

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

IN RE:)	
)	
PROTEA BIOSCIENCES, INC., AND)	Chapter 11
PROTEA BIOSCIENCES GROUP, INC.,)	
Debtors.)	Case No.: 17-bk-01200
)	
_____)	Judge Flatley
)	
PROTEA BIOSCIENCES, INC., AND)	Hearing Date and Time:
PROTEA BIOSCIENCES GROUP, INC.,)	
)	Response Deadline
Movants,)	
)	
-vs-)	
)	
SUMMIT RESOURCES, INC., WV)	
ECONOMIC DEVELOPMENT AUTHORITY,)	
UNITED BANK, YALE UNIVERSITY,)	
)	
Respondents.)	

EMERGENCY MOTION FOR ENTRY OF AN ORDER: (A) AUTHORIZING THE SALE OF ALL OR SUBSTANTIALLY ALL ASSETS OF THE DEBTORS FREE AND CLEAR OF THIRD PARTY INTERESTS, LIENS, CLAIMS, CHARGES AND/OR ENCUMBRANCES PURSUANT TO 11 U.S.C. §§ 363(b) AND 363(f); (B) AUTHORIZING THE ASSUMPTION AND ASSIGNMENT OF EXECUTORY CONTRACTS AND/OR UNEXPIRED LEASES PURSUANT TO 11 U.S.C. § 365; (C) APPROVING STALKING HORSE BID PROTECTIONS; AND (D) GRANTING RELATED RELIEF

Protea Biosciences, Inc. (“Operating Debtor”) and Protea Biosciences Group, Inc. (“Parent Debtor”) (collectively, the “Debtors”) respectfully move for the entry of an order granting the instant *Emergency Motion for Entry of an Order: (A) Authorizing the Sale of All of Substantially All Assets of the Debtors Free and Clear of Third Party Interests, Liens, Claims, Charges and/or Encumbrances Pursuant to 11 U.S.C. §§ 363(b) and 363(f); (B) Authorizing the Assumption and Assignment of Executory Contracts and/or Unexpired Leases Pursuant to 11*

U.S.C. § 365; (C) Approving Stalking Horse Bid Protections; and (D) Granting Related Relief (this “Sale Motion”), and in support thereof, avers as follows.¹

JURISDICTION AND VENUE

1. The United States Bankruptcy Court for the Northern District of West Virginia (this “Court”) has jurisdiction over this Sale Motion pursuant to 28 U.S.C. §§ 157 and 1134.
2. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2).
3. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.
4. Sections 105(a), 363, 365, 503 and 507 of title 11, United States Code, 11 U.S.C. § 101 et seq. (as amended, the “Bankruptcy Code”) govern the relief requested in this Sale Motion. Rules 2002, 6004, 6006, and 9014 of the Federal Rules of Bankruptcy Procedure (“Bankruptcy Rules”), set forth the procedural requirements for the transactions contemplated in this Sale Motion.

PARTIES

5. The Operating Debtor is a Delaware corporation engaged primarily in the business of developing and commercializing life science technologies, products and services focused on protein characterization, proteomics, metabolomics and small molecule analysis.
6. The names and addresses of all Respondents who may hold liens, claims and/or encumbrances against the Property (as defined herein), or must otherwise receive notice of this Sale Motion pursuant to the Bankruptcy Rules, are as follows:
 - a. Summit Resources, Inc. (“Summit”)
 - b. WV Economic Development Authority
 - c. United Bank

¹ Capitalized terms not defined herein have the meanings ascribed to them in the Declaration of John W. Teitz in Support of First Day Motions.

d. Yale University

7. The following individuals and/or entities are counterparties to executory contracts or unexpired leases with the Debtor:

- a. NEC Leasing
- b. NFS Leasing, Inc.
- c. QA Group, LLC d/b/a Quantum Analytics
- d. White Birch Properties
- e. Yale University

BACKGROUND

8. Starting in March 2013, Summit began funding the Debtors' operating losses. Without Summit's funding the Debtors likely would not have been able to meet payroll, pay for critical benefits such as healthcare or meet various other day-to-day operational expenses. From March 2013 through the Petition Date Summit funded the Debtors' losses in excess of \$5,000,000. Often times the Debtors would contact Summit with only a couple days' notice with a request to fund payroll. Without Summit being readily available to fund payroll and benefits the Debtors likely would have ceased operations long ago. Throughout this period of time the Debtors routinely promised Summit repayment of Summits loans, but the Debtors were never able to make good on those promises. Despite these repeated assurances from the Debtors, Summit was never repaid. Despite not repaying Summit's loans, the Debtors continued to request additional funding and/or liquidated Summit's collateral to make payroll all the way up through the filing of this case, as the Debtors attempted to locate financing to repay Summit and fund operations in the short and medium term while the Debtors sought a long-term financing solution. Summit kept the Debtors operating and employees paid for a year. But eventually this

case was necessary to bring the Debtors' continued losses to a managed conclusion.

9. In April of 2017, Summit loaned the Operating Debtor \$1,750,000 so it could fund its ongoing operations and cover its employees' payroll, health care, and benefits. Summit extended additional financing again in October of 2017 to continue funding the Operating Debtor's operations.

10. Summit has agreed, pending court approval of terms and conditions strictly acceptable to Summit, to make available to the Operating Debtor a \$475,000.00 debtor-in-possession loan (the "DIP Facility") that the Operating Debtor can use to fund its ongoing operations, preserve the jobs of its employees, and prosecute the sale contemplated in this Motion. In addition, upon the written request of the Debtors' key employees during the term of the DIP Facility, Summit may, in its sole discretion, advance up to an additional \$700,000.00 (the "**Additional Advance**") (thereby making the aggregate amount of the DIP Facility \$1,175,000.00) to fund operational use and capital expenditures in the Debtors' diagnostic business.

11. On December 1, 2017 ("Petition Date"), the Debtors filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code, docketed at case number 17-01200 (the "Bankruptcy Case").

12. The Debtors continue to manage and operate their businesses as a debtor-in-possession pursuant to Section 1107 and 1108 of the Bankruptcy Code.

13. To date, no trustee, examiner or committee of creditors has been appointed in the Bankruptcy Case, nor has any party requested the appointment of any of the foregoing.

14. On December [], 2017, the Debtors executed that certain Asset Sale and Purchase

Agreement (the “APA”)², through which the Debtors covenanted and agreed, subject to this Court’s approval, to sell (the “Sale”) all or substantially all of the assets of the Debtors as specifically and exclusively identified by the Buyer (as defined herein) in the APA (“Purchased Assets”) to Summit (Summit may be hereinafter referred to as the “Buyer” or “Stalking Horse Bidder”) for an initial credit bid (“Summit Credit Bid”)³ of \$1,000,000.00 (“Purchase Price”) with full reservation of all rights to increase the initial credit bid up to the total amount of Summit’s secured claim, pursuant to Section 363 of the Bankruptcy Code..

15. The Buyer has also agreed, in exchange for the Debtors requesting approval of the fees and expense reimbursement traditionally offered to stalking horse bidders, to serve as the Stalking Horse Bidder for the sale of the Purchased Assets and allow the Summit Credit Bid to serve as the stalking horse bid (“Stalking Horse Bid”).

16. The Summit Credit Bid is a bid to purchase all or substantially all of the Debtors’ assets, including, without limitation, any and all claim(s) the Debtors may have against Summit, whether or not arising under Chapter 5 of the Bankruptcy Code; provided, however, that, only upon the occurrence of all of the following: (i) the entry of a final and non-appealable Sale Order approving and authorizing the sale of all or substantially all of the Debtors’ assets to either: (a) Summit, or (b) a third party whose accepted bid exceeds Summit’s Stalking Horse Bid; (ii) the entry of a final and non-appealable Final Order (as defined in the Debtor-In-Possession Loan Agreement (“DIP Agreement”) filed as an exhibit to the Debtors’ *Emergency Motion for Entry of Interim and Final Orders (I) Authorizing the Debtors to Obtain Postpetition Financing; (II)*

2. Capitalized terms not otherwise defined herein shall have the same definitions as ascribed to them in either the APA or the Bid Procedures Motion (as defined herein). To the extent there exists any inconsistency between this Sale Motion, the Bid Procedures Motion, and the Agreement, the terms, conditions and provisions of the APA shall control.

3. The Summit Credit Bid is Summit’s initial credit bid for its purchase of the Purchased Assets.

Authorizing the Debtors to Use Cash Collateral; (III) Granting Liens and Providing Superpriority Administrative Expense Status; (IV) Granting Adequate Protection; (V) Modifying the Automatic Stay; (VI) Scheduling a Final Hearing; and (VII) Granting Related Relief (“DIP Motion”)); and (iii) the expiration of any applicable Investigation Period (as defined in the DIP Motion) without the filing of a Challenge Claim (as defined in the DIP Motion), Summit agrees to carve out from the Purchased Assets, except for any claim(s) or cause(s) of action the Debtors have or may have against Summit: (w) causes of action arising under sections 544, 547, 548, 550 or 553 of the Bankruptcy Code, and all proceeds thereof (the “Avoidance Actions”); (x) any and all litigation claims that the Debtors can assert against any party other than the Avoidance Actions (the “Litigation Claims”); (y) net operating losses of the Debtors (the “NOLs”); and (z) any royalty payments or the monetization of the interests of the Debtor and PBG related to AzurRx (the “AzurRx Royalty” and with the Avoidance Actions, Litigation Claims, and NOLs, the “Carved-Out Collateral”).

17. The APA represents a binding bid from the Stalking Horse Bidder to purchase the Purchased Assets from the Debtors and contains standard stalking horse protections, including an expense reimbursement of \$100,000.00 (“Break-Up Fee”) if the Stalking Horse Bidder is not the Successful Bidder at the Auction Hearing.

18. Contemporaneously with the filing of this Sale Motion, the Debtors filed a *Motion for Entry of an Order Approving (I) Bidding Procedures for the Sale of Property Free and Clear of Liens and Encumbrances; (II) Break-Up Fee Related to the Sale of Property Free and Clear of Liens and Encumbrances; (III) Form and Manner of Sale Notice; and (IV) Assumption and Assignment Procedures for Executory Contracts and Unexpired Leases (“Bid Procedures Motion”)*.

19. As set forth in the Bid Procedures Motion, the proposed Bidding Procedures (as defined in the Bid Procedures Motion) shall govern the Sale of the Purchased Assets contemplated in this Sale Motion and the process by which Qualified Bidders (as defined in the Bid Procedures Motion) may submit Qualified Competing Bid (as defined in the Bid Procedures Motion) at an auction (the "Auction") to maximize the sale price of the Purchased Assets at the hearing on the approval of this Sale Motion ("Sale Hearing"), which shall take place before this Court at the date and time set for on the Sale Notice (as defined in the Bid Procedures Motion).

RELIEF REQUESTED

20. By this Sale Motion, the Debtors seek approval of the Sale of the Purchased Assets under Sections 363(b) and 363(f) of the Bankruptcy Code, free and clear of any interest in the Purchased Assets to the Stalking Horse Bidder, or to the Successful Bidder at the Sale Hearing. The sale will be subject to and in accordance with the Bidding Procedures set forth in the Bid Procedures Motion and approved by an order granting relief requested in the Bid Procedures Motion (the "Bid Procedures Order") and will include an expense reimbursement of up to \$100,000.00 if the Stalking Horse Bidder is not the Successful Bidder. The Debtors also seek the authority to assume and assign certain executory contracts and unexpired leases (collectively, "Assumed Contracts") designed by the Stalking Horse Bidder (or Successful Bidder) to the Successful Bidder in connection with the closing on the Sale.

I. Marketing of the Purchased Assets

21. The Debtors have marketed the Purchased Assets to various parties, including certain current customers and vendors. Although certain parties have expressed interest in purchasing some or all of the Purchased Assets, no party has yet been willing to enter into a letter of intent or asset purchase agreement on terms similar or better than the APA. The Debtors

will continue marketing the Purchased assets to parties other than the Stalking Horse Bidder, pursuant to the Debtors' Bid Procedures Motion, filed concurrently with this Motion.

II. Notice of the Motion and Sale Hearing

22. The Debtors propose that the following notice and related procedures be implemented in connection with the sale process, as set forth more fully in the Bid Procedures Motion and the Bid Procedures Order:

- a. Notice of Sale Motion and Sale Hearing. Notice of the Sale Motion and the Sale Hearing shall be good and sufficient, and no other or further notice shall be required, if, within five (5) days after entry of the Bid Procedures Order, the Debtors serve the Sale Motion (with all exhibits) and the Bid Procedures Order (with all exhibits), by first-class mail, postage prepaid, upon all creditors and parties-in-interest.
- b. Date, Time, and Place of Sale Hearing. The Bankruptcy Court shall conduct the Sale Hearing on [_____] (prevailing Eastern Time) before the Honorable Patrick M. Flatley, U.S.B.J., at the United States Bankruptcy Court for the Northern District of West Virginia, 1125 Chapline Street, Wheeling, WV 26003.
- c. Objection Deadline to Sale Order. Objections, if any, to the approval of the assumption and assignment of any Assumed Contracts and/or the sale of the Purchased Assets pursuant to the APA (an "Objection") must be filed on or before 5:00 p.m. (prevailing Eastern Time) on [_____] (the "Objection Deadline"), with a copy of the Objection served, so as to be actually received by the Objection Deadline, upon all parties set forth in the Bid Procedures Order. Objections to the Auction or the selection of the Successful Bid shall be made at the Sale Hearing.

III. Sale of the Purchased Assets, Assumption and Assignment of Assumed Contracts, and Related Relief

23. The Debtors seek the authority to sell, convey and transfer the Purchased Assets to the Stalking Horse Bidder (or the Successful Bidder) in accordance with the APA, as may be modified or amended from time to time. The Debtors believe that such a sale will maximize the value of the estate and benefit all interested parties.

24. The APA provides for the sale all of the Purchased Assets (as identified in Section 2.2(a) of the APA) to the Stalking Horse Bidder. All of the Purchased Assets are to be sold free and clear of all liens, claims, interests and encumbrances.

25. The Stalking Horse Bidder has agreed to assume only certain liabilities of the Debtors, all as more specifically set forth in Section 2.2(c) of the APA.

26. The Stalking Horse Bidder shall purchase Purchased Assets and shall assume the Assumed Liabilities in exchange for an initial credit bid of \$1,000,000.00 with full reservation of all rights to increase the initial credit bid up to the total amount of Summit's secured claim. Although the final credit bid may be less than the Stalking Horse Bidder's secured liens, the Debtors and the Stalking Horse Bidder intend that, subject to the entry of the Final Order (as defined in the DIP Agreement), the final accepted credit bid or any final accepted bid submitted by a third party in an amount that exceeds the \$1,000,000.00 Stalking Horse Bid, fully and finally satisfies all of the Debtors' secured obligations to the Stalking Horse Bidder. Upon the final sale of the assets subject to this APA, whether to the Stalking Horse Bidder or to a third party whose bid exceeds the amount of the Stalking Horse Bid, the Stalking Horse Bidder will fully and finally release all of its secured liens with respect to the Debtors' assets (including the Stalking Horse Bidder's prepetition liens and the DIP Facility). To be clear, should a transaction with either (1) the Stalking Horse Bidder or (2) a third party whose accepted bid exceeds that of

the Stalking Horse Bid be finally approved by this Court, all of the Stalking Horse Bidder's secured liens against the Debtors' assets, including any assets excluded from that transaction, will be extinguished.

27. In the event that a Qualified Bidder (and not the Stalking Horse Bidder) is the Successful Bidder at the conclusion of the Sale Hearing, the Debtors seek the authority to pay the Stalking Horse Bidder's fees and expense associated with the sale of the Assets in an amount not to exceed the Break-Up Fee.

28. The Break-Up Fee shall constitute a super-priority administrative expense of the Stalking Horse Bidder under Section 364(c)(1) of the Bankruptcy Code with priority over any and all administrative expenses of any kind, including those specified in Sections 503(b) or 507(b) of the Bankruptcy Code.

29. The Debtors believe that the Stalking Horse Bid represents the fair market value of the Purchased Assets and that confirmation of the Sale of the Debtors' assets in accordance with the terms of the APA, subject to modification and bidding pursuant to the terms and conditions of the Bidding Procedure Order, and pursuant to the provisions of Section 363 of the Bankruptcy Code, is appropriate under the circumstances and in the best interest of the Debtors' estates and their creditors.

30. The Sale is conditioned upon, inter alia, this Court entering a final, non-appealable order approving the sale ("Sale Order"), satisfactory to the Debtors and the Successful Bidder. The Debtors believe that the Stalking Horse Bid is the highest and best offer to date.

31. The sale of the Purchased Assets, TIME BEING OF THE ESSENCE, shall be a sale in "AS IS, WHERE IS" condition, without representations or warranties of any kind

whatsoever, except as may be provided for in the Bid Procedures Order, and the participation of the Stalking Horse Bidder, and/or any Qualified Bidder, in the sale process shall constitute an agreement and representation that the Stalking Horse Bidder, and/or any Qualified Bidder, has inspected the Purchased Assets and is purchasing the Purchased Assets solely on the basis of such inspections, and not as a result of any representation of any kind whatsoever by the Debtors or any agents or representative thereof, except as otherwise set forth herein.

32. NAMED RESPONDENTS MAY HOLD LIENS, CLAIMS OR ENCUMBRANCES AGAINST THE PURCHASED ASSETS. ALL SUCH RESPONDENTS SHOULD TAKE NOTICE THAT THE SALE IS TO BE FREE AND CLEAR OF ANY LIENS, CLAIMS OR ENCUMBRANCES, INCLUDING BUT NOT LIMITED TO ANY LIEN, CLAIM, ENCUMBRANCE OR INTEREST ARISING OUT OF ANY CLAIM, JUDGMENT, CAUSE OF ACTION, OR OTHER RIGHT TO PAYMENT, WHETHER REDUCED TO JUDGMENT, LIQUIDATED, UNLIQUIDATED, FIXED, CONTINGENT, MATURED, UNMATURED, DISPUTED, UNDISPUTED, LEGAL, EQUITABLE, SECURED OR UNSECURED. ALL SUCH RESPONDENTS HAVING ANY INTEREST OR CLAIM WHATSOEVER AGAINST THE PURCHASED ASSETS SHOULD TAKE NOTICE THAT THE SUCH INTEREST OR CLAIM SHALL BE DIVESTED BY THIS SALE TO THE EXTENT IT RELATES TO THE PURCHASED ASSETS.

33. The identification of any party herein as a lien holder and/or interest holder, including but not limited to being scheduled as the holder of a lien, statutory, judicial, or consensual, is without prejudice to the rights of the Debtors, Summit, and/or any party in interest to challenge the validity, extent, and/or priority thereof, and/or to challenge the validity of the debt, including but not limited to the amount alleged.

34. The Debtors also seek (a) authorization to assume and assign the Assumed Contracts in connection with the sale of the Purchased Assets, (b) protection for the Stalking Horse Bidder under Section 363(m) of the Bankruptcy Code, and (c) waiver of the 14-day stay of the Sale Order pursuant to Bankruptcy Rules 6004(h) and 6006(g).

LEGAL BASIS FOR RELIEF REQUESTED

A. The Sale Satisfies Section 363(b) of the Bankruptcy Code

35. Ample authority exists for approval of the transactions contemplated in this Sale Motion and the APA. Section 363 of the Bankruptcy Code provides, in relevant part, that “[t]he trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.” 11 U.S.C. § 363(b)(1).

36. Although section 363 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 a debtor’s estate, courts have approved the authorization of a sale of a debtor’s assets if such sale is based upon the sound business judgment of the debtor. *See, e.g., Providence Hall Assocs. Ltd. P’ship v. Wells Fargo Bank, N.A.*, 816 F.3d 273, 279 (4th Cir. 2016) (discussing business judgment standard for sales); *Rose v. Logan*, No. RDB-13-3592, 2014 U.S. Dist. LEXIS 38890, 2014 WL 1236008, at *7 (D. Md. Mar. 25, 2014) (describing the standard for approving a sale of bankruptcy estate assets); *In re The Lady H Coal Co., Inc.*, 193 B.R. 233, 243 (Bankr. S.D.W. Va. 1996); *In re WBQ Partnership*, 189 B.R. 97, 102 (Bankr. E.D. Va. 1995).

37. Courts typically consider the following factors in determining whether a proposed sale satisfies this standard: (a) whether a sound business justification exists for the sale; (b) whether adequate and reasonable notice of the sale was provided to interested parties; (c) whether the sale will produce a fair and reasonable price for the property; and (d) whether the

parties have acted in good faith. *See In re Decora Indus., Inc.*, 2002 WL 32332749, at *2 (D. Del. May 20, 2002) (citing *In re Delaware & Hudson Ry. Co.*, 124 B.R. 169, 176 (D. Del. 1991)); *Lady H Coal Co.*, 193 B.R. at 243; *see also, e.g., In re Daufuskie Island Props., LLC*, 431 B.R. 626, 638 (Bankr. D.S.C. 2010); *In re W.A. Mallory Co.*, 214 B.R. 834, 836 (Bankr. E.D. Va. 1997).

38. Where a debtor demonstrates a valid business justification for a decision, it is presumed that “in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.” *In re Integrated Res., Inc.*, 147 B.R. at 656 (quoting *Van Gorkcom*, 488 A.2d at 872).

39. Where, as here, there is an articulated business justification for selling debtor’s property outside of the ordinary course of business, courts should generally permit such a sale. *See In re Gucci*, 126 F.3d 380, 387 (2d Cir. 1997); *Stephens Industries, Inc. v. McClung*, 789 F.2d 386, 390 (6th Cir. 1986); *Lady H Coal Co.*, 193 B.R. at 243.

I. The Debtors have Demonstrated a Sound Business Justification for the Sale of the Purchased Assets

40. A sound business purpose for the sale of a debtor’s assets outside the ordinary course of business exists where such sale is necessary to preserve the value of the estate for the benefit of creditors and interest holders. *See, e.g., In re Abbotts Dairies of Pa., Inc.*, 788 F.2d 143 (3d Cir. 1986); *In re Lionel Corp.*, 722 F.2d at 1063; *In re Food Barn Stores, Inc.*, 107 F.3d at 564-65 (recognizing the paramount goal of any proposed sale of property of estate is to maximize value).

II. In the above-captioned cases, the Debtors, with the assistance of their retained professionals, recognized that an orderly but expeditious sale of the Purchased Assets is critical to maximizing the value of the Debtors’ assets and recoveries for the Debtors’ economic stakeholders. Moreover, the timely consummation of the

sale of the Purchased Assets is required under the express terms of the APA,.The Debtors Provided Adequate and Reasonable Notice of the Sale to Interested Parties.

41. Bankruptcy Rule 6004(a) requires that notice of a proposed sale of property not in the ordinary course of business “be given pursuant to Rule 2002(a)(2), (c)(1), (i) and (k)[.]” The relevant portions of the applicable subsections of Bankruptcy Rule 2002 require as follows:

- a. Bankruptcy Rule 2002(a)(2): “[T]he debtor, the trustee, all creditors and indenture trustees” must receive 21 days’ notice of the sale by mail.”
- b. Bankruptcy Rule 2002(c)(1): The notice must include “the time and place of any public sale, the terms and conditions of any private sale and the time for filing objections.” Further, the notice “is sufficient if it generally describes the property.”
- c. Bankruptcy Rule 2002(i): The notice must be mailed to committees appointed under section 1102 of the Bankruptcy Code.
- d. Bankruptcy Rule 2002(k): The notice must be transmitted to the United States Trustee.

See Fed. R. Bankr. P. 6004(a), 2002(a)(2), 2002(c)(1), 2002(i), and 2002(k).

42. Bankruptcy Rule 6004(d) further requires that a motion “for authority to sell property free and clear of liens or other interests shall be made in accordance with Rule 9014 and shall be served on the parties who have liens or other interests in the property to be sold. The notice required by [Bankruptcy Rule 6004(a)] shall include the date of the hearing on the motion and the time within which objections may be filed and served on the debtor in possession[.]”
Fed. R. Bankr. P. 6004(d).

43. Bankruptcy Rule 9014(b) requires service “in the manner provided for service of

a summons and complaint by Rule 7004 and within the time determined under Rule 9006(d).” Fed. R. Bankr. P. 9014(b). Bankruptcy Rule 7004 provides for service by first class mail, postage prepaid, and Bankruptcy Rule 9007(d) provides that service must be effectuated not later than seven days before the hearing, unless a different period is fixed by the Bankruptcy Rules or order of the court. Fed R. Bankr. P. 7004.

44. Finally, Bankruptcy Rule 6006 requires that a motion to assume, reject, or assign an executory contract or unexpired lease be given to the counterparty, to other parties-in-interest as the court may direct, and the United States Trustee. Fed. R. Bankr. P. 6006.

45. The Debtors propose to serve this Sale Motion, the Bid Procedures Order and the Sale Order, together with their respective exhibits, upon the following parties via first-class mail, postage prepaid: (a) all entities known to have expressed an interest in the purchase of the Purchased Assets; (b) all entities known to have asserted any lien, claim, interest or encumbrance in or upon the Purchased Assets; (c) all federal, state and local regulatory or taxing authorities or recording offices which have a reasonably known interest in the relief requested by the Sale Motion; (d) all parties to the Assumed Contracts; (e) Office of the United States Trustee; and (f) all parties on the creditor mailing matrix or that have otherwise requested service of papers.

46. The Debtors believe that the described notice satisfies the relevant requirements of Bankruptcy Rules 2002, 6004, 6006, 7004, 9007 and 9014 and constitutes good and adequate notice of this Motion, the Sale, the Sale Hearing, and proceedings related thereto.

III. The Proposed Sale Will Produce a Fair and Reasonable Purchase Price for the Purchased Assets

47. As set forth above, the Debtors believe that the proposed of the Purchased Assets to the Stalking Horse Bidder will produce a fair and reasonable purchase price for the Purchased Assets by way of reducing the Stalking Horse Bidder’s claim against the Debtors.

48. Given that the Stalking Horse Bid, together with the approved bid protections, will serve as a floor for Qualified Bids for the Purchased Assets, the Debtors are confident that the sale process will culminate in the Debtors obtaining the highest or otherwise best value for the Purchased Assets.

49. In addition, the Bidding Procedures were carefully designed to facilitate a robust and competitive bidding process. The Bidding Procedures provide an appropriate framework for the Debtors to review, analyze and compare all bids received to determine which bids are in the best interests of the Debtors' estates.

50. Sale governed by the Bidding Procedures undoubtedly will serve the important objectives of obtaining not only a fair and reasonable purchase price for the Purchased Assets, but also the highest or otherwise best value for the Purchased Assets, which will inure to the benefit of all parties in interest in this Case.

IV. Good Faith and Section 363(m)

51. Section 363(m) of the Bankruptcy Code protects a good faith purchaser's interest in property purchased from a debtor notwithstanding that the sale conducted under section 363(b) is later reversed or modified on appeal.

52. Specifically, section 363(m) of the Bankruptcy Code states the following:

The reversal or modification on appeal of an authorization under [section 363(b) of the Bankruptcy Code] . . . does not affect the validity of a sale . . . to an entity that purchased . . . such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale . . . were stayed pending appeal.

11 U.S.C. § 363(m).

53. Section 363(m) of the Bankruptcy Code fosters the “policy of not only affording finality to the judgment of the [B]ankruptcy [C]ourt, but particularly to give finality to those

orders and judgments upon which third parties rely.” *Reloeb Co. v. LTV Corp (In re Chateaugay Corp.*, No. 92 Civ. 7054 (PKL), 1993 U.S. Dist. Lexis 6130, at *9 (S.D.N.Y. May 10, 1993) (quoting *In re Abbotts Dairies of Pa., Inc.*, 788 F.2d at 147).

54. While the Bankruptcy Code does not define “good faith,” courts have recognized that “the phrase encompasses one who purchases in ‘good faith’ and for ‘value.’” *In re Abbotts Dairies*, 788 F.2d at 147 (to constitute lack of good faith, a party’s conduct in connection with the sale must usually amount to fraud, collusion between the purchaser and other bidders or the trustee or an attempt to take grossly unfair advantage of other bidders)

55. In other words, a party would have to show fraud or collusion between the buyer and the debtor in possession, the trustee or other bidders to demonstrate a lack of good faith. *See Kabro Assocs. of West Islip, LLC v. Colony Hill Assocs. (In re Colony Hill Assocs.)*, 111 F.3d 269, 276 (2d Cir. 1997) (“[t]ypically, the misconduct that would destroy a [buyer]’s good faith status at a judicial sale involves fraud, collusion between the [buyer] and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders”).

56. Due to the absence of a bright-line test for good faith, the determination is based on the facts of each case, with a focus on the “integrity of [a bidder’s] conduct in the course of the sale proceedings.” *In re Pisces Leasing Corp.*, 66 B.R. 671, 673 (E.D.N.Y. 1986) (quoting *In re Rock Indus. Mach. Corp.*, 572 F.2d 1195, 1998 (7th Cir. 1978)). Case 17-11655

57. The Debtors submit that the Stalking Horse Bidder, or any other Successful Bidder, is or would be a “good faith purchaser” within the meaning of section 363(m) of the Bankruptcy Code. The Debtors and the Stalking Horse Bidder have entered into the APA collusion, in good faith and through extensive arm’s length negotiations.

58. To the best of the Debtors’ knowledge, information and belief, no party has

engaged in any conduct that would cause or permit the APA to be set aside under section 363(m) of the Bankruptcy Code.

59. Further, as set forth above, the Bid Procedures are designed to produce a fair and transparent competitive bidding process and require confirmation from any Qualified Bidder it has not engaged in any collusion with respect to the bidding or the sale of any of the Purchased Assets. Any asset purchase agreement with a Successful Bidder executed by the Debtors will be negotiated at arm's length and in good faith.

60. Accordingly, the Debtors seek a finding that any Successful Bidder (including the Stalking Horse Bidder) is a good faith purchaser and is entitled to the full protections afforded by section 363(m) of the Bankruptcy Code.

61. Based on the foregoing, the Debtors submit that they have demonstrated that the proposed sale of the Purchased Assets is a sound exercise of the Debtors' business judgment and should be approved as a good faith transaction.

B. The Assets Should Be Sold Free and Clear of Liens, Claims, Interests and Encumbrances Under Section 363(f) of the Bankruptcy Code

62. In the interest of attracting the best offers, the Purchased Assets should be sold free and clear of any and all liens, claims, interests and other encumbrances, in accordance with section 363(f) of the Bankruptcy Code, with any such liens, claims, interests and encumbrances attaching to the proceeds of the applicable sale.

63. Section 363(f) of the Bankruptcy Code authorizes a debtor to sell assets free and clear of liens, claims, interests and encumbrances if any one of the following conditions is satisfied:

- a. applicable non-bankruptcy law permits sale of such property free and clear of such interest;

- b. such entity consents;
- c. such interest is a lien and the price at which such property is to be sold is greater than the value of all liens on such property;
- d. such interest is in bona fide dispute; or
- e. such entity could be compelled, in legal or equitable proceeding, to accept a money satisfaction of such interest.

11 U.S.C. § 363(f); *see also In re Kellstrom Indus., Inc.*, 282 B.R. 787, 793 (Bankr. D. Del. 2002) (“Section 363(f) is written in the disjunctive, not the conjunctive, and if any of the five conditions are met, the debtor has the authority to conduct the sale free and clear of all liens.”);

64. The Debtors submit that the sale of the Purchased Assets free and clear of liens, claims, interests and encumbrances will satisfy one or more of the requirements under section 363(f) of the Bankruptcy Code.

65. For example, to the extent a party objects to the sale on the basis that it holds a prepetition lien or encumbrance on the Purchased Assets, the Debtors believe that any such party could be compelled to accept a monetary satisfaction of such claims, under section 363(f)(5) of the Bankruptcy Code, or that such lien is in bona fide dispute, under section 363(f)(4) of the Bankruptcy Code.

66. Moreover, the Debtors have sent or will send the Sale Notice to any purported prepetition lienholders. If such lienholders do not object to the proposed Sale Transaction, then their consent should reasonably be presumed.

67. Accordingly, the Debtors request that, unless a party asserting a prepetition lien, claim or encumbrance on any of the Purchased Assets (other than with respect to Assumed Liabilities and Permitted Liens (as such terms are defined in the APA)) timely objects to this

Sale Motion, such party shall be deemed to have consented to any sale approved at the Sale Hearing. *See Hargave v. Twp. of Pemberton*, 175 B.R. 855, 858 (Bankr. D.N.J. 1994) (by not objecting to a sale motion, a creditor is deemed to consent to the relief requested therein); *Future Source, LLC v. Reuters, Ltd.*, 312 F.3d 281 (7th Cir. 2002) *cert. denied*, 538 U.S. 962 (2003) (holding that interest holder's failure to object to sale constitutes consent for purposes of Bankruptcy Code §363(f)(2), if there was adequate notice); *In re: Elliot*, 94 B.R. 343 (E.D. Pa. 1988) (holding same).

68. The purpose of a sale order purporting to authorize the transfer of assets free and clear of all claims, liens and encumbrances would be defeated if claimants could thereafter use the transfer as a basis to assert claims against a purchaser arising from a seller's pre-sale conduct. Moreover, without such assurances, potential bidders may choose not to participate in the Auction, or may submit reduced bid amounts, to the detriment of the Debtors' economic stakeholders.

69. Accordingly, the Debtors' request that the Court authorize the sale of the Purchased Assets free and clear of any liens, claims, interests and encumbrances (with the exception of Permitted Liens and Assumed Liabilities), in accordance with section 363(f) of the Bankruptcy Code, subject to such liens, claims, interests and encumbrances attaching to the proceed thereof in the same order of relative priority, with the same validity, force and effect as prior to such.

*C. Assumption and Assignment of Executory Contracts and
Unexpired Leases Should Be Authorized*

70. Section 365(a) of the Bankruptcy Code provides that a debtor in possession "subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor." 11 U.S.C. § 365(a).

71. Courts employ the business judgment standard in determining whether to approve a debtor's decision to assume or reject an executory contract or unexpired lease. *See, e.g., In re Market Square Inn, Inc.*, 978 F.2d 116, 121 (3d Cir. 1992) (assumption or rejection of lease "will be a matter of business judgment by the bankruptcy court").

72. The "business judgment" test in this context only requires that a debtor demonstrate that assumption or rejection of an executory contract or unexpired lease benefits the estate. *See Sharon Steel Corp. v. Nat'l Fuel Gas Distrib. Corp.*, 872 F.2d 36, 40 (3d Cir. 1989).

73. Any assumption and assignment of the Assumed Contracts is an exercise of the Debtors' sound business judgment because the transfer of such Assumed Contract is necessary for the Debtors to obtain the best value for the Purchased Assets.

74. The assumption and assignment of Assumed Contracts is a critical component of the APA and, therefore, should be approved.

75. The consummation of any sale involving the assignment of an Assumed Contract will be contingent upon the Debtors' compliance with the applicable requirements of section 365 of the Bankruptcy Code.

76. Section 365(b)(1) of the Bankruptcy Code requires that any outstanding defaults under the Assumed Contracts to be assumed be cured or that the debtor provides adequate assurance that such defaults will be promptly cured.

77. The Debtors' assumption and assignment of Assumed Contracts will be contingent upon payment of the applicable cure cost(s) and effective only upon the closing on the transaction contemplated in the APA.

78. As set in the Bid Procedures Order, Debtors propose to file with the Court and serve on each counterparty to a proposed Assumed Contract, which will set forth the Debtors'

good faith calculations of applicable cure with respect to each Assumed Contract.

79. Counterparties will have a meaningful opportunity to raise any objections to the proposed assumption of their respective contracts and leases in advance of the applicable Sale Hearing and prior to the objection deadline for the Sale Motion.

80. Pursuant to section 365(f)(2) of the Bankruptcy Code, a debtor may assign an executory contract if “adequate assurance of future performance by the assignee of such contract or lease is provided.” The meaning of “adequate assurance of future performance” depends on the facts and circumstances of each case, but should be given “practical, pragmatic construction.” *See Carlisle Homes, Inc. v. Azzari (In re Carlisle Homes, Inc.)*, 103 B.R. 524, 538 (Bankr. D.N.J. 1988) (citation omitted); *see also In re Natco Indus., Inc.*, 54 B.R. 436, 440 (Bankr. S.D.N.Y. 1985) (adequate assurance of future performance does not mean an absolute assurance that debtor will thrive and pay rent).

81. Among other things, adequate assurance may be provided by evidencing the assignee’s financial health and experience in managing the type of enterprise or property assigned. *See In re Bygaph, Inc.*, 56 B.R. 596, 605-06 (Bankr. S.D.N.Y. 1986) (adequate assurance of future performance is present when the prospective assignee of a lease has financial resources and has expressed willingness to devote sufficient funding to the business to give it a strong likelihood of succeeding).

82. As set forth above and in the Bidding Procedures, for a bid to qualify as a Qualified Bid, a potential bidder must include with its bid information regarding its ability (and the ability of its designated assignee, if applicable) to perform under applicable Assumed Contract.

83. Each affected Counterparty will have an opportunity to object to the ability of the

Successful Bidder to provide adequate assurance as provided in the Bid Procedures Order. Therefore, the Court should authorize the Debtors to assume and assign the proposed Assumed Contracts to the Stalking Horse Bidder or the Successful Bidder.

D. Waiver of Bankruptcy Rules 6004(a), 6004(h) and 6006(d)

84. The Debtors request that the Court (a) find that notice of the Sale Motion is adequate under Bankruptcy Rule 6004(a) under the circumstances and (b) waive the fourteen-day stay requirements under Bankruptcy Rules 6004(h) and 6006(d). In light of the Debtors' current financial condition and their obligation to comply with the conditions to closing the Sale contemplated in the APA, the proposed sale contemplated herein should be consummated as soon as practicable to allow the Debtors to maximize value for its estate.

85. Accordingly, the Debtors request that the Sale Order and any order authorizing the assumption and assignment of an Assumed Contract in connection with the sale contemplated in the APA be effective immediately upon entry and that the 14-day stay imposed by Bankruptcy Rules 6004(h) and 6006(d) be waived.

WHEREFORE the Debtors respectfully request that the Court enter the Sale Order, substantially in the forms attached hereto, granting the relief requested herein and such other and further relief as the Court may deem just and proper.

Dated: December 5, 2017

BUCHANAN INGERSOLL & ROONEY LLP

By: /s/Christopher P. Schueller
Christopher P. Schueller (WV 11267)
One Oxford Centre, 20th floor
301 Grant Street
Pittsburgh, PA 15219
Telephone: (412) 562-8800
E-mail: christopher.schueller@bipc.com
Proposed Counsel for the Debtors

4810-5973-2055, v. 10

EXHIBIT A

ASSET SALE AND PURCHASE AGREEMENT

This ASSET SALE AND PURCHASE AGREEMENT (together with all Exhibits and Schedules attached hereto, as any of the foregoing may be amended, consolidated, supplemented or otherwise modified from time to time, this “**Agreement**”) is made and entered into as of the _____ day of _____, 20__ (the “**Execution Date**”), by and between **PROTEA BIOSCIENCES, INC.**, a Delaware corporation, and **PROTEA BIOSCIENCES GROUP, INC.**, a Delaware corporation (collectively, the “**Seller**”), and **SUMMIT RESOURCES, INC.**, a West Virginia corporation, or its designee or assignee (the “**Buyer**”). Seller and Buyer are each sometimes referred to individually herein as a “**Party**”, and collectively as the “**Parties**”.

RECITALS:

WHEREAS, Seller is engaged primarily in the business of developing and commercializing life science technologies, products and services focused on protein characterization, proteomics, metabolomics and small molecule analysis (collectively, together with any and all other technologies, intellectual property, products and services provided by Seller and/or any of its subsidiaries or affiliated entities, the “**Seller’s Business**”);

WHEREAS, on December 1, 2017 (the “**Petition Date**”), the Seller filed a voluntary petition for relief under Chapter 11 of the United States Code, 11 U.S.C. § 101 *et seq.* (as amended and in effect as of the Petition Date, the “**Bankruptcy Code**”) in the United States Bankruptcy Court for the Northern District of West Virginia (the “**Bankruptcy Court**”), said petition being jointly administered at Bankruptcy Case No. 17-01200 (the “**Bankruptcy Case**”);

WHEREAS, the Buyer desires to purchase from Seller, and the Seller desires to sell to Buyer, the Purchased Assets and Assumed Contracts (each as hereinafter defined) owned by the Seller, all in accordance with and subject to the terms and conditions of this Agreement (the “**Transaction**”);

WHEREAS, the Seller has determined that it is advisable, and in the best interests of its estate and creditors, to designate Buyer as the Stalking Horse Bidder and to consummate the transactions provided for herein pursuant to a Final Order (as hereinafter defined) of the Bankruptcy Court to be entered in the Bankruptcy Case pursuant to, among other provisions, Section 105, 363(b), 363(f), and 365 of the Bankruptcy Code, authorizing the sale of the Purchased Assets and Assumed Contracts as contemplated herein (the “**Sale Order**”);

NOW, THEREFORE, in consideration of the foregoing premises and of the mutual and independent covenants, promises and undertakings hereinafter set forth, and for other good and valuable consideration, the receipt and legal sufficiency of which are hereby acknowledged, and intending to be legally bound, the Parties hereto agree as follows:

ARTICLE I.
Recitals, Definitions and Certain Usages

1.1 **Recitals.** The foregoing recitals are adopted by reference and made a part of this Agreement as though fully restated herein.

1.2 **Definitions.** The following words and phrases, when and where used in this Agreement, shall have the meanings ascribed to them as follows:

(a) **“Agreement”** means this Asset Sale and Purchase Agreement (including the Exhibits and Schedules hereto), as the same may, from time to time, be amended, modified, consolidated or supplemented in accordance with its terms.

(b) **“Assets”** means all of the assets of the Bankruptcy Estate, whether or not reflected in the financial records of the Seller.

(c) **“Assumed Contracts”** has the meaning ascribed to it in Section 2.2(a)(v).

(d) **“Assumed Liabilities”** has the meaning ascribed to it in Section 2.2(c).

(e) **“Auction Sale”** means the auction for the sale of the Purchased Assets conducted pursuant to the Bankruptcy Code which shall be subject to higher and better offers as approved by the Bankruptcy Court.

(f) **“Bankruptcy Case”** has the meaning ascribed to such term in the second WHEREAS clause set forth in the recitals to this Agreement.

(g) **“Bankruptcy Code”** has the meaning ascribed to it in the second WHEREAS clause set forth in the recitals to this Agreement, and shall include any amendment thereto from time to time after the Execution Date.

(h) **“Bankruptcy Court”** has the meaning ascribed to it in the second WHEREAS clause set forth in the recitals to this Agreement.

(i) **“Bankruptcy Estate”** means the estate of the Seller created pursuant to Section 541 of the Bankruptcy Code upon commencement of the Bankruptcy Case.

(j) **“Bill of Sale”** has the meaning ascribed to it in Section 2.2(d) of this Agreement.

(k) **“Business Day”** means any day other than a Saturday, Sunday or other day on which banks or other financial institutions located in the State of West Virginia are required or permitted by law to be closed for the conduct of normal banking business.

(l) **“Buyer”** has the meaning ascribed to it in the introductory paragraph.

- (m) “**Cash Consideration**” has the meaning ascribed to it in Section 2.3(a)(i).
- (n) “**Closing**” has the meaning ascribed to it in Section 2.1.
- (o) “**Closing Conditions**” has the meaning ascribed to it in Section 6.3.
- (p) “**Closing Date**” has the meaning ascribed to it in Section 2.1.

(q) “**Confidential Information**” means, subject as provided hereafter, all non-public and proprietary information disclosed hereunder or previously disclosed by any party to any other party in connection with and/or in furtherance of the Transaction, whether written, oral or visual, in any format including, without limitation documents, operations data and reports, business or financial information, rent rolls or data including tax returns, customer lists, pricing, rates and fees, employee information, business plans, business strategies, service concepts, projections, research, marketing materials, equipment, inventory, suppliers and supply contracts and agreements, organizational or personal data, oral disclosures, technical information, research and development, business methods, trade secrets, plans, and any other proprietary and/or information pertaining to any of the foregoing, and all notes, analyses, compilations, studies, interpretations or other documents prepared by the receiving party which contain, reflect or are based on, in whole or in part, any of the foregoing information furnished to the receiving party, which is designated or identified as, or stated to be, “confidential” or “proprietary” or which, given the nature of the information or the circumstances surrounding its disclosure, reasonably should be considered as confidential or proprietary. Notwithstanding the foregoing, all Confidential Information delivered pursuant to this Agreement shall be presumed confidential and proprietary information and shall not be required to be marked or identified as “confidential” to be subject to the terms and conditions of this Agreement. Further notwithstanding the foregoing, Confidential Information shall not include any information which (a) was in the public domain at the time it was communicated to the receiving party by the disclosing party; (b) entered the public domain subsequent to the time it was communicated to the receiving party by the disclosing party through no fault of the receiving party; (c) was in the receiving party’s possession free of any obligation of confidence at the time it was communicated to the receiving party by the disclosing party; (d) was rightfully communicated to the receiving party free of any obligation of confidence subsequent to the time it was communicated to the receiving party by the disclosing party; (e) was developed by employees or agents of the receiving party independently of and without reference to any information communicated to the receiving party by the disclosing party; (f) was communicated by the disclosing party to an unaffiliated third party free of any obligation of confidence; or (g) was communicated in response to a valid order by a court or other governmental body, was otherwise required by law, or was necessary to establish the rights of any party under this Agreement.

- (r) “**Consideration**” has the meaning ascribed to it in Section 2.3.

(s) “**Contract**” means any written or oral contract, purchase order, service order, sales order, indenture, note, bond, lease, license, commitment or instrument or other agreement, arrangement or commitment that is binding upon any person or entity, or any of their respective property, under applicable law.

(t) “**Contract Amounts**” has the meaning ascribed to it in Section 2.8(b).

(u) “**Credit Bid Amount**” has the meaning ascribed to it in Section 2.3(a)(i).

(v) “**Credit Facilities**” means, collectively, the Pre-Petition Indebtedness and the DIP Indebtedness.

(w) “**Cure Payments**” means payments necessary to cure certain past-due payments owed by the Seller under any Assumed Contracts which payments have been, or hereafter are, approved by the Bankruptcy Court to be paid to the applicable lessor(s) in connection with, or following the Closing.

(x) “**Deed**” has the meaning ascribed to it in Section 2.2(d).

(y) “**DIP Budget**” means the Budget as defined in the DIP Loan Agreement in effect as of the date of this Agreement or that may be in effect at any time prior to Closing.

(z) “**DIP Indebtedness**” means all indebtedness, obligations and liabilities of the Seller, including, without limitation, principal, interest, fees, premiums and any other amounts due or other obligations of Seller arising under the DIP Order, the DIP Loan Agreement and/or the DIP Loan Documents.

(aa) “**DIP Lender**” means the Buyer.

(bb) “**DIP Loan Agreement**” means that certain Debtor-In-Possession Loan Agreement dated as of , by and among the Seller, as borrower and as a debtor-in-possession, and the DIP Lender, as such DIP Loan Agreement may be amended, modified, supplemented or restated from time to time.

(cc) “**DIP Loan Documents**” means the DIP Loan Agreement and the other “Loan Documents” as defined in the DIP Loan Agreement, as such Loan Documents are amended, modified, supplemented or restated from time to time.

(dd) “**DIP Motion**” means the *Motion for Entry of Interim and Final Orders (I) Authorizing the Debtor to Obtain Postpetition Financing; (II) Authorizing the Debtor to Use Cash Collateral; (III) Granting Liens and Providing Superpriority Administrative Expense Status; (IV) Granting Adequate Protection; (V) Modifying the Automatic Stay; (VI) Scheduling a Final Hearing; and (VII) Granting Related Relief* filed by the Debtors in the Bankruptcy Case.

(ee) **“DIP Order”** means that certain Final Order of the Bankruptcy Court, dated [REDACTED], (i) authorizing Seller (A) to obtain post-petition secured financing pursuant to sections 105, 361, 362, 364 and 507 of the Bankruptcy Code, and (B) to utilize cash collateral pursuant to section 363 of the Bankruptcy Code; (ii) granting liens and super-priority claims; and (iii) granting adequate protection to pre-petition secured parties pursuant to sections 361, 362, 363 and 364 of the Bankruptcy Code, as may be amended or modified.

(ff) **“DIP Promissory Note”** means that certain Debtor-In-Possession Promissory Note dated as of [REDACTED], by and among the Seller and the DIP Lender in the principal amount of Four Hundred Seventy-Five Thousand and 00/100 Dollars (\$475,000.00), as such DIP Promissory Note may be amended, modified, supplemented or restated from time to time. The DIP Promissory Note evidences the DIP Obligations.

(gg) **“Due Diligence Period”** has the meaning ascribed to it in Section 4.1(a).

(hh) **“Employment Contracts”** has the meaning ascribed to in in Section 6.2(b).

(ii) **“Encumbrances”** means any and all Liabilities, levies, claims, charges, assessments, mortgages, security interests, liens, pledges, conditional sales agreements, title retention Contracts, leases, subleases, rights of first refusal, options to purchase, restrictions, easements, covenants and other encumbrances, and agreements or commitments to create or suffer any of the foregoing.

(jj) **“Equipment”** has the meaning ascribed to it in Section 2.2(a)(ii).

(kk) **“Environmental Laws”** means all state, federal or local laws, ordinances, codes or regulations relating to the use, storage, treatment and/or disposal of Hazardous Substances or to the protection of the environment.

(ll) **“Environmental Permits”** means all material licenses, permits and approvals necessary or or required under all applicable Environmental Laws for the ownership and operation of the Seller’s Business and Purchased Assets.

(mm) **“ERISA”** means the Employee Retirement Income Security Act of 1974.

(nn) **“Excluded Assets”** has the meaning ascribed to it in Section 2.2(b).

(oo) **“Excluded Liabilities”** has the meaning ascribed to it in Section 2.2(c).

(pp) **“Expense Reimbursement”** has the meaning ascribed to it in Section 6.6.

(qq) **“Final Order”** means an order or judgment of the Bankruptcy Court entered by the Clerk of the Bankruptcy Court on the docket in the Bankruptcy Case

which has not been reversed, vacated or stayed and as to which (a) the time to appeal, petition for certiorari or move for a new trial, re-argument or rehearing has expired and as to which no appeal, petition for certiorari or other proceeding for a new trial, re-argument or rehearing shall then be pending, or (b) if an appeal, writ of certiorari, new trial, re-argument or rehearing thereof has been sought, such order or judgment of the Bankruptcy Court shall have been affirmed by the highest court to which such order was appealed or certiorari shall have been denied or a new trial, re-argument 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, re-argument or rehearing shall have expired; provided, however, that the possibility that a motion under Rule 60 of the Federal Rules of Civil Procedure, or any analogous rule under the Federal Rules of Bankruptcy Procedure and/or the local rules of the Bankruptcy Court, may be filed relating to such order shall not cause such order not to be a Final Order.

(rr) “**Hazardous Substances**” means, collectively (i) any hazardous or toxic waste, substance or material defined as such in (or for the purposes of) any Environmental Laws, (ii) asbestos-containing material, (iii) medical and biological waste, (iv) polychlorinated biphenyls, (v) petroleum products, including gasoline, fuel, oil, crude oil and other various constituents of such products, and (vi) any other chemicals, materials or substances, exposure to which is prohibited, limited or regulated by any Environmental Laws.

(ss) “**Indebtedness**” of any Person means, without duplication: (i) the interest in respect of, principal of and premium (if any) in respect of (A) indebtedness of such Person for money borrowed, and (B) indebtedness evidenced by notes, debentures, bonds or other similar instruments for the payment of which such Person is responsible or liable; (ii) all obligations of such Person issued or assumed as the deferred purchase price of property (other than for services and goods acquired in the ordinary course of business); (iii) all obligations of such Person under leases required to be capitalized in accordance with GAAP; (iv) all obligations of such Person for the reimbursement of any obligor on any letter of credit, banker’s acceptance or similar credit transaction; (v) all obligations of the type referred to in clauses (i) through (iv) of any Persons for the payment of which such Person is responsible or liable, directly or indirectly, as obligor, guarantor, surety or otherwise, including guarantees of such obligations; and (vi) all obligations of the type referred to in clauses (i) through (v) of other Persons secured by any Encumbrance, on any property or asset of such Person (whether or not such obligation is assumed by such Person).

(tt) “**Intellectual Property**” means all intellectual property and proprietary rights of any kind, including, without limitation: (i) trademarks, service marks, trade names, slogans, logos, trade dress, internet domain names, uniform resource identifiers, rights in design, brand names and other similar designations of source or origin, together with all goodwill, registrations and applications related to the foregoing, (ii) patents, utility models and industrial design registrations (and all continuations, divisionals, continuations in part, provisionals, renewals, reissues, re-examinations and applications for any of the foregoing), (iii) copyrights and copyrightable subject matter (including,

without limitation, any registrations and applications for any of the foregoing); (iv) trade secrets and other confidential or proprietary business information (including manufacturing and production processes and techniques, research and development information, technology, drawings, specifications, designs, plans, proposals, technical data, financial marketing and business data, pricing and cost information, business and marketing plans, customer and supplier lists and information), know how, proprietary processes, formulae, algorithms, models and methodologies; (v) computer software, computer programs and databases (whether in source code, object code or other form); and (vi) all rights to sue for past, present and future infringement, misappropriation, dilution or other violation of any of the foregoing and all remedies at law or equity associated therewith.

(uu) **“Legal Proceeding”** means any claim, Liability, action, complaint, suit, litigation, arbitration, appeal, petition, demand, inquiry, hearing, proceeding, investigation or other dispute, whether civil, criminal, administrative or otherwise, at law or in equity, by or before any governmental body or any third person, and any appeal from any of the foregoing.

(vv) **“Liability”** means any debt, adverse claim, liability, duty, responsibility, obligation, commitment, assessment, cost, expense, loss, expenditure, charge, fee, penalty, fine, contribution or premium of any kind or nature whatsoever, whether known or unknown, asserted or unasserted, absolute or contingent, direct or indirect, accrued or unaccrued, liquidated or unliquidated, or due or to become due, and regardless of when sustained, incurred or asserted or when the relevant events occurred or circumstances existed, including all costs and expenses relating thereto, and **“Liabilities”** means all of the foregoing, collectively.

(ww) **“Non-Assumed Contracts”** means any Contracts to which Seller is a party but that are not Assumed Contracts.

(xx) **“Person”** means an individual, corporation, partnership, limited liability company, joint venture, association, trust, unincorporated organization, labor union, estate, governmental body or other entity or group.

(yy) **“Personal Property”** has the meaning ascribed to it in Section 2.2(a)(iii).

(zz) **“Petition Date”** has the meaning ascribed to it in the second WHEREAS clause set forth in the recitals to this Agreement.

(aaa) **“Pre-Petition Indebtedness”** means all indebtedness, obligations and liabilities of the Seller, including, without limitation, principal, interest, fees, premiums and any other amounts due or other obligations of Seller arising under the Pre-Petition Loan Agreement and/or the Pre-Petition Loan Documents.

(bbb) **“Pre-Petition Loan Agreement”** means that certain Promissory Note and Loan Agreement dated October 19, 2017 between Buyer, as lender, and Seller, as

borrower, together with any and all amendments, modifications, supplements or restatements thereof.

(ccc) “**Pre-Petition Loan Documents**” means the Pre-Petition Loan Agreement and all other loan and security documents executed in connection therewith.

(ddd) “**Prorated Charges**” has the meaning ascribed to it in Section 2.8(a).

(eee) “**Purchased Assets**” has the meaning ascribed to it in Section 2.2(a).

(fff) “**Sale Hearing**” means the hearing before the Bankruptcy Court to approve the Transaction.

(ggg) “**Sale Motion**” means any motion or plan filed for the purpose of approving the Transaction (as defined herein).

(hhh) “**Sale Order**” has the meaning ascribed to it in the fifth WHEREAS clause set forth in the recitals to this Agreement and Section 6.2(b).

(iii) “**Seller**” has the meaning ascribed to it in the introductory paragraph.

(jjj) “**Seller Plans**” has the meaning ascribed to it in Section 3.2(o).

(kkk) “**Seller’s Business**” has the meaning ascribed to it in the first WHEREAS clause set forth in the recitals to this Agreement.

(lll) “**Seller’s Closing Documents**” has the meaning ascribed to it in Section 2.2(d).

(mmm) “**Seller’s Intellectual Property**” means all Intellectual Property owned by, or licensed to, Seller and/or otherwise used in connection with the operation of the Seller’s Business.

(nnn) “**Transaction**” has the meaning ascribed to it in the fourth WHEREAS clause set forth in the recitals to this Agreement.

(ooo) “**Unpaid Contract Amounts**” has the meaning ascribed to it in Section 2.8(b).

1.3 Certain Usages. As used in this Agreement:

(a) the meanings of words and phrases used herein are equally applicable to the singular and plural forms of those terms where appropriate; and references to the masculine, feminine or neuter gender includes each other gender where appropriate;

(b) the word “dollar” or the symbol “\$” refers to the legal tender of the United States of America;

(c) the words “herein,” “hereof,” “hereto,” “hereunder” and similar words refer to this Agreement; and

(d) the captions and headings contained in this Agreement are for convenience of reference only and shall not expand, limit or otherwise affect the provisions of this Agreement or the interpretation or applicability of such provisions.

ARTICLE II.

The Closing; Sale and Purchase of Assets

2.1 **The Closing.** Subject to the provisions of Section 5.1 below, the closing of the Transaction (the “**Closing**”) shall take place no later than five (5) Business Days immediately following the day on which the Sale Order becomes final, un-appealable, and not subject to any pending appeal, or on such other date as may be mutually agreed to by the Parties (the “**Closing Date**”), and shall take place at a location and time mutually agreed to by the Parties. TIME IS OF THE ESSENCE. Notwithstanding the actual time of the Closing on the Closing Date, the Closing shall be deemed, for accounting and financial reporting purposes, to have occurred as of 12:00 a.m. on the Closing Date.

2.2 **Sale and Purchase of the Purchased Assets.**

(a) At the Closing, the Seller shall sell, assign, transfer and/or deliver to the Buyer, and Buyer shall purchase and acquire from Seller, all of Seller’s right, title and interest in and to all or substantially all of Seller’s Assets, excluding only the specifically identified Excluded Assets, and including, without limitation, the following (the “**Purchased Assets**”):

(i) all equipment, vehicles, computer hardware and software and all other tangible personal property owned by the Seller, including, but not limited to, those items listed on Schedule 2.2(a)(ii) hereto (the “**Equipment**”);

(ii) all of the Seller’s right, title and interest in and to all Assets, furniture, furnishings, fixtures, machinery, equipment, inventory, accounts, accounts receivable, chattel paper, books, records, files, papers, business rights, purchasing, accounting, sales, marketing and logistical records, leases, Contracts, general intangibles, and all other personal property of every kind, tangible and intangible, and any proceeds therefrom, whether owned by the Seller or used in connection with Seller’s Business and/or the ownership, maintenance and/or operation of the Seller’s property and Equipment, including, without limitation, all Personal Property identified on Schedule A/B filed by the Seller in the Bankruptcy Case (collectively, the “**Personal Property**”);

(iii) copies of all other books, records, files, papers, business rights and other documents (in whatever form, including computer files and software), including, without limitation, all inventory, purchasing, accounting, sales, marketing and logistical records (“**Business Papers**”), which relate directly or indirectly to the ownership, maintenance and operation of Equipment;

(iv) copies of any and all material Contracts, leases or permits to which Seller is a party to be assumed and assigned to, and/or renegotiated by, Buyer as part of the Transaction, and which Buyer does not otherwise expressly exclude in writing no less than ten (10) days prior to the date of the Sale Hearing, including, without limitation, those certain executory Contracts and unexpired leases listed on Schedule 2.2(a)(v) hereto (as may be amended from time to time by Buyer in its sole discretion) (collectively, the “**Assumed Contracts**”);

(v) all of Seller’s right, title and interest in and to Seller’s Intellectual Property;

(vi) copies of all Contracts, agreements, leases, licenses and/or other instruments pursuant to which Seller is granted a license to, or any rights under, any Intellectual Property of any third party and/or pursuant to which Seller grants to any third party a license to, or any rights under, any of Seller’s Intellectual Property;

(vii) all goodwill and other intangible assets associated with the Seller’s Business or the Purchased Assets;

(viii) any and all accounts receivable of the Seller;

(ix) any and all cash and cash equivalents owned by the Seller;

(x) copies of the Seller’s tax returns, copies of the articles of incorporation, the corporate seals and copies of the minute books;

(xi) any and all claims of the Seller to life insurance proceeds or cash surrender value of any of the Seller’s officers, directors or employees;

(xii) any and all existing, threatened and/or potential claims, of any nature whatsoever, that the Seller has against Buyer as a result of any action or inaction of Buyer occurring on or before the Closing Date;

(xiii) all other general intangibles and rights that are necessary for the transfer of the Purchased Assets to the Buyer, specifically including any and all options or other agreements for the Seller’s acquisition of adjacent or nearby real property including but not limited to those items listed on Schedule 2.2(a)(xiii), if any; and

(xiv) any and all of Seller's other assets related to the operation of the Seller's Business and not specifically included herein as an Excluded Asset or otherwise excluded by Buyer prior no later than ten (10) days prior to the date of the Sale Hearing.

Notwithstanding the foregoing or anything to the contrary contained in this Agreement, Buyer and Sellers each hereby acknowledge and agree that Buyer shall have the right, in its sole and absolute discretion, to reject (in whole or in part) and/or re-convey to each Seller, as applicable, and without any adjustment to or return of any portion of the Consideration, any Purchased Assets of such Seller which Buyer determines, in its sole discretion, for any reason whatsoever, to be unsuitable and/or undesirable for Buyer's intended use or purpose.

(b) Notwithstanding anything in this Agreement to the contrary, the Seller shall retain all other assets which are not directly referenced in Section 2.2(a) above and/or the related Schedules, specifically including, but not limited to, the assets identified on Schedule 2.2(b) hereto (the "**Excluded Assets**"). Notwithstanding any other agreement between Buyer and Seller or any order of a court, the Seller shall not have a lien on the Excluded Assets following the Closing provided that (i) the Bankruptcy Court has entered an appropriate order approving and authorizing the sale of all or substantially all of the Purchased Assets to Seller; (ii) the Bankruptcy Court has entered a final and non-appealable DIP Order, and (iii) any applicable Investigation Period (as defined in the DIP Motion) has expired.

(c) Buyer shall not assume, take over, become liable for the payment or performance of, or agree to perform, and shall not be obligated to assume or otherwise discharge, any obligations or Liabilities of the Seller or its directors, officers, shareholders or agents (acting in such capacities) of any nature whatsoever, whether accrued or unaccrued (the "**Excluded Liabilities**"), except for obligations which arise after the Closing Date with respect to the Assumed Contracts (the "**Assumed Liabilities**"), and the Auction Sale of the Purchased Assets shall be free and clear of any Encumbrances. Without limiting the generality of the foregoing, the Excluded Liabilities shall include:

(i) all Liabilities of Seller relating to or otherwise arising, whether before, on or after the Closing Date, out of, or in connection with, any of the Excluded Assets;

(ii) all Liabilities of the Seller with respect to any Non-Assumed Contracts;

(iii) all Liabilities of Seller arising out of or relating to any Legal Proceedings arising out of or in connection with events occurring on or prior to the Closing Date, no matter when raised;

(iv) all accounts payable of Seller arising on or prior to the Closing Date;

(v) all Liabilities of Seller arising out of or relating to services or products of Seller to the extent provided, developed, made or marketed, sold or distributed on or prior to the Closing Date;

(vi) all Liabilities of Seller under any Assumed Contracts arising out of or relating to Seller's conduct, action, omission or breach occurring on or prior to the Closing Date (other than the Cure Payments to be paid by Buyer), no matter when raised;

(vii) all Liabilities of Seller under any Assumed Contracts arising out of or relating to any alleged tort, breach of contract, non-compliance or alleged non-compliance with any law, ordinance, regulation, rule or treaty by the Seller;

(viii) all Liabilities of Seller for infringement or misappropriation of any Intellectual Property arising out of or relating to any conduct of Seller or operation of the Seller's Business on or prior to the Closing Date;

(ix) all Liabilities of Seller under this Agreement;

(x) all Liabilities of Seller based upon Seller's acts or omissions occurring after the Closing Date;

(xi) any claims (as defined in the Bankruptcy Code) arising prior to the Closing and not expressly assumed by Buyer pursuant to this Agreement;

(xii) all Liabilities relating to any environmental, health or safety matter (including any Liability or obligation under any Environmental Law, whether known or unknown), arising out of or relating to Seller's conduct, action or omission or its leasing, ownership or operation of real property on or prior to the Closing Date, no matter when raised;

(xiii) all Liabilities of Seller in respect of Indebtedness, whether or not relating to the Seller's Business;

(xiv) any claims, demands, proceedings or causes of action subject to or covered by the Seller's insurance policies in effect from time to time on or prior to the Closing Date, which insurance policies existing as of the Closing Date shall remain in effect and enforceable to cover any claims, demands, proceedings or causes of action;

(xv) all Liabilities relating to current or former employees, directors or officers of the Seller (A) under any employment, wage and hour restriction, equal opportunity, discrimination, plant closing or immigration and naturalization laws,

or (B) in connection with any workers' compensation or other employee health, accident, disability or safety claims;

(xvi) all Liabilities of Seller for taxes of any nature whatsoever, except as otherwise set forth in this Agreement;

(xvii) any payments due to any equity holders of the Seller in respect of management or other fees;

(xviii) all Liabilities resulting from an Encumbrance;

(xix) all Liabilities arising from the operation of any successor liability laws, including "bulk sales" statutes, to the extent that non-compliance therewith or the failure to obtain necessary clearances would subject Buyer or the Purchased Assets to the claims of any creditors of Seller other than with respect to any Assumed Liabilities, or would subject any of the Purchased Assets to any Encumbrances or other restrictions; and

(xx) all Liabilities for administrative priority claims.

For the avoidance of doubt, except as expressly set forth herein to the contrary, none of the Excluded Liabilities shall be included as Assumed Liabilities.

(d) The Purchased Assets shall be sold, assigned, transferred and delivered to the Buyer pursuant to a special warranty deed (the "**Deed**") and a bill of sale (the "**Bill of Sale**"), and together with the Deed, the "**Seller's Closing Documents**") from Seller, each substantially in the form attached as Exhibit A-1 and Exhibit A-2 hereto, respectively.

2.3 Consideration.

(a) The aggregate consideration for the Purchased Assets (collectively, the "**Consideration**") shall be:

(i) the sum of One Million and 00/100 Dollars (\$1,000,000.00) (the "**Cash Consideration**"), which shall be satisfied by Buyer by way of an offset against the entire Indebtedness of Seller under the Credit Facilities held by Buyer equal to the amount of Indebtedness thereunder at the Closing pursuant to Section 363(k) of the Bankruptcy Code (the "**Credit Bid Amount**"). Without limiting the foregoing, Buyer hereby reserves the right, in its sole discretion, to increase the Credit Bid Amount to an amount up to the total amount of the Seller's Indebtedness under the Credit Facilities;

(ii) the amount and obligations of any Assumed Liabilities as described in Section 2.2(c); and

(iii) subject to entry of the DIP Order, the full and final release by Buyer of the entire Indebtedness of Seller and all liens secured by Seller's assets, including for any amounts owed by Seller to Buyer over and above the final Credit Bid Amount.

(b) The Consideration shall be satisfied at the Closing as to:

(i) the Credit Bid Amount, by Buyer's (A) acknowledgment of complete full and final satisfaction of the entire Seller's Indebtedness under Credit Facilities, and (B) release of all security interests and liens securing the entire Seller's Indebtedness under Credit Facilities; and

(ii) the amount of the Assumed Liabilities by Buyer's assumption of such Assumed Liabilities through a duly executed assignment and assumption agreement in form and substance satisfactory to Buyer.

2.4 Allocation of Consideration. The Buyer and Seller agree to exert their best efforts prior to Closing to agree on a mutual allocation of the Consideration between the various Purchased Assets. In the event that Buyer and Seller are unable to timely agree upon such an allocation, Buyer and Seller agree that no allocation shall be referenced in this Agreement or in any other agreements or documents executed in connection with this Agreement, and the allocation of the Consideration between the various Purchased Assets will be determined by the Buyer at a future date with consideration to be given regarding appropriate tax issues.

2.5 Actions at the Closing. At the Closing, the following shall take place:

(a) the Buyer shall execute and deliver to the Seller a certificate stating that (i) all representations and warranties made by the Buyer in Section 3.1 hereof are true, accurate and complete as of the Closing Date, and (ii) the Buyer has performed and complied with all covenants and agreements to be performed and complied with by the Buyer under this Agreement at or prior to the Closing Date;

(b) the Seller shall execute and deliver to the Buyer a certificate stating that (i) all representations made by the Seller in Section 3.2 hereof are true, accurate and complete as of the Closing Date, (ii) the Seller has performed, and complied with all covenants and agreements to be performed and complied with by the Seller under this Agreement at or prior to the Closing Date; and (iii) the Seller will perform the covenants in Section 4.1 hereof.

(c) the Seller and the Buyer shall execute and deliver an acknowledgement that the Closing Conditions have been fulfilled to the satisfaction of the Seller and the Buyer or have otherwise been waived by the party benefiting from such Closing Condition(s);

(d) the Seller and the Buyer shall execute and deliver the Deed and Bill of Sale necessary to effectate the sale and transfer of the Purchased Assets to Buyer as contemplated herein; and

(e) the Buyer shall pay the Consideration, in the form of (i) the Credit Bid Amount, and (ii) a duly executed assignment and assumption agreement in form and substance satisfactory to Buyer, assuming the Assumed Liabilities.

(f) Buyer and Seller shall deliver such other assignments and other good and sufficient instruments of assumption and transfer, in form and substance satisfactory to Seller and Buyer, necessary or appropriate to transfer and assign the Purchased Assets and Assumed Liabilities to Buyer.

2.6 Transfer of Title; Transfer Taxes. All of Seller's right, title and interest in and to the Purchased Assets shall be sold, conveyed, assigned, transferred and delivered by the Seller to the Buyer at the Closing, free and clear of all Encumbrances. All transfer, conveyance, sales, use, stamp and/or similar state and local taxes arising from the Transaction (including, without limitation, real estate transfer taxes), if any, shall be shared equally between the Seller and the Buyer and paid at Closing. Without limiting the foregoing, the Buyer and Sellers acknowledge and anticipate that the Transaction will be exempt from real estate transfer taxes and stamps pursuant to the applicable provisions of the Bankruptcy Code. In the event that Closing is not delayed, the Buyer and Seller may agree that the Transaction be accomplished under Section 1146(a) of the Bankruptcy Code, to the extent permitted.

2.7 Free and Clear of Liens, Claims and Interests. Except to the extent specifically provided for in this Agreement, the Purchased Assets shall be sold, conveyed, assigned, transferred and delivered by the Seller to the Buyer at the Closing free and clear of all liens as authorized by the Bankruptcy Code, including if applicable, any and all liens, mortgages, pledges, security interests, real estate and personal property taxes, restrictions, judgments, prior assignments, Liabilities, obligations, encumbrances, charges, tenancies, licenses, covenants, successor or transferee Liabilities and claims of any and all nature and description whatsoever, including, without limitation, any of the foregoing arising under, related to or resulting from the Seller's existing Contracts, leases, agreements and similar arrangements (collectively, "**Encumbrances**").

2.8 Prorations.

(a) Any and all real estate and personal property taxes, real estate assessments and other similar charges against real estate, and power and utility charges, including, without limitation, amounts due for electric, gas, sewer, water, telephone and other utilities, on the Purchased Assets (collectively, the "**Prorated Charges**") shall be prorated based upon the applicable payment period (i.e., calendar or other tax fiscal year) to which the same are attributable. Seller shall pay at the Closing any unpaid Prorated Charges attributable to periods or portions thereof occurring prior to the Closing Date, and Buyer shall pay all Prorated Charges attributable to periods or portions thereof occurring from and after the Closing Date. In the event that as of the Closing Date the

actual tax bills for the tax year or years in question are not available and the amount of taxes to be prorated as aforesaid cannot be ascertained, then rates, millages and assessed valuation of the previous year, with known modifications, shall be used. Buyer and Seller agree that if the real estate and/or personal property taxes prorations are made based upon the taxes for the preceding tax period, the prorations shall be re-calculated after Closing when such tax bill(s) become available. With regard to municipal and/or utility charges, "final readings" as of the Closing Date shall be ordered from the appropriate billing authority, with the cost(s) of obtaining any such "final readings", if any, being shared equally by Buyer and Seller. The provisions of this Section 2.8(a) shall survive the Closing of the Transaction and delivery of the applicable Seller's Closing Documents.

(b) Except as otherwise set forth in this Agreement, Seller shall be entitled to the benefit of all royalties, rents and/or other payments under any Assumed Contracts accruing prior to the Closing Date, and Buyer shall be entitled to all royalties, rents and/or other payments under any Assumed Contracts accruing as of and from the Closing Date. All of such royalties, rents and/or other payments (collectively, the "**Contract Amounts**") that are collected prior to the Closing shall be prorated as of the Closing Date in accordance with the immediately preceding sentence. Notwithstanding the foregoing, all Contract Amounts that are accrued but unpaid as of the Closing Date (including, without limitation, royalties, rents and/or other payments accrued prior to Closing but payable in arrears after the Closing) (collectively, the "**Unpaid Contract Amounts**") shall belong to, and be applied to the Consideration for the benefit of, the Buyer unless otherwise specifically set forth herein, and Seller shall, upon receipt of any such Unpaid Contract Amounts, receive the same in trust for the benefit of Buyer and shall promptly remit any such amounts to the Buyer within ten (10) days after Seller's receipt of the same, to be applied to the Consideration. The provisions of this Section 2.8(b) shall survive the Closing of the Transaction and delivery of the Deed.

(c) All prorations and payments to be made under the foregoing provisions of this Section 2.8 shall be agreed upon by Buyer and Seller prior to the Closing and shall be binding upon the Buyer and Seller, except as otherwise set forth above; provided, however, in the event any proration, apportionment or computation shall prove to be incorrect for any reason following the Closing, then either Buyer or Seller shall be entitled to an adjustment to correct the same upon written demand to the other party from whom it is entitled to such adjustment within thirty (30) calendar days after the erroneous payment or computation was first discovered. If written notice is not delivered to the other party (or parties) within said 30-day period, then the aggrieved party's right to seek adjustment for any such incorrect proration, apportionment or computation shall be deemed waived. The provisions of this Section 2.8(c) shall survive the Closing of the Transaction and delivery of the applicable Seller's Closing Documents.

2.9 Possession. Possession of the Purchased Assets shall be surrendered by the Seller and tendered to the Buyer pursuant to a fully executed and delivered Seller's Closing Documents, as necessary, immediately following the Closing.

ARTICLE III.
Representations and Warranties

3.1 Representations and Warranties of the Buyer. The Buyer represents and warrants to the Seller that the following statements are true, accurate and complete as of the Execution Date and as of the Closing Date, except that the representations and warranties contained in paragraph (c) of this Section 3.1 shall be made only as of the Closing Date:

(a) The Buyer is a corporation duly organized, validly existing and in good standing under the laws of the State of West Virginia and has the full power and authority to carry on its business.

(b) The Buyer has the full legal right, power and authority to execute and deliver this Agreement, and each other agreement, certificate and other writing executed and delivered (or to be executed and delivered) by the Buyer hereunder, and to perform fully its obligations hereunder and thereunder. This Agreement, and each other agreement, certificate and other writing executed and delivered (or to be executed and delivered) by the Buyer hereunder, have been (or will be) duly executed and delivered by the Buyer and are (and will be) the valid and binding obligations of the Buyer.

(c) The officers, directors and/or shareholders of the Buyer, as required, have approved this Agreement and each agreement, certificate and other writing executed and delivered by the Buyer hereunder, and all actions to be taken in connection with the transactions contemplated by this Agreement, have been duly authorized on the part of the Buyer.

3.2 Representations and Warranties of the Seller. The Seller hereby represents and warrants to the Buyer that the following statements are true, accurate and complete as of the date hereof and as of the Closing Date:

(a) The Seller has all necessary corporate power and authority on behalf of the Seller and Seller's Estate to enter into this Agreement and, subject to Bankruptcy Court approval, to carry out the transactions contemplated hereby.

(b) Except as set forth on Schedule 3.2(b), all actions required to be taken by Seller to authorize the execution, delivery and performance of this Agreement and all other agreements contemplated hereby have been duly and properly taken or obtained by Seller. Except as set forth on Schedule 3.2(b), and except for the Bankruptcy Court approval, no other action on the part of such Seller is necessary to authorize the execution, delivery and performance of this Agreement and all other agreements contemplated hereby. This Agreement has been duly and validly executed and delivered by the Seller and, assuming due and valid execution by Buyer, this Agreement constitutes a valid and binding obligation of Seller enforceable in accordance with its terms.

(c) The Seller is authorized to convey the Purchased Assets pursuant to a Final Order of the Bankruptcy Court in the Bankruptcy Case to carry out the Transaction

contemplated hereby.

(d) Neither the execution and delivery of this Agreement, nor the consummation of the Transaction contemplated herein by the Seller, nor compliance with any of the material provisions of this Agreement by Seller, will violate, conflict with or result in a breach of any material provision of Seller's articles of incorporation, bylaws, or any other organizational documents of Seller.

(e) The Purchased Assets and Excluded Assets comprise substantially all of the property and Assets used in the conduct of the Seller's Business.

(f) Neither the Seller nor any affiliate thereof, nor any officer, director or shareholder thereof, have engaged or incurred any Liability to any finder, broker or agent in connection with the Transaction contemplated hereunder.

ARTICLE IV.

Covenants

4.1 Covenants of Seller. As part of, and in connection with, the Transaction, the Seller covenants and agrees as follows:

(a) Access and Information; Inspections. Commencing as of the date of the Confirmation Order and continuing until the Closing Date (the "**Due Diligence Period**"), (i) Seller shall afford to the officers and agents of Buyer (including, without limitation, accountants, attorneys, banker and other consultants and authorized agents of Buyer) full and complete access during normal business hours to, and the right to inspect, the plans, properties, books, accounts, records, and all other relevant documents and information with respect to the Assets, liabilities and business of the Seller, and (ii) Seller shall furnish Buyer with such additional financial and operating data and other information in Seller's possession or control as to the businesses and properties of the Seller as Buyer or its representatives may from time to time reasonably request, without regard to where such information may be located; provided, however, that all such information and/or disclosures shall be considered Confidential Information of Seller hereunder and shall be received by Buyer subject to and consistent with the confidentiality provisions of this Agreement and/or any confidentiality and/or non-disclosure agreements entered into (or to be entered into) among Buyer, its representatives and/or Seller. Buyer's right of access and inspection shall be exercised in such manner as to not unreasonably interfere with the Seller's Business. Such access may include consultations with authorized Seller personnel. Without limiting the foregoing, Seller hereby covenants and acknowledges that:

(i) Schedule 4.1(a)(i) contains a complete and accurate list of any and all mortgages, or any material liens, deeds of trust, leases, Contracts, material orders, judgments or decrees or any other Encumbrance by which Seller and/or the Purchased Assets is/are bound, which, after giving effect to the Sale Order, will (i) require the consent of another to the execution of this Agreement, or (ii)

require the consent of another to consummate the Transaction contemplated herein, if any;

(ii) Schedule 4.1(a)(ii) contains a complete and accurate list and description of any written notice(s) received by Seller of, and/or ongoing investigation(s) with respect to, any violation of, or an obligation to take remedial action under, any applicable (i) law, statute, ordinance, rule, regulation, policy or guideline promulgated, (ii) license or certified issued, or (iii) order, judgment or decree entered by, any federal, state or local or foreign court or governmental authority relating to Seller's Business or the Purchased Assets, if any, other than violations of Environmental Laws;

(iii) Schedule 4.1(a)(iii) contains a complete and accurate list and description of any written notice(s) received by Seller of, and/or ongoing investigation(s) and/or remedial actions with respect to, any violation of, or an obligation to take remedial action under, any applicable Environmental Laws relating to Seller's Business or the Purchased Assets, if any. Schedule 4.1(a)(iii) also contains a complete and accurate list of all material Environmental Permits necessary for the ownership and operation of Seller's Business and the Purchased Assets. All such Environmental Permits are, or shall be, in effect, and no action to revoke or modify any of such Environmental Permits shall be pending, as of the Closing Date;

(iv) Schedule 2.2(a)(v) contains a complete and accurate list of any and all Assumed Contract(s) to which Seller is a party or by which it is bound, and any guaranty, indenture or loan agreement relating to the Purchased Assets and/or such Seller's Business, which will be breached and/or under which Seller (or Buyer, as successor in interest to such Seller) shall be, or may be declared to be, in default, with or without notice or lapse of time, or both, as a result of the execution, delivery and/or performance of this Agreement, if any. No provision of this Section 4.1(a)(iv) shall be deemed as a waiver of any failure to obtain consents to the assignment of the Assumed Contracts from third parties to such Assumed Contracts in which consent is required to assign the same;

(v) Schedule 4.1(a)(v) contains a complete and accurate list of any and all Encumbrances affecting, and/or pending or threatened disputes and/or claims as to the ownership, lease, use and/or rights of or to, the Purchased Assets, if any;

(vi) Seller shall make available and/or deliver to Buyer any and all written correspondence received by Seller, if any, from any governmental entity since the most recent state licensure or certification survey related to Seller's Business which pertains to violations or and/or uncorrected material deficiencies with respect to any such licenses and certifications and all laws and regulations applicable thereto;

(vii) Schedule 4.1(a)(vii) sets forth a complete and accurate list of any and all claims, proceedings, judgments, orders, decrees, investigations and/or

other governmental restrictions filed, entered, pending, threatened and/or otherwise applicable or relating to or affecting Seller with respect to the operation of Seller's Business or any of the Purchased Assets;

(viii) Within fifteen (15) days of the Execution Date, Seller shall provide Buyer with a complete list (as of the Execution Date) of names, positions and current annual salaries or wage rates, bonus and other compensation and accrued paid time off of all full-time and part-time employees of Seller with respect to the operation of Seller's Business and indicating whether such employee is a part-time or full-time employee, together with copies of any employment agreement(s) between Seller and any of its employees. Such list shall also set forth any labor unions representing or collective bargaining agreements in effect covering the employees of Seller, if any, as well as a list and description of any unfair labor practice complaints against Seller pending or threatened before the National Labor Relations Board, if any;

(ix) Within fifteen (15) days of the Execution Date, Seller shall provide Buyer with a true, correct and complete list of all insurance policies maintained by Seller with respect to the operation of Seller's Business as of the Execution Date, together with copies of the applicable insurance policies and/or certificates evidencing the same.

(b) Conduct of Business. On and after the Execution Date, and prior to the Closing Date, and except as otherwise consented to or approved by an authorized officer of Buyer (which consent shall not be unreasonably withheld, conditioned or delayed) required by this Agreement, or required as a result of Seller's filing of the Bankruptcy Case and/or applicable orders of the Bankruptcy Court or pursuant to the Bankruptcy Code, Seller shall, with respect to the operation of the Seller's Business and ownership of the Purchased Assets:

(i) carry on its operations with respect to the Seller's Business in substantially the same manner as presently conducted and not make any material adverse change in operations, finance, accounting policies or real or personal property;

(iii) maintain the Purchased Assets and all parts thereof and all other Assets necessary for the operation of the Seller's Business in operating condition in a manner consistent with past practices, ordinary wear and tear excepted, inclusive of substitutions and retirements in the ordinary course of business;

(iv) perform all of its material post-petition obligations in accordance with the Bankruptcy Code;

(v) keep in full force and effect present insurance policies or other comparable self-insurance covering all or any portion of Seller's Business and/or the Purchased Assets; and

(vi) use its commercially reasonable efforts to maintain and preserve its business organization intact, and maintain its relationships with suppliers, customers and other having a business relationship with the Seller.

(c) Negative Covenants. From the Execution Date until the Closing Date, with respect to the operation of Seller's Business, Seller shall not, without the prior written consent of Buyer, or except as may be required by law or Seller's filing of the Bankruptcy Case:

(i) except as provided in Schedule 4.1(c)(i), increase compensation payable to or to become payable or make any bonus payment to or otherwise enter into one or more bonus agreements with any employee, except in the ordinary course of business consistent with past practice;

(ii) create, assume or permit to exist any new funded Indebtedness, mortgage, deed of trust, pledge or other material lien or Encumbrance upon any of the Purchased Assets;

(iii) acquire (whether by purchase or lease) or sell, assign, lease or otherwise transfer or dispose of any property or equipment, except in the ordinary course of business consistent with historical practices;

(iv) unless otherwise specifically permitted pursuant to the terms of an order of the Bankruptcy Court, accelerate, terminate, modify, amend or cancel any Contract to which Seller is a party or otherwise is bound, or waive, release or assign any rights or claims thereunder, in each case, in a manner adverse to Seller, and no other party to any such Contract has accelerated, terminated, modified, amended or cancelled such Contract or waived, released or assigned any rights or claims thereunder;

(v) incur or make any capital expenditures in an aggregate amount in excess of \$50,000.00, except as permitted in the DIP Budget;

(vi) create, incur, assume or guarantee any Indebtedness that will be binding upon Buyer;

(vii) transfer, assign, abandon, permit to lapse or grant any license or sublicense of any rights under or with respect to any of Seller's Intellectual Property, other than non-exclusive licenses of Intellectual Property granted pursuant to license agreements entered into in the ordinary course of business;

(viii) delay or postpone the payment of undisputed accounts payable or any other undisputed Liabilities of the Seller's Business in any material respect;

(ix) adopt, make or agree to (A) any welfare, pension, retirement, profit-sharing, incentive compensation or similar plan, program, payment or

arrangement for any employee, or (B) any new employment, change of control or collective bargaining agreement;

(x) breach any provision of the DIP Order or the DIP Loan Documents; or

(xi) take any action outside the ordinary course of business that would have a material adverse effect on the Purchased Assets or the Seller's Business.

(d) Cooperation. Seller shall cooperate in good faith with Buyer and its authorized representatives and attorneys: (i) in Buyer's efforts to obtain all consents, approvals, authorizations, clearances and licenses required to carry out the Transaction contemplated by this Agreement or which Buyer reasonably deems necessary or appropriate; (ii) in the preparation of any document or other material which may be required by any governmental agency as a predicate to or result of the Transaction, and (iii) in Buyer's efforts to effectuate the assignment of Assumed Contracts to Buyer as of the Closing Date.

(e) Additional Financial Information. Within thirty (30) calendar days following the end of each calendar month from the Execution Date to the Closing Date, Seller shall deliver to Buyer complete copies of the unaudited balance sheet and related unaudited statements of income relating to the Seller's Business for each month then ended, together with corresponding year-to-date amounts.

(f) Seller's Efforts to Close. Subject to the provisions of Article V, Seller shall use commercially reasonable efforts to satisfy all of the conditions precedent set forth in Section 6.2 to its or Buyer's obligations under this Agreement to the extent that Seller's action or inaction can control or reasonably influence the satisfaction of such conditions.

(g) Bankruptcy Proceedings. The Seller shall use commercially reasonable efforts to obtain entry, as promptly as practicable, of the Sale Order, general approval of the Transaction and such other relief from the Bankruptcy Court as may be necessary or appropriate in connection with this Agreement and the consummation of the Transaction contemplated hereby.

(h) Compliance with Agreement. Except as the Seller may, in good faith after consultation with counsel, determine is otherwise required as a result of fiduciary duties imposed by law, the Seller shall not file any pleading or take other action in the Bankruptcy Court with respect to this Agreement or the consummation of the Transaction contemplated hereby which is inconsistent with the terms hereof or the terms of the approved and applicable bid procedures, without first obtaining the written consent of the Buyer, which consent shall not be unreasonably withheld; provided, that nothing contained in the foregoing shall be construed to limit in any way the parties' rights under

this Agreement or the Buyer's right to immediate payment of the Expense Reimbursement.

(i) Bankruptcy Code Section 363(m). The Buyer and the Seller acknowledge and agree that the Buyer is a "good faith purchaser" within the meaning of Section 363(m) of the Bankruptcy Code and is thereby entitled to the Bankruptcy Code protection afforded good faith, arm's length purchasers. At its option and notwithstanding anything to the contrary contained in this Agreement, the Buyer may close this Transaction subsequent to the entry of the Sale Order and during the applicable period for appeal, without waiving the protection afforded the Buyer pursuant to Section 363(m) of the Bankruptcy Code. The Seller further acknowledges that the Buyer has negotiated in good faith and at arm's length with the Seller.

4.2 Covenants of Buyer. As part of, and in connection with, the Transaction, the Buyer covenants and agrees as follows:

(a) Confidentiality. Prior to and until the Closing Date, all Confidential Information that has been provided to the Buyer, or any representation of the Seller, in connection with any of the matters contemplated by this Agreement, whether provided before or after the execution and delivery of this Agreement, shall be held in strict confidence by the Buyer and such Confidential Information shall not be used by the Buyer or any of its representatives for any reason other than the evaluation and consummation of the Transaction. In the event the Transaction is not consummated, (i) the Buyer shall return, and shall cause its representatives to return, to the Seller, all documents and other materials in tangible form comprising such Confidential Information.

(b) Buyer's Efforts to Close. Subject to the provisions of Article V, Buyer shall use commercially reasonable efforts to satisfy all of the conditions precedent set forth in Section 6.1 to its or Seller's obligations under this Agreement to the extent that Buyer's action or inaction can control or reasonably influence the satisfaction of such conditions.

(c) Excluded Assets. As soon as reasonably practicable after the Closing Date, Buyer shall deliver to Seller or Seller's designee any Excluded Assets found with or at any Purchased Assets without imposing a charge on Seller for Buyer's storage or holding of the same. The provisions of this Section 4.2(c) shall survive the Closing hereunder and delivery of the applicable Seller's Closing Documents.

(d) Conduct Pending Closing. Prior to consummation of the Transaction contemplated hereby or the termination or expiration of this Agreement pursuant to its terms, unless Seller shall otherwise consent in writing, Buyer shall not take any action or fail or omit to take any action which would cause any of Buyer's representations and warranties set forth in Section 3.1 to be inaccurate or untrue in any material respect as of the Closing.

ARTICLE V.

Bankruptcy Code Provisions and Bankruptcy Court Approval

5.1 **Bankruptcy Court Approval.** Buyer and Seller acknowledge and agree that the Transaction involving the sale of the Purchased Assets and the assumption and assignment of the Assumed Contracts will be conducted pursuant to Sections 363 and 365 of the Bankruptcy Code and Bankruptcy Rule of Procedure 4001 and, as such, are subject to Bankruptcy Court approval. In furtherance of the foregoing, and notwithstanding anything to the contrary contained in this Agreement, Buyer and Seller acknowledge, covenant and agree as follows:

(a) the Purchased Assets will be exposed to the Auction Sale with this Agreement constituting the format by which any other qualified bid (as defined in the Bankruptcy Code and/or any approved bidding procedures) involving the Purchased Assets must be submitted; and

(b) if Buyer's offer under this Agreement is not adjudicated by the Bankruptcy Court to be the "highest and best offer" for the Purchased Assets under approved and applicable bid procedures, the Purchased Assets will not be sold to Buyer and this Agreement will terminate with no liability to the Sellers except that the Buyer will be entitled to file its motion with the Bankruptcy Court requesting its Expense Reimbursement.

5.2 **Bankruptcy Filings.** From and after the Execution Date and until the Closing Date, Seller shall provide notice, within three (3) Business Days, to Buyer of the filing of any pleadings, motions, notices, statements, schedules, applications, reports and other papers that are filed in the Bankruptcy Case. Notwithstanding the foregoing, except as required by applicable law or fiduciary duty or as necessary to preserve Seller's rights hereunder, Seller shall not file any pleadings, motions, notices, statements, schedules, applications, reports and other papers in the Bankruptcy Case that would, or would reasonably be expected to, alter, modify, limit or restrict Buyer's rights or remedies pursuant to this Agreement, without the prior written consent of Buyer (which may be granted or withheld in Buyer's sole discretion).

5.3 **Appeal of Sale Order.** In the event an appeal is taken or a stay pending appeal is requested from the Sale Order, Seller shall immediately notify Buyer in writing of such appeal or stay request and shall provide to Buyer promptly a copy of the related notice of appeal or order of stay. Seller shall also provide Buyer with written notice of any motion or application filed in connection with any appeal from either of such orders. In the event of an appeal of the Sale Order, Seller shall be primarily responsible for drafting pleadings and attending hearings as necessary to defend against the appeal.

ARTICLE VI.

Conditions of the Closing; Termination of Agreement

6.1 **Conditions to Obligation of the Seller to Close.** The obligation of the Seller to consummate the Transaction shall be subject to satisfaction of each of the following conditions

on or prior to the Closing Date unless specifically waived in writing by Seller in whole or in part at or prior to the Closing:

(a) the Buyer shall have executed and delivered all documents, instruments and certificates required to be executed and delivered pursuant to this Agreement;

(b) the representations and warranties of Buyer contained in Section 3.1 hereof shall be true, accurate and complete as of the Closing Date, with the same effect as though made at such date and time, except to the extent waived by the Seller, and the Buyer shall have performed and complied with all material covenants and agreements to be performed and complied with by the Buyer at or prior to the Closing Date;

(c) all actions by the Buyer required by Section 2.5 hereof shall have been taken to the reasonable satisfaction of the Seller; and

(d) no injunction shall have been obtained restraining, delaying or prohibiting, and no suit, action or other legal proceeding shall be pending before any court, arbitral panel, or governmental authority in which it is sought to restrain, delay or prohibit, the consummation of any part of the Transaction contemplated by this Agreement.

6.2 Conditions to Obligation of the Buyer to Close. The obligation of the Buyer to consummate the Transaction shall be subject to satisfaction of each of the following conditions on or prior to the Closing Date unless specifically waived in writing by Buyer in whole or in part at or prior to the Closing:

(a) The Bankruptcy Court shall have entered an order in form and substance satisfactory to Buyer setting the bidding procedures in the Bankruptcy Case within ten (10) days of the Petition Date;

(b) the Bankruptcy Court shall have entered an order in form and substance satisfactory to Buyer authorizing the sale of the Purchased Assets to Buyer and assumption and assignment of all Assumed Contracts (the “**Sale Order**”) within sixty (60) days of the Petition Date;

(c) Buyer shall have entered into binding employment agreements with, or otherwise received a binding, written commitment from such employees acceptable to Buyer with respect to the continued employment of, the below listed employees of the Seller (and any other employees of the Seller reasonably determined by Buyer to be necessary or appropriate for the continued operation of the Seller’s Business following Closing) (collectively, the “**Employment Contracts**”), in form and substance satisfactory to Buyer in its sole discretion, to be effective only upon, and subject to, Closing hereunder:

- (i) Erin Seeley, and
- (ii) Matt Powell;

(d) Buyer shall have entered into a binding consulting agreement with, or otherwise received a binding, written commitment from such consultant acceptable to Buyer with respect to the ongoing consultation services of Rossitza Lazova (the “**Consulting Agreement**”), and any other consultant or employee of the Seller reasonably determined by Buyer to be necessary or appropriate for the continued operation of the Seller’s Business following Closing, all in form and substance satisfactory to Buyer in its sole discretion, and to be effective only upon, and subject to, Closing hereunder;

(e) the Seller shall have executed and delivered all documents, instruments and certificates required to be executed and delivered pursuant to this Agreement;

(f) the representations and warranties of the Seller contained in Section 3.2 hereof shall be true, accurate and complete as of the Closing Date, with the same effect as though made at such date and time, except to the extent waived by the Buyer in writing, and the Seller shall have performed and complied with all covenants and agreements to be performed and complied with by the Seller, including, without limitation, the delivery and/or completion of those items set forth in Section 4.1(a)(i) – (ix), at or prior to the Closing Date;

(g) all actions by the Seller required by Section 2.5 hereof shall have been taken to the reasonable satisfaction of the Buyer;

(h) no injunction shall have been obtained restraining, delaying or prohibiting, and no suit, action or other legal proceeding shall be pending before any court, arbitral panel, or governmental authority in which it is sought to restrain, delay or prohibit, the consummation of any part of the Transaction contemplated by this Agreement;

(i) Buyer shall have obtained any and all licenses, permits and authorizations from governmental agencies or governmental bodies that are required for continued operation of the Seller’s Business following consummation of the Transaction contemplated hereby;

(j) the Purchased Assets shall be free and clear of all liens as authorized by the Bankruptcy Code, including any and all Encumbrances;

(k) Seller shall not be in breach of or default under any Assumed Contract(s), except for any breach and/or default which has been disclosed to Buyer prior to the Closing Date and which Buyer has agreed will survive Closing; and

(l) There shall exist no “accumulated funding deficiencies” within the meaning of ERISA or the Internal Revenue Code of 1986, as amended, or any federal excise tax or other Liability on account of any deficient findings in respect of any “employee welfare benefit plan” as defined in Section 3(1) of ERISA, “employee pension benefit plan” as defined in Section 3(3) of ERISA, or any other employee benefit or

perquisite provided by Seller with respect to the operation of the Seller's Business, in which any employee of Seller participates in his/her capacity as such.

6.3 Commercially Reasonable Efforts. The conditions to the consummation of the Transaction set forth in Sections 6.1 and 6.2 hereof are herein collectively referred to as "**Closing Conditions.**" Neither the Seller, on the one hand, nor the Buyer, on the other hand, may assert the failure of any Closing Condition that has been caused by any action or failure to act by such party, it being understood and agreed that the parties will use all commercially reasonable efforts to ensure that all Closing Conditions are satisfied.

6.4 Waiver of Closing Conditions. Subject to the provisions of Section 6.3 hereof:

(a) If any of the Closing Conditions specified in Section 6.1 hereof have not been fulfilled, the Seller may nevertheless, at its election, proceed with the Closing; any such election to proceed with the Closing shall be evidenced by an executed certificate of the Seller and shall constitute a waiver of the applicable Closing Conditions by the Seller; and

(b) If any of the Closing conditions specified in Section 6.2 hereof have not been fulfilled, the Buyer may nevertheless, at its election, proceed with the Closing; any such election to proceed with the Closing shall be evidenced by a certificate of the Buyer executed by its authorized representative and shall constitute a waiver of the applicable Closing Conditions by the Buyer.

6.5 Termination of Agreement. This Agreement and the Transaction may be terminated at any time prior to the Closing Date as follows, and in no other manner:

(a) at any time prior to the Closing Date by the mutual written consent of the Seller and the Buyer;

(b) by the Seller by written notice to the Buyer if the Buyer materially breaches or violates any other provision of this Agreement and fails to cure such breach within thirty (30) days of such written notice;

(c) by the Buyer by written notice to the Seller if the Seller materially breaches or violates any provision of this Agreement or if any of the other requirements of the Agreement have not been satisfied;

(d) by the Seller in the event that pursuant to an Auction Sale conducted by the Bankruptcy Court, Buyer is not the successful bidder;

(e) by the Buyer on or before the expiration of the Due Diligence Period if, for any reason, Buyer determines, in its sole and absolute discretion, that the Purchased Assets are unsuitable for its intended use or Buyer is not satisfied with its tests, reviews, inspections or other due diligence conducted or performed during such Due Diligence Period;

(f) subject to the provisions of Sections 6.3 and 6.4 above, by Buyer or Seller, as applicable, in the event any of the conditions precedent to such party's obligation to close set forth in Sections 6.1 and 6.2, respectively, have not been fulfilled as of the Closing Date;

(g) by either Buyer or Seller, if for any reason Buyer is unable, pursuant to any order of the Bankruptcy Court in accordance with Section 363(k) of the Bankruptcy Code, to credit bid the Credit Bid Amount in payment of the Consideration; and/or

(h) by either the Seller or the Buyer by notice to the other Party if the Closing has not occurred on or before the Closing Date.

6.6 Expense Reimbursement. If the Seller shall terminate this Agreement pursuant to the Bankruptcy Court's approval of an Auction Sale; whereby Buyer is not the successful bidder at the Auction Sale of the Purchased Assets, then the Buyer shall have the right to file a motion to seek reimbursement of its out-of-pocket expenses including professional fees and costs, from any deposit and/or the purchase price of the successful bidder (the "**Expense Reimbursement**"). Buyer agrees not to request Expense Reimbursement in excess of \$100,000.00 in the aggregate.

ARTICLE VII.

Miscellaneous

7.1 Entire Agreement; Amendments. This Agreement is intended by the Parties to be the final, complete and exclusive expression of the agreements and understandings between them relating to the subject matter hereof. This Agreement supersedes any and all prior oral or written agreements, understandings and negotiations between the Parties relating to the subject matter hereof, all of which agreements, understandings and negotiations are merged with and into this Agreement. No amendment, modification, rescission, waiver, or release of any provision of this Agreement shall be effective unless set forth in writing and signed by the Party or Parties to be bound thereby. In the event of any conflict or apparent conflict between the terms of this Agreement and the terms and conditions of the Plan, the terms of the Plan shall control. Without limiting the foregoing, the terms of this Agreement and the terms of the Plan shall, to the fullest extent possible, be read and interpreted together, and, to the extent of any conflict or apparent conflict, each of said documents shall be interpreted to provide Buyer with the fullest rights available at law to acquire the Purchased Assets free and clear of all liens and Encumbrances.

7.2 No Third-Party Benefits Intended. The representations and warranties and covenants and agreements and undertakings contained in this Agreement are solely for the benefit of the Parties hereto and their respective successors and permitted assigns and, nothing herein, expressed or implied is intended to confer any rights on any other person.

7.3 Joint Negotiation and Drafting. The Parties have participated jointly in the negotiation and drafting of this Agreement. In the event of any ambiguity or question of intent or interpretation hereunder, this Agreement shall be construed in accordance with the

immediately preceding sentence and no presumption or burden of proof shall favor or disfavor any Party by virtue of the authorship of any provision of this Agreement.

7.4 Further Assurances. Each Party shall execute and deliver such instruments and take such other action as shall be reasonably required, or as shall be reasonably requested by any other Party, in order to carry out the Transaction and otherwise to give effect to this Agreement, at or prior to and after the Closing Date.

7.5 Choice of Law. This Agreement, and each other agreement, certificate and other writing executed and delivered hereunder, and the legal relations between the parties shall, in all respects, be governed by, and construed in accordance with, the laws of the State of West Virginia, without regard to principles of conflict of laws.

7.6 Casualty. If, between the date hereof and the Closing, there shall occur a fire or other casualty affecting any of the Purchased Assets, then Buyer shall have the option to:

- (i) terminate this Agreement upon written notice to the Seller: or,
- (ii) elect to purchase the Purchased Assets in their damaged condition provided that the Seller shall assign to Buyer the right to receive any and all insurance proceeds payable to Seller as a result of such fire or other casualty on the Purchased Assets.

7.7 Notices. Any notices, consents or other communications by or between the Parties required or permitted hereunder shall be in writing, and shall be sufficiently given if hand delivered or sent by registered mail or certified mail, postage prepaid, by facsimile transmission with confirmed receipt or by overnight courier or delivery service addressed or sent by facsimile transmission as follows:

To the Seller:

Protea Biosciences Group, Inc.
1311 Pineview Drive
Morgantown, WV 26506
Attn: Leo Harris, Director
Email: Harris36@myactv.net

With a copy to:

Christopher Schueller, Esq.
Buchanan Ingersoll & Rooney, PC
One Oxford Centre
301 Grant Street, 20th Floor
Pittsburgh, PA 15219-1410
Email: christopher.schueller@bipc.com

To the Buyer:

Summit Resources, Inc.
303 Middle Collision Road
Mount Lookout, WV 26678
Attn: Steve Antoline
Email: santoline@frontier.com

With copy to:

Kirk Burkley, Esq.
Bernstein Burkley
707 Grant Street
2200 Gulf Tower
Pittsburgh, PA 15219
Email: kburkley@bernsteinlaw.com

Any Party may change such party's address and/or facsimile number by giving notice of such change to the other Parties in accordance with this Section 7.8.

7.9 Termination of All Litigation. The Parties agree that they will use their best efforts to enter a Sale Order that will include provisions whereby any and all litigation or claims of any Party will be terminated. The litigation and claims to be terminated include, without limitation, any and all claims asserted by the Seller in the Bankruptcy Case.

7.10 Assignments. The obligations and duties under this Agreement may not be assigned or transferred, in whole or in part, by operation of law or otherwise, by any Party and any attempt to do so shall be null and void. Notwithstanding the foregoing, the Buyer reserves the right to designate an assignee of this Agreement provided such assignee honors and fulfills its obligations and duties hereunder.

7.11 Counterparts. This Agreement and any other agreement, certificate or other writing to be executed and delivered in connection with the Closing may be executed in one or more counterparts, and by different parties on different counterparts, each of which shall be considered an original and all of which shall be considered one and the same agreement, certificate or other writing, as the case may be, and shall become effective when one or more counterparts have been executed and delivered to each of the parties. One or more counterparts of this Agreement or any other agreement, certificate or other writing to be executed and delivered in connection with the Closing may be delivered by facsimile transmission or electronic mail with the intent that it or they shall constitute an original counterpart hereof or thereof.

7.12 Other Activities by the Seller. Nothing contained in this Agreement shall restrict, limit or otherwise affect the right and ability of the Seller to use, operate, sell or otherwise dispose of the Excluded Assets.

7.13 Binding Effect. This Agreement, and each other agreement, certificate and other writing executed and delivered hereunder, shall inure to the benefit of, and be enforceable by, the Parties and their respective successors and permitted assigns.

7.14 Transaction Costs. Subject to the Expense Reimbursement Requirement, each Party shall pay its own expenses in connection with this Agreement.

7.15 Bulk Sales. The Parties agree to waive compliance with any “bulk sales” or similar laws that may be applicable to the Transaction to the extent permitted by law.

7.16 Severability. The provisions of this Agreement shall not be deemed to be severable and the invalidity or unenforceability of any provisions of this Agreement shall, at the option of the Buyer, invalidate the other provisions hereof.

7.17 Broker. Each Party hereto represents and warrants to the other Parties that it is has had no interaction or agreement with any broker for this Transaction which would result in or require the payment of a brokerage commission.

[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK]
[SIGNATURE PAGE FOLLOWS]

IN WITNESS WHEREOF, each of the Parties has caused this Agreement to be executed on its behalf by one of its duly authorized representative, all as of the day and year first above written.

SELLER:

PROTEA BIOSCIENCES, INC., a Delaware corporation

By: _____
Name: _____
Title: _____

PROTEA BIOSCIENCES GROUP, INC., a Delaware corporation

By: _____
Name: _____
Title: _____

BUYER:

SUMMIT RESOURCES, INC., a West Virginia corporation

By: _____
Name: _____
Title: _____

EXHIBIT A-1

FORM OF DEED

(Attached)

EXHIBIT A-2

FORM OF BILL OF SALE

(Attached)

SCHEDULE 2.2(a)(ii)

EQUIPMENT

SCHEDULE 2.2(a)(v)

ASSUMED CONTRACTS

SCHEDULE 2.2(a)(xiii)

SPECIFIC GENERAL INTANGIBLES

SCHEDULE 2.2(b)

EXCLUDED ASSETS

1. Claims and causes of actions against third parties under chapter 5 of the United States Bankruptcy Code;
2. AxurRx royalties;
3. Tort and contract claims against third parties (not to include any claims of Seller against Buyer);
4. Insurance coverage and claims associated with the coverage, including D&O insurance coverage; and
5. Net operating losses.

SCHEDULE 3.2(b)

REQUIRED CONENTS/APPROVALS/AUTHORIZATIONS

SCHEDULE 3.2(e)

REAL PROPERTY NECESSARY FOR SELLER'S BUSINESS

SCHEDULE 4.1(a)(i)

ENCUMBRANCES REQUIRING CONSENT/APPROVAL

SCHEDULE 4.1(a)(ii)

EXISTING VIOLATIONS OF LAW

SCHEDULE 4.1(a)(iii)

**EXISTING VIOLATIONS OF ENVIRONMENTAL LAWS
AND
LIST OF NECESSARY ENVIRONMENTAL PERMITS**

SCHEDULE 4.1(a)(v)

ENCUMBRANCES ON PURCHASED ASSETS

SCHEDULE 4.1(a)(vii)

LITIGATION

SCHEDULE 4.1(c)(i)

PENDING COMPENSATION INCREASES