Permitted Liens and Assumed Liabilities, as such terms are defined

in the Agreement) attach to the proceeds of the sale. Additionally, these lien holders could be compelled to take a monetary judgment in satisfaction of such liens.

27. Accordingly, the requirements of Section 363(f) of the Bankruptcy Code can be satisfied, and the sale of the Purchased Assets free and clear of all liens, claims, encumbrances and other interests is appropriate.

**C. The Prevailing Bidder Should Be Afforded All Protections Under Bankruptcy Code Section 363(m) as a Good Faith Purchaser.**

28. Section 363(m) of the Bankruptcy Code provides that “the reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith . . .” 11 U.S.C. § 363(m).

29. As discussed above, the Proposed Sale Process and the Bidding Procedures (if and in whatever form approved at the Bidding Procedures Hearing) have been designed to create a fair, open and level playing field. Accordingly, Industries requests that the party submitting the Prevailing Bid be determined to have acted in good faith and be entitled to the protections of a good faith purchaser under Section 363(m) of the Bankruptcy Code. See, e.g., In re United Press Int’l, Inc., No. 91 B 13955 (FGC), 1992 U.S. Bankr. LEXIS 842, at \*3 (Bankr. S.D.N.Y. May 18, 1992). In this regard, any transaction reflected in the Agreement will be negotiated by the parties at arm’s length and in good faith, and the Stalking Horse Purchaser and its affiliates or the party that submits the Prevailing Bid (the “Highest Bidder”) (i) are not “insiders” or affiliates of the Debtors, and (ii) do not have any relationship to the Debtors that has not been fully disclosed to the Court.

**D. Section 365 Authorizes the Assumption and Assignment of Executory Contracts and Unexpired Leases.**

30. The Agreement also contemplates the assumption of certain executory contracts and unexpired leases and the assignment of these contracts and leases to the Stalking Horse Purchaser or the Highest Bidder. Accordingly, the Debtors also respectfully seek provisions in the Sale Order (i) authorizing the Debtors to assume and assign the Assumed Contracts pursuant to Section 365 of the Bankruptcy Code, (ii) fixing the cure amounts identified in the Cure Notice as the exact amounts that must be paid to the non-debtor parties to the Assumed Contracts (the “Cure Costs”), (iii) authorizing Industries and authorizing and directing the Highest Bidder to pay the Cure Costs at the closing, and (iv) deeming the parties to the Assumed Contracts adequately assured of future performance.

31. Section 365(a) of the Bankruptcy Code provides that a debtor-in-possession “subject to the court’s approval, may assume or reject any executory contract or unexpired lease of the debtor.” 11 U.S.C. § 365(a). Courts evaluate a decision to assume or reject an executory contract or unexpired lease under the “business judgment” standard. See In re Decora Indus., Inc., No. 00-4459 (JJF), 2002 WL 32332749, at \*8 (D. Del. May 20, 2002); In re AbitibiBowater Inc., 418 B.R. 815, 831 (Bankr. D. Del. 2009) (“A debtor’s decision to assume or reject an executory contract is a matter within the ‘business judgment’ of the debtor.”) (citation omitted); Official Comm. of Unsecured Creditors v. Aust (In re Network Access Solutions, Corp.), 330 B.R. 67, 75 (Bankr. D. Del. 2005) (“The standard for approving the assumption of an executory contract is the business judgment rule”); see also Phar Mor, Inc. v. Strouss Bldg. Assocs., 204 B.R. 948, 952 (N.D. Ohio 1997) (“Courts should generally defer to a debtor’s decision whether to reject an executory contract.”) (citation omitted). The business judgment standard requires that the court approve the debtor’s business decision unless that judgment is the product of bad faith or a gross abuse of discretion. See Computer Sales Int’l, Inc. v. Federal Mogul (In re

Federal Mogul Global, Inc.), 293 B.R. 124, 126 (D. Del. 2003); Lubrizol Enters. v. Richmond Metal Finishers, Inc. (In re Richmond Metal Finishers, Inc.), 756 F.2d 1043, 1047 (4th Cir. 1985).

32. Here, the Assumed Contracts are integral assets of the Business, and Industries has determined, in the exercise of its business judgment, that the assumption and assignment of the Assumed Contracts in connection with a sale of the Purchased Assets is necessary to yield significant value and benefit to Industries and its estate from the sale of the Purchased Assets.

33. Industries also requests that the Court fix the amount of Cure Costs due under the Assumed Contracts in connection with the requirement in Section 365(b)(1) of the Bankruptcy Code that the debtor in possession, at the time of assumption, cure defaults in any executory contract or unexpired lease being assumed, or provide adequate assurance that the default will be promptly cured. In anticipation of the sale of the Business, Industries reviewed its books and records, calculated the arrearages owing on the Assumed Contracts, and determined that the Cure Costs identified in the Cure Notice are the amounts that should be paid to the non-debtor parties to the Assumed Contracts.

34. To Industries' knowledge, there are no defaults under the Assumed Contracts that are required to be cured or for which there is compensation due, other than the Cure Costs. Accordingly, Industries respectfully requests that this Court include in the Sale Order provisions: (i) authorizing Industries to assume and assign the Assumed Contracts to the Stalking Horse Purchaser or to the Highest Bidder pursuant to Section 365 of the Bankruptcy Code, (ii) fixing the Cure Costs as the amounts needed to cure any defaults under the Assumed Contracts, (iii) authorizing Industries and authorizing and directing the Highest Bidder to pay the Cure Costs at the closing, and (iv) deeming the parties to the Assumed Contracts adequately assured of future performance by the Stalking Horse Purchase or the Highest Bidder.

**E. The Proposed Bidding Procedures and Breakup Fee Are Appropriate.**

35. Industries has formulated a bidding process that it believes will induce prospective competing bidders to expend the time, energy and resources necessary to submit an Initial Overbid or an Initial Bid, and which Industries believes is fair and reasonable in view of the assets to be sold. The Proposed Sale Process and, in particular, the Breakup Fee, if applicable, are reasonable and supported by applicable case law.

36. Historically, bankruptcy courts have approved bidding incentives, including break-up fees awarded to an initial bidder or “stalking horse,” in the event of a successful overbid based on the business judgment of the debtor. See, e.g., In re 995 Fifth Ave. Assocs., L.P., 96 B.R. 24, 28 (Bankr. S.D.N.Y. 1992) (bidding incentives 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”); In re Integrated Resources, Inc., 147 B.R. 650, 656 (Bankr. S.D.N.Y. 1992) (noting that “the business judgment of the Debtor is the standard applied under the law in this district” and applying the standard to a break-up fee).

37. The Third Circuit Court of Appeals has also addressed the appropriate standard for determining whether proposed bidding incentives in the bankruptcy context are appropriate. In Calpine Corp. v. O’Brien Env’tl. Energy, Inc. (In re O’Brien Env’tl. Energy, Inc.), 181 F.3d 527 (3d Cir. 1999), the Third Circuit Court of Appeals held that even though bidding incentives are measured against a business judgment standard in nonbankruptcy transactions, the administrative expense provisions of Section 503(b) of the Bankruptcy Code govern bidding incentives in the bankruptcy context. Finding no “compelling justification” for treating an application for break-up fees and expenses under Section 503(b) any differently from other applications for administrative expenses, the Court concluded that “the determination whether break-up fees or expenses are

allowable under § 503(b) must be made in reference to general administrative expense jurisprudence. In other words, the allowability of break-up fees, like that of other administrative expenses, depends upon the requesting party's ability to show that the fees were actually necessary to preserve the value of the estate." Id. at 535.

38. In O'Brien, the Third Circuit identified at least two circumstances in which bidding incentives may provide actual benefit to the estate, justifying administrative expense status. First, there exists an actual benefit to the estate where "assurance of a break-up fee promoted more competitive bidding, such as by inducing a bid that otherwise would not have been made and without which bidding would have been limited." Id. at 537. Second, where the availability of bidding incentives induces a prospective buyer to research the value of the debtor and submit a bid that serves as a minimum bid on which other bidders can rely, the initial "bidder may have provided a benefit to the estate by increasing the likelihood that the price at which the Debtors is sold will reflect its true worth." Id. Both of those circumstances exist in this case, because the inducement of the Breakup Fee will be important in persuading the Stalking Horse Purchaser to make an initial offer, which will serve as a "floor" for other bidders in connection with the Proposed Sale Process, and to expend the time and resources associated with conducting due diligence regarding the Business and with negotiating and entering into the Agreement.

39. Under the "administrative expense" standard enunciated in O'Brien, as well as the "sound business judgment" standard followed in other jurisdictions, the Bidding Procedures proposed by the Debtors should be approved as fair and reasonable. The proposed Breakup Fee of \$240,000, which is inclusive of any out-of-pocket expenses incurred by the Stalking Horse Purchaser in connection with the negotiation of the Agreement, is reasonable and generally consistent with the range of bidding protection typically approved by bankruptcy courts in cases

in this district. See, e.g., In re Women First Health Care, 332 B.R. 115, 118 (Bankr. D. Del. 2005) (noting the court had approved a breakup fee of 2.8%); In re Solyndra LLC, Case No. 11-12799 (MFW) (Bankr. D. Del. Sept. 28, 2012) (D.I. 1113) (court approved breakup fee of 2.6% in connection with \$90 million sale of assets); In re Northstar Aerospace (USA) Inc., Case No 12-11817 (MFW) (Bankr. D. Del. June 27, 2012) (D.I. 119) (court approved breakup fee of 3.5% in connection with \$70 million sale of assets); In re Archway Cookies LLC, Case No. 08-12323 (Bankr. D. Del. Dec. 3, 2008) (approving \$750,000 breakup fee in connection with a \$25 million sale, or 3.8%); In re Global Home Prods. LLC, Case No. 06-10340 (KG) (Bankr. D. Del. July 14, 2006) (D.I. 507) (court approved break-up fee of 3.5% in connection with sale of assets); In re Ameriserve Food Distrib., Inc., Case No. 00-00358 (PJW) (Bankr. D. Del. Apr. 3, 2000) (D.I. 7016) (court approved break-up fee of 3.6% or \$4 million in connection with \$110 million sale of assets). Moreover, payment of the Breakup Fee will not diminish the Debtor's estate. If Industries enters an agreement with a Stalking Horse Purchaser, so long as Industries does not unilaterally abandon the consummation of the transactions contemplated by such agreement, the Breakup Fee would be payable only if a sale to a higher and better bidder is consummated, and the Initial Overbid under the Bidding procedures includes the addition of the Breakup Fee.

40. Furthermore, pursuant to the Agreement, the entry of a Bidding Procedures Order approving the Breakup Fee would be a condition precedent that must be satisfied before the Stalking Horse Purchaser would be obligated to close the transactions set forth in the Agreement. See In re Reliant Energy Channelview, L.P., 594 F.3d 200 (3d Cir. 2010) (reasoning a break-up fee should be approved if it is necessary to entice a party to make the first bid or it would induce a stalking horse bidder to remain committed to a purchase). Accordingly, if this Court does not enter the Bidding Procedures Order approving the Breakup Fee, any agreement entered by the

Stalking Horse Purchaser would not obligate the Stalking Horse Purchaser to close the proposed transaction and purchase the Purchased Assets at closing.

41. Therefore, because the procedures and incentives included in the Proposed Sale Process, including the proposed Breakup Fee, are fair and reasonable, are reasonably calculated to produce the best and highest offers for the Purchased Assets and thereby confer actual benefits upon the estates herein, and are within the range of incentives customarily approved by courts in this district, such procedures should be approved in these bankruptcy cases.

**F. Relief Under Bankruptcy Rules 6004(h) and 6006(d) is Appropriate**

42. Bankruptcy Rule 6004(h) provides that “[a]n order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of 14 days after entry of the order, unless the court orders otherwise.” Additionally, Bankruptcy Rule 6006(d) provides that “[a]n order authorizing the trustee to assign an executory contract or unexpired lease under § 365(f) is stayed until the expiration of 14 days after the entry of the order, unless the court orders otherwise.”

43. The purpose of Bankruptcy Rule 6004(h) and 6006(d) is to provide sufficient time for an objecting party to appeal before an order can be implemented. See Advisory Committee Notes to Fed. R. Bankr. P. 6004(h) and 6006(d). 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 period, the leading treatise on bankruptcy suggests that the stay period should be eliminated to allow a sale or other transaction to close immediately “where there has been no objection to the procedure.” 10 Collier on Bankruptcy, ¶ 6004.10 at 6004-18 (L. King., 15th rev. ed. 2008). The treatise further provides that if an

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. Id.

44. As described above, time is clearly of the essence. To maximize the value received for the Purchased Assets, Industries seeks to consummate the sale of the Purchased Assets as soon as possible following the Approval Hearing. Accordingly, the Debtors request that the Court waive the fourteen-day stay period under Bankruptcy Rules 6004(h) and 6006(d) or, in the alternative, if an objection to the proposed sale of the Purchased Assets is filed, reduce the stay period to the minimum amount of time needed by the objecting party to file its appeal.

#### Notice

45. This Motion will be served, and further notice of the Auction, the Proposed Sale Process, the Sale Hearing and the proposed sale by Industries of the Purchased Assets will be given, in accordance with the procedures set forth above. Industries respectfully submits that such notice is sufficient and proper under the circumstances, and that no other or further notice is required.

WHEREFORE, based upon the foregoing, Industries respectfully requests that the Court (a) enter an order following the Bidding Procedures Hearing, substantially in the form attached hereto as Exhibit A, (i) approving the Proposed Sale Process (including payment of the Breakup Fee, if applicable), and (ii) authorizing Industries to take all actions reasonably necessary to effectuate such Proposed Sale Process and the sale presented in accordance therewith; (b) following the Sale Hearing, enter the Sale Order substantially in the form attached hereto as Exhibit B, approving the highest or best bid for the Purchased Assets and granting the other relief requested in this Motion; and (c) grant such other and further relief as the Court deems just and proper.

This 4th day of October 2013.

Respectfully submitted,

/s/ Frederick B. Rosner  
THE ROSNER LAW GROUP LLC  
Frederick B. Rosner (No. 3995)  
Scott J. Leonhardt (No. 4885)  
824 N. Market Street, Suite 810  
Wilmington, Delaware 19801  
Telephone: (302) 319-6300  
rosner@teamrosner.com

and

KING & SPALDING LLP  
Arthur J. Steinberg  
New York Bar No. 1680495  
asteinberg@kslaw.com  
1185 Avenue of the Americas  
New York, NY 10036-4003  
Telephone: (212) 556-2158  
Facsimile: (212) 556-2222

and

Jeffrey R. Dutson  
Georgia Bar No. 637106  
jdutson@kslaw.com  
Annie R. Carroll  
Georgia Bar No. 127813  
acarroll@kslaw.com  
1180 Peachtree Street  
Atlanta, Georgia 30309-3521  
Telephone: (404) 572-4600  
Facsimile: (404) 572-5131

CO-COUNSEL FOR THE  
DEBTORS-IN-POSSESSION