

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION

In re:

Peabody Energy Corporation, et al.,

Debtors.

Case No. 16-42529-399  
CHAPTER 11

Jointly Administered

Hearing Date and Time:  
January 26, 2017 at 10:00 a.m.  
(Central)

Response Deadline:  
January 19, 2017

Hearing Location:  
United States Courthouse  
Thomas F. Eagleton Federal Building  
5th Floor, North Courtroom  
111 South Tenth Street  
St. Louis, Missouri 63102

**DEBTORS' MOTION FOR ENTRY OF ORDERS (I)(A) APPROVING BIDDING PROCEDURES FOR THE SALE OF A CERTAIN ASSET, (B) AUTHORIZING THE DEBTORS TO ENTER INTO THE STALKING HORSE PURCHASE AGREEMENT, (C) APPROVING BID PROTECTIONS, (D) SCHEDULING AN AUCTION, (E) APPROVING THE FORM AND MANNER OF NOTICE THEREOF, (F) SCHEDULING A SALE HEARING AND APPROVING THE FORM AND MANNER OF NOTICE THEREOF, AND (G) APPROVING ASSUMPTION AND ASSIGNMENT PROCEDURES; AND (II)(A) APPROVING THE SALE OF A CERTAIN ASSET FREE AND CLEAR OF LIENS, CLAIMS, INTERESTS AND ENCUMBRANCES AND (B) APPROVING THE ASSUMPTION AND ASSIGNMENT OF EXECUTORY CONTRACTS AND UNEXPIRED LEASES; AND (III) GRANTING RELATED RELIEF**

Peabody Energy Corporation ("PEC") and certain of its direct and indirect subsidiaries, as debtors and debtors in possession (collectively, the "Debtors"), hereby move the Court, pursuant to sections 105, 363 and 365 of chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") and Rules 2002, 6004, 6006 and 9014 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), for entry of (I) an order (the "Bidding Procedures Order") (A) approving bidding procedures (the "Bidding Procedures") for the sale (the "Sale") of the

Debtor Sellers' (defined below) interest in Dominion Terminal Associates ("DTA") (the "Asset"), (B) approving the Debtors' selection of Newport News Terminal Associates, LLC, a Virginia limited liability company, as the stalking horse bidder (the "Stalking Horse Bidder") and authorizing the Debtor Sellers to enter into the Stalking Horse APA (as defined below), (C) approving the Bid Protections (as defined below), (D) scheduling an Auction (as defined below) and approving the form and notice of the Auction (the "Auction Notice"), (E) approving the Form and Manner of Notice thereof, (F) scheduling a sale hearing and approving the form and manner of notice thereof (the "Sale Notice"), and (G) approving assumption and assignment procedures (the "Assignment Procedures"), including the form and manner of the Debtors' notice of proposed cure amounts (the "Cure Notice"); and (II) an order (the "Sale Order") (A) approving the Sale of the Asset free and clear of liens, claims, interests and encumbrances and (B) approving the assumption and assignment of certain executory contracts; and (III) an order granting related relief<sup>1</sup> In support of this motion (the "Motion"), the Debtors respectfully represent as follows:

### **Jurisdiction and Venue**

1. This Court has subject matter jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334 and Rule 81-9.01(B)(1) of the Local Rules of the United States District Court for the Eastern District of Missouri. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

### **Background**

2. On April 13, 2016 (the "Petition Date"), the Debtors commenced their reorganization cases by filing voluntary petitions for relief under the Bankruptcy Code.

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<sup>1</sup> Capitalized terms used but not defined herein shall have the meanings ascribed to them in the Bidding Procedures.

The Debtors are authorized to continue to operate their businesses and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

3. Debtor PEC is a Delaware corporation headquartered in St. Louis, Missouri. PEC was incorporated in 1998 and became a public company in 2001. Each of the other Debtors is a wholly-owned direct or indirect subsidiary of PEC.

4. PEC is the world's largest private-sector coal company (by volume), with 26 active coal mining operations located in the United States and Australia. The Debtors' domestic mines produce and sell thermal coal, which is primarily purchased by electricity generators. PEC's Australian operations mine both thermal and metallurgical coal, a majority of which is exported to international customers. As of December 31, 2015, Debtor PEC and its subsidiaries' property holdings include 6.3 billion tons of proven and probable coal reserves and approximately 500,000 acres of surface property through ownership and lease agreements. In the United States alone, as of December 31, 2015, the Debtors held an estimated 5.5 billion tons of proven and probable coal reserves, and the Debtors generated sales of approximately 180 million tons of coal.

5. The Debtors operate in a competitive and highly regulated industry that has experienced strong headwinds and precipitously declining demand and pricing in recent years due to the rise of low priced alternative energy sources – including an abundance of natural gas. Combined with these factors, slowing global economic growth drove a wide range of goods prices lower in 2015 and resulted in the largest broad market decline since 1991. Indeed, demand from electric utilities in the United States alone declined approximately 110 million tons in 2015. These market conditions, in connection with lower realized pricing in the United States and Australia, resulted in a 21.0 million ton decline in the Debtors' and their non-debtor subsidiaries' coal sales during 2015.

6. A detailed description of the Debtors and their businesses is set forth in greater detail in the Declaration of Amy B. Schwetz, Executive Vice President & Chief Financial Officer of Debtor Peabody Energy Corporation, in Support of First Day Motions of Debtors and Debtors in Possession [Docket No. 7], which is incorporated herein by reference.

### **Relief Requested**

7. By this Motion, the Debtors seek, pursuant to sections 105, 363 and 365 of the Bankruptcy Code and Bankruptcy Rules 2002, 6004, 6006 and 9014, (A) an order (i) approving the Bidding Procedures in connection with the Sale; (ii) establishing the Assignment Procedures; (iii) approving the Cure Notice, the Sale Notice, the Assumption and Assignment Notice and the Auction Notice; (iv) scheduling the Stalking Horse Hearing, the Auction (if necessary) and the Sale Hearing; and (v) granting related relief; and (B) an order (i) authorizing the sale of the Asset free and clear of all liens, claims, interests and encumbrances; (ii) authorizing the assumption and assignment of certain executory contracts and unexpired leases in connection with the Sale; and (iii) granting related relief. The Debtors believe that the procedures proposed herein with respect to the Sale are the best way to maximize the value of the Asset for the Debtors' and their estates, creditors and stakeholders.

### **The Proposed Sale of the Asset**

#### **I. The Initial Marketing Process**

8. Debtors James River Coal Terminal, LLC and Peabody Terminal, LLC (together, the "Debtor Sellers") own an aggregate 37.5% share in DTA. DTA is a Virginia general partnership. DTA operates a coal export and ground storage facility at the Port of Hampton Roads on the East Bank of the James River in Newport News, Virginia. DTA exports coal primarily to Asian, European and South American markets.

9. Prior to the filing of this Motion, and beginning approximately in September 2016, the Debtors' investment banker, Lazard Frères & Co. LLC ("Lazard") marketed the Asset with the goal of obtaining a Stalking Horse Bid (defined below) (the "Initial Marketing Process"). The Initial Marketing Process included: (a) reaching out to 32 potential bidders, (b) the execution of 10 confidentiality agreements that allowed the Debtors and Lazard to share pertinent information regarding the asset to potential bidders and (c) the receipt of four initial offers. As part of the Initial Marketing Process, Lazard contacted each other entity (the "DTA Partners") that also owns an interest in DTA. One of DTA Partners executed a confidentiality agreement and received the bidding information. The other DTA Partner chose not to participate in the sale process. Neither DTA Partner submitted any offer for the Asset. At the conclusion of the Initial Marketing Process, the Debtors determined the Stalking Horse Bidder had submitted the highest and best bid for the Asset to date.

## **II. The Bidding Procedures**

10. The Debtors propose to conduct the sale of the Asset through the Bidding Procedures, which are described below (the "Sale Process") to ensure that their estates realize the maximum value for the Asset.

11. To optimally and expeditiously solicit, receive and evaluate bids in a fair and accessible manner, the Debtors have developed the Bidding Procedures to govern the Sale Process. The Bidding Procedures are designed to (i) encourage all entities to put their best bids forward and (ii) maximize the value of the Asset.

12. The Debtors request that this Court approve the proposed Sale Process and the Bidding Procedures, the material terms of which are discussed below.

**A. Qualifications of Bidders and Bids**

13. Parties who may be interested in purchasing the Asset should submit an executed version of the confidentiality agreement included as Exhibit 1 to the Bidding Procedures (the "Confidentiality Agreement") to Lazard, 300 North LaSalle St., Chicago, IL 60654 (Attn. Juan Correa (312) 407-6603; juan.correa@lazard.com and Tyler Cowan (312) 407-6657; tyler.cowan@lazard.com). Upon execution of a Confidentiality Agreement, parties will be given access to the Debtors' data room (the "Data Room") and may begin conducting due diligence.

14. Stalking Horse APA: The Stalking Horse Bidder has placed a bid (the "Stalking Horse Bid") to acquire the Asset pursuant to that certain Asset Purchase Agreement dated January 12, 2017 (the "Stalking Horse APA") which agreement is attached hereto as Exhibit A. The Debtors have also posted the Stalking Horse APA in the Data Room. The Stalking Horse Bid shall be subject to higher and better offers to acquire the Asset. To facilitate a competitive, value-maximizing Sale, the Debtor Sellers are requesting authority, in the exercise of their business judgment and in accordance with the Bidding Procedures, to offer the Stalking Horse Bidder a break-up fee of \$200,000 or 2% of the Stalking Horse Bid (the "Break-Up Fee") and reimbursement of the Stalking Horse Bidder's reasonable fees and expenses in an amount no greater than \$150,000 (the "Expense Reimbursement" and, together with the Break-Up Fee, the "Bid Protections").<sup>2</sup>

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<sup>2</sup> To the extent the Motion conflicts with the terms of the Bidding Procedures, the Bidding Procedures Order or the Stalking Horse APA, the terms of the Bidding Procedures, the Bidding Procedures Order or the Stalking Horse APA, as applicable, shall control.

15. Qualified Bids. In order to constitute a Qualified Bid (as defined below), any proposal, solicitation or offer for the Asset (each, a "Bid") submitted by a bidder (each, a "Bidder") must (i) be submitted in writing prior to March 2, 2017 at 4:00 p.m. (Central Time) (the "Bid Deadline") and (ii) satisfy the following requirements, as determined by the Debtors in their reasonable business judgment (collectively, the "Bid Requirements"):

- i. Contain a duly authorized and signed definitive purchase and sale agreement (a "Qualified APA") and a redline thereof showing changes to the Stalking Horse APA that: (a) identifies the Asset, (b) contains a purchase price equal to or greater than the Minimum Overbid (as defined below), to be paid by each such Bidder in cash in full at the closing of the transaction after application of the Good Faith Deposit (as defined below), (c) is on terms no less favorable (in the Debtor Sellers' reasonable business judgment) than the terms and conditions contained in the Stalking Horse APA, including, without limitation, after consideration of the Bid Protections and the scope and extent of any representations and warranties and other terms and conditions for the Sale, and (d) is not subject to any: (1) financing contingencies of any kind, (2) contingencies relating to due diligence after the Bid Deadline, (3) contingencies relating to the approval of the Bidder's board of directors or other internal approvals or non-governmental third party consents or approvals or (4) conditions precedent to the Bidder's obligation to purchase the Asset and complete the Sale other than those agreed to by the Debtor Sellers and/or included in the Stalking Horse APA.
- ii. Be accompanied by the provision of a certified or bank check or wire transfer in the amount of at least 10% of the purchase price proposed in the Qualified APA as a good faith deposit (the "Good Faith Deposit"). The Good Faith Deposit shall be held in escrow and credited to the closing payment if the Bidder is ultimately determined to be the Successful Bidder (as defined below) and any closing payment is due. If the Bidder is not the Successful Bidder or the Backup Successful Bidder (as defined below), the Good Faith Deposit will be returned to the Bidder within three (3) business days following the Auction. In the event that a Bidder is selected as the Backup Successful Bidder, and subject to the terms of the Stalking Horse APA if the Stalking Horse Bidder is the Backup Successful Bidder, the Good Faith Deposit shall be returned to the Backup Successful Bidder within three (3) business days following the closing of a Sale to the Successful Bidder.
- iii. Contain a written statement that the Bidder agrees to be bound by the terms of the Bidding Procedures and the Bidding Procedures Order and include a commitment that the Bidder shall (a) commence and complete all filings with respect to necessary government and other approvals

within three (3) days following the entry of the Sale Order and (b) consummate the purchase of the Asset by April 15, 2017.

- iv. Be accompanied by evidence, satisfactory to the Debtor Sellers, that the Bidder is willing, authorized (including by such Bidder's board of directors or comparable governing body), capable and qualified financially, operationally, legally and otherwise, of unconditionally performing all obligations under the Qualified APA, including, without limitation, (a) all assumed obligations with respect to the Asset and (b) the ability to provide adequate assurance of future performance under executory contracts and unexpired leases to be assumed pursuant to section 365 of the Bankruptcy Code.
- v. Provide that (i) the Bidder agrees to serve as the Backup Successful Bidder if it is selected as the next highest and best bid for the Asset after the Successful Bid is determined in accordance with the Bidding Procedures and (ii) the Bidder's Bid shall remain open and irrevocable until at least thirty (30) days after the entry of an order by the Court approving a definitive agreement providing for the sale of the Asset.
- vi. Fully disclose the identity of each entity that will be bidding in any Auction scheduled by the Debtor Sellers, including, without limitation, the identity of any control parties.
- vii. Be submitted to (i) counsel for the Debtors, (a) Jones Day, North Point, 901 Lakeside Avenue, Cleveland, OH 44114 (Attn: Heather Lennox, Esq. and Thomas Wearsch, Esq.); (b) Jones Day, 51 Louisiana Avenue, N.W., Washington, D.C. 20001 (Attn: Amy Edgy, Esq. and Daniel T. Moss, Esq.); (ii) counsel for the Stalking Horse Bidder, Latham & Watkins LLP, 885 Third Avenue, New York, NY 10022 (Attn: Charles E. Carpenter, Esq. and David A. Hammerman, Esq.), **so as to be received no later than the Bid Deadline**. The Debtors may extend the Bid Deadline until the start of any Auction for one or more bidders without further notice.

16. Notice of Qualified Bidders. A Bid that satisfies each of the Bid Requirements, as determined in the Debtors' reasonable business judgment, shall constitute a "Qualified Bid" by a "Qualified Bidder". The Debtors shall notify each Qualified Bidder that such party is a Qualified Bidder within two (2) days after the Bid Deadline.

17. Evaluation of Competing Bids. The Bidding Procedures set forth various factors that will be considered by the Debtors in evaluating each Qualified Bid. The Debtors may evaluate competing bids in a manner that will maximize the value to their estates.

18. Auction. In the event the Debtors receive more than one Qualified Bid, there shall be an Auction on March 6, 2017 at 10:00 a.m. (Eastern Time) at Jones Day, 901 Lakeside Avenue, Cleveland, OH 44114. The Stalking Horse APA shall serve as the "Baseline Bid" at the commencement of the Auction.

19. No Qualified Bids. If the Debtors do not receive any Qualified Bids with respect to the Asset, other than the Stalking Horse Bid, the Debtors shall report the same to the Court and promptly proceed to seek the entry of the appropriate orders approving the sale to the Stalking Horse Bidder.

**B. The Notice Procedures**

20. Notice of Auction and Sale Hearing. As soon as practicable after the entry of the Bidding Procedures Order, the Debtors will cause the Auction and Hearing Notice attached hereto as Exhibit B to be served by first-class mail (postage prepaid), facsimile, electronic transmission or overnight mail upon: (i) all entities known by the Debtors to have expressed an interest in a transaction with respect to the Asset during the past eighteen (18) months, including all Qualified Bidders; (ii) all state and local taxing authorities or recording offices which have a reasonably known interest in the relief requested; (iii) all non-debtor parties to relevant contracts or leases (executory or otherwise); (iv) all parties who are known or reasonably believed, after reasonable inquiry, to have asserted any lien, encumbrance, claim or other interest in the Asset; and (v) all parties set forth in the Debtors' Master Service List maintained in these chapter 11 cases (to the extent any party to receive notice thereby has not received notice pursuant to sections (i) through (v) above).

21. Assumption and Assignment Notice. As soon as is practicable after the entry of the Bidding Procedures Order, the Debtors will serve the Assumption and Assignment Notice attached hereto as Exhibit C, by first class mail, facsimile, electronic transmission or overnight

mail on (a) each counterparty (a "Contract Counterparty") to each potential Assumed and Assigned Contract (as defined below) and (b) its attorney, if known, at the last known address available to the Debtors. The Assumption and Assignment Notice shall set forth the following information: (i) the contract(s) and/or lease(s) that may be assumed by the Debtor Sellers and assigned to the Successful Bidder(s); (ii) the name and address of the Contract Counterparty thereto; (iii) the amount (the "Cure Amount"), if any, necessary to cure any existing default in accordance with sections 365(b) and 365(f)(2) of the Bankruptcy Code; and (iv) the deadlines by which any such Contract Counterparty must file an objection to the proposed assumption and assignment of any Assumed and Assigned Contract; **provided, however**, that the presence of any contract or lease on an Assumption and Assignment Notice does not constitute an admission that such contract or lease is an executory contract or unexpired lease.

### **III. The Auction**

22. Auction. In the event that the Debtors additional Qualified Bids, the Auction will start on March 6, 2017 at 10:00 a.m. (Eastern Time) at Jones Day, 901 Lakeside Avenue, Cleveland, OH 44114. To participate in the Auction, each prospective purchaser must be a Qualified Bidder. Each Qualified Bidder must have at least one (1) individual representative with authority to bind the Qualified Bidder attending the Auction in person. Only (1) Qualified Bidders, (2) Citibank as Administrative Agent under the Debtors First Lien Credit Agreement and (3) the Unsecured Creditors Committee, and their respective legal and financial advisors, shall be entitled to attend the Auction. The Debtor Sellers reserve the right to limit the number of attendees from each Qualified Bidder in the Auction room. By attending the Auction, each party present agrees to keep the Auction, the Bids at the Auction and all details concerning the Auction confidential. The Auction shall be conducted in the presence of a certified court reporter who shall transcribe the Auction.

23. A Qualified Bidder wishing to submit a bid at the Auction must bid an amount no less than \$450,000 greater than the total consideration contained in the Stalking Horse Bid (the "Minimum Overbid").

24. Subject to the Minimum Overbid, Qualified Bidders shall submit successive bids in increments to be determined by the Debtors at the Auction (the "Incremental Bid Amount") for the purchase of the Asset until there is only one offer that the Debtors determine, subject to Court approval, is the highest and/or best offer for the Asset (a "Successful Bid" and such Bidder, the "Successful Bidder"). The second highest bid, to the extent determined to be acceptable to the Debtors, shall be deemed to be the backup bid (the "Backup Successful Bid" and such Bidder, the "Backup Successful Bidder").

25. All Bids made at the Auction shall remain open until (i) if the Qualified Bidder is not selected as a Successful Bidder or the Backup Successful Bidder, three (3) days after the end of the Auction, or (ii) if the Bidder submits the Successful Bid or is deemed to be the Backup Successful Bidder, the earlier of (A) April 15, 2017 or (B) the Closing (as defined in the Stalking Horse APA or a Qualified Bid as the case may be).

26. Highest and/or Best Bid. At all times during the Sale Process, the Debtors shall retain full discretion and the right to determine which Bid or Bids constitute the highest or otherwise best offer for the purchase of the Asset and which Bid or Bids should be selected as the Successful Bid(s), if any, all subject to final approval by the Court pursuant to section 363(b) of the Bankruptcy Code. The Debtors may adopt rules for the Auction that, in their judgment, will better promote the goals of the Auction and that are not inconsistent in any material respect with any of the other material provisions hereof or of any Court order.

27. Proceeds. All valid and properly perfected liens against the Asset shall attach to the net proceeds of the Sale.

28. Reservation of Rights. Subject to the terms of the Stalking Horse APA, the Debtors reserve the right to make modifications to these Bidding Procedures at or prior to the Auction, including, without limitation, the right to (i) extend the deadlines set forth herein with respect to any or all Potential Bidders and Bidders, (ii) impose additional terms and conditions with respect to any or all Potential Bidders and Bidders, (iii) adjourn or cancel the Auction at or prior to the Auction and (iv) adjourn or cancel the Sale Hearing.

#### **IV. The Sale Hearing**

29. Sale Hearing. As soon as is practicable following the conclusion of the Auction, the Debtors shall file the definitive purchase and sale agreement for the Successful Bid (the "Final APA"). The Debtors intend to present the Successful Bid(s) to the Court at the Sale Hearing. The Debtors shall be deemed to have accepted a Bid only when the Bid has been approved by the Court at the Sale Hearing. Upon the failure to consummate the Sale after the Sale Hearing because of the occurrence of a breach, default or termination by the proposed purchaser under the terms of the Successful Bid, the Backup Successful Bid shall be deemed the Successful Bid without further order of the Court, and the parties shall be authorized to consummate the transaction contemplated by the Backup Successful Bid.

30. Sale Implementation. Following the approval of the Successful Bid(s) at the Sale Hearing, the Debtor Sellers will be authorized to take any and all actions necessary and appropriate to facilitate the closing of the Sale (the "Closing") and implement the transactions contemplated by the Successful Bid(s).

#### **V. Assumption and Assignment of Contracts and Leases**

31. To facilitate the Sale and the assumption and assignment of the executory contracts and unexpired leases to be assumed and assigned to the Successful Bidder(s) (the "Assumed and Assigned Contracts"), the Debtors propose to serve the Assumption and

Assignment Notice as soon as practicable after the entry of the Bidding Procedures Order.

The Debtors request that the Court approve the following procedures for fixing any cure amounts owed in connection with the Assumed and Assigned Contracts (the "Assumption and Assignment Procedures").

32. The Assumption and Assignment Notice shall set forth the following information: (i) the contract(s) and/or lease(s) that may be assumed by the Debtors and assigned to the Successful Bidder(s); (ii) the name and address of the Contract Counterparty thereto; (iii) the Cure Amount, if any; and (iv) the deadlines by which any such Contract Counterparty must file an objection to the proposed assumption and assignment of any Assumed and Assigned Contract.

33. All objections to the assumption and assignment of any lease or contract, including, without limitation, any objection to the Debtors' proposed Cure Amount or the provision of adequate assurance of future performance under any lease or contract pursuant to section 365 of the Bankruptcy Code ("Adequate Assurance"), must: (a) comply with the General Objection Procedures (as defined below); (b) identify the lease or contract to which the objector is a party; (c) describe with particularity any cure the claimant contends is required under section 365 of the Bankruptcy Code (the "Cure Claim") and identify the basis(es) of the alleged Cure Claim under the contract or lease; (d) attach all documents supporting or evidencing the Cure Claim; and (e) if the response contains an objection to Adequate Assurance, state with specificity what the objecting party believes is required to provide Adequate Assurance (collectively with the General Objection Procedures, the "Assigned Contract Objection Procedures").

34. If no objection is timely and properly filed and served in accordance with the Assigned Contract Objection Procedures, (a) the Cure Amount set forth in the Assumption and

Assignment Notice shall be controlling, notwithstanding anything to the contrary in any contract or lease or other document, and the non-debtor party to the contract or lease shall be forever barred from asserting any other claim arising prior to the assignment against the Debtors or the purchaser, and (b) the purchaser's promise to perform under the contract or lease shall be deemed Adequate Assurance under the contract or lease. To the extent the Debtors dispute any Cure Claim, such dispute shall be presented to the Court at the Sale Hearing or such earlier or later date and time as the Debtors and the objector may agree or the Court may order, but such dispute shall not affect in any way the effectiveness of any assumption and assignment of a contract or lease.

35. While the Debtors have made a good faith effort to identify all contracts and leases to be assumed and assigned in connection with the Sale, they may discover additional contracts and/or leases that the Debtor Sellers and the purchaser desire to assume and assign in connection therewith. Accordingly, if, at any time after the entry of the Bidding Procedures Order, the Debtors identify additional prepetition executory contracts and/or leases to be assumed and assigned to the purchaser as Assumed and Assigned Contracts (whether before or after closing of the Sale), the Debtors shall serve a supplemental Assumption and Assignment Notice (each, a "Supplemental Assumption and Assignment Notice") by first class mail, facsimile, electronic transmission or overnight mail on the Contract Counterparty (and its attorney, if known) to each supplemental Assumed and Assigned Contract (each, a "Supplemental Assumed and Assigned Contract") by no later than fourteen (14) days before the Closing. Each Supplemental Assumption and Assignment Notice shall set forth the following information: (i) the name and address of the Contract Counterparty, (ii) notice of the proposed effective date of the assignment (subject to the right of the Debtors and the purchaser to withdraw such request for assumption and assignment of the Supplemental Assumed and

Assigned Contract prior to the Closing), (iii) identification of the Supplemental Assumed and Assigned Contract and (iv) the Cure Amount, if any.

36. Unless the Contract Counterparty or any other entity properly files an objection to the Supplemental Assumption and Assignment Notice in accordance with the General Objection Procedures (as defined below) within ten (10) days of the date of the Supplemental Assumption and Assignment Notice, the Debtor Sellers may assume and assign the Supplemental Assumed and Assigned Contract, subject to the occurrence of the Closing, without further order or notice of hearing. If an objection is filed and served in accordance with the General Objection Procedures within ten (10) days of the date of the Supplemental Assumption and Assignment Notice, and the objection cannot be resolved consensually, the Debtors will request that the Court schedule a hearing to consider the objection.

## **VI. Notice**

37. The Debtors propose to give notice, immediately after the entry of the Bidding Procedures Order, of the Bidding Procedures, the Sale Notice, the Assumption and Assignment Notice, the Auction Notice, the Sale Hearing and the Objection Deadline, served by first-class mail, facsimile, electronic transmission or overnight mail upon: (i) all entities known by the Debtors to have expressed an interest in a transaction with respect to the Asset during the past eighteen (18) months, including all Qualified Bidders; (ii) all state and local taxing authorities or recording offices which have a reasonably known interest in the relief requested; (iii) all non-debtor parties to relevant contracts or leases (executory or otherwise); (iv) all parties who are known or reasonably believed, after reasonable inquiry, to have asserted any lien, encumbrance, claim or other interest in the Asset; and (v) upon all parties set forth in the Debtors' Master Service List maintained in these chapter 11 cases (to the extent any party to

receive notice thereby has not received notice pursuant to sections (i) through (iv) above) (collectively, the "Notice Parties").

## VII. Objections

38. All objections to the relief requested in the proposed Bidding Procedures Order (including any objection that the Assigned Contracts may not be assumed and assigned by the Debtor Sellers to the Successful Bidder due to any right of first refusal, consent right or other similar restriction) must be: (a) in writing; (b) signed by counsel or attested to by the objecting party; (c) in conformity with the Bankruptcy Rules and the Local Rules of the Court; (d) filed with the Court by 4:00 p.m. (Central Time) on January 19, 2017 (the "Procedures Objection Deadline"); and (e) served on the following parties (collectively, the "Objection Notice Parties") in accordance with the Local Rules of the Court **so as to be received on or before the relevant objection deadline**: (i) counsel for the Debtors, (a) Jones Day, North Point, 901 Lakeside Avenue, Cleveland, OH 44114 (Attn: Heather Lennox, Esq. and Thomas Wearsch, Esq.); (b) Jones Day, 51 Louisiana Avenue, N.W., Washington, D.C. 20001 (Attn: Amy Edgy, Esq. and Daniel T. Moss, Esq.); (ii) counsel for the Stalking Horse Bidder, Latham & Watkins LLP, 885 Third Avenue, New York, NY 10022 (Attn: Charles E. Carpenter, Esq. and David A. Hammerman, Esq). All objections to the Sale, the assumption and assignment of the Assumed and Assigned Contracts (other than any objection that the Assigned Contracts may not be assumed and assigned by the Debtor Sellers to the Successful Bidder due to any right of first refusal, consent right or other similar restriction) and any other relief requested in this Motion other than the relief granted by this Court in the Bidding Procedures Order, must be: (a) in writing; (b) signed by counsel or attested to by the objecting party; (c) in conformity with the Bankruptcy Rules and the Local Rules of the Court; (d) filed with the Court by 4:00 p.m. (Central Time) on March 2, 2017 (the "General Objection Deadline"); and (e) served on the

Objection Notice Parties in accordance with the Local Rules of the Court **so as to be received on or before the relevant objection deadline; provided, however,** that any party may object based on events occurring at the Auction until 4:00 p.m. (Central Time) on the day prior to the Sale Hearing. These procedures are collectively referred to as the "General Objection Procedures." Each objection shall state the legal and factual basis of such objection and may be orally supplemented at the relevant hearing.

### **ARGUMENT**

#### **Approval of the Bidding Procedures**

##### **A. The Bidding Procedures Are Appropriate Under the Circumstances**

39. Section 363 of the Bankruptcy Code and Bankruptcy Rule 6004(f)(1) authorize debtors to sell property outside the ordinary course of business by private sale or by auction. The Debtors seek to market the Asset through a competitive bidding process to maximize the value of the Asset and the Debtors' business. An auction conducted substantially in accordance with the Bidding Procedures will enable the Debtors to obtain the highest and best offer for the Asset.

40. Generally, to obtain approval of a proposed sale of assets, a debtor must demonstrate that the proffered purchase price is the highest and best offer under the circumstances of the case. In re Integrated Res., 147 B.R. 650, 659 (S.D.N.Y. 1992) ("It is a well-established principle of bankruptcy law that the . . . Debtors' duty with respect to such sales is to obtain the highest price or greatest overall benefit possible for the estate.") (quoting Cello Bay Co. v. Champion Int'l Corn. (In re Atlanta Packaging Prods., Inc.), 99 B.R. 124, 131 (Bankr. N.D. Ga. 1988)); see generally Four B. Corp. v. Food Barn Stores, Inc. (In re Food Barn Stores, Inc.), 107 F.3d 558, 564-65 (8th Cir. 1997) (holding that in bankruptcy sales, "a primary objective of the Code [is] to enhance the value of the estate at hand"). Moreover, "bankruptcy

courts have wide discretion in structuring sales of estate assets" and "they have ample latitude to strike a satisfactory balance between the relevant factors of fairness, finality, integrity, and maximization of assets." Wintz v. Am. Freightways, Inc. (In re Wintz Cos.), 219 F.3d 807, 812 (8th Cir. 2000) (internal citations omitted). As the court in In re Wintz noted, "[bankruptcy courts] must be accorded sufficient discretion to decide the truly close cases as best they can in view of these competing considerations." Id. (internal citations omitted).

41. The Debtors believe that the Bidding Procedures ensure that the Sale Process is conducted fairly and will yield the highest value for their estates and creditors. The Bidding Procedures are designed to facilitate a competitive bidding process in which all potential bidders are encouraged to participate and submit competing bids. The Bidding Procedures also provide potential bidders with sufficient notice and opportunity to acquire the information necessary to submit a timely and informed bid. Thus, the Debtors and all parties in interest can be assured that the consideration for the Asset will be fair and reasonable. At the same time, the Bidding Procedures provide the Debtors with the opportunity to consider all competing offers and to select, in their reasonable business judgment, the highest or otherwise best offer for the Asset.

42. The Debtors further believe that the Bidding Procedures provide a framework for the sale of the Asset that will enable the Debtors to review, analyze and compare, in a relatively uniform fashion, all offers received to determine which offer is the highest or otherwise best and in the best interests of the Debtors' estates and creditors. Accordingly, the Debtors request that the Court approve the Bidding Procedures.

**B. Approval of the Bidding Procedures is Warranted Under Section 363 of the Bankruptcy Code.**

43. Section 363(b) of the Bankruptcy Code provides that a debtor "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). Section 363(b) of the Bankruptcy Code does not specify a standard for determining when it is appropriate for a court to authorize the use, sale or lease of property of the estate; however, bankruptcy courts in this District and elsewhere have required that the authorization of such use, sale or lease of property of the estate out of the ordinary course of business be based upon the sound business judgment of the debtor. See, e.g., Lionel, 722 F.2d 1063, 1070 (2d Cir. 1983) (requiring "some articulated business justification" to approve the use, sale or lease of property outside the ordinary course of business); In re Channel One Comm., Inc., 117 B.R. 493, 496 (Bankr. E.D. Mo. 1990) (citing In re Lionel); In re Trilogy Dev. Co., LLC, 2010 Bankr. LEXIS 5636, at \*\*3-4 (Bankr. W.D. Mo. 2010) (same); In re Filene's Basement, LLC, No. 11-13511, 2014 Bankr. LEXIS 2000, at \*39 (Bankr. D. Del. Apr. 29, 2014) ("Transactions under §363 must be based upon the sound business judgment of the debtor or trustee."); Stephens Indus., Inc. v. McClung, 789 F.2d 386, 390 (6th Cir. 1986) ("The Bankruptcy Court implicitly found that an articulated business reason justified the sale ... Consequently, we conclude that the Bankruptcy Court did not abuse its discretion in approving the sale of ASC's assets."); In re Efoora, Inc., 472 B.R. 481, 488 (Bankr. N.D. Ill. 2012) ("A sale is permissible and will be authorized as long as the trustee has an 'articulated business justification.'") (quoting Fulton State Bank v. Schipper (In re Schipper), 933 F.2d 513, 515 (7th Cir. 1991)). A sound business purpose for the sale of a debtor's assets outside the ordinary course of business may be found where such a sale is necessary to preserve the value of assets for the estate, its creditors or interest holders. See, e.g., Lionel, 722 F.2d at 1070.

44. The "sound business purpose" test requires the debtor to establish that

- (1) a sound business purpose justifies the sale of assets outside the ordinary course of business;
- (2) the sale price is fair;
- (3) the debtor has provided accurate and reasonable notice to all interested parties;
- (4) the sale was in good faith.

See Lionel, 722 F.2d at 1071; In re Channel

One, 117 B.R. at 496 (citing Lionel); In re Mid Am. Agri Products/Horizon, LLC, No. 09-41543, 2009 Bankr. LEXIS 5246, at \*\*4-7 (Bankr. D. Neb. Dec. 30, 2009). However, the "sound business purpose" test is not an onerous standard and may be satisfied "as long as the proposed action appears to enhance the debtor's estate." In re Food Barn, 107 F.3d at 567 n.16 ("[w]here the [debtor's] request is not manifestly unreasonable or made in bad faith, the court should normally grant approval as long as the proposed action appears to enhance the debtor's estate"); Crystalin, LLC v. Selma Props. Inc. (In re Crystalin, LLC), 293 B.R. 455, 463-64 (B.A.P. 8th Cir. 2003) (citing In re Food Barn); In re Noranda Aluminum, Inc., 549 B.R. 725, 728 (Bankr. E.D. Mo. 2016) (same).

45. Once a debtor articulates a valid business justification for its actions, courts should "give great deference to the substance of the directors' decision and will not invalidate the decision, will not examine its reasonableness, and will not substitute its views for those of the board if the latter's decision can be attributed to any rational business purpose." In re Global Crossing Ltd., 295 B.R. 726, 744 (Bankr. S.D.N.Y. 2003) (citing Paramount Commc'ns Inc. v. QVC Network Inc., 637 A.2d 34, 45 n.17 (Del. 1994)); accord In re Noranda Aluminum, 549 B.R. at 728 ("...the bankruptcy court should not interfere with the trustee or debtor-in-possession's business judgment except on a finding of bad faith or gross abuse of their business discretion." (internal citations and quotations omitted); Official Comm. of Subordinated Bondholders v. Integrated Res., Inc. (In re Integrated Res., Inc.), 147 B.R. 650, 656 (S.D.N.Y. 1990) (presuming, based on the business judgment rule, "that in making a business decision the directors of [the debtor] acted on an informed basis, in good faith and in the honest belief that the action was in the best interests of the company") (quoting Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985)); In re Johns-Manville Corp., 60 B.R. 612, 616 (Bankr. S.D.N.Y. 1986) ("Where the debtor articulates a reasonable basis for its business decisions (as distinct

from a decision made arbitrarily or capriciously), courts will generally not entertain objections to the debtor's conduct."); In re Diplomat Constr., Inc., 481 B.R. 215, 219 (Bankr. N.D. Ga. 2012) ("The Trustee is responsible for the administration of the estate and his judgment on the sale and the procedure for the sale is entitled to respect and deference from the Court, so long as the burden of giving sound business reasons is met."); In re Bryan, 2013 Bankr. LEXIS 3650, at \*2 (Bankr. M.D. Ala. Sept. 3, 2013) (A trustee's decision in executing a sale or accepting a bid is entitled to respect and great deference from the Court, so long as the burden of giving sound business reasons is met.) (internal quotations omitted). Thus, if a debtor's actions satisfy the business judgment rule, then the transaction in question should be authorized under section 363(b)(1) of the Bankruptcy Code.

46. The proposed Bidding Procedures meet the "sound business purpose" test. The Debtors have determined that the Asset is not necessary for the continuation of their businesses after the Debtors emerge from these chapter 11 cases. Maximizing the value of the Asset now, for the benefit of the Debtors' estates and their creditors, is sound business purpose.

47. Accordingly, the Bidding Procedures should be approved, and the Debtors should be authorized to sell the Asset thereunder, subject to the Court's review and approval of the specific terms of the Sale at the Sale Hearing.

**C. The Proposed Notice of the Sale Hearing is Adequate and Appropriate.**

48. Pursuant to Bankruptcy Rule 2002(a), the Debtors are required to provide their creditors with 21 days notice of the Sale Hearing. Pursuant to Bankruptcy Rule 2002(c), such notice must include the date, time and place of the Auction and the Sale Hearing and the deadline for filing any objections to the relief requested in the Sale Motion (the "Auction and Hearing Notice"). As noted above, the Debtors propose that the deadline for objecting to the Sale, the assumption and assignment of the Assumed and Assigned Contracts (excluding any

objection that the Assigned Contracts may not be assumed and assigned by the Debtor Sellers to the Successful Bidder due to any right of first refusal, consent right or other similar restriction which objection must be filed by the Procedures Objection Deadline) and any other relief requested in this Motion other than the relief granted by this Court in the Bidding Procedures Order be no earlier than March 2, 2017.

49. As soon as practicable after entry of the Bidding Procedures Order], the Debtors will serve the proposed Auction and Hearing Notice by first-class mail, postage prepaid upon Notice Parties.

50. The Auction and Hearing Notice will indicate that copies of this Motion and any future sale documents, if applicable, can be obtained on the website of the Debtors' claims and noticing agent, at <http://www.kccllc.net/peabody> (the "Restructuring Website"). In addition, within ten business days after the entry of the Bidding Procedures Order, or as soon as practicable thereafter, the Debtors will cause the Publication Notice attached hereto as Exhibit D to be (a) published for one day in the national edition of The USA Today, (b) published for one day in the national edition of the Wall Street Journal and (c) posted on the Restructuring Website.

51. The Auction and Hearing Notice will include, among other things, the proposed date, time and place of the Auction and the Sale Hearing; information about the Asset, the sale process and the potential terms of sale; and the deadlines for filing any objections to the relief requested in this Motion that was not previously granted in the Bidding Procedures Order. Therefore, the Auction and Hearing Notice will comply with Bankruptcy Rule 2002(c). The Debtors submit that the methods of notice described herein comply fully with Bankruptcy Rule 2002 and constitute good and adequate notice of the proposed sale of the Asset.

**D. The Proposed Assumption and Assignment Procedures Are Adequate and Appropriate.**

52. Section 365(a) of the Bankruptcy Code provides that a debtor, "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). Section 365(b)(1) of the Bankruptcy Code, in turn, codifies the requirements for assuming an executory contract of a debtor. This subsection provides that:

(b)(1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee –

- (A) cures, or provides adequate assurance that the trustee will promptly cure, such default . . . ;
- (B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and
- (C) provides adequate assurance of future performance under such contract or lease.

11 U.S.C. § 365(b)(1).

53. Section 365(f)(2) of the Bankruptcy Code provides, in pertinent part, that:

The trustee may assign an executory contract or unexpired lease of the debtor only if --

- (A) the trustee assumes such contract or lease in accordance with the provisions of this section; and
- (B) adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease.

11 U.S.C. § 365(f)(2). The meaning of "adequate assurance of future performance" depends on the facts and circumstances of each case, but should be given "practical, pragmatic construction."

Richmond Leasing Co. v. Capital Bank, N.A., 762 F.2d 1303, 1309-10 (5th Cir. 1985); accord

In re Tama Beef Packing, Inc., 277 B.R. 407, 411 (Bankr. N.D. Iowa 2002) ("In making the

determination of "adequate assurance", the Court must give a practical pragmatic construction based on the circumstances of each case ... Assurance is adequate if performance is likely; that is, more probable than not.") (internal citations omitted); Ill. Inv. Tr. No. 92-7163 v. Allied Waste Indus. (In re Res. Tech. Corp.), 624 F.3d 376, 383 (7th Cir. 2010) ("As used in § 365(f)(2)(B), "adequate" is a term of art and simply means assurances that are commercially reasonable under the particular circumstances of the case. This is a commonsense, case-specific inquiry, and § 365(f)(2)(B) is given a practical, pragmatic construction ...) (internal quotations omitted).

54. Among other things, "adequate assurance may be provided by demonstrating the assignee's financial health and experience in managing the type of enterprise or property assigned." In re Kabuto Ariz. Props., LLC, No. 09-11282, 2009 Bankr. LEXIS 4961, at \*73 (Bankr. D. Ariz. Dec. 9, 2009) (citing In re Bygaph, Inc., 56 B.R. 596, 605-06 (Bankr. S.D.N.Y. 1986) (finding adequate assurance of future performance present when prospective assignee of lease from debtor has financial resources and has expressed willingness to devote sufficient funding to the business to give it a strong likelihood of succeeding)).

55. To the extent a default exists under any Assumed and Assigned Contract, the default will be promptly cured or adequate assurance that such default will be cured will be provided prior to the assumption and assignment as set forth in this Motion. If necessary, the Debtors will submit facts prior to or at the Sale Hearing to show the financial capability of the purchaser and its willingness and ability to perform under the Assumed and Assigned Contracts. The Sale Hearing will therefore provide the Court and other interested parties the opportunity to evaluate and, if necessary, challenge the ability of the purchaser to provide adequate assurance of future performance under the Assumed and Assigned Contracts, as required by section 365(b)(1)(C) of the Bankruptcy Code.

56. The Debtors submit that it is an exercise of their sound business judgment to assume and assign the Assumed and Assigned Contracts to the purchaser in connection with the Sale, and the assumption, assignment and sale of Assumed and Assigned Contracts is in the best interests of the Debtors, their estates and their creditors. Accordingly, the Court should authorize the Debtor Sellers to assume and assign the Assumed and Assigned Contracts as set forth herein.

**E. The Sale Process Has Been Proposed in Good Faith and Without Collusion and The Successful Bidder Should Be Granted the Protections of Section 363(m) of the Bankruptcy Code**

57. The Debtors have proposed the Bidding Procedures in good faith and intend to negotiate with all bidders in good faith and at arm's length with respect to the Sale. The Debtors also intend to seek a determination that the Stalking Horse Bidder or any other Successful Bidder is entitled to the benefits and protections provided by section 363(m) of the Bankruptcy Code.

58. Section 363(m) of the Bankruptcy Code provides in pertinent part:

[t]he reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease or 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, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

11 U.S.C. § 363(m). Section 363(m) of the Bankruptcy Code thus protects a buyer of assets pursuant to section 363 of the Bankruptcy Code from the risk that it will lose its interest in the purchased assets if the order approving the sale is reversed on appeal, provided that the buyer purchased the assets in "good faith." See generally In re Trism, Inc., 328 F.3d 1003, 1008 (8th Cir. 2003) ("Section 363(m) protects a good faith purchaser and lists no other exceptions or any other qualifications to receive the protection of section 363(m).").

59. Although the Bankruptcy Code does not define "good faith," courts have held that a purchaser shows its good faith through the integrity of its conduct during the course of the sale proceedings, finding that where there is a lack of such integrity, a good faith finding may not be made. See, e.g., Licensing by Paolo v. Sinatra (In re Gucci), 126 F.3d 380, 390 (2d Cir. 1997) ("Good faith of a purchaser is shown by the integrity of his conduct during the course of the sale proceedings; where there is a lack of such integrity, a good faith finding may not be made. A purchaser's good faith is lost by fraud, collusion between the purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders.") (internal citations omitted); In re Abbotts Dairies of Pa., Inc., 788 F.2d 143, 150 (3d Cir. 1986) ("Typically, the misconduct that would destroy a [buyer's] good faith status at a judicial sale involves fraud, collusion between the [proposed buyer] and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders.") (citations omitted); In the Matter of Andy Frain Services, Inc., 798 F.2d 1113, 1125 (7th Cir. 1986) (same).

60. As the Debtors will demonstrate at the Sale Hearing, the Stalking Horse Bidder has negotiated and dealt with the Debtors at arm's length and any Successful Bidder shall have negotiated and dealt with the Debtors at arm's length. No known potential bidder for the Asset is an insider of the Debtors, as that term is defined in section 101(31) of the Bankruptcy Code, and all negotiations have been and will continue to be conducted on an arm's length, good faith basis. Moreover, there is no evidence of fraud or collusion in terms of the proposed sale. With respect to potential bidders, the Bidding Procedures are designed to ensure that no party is able to exert undue influence over the process. Under these circumstances, the Court should find in the Sale Order that Successful Bidder is entitled to all of the protections of section 363(m) of the Bankruptcy Code. The Debtors believe that providing the Successful Bidder with such

protection will ensure that the maximum price will be received by the Debtors for the Asset and closing of the Sale will occur promptly.

**F. Adequate and Reasonable Notice of the Sale Will Be Provided.**

61. As described above, the Auction and Hearing Notice will: (a) be served in a manner that provides at least 21 days' notice of the date, time and location of the Auction and Sale Hearing; (b) inform parties in interest of the deadlines for objecting to the Sale; and (c) otherwise include all information relevant to parties interested in or affected by the Sale. Significantly, the form and manner of the Auction and Hearing Notice will have been approved by this Court pursuant to the Bidding Procedures Order after notice and a hearing before it is served on other parties in interest. Likewise, the Publication Notice will be published in the form and manner approved by the Court.

**G. Approval of the Bid Protections is Warranted.**

62. The Stalking Horse Bidder has been involved in negotiations with the Debtors for over five months. In the course of the Stalking Horse Bidder's due diligence, it has spent a material amount in professional fees and other expenses. As such, in order to incentivize the Stalking Horse Bidder to complete the Stalking Horse APA and to serve as Stalking Horse Bidder, the Debtors have determined, in an exercise of their sound business judgment, to provide the Stalking Horse Bidder with the Bid Protections in the event that the Stalking Horse Bidder is not the Successful Bidder at the auction.

63. Subject to the Court's approval, the Debtors propose to pay the Stalking Horse Bidder the Break-Up Fee and the Expense Reimbursement in accordance with the terms of the Stalking Horse APA.

64. Approval of incentives like the Bid Protections are generally assessed under the standards set forth in Calpine Corporation v. O'Brien Environmental Energy, Inc. (O'Brien

Environmental Energy, Inc.), 181 F.3d 527 (3d Cir. 1999). In O'Brien, the Third Circuit concluded that "the determination [of] 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 inquiry] ... 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. The Third Circuit provided the following nine factors that should be considered in determining whether incentives should be awarded: (1) the presence of self-dealing or manipulation in negotiating the bidding protections; (2) whether the bidding protections harm, rather than encourage, bidding; (3) the reasonableness of the fee relative to the purchase price; (4) whether the unsuccessful bidder placed the estate property in a sale configuration mode to attract other bidders to the auction; (5) the bidding protections' ability to attract or retain a potentially successful bid, establish a bid standard or minimum for other bidders or attract additional bidders; (6) the correlation of the bidding protections to a maximization of value of the debtor's estate; (7) the principal secured creditors and the creditors' committees support of the bidding protections and expense reimbursement; (8) the benefits of the safeguards to the debtors' estate; and (9) the substantial adverse impact of the bidding protections on unsecured creditors, where such creditors are in opposition to the break-up fee. See Id., at 536. Courts in the Eighth Circuit have adopted the O'Brien analysis. See e.g., AgriProcessors, Inc. v. Iowa Quality Beef Supply Network, L.L.C. (In re Tama Beef Packing, Inc.), 290 B.R. 90, 97-98 (B.A.P. 8th Cir. 2003), rev'd on other ground, 321 B.R. 496, 497 (B.A.P. 8th Cir. 2005) ("We agree with the reasoning of the O'Brien court and hold that the determination of whether break-up fees or expenses are allowable under section 503(b)(1)(A) will be made in reference to general administrative expense jurisprudence ... In order to determine whether the fees and expenses ... did, indeed, benefit the estate we will apply the nine factors identified by the O'Brien court ... .").

65. The Debtors submit that approval of the Bid Protections is authorized pursuant to the O'Brien factors. As the Eighth Circuit has noted, "depending on the circumstances and the

terms of the transaction, an unsuccessful stalking horse bidder may seek reimbursement of its actual expenses or it may seek a break-up fee which is designed to compensate the unsuccessful bidder for the risk and costs incurred in advancing the competitive bidding process." 321 B.R. at 497. Based on the Debtors' prepetition discussions with potential purchasers, the Debtors determined that the Bid Protections were necessary to attract and retain the Stalking Horse Bidder. The Stalking Horse Bid provides substantial value to the Debtors by providing a minimum floor for the Asset, which can be utilized to seek higher or better offers at the Auction. In addition, the Debtors conducted the negotiations with the Stalking Horse Bidder in good faith, on an arm's-length basis, as demonstrated by the fact that the Debtors negotiated with multiple parties before selecting the Stalking Horse Bidder as the highest and best offer. Finally, authorization of the Bid Protections will not chill the bidding for the Asset.

66. After considering the reasonableness of bidding incentives, courts have approved a range of break-up fees and expense reimbursements as being appropriate under the facts and circumstances of the case. In re Claim Jumper Restaurants, LLC, Case No. 10-12819 (Bankr. D. Del. Oct. 1, 2010) (\$750,000 expense reimbursement); In re Universal Building Products, Inc., Case No. 10-12453 (Bankr. D. Del. Aug. 27, 2010) (approving \$400,000 break-up fee and expense reimbursement up to \$850,000 on purchase price of \$25,000,000); In re Nortel Networks Inc., Case No. 09-10138 (Bankr. D. Del. Feb. 27, 2009) (approving \$650,000 break-up fee and expense reimbursement of \$400,000 (i.e., 5.9% in the aggregate) on proposed purchase price of \$17,650,000); In re Gallery Corp., Case No. 07-11628 (Bankr. D. Del. Nov. 29, 2007) (approving 3% break-up fee and expense reimbursement up to \$100,000 on a sale with a proposed purchase price of \$7,100,000); In re Radnor Holdings, Case No. 06-10894 (Bankr. D. Del. September 22, 2006) (aggregate fee and expense reimbursement of 3% permitted); In re Montgomery Ward Holding Corp., Case No. 97-1409 (PJW), (Bankr. D. Del.

February 17, 1998) (fee of 4.0% upheld). The Bid Protections proposed by the Debtors are 3% of the value of the Stalking Horse APA. See 321 B.R. at 498 ("The distinction is significant because break-up fees are, as the bankruptcy court correctly concluded, usually limited to one to four percent of the purchase price ...").

### **Approval of the Sale**

#### **H. The Sale is Warranted Under Section 363 of the Bankruptcy Code.**

67. As described above, the Debtors have a sound business justification for selling the Asset. See supra ¶ 46. In addition, the Asset will be subject to an open and competitive bidding process, enhancing the Debtors' ability to receive the highest or otherwise best value for the Asset. Consequently, any Successful Bid, after being subject to a "market check" in the form of public marketing and the Auction, if necessary, will constitute the highest or otherwise best offer for the Asset and will provide a greater recovery for the Debtors' estates than any known or practicably available alternative. See In re Trans World Airlines, Inc., No. 01-00056, 2001 Bankr. LEXIS 980, at \*13 (Bankr. D. Del. Apr. 2, 2001) (noting that while a "section 363(b) sale transaction does not require an auction procedure ... [t]he auction procedure has developed over the years as an effective means for producing an arm's length fair value transaction"); Cohen v. KB Mezzanine Fund II, LP (In re Submicron Sys. Corp.), 432 F.3d 448, 461 (3d Cir. 2006) (holding that sales pursuant to section 363 of the Bankruptcy Code are an efficient and reliable mechanism for valuing assets)

68. Thus, the Debtors submit that any Successful Bid will constitute the highest or otherwise best offer for the Asset and will provide a greater recovery for the Debtors' estates than would be provided by any other available alternative. As such, the Debtors' determination to sell the Asset through the Bidding Procedures and subsequently enter into one or more APAs reflecting the Successful Bid(s) for the Asset (including, as applicable, the Stalking Horse APA)

will be a valid and sound exercise of the Debtors' business judgment. As applicable, the Debtors will submit evidence at the Sale Hearing to support these conclusions. Therefore, the Debtors request that the Court make a finding that the proposed Sale Order is a proper exercise of the Debtors' business judgment and is authorized under the circumstances.

**I. The Sale Has Been Proposed in Good Faith and Without Collusion.**

69. As discussed above, the Sale has been proposed in good faith and without collusion, and the Successful Bidder should be granted the protections of section 363(m) of the Bankruptcy Code. See supra ¶¶ 8- 38. The Debtors will submit evidence as necessary in connection with Court approval of a Sale Transaction to demonstrate that the Successful Bidder is a "good faith purchaser" entitled to the protections of section 363(m) of the Bankruptcy Code.

**J. The Bidding Procedures and Auction Will Deliver a Fair Value Transaction.**

70. It is well-settled that, where there is a court-approved bidding process, a full and fair price is presumed to have been obtained for the assets sold because the best way to determine value is exposure to the market. See Bank of Am. Nat'l Trust & Sav. Ass'n. v. 203 N. LaSalle St. P'ship, 526 U.S. 434, 457 (1999) ("the best way to determine value is exposure to a market.").

71. The Bidding Procedures ensure that the Debtors will receive the highest and best Qualified Bids. Moreover, as noted above, Lazard will continue to market the Asset and solicit offers consistent with the Bidding Procedures, including, for example, by contacting previously solicited parties, continuing to provide interested parties that sign a Confidentiality Agreement with Data Room access and other requested information and otherwise assisting the Debtors with all efforts to increase the value of the Asset. Even if no Auction is held for the Asset because an additional Qualified Bid(s) is not received, the resulting purchase price will, conclusively, be fair value because of the public and open marketing process.

**K. The Debtor Sellers Should Not Be Subject to any Right of First Refusal, Consent Rights or Similar Restrictions Regarding the Asset**

72. As part of the relief requested hereunder, the Debtors seek confirmation in the Bidding Procedures Order that the proposed Sale hereunder will not be subject to any right of first refusal, consent right or other similar restriction in favor of any of the DTA Partners.

73. Pursuant to that certain Second Amended and Restated Consortium Agreement, dated as of July 1, 1987, initially by and among Ashland Terminal, Inc., a Delaware corporation, Debtor Sellers, BHP-Utah Terminal Company, a Delaware corporation, Westmoreland Terminal Company, a Delaware corporation, and Pittston Coal Terminal Corporation, a Virginia corporation (as amended, the "Consortium Agreement"), if any participant in the Asset wishes to sell all or part of its ownership interest in DTA, the other DTA Partners to the Consortium Agreement will have the right to purchase the relevant ownership asset at a cost at least equal to a bona fide offer made to the selling participant. Consortium Agreement, § 7.2. This type of provision is commonly referred to as a right of first refusal.

74. Under section 365(f)(1) of the Bankruptcy Code, a trustee or debtor in possession can assign an executory contract notwithstanding a provision in that contract "that prohibits, restricts, or conditions the assignment of such contract..." 11 U.S.C. § 365(f)(1). As a consequence, when a debtor in possession wishes to assign an executory contract, any such provision is unenforceable. See, e.g., In re Rickel Home Centers, 240 B.R. 826, 831 (D.Del.1998) (Farnan, J., sitting as bankruptcy court), app. dismissed, 209 F.3d 291 (3d Cir.), cert. denied, 531 U.S. 873 (2000). Section 365(f) renders unenforceable not only provisions which prohibit assignment *outright*, but also provisions that are so restrictive that they constitute de facto anti-assignment provisions. In re Adelpia Commc'ns Corp., 359 B.R. 65, 85 (Bankr. S.D.N.Y. 2007).

75. As the court in Adelpia stated:

Among the types of provisions that have been held to be unenforceable under section 365(f) are rights of first refusal, and for good reason. They always "restrict" assignment—one of the three types of scenarios that result in invalidation under section 365(f). And in many (though not all) circumstances, rights of first refusal will do so in a fashion that materially impairs the estate's ability to maximize value for its creditors when it markets its assets, which often consist of (partly or entirely) executory contracts.

359 B.R. at 85–86. The Bidding Procedures, along with the assumption of the DTA Agreements (which include the Consortium Agreement, as defined in the Stalking Horse APA) pursuant to the Assumption and Assignment Procedures, have been designed to maximize the value of the Asset and the return for the Debtors' estates. Enforcement of any right of first refusal would chill the bidding regarding the Asset as it would discourage prospective purchasers and assignees from making the effort to initially put a bid before the bankruptcy court and thwart the fundamental policy of maximizing estate assets for the benefit of all creditors. Id., citing In re Mr. Grocer, Inc., 77 B.R. 349, 353 (Bankr. D. N.H. 1987). Indeed, the failure to answer this question early in the process as requested by the Debtors will have significant negative effects on the potential value to be received for the Asset. It is a requirement of the Stalking Horse APA that this issue be answered through the Bidding Procedures Order. Failure to do so creates a termination right for the Stalking Horse Bidder as the Stalking Horse Bidders do not wish to risk the uncertainty created by a failure to answer this question prior to expending further resources.

76. Additionally, the DTA Partners will not be prejudiced in any way by the relief requested in the Bidding Procedures Order. Each partner has received notice of this potential sale and has had nearly half a year to consider purchasing the Asset as part of the Prior Marketing Process and each will be given notice and a further opportunity to participate in the Sale Process. The DTA Partners have had considerably more time to consider the Sale than the 80 days they would otherwise be afforded under the Consortium Agreement. Enforcement of

the sale restrictions would provide no actual value to the DTA Partners and would only serve to harm the Debtors' creditors and estates.

**L. Adequate and Reasonable Notice of the Sale Will Be Provided.**

77. As discussed above, the Debtors submit that the methods of notice described herein comply fully with Bankruptcy Rule 2002 and constitute good and adequate notice of the proposed sale of the Asset. See supra ¶ 61.

**M. The Sale of the Asset Should Be Free and Clear of all Liens, Claims, Interests and Encumbrances**

78. The Debtors request approval to sell the Asset free and clear of any and all liens, claims, interests and encumbrances in accordance with section 363(f) of the Bankruptcy Code. It is well established that a bankruptcy court has the power, pursuant to section 363(f) of the Bankruptcy Code, to approve the sale of a debtor's assets free and clear of any claims against the debtor. United Mine Workers of Am. Benefit Plan v. Leckie Smokeless Coal Co. (In re Leckie Smokeless Coal Co.), 99 F.3d 573, 585 (4th Cir. 1996) (holding that successor liability claims are "interests in property" within the meaning of §363(f)). Pursuant to section 363(f) of the Bankruptcy Code, a debtor in possession may sell estate property "free and clear of any interest in such property of an entity other than the estate" if:

- viii. applicable nonbankruptcy law permits sale of such property free and clear of such interest;
- ix. such entity consents;
- x. 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;
- xi. such interest is in bona fide dispute; or
- xii. 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).

79. Since section 363(f) of the Bankruptcy Code is written in the disjunctive, any of the five conditions provides authority to sell free and clear of claims, liens and encumbrances. See Gulf States Steel, 285 B.R. 497, 506 (Bankr. N.D. Ala 2002); In re Pacific Energy Resources Ltd., et al., No. 09-10785 (Bankr. D. Del. Aug. 18, 2009); In re Flying J Inc., et al., Case No. 08-1334 (Bankr. D. Del. July 27, 2009); In re Dundee Equity Corp., No. 89-10233, 1992 WL 53743, at \*4 (Bankr. S.D.N.Y. Mar. 6, 1992); In re Collins, 180 B.R. 447, 450 (Bankr. E.D. Va. 1995).

80. A sale free and clear of all liens, claims, interests and encumbrances is necessary to maximize the value of the Asset. A sale subject to liens, claims, interests and encumbrances would result in a lower purchase price and be of substantially less benefit to the Debtors' estates. A sale free and clear of all liens is particularly appropriate under the circumstances because any lien in, to or against the Asset that exists immediately prior to the closing of the Sale will attach to the sale proceeds with the same validity, priority, force and effect as it had at such time, subject to the rights and defenses of the Debtors or any party in interest. The Debtors submit that holders of liens will be adequately protected by the availability of the proceeds of the Sale. Thus, the proposed Sale satisfies sections 363(f) of the Bankruptcy Code. Moreover, any holder of a claim or interest that receives notice of the Sale and fails to object to the sale of the Asset free and clear of all liens, claims, interests and encumbrances should be deemed to consent to the sales, thereby complying with section 363(f)(2) of the Bankruptcy Code.

**N. Approval of the Assumption and Assignment of Executory Contracts and Unexpired Leases.**

81. As discussed above (see supra ¶ 47), the Debtors submit that it is an exercise of their sound business judgment to assume and assign the Assumed and Assigned Contracts to the purchaser in connection with the Sale, and the assumption, assignment and sale of Assumed and Assigned Contracts is in the best interests of the Debtors, their estates and their creditors.

Accordingly, the Court should authorize the Debtor Sellers to assume and assign the Assumed and Assigned Contracts as set forth herein.

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

82. Pursuant to Bankruptcy Rule 6004(h), unless the Court orders otherwise, all orders authorizing the sale of property pursuant to section 363 of the Bankruptcy Code are automatically stayed for fourteen (14) days after entry of the order. Similarly, under Bankruptcy Rule 6006(d), unless the Court orders otherwise, all orders authorizing the assignment of contracts or unexpired leases are automatically stayed for fourteen (14) days after entry of the order. The purpose of Bankruptcy Rules 6004(h) and 6006(d) is to provide sufficient time for an objecting party to request a stay pending appeal before the order can be implemented. See Advisory Committee Notes to Fed. R. Bankr. P. 6004(h); Advisory Committee Notes to Fed. R. Bankr. P. 6006(d).

83. 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 14-day stay periods, commentators agree that the 14-day stay period should be eliminated to allow a sale or other transaction to close immediately where there has been no objection to the procedure. See generally 10 Collier on Bankruptcy ¶ 6004 (16th ed. rev. 2015). Furthermore, if an objection is filed and overruled, and the objecting party informs the court of its intent to appeal, the stay may be reduced to the amount of time necessary to file such appeal. Id.

84. Because of the potentially diminishing value of the Asset, the Debtor Sellers must close this sale promptly after all closing conditions have been met or waived. Thus, waiver of any applicable stays is appropriate in this circumstance.

**Notice**

85. In accordance with this Court's Order Establishing Certain Notice, Case Management and Administrative Procedures [Docket No. 114] (the "Case Management Order"), notice of the request in this Motion for the entry of the Bidding Procedures Order has been given to (a) all parties on the Master Service List (as defined in the Case Management Procedures), (b) the DTA Partners and (c) any party that has requested notice pursuant to Bankruptcy Rule 2002. Notice of the remaining relief, including the entry of the Sale Order, will be given as described herein. In light of the nature of the relief requested, the Debtors submit that no other or further notice is necessary.

**No Prior Request**

86. No prior request for the relief sought herein has been made to this Court or any other Court in connection with these chapter 11 cases.

WHEREFORE, the Debtors respectfully request that the Court (I) enter (a) an order (i) approving the Bidding Procedures in connection with the Sale; (ii) establishing the Assignment Procedures; (iii) approving the Cure Notice, the Sale Notice, the Assumption and Assignment Notice and the Auction Notice; (iv) scheduling the Stalking Horse Hearing (if necessary), the Auction (if necessary) and the Sale Hearing; and (v) granting related relief; and (B) an order (i) authorizing the sale of the Asset free and clear of all liens, claims, interests and encumbrances; (ii) authorizing the assumption and assignment of certain executory contracts and unexpired leases in connection with the Sale; and (iii) granting related relief; and (II) grant such other and further relief to the Debtors as the Court may deem proper.

Dated: January 12, 2017  
St. Louis, Missouri

Respectfully submitted,

/s/ Steven N. Cousins

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Steven N. Cousins, MO 30788  
Susan K. Ehlers, MO 49855  
Armstrong Teasdale LLP  
7700 Forsyth Boulevard, Suite 1800  
St. Louis, MO 63105  
Telephone: (314) 621-5070  
Facsimile: (314) 612-2239  
Email: scousins@armstrongteasdale.com  
Email: sehlers@armstrongteasdale.com

Heather Lennox (admitted *pro hac vice*)  
Jones Day  
North Point  
901 Lakeside Avenue  
Cleveland, OH 44114  
Telephone: (216) 586-3939  
Facsimile: (216) 579-0212

Amy Edgy (admitted *pro hac vice*)  
Daniel T. Moss (admitted *pro hac vice*)  
Jones Day  
51 Louisiana Avenue, N.W.  
Washington, D.C. 20001-2113  
Telephone: (202) 879-3939  
Facsimile: (202) 626-1700

*Attorneys for Debtors and  
Debtors in Possession*

**EXHIBIT A**

**Stalking Horse APA**

## **ASSET PURCHASE AGREEMENT**

This ASSET PURCHASE AGREEMENT (this "Agreement"), dated as of January 12 2017, by and among the parties identified on the signature page as the "Sellers" and Newport News Terminal Associates, LLC, a Virginia limited liability company ("Purchaser") and Xcoal Energy & Resources, a Pennsylvania limited partnership ("Guarantor").

### **RECITALS:**

A. Sellers are currently in possession of the Purchased Assets as Debtors in Possession ("Debtors") pursuant to title 11 of the United States Code, 11 U.S.C. §§ 101, et seq. ("Bankruptcy Code"), in the chapter 11 cases of Peabody Energy Corporation and its filing subsidiaries, jointly administered as Case No. 16-42529 in the United States Bankruptcy Court for the Eastern District of Missouri (collectively, "Bankruptcy Case").

B. Sellers are participants in Dominion Terminal Associates, a Virginia limited liability partnership ("DTA"), governed by that certain Second Amended and Restated Consortium Agreement, dated as of July 1, 1987, initially by and among Ashland Terminal, Inc., a Delaware corporation, Sellers, BHP-Utah Terminal Company, a Delaware corporation, Westmoreland Terminal Company, a Delaware corporation, and Pittston Coal Terminal Corporation, a Virginia corporation, as amended ("Consortium Agreement").

D. Sellers currently hold an aggregate 37.5% Ownership Interest (as defined in the Consortium Agreement) in DTA (the ownership interest in DTA held by Sellers, the "Purchased Ownership Interest").

D. Subject to the terms and conditions set forth herein, Purchaser has agreed to purchase, and Sellers have agreed to sell, the Purchased Ownership Interest free and clear of all Liens other than the Permitted Exceptions in accordance with sections 363 and 365 of the Bankruptcy Code.

E. The parties hereto desire to make certain representations, warranties, covenants and agreements in connection with the transactions contemplated hereby.

NOW, THEREFORE, the parties hereby agree as follows:

### **I. DEFINITIONS**

1.1 Certain Definitions. For purposes of this Agreement, the following terms, when used herein with initial capital letters, have the meanings specified in this Section 1.1:

"Affiliate" means, with respect to any Person, any other Person that, directly or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, such Person, and the term "control" (including the terms

“controlled by” and “under common control with”) means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of such Person, whether through ownership of voting securities, by contract or otherwise, and includes an affiliate under section 101(2) of the Bankruptcy Code.

“Alternative Transaction” means the direct or indirect sale, transfer or other disposition, in one or more transactions, of all or any material part of the Purchased Assets to any Person (or group of Persons) other than the Purchaser or effecting any other transaction, the consummation of which would be substantially inconsistent with the transaction set forth herein.

“Applicable Invoice” means any invoice or statement bearing a date on or after the Closing Date or otherwise relating to a Straddle Period, in each case issued by DTA or any manager or employee of DTA in respect of the Purchased Ownership Interest for any Allocable Amounts.

“Assigned Contracts” means the DTA Agreements and each other Contract of Sellers listed on Schedule 1.1.

“Bidding Procedures and Sale Motion” means one or more motions and notices filed by the Sellers, in each case in form and substance reasonably acceptable to the Purchaser, and served on creditors and parties in interest, in accordance with the Bidding Procedures Order, other orders of the Bankruptcy Court, the Federal Rules of Bankruptcy Procedures and local rules of the Bankruptcy Court, which motion(s) seeks, among other things, (i) authority from the Bankruptcy Court for the Sellers to enter into this Agreement and to consummate the transactions contemplated hereby and (ii) entry by the Bankruptcy Court of the Bidding Procedures Order and the Sale Order.

“Bidding Procedures Order” means the order of the Bankruptcy Court substantially in the form of Exhibit A hereto or otherwise reasonably satisfactory to the Purchaser, which, among other things: (i) approves payment of the Break-up Fee and Expense Reimbursement in accordance with Section 4.6(b) and (ii) confirms, in language acceptable to Purchaser in its sole discretion, that no right of first refusal, consent rights or other similar rights may be enforced under the Assigned Contracts as part of this process or otherwise contemplated as part of the transaction set forth herein.

“Break-up Fee” means \$200,000.00.

“Business Day” means any day of the year (i) on which banking institutions in New York City are open to the public for conducting business and are not required or authorized to close and (ii) that is not a Legal Holiday as defined in Rule 9006(A)(6) of the Federal Rules of Bankruptcy Procedure.

“Claim” has the meaning set forth in Section 101(15) of the Bankruptcy Code.

“Code” means the Internal Revenue Code of 1986, as amended.

“Contract” means any contract, indenture, note, bond, lease or other binding agreement, arrangement or commitment, whether written or oral.

“Debts” has the meaning set forth in Section 101(12) of the Bankruptcy Code.

“Documents” means all files, documents, books, records, ledgers, journals, title policies, customer lists, regulatory filings, operating data and plans, and other similar materials exclusively related to the Purchased Assets, in each case whether or not in electronic form.

“DTA Agreements” means the Consortium Agreement, the Operating Agreement, the Throughput Agreement, the Transportation Agreement, the Parent Company Agreement and the Option Agreement.

“DTA Facility” means the terminal facilities and other related property located in Newport News, Virginia operated by DTA.

“Excluded Matter” means the effect of: (i) any change in the United States or foreign economies or financial or capital markets in general or changes in interest rates; (ii) any change that generally affects the businesses or industries in which Sellers and their respective Affiliates generally operate or compete; (iii) any changes or market fluctuations for the price of any commodities or currencies, including the price of thermal or metallurgical coal; (iv) any change in the political environment and any change arising in connection with earthquakes, hostilities, acts of war, sabotage or terrorism or military actions or any escalation or material worsening of any such hostilities, acts of war, sabotage or terrorism or military actions existing or underway as of the date hereof; (v) any change in applicable Laws or accounting rules; (vi) any actions taken or proposed to be taken by Purchaser or any of its Affiliates, the identity of the Purchaser, the process leading to the execution or announcement of this Agreement or the execution, announcement, pendency or completion of the transactions contemplated by this Agreement; (vii) any action taken or omission to act with the consent or upon the request of the Purchaser, any effect resulting from the public announcement of this Agreement, compliance with terms of this Agreement or the consummation of the transactions contemplated by this Agreement; (viii) any failure of the operations relating to the DTA Facility to meet, with respect to any period or periods, any internal forecasts or projections, estimates of earnings or revenues or business plans; (ix) any effect resulting from the filing of the Bankruptcy Case, including Sellers’ inability to pay certain obligations as a result of the filing of the Bankruptcy Case; and (x) any matter disclosed on any of the schedules or exhibits hereto or in any filings by Sellers and their respective Affiliates with the Bankruptcy Court or the Securities and Exchange Commission prior to the date of this Agreement.

“Expense Reimbursement” has the meaning ascribed to it in Section 4.6(b).

“Final Order” means an order or judgment of the Bankruptcy Court (or any other court of competent jurisdiction) entered by the clerk of the Bankruptcy Court (or such other court) on the docket in the Bankruptcy Case (or the docket of such other court),

which has not been modified, amended, reversed, vacated or stayed and as to which (i) the time to appeal, petition for certiorari, or move for a new trial, reargument or rehearing has expired and as to which no appeal, petition for certiorari or motion for new trial, reargument or rehearing shall then be pending or (ii) if an appeal, writ of certiorari new trial, reargument or rehearing thereof has been sought, such order or judgment of the Bankruptcy Court (or other court of competent jurisdiction) shall have been affirmed by the highest court to which such order was appealed, or certiorari shall have been denied, or a new trial, reargument or rehearing shall have been denied or resulted in no modification of such order, and the time to take any further appeal, petition for certiorari or move for a new trial, reargument or rehearing shall have expired, as a result of which such order shall have become final in accordance with Rule 8002 of the Federal Rules of Bankruptcy Procedure; *provided*, that the possibility that a motion under Rule 60 of the Federal Rules of Civil Procedure, or any analogous rule under the Bankruptcy Rules, may be filed relating to such order, shall not cause an order not to be a Final Order.

“Governmental Body” means any government or governmental, administrative, taxing or regulatory body thereof, or political subdivision thereof, whether foreign, federal, municipal, state or local, or any agency, instrumentality or authority thereof, or any court or arbitrator (public or private).

“Knowledge” means the actual knowledge, with respect to Sellers, of those persons identified on Schedule 1.1(a), and the actual knowledge, with respect to Purchaser, of those officers of Purchaser identified on Schedule 1.1(b).

“Law” means any federal, municipal, state, local or foreign law, legislation, constitution, edict, decree, proclamation, treaty, ruling, directive, pronouncement, statute, code, ordinance, rule or regulation or common law requirement.

“Legal Proceeding” means any judicial, administrative or arbitral actions, suits, proceedings (public or private) or claims or any proceedings by or before a Governmental Body.

“Liability” means any cost, expense, Debt, Claim, liability or obligation (whether direct or indirect, known or unknown, absolute or contingent, accrued or unaccrued, liquidated or unliquidated or due or to become due), regardless of when asserted or by whom, and including all costs and expenses directly relating thereto.

“Lien” means all mortgages, pledges, charges, liens (as defined in Section 101(37) of the Bankruptcy Code), Debts, interests, debentures, trust deeds, Claims, encumbrances, licenses, assignments by way of security or otherwise, security interests, conditional sales contracts or other title retention agreements, instruments charging, or creating a security interest in the Purchased Assets or any part thereof or interest therein, and any agreements, leases, licenses, occupancy agreements, options, easements, rights of way, restrictions, executions or other encumbrances (including notices or other registrations in respect of any of the foregoing) affecting any right or title to the Purchased Assets or any part thereof or interest therein, in each case of any type,

nature or kind whatsoever (whether known or unknown, secured or unsecured or in the nature of setoff or recoupment, choate or inchoate, filed or unfiled, scheduled or unscheduled, noticed or unnoticed, recorded or unrecorded, perfected or unperfected, allowed or disallowed, contingent or non-contingent, liquidated or unliquidated, matured or unmatured, material or nonmaterial, disputed or undisputed, whether arising prior to or subsequent to the commencement of the Bankruptcy Case, and whether imposed by agreement, understanding, Law, equity, or otherwise, including claims otherwise arising under doctrines of successor liability).

“New Through-Put Agreement” means the agreement in the form attached hereto in Exhibit C.

“Operating Agreement” means that certain Amended and Restated Operating Agreement, dated as of January 1, 1988, initially by and among, DTA, Ashland Terminal, Inc., BHP-Utah Terminal Company, Cavalier Coal Terminal Company, Sellers, Westmoreland Terminal Company and Pittston Coal Terminal Corporation, as amended.

“Option Agreement” means that certain Option and Right of First Refusal Agreement, dated as of June 29, 1982, initially by and among, The Chesapeake and Ohio Railway Company, Armco Terminal Company, Ashland Terminal, Inc., Sierra Coal Company, Westmoreland Terminal Company and Pittston Coal Terminal Corporation, partners trading as Dominion Terminal Associates, as amended.

“Order” means any order, writ, judgment, injunction, decree, rule, ruling, directive, determination or award made, issued or entered by or with any Governmental Body, whether preliminary, interlocutory or final, including any Order entered by the Bankruptcy Court in the Bankruptcy Case (including the Sale Order).

“Parent Company Agreement” means that certain Tenth Amended and Restated Parent Company Agreement, dated as of April 30, 2008, by and among Alpha Natural Resources, LLC, Arch Coal, Inc., Peabody Holding Company, LLC and Dominion Energy, Inc.

“Permits” means, a permits, licenses, consents, authorizations, permit applications and other approvals issued by a Governmental Body.

“Permitted Exceptions” means: (i) statutory Liens for taxes, fees and assessments not yet due or payable; (ii) any other imperfections in title, charges, restrictions and encumbrances that do not materially affect the value or use of the affected asset; (iii) Liens for Liabilities that constitute Assumed Liabilities or otherwise arise under the terms and conditions of any Assigned Contract and (iv) restrictions on transfer or assignment and rights of first refusal contained in any Assigned Contract and any restrictions under applicable securities laws.

“Person” means any individual, corporation, limited liability company, partnership, firm, joint venture, association, joint-stock company, trust, unincorporated organization,

Governmental Body or other entity (including as defined in section 101(15) of the Bankruptcy Code).

“Purchased Assets” means the rights of Sellers in the Purchased Ownership Interest and each of the Assigned Contracts.

“Purchaser Material Adverse Effect” means any event or occurrence (regardless of whether such event or occurrence constitutes a breach of any representation, warranty or covenant of Purchaser hereunder) that has had or would reasonably be expected to have, individually or when considered together with any other events or occurrences, a material adverse effect on the ability of Purchaser to consummate the transactions contemplated by this Agreement or perform its obligations under this Agreement.

“Sale Hearing” means the hearing before the Bankruptcy Court held pursuant to the Bidding Procedures Order to approve the terms of this Agreement and the Sale Order and to authorize the sale of the Purchased Assets as described herein and in the Sale Order.

“Sale Order” means the order of the Bankruptcy Court, in form and substance acceptable to both Purchaser and Sellers in their respective sole discretions, which, among other things, (i) approves pursuant to Sections 105, 363 and 365 of the Bankruptcy Code, (A) the execution, delivery and performance by the Sellers of this Agreement, (B) the sale of the Purchased Assets to Purchaser free and clear of all Liens other than the Permitted Exceptions and all Liabilities of the Sellers of any kind or nature whatsoever, whether at law or in equity, including free and clear of any rights or claims based on theories of transferee or successor liability under any applicable Law, whether arising before or after the commencement of the Bankruptcy Case, save and excepting only those Liabilities expressly assumed by Purchaser in writing under this Agreement and (C) the performance by the Sellers of their respective obligations under this Agreement; (ii) authorizes the Sellers to assume and assign to Purchaser the Assigned Contracts; (iii) finds that the Purchaser has acted in “good faith” within the meaning of and is entitled to the protections of section 363(m) of the Bankruptcy Code; (iv) finds that this Agreement was negotiated, proposed and entered into by the Parties without collusion, in good faith and from arm’s length bargaining positions; (v) provides that this Agreement and the transactions contemplated hereby may, subject to the terms set forth herein, be specifically enforced against and binding upon, and not subject to rejection or avoidance by any Seller or their respective estates or any chapter 7 or chapter 11 trustee of Sellers or other representative of their respective estates; (vi) finds that the Purchaser is not a successor to the Sellers; and (vii) approves as administrative expenses under Section 503(b) and 507 of the Bankruptcy Code any claims by Purchaser against any Seller arising under or in connection with this Agreement or the documents related thereto.

“Seller Material Adverse Effect” means any event or occurrence (regardless of whether such event or occurrence constitutes a breach of any representation, warranty or covenant of Sellers hereunder) that has had or would reasonably be expected to

have, individually or when considered together with any other events or occurrences, a material adverse effect on or a material adverse change in or to (i) the Purchased Assets, other than an effect or change resulting from an Excluded Matter, or (ii) the ability of Sellers to perform their obligations under this Agreement.

“Tax” means (i) any and all taxes, charges, levies or other similar assessments or liabilities in the nature of a tax, including income, gross receipts, ad valorem, premium, value-added, net worth, capital stock, capital gains, documentary, recapture, alternative or add-on minimum, disability, estimated, registration, recording, excise, real property, personal property, extraction, unmined mineral, sales, use, license, lease, service, service use, transfer, withholding, employment, unemployment, insurance, social security, business license, business organization, environmental, workers compensation, payroll, employer health, profits, severance, stamp, occupation, windfall profits, customs, duties, gift, estate, franchise, production, inventory, unclaimed property, escheat and other taxes of any kind whatsoever imposed by a Governmental Body, and any interest, fines, penalties, assessments or additions to tax imposed with respect to such items or any contest or dispute thereof or (ii) liability for the payment of any amounts of the type described in (i) as a result of being party to any agreement or any express or implied legal or contractual obligation to indemnify or otherwise assume or succeed to the liability of any other Person.

“Throughput Agreement” means that certain Amended and Restated Throughput and Handling Agreement, dated as of July 1, 1987, initially by and among, DTA, Ashland Terminal, Inc., BHP-Utah Terminal Company, Cavalier Coal Terminal Company, Sellers, Westmoreland Terminal Company and Pittston Coal Terminal Corporation, as amended.

“Transportation Agreement” means that certain Transportation Agreement effective as of July 1, 2014, by and among, CSX Transportation, Inc., DTA, Ashland Terminal, Inc., Sellers and Alpha Terminal Company, LLC.

## 1.2 Other Definitional and Interpretive Matters.

(a) Unless otherwise expressly provided, for purposes of this Agreement, the following rules of interpretation will apply:

Calculation of Time Period. When calculating the period of time before which, within which or following which any act is to be done or step taken pursuant to this Agreement, the date that is the reference date in calculating such period will be excluded.

Dollars. Any reference in this Agreement to \$ will mean U.S. dollars.

Exhibits/Schedules. All exhibits and schedules annexed hereto or referred to herein are hereby incorporated in and made a part of this Agreement as if set forth in full herein. Any capitalized terms used in any schedule or exhibit annexed hereto or referred to herein but not otherwise defined therein will be defined as set forth in this Agreement.

Gender and Number. Any reference in this Agreement to gender will include all genders, and words imparting the singular number only will include the plural and vice versa.

Headings. The division of this Agreement into Articles, Sections and other subdivisions and the insertion of headings are for convenience of reference only and will not affect or be utilized in construing or interpreting this Agreement. All references in this Agreement to any "Section" are to the corresponding Section of this Agreement unless otherwise specified.

Herein. The words such as "herein," "hereinafter," "hereof" and "hereunder" refer to this Agreement as a whole and not merely to a subdivision in which such words appear unless the context otherwise requires.

Including. The word "including" or any variation thereof means "including, without limitation" and will not be construed to limit any general statement that it follows to the specific or similar items or matters immediately following it. The words "or," "either" and "any" are not exclusive.

(b) The parties hereto have participated jointly in the negotiation and drafting of this Agreement and, in the event an ambiguity or question of intent or interpretation arises, this Agreement will be construed as jointly drafted by the parties hereto and no presumption or burden of proof will arise favoring or disfavoring any party by virtue of the authorship of any provision of this Agreement.

## **II. PURCHASE AND SALE OF ASSETS; ASSUMPTION OF LIABILITIES**

2.1 Purchase and Sale of Assets. On the terms and subject to the conditions set forth in this Agreement, at the Closing, Purchaser will purchase, acquire and accept from Sellers, and Sellers will sell, assign, transfer, convey and deliver to Purchaser, all of Sellers' right, title and interest in, to and under the Purchased Assets, free and clear of all Liens pursuant to the Sale Order, other than Permitted Exceptions. Nothing herein shall constitute an agreement to sell, transfer, assign or convey any asset of Sellers other than the Purchased Assets and Sellers shall retain all right, title and interest in and to all of their respective assets and properties other than the Purchased Assets.

2.2 Assumption of Liabilities. On the terms and subject to the conditions set forth in this Agreement, at the Closing, Purchaser will assume, effective as of the Closing, and will agree to timely perform and discharge in accordance with their respective terms (to the extent not performed or discharged prior to Closing), the following Liabilities (collectively, the "Assumed Liabilities"):

(a) all Liabilities of Sellers under the DTA Agreements, subject to Section 3.4(a) and Section 3.4(b) herein;

(b) all Liabilities of the Sellers that arise after the Closing under the Assigned Contracts that are not DTA Agreements;

(c) all Liabilities of Sellers arising from or related to the ownership of the Purchased Ownership Interest on or after the Closing; and

(d) all Liabilities of Sellers relating to the DTA Facility, including the transportation and handling of coal at or through the DTA Facility and the operation of the DTA Facility arising after the Closing;

provided, that Purchaser shall not assume any liability for Taxes of Sellers with respect to any of the foregoing in clauses (a) through (d) above.

2.3 Excluded Liabilities. Purchaser will not assume and will be deemed not to have assumed, and Sellers will remain liable with respect to, any Liabilities of Sellers other than the Assumed Liabilities, including, without limitation, any Liabilities that Sellers must pay in accordance with Section 2.4 hereof (collectively, the "Excluded Liabilities").

2.4 Cure Amounts. At Closing and pursuant to section 365 of the Bankruptcy Code, Sellers will assume the Assigned Contracts (to the extent not previously assumed) and assign the Assigned Contracts to Purchaser. Sellers shall pay the outstanding cure amounts necessary to cure all defaults under the Assigned Contracts, if any, and pay all losses arising from such defaults to the full extent required by section 365 of the Bankruptcy Code, as and when finally determined by the Bankruptcy Court as set forth in the Bidding Procedures Order. Neither Purchaser nor any of their respective Affiliates will have any Liability for any cure amounts.

2.5 Further Conveyances and Assumptions. From time to time following the Closing, Sellers and Purchaser will, and will cause their respective Affiliates to, execute, acknowledge and deliver all such further conveyances, notices, assumptions, assignments, releases and other instruments, and will take such further actions, as may be reasonably necessary or appropriate to assure fully to Purchaser and its respective successors or assigns, all of the properties, rights, titles, interests, estates, remedies, powers and privileges intended to be conveyed to Purchaser under this Agreement and to assure fully to each Seller and its Affiliates and their successors and assigns, the assumption of the liabilities and obligations intended to be assumed by Purchaser under this Agreement, and to otherwise make effective the transactions contemplated hereby provided, that nothing in this Section 2.5 will require Purchaser or any of its Affiliates to assume any Liabilities other than the Assumed Liabilities.

### III. CONSIDERATION; ADJUSTMENT

3.1 Consideration. The aggregate consideration for the Purchased Assets ("Purchase Price") will be:

- and
- (a) an amount in cash equal to (i) \$10,000,000.00 ("Cash Amount");
  - (b) the assumption of the Assumed Liabilities.

3.2 Purchase Price Deposit. Pursuant to the Bidding Procedures Order, Purchaser has deposited with Sellers the sum of \$1,000,000.00 (the "Deposit Amount"), which will be released or retained by Sellers as follows:

(a) if the Closing occurs, the Deposit Amount and all accrued investment income thereon will be retained by Sellers, and the Deposit Amount (together with accrued investment income thereon) will be applied towards the Cash Amount;

(b) if this Agreement is terminated by Sellers pursuant to Section 4.4(f), the Deposit Amount, together with all accrued investment income thereon, will be retained by Sellers; and

(c) if this Agreement is terminated for any reason other than by Sellers pursuant to Section 4.4(f), the Deposit Amount, together with all accrued investment income thereon, will be returned to Purchaser within three business days, as specified herein and subject to the terms of the Bidding Procedures Order.

3.3 Payment of Purchase Price. On the Closing Date, (a) Purchaser will pay the Cash Amount (less the Deposit Amount) to the Sellers in immediately available funds to an account designated by the Sellers, and (b) Sellers will be entitled to retain the Deposit Amount and all accrued investment income thereon as provided in Section 3.2(a) above.

3.4 Reconciliation of Certain Amounts.

(a) Purchaser, on the one hand, and Sellers, on the other hand, shall apportion the reimbursements, credits, receivables, distributions and expenditures attributable to any period on or prior to Closing under the Assigned Contracts ("Pre-Closing Period"), including the funding obligations contained in Article V of the Operating Agreement, (collectively, "Allocable Amounts") based on a reconciliation between Purchaser and Sellers of: (i) all unpaid expenditures reflected in all Applicable Invoices for any Pre-Closing Period; and (ii) any outstanding credits, receivables, reimbursements or other distributable amounts from DTA in respect of the Purchased Ownership Interest reflected in all Applicable Invoices for any Pre-Closing Period occurring in the ordinary course of business, in each case as of midnight on the day immediately preceding the Closing Date (the "Adjustment Time"). Such apportionment shall be undertaken in accordance with the procedures set forth in sub-paragraph (c).

(b) Purchaser, on the one hand, and Sellers, on the other hand, shall apportion Allocable Amounts attributable to any period that begins prior to the Closing Date and ends after the Closing Date ("Straddle Period") paid or received by Sellers or Purchaser (or their respective Affiliates) based on a reconciliation between Purchaser and Sellers of: (i) all expenditures made by Sellers and Purchaser and their respective Affiliates for Allocable Amounts for any Straddle Period reflected in all Applicable Invoices; and (ii) any credits, receivables, reimbursements or other distributable amounts received by Sellers or Purchaser and their respective Affiliates from DTA in

respect of the Purchased Ownership Interest reflected in all Applicable Invoices for any Straddle Period, in each case as of the Adjustment Time. Such apportionment shall be undertaken in accordance with the procedures set forth in sub-paragraph (c).

(c) Within 30 days after the Closing Date, Purchaser and Sellers shall make available to each other copies of all Applicable Invoices and shall agree in good faith on a proration of the amounts reflected in each Applicable Invoice for Allocable Amounts based on the number of days elapsed in the relevant period reflected in such Applicable Invoice determined as of the Adjustment Time. Purchaser and Sellers shall net the balance for the Pre-Closing Period determined pursuant to Section 3.4(a) above against the balance for the Straddle Period determined pursuant to Section 3.4(b) above against one-another to determine the net amount owed by Sellers to Purchaser or vice versa and the applicable party hereto shall remit the agreed upon balance within 10 Business Days following such determination.

(d) If Purchaser or Sellers receive Applicable Invoices within 180 days after the Closing Date for Allocable Amounts ("Unaccounted Invoices") in an aggregate amount greater than \$50,000 attributable to any period on or prior to Closing (whether related entirely to the Pre-Closing Period or a Straddle Period), then Purchaser and Sellers shall mutually agree on an appropriate payment to reflect such adjustment as if such Allocable Amounts reflected in Unaccounted Invoices had been reflected in the determination made by the parties in accordance with Section 3.4(b) above. No adjustments will be made, or payments will be payable, in respect of invoices received after such 180<sup>th</sup> day.

3.5 Purchase Price Allocation. After the payment of any amounts required to be made pursuant to Section 3.4(c) or Section 3.4(d), Purchaser shall prepare and deliver to Sellers a statement (the "Allocation Statement") allocating the Cash Amount, plus any Assumed Liabilities to the extent properly taken into account under the Code, as adjusted to take into account any payments made under Section 3.4(c) or Section 3.4(d), among the Purchased Assets, and a further allocation among the assets of DTA attributable to the Purchased Ownership Interest, in accordance with Sections 1060, 755, 754 and 743 of the Code, as applicable (and any similar provision of state, local or non-U.S. tax law). Sellers and Purchaser agree to be bound by the Allocation Statement and act in accordance with the Allocation in the preparation, filing and audit of any Tax Return; provided, however, that nothing contained herein shall prevent Purchaser or Sellers from settling any proposed deficiency or adjustment by any taxing authority based upon or arising out of the Allocation Statement, and neither Purchaser nor Sellers shall be required to litigate before any court any proposed deficiency or adjustment by any taxing authority challenging such Allocation Statement.

#### IV. CLOSING AND TERMINATION

4.1 Closing Date. Subject to the satisfaction of the conditions set forth in Sections 8.1, 8.2 and 8.3 hereof (or the waiver thereof by the party entitled to waive that condition), the closing of the purchase and sale of the Purchased Assets and the assumption of the Assumed Liabilities provided for in Article II hereof (the "Closing") will

take place at the offices of Jones Day, North Point, 901 Lakeside Avenue, Cleveland, Ohio 44114-1190 (or at such other place as the parties may designate in writing) at 10:00 a.m. (local time) on the date that is two (2) Business Days following the satisfaction or waiver of the conditions set forth in Article VIII (other than conditions that by their nature are to be satisfied at the Closing, but subject to the satisfaction or waiver of such conditions), unless another time or date, or both, are agreed to in writing by the parties hereto. The date on which the Closing occurs is referred to in this Agreement as the "Closing Date".

4.2 Deliveries by Sellers. At the Closing, Sellers will deliver to Purchaser:

- (a) one or more duly executed assignment and assumption agreements in substantially the form attached hereto as Exhibit B;
- (b) the officer's certificate required to be delivered pursuant to Sections 8.1(a) and 8.1(b);
- (c) a copy of the Sale Order as entered by the Bankruptcy Court;
- (d) all other deeds, endorsements, assignments, company seals, instruments of transfer and other instruments of conveyance reasonably requested by Purchaser or required to convey and assign the Purchased Assets to Purchaser and vest title therein in Purchaser free and clear of all Liens (other than Permitted Exceptions)
- (e) affidavits executed by each Seller, in form and substance reasonably satisfactory to Purchaser, that such Seller is not a foreign person within the meaning of section 1445(f)(3) of the Code.

4.3 Deliveries by Purchaser. At the Closing, Purchaser will deliver to Sellers:

- (a) the consideration specified in Section 3.3;
- (b) one or more duly executed assignment and assumption agreements in substantially the form attached hereto as Exhibit B;
- (c) the officer's certificate required to be delivered pursuant to Sections 8.2(a) and 8.2(b).

4.4 Termination of Agreement. This Agreement may be terminated prior to the Closing as follows:

- (a) by Purchaser or Sellers, if the Closing has not occurred by the close of business on April 15, 2017 (the "Termination Date"); provided, however, that, if the Closing has not occurred on or before the Termination Date due to a breach of any representations, warranties, covenants or agreements contained in this Agreement by Purchaser or a Seller, then the breaching party may not terminate this Agreement pursuant to this Section 4.4(a);

(b) by mutual written consent of Sellers and Purchaser;

(c) by Purchaser, if any condition to the obligations of Purchaser set forth in Sections 8.1 and 8.3 has become incapable of fulfillment other than as a result of a breach by Purchaser of any covenant or agreement contained in this Agreement, and such condition is not waived by Purchaser;

(d) by Sellers, if any condition to the obligations of Sellers set forth in Sections 8.2 and 8.3 has become incapable of fulfillment other than as a result of a breach by Sellers of any covenant or agreement contained in this Agreement, and such condition is not waived by Sellers;

(e) by Purchaser, if Sellers breach any representation or warranty or any covenant or agreement contained in this Agreement, such breach would result in a failure of a condition set forth in Sections 8.1 or 8.3 and such breach has not been cured by the earlier of (i) 20 Business Days after the giving of written notice by Purchaser to Sellers of such breach and (ii) the Termination Date;

(f) by Sellers, if Purchaser breaches any representation or warranty or any covenant or agreement contained in this Agreement, such breach would result in a failure of a condition set forth in Sections 8.2 or 8.3 and such breach has not been cured by the earlier of (i) 20 Business Days after the giving of written notice by Sellers to Purchaser of such breach and (ii) the Termination Date;

(g) by Sellers or Purchaser, if there is in effect a final non-appealable Order enjoining or otherwise prohibiting the consummation of the transactions contemplated hereby or declaring this Agreement unenforceable; it being agreed that the parties hereto may promptly appeal any adverse determination which is capable of appeal and pursue such appeal with reasonable diligence;

(h) by Purchaser or Sellers if (i) the Bankruptcy Court enters an order approving an Alternative Transaction and Purchaser is not designated the Back-Up Bidder under the Bidding Procedures Order or (ii) upon consummation of an Alternate Transaction if Purchaser is designated as the Back-Up Bidder under the Bidding Procedures Order.

(i) by Purchaser if Sellers (A) withdraw the Bidding Procedures and Sale Motion, or publicly announces their intention to withdraw the Bidding Procedures and Sale Motion, (B) move to voluntarily dismiss the Bankruptcy Case, (C) move for conversion of the Bankruptcy Case to Chapter 7 of the Bankruptcy Code or (D) move for appointment of an examiner with expanded powers pursuant to Section 1104 of the Bankruptcy Code or a trustee in the Bankruptcy Case;

(j) by Purchaser if (A) a trustee or examiner with expanded powers is appointed in the Bankruptcy Case or (B) the Bankruptcy Case is dismissed or converted to a case under Chapter 7 of the Bankruptcy Code;

(k) by Purchaser if any order of the Bankruptcy Court is entered denying approval of the Bidding Procedures Order or the Sale Order;

(l) by Purchaser if the Bankruptcy Court shall not have entered the Bidding Procedures Order, in form and substance reasonably acceptable to Purchaser, on or prior to the date that is January 31, 2017, or such order shall have been stayed, vacated, reversed, modified or amended at any time in any respect without the prior written consent of Purchaser given in its sole discretion;

(m) by Purchaser if the Bankruptcy Court shall not have entered the Sale Order, in form and substance acceptable to Purchaser in its sole discretion, on or prior to the date that is March 15, 2017, or such order shall have been stayed, vacated, reversed, modified or amended at any time in any respect without the prior written consent of Purchaser given in its sole discretion; or

(n) by Purchaser if Sellers shall have entered into any new throughput agreements relating to the Purchased Assets without the prior written consent of Purchaser; provided, however, Sellers shall be permitted to enter into new throughput agreements without prior written consent of Purchaser where the obligations of Sellers are materially completed as of the Closing Date..

4.5 Procedure Upon Termination. The terminating party will provide prompt written notice to the other party of the exercise of any right to terminate this Agreement in accordance with Section 4.4, and this Agreement will terminate, and the purchase of the Purchased Assets hereunder will be abandoned, without further action by Purchaser or Sellers. If this Agreement is terminated as provided herein, each party will redeliver all documents, work papers and other material of any other party relating to the transactions contemplated hereby, whether so obtained before or after the execution hereof, to the party furnishing the same, and the Deposit Amount will be retained or returned according to Section 3.2.

4.6 Effect of Termination.

(a) In the event that this Agreement is validly terminated as provided herein, then each of the parties will be relieved of its duties and obligations arising under this Agreement after the date of such termination and such termination will be without liability to Purchaser or Sellers; provided, however, that the provisions of Sections 3.2, 4.5 and this Section 4.6 and Article IX (other than Section 9.4) hereof and, to the extent necessary to effectuate the foregoing enumerated provisions, Section 1.1 hereof, will survive any such termination and will be enforceable hereunder; provided, further, that (i) upon a termination under Section 4.4(f), Sellers' remedies shall include forfeiture of the Deposit and all rights under applicable law and equity, and (ii) nothing in this Section 4.6 will be deemed to release any party from liability for any intentional breach of its obligations under this Agreement prior to such termination.

(b) In the event that (i) this Agreement is validly terminated as provided herein, pursuant to Section 4.4(h) (and Purchaser is not in breach of its obligations

under this Agreement or was not in breach of its obligations under this Agreement at the time of termination) and Sellers consummate an Alternative Transaction, then Sellers shall pay the Break-up Fee to Purchaser in immediately available funds by wire transfer to an account designated by Purchaser within 5 Business Days following the consummation of the Alternative Transaction and (ii) this Agreement is validly terminated for any reason (other than by the Sellers pursuant to Section 4.4(f)), then Sellers shall pay or cause to be paid to Purchaser all reasonable out-of-pocket fees and expenses (including reasonable attorneys' fees and expenses) incurred by the Purchaser in connection with or related to Purchaser's evaluation, consideration, analysis, negotiation, and documentation of this Agreement or the transactions contemplated hereby, in an amount not to exceed \$150,000.00 in the aggregate (the "Expense Reimbursement"). Purchaser acknowledges and agrees that its right to receive the Break-up Fee and the Expense Reimbursement (whether or not payable) shall constitute the sole liability of Sellers and the sole remedy available to Purchaser resulting from the failure to consummate the transactions contemplated hereby in the event this Agreement is validly terminated. For the avoidance of doubt, the parties acknowledge and agree that in no event shall Sellers be required to pay the Break-up Fee or Expense Reimbursement on more than one occasion and, in any circumstance where the Break-up Fee or Expense Reimbursement is payable, Purchaser shall have no right to specific performance or any other remedy available to it at Law or in equity. The Break-Up Fee and Expense Reimbursement shall, pursuant to the Bidding Procedures Order, constitute allowed administrative expenses of the Debtors' estates on a joint and several basis under and pursuant to Sections 503(b) and 507 of the Bankruptcy Code.

(c) Purchaser and Sellers acknowledge that the agreements contained in this Section 4.6 are an integral part of the transactions contemplated hereby, and that, without these agreements, the parties hereto would not enter into this Agreement.

## **V. REPRESENTATIONS AND WARRANTIES OF SELLERS**

Each Seller hereby jointly and severally represents and warrants to Purchaser that:

5.1 Organization and Good Standing. Each Seller is a limited liability company duly organized, validly existing and in good standing under the laws of the State of Delaware and, subject to the limitations imposed on such Seller as a result of having filed a petition for relief under the Bankruptcy Code, has the requisite power and authority to own, lease and operate its properties and to carry on its business as now conducted. Each Seller is duly qualified or licensed to do business in each jurisdiction in which the nature of its business or the ownership or leasing of its properties makes such qualification or licensing necessary, except where the failure to be so qualified would not reasonably be expected to have, individually or in the aggregate, a Seller Material Adverse Effect.

5.2 Authorization of Agreement. Subject to entry of the Sale Order and such other authorization required by the Bankruptcy Court, each Seller has the requisite

company power and authority to execute and deliver this Agreement and each other agreement, document or instrument contemplated hereby or thereby to which it is a party and to perform its respective obligations hereunder and thereunder. The execution and delivery of this Agreement and each other agreement, document or instrument contemplated hereby or thereby to which a Seller is a party and the consummation of the transactions contemplated hereby and thereby have been duly authorized by all requisite limited liability company action on the part of each Seller. This Agreement and each other agreement, document or instrument contemplated hereby or thereby to which a Seller is a party has been duly and validly executed and delivered by such Seller and (assuming the due authorization, execution and delivery by the other parties hereto and the entry of the Sale Order and such other authorization required by the Bankruptcy Court) this Agreement and each other agreement, document or instrument contemplated hereby or thereby to which it is a party constitutes legal, valid and binding obligations of such Seller enforceable against such Seller in accordance with its respective terms, and subject, as to enforceability, to applicable bankruptcy, insolvency, reorganization and similar Law affecting the enforcement of creditors' rights generally and general principles of equity (regardless of whether enforcement is sought in a proceeding at law or in equity).

5.3 Title to Purchased Assets. Sellers own the Purchased Assets, and, subject to the entry of the Sale Order and such other authorization required by the Bankruptcy Court, Purchaser will be vested with good title to such Purchased Assets, free and clear of all Liens, other than Permitted Exceptions, to the fullest extent permissible under section 363(f) of the Bankruptcy Code.

5.4 Litigation. As of the date hereof, there are no Legal Proceedings pending or, to the Knowledge of Sellers, threatened in writing against Sellers before any Governmental Body, that would reasonably be expected to have, individually or in the aggregate, a Seller Material Adverse Effect.

5.5 Financial Advisors. No Person engaged by a Seller is entitled to any fee or commission or similar payment from Purchaser in respect of the transactions contemplated by this Agreement that would constitute an Assumed Liability.

5.6 Contracts. To the knowledge of Sellers, Sellers have provided Purchaser with copies of all Contracts relating to the Purchased Assets for purposes of completing Schedule 1.1.

5.7 Conflicts. The execution and delivery by Sellers of this Agreement and each other agreement, document or instrument contemplated hereby or thereby to which Sellers are a party, the consummation of the transactions contemplated hereby and thereby and compliance by Sellers with any of the provisions hereof or thereof do not conflict with, or result in any violation of or default (with or without notice or lapse of time, or both) under, or give rise to a right of termination or cancellation under any provision of: (i) the organizational documents of Sellers; (ii) any Contract or Permit to which Sellers are a party or by which any of the properties or assets of Sellers are bound; (iii) any Order of any Governmental Body applicable to Sellers or any of the

properties or assets of Sellers as of the date hereof; or (iv) any applicable Law, other than, in the case of clauses (ii), (iii) and (iv), such conflicts, violations, defaults, terminations or cancellations that would not reasonably be expected to have, individually or in the aggregate, a Seller Material Adverse Effect

5.8 Compliance with Laws. Each Seller is in compliance with all Laws applicable to the Purchased Assets or Assumed Liabilities, except where such non-compliance would not reasonably be expected to have, individually or in the aggregate, a Seller Material Adverse Effect.

5.9 Partnership Election; 754 Election. DTA is, and has been since December 31, 2010, properly treated as a partnership for U.S. federal income tax purposes. Since the filing of the 2015 U.S. federal income tax return on Internal Revenue Service Form 1065, there has been no termination of the partnership for U.S. federal income tax purposes.

**5.10 NO OTHER REPRESENTATIONS OR WARRANTIES. EXCEPT FOR THE REPRESENTATIONS AND WARRANTIES CONTAINED IN THIS ARTICLE V, NONE OF SELLERS NOR ANY OTHER PERSON MAKES ANY OTHER EXPRESS OR IMPLIED REPRESENTATION OR WARRANTY WITH RESPECT TO SELLERS, THEIR BUSINESSES, THE PURCHASED ASSETS, DTA, THE DTA FACILITY, THE ASSUMED LIABILITIES OR THE TRANSACTIONS CONTEMPLATED BY THIS AGREEMENT, AND EACH SELLER DISCLAIMS ANY OTHER REPRESENTATIONS OR WARRANTIES, WHETHER MADE BY SELLERS, ANY AFFILIATE OF SELLERS OR ANY OF SELLERS' OR THEIR AFFILIATES' RESPECTIVE OFFICERS, DIRECTORS, EMPLOYEES, ATTORNEYS, ADVISORS, CONSULTANTS, AGENTS AND REPRESENTATIVES ("REPRESENTATIVES"). EXCEPT FOR THE REPRESENTATIONS AND WARRANTIES CONTAINED IN ARTICLE V HEREOF (AS MODIFIED OR SUPPLEMENTED BY THE SCHEDULES AND EXHIBITS HERETO), EACH SELLER: (A) EXPRESSLY DISCLAIMS AND NEGATES ANY REPRESENTATION OR WARRANTY, EXPRESSED OR IMPLIED, AT COMMON LAW, BY STATUTE, OR OTHERWISE, REGARDING SELLERS, THEIR BUSINESSES, THE PURCHASED ASSETS, THE COMPLETENESS OF THE INFORMATION PROVIDED, DTA OR THE DTA FACILITY (INCLUDING ANY IMPLIED OR EXPRESSED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, OR OF CONFORMITY TO MODELS OR SAMPLES OF MATERIALS) AND (B) DISCLAIMS ALL LIABILITY AND RESPONSIBILITY FOR ANY REPRESENTATION, WARRANTY, PROJECTION, FORECAST, STATEMENT OR INFORMATION MADE, COMMUNICATED OR FURNISHED (VERBALLY OR IN WRITING) TO PURCHASER OR ITS AFFILIATES OR THEIR RESPECTIVE ADVISORS OR REPRESENTATIVES (INCLUDING ANY OPINION, INFORMATION, PROJECTION OR ADVICE THAT MAY HAVE BEEN OR MAY BE PROVIDED TO PURCHASER BY ANY REPRESENTATIVE). SELLERS MAKE NO REPRESENTATIONS OR WARRANTIES TO PURCHASER REGARDING DTA OR THE DTA FACILITY.**

## VI. REPRESENTATIONS AND WARRANTIES OF PURCHASER AND GUARANTOR

Purchaser hereby represents and warrants to Sellers that:

6.1 Organization and Good Standing. Purchaser and Guarantor each is an entity duly organized, validly existing and in good standing under the laws of the state of its formation and has the requisite company power and authority to own, lease and operate its properties and to carry on its business as now conducted.

6.2 Authorization of Agreement. Purchaser and Guarantor each has the requisite company power and authority to execute and deliver this Agreement and each other agreement, document or instrument contemplated hereby or thereby to which it is a party and to perform its obligations hereunder and thereunder. The execution and delivery of this Agreement and each other agreement, document or instrument contemplated hereby or thereby to which Purchaser is a party and the consummation of the transactions contemplated hereby and thereby have been duly authorized by all requisite company action on the part of Purchaser and/or Guarantor, as applicable. This Agreement and each other agreement, document or instrument contemplated hereby or thereby to which Purchaser is a party has been duly and validly executed and delivered by Purchaser and/or Guarantor, as applicable and (assuming the due authorization, execution and delivery by the other parties hereto) this Agreement and each other agreement, document or instrument contemplated hereby or thereby to which Purchaser is a party constitutes legal, valid and binding obligations of Purchaser and/or Guarantor, as applicable, enforceable against Purchaser or Guarantor in accordance with its respective terms, and subject, as to enforceability, to applicable bankruptcy, insolvency, reorganization and similar Law affecting the enforcement of creditors' rights generally and general principles of equity (regardless of whether enforcement is sought in a proceeding at law or in equity).

6.3 Conflicts.

The execution and delivery by Purchaser and Guarantor of this Agreement and each other agreement, document or instrument contemplated hereby or thereby to which Purchaser is a party, the consummation of the transactions contemplated hereby and thereby and compliance by Purchaser and Guarantor with any of the provisions hereof or thereof do not conflict with, or result in any violation of or default (with or without notice or lapse of time, or both) under, or give rise to a right of termination or cancellation under any provision of: (i) the organizational documents of Purchaser or Guarantor; (ii) any Contract or Permit to which Purchaser or Guarantor is a party or by which any of the properties or assets of Purchaser are bound; (iii) any Order of any Governmental Body applicable to Purchaser or Guarantor or any of the properties or assets of Purchaser or Guarantor as of the date hereof; or (iv) any applicable Law, other than, in the case of clauses (ii), (iii) and (iv), such conflicts, violations, defaults, terminations or cancellations that would not reasonably be expected to have, individually or in the aggregate, a Purchaser Material Adverse Effect.

6.4 Litigation. As of the date of this Agreement, there are no Legal Proceedings pending or, to the Knowledge of Purchaser or Guarantor, threatened in writing against Purchaser or Guarantor, or to which Purchaser or Guarantor is otherwise a party before any Governmental Body, that would reasonably be expected to have, individually or in the aggregate, a Purchaser Material Adverse Effect.

6.5 Financial Advisors. No Person engaged by Purchaser or Guarantor or any of their Affiliates is entitled to any fee or commission or similar payment from Sellers in respect of the transactions contemplated by this Agreement that would be a Liability of Sellers or any of their respective Subsidiaries.

6.6 Financial Capability. Purchaser has, and will have at the Closing, available cash and credit capacity sufficient to pay the Cash Amount, any other amounts payable hereunder and any other expenses incurred by Purchaser in connection with the transactions contemplated by this Agreement. For the avoidance of doubt, Purchaser's obligations to complete the transactions contemplated hereby are not dependent upon or conditioned on receipt of financing.

6.7 Purchase for Investment. Purchaser is purchasing the Purchased Ownership Interest for investment for its own account and not with a view to, or for sale in connection with, any distribution thereof. Purchaser (either alone or together with its advisors) has sufficient knowledge and experience in financial and business matters so as to be capable of evaluating the merits and risks of its investment in the Purchased Ownership Interest and is capable of bearing the economic risks of such investment. Purchaser acknowledges that the Purchased Ownership Interest has not been registered under any federal or state securities Laws.

6.8 **LIMITED REPRESENTATIONS AND WARRANTIES.**  
**NOTWITHSTANDING ANYTHING CONTAINED IN THIS AGREEMENT TO THE CONTRARY, PURCHASER AND GUARANTOR EACH ACKNOWLEDGES AND AGREES THAT SELLERS ARE NOT MAKING ANY REPRESENTATIONS OR WARRANTIES WHATSOEVER, EXPRESS OR IMPLIED, BEYOND THOSE EXPRESSLY GIVEN BY SELLERS IN ARTICLE V HEREOF, AND PURCHASER AND GUARANTOR EACH ACKNOWLEDGES AND AGREES THAT, EXCEPT FOR THE REPRESENTATIONS AND WARRANTIES CONTAINED IN ARTICLE V, PURCHASER WILL PURCHASE, ACQUIRE AND ACCEPT FROM SELLERS, AND SELLERS WILL SELL, ASSIGN, TRANSFER, CONVEY AND DELIVER TO PURCHASER, ALL OF SELLERS' RIGHT, TITLE AND INTEREST IN, TO AND UNDER THE PURCHASED ASSETS, ON AN "AS IS, WHERE IS" BASIS. PURCHASER AND GUARANTOR EACH ACKNOWLEDGES THAT IT HAS CONDUCTED TO ITS SATISFACTION ITS OWN INDEPENDENT INVESTIGATION OF THE PURCHASED ASSETS, DTA AND THE DTA FACILITY, AND, IN MAKING THE DETERMINATION TO PROCEED WITH THE TRANSACTIONS CONTEMPLATED BY THIS AGREEMENT, PURCHASER AND GUARANTOR EACH HAS RELIED ONLY ON THE RESULTS OF ITS OWN INDEPENDENT INVESTIGATION AND THE REPRESENTATIONS CONTAINED IN ARTICLE V.**

## VII. COVENANTS

### 7.1 Bankruptcy Court Filings.

(a) Sellers will use commercially reasonable efforts to pursue the entry of the Bidding Procedures Order and the Sale Order (should Purchaser become the "Successful Bidder" under the procedures established under the Bidding Procedures Order) unless a Seller's sole member concludes in good faith that doing so would be inconsistent with the exercise of its fiduciary duties in the Bankruptcy Case. Purchaser agrees that it will promptly take such actions required by the Bidding Procedures Order and such other actions as are reasonably requested by a Seller or any of their respective Affiliates to assist in obtaining entry of the Bidding Procedures Order and Sale Order, as applicable, including by furnishing affidavits or other documents or information for filing with the Bankruptcy Court for the purposes, among others, of providing necessary assurances of performance by Purchaser under this Agreement and demonstrating that Purchaser is a "good faith" purchaser under section 363(m) of the Bankruptcy Code. If the entry of the Sale Order is appealed prior to Closing, Sellers and Purchaser will use their respective commercially reasonable efforts to defend such appeal(s) unless, in Sellers' case, a Seller's sole member concludes in good faith that doing so would be inconsistent with the exercise of its fiduciary duties in the Bankruptcy Case. Purchaser shall not, without the prior written consent of Sellers, file, join in or otherwise support in any manner whatsoever, any motion or other pleading relating to this Agreement or the transactions contemplated by this Agreement. Sellers will provide Purchaser a reasonable opportunity to review and comment upon all motions, briefs, notices, schedules, proposed orders, amendments, supplements or other pleadings that Sellers propose to file in the Bankruptcy Court relating to the transactions contemplated herein prior to filing with the Bankruptcy Court.

(b) Sellers and Purchaser acknowledge and agree that until the earlier of: (i) the issuance by the Bankruptcy Court of the Sale Order or (ii) the termination of this Agreement in accordance with its terms, Sellers and their respective Affiliates, and their respective Representatives, in each case are permitted to solicit inquiries, proposals, offers or bids from, supply information to, and negotiate with, any Person relating to, the, direct or indirect, sale, transfer, conveyance, assignment or other disposition, in one or more transactions, of all or part of the Purchased Assets or the sale, recapitalization or restructuring of DTA or the DTA Facility, and are permitted to take any other action, including entering into any agreement or letter of intent with respect thereto, to cause, promote or assist in consummating an Alternative Transaction; provided, however, that Sellers and their respective Affiliates may only voluntarily enter into, and seek Bankruptcy Court approval of, any definitive agreement regarding an Alternative Transaction as permitted by the Bidding Procedures Order. Neither Sellers nor any of their respective Affiliates or Representatives shall have any Liability to Purchaser, either under or relating to this Agreement or any applicable Law, by virtue of entering into or seeking Bankruptcy Court approval of any agreement for an Alternative Transaction pursuant to this Section 7.1(b), other than the Liability (if any) of Sellers for the Break-up Fee or Expense Reimbursement in accordance with Section 4.6(b).

7.2 Access to Information. Prior to the Closing Date, Sellers shall use commercially reasonable efforts to permit Purchaser and its officers, employees, advisors, consultants and representatives, reasonable access to such Documents of the Sellers so as to permit Purchaser to undertake such review of the Purchased Assets and the Assumed Liabilities as it reasonably requests and to make extracts and copies of such Documents as it reasonably requests (and at Purchaser's expense). Any such review will be conducted upon reasonable advance notice and under reasonable circumstances and will be subject to restrictions under applicable Law. Notwithstanding anything herein to the contrary, no such investigation or examination will be permitted to the extent that it would require disclosure of information that is competitively sensitive or subject to attorney-client privilege.

7.3 Commercially Reasonable Efforts. Subject to the other provisions of this Agreement, Purchaser and each Seller will use their respective commercially reasonable efforts to: (a) take all actions necessary or appropriate to consummate the transactions contemplated by this Agreement; and (b) cause the fulfillment at the earliest practicable date of all of the conditions to their respective obligations to consummate the transactions contemplated by this Agreement. Purchaser shall use its commercially reasonable efforts to provide evidence of any adequate assurance of future performance required by section 365 of the Bankruptcy Code.

7.4 Preservation of Records. Sellers and Purchaser agree that each of them will preserve and keep the records held by it or its Affiliates relating to the Purchased Assets for a period of six months from the Closing Date (except as provided below) and will make such records and personnel available to the other as may be reasonably required by such party to enable Sellers or Purchaser to comply with their respective obligations under this Agreement and each other agreement, document or instrument contemplated hereby and to permit the Sellers to comply with their obligations as debtors in the Bankruptcy Case. At the expiration of the period of six months from the Closing Date, prior to discarding any records relating to the Purchased Assets, each party shall use reasonable commercial efforts considering their respective document retention policies to offer to transfer such records to the other party.

7.5 Publicity. The initial press release concerning this Agreement and the transactions contemplated hereby will be in substantially the form agreed by the parties hereto. None of the parties hereto will issue any press release concerning this Agreement or the transactions contemplated hereby without obtaining the prior written approval of the other party hereto, which approval will not be unreasonably withheld or delayed, unless, in the reasonable judgment of Purchaser or Sellers, disclosure is otherwise required by the Bankruptcy Court with respect to filings to be made with the Bankruptcy Court in connection with this Agreement or otherwise by applicable Law.

7.6 Disclosure Schedules. There may be included in the disclosure schedules items that are not "material" or otherwise required to be included thereon. Such inclusion, or any references to dollar amounts, will not be deemed to be an acknowledgement or representation that such items are material, to establish any

standard of materiality or to define further the meaning of such terms for purposes of this Agreement. Information provided in one schedule will suffice, without repetition or cross reference, as a disclosure of such information in any other schedule to which its relevance is reasonably apparent on its face. From time to time prior to the Closing, Sellers will have the right to supplement or amend the schedules with respect to any matter hereafter arising or discovered after the delivery of the schedules pursuant to this Agreement.

7.7 Throughput; Remittance. Without the prior written consent of Purchaser, Sellers shall not enter into any new throughput agreements related to the Purchased Assets where such agreements shall have a term that extends past the Closing Date. Sellers shall be permitted to enter into new throughput agreements only where the obligations of Sellers are materially completed as of the Closing Date. Purchasers agree to promptly remit to Sellers any payments related to any account receivable that is generated by Sellers prior to the Closing Date related to a throughput agreement no matter when such payment is received. Sellers agree to promptly remit to Purchaser any payments related to any account receivable that is generated by Purchaser after to the Closing Date related to a throughput agreement.

## VIII. CONDITIONS TO CLOSING

8.1 Conditions Precedent to Obligations of Purchaser. The obligation of Purchaser to consummate the transactions contemplated by this Agreement is subject to the fulfillment or waiver, on or prior to the Closing Date, of each of the following conditions:

(a) the representations and warranties of Sellers contained in this Agreement shall be true and correct in all material respects (disregarding all qualifications and limitations as to materiality or "Seller Material Adverse Effect" contained therein) on and as of the Closing, except to the extent expressly made as of an earlier date, in which case as of such earlier date, except where the failure of such representations and warranties to be true and correct would not reasonably be expected to have, individually or in the aggregate, a Seller Material Adverse Effect, and Purchaser shall have received a certificate signed by an authorized officer of one of the Sellers, dated the Closing Date, to the foregoing effect;

(b) Sellers shall have performed in all material respects all obligations and agreements required in this Agreement to be performed by them prior to the Closing Date, and Purchaser shall have received a certificate signed by an authorized officer of one of the Sellers, dated the Closing Date, to the foregoing effect;

(c) the Bankruptcy Court shall have entered the Bidding Procedures Order in form and substance reasonably acceptable to Purchaser and such Bidding Procedures Order shall be a Final Order (unless such Final Order requirement is waived by Purchaser in its sole discretion);

(d) the Bankruptcy Court shall have entered one or more orders (which may be the Sale Order), in form and substance acceptable to Purchaser in its sole discretion, approving the assumption and assignment of the Assigned Contracts to the Purchaser pursuant to Section 365 of the Bankruptcy Code and such order(s) shall not have been modified, stayed or appealed, and, to the Knowledge of Sellers, there are no modifications, stays or appeals with respect to such order(s) reasonably expected during the appeal period.

(e) the cure amounts shall have been paid by the Sellers in accordance with the terms hereof;

(f) Purchaser shall have delivered an executed copy of the New Through-Put Agreement; and

(g) Sellers shall have delivered, or caused to be delivered, to Purchaser all of the items set forth in Section 4.2.

**8.2 Conditions Precedent to Obligations of Sellers.** The obligations of Sellers to consummate the transactions contemplated by this Agreement are subject to the fulfillment or waiver, prior to or on the Closing Date, of each of the following conditions:

(a) the representations and warranties of Purchaser contained in this Agreement shall be true and correct in all material respects (disregarding all qualifications and limitations as to materiality or "Purchaser Material Adverse Effect" contained therein) on and as of the Closing, except to the extent expressly made as of an earlier date, in which case as of such earlier date, except where the failure of such representations and warranties to be true and correct would not reasonably be expected to have, individually or in the aggregate, a Purchaser Material Adverse Effect, and Sellers shall have received a certificate signed by an authorized officer of one of the Purchaser, dated the Closing Date, to the foregoing effect;

(b) Purchaser shall have performed in all material respects with all obligations and agreements required by this Agreement to be performed by Purchaser on or prior to the Closing Date, and Sellers shall have received a certificate signed by an authorized officer of Purchaser, dated the Closing Date, to the foregoing effect; and

(c) Purchaser shall have delivered, or caused to be delivered, to Sellers all of the items set forth in Section 4.3.

**8.3 Conditions Precedent to Obligations of Purchaser and Sellers.** The respective obligations of Purchaser and Sellers to consummate the transactions contemplated by this Agreement are subject to the fulfillment or waiver, on or prior to the Closing Date, of each of the following conditions:

(a) there shall not be in effect any (i) Order, decree or judgment by the Bankruptcy Court or any other Governmental Body having competent jurisdiction restraining, enjoining or otherwise prohibiting the consummation of the transactions

contemplated hereby, or (ii) Law that makes the consummation of the transactions contemplated hereby illegal or otherwise prohibited; and

(b) the Bankruptcy Court shall have entered the Sale Order in form and substance acceptable to Purchaser in its sole discretion and such Sale Order shall not have been modified, stayed or appealed, and, to the Knowledge of Sellers, there are no modifications, stays or appeals with respect to such Sale Order reasonably expected during the appeal period.

8.4 Frustration of Closing Conditions. No party may rely on the failure of any condition set forth in Sections 8.1, 8.2 or 8.3, as the case may be, if such failure was caused by such party's breach of any covenant of agreement contained in this Agreement.

## IX. MISCELLANEOUS

9.1 Transfer Taxes. Sellers will be responsible for all documentary, stamp, transfer, registration, sales, use, excise and other similar non-income taxes and charges and all filing and recording fees (and any penalties and interest associated with such taxes, charges and fees) arising from or relating to the consummation of the transactions contemplated by this Agreement (collectively, "Transfer Taxes"), regardless of the party on whom liability is imposed under the provisions of the Laws relating to such Transfer Taxes. Sellers and Purchaser will consult and cooperate in timely preparing and making all filings, returns, reports and forms as may be required to comply with the provisions of the Laws relating to such Transfer Taxes and will cooperate and otherwise take commercially reasonable efforts to obtain any available refunds for or exemptions from such Transfer Taxes.

9.2 No Survival of Representations and Warranties. The parties hereto agree that the representations and warranties contained in this Agreement will not survive the Closing hereunder, and none of the parties will have any Liability to each other after the Closing for any breach thereof. The parties hereto agree that the covenants contained in this Agreement to be performed after the Closing will survive the Closing hereunder, and each party hereto will be liable to the other after the Closing for any breach thereof.

9.3 Expenses. Each of Sellers and Purchaser will bear its own respective expenses incurred in connection with the negotiation and execution of this Agreement and each other agreement, document and instrument contemplated by this Agreement and the consummation of the transactions contemplated hereby.

9.4 Injunctive Relief. Damages at law may be an inadequate remedy for the breach of any of the covenants or agreements contained in this Agreement, and, accordingly, any party hereto will be entitled to injunctive relief with respect to any such breach, including specific performance of such covenants or agreements or an order enjoining a party from any threatened, or from the continuation of any actual, breach of the covenants or agreements contained in this Agreement; provided, however, that in

no event shall Purchaser be entitled to enforce or seek to enforce in any manner Sellers' obligations to consummate the transactions contemplated herein if Sellers elect to pursue or consummate an Alternative Transaction or otherwise enjoin or seek to enjoin Sellers or their Representatives from taking any action permitted under Section 4.4 or 7.1(b). Subject to the limitations contained in the preceding sentence, the rights set forth in this Section 9.4 will be in addition to any other rights which a party hereto may have at law or in equity pursuant to this Agreement.

**9.5 SUBMISSION TO JURISDICTION; CONSENT TO SERVICE OF PROCESS.**

(a) **WITHOUT LIMITING ANY PARTY'S RIGHT TO APPEAL ANY ORDER: (I) THE BANKRUPTCY COURT WILL RETAIN EXCLUSIVE JURISDICTION TO ENFORCE THE TERMS OF THIS AGREEMENT AND TO DECIDE ANY CLAIMS OR DISPUTES THAT MAY ARISE OR RESULT FROM, OR BE CONNECTED WITH, THIS AGREEMENT, ANY BREACH OR DEFAULT HEREUNDER OR THE TRANSACTIONS CONTEMPLATED HEREBY; AND (II) ANY AND ALL PROCEEDINGS RELATED TO THE FOREGOING WILL BE FILED AND MAINTAINED ONLY IN THE BANKRUPTCY COURT, AND THE PARTIES HEREBY CONSENT TO AND SUBMIT TO THE JURISDICTION AND VENUE OF THE BANKRUPTCY COURT AND WILL RECEIVE NOTICES AT SUCH LOCATIONS AS INDICATED IN SECTION 9.9 HEREOF; PROVIDED, HOWEVER, THAT IF THE BANKRUPTCY CASE HAS BEEN CLOSED PURSUANT TO SECTION 350 OF THE BANKRUPTCY CODE, AND HAVE NOT BEEN REOPENED, THE PARTIES AGREE TO UNCONDITIONALLY AND IRREVOCABLY SUBMIT TO THE EXCLUSIVE JURISDICTION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI OR THE STATE COURTS FOR THE STATE OF MISSOURI LOCATED IN THE CITY OF ST. LOUIS, MISSOURI OR ST. LOUIS COUNTY, MISSOURI AND ANY APPELLATE COURT FROM ANY THEREOF, FOR THE RESOLUTION OF ANY SUCH CLAIM OR DISPUTE. THE PARTIES HEREBY IRREVOCABLY WAIVE, TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, ANY OBJECTION WHICH THEY MAY NOW OR HEREAFTER HAVE TO THE LAYING OF VENUE OF ANY SUCH DISPUTE BROUGHT IN SUCH COURT OR ANY DEFENSE OF INCONVENIENT FORUM FOR THE MAINTENANCE OF SUCH DISPUTE AND IRREVOCABLY SUBMITS TO THE JURISDICTION OF ANY SUCH COURT IN ANY LEGAL PROCEEDING REGARDING SUCH CLAIM OR DISPUTE. EACH OF THE PARTIES HERETO AGREES THAT A JUDGMENT IN ANY SUCH DISPUTE MAY BE ENFORCED IN OTHER JURISDICTIONS BY SUIT ON THE JUDGMENT OR IN ANY OTHER MANNER PROVIDED BY LAW.**

(b) **EACH OF THE PARTIES HERETO HEREBY CONSENTS TO PROCESS BEING SERVED BY ANY PARTY TO THIS AGREEMENT IN ANY SUIT, ACTION OR PROCEEDING BY DELIVERY OF A COPY THEREOF IN ACCORDANCE WITH THE PROVISIONS OF SECTION 9.9.**

**9.6 WAIVER OF RIGHT TO TRIAL BY JURY. EACH PARTY TO THIS AGREEMENT WAIVES ANY RIGHT TO TRIAL BY JURY IN ANY LEGAL**

**PROCEEDING REGARDING THIS AGREEMENT OR ANY PROVISION HEREOF OR ANY CLAIM OR DISPUTE THAT MAY ARISE FROM THIS AGREEMENT OR THE TRANSACTIONS CONTEMPLATED HEREIN.**

9.7 Entire Agreement; Amendments and Waivers. This Agreement (including the schedules and exhibits hereto) represent the entire understanding and agreement between the parties hereto with respect to the subject matter hereof. This Agreement can be amended, supplemented or changed, and any provision hereof can be waived, only by written instrument making specific reference to this Agreement signed by the party against whom enforcement of any such amendment, supplement, modification or waiver is sought. No action taken pursuant to this Agreement, including any investigation by or on behalf of any party, will be deemed to constitute a waiver by the party taking such action of compliance with any representation, warranty, covenant or agreement contained herein. The waiver by any party hereto of a breach of any provision of this Agreement will not operate or be construed as a further or continuing waiver of such breach or as a waiver of any other or subsequent breach. No failure on the part of any party to exercise, and no delay in exercising, any right, power or remedy hereunder will operate as a waiver thereof, nor will any single or partial exercise of such right, power or remedy by such party preclude any other or further exercise thereof or the exercise of any other right, power or remedy. Except as provided in Section 4.6, all remedies hereunder are cumulative and are not exclusive of any other available remedies.

9.8 Governing Law. This Agreement will be governed by and construed in accordance with the laws of the State of Missouri applicable to contracts made and performed in such State and, where applicable, Federal Law, including the Bankruptcy Code.

9.9 Notices. All notices and other communications under this Agreement will be in writing and will be deemed given: (a) when delivered personally by hand; (b) when sent by facsimile or email (with written confirmation of transmission) if the sender on the same day sends a confirming copy of such notice by a recognized overnight courier (charges prepaid); or (c) one (1) Business Day following the day sent by overnight courier (with written confirmation of receipt), in each case at the following addresses, email addresses and facsimile numbers (or to such other address, email address or facsimile number as a party may have specified by notice given to the other party pursuant to this provision):

If to Sellers, to:

Peabody Terminals, LLC and  
James River Coal Terminal, LLC  
c/o Peabody Investments Corp.  
Attn: Senior Vice President-Corporate  
Development  
701 Market Street  
St. Louis, Missouri 63101

Facsimile: (314) 342-3419  
E-Mail: acapdeboscq@peabodyenergy.com

with a copy to:

Peabody Terminals, LLC and  
James River Coal Terminal, LLC  
c/o Peabody Investments Corp.  
Attn: Chief Legal Officer  
701 Market Street  
St. Louis, Missouri 63101  
Facsimile: (314) 342-3419  
E-Mail: vdorch@peabodyenergy.com

With a copy (which will not constitute notice) to:

Jones Day  
North Point  
901 Lakeside Avenue  
Cleveland, Ohio 44114-1190  
Facsimile: (216) 579-0212  
Attention: Thomas M. Wearsch and Heather  
Lennox  
E-Mail: twearsch@jonesday.com  
E-Mail: hlennox@jonesday.com

If to Purchaser, to:

Newport News Terminal Associates, LLC  
One Energy Place, Suite 9000  
Latrobe, Pennsylvania 15650  
Attention: Ernie L. Thrasher, CEO  
email: ernie.thrasher@xcoal.com

with a copy to:

Blackhawk Mining LLC  
3228 Summit Square Place, Suite 180  
Lexington, KY 40509  
Attn: Elizabeth Nicholas, Christopher N. Moravec  
and Jesse Parrish  
E-Mail: enicholas@blackhawkmining.com  
E-Mail: cnm@blackhawkmining.com  
E-Mail: jparrish@blackhawkmining.com

If to Guarantor, to:

Xcoal Energy and Resources  
One Energy Place, Suite 9000

Latrobe, Pennsylvania 15650  
Attention: Ernie L. Thrasher, CEO  
email: ernie.thrasher@xcoal.com

With copies (which will not constitute notice) to:

McCann Garland Ridall & Burke  
816 Ligonier Street, Suite 600  
Latrobe, Pennsylvania 15650  
Attention: Bradley E. Smith  
email: bsmithmgrb@comcast.net

Latham & Watkins LLP  
885 Third Avenue  
New York, NY 10022  
Facsimile: (212) 751-4864  
Attention: Charlie Carpenter and David  
Hammerman  
E-Mail: charlie.carpenter@lw.com  
E-Mail: david.hammerman@lw.com

9.10 Severability. If any term or other provision of this Agreement is invalid, illegal or incapable of being enforced by any Law or public policy, all other terms or provisions of this Agreement will nevertheless remain in full force and effect so long as the economic or legal substance of the transactions contemplated hereby is not affected in any manner materially adverse to a party hereto. Upon such determination that any term or other provision is invalid, illegal or incapable of being enforced, the parties hereto will negotiate in good faith to modify this Agreement so as to effect the original intent of the parties as closely as possible in an acceptable manner so that the transactions contemplated hereby are consummated as originally contemplated to the greatest extent possible.

9.11 Assignment. This Agreement will be binding upon and inure to the benefit of the parties and their respective successors and permitted assigns. Nothing in this Agreement will create or be deemed to create any third party beneficiary rights in any Person or entity not a party to this Agreement. No assignment of this Agreement or of any rights or obligations hereunder may be made by either Sellers or Purchaser (by operation of law or otherwise) without the prior written consent of the other parties hereto and any attempted assignment without the required consents will be void, provided, however, that: (a) Purchaser may assign some or all of its rights or delegate some or all of its obligations hereunder to one or more wholly-owned subsidiaries formed by it prior to Closing or to a joint venture entity formed and owned by Xcoal Energy and Resources and Blackhawk Mining, LLC, a Kentucky limited liability company (provided, however, Guarantor must own at least 50% of such joint venture) and (b) Sellers may assign some or all of their rights or delegate some or all of their obligations hereunder to successor entities pursuant to a plan of reorganization

confirmed by the Bankruptcy Court. No assignment of any obligations hereunder will relieve the parties hereto of any such obligations. Upon any such permitted assignment, the references in this Agreement to Sellers or Purchaser will also apply to any such assignee unless the context otherwise requires.

9.12 Non-Recourse. No past, present or future director, officer, employee, incorporator, member, partner or equityholder of either Sellers or Purchaser or any of their respective Affiliates will have any Liability for any obligations or liabilities arising under this Agreement or any agreement entered into in connection herewith of or for any claim based on, in respect of, or by reason of, the transactions contemplated hereby and thereby.

9.13 Counterparts. This Agreement may be executed in one or more counterparts, each of which will be deemed to be an original copy of this Agreement and all of which, when taken together, will be deemed to constitute one and the same agreement.

9.14 No Strict Construction. The language used in this Agreement shall be deemed to be the language chosen by the parties hereto to express their mutual intent, and no rule of strict construction shall be applied against any Person.

## X. GUARANTY

10.1 Guaranty. To induce Sellers to enter into this Agreement, Guarantor hereby unconditionally and irrevocably guarantees (the "Guaranty"), as a principal and not as a surety, to Sellers and their successors and assigns the obligations of Purchaser hereunder and under each other agreement, document or instrument contemplated hereby or thereby. This Guaranty shall be a continuing guarantee and shall be a guarantee of payment and performance and not merely collection. Suit may be brought or demand may be made against Purchaser or Guarantor, or against both of them, separately or together, without impairing the rights or remedies of Sellers. Sellers shall not be required to make any demand upon Purchaser, or to pursue or exhaust all of Sellers' rights or remedies against Purchaser, prior to making any demand on or invoking any of Sellers' rights and remedies against Guarantor. Guarantor hereby agrees that neither Sellers' rights or remedies nor Guarantor's obligations under the terms of this Guaranty shall be released, diminished, impaired, reduced or affected by any claim or defense that this Guaranty was made without consideration or is not supported by adequate consideration. Sellers may, at any time and from time to time, without the consent of, or notice to, Guarantor, and without discharging Guarantor from its obligations hereunder: (a) amend, modify, alter or supplement this Agreement, in accordance with its terms; (b) exercise, or refrain from exercising, any rights against Purchaser, Guarantor or any other Person; and (c) take collateral to secure the payment and performance obligations of Purchaser or Guarantor. Guarantor agrees that Sellers shall not be required to provide Guarantor any notice pursuant to this Section 10.1 and that no failure to give any such notice shall discharge or diminish the liability which Guarantor would have had under this Section 10.1 if such notice had been given. This Guaranty is binding not only on Guarantor, but also on Guarantor's successors and

assigns. This Guaranty shall continue to bind Guarantor in the event that this Agreement is assigned by Purchaser or Guarantor.

*[Signature page follows]*

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by their respective officers thereunto duly authorized, as of the date first written above.

PURCHASER:

NEWPORT NEWS TERMINAL  
ASSOCIATES, LLC

By: 

Name: Ernie L. Thrasher  
Title: Chief Executive Officer

GUARANTOR:

XCOAL ENERGY & RESOURCES

By: 

Name: Ernie L. Thrasher  
Title: Chief Executive Officer

SELLERS:

PEABODY TERMINALS, LLC

By: \_\_\_\_\_  
Name: Walter Hawkins, Jr.  
Title: Senior Vice President Finance

JAMES RIVER COAL TERMINAL, LLC

By: \_\_\_\_\_  
Name: Walter Hawkins, Jr.  
Title: Senior Vice President Finance

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by their respective officers thereunto duly authorized, as of the date first written above.

PURCHASER:

NEWPORT NEWS TERMINAL  
ASSOCIATES, LLC

By: \_\_\_\_\_  
Name: Ernie L. Thrasher  
Title: Chief Executive Officer

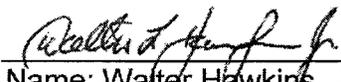
GUARANTOR:

XCOAL ENERGY & RESOURCES

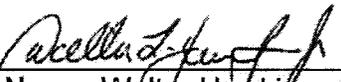
By: \_\_\_\_\_  
Name: Ernie L. Thrasher  
Title: Chief Executive Officer

SELLERS:

PEABODY TERMINALS, LLC

By:  \_\_\_\_\_  
Name: Walter Hawkins, Jr.  
Title: Senior Vice President Finance

JAMES RIVER COAL TERMINAL, LLC

By:  \_\_\_\_\_  
Name: Walter Hawkins, Jr.  
Title: Senior Vice President Finance

**SCHEDULE 1.1**

**ASSIGNED CONTRACTS**

Coal Terminaling Agreement, dated as of March 1, 2016, among Sellers and Blackhawk River Logistics, LLC, as amended

Coal Terminaling Agreement, dated as of December 8, 2016, among Sellers and White Forest Resources, Inc

**SCHEDULE 1.1(a)**

**KNOWLEDGE OF SELLERS**

Bryan Galli  
John S. Yaeger

**SCHEDULE 1.1(b)**  
**KNOWLEDGE OF PURCHASER**

Ernie L. Thrasher

**EXHIBIT A**

**FORM OF BIDDING PROCEDURES ORDER**

**IN UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION**

In re:

Peabody Energy Corporation, et al.,  
Debtors.

Case No. 16-42529-399

CHAPTER 11

Jointly Administered

**ORDER (A) APPROVING BIDDING PROCEDURES FOR THE SALE OF A CERTAIN ASSET, (B) AUTHORIZING THE DEBTORS TO ENTER INTO THE STALKING HORSE PURCHASE AGREEMENT, (C) APPROVING BID PROTECTIONS, (D) SCHEDULING AN AUCTION, (E) APPROVING THE FORM AND MANNER OF NOTICE THEREOF, (F) SCHEDULING A SALE HEARING AND APPROVING THE FORM AND MANNER OF NOTICE THEREOF, AND (G) APPROVING ASSUMPTION AND ASSIGNMENT PROCEDURES**

This matter coming before the Debtors' Motion for Entry of Orders (I)(A) Approving Bidding Procedures for the Sale of a Certain Asset, (B) Authorizing the Debtors to Enter into the Stalking Horse Purchase Agreement, (C) Approving Bid Protections, (D) Scheduling an Auction, (E) Approving the Form and Manner of Notice thereof, (F) Scheduling a Sale Hearing and Approving the Form and Manner of Notice thereof, and (G) Approving Assumption and Assignment Procedures; and (II)(A) Approving the Sale of a Certain Asset Free and Clear of Liens, Claims, Interests and Encumbrances and (B) Approving the Assumption and Assignment of Executory Contracts and Unexpired Leases; and (III) Granting Related Relief [Docket No. [ ]]

(the "Motion"),<sup>1</sup> filed by the above-captioned debtors and debtors in possession (collectively, the "Debtors"); the Court having reviewed the Motion and having heard the statements of counsel regarding the relief requested in the Motion at a hearing before the Court (the "Hearing"); and the Court finding that (i) it has jurisdiction over the matters raised in the Motion pursuant to 28 U.S.C. §§ 157 and 1334; (ii) this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); (iii) the relief requested in the Motion is in the best interests of the Debtors, their estates, and their creditors; (iv) proper and adequate notice of the Motion and the Hearing has been given and no other or further notice is necessary; and (v) upon the record herein after due deliberation thereon, good and sufficient cause exists for the granting of the relief as set forth herein;

IT IS HEREBY FOUND AND DETERMINED THAT:

A. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). The statutory predicates for the relief sought herein are sections 105, 363, and 365 of the Bankruptcy Code and Bankruptcy Rules 2002, 6004, 6006 and 9014. Venue for the Chapter 11 Cases and this Motion in this District is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

B. The Debtors have (i) articulated good and sufficient reasons to this Court to grant the relief requested in the Motion, the Stalking Horse APA, and the Bidding Procedures, and (ii) demonstrated sound business justifications to support such relief.

C. The Bidding Procedures are fair, reasonable, and appropriate, and are designed to maximize the value of the Debtors' estates.

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<sup>1</sup> Capitalized terms not defined herein have the meanings given to them in the Motion.

D. The Debtors and the Stalking Horse Bidder entered into the Stalking Horse APA, which is attached to the Motion as Exhibit A. The provisions of the Stalking Horse APA and the Bidding Procedures are reasonable, contained material inducements to the Stalking Horse Bidder, were reasonably relied upon by the Stalking Horse Bidder in deciding to enter into the Stalking Horse APA, and are designed to achieve the highest or otherwise best price for the Asset.

E. The Debtors have demonstrated a compelling and sound business justification for authorizing and requiring the payment of the Break-Up Fee and the Expense Reimbursement. The Bidding Procedures, including, but not limited to, the Break-Up Fee and the Expense Reimbursement, are fair and reasonable, provide a material benefit to the Debtors' estates and creditors, and were negotiated by the Debtors in good faith and at arm's length.

F. The Debtors' payment to the Stalking Horse Bidder (under the conditions of and as set forth in the Stalking Horse APA and herein) of the Break-Up Fee and the Expense Reimbursement is (i) an actual and necessary cost and expense of preserving the Debtors' estates, within the meaning of section 503(b) of the Bankruptcy Code; (ii) of substantial benefit to the Debtors' estates; (iii) reasonable and appropriate, in light of, among other things, (a) the size and nature of the proposed sale under the Stalking Horse APA, (b) the substantial efforts that have been and will be expended by the Stalking Horse Bidder in performing the substantial due diligence and incurring the expenses necessary and entering into the Stalking Horse APA with the knowledge and risk that arises from participating in the sale and subsequent bidding process, and (c) the benefits that the Stalking Horse Bidder has provided to the Debtors' estates and creditors and all parties in interest herein, notwithstanding that the proposed sale is subject to higher or better offers; and (iv) necessary to ensure that the Stalking Horse Bidder will continue to pursue its proposed acquisition of the Asset. In particular, the Stalking Horse APA and

Bidding Procedures were the culmination of a process undertaken by the Debtors and their professionals to negotiate a transaction with a bidder who was prepared to pay the highest or otherwise best purchase price to date for the Asset in order to maximize the value of the Debtors' estates.

G. The payment of (a) the Break-Up Fee, by wire transfer of immediately available funds and in accordance with Section 4.6 of the Stalking Horse APA, and (b) the Expense Reimbursement, in cash and in accordance with Section 4.6 of the Stalking Horse APA, should be approved because, among other things, (i) no other party to date has entered into an asset purchase agreement for the acquisition of the Asset on terms acceptable to the Debtors, (ii) the execution of the Stalking Horse APA is a necessary prerequisite to determining whether any party other than the Stalking Horse Bidder is willing to enter into a definitive agreement for the acquisition of the Asset on terms acceptable to the Debtors and their creditor constituency, (iii) the protections afforded to the Stalking Horse Bidder by the Break-Up Fee and the Expense Reimbursement were material inducements for, and express conditions of, the Stalking Horse Bidder's willingness to enter into the Stalking Horse APA, and (iv) the Stalking Horse Bidder is unwilling to commit to hold open its offer to acquire the Asset under the terms of the Stalking Horse APA unless it is assured of the payment of the Break-Up Fee and the Expense Reimbursement.

H. The assurance of the payment of the Break-Up Fee and the Expense Reimbursement (i) will promote more competitive bidding by inducing the Stalking Horse Bid, which otherwise would not have been made, without which competitive bidding would be limited, and which may be the highest and best available offer for the Asset, (ii) has induced the Stalking Horse Bidder to research the value of the Asset, conduct extensive due diligence and propose the transactions contemplated by the Stalking Horse APA, including, among other

things, submission of a bid that will serve as a minimum or floor bid on which all other bidders can rely, and (iii) will provide a benefit to the Debtors' estates by increasing the likelihood that the price at which the Asset is sold will reflect their true worth.

I. The Break-Up Fee and the Expense Reimbursement are expenses and requirements necessary to maximize the value of the Debtors' estates, and the entry of this Bidding Procedures Order is in the best interests of the Debtors, their estates, creditors, and all other parties in interest.

J. The Break-Up Fee and Expense Reimbursement were a material inducement for, and a condition of, the Stalking Horse Bidder's entry into the Stalking Horse APA.

K. Paragraph 6 of the Bidding Procedures, which requires that any competing bid must meet or exceed the Minimum Overbid (as defined in the Bidding Procedures) is a reasonable bidding procedure under the circumstances.

L. Notice of the Motion, the Bidding Procedures, the proposed entry of this Bidding Procedures Order, and the hearing to consider the Motion, the Bidding Procedures, and the entry of this Bidding Procedures Order (the "**Bidding Procedures Hearing**") has been provided as set forth in the Motion, and is appropriate and reasonably calculated to provide all interested parties with timely and proper notice under Bankruptcy Rules 2002, 4001, 6004, and 6006, and no other or further notice of, or hearing on, the Motion or this Bidding Procedures Order is required.

M. The Sale Notice, substantially in the form attached as **Exhibit B** to the Motion, is reasonably calculated and sufficient to provide interested parties with timely and proper notice of the proposed Sale, including, without limitation: (i) the date and time of the Bid Deadline and the date, time, and place of the Auction (if one is held); (ii) the Bidding Procedures; (iii) the deadline for filing objections to the Sale and entry of the Sale Order, and the date, time, and place of the Sale Hearing; (iv) a description of the Sale as being free and clear of liens, claims, encumbrances

and other interests (except as set forth in the Stalking Horse APA); and (v) notice of the proposed Assumption and Assignment Procedures, and no other or further notice of such matters is necessary or shall be required.

N. The Motion and the Bidding Procedures Order are reasonably calculated and sufficient to provide the DTA Partners with timely and proper notice of the proposed Sale, including, without limitation, with respect to the enforcement of rights of first refusal, consent requirements or other sale restrictions contained in any DTA Agreement.

O. The Motion, this Bidding Procedures Order, the Assumption and Assignment Procedures set forth herein, and the Assumption and Assignment Notice substantially in the form attached as **Exhibit C** to the Motion, are reasonably calculated to provide Contract Counterparties to any Contracts and/or Leases to be assumed by the Debtors and assigned to the Successful Bidder(s) with proper and sufficient notice of the intended assumption and assignment of their Contracts and/or Leases, the procedures in connection therewith, and any Cure Amounts relating thereto.

P. Entry of this Bidding Procedures Order is in the best interests of the Debtors and their respective estates and creditors, and all other parties in interest.

IT IS THEREFORE ORDERED THAT:

1. The Motion is GRANTED as set forth herein.
2. All objections to the entry of this Order or to the relief provided herein, that have not been withdrawn with prejudice, waived, resolved or settled are hereby denied and overruled on the merits with prejudice.
3. Notwithstanding the terms of any DTA Agreement to the contrary, no right of first refusal, consent requirement or other sale restriction shall be enforceable or otherwise

effectuated with respect to the Debtor Sellers' sale of the Asset. For the avoidance of doubt, all valid and properly perfected liens against the Asset shall attach to the net proceeds of the Sale.

4. The Bidding Procedures, including, but not limited to, the Bid Protections and references therein to the Stalking Horse APA, attached hereto as Annex 1 are hereby approved in all respects and shall govern all bids and bid proceedings relating to the Asset under the terms thereof. The Debtors and their professionals and agents are authorized and empowered to take any and all actions necessary or appropriate to implement the Bidding Procedures.

5. As a result of the benefit to the Debtors and their estates of the Stalking Horse APA and to provide an incentive and to compensate the Stalking Horse Bidder for performing the substantial due diligence and incurring the expenses necessary and entering into the Stalking Horse APA with the knowledge and risk that arises from participating in the sale and subsequent bidding process, the Debtors shall pay the Stalking Horse Bidder, under the conditions and in the amount set forth in the Stalking Horse APA and this Order, the Break-Up Fee in the amount of \$200,000, and to reimburse the Stalking Horse Bidder for expenses associated with the Stalking Horse APA (including the fees and costs of the Stalking Horse Bidder's attorneys and other advisors) in the amount of up to \$150,000. The Break-Up Fee and the Expense Reimbursement shall be paid in accordance with the Stalking Horse APA, the Bidding Procedures and this Order. The Break-Up Fee and the Expense Reimbursement shall constitute allowed super-priority administrative expense claims against the Debtors on a joint and several basis under sections 503 and 507(b) of the Bankruptcy Code, senior to all other administrative expense claims against the Debtors.

6. The Good Faith Deposit of the Successful Bidder (other than the Stalking Horse Bidder) will be used first to satisfy any Break-Up Fee and Expense Reimbursement to which the Stalking Horse Bidder is entitled hereunder by reason of its not being the Successful Bidder.

7. The deadline for submitting a Qualified Bid shall be **March 2, 2017 at 4:00 p.m.** (Central Time) (the "Bid Deadline"). The Bid Deadline may be modified as set forth in the Bidding Procedures.

8. In the event the Debtors receive a Qualified Bid in addition to the Stalking Horse Bid, the Debtor shall conduct an Auction which will start on March 6, 2017 at 10:00 a.m. (Eastern Time) at Jones Day, 901 Lakeside Avenue, Cleveland, Ohio 44114 (or such later date and time as selected by the Debtors with the consent of the Stalking Horse Bidder, not to be unreasonably withheld). The Auction shall be conducted openly and shall be transcribed as described in greater detail in the Bidding Procedures. As described in the Bidding Procedures, the Debtors may designate a Successful Bidder without conducting an Auction and have acknowledged that the Stalking Horse Bid is a Qualified Bid, is acceptable, and shall be submitted to the Court for approval in the event that there are no other Qualified Bids of the Stalking Horse Bid is designated the Successful Bid at the Auction.

9. At the request of the Debtors, each bidder participating at the Auction shall be required to confirm in writing, that: (i) it has not engaged in any collusion with respect to the bidding; and (ii) its Qualified Bid is a good faith *bona fide* offer and it intends to consummate the proposed transaction if selected as the Successful Bidder.

10. A hearing to consider approval of the Sale (the "Sale Hearing") is scheduled to take place on March 9, 2017 at 10:00 a.m. (Central Time), or as soon thereafter as counsel may be heard, before the Honorable Barry S. Schermer in Bankruptcy Courtroom 5 North, in the Thomas F. Eagleton U.S. Courthouse, 111 South Tenth Street, St. Louis, Missouri 63102, or before any other judge who may be sitting in his place and stead. The Sale Hearing may be continued to a later date by the Debtors by sending notice prior to, or making an announcement

at, the Sale Hearing. No further notice of any such continuance will be required to be provided to any party.

11. Within ten business days after entry of this Order, the Debtors shall serve the Auction and Hearing Notice attached to the Motion as Exhibit B by first-class mail, postage prepaid, upon the Notice Parties.

12. In addition, within ten business days of the entry of this Order, or as soon as thereafter as practicable, the Debtors will cause the Publication Notice attached to the Motion as Exhibit D to be (a) published for one (1) day in the national edition of The USA Today, (b) published for one (1) day in the national edition of the Wall Street Journal and (c) posted on the Restructuring Website. The Debtors are authorized to revise the Auction and Hearing Notice as necessary or appropriate to prepare the notice for publication.

13. All objections to the Sale, the assumption and assignment of the Assumed and Assigned Contracts and any other relief requested in this Motion other than the relief granted by this Order, must be: (a) in writing; (b) signed by counsel or attested to by the objecting party; (c) in conformity with the Bankruptcy Rules and the Local Rules of the Court; (d) filed with the Court by 4:00 p.m. (Central Time) on March 2, 2017 (the "General Objection Deadline"); and (e) served on the following parties (collectively, the "Objection Notice Parties") in accordance with the Local Rules of the Court **so as to be received on or before the relevant objection deadline**: (i) counsel for the Debtors, (a) Jones Day, North Point, 901 Lakeside Avenue, Cleveland, OH 44114 (Attn: Heather Lennox, Esq. and Thomas Wearsch, Esq.); (b) Jones Day, 51 Louisiana Avenue, N.W., Washington, D.C. 20001 (Attn: Amy Edgy, Esq. and Daniel T. Moss, Esq.); (ii) counsel for the Stalking Horse Bidder, Latham & Watkins LLP, 885 Third Avenue, New York, NY 10022 (Attn: Charles E. Carpenter, Esq. and David A. Hammerman, Esq.); **provided, however**, that any party may object based on events occurring at the Auction

until 4:00 p.m. (Central Time) on the day prior to the Sale Hearing. These procedures are collectively referred to as the "General Objection Procedures". Each objection shall state the legal and factual basis of such objection and may be orally supplemented at the relevant hearing.

14. Following the designation of a Successful Bid, the Debtors shall file a notice of the Successful Bid, along with copies of the proposed APA and Sale Order, marked to show changes from the form documents previously filed with the Court (a "Notice of Successful Bid"). A Notice of Successful Bid shall be filed by 4:00 P.M. Central time on March 7, 2017.

15. The deadline for objecting to approval of the Sale for any issue raised by the Notice of Successful Bid (i.e., by the revised APA and proposed Sale Order) shall be 4:00 P.M. Central Time on March 8, 2017 (the "Supplemental Objection Deadline").

16. A party that fails to timely file an objection to any potential or proposed sale by the General Objection Deadline or the Supplemental Objection Deadline, as applicable, shall be (a) forever barred from asserting any objection to entry of the Sale Order or consummation of the Sale, including with respect to the transfer of the Asset free and clear of all liens, claims, and encumbrances, and (b) deemed to have consented to entry of the Sale Order and consummation of the Sale, without limitation, for purposes of section 363(f) of the Bankruptcy Code.

17. As soon as is practicable after the entry of this Order, the Debtors will serve the Assumption and Assignment Notice attached to the Motion as Exhibit C by first class mail, facsimile, electronic transmission or overnight mail on (a) each counterparty (a "Contract Counterparty") to each potential Assumed and Assigned Contract and (b) its attorney, if known, at the last known address available to the Debtors. The Assumption and Assignment Notice shall set forth the following information: (i) the contract(s) and/or lease(s) that may be assumed

by the Debtor Sellers and assigned to the Successful Bidder(s); (ii) the name and address of the Contract Counterparty thereto; (iii) the Cure Amount, if any, necessary to cure any existing default in accordance with sections 365(b) and 365(f)(2) of the Bankruptcy Code; and (iv) the deadlines by which any such Contract Counterparty must file an objection to the proposed assumption and assignment of any Assumed and Assigned Contract; **provided, however**, that the presence of any contract or lease on an Assumption and Assignment Notice does not constitute an admission that such contract or lease is an executory contract or unexpired lease.

18. All objections to the assumption and assignment of any lease or contract, including, without limitation, any objection to the Debtors' proposed Cure Amount or the provision of adequate assurance of future performance under any lease or contract pursuant to section 365 of the Bankruptcy Code ("Adequate Assurance"), must: (a) comply with the General Objection Procedures (as defined above); (b) identify the lease or contract to which the objector is a party; (c) describe with particularity any cure the claimant contends is required under section 365 of the Bankruptcy Code (the "Cure Claim") and identify the basis(es) of the alleged Cure Claim under the contract or lease; (d) attach all documents supporting or evidencing the Cure Claim; and (e) if the response contains an objection to Adequate Assurance, state with specificity what the objecting party believes is required to provide Adequate Assurance (collectively with the General Objection Procedures, the "Assigned Contract Objection Procedures").

19. If no objection is timely and properly filed and served in accordance with the Assigned Contract Objection Procedures, (a) the Cure Amount set forth in the Assumption and Assignment Notice shall be controlling, notwithstanding anything to the contrary in any contract or lease or other document, and the non debtor party to the contract or lease shall be forever barred from asserting any other claim arising prior to the assignment against the Debtors

or the purchaser, and (b) the purchaser's promise to perform under the contract or lease shall be deemed Adequate Assurance under the contract or lease. To the extent the Debtors dispute any Cure Claim, such dispute shall be presented to the Court at the Sale Hearing or such earlier or later date and time as the Debtors and the objector may agree or the Court may order, but such dispute shall not affect in any way the effectiveness of any assumption and assignment of a contract or lease.

20. The form of the Auction and Hearing Notice, the Publication Notice and the Assumption and Assignment Notice and the manner of service described herein are appropriate and sufficient for all purposes and hereby approved in all respects. The Debtors shall be permitted to make non substantive revisions to the Auction and Hearing Notice, the Publication Notice and the Assumption and Assignment Notice, consistent with the Bidding Procedures and this Order.

21. No other or further notice of the Motion, this Order, the Bidding Procedures, the Sale, the Auction, the Successful Bidders, the assumption and assignment of the Assumed and Assigned Contracts or the Sale Hearing shall be required.

22. All parties (whether or not Qualified Bidders) that participate in the bidding process (including any Auction) shall be deemed to have knowingly and voluntarily (a) consented to the entry of a final order by this Court in connection with the Motion (including any disputes relating to the Bidding Procedures, the Auction and/or the Sale) to the extent that it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments in connection herewith consistent with Article III of the United States Constitution and (b) waived any right to jury trial in connection with any disputes relating to the any of the foregoing matters.

23. The failure to specifically include or reference any particular provision, section or article of the Bidding Procedures in this Order shall not diminish or impair the effectiveness of such procedures, it being the intent of this Court that the Bidding Procedures be authorized and approved in their entirety.

24. This Order shall be binding on the Debtors, including any chapter 7 or chapter 11 trustee or other fiduciary appointed for the estates of the Debtors. Certain provisions of this Order that relate to bid protections shall inure to the benefit of the Stalking Horse Bidder and its affiliates, successors and assigns. The Stalking Horse Bidder shall have standing to appear and be heard on all issues relating to the sale process, the Bidding Procedures, the Auction, and/or the Sale. The Bidding Procedures may not be modified without the prior written consent of the Stalking Horse Bidder, which consent shall not be unreasonably withheld.

25. This Order shall be immediately effective and enforceable upon its entry, and nothing in Bankruptcy Rule 6004(h), 6006(d), 7062 or 9014 (to the extent applicable) shall cause a stay hereof.

Dated: \_\_\_\_\_, 2017  
St. Louis, Missouri

\_\_\_\_\_  
UNITED STATES BANKRUPTCY JUDGE

Submitted by:

Steven N. Cousins  
Susan K. Ehlers  
Armstrong Teasdale LLP  
7700 Forsyth Boulevard, Suite 1800  
St. Louis, MO 63105

Heather Lennox (admitted *pro hac vice*)  
Jones Day  
North Point  
901 Lakeside Avenue  
Cleveland, OH 44114

Amy Edgy (admitted *pro hac vice*)  
Daniel T. Moss (admitted *pro hac vice*)  
Jones Day  
51 Louisiana Avenue, N.W.  
Washington, D.C. 20001-2113

*Attorneys for Debtors  
and Debtors in Possession*

**Annex 1**

**Bidding Procedures**

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION

In re:

Peabody Energy Corporation, et al.,

Debtors.

Case No. 16-42529-399

CHAPTER 11

Jointly Administered

**BIDDING PROCEDURES**<sup>1</sup>

Peabody Energy Corporation ("PEC") and certain of its direct and indirect subsidiaries (collectively, the "Debtors") are debtors and debtors in possession in jointly administered chapter 11 cases under Case No. 16-42529-399 (the "Chapter 11 Cases") pending in the United States Bankruptcy Court for the Eastern District of Missouri (the "Court").

On [\_\_\_\_], 2016, the Court entered the Order (A) Establishing Bidding and Sale Procedures For a Certain Asset; (B) Authorizing the Debtors to Enter into the Stalking Horse Purchase Agreement, (C) Approving Bid Protections, (D) Scheduling an Auction, (E) Approving the Form and Manner of Notice thereof, (F) Scheduling a Sale Hearing and Approving the Form and Manner of Notice thereof, and (G) Approving Assumption and Assignment Procedures [Docket No. [\_\_]] (the "Bidding Procedures Order"), in which the Court approved the following procedures (the "Bidding Procedures") setting forth the process by which debtors James River Coal Terminal, LLC and Peabody Terminal, LLC (together, the "Debtor Sellers") are authorized to conduct a sale (the "Sale") of the Debtor Sellers' aggregate 37.50% interest (including the assumption of any related contracts, the "Purchased Asset") in Dominion Terminal Associates ("DTA"). A copy of the Bidding Procedures Order may be obtained on the website maintained by the Debtors' claims and noticing agent or by contacting the Debtors' counsel, in writing at Jones Day, North Point, 901 Lakeside Avenue, Cleveland, OH 44114 (Attn: Thomas Wearsch, Esq. or by e-mail at [twearsch@jonesday.com](mailto:twearsch@jonesday.com)).

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<sup>1</sup> Capitalized terms used but not defined herein shall have the meanings ascribed to them in the *Motion of the Debtors for Entry of Orders (I)(A) Approving Bidding Procedures for the Sale of a Certain Asset, (B) Authorizing the Debtors to Enter into the Stalking Horse Purchase Agreement, (C) Approving Bid Protections, (D) Scheduling an Auction, (E) Approving the Form and Manner of Notice thereof, (F) Scheduling a Sale Hearing and Approving the Form and Manner of Notice thereof, and (G) Approving Assumption and Assignment Procedures; and (II)(A) Approving the Sale of a Certain Asset Free and Clear of Liens, Claims, Interests and Encumbrances and (B) Approving the Assumption and Assignment of Executory Contracts and Unexpired Leases; and (III) Granting Related Relief* [Docket No. [\_\_]] (the "Bidding Procedures Motion").

**A. The Purchased Asset**

DTA operates a coal export and ground storage facility at the Port of Hampton Roads on the East Bank of the James River in Newport News, Virginia. DTA exports coal primarily to Asian, European and South American markets. The Purchased Asset will be sold free and clear of all liens, claims, encumbrances and other interests (except as otherwise set forth in the applicable purchase and sale agreement). Bids to purchase the Purchased Asset must consist of cash plus assumption of any specified liabilities.

**B. Important Dates and Contact Information**

These Bidding Procedures provide interested parties with the opportunity to complete diligence, submit competing bids for the Purchased Asset and participate in an auction to be conducted by the Debtor Sellers (the "Auction"). The key dates for the Sale Process are as follows:

Bid Deadline	March 2, 2017
Deadline to File Sale and Cure Objections	March 2, 2017
Deadline to File Adequate Assurance Objections	March 2, 2017
Auction Date	March 6, 2017
Deadline to Publish Results of Auction	March 7, 2017
Sale Hearing	March 9, 2017
Closing	Prior to April 15, 2017

Information, bids and other correspondence that must be provided to the Debtor Sellers under these Bidding Procedures must be delivered to the following parties (collectively, the "Notice Parties"): to (i) the Debtor Sellers, 701 Market Street, St. Louis, Missouri 63101 (Attn: Allen T. Capdeboscq; Matthew D. Schaub); (ii) counsel for the Debtor Sellers, (a) Jones Day, North Point, 901 Lakeside Avenue, Cleveland, OH 44114 (Attn: Heather Lennox, Esq.; Thomas Wearsch, Esq.); (b) Jones Day, 51 Louisiana Avenue, N.W., Washington, D.C. 20001 (Attn: Amy Edgy, Esq.; Daniel T. Moss, Esq.); (iii) investment banker for the Debtor Sellers, Lazard Freres & Co., 300 North LaSalle St., Chicago, IL 60654 (Attn: Juan Correal; Tyler Cowan), (iv) counsel to the Stalking Horse Bidder, Latham & Watkins LLP, 885 Third Avenue, New York, NY 10022 (Attn: Charlie Carpenter, Esq.; David Hammerman, Esq.), (v) counsel to the Official Committee of Unsecured Creditors, Morrison & Foerster LLP, 250 West 55th Street New York, NY 10019-9601 (Attn: Lorenzo Marinuzzi Esq.; Daniel Harris Esq.), and (vi) counsel to Citibank as Administrative Agent under the Debtors First Lien Credit Agreement, Davis Polk & Wardwell LLP, 450 Lexington Avenue, New York, NY 10017 (Attn.: Darren Klien Esq.; Angela Libby Esq.).

**C. Due Diligence**

Subject to the execution and delivery of a confidentiality agreement substantially in the form attached hereto as Exhibit 1 (a "Confidentiality Agreement"), any party willing to submit a proposal, solicitation or offer (each, a "Bid") for the Purchased Asset (such party, a "Potential

Bidder") may be granted access to public and non-public information relating to the Purchased Asset to facilitate its consideration of making its Bid, including access to the Debtor Sellers' on-line data room for this transaction (the "Due Diligence Data Room"). Any confidentiality agreement previously entered into between the Debtor Sellers and a Potential Bidder related to this transaction and in effect on the date of the entry of the Bid Procedures Order shall be deemed a Confidentiality Agreement for the purposes of these Bidding Procedures.

The Debtor Sellers shall provide each Potential Bidder with reasonable due diligence information to enable such Potential Bidder to properly evaluate the Purchased Asset. Potential Bidders interested in conducting due diligence should contact the Debtor Sellers' investment banker, Lazard Frères & Co. LLC ("Lazard"), 300 North LaSalle St., Chicago, IL 60654 (Attn. Juan Correa (312) 407-6603; [juan.correa@lazard.com](mailto:juan.correa@lazard.com) and Tyler Cowan (312) 407-6657; [tyler.cowan@lazard.com](mailto:tyler.cowan@lazard.com)). The Debtor Sellers shall have no obligation to (i) furnish any due diligence information after the Bid Deadline and (ii) furnish due diligence information requested by one Potential Bidder to the other Potential Bidders.

Each Potential Bidder shall comply with all reasonable requests for additional information and due diligence access by the Debtor Sellers or their advisors regarding such Potential Bidder, its contemplated transaction and its financial wherewithal to consummate a transaction. Failure by a Potential Bidder to comply with requests for additional information and due diligence access may be a basis for the Debtor Sellers to determine that such bidder is not a Qualified Bidder (as defined below). The Debtor Sellers reserve the right to permit a Potential Bidder to remedy any such failure to comply.

In connection with the provision of due diligence information to Potential Bidders, the Debtor Sellers shall not furnish any confidential information relating to the Purchased Asset or DTA to any person except a Potential Bidder or such Potential Bidder's duly authorized representatives to the extent covered by the applicable Confidentiality Agreement.

The Debtor Sellers and their advisors shall coordinate all reasonable requests for additional information and due diligence access from Potential Bidders; **provided, however**, that the Debtor Sellers may decline to provide such information to any Potential Bidder who, in the Debtor Sellers' reasonable business judgment, has not established that such Potential Bidder intends in good faith to, or has the capacity to, consummate a transaction. No conditions relating to the completion of due diligence shall be permitted to exist after the Bid Deadline.

**D. "As is, Where is"**

Other than as specifically provided in the Stalking Horse APA or a Qualified APA (as defined below), as applicable, the sale of the Purchased Asset shall be without representation or warranties of any kind, nature or description by the Debtor Sellers, their agents or their estates. The Purchased Asset shall be transferred "as is," "where is" and "with all faults." **THE DEBTOR SELLERS EXPRESSLY DISCLAIM ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE AND MAKE NO WARRANTY, EXPRESS OR IMPLIED, AS TO THE NATURE, QUALITY, VALUE OR CONDITION OF THE PURCHASED ASSET.** Except as otherwise provided in the Stalking Horse APA or applicable Qualified APA, all of the Debtor Sellers' right, title, and interest in and to the Purchased Asset will be transferred free and clear of all liens, claims,

encumbrances and other interests in accordance with section 363(f) of the Bankruptcy Code and free of any restriction on transfer, assignment or conveyance, right of first refusal, right of first offer, matching right or any other similar rights, restrictions or obligations, in each case contained in any applicable agreement, including, without limitation, each Assumed and Assigned Contract (as defined below).

Each Potential Bidder for the Purchased Asset will be deemed to acknowledge and represent that it: (a) has had an opportunity to conduct due diligence regarding the Purchased Asset prior to making its Bid; (b) has relied solely upon its own independent review, investigation and inspection of any document including, without limitation, executory contracts and unexpired leases, in making its Bid; and (c) subject to Article V of the Stalking Horse APA or a Qualified APA, as applicable, did not rely upon or receive any written or oral statements, representations, promises, warranties or guaranties whatsoever, whether express, implied by operation of law or otherwise, with respect to the Purchased Asset, or the completeness of any information provided in connection with the Sale or the Auction.

#### **E. The Stalking Horse Bid**

Pursuant to the terms of the Bidding Procedures Order, the Bankruptcy Court approved the bid (the "Stalking Horse Bid") of Newport News Terminal Associates, LLC (the "Stalking Horse Bidder") pursuant to that certain Asset Purchase Agreement, dated January 12, 2017 (the "Stalking Horse APA"), attached hereto as Exhibit 2, and the bidding protections provided thereunder (including, but not limited to, the payment of a break-up fee and expense reimbursement to the Stalking Horse Bidder). The Stalking Horse Bid is deemed to constitute a Qualified Bid for all purposes hereunder. The Stalking Horse Bid shall be subject to higher and better offers to acquire the Purchased Asset solely as set forth below. To the extent of any conflicts between these Bidding Procedures and the terms of the Stalking Horse APA, the terms of the Stalking Horse APA shall control.

#### **F. Qualified Bids**

Other than with respect to the Stalking Horse Bid, in order to constitute a Qualified Bid (as defined below), a Bid submitted by a bidder (each, a "Bidder") must (i) be submitted in writing prior to March 2, 2017 at 12:00 p.m. (Central Time) (the "Bid Deadline") and (ii) satisfy the following requirements, as determined by the Debtor Sellers in their reasonable business judgment (collectively, the "Bid Requirements"):

- i. Contain a duly authorized and signed definitive purchase and sale agreement (a "Qualified APA") and a redline thereof showing changes to the Stalking Horse APA that: (i) identifies the Purchased Asset, (ii) contains a purchase price equal to or greater than the sum of the purchase price set forth in the Stalking Horse APA plus \$450,000 (such sum, the "Minimum Overbid"), to be paid by each such Bidder in cash in full at the closing of the transaction after application of the Good Faith Deposit (as defined below), (iii) is on terms no less favorable (in the Debtor Sellers' reasonable business judgment) than the terms and conditions contained in the Stalking Horse APA, including, without limitation, after consideration of the Break-up Fee (as defined in the

Stalking Horse APA) and the Expense Reimbursement (as defined in the Stalking Horse APA, and together with the Break-up Fee, the "Stalking Horse Bid Protections") and the scope and extent of any representations and warranties and other terms and conditions for the Sale, and (iv) is not subject to any: (a) financing contingencies of any kind, (b) contingencies relating to due diligence after the Bid Deadline, (c) contingencies relating to the approval of the Bidder's board of directors or other internal approvals or non-governmental third-party consents or approvals or (d) conditions precedent to the Bidder's obligation to purchase the Purchased Asset and complete the Sale other than those agreed to by the Debtor Sellers and/or included in the Stalking Horse APA.

- ii. Be accompanied by the provision of a certified or bank check or wire transfer in the amount of at least 10% of the purchase price proposed in the Qualified APA as a good faith deposit (the "Good Faith Deposit"). The Good Faith Deposit shall be held in escrow and credited to the closing payment if the Bidder is ultimately determined to be the Successful Bidder (as defined below) and any closing payment is due. If the Bidder is not the Successful Bidder or the Backup Successful Bidder (as defined below), the Good Faith Deposit will be returned to the Bidder within three (3) business days following the Auction. In the event that a Bidder is selected as the Backup Successful Bidder, and subject to the terms of the Stalking Horse APA if the Stalking Horse Bidder is the Backup Successful Bidder, the Good Faith Deposit shall be returned to the Backup Successful Bidder within three (3) business days following the closing of a Sale to the Successful Bidder.
- iii. Contain a written statement that the Bidder agrees to be bound by the terms of the Bidding Procedures and the Bidding Procedures Order and include a commitment that the Bidder shall (i) commence and complete all filings with respect to necessary government and other approvals within three (3) days following the entry of the Sale Order and (ii) consummate the purchase of the Purchased Asset prior to April 15, 2017.
- iv. Be accompanied by evidence, satisfactory to the Debtor Sellers, that the Bidder is willing, authorized (including by such Bidder's board of directors or comparable governing body), capable and qualified financially, operationally, legally and otherwise, of unconditionally performing all obligations under the Qualified APA, including, without limitation, (1) all assumed obligations with respect to the Purchased Asset and (2) the ability to provide adequate assurance of future performance under executory contracts and unexpired leases to be assumed pursuant to section 365 of the Bankruptcy Code.
- v. Provide that (i) the Bidder agrees to serve as the Backup Successful Bidder if it is selected as the next highest and best bid for the Purchased Asset after the Successful Bid is determined in accordance with the Bidding Procedures and (ii) the Bidder's Bid shall remain open and

irrevocable until at least thirty (30) days after the entry of an order by the Court approving a definitive agreement providing for the sale of the Purchased Asset.

- vi. Fully disclose the identity of each entity that will be bidding in any Auction scheduled by the Debtor Sellers, including, without limitation, the identity of any control parties.
- vii. Be submitted to the Notice Parties, **so as to be received no later than the Bid Deadline**. The Debtor Sellers may extend the Bid Deadline until the start of any Auction for one or more bidders without further notice.

### **G. Qualified Bidders**

A Bid that satisfies each of the Bid Requirements, as determined in the Debtor Sellers' reasonable business judgment, shall constitute a "Qualified Bid" by a "Qualified Bidder". Notwithstanding anything in these Bidding Procedures to the contrary, the Stalking Horse APA is a Qualified Bid and the Stalking Horse Bidder is a Qualified Bidder for all purposes under these Bidding Procedures. The Debtor Sellers shall notify each Qualified Bidder that such party is a Qualified Bidder within two (2) business days after the Bid Deadline.

If any Bid is determined by the Debtor Sellers not to be a Qualified Bid, the Debtor Sellers shall cause such Bidder to be refunded its Good Faith Deposit and all accumulated interest thereon on or within three (3) business days after the Debtor Sellers deliver written notice that such Bid was not deemed a "Qualified Bid."

Between the date that the Debtor Sellers notify a Potential Bidder that it is a Qualified Bidder and the Auction, the Debtor Sellers may discuss, negotiate or seek clarification of any Qualified Bid from a Qualified Bidder. Subject to the terms and conditions of the Stalking Horse APA or an applicable Qualified APA, a Qualified Bidder may not modify, amend or withdraw its Qualified Bid without the written consent of the Debtor Sellers, except for proposed amendments to increase the consideration contemplated by, or otherwise improve the terms of, the Qualified Bid, during the period that such Qualified Bid remains binding as specified herein; provided, that any Qualified Bid may be improved at the Auction as set forth herein. Any improved Qualified Bid must qualify and otherwise constitute a Qualified Bid.

### **H. Notice Procedures**

#### **a. Notice of Auction and Sale Hearing**

As soon as practicable after entry of the Bidding Procedures Order, the Debtor Sellers will cause the Notice of Auction and Sale Hearing, attached hereto as Exhibit 3, to be served by first-class mail, facsimile, electronic transmission or overnight mail on: (i) all entities known by the Debtor Sellers to have expressed an interest in a transaction with respect to the Purchased Asset during the past eighteen (18) months, including all Qualified Bidders; (ii) all state and local taxing authorities or recording offices that have a reasonably known interest in the relief requested; (iii) all non-debtor parties to relevant contracts or leases (executory or otherwise); (iv) all parties who are known or reasonably believed, after reasonable inquiry, to have asserted any lien, encumbrance, claim or other interest in the Purchased Asset; and (v) all parties set forth in

the Debtor Sellers' Master Service List maintained in these chapter 11 cases (to the extent any party to receive notice thereby has not received notice pursuant to sections (i) through (v) above).

a. Notice of Assumption and Assignment of Contracts

The Debtor Sellers will serve the Assumption and Assignment Notice, attached hereto as Exhibit 4, to be served by first-class mail, facsimile, electronic transmission or overnight mail on (a) each counterparty (a "Contract Counterparty") to each potential Assumed and Assigned Contract and (b) its attorney, if known, at the last known address available to the Debtor Sellers.

The Assumption and Assignment Notice shall set forth the following information: (i) the contract(s) and/or lease(s) that may be assumed by the Debtor Sellers and assigned to the Successful Bidder(s); (ii) the name and address of the Contract Counterparty thereto; (iii) the amount (the "Cure Amount"), if any, necessary to cure any existing default in accordance with sections 365(b) and 365(f)(2) of the Bankruptcy Code; and (iv) the deadlines by which any such Contract Counterparty must file an objection to the proposed assumption and assignment of any Assumed and Assigned Contract; **provided, however**, that the presence of any contract or lease on an Assumption and Assignment Notice does not constitute an admission that such contract or lease is an executory contract or unexpired lease.

As soon as practicable after the conclusion of the Auction, the Debtor Sellers shall file with the Court and serve by facsimile, electronic transmission, overnight or first-contract mail on the Contract Counterparty (and its attorney, if known) to each Assumed and Assigned Contract, a notice: (a) identifying the Successful Bidder(s); (b) stating which contract(s) and/or lease(s) will be assumed and assigned thereto; and (c) containing a statement as to the Successful Bidder(s)' ability to perform the Debtor Sellers' obligations under the applicable Assumed and Assigned Contracts.

**I. No Qualified Bids other than Stalking Horse Bid**

If the Debtor Sellers do not receive any Qualified Bids with respect to the Purchased Asset, other than the Stalking Horse Bid, the Debtor Sellers shall not hold the Auction, promptly file a notice of cancellation with the Court, and promptly proceed to seek the entry of the appropriate orders approving the Stalking Horse APA.

**J. Auction**

In the event the Debtor Sellers receive a Qualified Bid in addition to the Stalking Horse Bid, the Debtor Sellers shall conduct an Auction which will start on March 6, 2017 at 10:00 a.m. (Eastern Time) at Jones Day, 901 Lakeside Avenue, Cleveland, Ohio 44114 or such later date and time as selected by the Debtor Sellers (with the consent of the Stalking Horse Bidder, not to be unreasonably withheld). The Auction shall be conducted in a timely fashion according to the following procedures.

The Stalking Horse APA shall serve as the "Baseline Bid" at the commencement of the Auction. The Baseline Bid shall be subject to higher and better Bids at the Auction, as described further below.

A Qualified Bidder wishing to submit a bid at the Auction must bid in an amount equal to or greater than the Minimum Overbid.

Subject to the Minimum Overbid, Qualified Bidders shall submit successive bids in increments no less than \$100,000.00 at the Auction (the "Incremental Bid Amount") for the purchase of the Purchased Asset until there is only one offer that the Debtor Sellers determine, subject to Court approval, is the highest and/or best offer for the Purchased Asset (a "Successful Bid" and such Bidder, the "Successful Bidder"). The second highest bid, to the extent determined to be acceptable to the Debtor Sellers, shall be deemed to be the backup bid (the "Backup Successful Bid" and such Bidder, the "Backup Successful Bidder"). The Debtor Sellers shall take into account the Stalking Horse Bid Protections in each round of bidding at the Auction.

In making the determination of which Qualified Bid(s) constitutes the Successful Bid(s), the Debtor Sellers shall take into account any factors that the Debtor Sellers reasonably deem relevant to the value of the Qualified Bid(s), including, among other things, (a) the number, type, and nature of any changes to the Stalking Horse APA requested by the Qualified Bidder; (b) the amount and nature of the total consideration; (c) the likelihood of the Qualified Bidder's ability to close a transaction and the timing thereof; and (d) the tax consequences of such Qualified Bid (collectively, the "Bid Assessment Criteria"). To be clear, the Debtor Sellers may evaluate competing bids in any manner that will maximize the aggregate value to the estates.

b. Auction Procedures

The Debtor Sellers and their professionals shall direct and preside over the Auction. The Debtor Sellers will conduct the Auction on an open basis and shall not require any Qualified Bidders submit their last and final bids on a "blind" basis. At the start of the Auction, the Debtor Sellers shall describe procedural rules for the conduct of the Auction, the terms of the Baseline Bid and the Incremental Bid Amount. All incremental Bids in accordance with the Incremental Bid Amount made thereafter shall be "Overbids" and shall be made and received on an open basis, and all material terms of each Overbid shall be fully disclosed to all other Qualified Bidders. The Debtor Sellers shall maintain a written transcript of all Bids made and announced at the Auction, including the Baseline Bid, all Overbids, the Successful Bid and the Backup Successful Bid.

To participate in the Auction, each prospective purchaser must be a Qualified Bidder. Each Qualified Bidder must have at least one (1) individual representative with authority to bind the Qualified Bidder attending the Auction in person. Only Qualified Bidders shall be entitled to bid at the Auction. Only (1) Qualified Bidders, (2) the DIP Lender and (3) the Unsecured Creditors Committee, and their respective legal and financial advisors, shall be entitled to attend the Auction. The Debtor Sellers reserve the right to limit the number of attendees from each Qualified Bidder in the Auction room. By attending the Auction, each party present agrees to keep the Auction, the Bids at the Auction and all details concerning the Auction confidential. The Auction shall be conducted in the presence of a certified court reporter who shall transcribe the Auction.

During the course of the Auction, the Debtor Sellers shall, after the submission of each Overbid, announce on the official record of the Auction and inform each Qualified Bidder which

Overbid reflects, in the Debtor Sellers' view, the highest or otherwise best Bid for some or all of the Purchased Assets. Each round of bidding will conclude after each participating Qualified Bidder has had a fair and reasonable opportunity to submit a subsequent bid with full knowledge of the then highest or otherwise best Bid as announced on the official record of the Auction.

At the Auction, all Qualified Bidders shall have the right to submit additional Qualified Bids and make additional modifications to their respective asset purchase agreements in order to improve its previous Qualified Bid.

a. Consideration of Overbids.

The Debtor Sellers reserve the right, in their reasonable business judgment, to adjourn the Auction one or more times to, among other things, facilitate discussions between the Debtor Sellers and Qualified Bidders; allow Qualified Bidders to consider how they wish to proceed; and provide Qualified Bidders the opportunity to provide the Debtor Sellers with such additional evidence as the Debtor Sellers, in their reasonable business judgment, may require, including, but not limited to, evidence that the Qualified Bidder has sufficient internal resources, or has received sufficient unconditional and irrevocable funding commitments, to consummate the proposed transaction at the prevailing Overbid amount.

b. Closing the Auction.

The Auction shall continue until there is a Successful Bid by a Successful Bidder. The Auction shall not close unless and until all Qualified Bidders have been given a reasonable opportunity to submit Overbids in compliance with these Bidding Procedures. Such acceptance by the Debtor Sellers of the Successful Bid is conditioned upon approval by the Court of the Successful Bid.

The identity of the Backup Successful Bidder and the amount and material terms of the Backup Successful Bid shall be announced by the Debtor Sellers at the conclusion of the Auction at the same time the Debtor Sellers announce the identity of the Successful Bidder. Subject to the terms and conditions of the Stalking Horse APA or other applicable Qualified APA, the Backup Bidder shall be required to keep its Qualified Bid (or if the Backup Bidder submitted one or more Overbids at the Auction, its final Overbid) open and irrevocable until the closing of the transaction with the Successful Bidder(s).

For the avoidance of doubt, nothing in these Bidding Procedures shall prevent the Debtors from exercising their fiduciary duties under applicable law.

The Debtor Sellers shall not consider any Bids or Overbids submitted after the conclusion of the Auction and any and all such Bids and Overbids shall be deemed untimely and shall under no circumstances constitute a Qualified Bid.

As soon as reasonably practicable after closing the Auction, the Debtor Sellers shall cause the definitive purchase and sale agreement for the Successful Bid(s) to be filed with the Court.

c. No Collusion; Good Faith Bona Fide Offer.

Each Qualified Bidder participating at the Auction will be required to confirm on the record that: (i) it has not engaged in any collusion with respect to the bidding; and (ii) its Qualified Bid is a good faith bona fide offer and it intends to consummate the proposed transaction if selected as the Successful Bidder.

**K. Backup Successful Bidder**

If a Successful Bidder fails to consummate an approved transaction contemplated by its Successful Bid, the Debtor Sellers may select the applicable Backup Successful Bidder as the Successful Bidder, and such Backup Successful Bidder shall be deemed a Successful Bidder for all purposes. The Debtor Sellers will be authorized, but not required, to consummate all transactions contemplated by the Bid of such Backup Successful Bidder without further order of the Court or notice to any party. Subject to the terms of the Stalking Horse APA or other Qualified APA, as applicable, in such case, the defaulting Successful Bidder's Good Faith Deposit shall be forfeited to the Debtor Sellers, and the Debtor Sellers specifically reserve the right to seek all available remedies against the defaulting Successful Bidder (or Backup Successful Bidder, if such party shall also breach or fail to perform), as applicable, including with respect to specific performance. In the event that the Backup Successful Bidder fails to consummate an approved Sale, the Purchased Assets may be sold pursuant to one or more subsequent sales.

**L. Highest and/or Best Bid**

At all times during the Auction Process, the Debtor Sellers shall retain full discretion and the right to determine which Bid or Bids constitute the highest or otherwise best offer for the purchase of the Purchased Asset and which Bid or Bids should be selected as the Successful Bid(s), if any, all subject to final approval by the Court pursuant to section 363(b) of the Bankruptcy Code. Notwithstanding the foregoing, in the event that all Bidders have submitted their final bids and no Qualified Bid provides for compensation to the Debtor Sellers over \$10 million, the Official Committee of Unsecured Creditors shall be provided the ability to consult with the Debtor Sellers as to the determination of the Successful Bid, but the final determination of the Successful Bid will be made by the Debtor Sellers. The Debtor Sellers may adopt rules for the Auction that, in their judgment, will better promote the goals of the Auction and that are not inconsistent in any material respect with any of the other material provisions hereof or of any Court order.

**M. Proceeds**

All valid and properly perfected liens against the Purchased Asset shall attach to the net proceeds of the Sale.

**N. Consent to Jurisdiction**

As provided in Sections 9.5 and 9.6 of the Stalking Horse APA or Qualified APA, as applicable, all Qualified Bidders shall be deemed to have consented to the core jurisdiction of the Court to enter an order or orders, which shall be binding in all respects, in any way related to the Debtors, the Chapter 11 Cases, the Bidding Procedures, the Stalking Horse APA or Qualified APA, as applicable, any modified version of the Stalking Horse APA or Qualified APA, as

applicable, the Auction or the construction and enforcement of documents relating to the Sale and waived any right to a jury trial in connection with any disputes relating to the Debtors, the Chapter 11 Cases, the Bidding Procedures, any Qualified APA, any modified version of the Stalking Horse APA, the Auction or the construction and enforcement of documents relating to the Sale.

**O. Sale Hearing**

A hearing to consider approval of the Sale (the "Sale Hearing") is scheduled to take place on March 9, 2017 at 10:00 a.m. (Central Time), or as soon thereafter as counsel may be heard, before the Honorable Barry S. Schermer in Bankruptcy Courtroom 5 North, in the Thomas F. Eagleton U.S. Courthouse, 111 South Tenth Street, St. Louis, Missouri 63102, or before any other judge who may be sitting in his place and stead.

The Sale Hearing may be continued to a later date by the Debtor Sellers by sending notice prior to, or making an announcement at, the Sale Hearing. No further notice of any such continuance will be required to be provided to any party.

At the Sale Hearing, the Debtor Sellers shall present the Successful Bid(s) to the Court for approval. Following the approval of the Successful Bid(s) at the Sale Hearing, the Debtor Sellers will be authorized to take any and all actions necessary and appropriate to complete and implement the Sale contemplated by the Successful Bid(s), including, without limitation, seeking the entry of one or more orders approving the Sale.

**P. Return of Good Faith Deposits**

The Good Faith Deposit of the Successful Bidder shall be applied to the purchase price of such transaction at closing. The Good Faith Deposits for each Qualified Bidder shall be held in one or more interest-bearing escrow accounts of the Debtor Sellers (and shall not be commingled or become property of the Debtors' estates absent further order of the Bankruptcy Court upon notice and hearing) on terms acceptable to the Debtor Sellers in their sole discretion and shall be returned (other than with respect to the Successful Bidder and the Backup Successful Bidder) no later than three (3) business days after conclusion the Auction. Upon the return of the Good Faith Deposits, the respective parties shall receive any and all interest that will have accrued thereon. The Debtor Sellers shall retain the Good Faith Deposits of the Successful Bidders solely in accordance with the terms of the applicable asset purchase agreement of each such bidder, respectively.

At the Closing, the Good Faith Deposit of any Successful Bidder (other than the Stalking Horse Bidder) will be used first to pay in full in cash any Stalking Horse Bid Protections to which the Stalking Horse Bidder is entitled under the Stalking Horse APA by reason of it not being the Successful Bidder, with the balance, if any, to be released to the Debtor Sellers or applied as provided under the Qualified APA between the Debtor Sellers and such Successful Bidder.

Subject to the terms and conditions of the Stalking Horse APA, if a Successful Bidder fails to consummate a proposed transaction because of a breach by such Successful Bidder, the Debtor Sellers will not have any obligation to return the Successful Bidder's Good Faith Deposit,

which may be retained by the Debtor Sellers as liquidated damages, in addition to any and all rights, remedies, and/or causes of action that may be available to the Debtor Sellers, and the Debtor Sellers shall be free to consummate the proposed transaction with the applicable Backup Successful Bidder without the need for an additional hearing or order of the Court.

**Q. No Modification or Waiver of Bidding Procedures**

These Bidding Procedures may not be amended or modified, or any term or condition waived, by the Debtor Sellers without (a) the Stalking Horse Bidder's prior written consent, which consent shall not be unreasonably withheld, or (b) further order of the Bankruptcy Court. Notwithstanding the foregoing, the provisions of this paragraph shall not operate or be construed to permit the Debtor Sellers to accept any Qualified Bid that does not include the Good Faith Deposit in cash, which shall serve as protection and security for payment of the Stalking Horse Bid Protections to the Stalking Horse Bidder as provided herein.

**R. Reservation of Rights**

Except as otherwise provided in the Stalking Horse APA, these Bidding Procedures or the Bidding Procedures Order, the Debtor Sellers further reserve the right, in their reasonable business judgment, to: (i) other than with respect to the Stalking Horse Bidder, determine which bidders are Qualified Bidders; (ii) other than with respect to the Stalking Horse Bid, determine which Bids are Qualified Bids; (iii) determine which Qualified Bid is the Successful Bid and the Backup Successful Bid; (iv) other than with respect to the Stalking Horse Bid, reject, at any time prior to the closing of the Auction or, if no Auction is held, at any time prior to entry of the Sale Order, any Bid that is (a) inadequate or insufficient, (b) not in conformity with the requirements of these Bidding Procedures or the requirements of the Bankruptcy Code or (c) contrary to the best interests of the Debtor Sellers and their estates; (v) waive terms and conditions set forth herein with respect to all potential bidders; (vi) impose additional terms and conditions; (vii) extend the deadlines set forth herein; (viii) continue or cancel the Auction and/or Sale Hearing in open court, or by filing a notice on the docket of these Chapter 11 Cases, without further notice; (ix) modify these Bidding Procedures and implement additional procedural rules that the Debtor Sellers determine, in their business judgment, will better promote the goals of the bidding process and discharge the Debtor Sellers' fiduciary duties; **provided, however**, that any modification to these Bidding Procedures shall not be inconsistent with the Bidding Procedures Order or any other Order of the Court, unless otherwise ordered by the Court.

The Stalking Horse Bidder shall have standing to appear and be heard on all issues related to the Auction, the Sale and the bidding process, including the right to object to the sale of the Purchased Asset or any portion thereof (including the conduct of the Auction and interpretation of these Bidding Procedures) at the Sale Hearing.

**EXHIBIT B**

**FORM OF ASSIGNMENT AND ASSUMPTION AGREEMENT**

## ASSIGNMENT AND ASSUMPTION AGREEMENT

This Assignment and Assumption Agreement (this "Agreement"), effective as of \_\_\_\_\_, is by and among the parties identified on the signature page as the "Sellers" and \_\_\_\_\_, a \_\_\_\_\_ ("Purchaser").

WHEREAS, Sellers and Purchaser have entered into a certain Asset Purchase Agreement, dated as of [DATE] (the "Purchase Agreement"), pursuant to which, among other things, Sellers have agreed to assign all of its rights, title and interests in, and Purchaser has agreed to purchase, acquire, accept, assume, perform and discharge: (i) the Purchased Ownership Interest, (ii) the Assumed Liabilities, and (iii) all of Sellers' duties and obligations under the Assigned Contracts.

NOW, THEREFORE, in consideration of the mutual covenants, terms and conditions set forth herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

1. Definitions. All capitalized terms used in this Agreement but not otherwise defined herein are given the meanings set forth in the Purchase Agreement.
2. Assignment and Assumption. Sellers hereby irrevocably sell, assign, transfer, convey and deliver to Purchaser all of Sellers' right, title and interest in, to and under the Purchased Assets, including the Purchased Ownership Interest and the Assigned Contracts. Purchaser hereby irrevocably purchases and acquires the Purchased Ownership Interest and accepts such assignment of all of Sellers' duties and obligations under the Purchased Assets, including the Purchased Ownership Interest and the Assigned Contracts, and irrevocably agrees to assume and timely perform and discharge in accordance with their respective terms all of the Liabilities of Sellers in, to and under the Purchased Assets, including the Purchased Ownership Interest and the Assigned Contracts, and all Assumed Liabilities.
3. Terms of the Purchase Agreement. This Agreement benefits and binds the parties hereto and their respective successors and assigns and does not and shall not be deemed to modify or affect, and is subject to, the terms of the Purchase Agreement. In the event of any conflict or inconsistency between the terms of the Purchase Agreement and the terms hereof, the terms of the Purchase Agreement shall govern.
4. Governing Law. This Agreement will be governed by and construed in accordance with the laws of the State of Missouri applicable to contracts made

and performed in such State and, where applicable, federal Law, including the Bankruptcy Code.

5. Counterparts. This Agreement may be executed in one or more counterparts, each of which will be deemed to be an original copy of this Agreement and all of which, when taken together, will be deemed to constitute one and the same agreement.

6. No Strict Construction. The language used in this Agreement shall be deemed to be the language chosen by the parties hereto to express their mutual intent, and no rule of strict construction shall be applied against any Person.

[SIGNATURE PAGE FOLLOWS]

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by their respective officers thereunto duly authorized, as of the date first written above.

PURCHASER:

NEWPORT NEWS TERMINAL  
ASSOCIATES, LLC

By: \_\_\_\_\_

Name: Ernie L. Thrasher

Title: Chief Executive Officer

SELLERS:

PEABODY TERMINALS, LLC

By: \_\_\_\_\_

Name: Walter Hawkins, Jr.

Title: Senior Vice President Finance

JAMES RIVER COAL TERMINAL, LLC

By: \_\_\_\_\_

Name: Walter Hawkins, Jr.

Title: Senior Vice President Finance

**EXHIBIT C**

**FORM OF NEW THROUGH-PUT AGREEMENT**

TO BE COMPLETED PRIOR TO CLOSING

**EXHIBIT B**

**Auction and Hearing Notice**

**IN UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION**

In re:

Peabody Energy Corporation, et al.,  
Debtors.

Case No. 16-42529-399

CHAPTER 11

Jointly Administered

**NOTICE OF AUCTION AND SALE  
HEARING FOR THE SALE OF THE DEBTORS' ASSET<sup>1</sup>**

**PLEASE TAKE NOTICE OF THE FOLLOWING:**

Bankruptcy Filing. On April 13, 2016 (the "Petition Date"), Peabody Energy Corporation ("PEC") and certain of its direct and indirect subsidiaries, as debtors and debtors in possession (collectively, the "Debtors"), each filed a voluntary petition for relief pursuant to chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the Eastern District of Missouri (the "Bankruptcy Court").

Motion to Approve Bidding Procedures. On January 12, 2017, the Debtors filed Debtors' Motion for Entry of Orders (I)(A) Approving Bidding Procedures for the Sale of a Certain Asset, (B) Authorizing the Debtors to Enter into the Stalking Horse Purchase Agreement, (C) Approving Bid Protections, (D) Scheduling an Auction, (E) Approving the Form and Manner of Notice thereof, (F) Scheduling a Sale Hearing and Approving the Form and Manner of Notice thereof, and (G) Approving Assumption and Assignment Procedures; and (II)(A) Approving the Sale of a Certain Asset Free and Clear of Liens, Claims, Interests and Encumbrances and (B) Approving the Assumption and Assignment of Executory Contracts and Unexpired Leases; and (III) Granting Related Relief [Docket No. [ \_ ]] (the "Motion"). The Motion sought the entry of an order (the "Bidding Procedures Order"): (i) approving the Debtors' proposed auction and bidding procedures (the "Bidding Procedures") to be employed in connection with the proposed sale (the "Sale") of the Debtor Sellers' interest in Dominion Terminal Associates ("DTA") (the

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<sup>1</sup> Capitalized terms not defined herein have the meanings given to them in the Bidding Procedures.

"Asset"); (ii) establishing procedures for the assumption and assignment of executory contracts and unexpired leases related to the Asset (the "Assignment Procedures"), including the form and manner of the Debtors' notice of proposed cure amounts (the "Cure Notice"); (iii) approving the form and manner of the Debtors' (a) notice of Sale (the "Sale Notice"), (b) notice of assumption and assignment of executory contracts and unexpired leases (the "Assumption and Assignment Notice") and (c) notice of Auction (the "Auction Notice"); (iv) scheduling (a) a hearing (the "Bidding Procedures Hearing") to approve the Bidding Procedures, including, but not limited to, the Debtors' selection of Newport News Terminal Associates, LLC, a Virginia limited liability company, as the stalking horse bidder (the "Stalking Horse Bidder") and the provision of Bid Protections to such Stalking Horse Bidder; (b) an auction (the "Auction") if the Debtors receive one or more timely and acceptable Qualified Bids and (c) a hearing (the "Sale Hearing") to consider approval of the Sale; and (v) granting related relief; and (B) an order (the "Sale Order") (i) authorizing the sale of the Asset free and clear of all liens, claims, interests and encumbrances to the bidder(s) with the highest or otherwise best bid(s) in accordance with the Bidding Procedures (each, a "Successful Bidder"); (ii) authorizing the assumption and assignment of certain executory contracts and unexpired leases in connection with the Sale; and (iii) granting related relief.

Free and Clear Sales; Good Faith Purchaser. Pursuant to section 363(f) of the Bankruptcy Code, and except as otherwise provided in the Successful Bidder's APA approved by the Bankruptcy Court, all of the Debtors' right, title and interest in and to the Asset are proposed to be sold free and clear of all liens, claims (as such term is defined in section 101(5) of the Bankruptcy Code), interests and encumbrances (collectively, "Liens"), with any Liens to attach to the proceeds of the sale as provided in the final Sale Order. In addition, the Sale Order will include proposed findings that the any successful bidder is a "good faith purchaser," as that term is defined in section 363(m) of the Bankruptcy Code, and has not violated section 363(n) of the Bankruptcy Code.

The Bidding Procedures Order. On [\_\_\_\_], 2017, the Bankruptcy Court entered the Bidding Procedures Order, approving the Bidding Procedures. See Docket No. [\_\_\_\_]. Pursuant to the Bidding Procedures, interested potential purchaser must fulfill certain requirements to, among other things, (a) participate in the bidding process, (b) become "Qualified Bidders" and (c) submit "Qualified Bids." A Bid shall not constitute a Qualified Bid unless it is submitted in accordance with the Bid Requirements, and a Bidder shall not constitute a Qualified Bidder unless it submits a Qualified Bid.

The Auction. In the event the Debtor Sellers receive a Qualified Bid in addition to the Stalking Horse Bid, the Debtor Sellers shall conduct an Auction which will start on March 6, 2017 at 10:00 a.m. (Eastern Time) at Jones Day, 901 Lakeside Avenue, Cleveland, Ohio 44114 or such later date and time as selected by the Debtor Sellers (with the consent of the Stalking Horse Bidder, not to be unreasonably withheld). The Auction shall be conducted openly and shall be transcribed as described in greater detail in the Bidding Procedures. At the request of the Debtors, each bidder participating at the Auction shall be required to confirm in writing, that: (i) it has not engaged in any collusion with respect to the bidding; and (ii) its

Qualified Bid is a good faith *bona fide* offer and it intends to consummate the proposed transaction if selected as the Successful Bidder.

Notice of Successful Bidder. Following the designation of a Successful Bid, the Debtors shall file a notice of the Successful Bid, along with copies of the Final APA and Sale Order, marked to show changes from the form documents previously filed with the Court (a "Notice of Successful Bid"). A Notice of Successful Bid shall be filed by 4:00 PM Central Time on March 7, 2017.

Sale Hearing. A hearing to consider approval of the Sale (the "Sale Hearing") is scheduled to take place on March 9, 2017 at 10:00 a.m. (Central Time), or as soon thereafter as counsel may be heard, before the Honorable Barry S. Schermer in Bankruptcy Courtroom 5 North, in the Thomas F. Eagleton U.S. Courthouse, 111 South Tenth Street, St. Louis, Missouri 63102, or before any other judge who may be sitting in his place and stead. The Sale Hearing may be continued to a later date by the Debtor Sellers by sending notice prior to, or making an announcement at, the Sale Hearing. No further notice of any such continuance will be required to be provided to any party.

Objections and Deadline. All objections to the Sale, the assumption and assignment of the Assumed and Assigned Contracts and any other relief requested in this Motion other than the relief granted by this Court in the Bidding Procedures Order, must be: (a) in writing; (b) signed by counsel or attested to by the objecting party; (c) in conformity with the Bankruptcy Rules and the Local Rules of the Court; (d) filed with the Court by 4:00 p.m. (Central Time) on March 2, 2017 (the "General Objection Deadline"); and (e) served on the following parties (collectively, the "Objection Notice Parties") in accordance with the Local Rules of the Court **so as to be received on or before the relevant objection deadline**: (i) counsel for the Debtors, (a) Jones Day, North Point, 901 Lakeside Avenue, Cleveland, OH 44114 (Attn: Heather Lennox, Esq.); (b) Jones Day, 51 Louisiana Avenue, N.W., Washington, D.C. 20001 (Attn: Amy Edgy, Esq. and Daniel T. Moss, Esq.); (ii) counsel for the Stalking Horse Bidder, Latham & Watkins LLP, 885 Third Avenue, New York, NY 10022 (Attn: Charles E. Carpenter, Esq. and David A. Hammerman, Esq); **provided, however**, that any party may object based on events occurring at the Auction until 4:00 p.m. (Central Time) on the day prior to the Sale Hearing. These procedures are collectively referred to as the "General Objection Procedures". Each objection shall state the legal and factual basis of such objection and may be orally supplemented at the relevant hearing.

**Failure to File an Objection. IF AN OBJECTION IS NOT TIMELY FILED AND SERVED IN ACCORDANCE WITH THE GENERAL OBJECTION PROCEDURES, IT MAY NOT BE CONSIDERED BY THE BANKRUPTCY COURT AND THE BANKRUPTCY COURT MAY GRANT THE RELIEF REQUESTED WITHOUT FURTHER HEARING AND NOTICE.**

Bidding Procedures Order Controls. This Auction and Hearing Notice is subject to the terms and conditions of the Bidding Procedures Order (including the Bidding Procedures attached thereto), with the Bidding Procedures Order controlling in the event of any conflict. As

such, the Debtors encourage parties-in-interest to review such documents carefully and in their entirety.

Separate Contract Procedures Notice. Parties to executory contracts and unexpired leases proposed to be assumed and assigned to the purchaser(s) of the Asset will receive a separate notice.

Parties Interested in Bidding. Parties interested in bidding on the Asset should contact the Debtor Sellers' investment banker, Lazard Frères & Co. LLC ("Lazard"), 300 North LaSalle St., Chicago, IL 60654 (Attn. Juan Correa (312) 407-6603; [juan.correa@lazard.com](mailto:juan.correa@lazard.com) and Tyler Cowan (312) 407-6657; [tyler.cowan@lazard.com](mailto:tyler.cowan@lazard.com)).

Other Inquiries. Parties with other inquiries concerning the Sale of the Asset may make a written request to: (i) counsel for the Debtor Sellers, (a) Jones Day, North Point, 901 Lakeside Avenue, Cleveland, OH 44114 (Attn: Heather Lennox, Esq.; Thomas Wearsch, Esq.); (b) Jones Day, 51 Louisiana Avenue, N.W., Washington, D.C. 20001 (Attn: Amy Edgy , Esq. and Daniel T. Moss, Esq.); (ii) investment banker for the Debtor Sellers, Lazard Freres & Co., 300 North LaSalle St., Chicago, IL 60654 (Attn. Juan Correa and Tyler Cowan), and (iii) counsel to the Stalking Horse Bidder, Latham & Watkins LLP, 885 Third Avenue, New York, NY 10022 (Attn: Charlie Carpenter, Esq. and David Hammerman, Esq.). In addition, copies of the Motion, the Bidding Procedures Order, the Bidding Procedures, the Stalking Horse APA and the Sale Order may accessed free of charge on the website of the Debtors' claims and noticing agent, at <http://www.kccllc.net/peabody> (the "Restructuring Website").

Dated: January \_\_, 2017  
St. Louis, Missouri

Respectfully submitted,

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Steven N. Cousins, MO 30788  
Susan K. Ehlers, MO 49855  
Armstrong Teasdale LLP  
7700 Forsyth Boulevard, Suite 1800  
St. Louis, MO 63105  
Telephone: (314) 621-5070  
Facsimile: (314) 612-2239  
Email: scousins@armstrongteasdale.com  
Email: sehlers@armstrongteasdale.com

Heather Lennox (admitted *pro hac vice*)  
Jones Day  
North Point  
901 Lakeside Avenue  
Cleveland, OH 44114  
Telephone: (216) 586-3939  
Facsimile: (216) 579-0212

Amy Edgy (admitted *pro hac vice*)  
Daniel T. Moss (admitted *pro hac vice*)  
Jones Day  
51 Louisiana Avenue, N.W.  
Washington, D.C. 20001-2113  
Telephone: (202) 879-3939  
Facsimile: (202) 626-1700

*Attorneys for Debtors and  
Debtors in Possession*

**EXHIBIT C**

**Assumption and Assignment Notice**

**IN UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION**

In re:

Peabody Energy Corporation, et al.,  
Debtors.

Case No. 16-42529-399

CHAPTER 11

Jointly Administered

**NOTICE OF (A) POTENTIAL ASSUMPTION AND ASSIGNMENT OF  
EXECUTORY CONTRACTS AND UNEXPIRED LEASES AND (B) CURE AMOUNTS**

**You are receiving this notice because you may be a counterparty to an executory contract or unexpired lease with Peabody Energy Corporation or one or more of its affiliated debtors. Please read this notice carefully as your rights may be affected by the transactions described herein.**

**PLEASE TAKE NOTICE OF THE FOLLOWING<sup>1</sup>:**

1. On April 13, 2016 (the "Petition Date"), Peabody Energy Corporation ("PEC") and certain of its direct and indirect subsidiaries, as debtors and debtors in possession (collectively, the "Debtors"), each filed a voluntary petition for relief pursuant to chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the Eastern District of Missouri (the "Bankruptcy Court").

2. On January 12, 2017, the Debtors filed Debtors' for Entry of Orders (I)(A) Approving Bidding Procedures for the Sale of a Certain Asset, (B) Authorizing the Debtors to Enter into the Stalking Horse Purchase Agreement, (C) Approving Bid Protections, (D) Scheduling an Auction, (E) Approving the Form and Manner of Notice thereof, (F) Scheduling a Sale Hearing and Approving the Form and Manner of Notice thereof, and (G) Approving Assumption and Assignment Procedures; and (II)(A) Approving the Sale of a Certain Asset Free and Clear of Liens, Claims, Interests and Encumbrances and (B) Approving the Assumption and

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<sup>1</sup> Capitalized terms not defined herein have the meanings given to them in the Bidding Procedures Motion.

Assignment of Executory Contracts and Unexpired Leases; and (III) Granting Related Relief [Docket No. [ ]] (the "Motion"). The Motion sought the entry of an order (the "Bidding Procedures Order"): (i) approving the Debtors' proposed auction and bidding procedures (the "Bidding Procedures") to be employed in connection with the proposed sale (the "Sale") of the Debtor Sellers' (as such term is defined in the Bidding Procedures Motion) interest in Dominion Terminal Associates ("DTA") (the "Asset"); (ii) establishing procedures for the assumption and assignment of executory contracts and unexpired leases related to the Asset (the "Assignment Procedures"), including the form and manner of the Debtors' notice of proposed cure amounts (the "Cure Notice"); (iii) approving the form and manner of the Debtors' (a) notice of Sale (the "Sale Notice"), (b) notice of assumption and assignment of executory contracts and unexpired leases (the "Assumption and Assignment Notice") and (c) notice of Auction (the "Auction Notice"); (iv) scheduling (a) a hearing (the "Bidding Procedures Hearing") to approve the Bidding Procedures, including, but not limited to, the Debtors' selection of Newport News Terminal Associates, LLC, a [XXX] limited liability company, as the stalking horse bidder (the "Stalking Horse Bidder") and the provision of Bid Protections to such Stalking Horse Bidder; (b) an auction (the "Auction") if the Debtors receive one or more timely and acceptable Qualified Bids and (c) a hearing (the "Sale Hearing") to consider approval of the Sale; and (v) granting related relief; and (B) an order (the "Sale Order") (i) authorizing the sale of the Asset free and clear of all liens, claims, interests and encumbrances to the bidder(s) with the highest or otherwise best bid(s) in accordance with the Bidding Procedures (each, a "Successful Bidder"); (ii) authorizing the assumption and assignment of certain executory contracts and unexpired leases in connection with the Sale; and (iii) granting related relief.

3. Pursuant to the Sale Order, the Debtor Sellers may, in accordance with section 365 of the Bankruptcy Code, assume and assign to a Successful Bidder one or more of the Assumed and Assigned Contracts listed on the attached Exhibit 1; **provided, however**, that the inclusion of an executory contract or unexpired lease on the attached Exhibit 1 does not mean that (i) a Successful Bidder will ultimately identify such agreement as an executory contract or unexpired lease to be assumed and assigned or (ii) such contract or lease is an executory contract or unexpired leases within the meaning of section 365 of the Bankruptcy Code. In the event that such agreements are assumed and assigned to a Successful Bidder, the Debtors have identified on the attached Exhibit 1 the Cure Amounts that the Debtors believe must be paid to cure all prepetition defaults as required by section 365 of the Bankruptcy Code.

5. To the extent not contained in the Bidding Procedures Order, all objections to the assumption and assignment of any lease or contract, including, without limitation, any objection to the Debtors' proposed Cure Amount or the provision of adequate assurance of future performance under any lease or contract pursuant to section 365 of the Bankruptcy Code ("Adequate Assurance"), must: (a) comply with the General Objection Procedures; (b) identify the lease or contract to which the objector is a party; (c) describe with particularity any cure the claimant contends is required under section 365 of the Bankruptcy Code (the "Cure Claim") and identify the basis(es) of the alleged Cure Claim under the contract or lease; (d) attach all documents supporting or evidencing the Cure Claim; and (e) if the response contains an objection to Adequate Assurance, state with specificity what the objecting

party believes is required to provide Adequate Assurance (collectively with the General Objection Procedures, the "Assigned Contract Objection Procedures").

6. If no objection is timely and properly filed and served in accordance with the Assigned Contract Objection Procedures, (a) the Cure Amount set forth in the Assumption and Assignment Notice shall be controlling, notwithstanding anything to the contrary in any contract or lease or other document, and the non debtor party to the contract or lease shall be forever barred from asserting any other claim arising prior to the assignment against the Debtors or the purchaser, and (b) the purchaser's promise to perform under the contract or lease shall be deemed Adequate Assurance under the contract or lease. To the extent the Debtors dispute any Cure Claim, such dispute shall be presented to the Court at the Sale Hearing or such earlier or later date and time as the Debtors and the objector may agree or the Court may order, but such dispute shall not affect in any way the effectiveness of any assumption and assignment of a contract or lease. All Cure Amounts shall be paid by the purchaser.

7. Following the designation of a Successful Bid, the Debtors shall file a notice of the Successful Bid, along with copies of the Successful Bidder's APA and Sale Order, marked to show changes from the form documents previously filed with the Court (a "Notice of Successful Bid"). A Notice of Successful Bid shall be filed not less than five (5) business days before the Sale Hearing and shall be served on the Notice Parties. The deadline for objecting to approval of the Sale solely for any additional issues raised by the Notice of Successful Bid (i.e., by the revised Stalking Horse APA and proposed Sale Order) shall be the earlier of (a) five (5) business days after the filing and service of Notice of Successful Bid and (b) two (2) business days before a Sale Hearing (the "Supplemental Objection Deadline").

9. An objection to the assumption and assignment of any lease or contract will not constitute an objection to the sale of Asset or the other terms of the Sale . Parties wishing to object to the Sale must file and serve a separate objection in accordance with the General Objection Procedures no later than March 2, 2017 at 4:00 p.m. (Central Time).

10. If you agree with the Cure Amount(s) indicated on Exhibit 1, and otherwise do not object to the Debtors' assignment of your lease or contract, you need not take any further action.

**11. The Debtor Sellers' decision to assume and assign executory contracts and unexpired leases is subject to Bankruptcy Court approval and consummation of the Sale. Accordingly, the Debtors shall be deemed to have assumed and assigned each of the executory contracts and unexpired leases only as of the date of, and effective and conditioned upon, the closing of the Sale. Absent such closing, the executory contracts and unexpired leases shall neither be deemed assumed nor assigned and shall in all respects be subject to further administration under the Bankruptcy Code.**

Dated: January \_\_, 2017  
St. Louis, Missouri

Respectfully submitted,

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Steven N. Cousins, MO 30788  
Susan K. Ehlers, MO 49855  
Armstrong Teasdale LLP  
7700 Forsyth Boulevard, Suite 1800  
St. Louis, MO 63105  
Telephone: (314) 621-5070  
Facsimile: (314) 612-2239  
Email: scousins@armstrongteasdale.com  
Email: sehlers@armstrongteasdale.com

Heather Lennox (admitted *pro hac vice*)  
Jones Day  
North Point  
901 Lakeside Avenue  
Cleveland, OH 44114  
Telephone: (216) 586-3939  
Facsimile: (216) 579-0212

Amy Edgy (admitted *pro hac vice*)  
Daniel T. Moss (admitted *pro hac vice*)  
Jones Day  
51 Louisiana Avenue, N.W.  
Washington, D.C. 20001-2113  
Telephone: (202) 879-3939  
Facsimile: (202) 626-1700

*Attorneys for Debtors and  
Debtors in Possession*

**Exhibit 1**

**Executory Contracts and Unexpired Leases**

**EXHIBIT D**

**Publication Notice**

**UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION**

In re:

Peabody Energy Corporation, et al.,  
  
Debtors.

Case No. 16-42529-399  
CHAPTER 11

Jointly Administered

Hearing Date and Time:  
March 9, 2017 at 10:00 a.m. (Central)

Objection Deadline:  
March 2, 2017

Hearing Location:  
United States Courthouse  
Thomas F. Eagleton Federal Building  
5th Floor, North Courtroom  
111 South Tenth Street  
St. Louis, Missouri 63102

**NOTICE OF AUCTION AND SALE HEARING FOR  
THE SALE OF THE DEBTORS' INTEREST IN DOMINION TERMINAL ASSETS**

**PLEASE TAKE NOTICE OF THE FOLLOWING:**

Bankruptcy Filing. On April 13, 2016 (the "Petition Date"), Peabody Energy Corporation ("PEC") and certain of its direct and indirect subsidiaries, as debtors and debtors in possession (collectively, the "Debtors"), each filed a voluntary petition for relief pursuant to chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the Eastern District of Missouri (the "Bankruptcy Court").

Motion to Approve Bidding Procedures. On January 12, 2017, the Debtors filed Debtors' for Entry of Orders (I)(A) Approving Bidding Procedures for the Sale of a Certain Asset, (B) Authorizing the Debtors to Enter into the Stalking Horse Purchase Agreement, (C) Approving Bid Protections, (D) Scheduling an Auction, (E) Approving the Form and Manner of Notice thereof, (F) Scheduling a Sale Hearing and Approving the Form and Manner of Notice thereof, and (G) Approving Assumption and Assignment Procedures; and (II)(A) Approving the Sale of a Certain Asset Free and Clear of Liens, Claims, Interests and Encumbrances and (B)

Approving the Assumption and Assignment of Executory Contracts and Unexpired Leases; and (III) Granting Related Relief [Docket No. [ \_]] (the "Motion").<sup>1</sup>

Free and Clear Sales; Good Faith Purchaser. Pursuant to section 363(f) of the Bankruptcy Code, and except as otherwise provided in the Successful Bidder's APA approved by the Bankruptcy Court, all of the Debtors' right, title and interest in and to the Asset are proposed to be sold free and clear of all liens, claims (as such term is defined in section 101(5) of the Bankruptcy Code), interests and encumbrances (collectively, "Liens"), with any Liens to attach to the proceeds of the sale as provided in the final Sale Order. In addition, the Sale Order will include proposed findings that the any successful bidder is a "good faith purchaser," as that term is defined in section 363(m) of the Bankruptcy Code, and has not violated section 363(n) of the Bankruptcy Code.

The Bidding Procedures Order. On [ ], the Bankruptcy Court entered the Bidding Procedures Order, approving the Bidding Procedures. See Docket No. [ \_]. Pursuant to the Bidding Procedures, interested potential purchaser must fulfill certain requirements to, among other things, (a) participate in the bidding process, (b) become "Qualified Bidders" and (c) submit "Qualified Bids." A Bid shall not constitute a Qualified Bid unless it is submitted in accordance with the Bid Requirements, and a Bidder shall not constitute a Qualified Bidder unless it submits a Qualified Bid.

The Auction. In the event the Debtor Sellers receive a Qualified Bid in addition to the Stalking Horse Bid, the Debtor Sellers shall conduct an Auction which will start on March 6, 2017 at 10:00 a.m. (Eastern Time) at Jones Day, 901 Lakeside Avenue, Cleveland, Ohio 44114 or such later date and time as selected by the Debtor Sellers (with the consent of the Stalking Horse Bidder, not to be unreasonably withheld). The Auction shall be conducted openly and shall be transcribed as described in greater detail in the Bidding Procedures. At the request of the Debtors, each bidder participating at the Auction shall be required to confirm in writing, that: (i) it has not engaged in any collusion with respect to the bidding; and (ii) its Qualified Bid is a good faith bona fide offer and it intends to consummate the proposed transaction if selected as the Successful Bidder.

Notice of Successful Bidder. Following the designation of a Successful Bid, the Debtors shall file a notice of the Successful Bid, along with copies of the Final APA and Sale Order, marked to show changes from the form documents previously filed with the Court (a "Notice of Successful Bid"). A Notice of Successful Bid shall be filed by 4:00 PM Central Time on March 7, 2017.

Sale Hearing. A hearing to consider approval of the Sale (the "Sale Hearing") is scheduled to take place on March 9, 2017 at 10:00 a.m. (Central Time), or as soon thereafter as counsel may be heard, before the Honorable Barry S. Schermer in Bankruptcy Courtroom 5

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<sup>1</sup> Defined terms used herein that are otherwise not defined shall have the meaning given to them in the Motion.

North, in the Thomas F. Eagleton U.S. Courthouse, 111 South Tenth Street, St. Louis, Missouri 63102, or before any other judge who may be sitting in his place and stead. The Sale Hearing may be continued to a later date by the Debtor Sellers by sending notice prior to, or making an announcement at, the Sale Hearing. No further notice of any such continuance will be required to be provided to any party.

Objections and Deadline. All objections to the Sale, the assumption and assignment of the Assumed and Assigned Contracts and any other relief requested in this Motion other than the relief granted by this Court in the Bidding Procedures Order, must be: (a) in writing; (b) signed by counsel or attested to by the objecting party; (c) in conformity with the Bankruptcy Rules and the Local Rules of the Court; (d) filed with the Court by 4:00 p.m. (Central Time) on March 2, 2017 (the "General Objection Deadline"); and (e) served on the following parties (collectively, the "Objection Notice Parties") in accordance with the Local Rules of the Court **so as to be received on or before the relevant objection deadline**: (i) counsel for the Debtors, (a) Jones Day, North Point, 901 Lakeside Avenue, Cleveland, OH 44114 (Attn: Heather Lennox, Esq.); (b) Jones Day, 51 Louisiana Avenue, N.W., Washington, D.C. 20001 (Attn: Amy Edgy, Esq. and Daniel T. Moss, Esq.); (ii) counsel for the Stalking Horse Bidder, Latham & Watkins LLP, 885 Third Avenue, New York, NY 10022 (Attn: Charles E. Carpenter, Esq. and David A. Hammerman, Esq); **provided, however**, that any party may object based on events occurring at the Auction until 4:00 p.m. (Central Time) on the day prior to the Sale Hearing. These procedures are collectively referred to as the "General Objection Procedures". Each objection shall state the legal and factual basis of such objection and may be orally supplemented at the relevant hearing.

**Failure to File an Objection. UNLESS AN OBJECTION IS TIMELY SERVED AND FILED, IT MAY NOT BE CONSIDERED BY THE COURT, AND THE COURT MAY GRANT THE RELIEF REQUESTED WITHOUT FURTHER HEARING AND NOTICE.**

Bidding Procedures Order Controls. This Notice is subject to the terms and conditions of the Bidding Procedures Order (including the Bidding Procedures attached thereto), with the Bidding Procedures Order controlling in the event of any conflict. As such, the Debtors encourage parties-in-interest to review such documents carefully and in their entirety.

Separate Contract Procedures Notice. Parties to executory contracts and unexpired leases proposed to be assumed and assigned to the purchaser(s) of the Asset will receive a separate notice.

Parties Interested in Bidding. Parties interested in bidding on the Asset should contact the Debtor Sellers' investment banker, Lazard Frères & Co. LLC ("Lazard"), 300 North LaSalle St., Chicago, IL 60654 (Attn. Juan Correa (312) 407-6603; juan.correa@lazard.com and Tyler Cowan (312) 407-6657; tyler.cowan@lazard.com).

Other Inquiries. Parties with other inquiries concerning the Sale of the Asset may make a written request to: (i) counsel for the Debtor Sellers, (a) Jones Day, North Point, 901 Lakeside Avenue, Cleveland, OH 44114 (Attn: Heather Lennox, Esq.; Thomas Wearsch, Esq.); (b) Jones Day, 51 Louisiana Avenue, N.W., Washington, D.C. 20001 (Attn: Amy Edgy, Esq.

and Daniel T. Moss, Esq.); (ii) investment banker for the Debtor Sellers, Lazard Freres & Co., 300 North LaSalle St., Chicago, IL 60654 (Attn. Juan Correa and Tyler Cowan), and (iii) counsel to the Stalking Horse Bidder, Latham & Watkins LLP, 885 Third Avenue, New York, NY 10022 (Attn: Charlie Carpenter, Esq. and David Hammerman, Esq.). In addition, copies of the Motion, the Bidding Procedures Order, the Bidding Procedures, the Stalking Horse APA and the Sale Order may accessed free of charge on the website of the Debtors' claims and noticing agent, at <http://www.kccllc.net/peabody> (the "Restructuring Website").