

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re

VI ACQUISITION CORP., *et al.*,

Debtors.

Chapter 11

Case No. 08-10623-KG

Jointly Administered

Re: D1824

**ORDER APPROVING (A) BIDDING PROCEDURES FOR SALE OF
SUBSTANTIALLY ALL ASSETS OF DEBTORS, (B) BIDDING PROTECTIONS,
BREAK-UP FEE AND EXPENSE REIMBURSEMENT IN CONNECTION
THEREWITH, (C) FORM OF ASSET PURCHASE AGREEMENT, (D) FORM AND
MANNER OF NOTICES OF THE SALE AND ASSUMPTION AND
ASSIGNMENT OF EXECUTORY CONTRACTS AND LEASES,
AND (E) HEARING DATE ON FINAL APPROVAL OF SALE
[RE: DOCKET NO. 824]**

This matter having come before the Court on the motion, dated December 10, 2008 (the "Motion"), of the above-captioned debtors and debtors-in-possession for approval of, *inter alia*, (A) bidding procedures for sale of substantially all assets of VI Acquisition Corp. ("VIAC") and VICORP Restaurants, Inc. ("VICORP", and together with VIAC, collectively, the "Sellers" or the "Debtors"), other than certain excluded assets, to Fidelity National Special Opportunities, Inc., Newport Global Opportunities Fund LP and Blue Ribbon Holdings, LLC (collectively, the "Purchaser"), (B) bidding protections and expense reimbursement in connection therewith, (C) form of asset purchase agreement as amended through February 2, 2009 (the "APA"), (D) form and manner of notices of proposed assumption and assignment of certain executory contracts and leases and of the sale in substantially the form attached as Exhibits B and C, respectively, to the Motion (with dates changed to be consistent with this Order), and (E) hearing date on final approval of sale (the "Sale Approval Hearing"); and it appearing that notice of the

relief sought pursuant to the Motion was good and sufficient under these circumstances, and that no other or further notice need be given; and the Court having considered (i) the record in these cases, (ii) any objections to the Motion; (iii) the arguments of counsel at the hearing held on January 30, 2009 (the "Hearing"); and (iv) the agreement of counsel as reflected herein; and it appearing that the relief requested in the Motion is in the best interest of the Debtors, their estates, creditors and other parties in interest; and after due deliberation thereon and good cause appearing therefor, it is hereby

FOUND AND DETERMINED THAT:¹

A. The court has jurisdiction over the Motion pursuant to 28 U.S.C. §§ 157 and 1334, and this matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (N) and (O). Venue of these cases in this district is proper under 28 U.S.C. §§ 1408 and 1409.

B. The statutory predicates for the relief sought in the Motion are sections 105(a); 363(b), (f), (m), and (n); 365; 503(b) and 1146(c) of title 11, United States Code, 11 U.S.C. §§ 101-1330, as amended (the "Bankruptcy Code") and Fed. R. Bankr. P. 2002, 6004, 6006, and 9014.

C. Good and sufficient cause has been established for approving: (i) the form and manner of notice (as set forth herein) of the Sale², the proposed assumption and assignment of certain of Debtor's executory contracts and leases to Purchaser or the Successful Bidder (hereinafter defined) the auction described herein (the "Auction"); the scheduling of the Sale Approval Hearing and the procedures in connection therewith; (ii) the Auction; (iii) the bidding

¹ Findings of fact shall be construed as conclusions of law and conclusions of law shall be construed as findings of fact when appropriate. See Fed. R. Bankr. P. 7052.

² Capitalized terms not otherwise herein defined shall have the meanings ascribed to them in the Motion.

procedures provided herein (the "Bidding Procedures"); (iv) the Bidding Protections provided herein (the "Bidding Protections"); and (v) the form of APA.

D. The APA and its terms were negotiated by the Debtors and Purchaser in good faith and in an arms-length manner.

E. The Auction, the Bidding Procedures and the Bidding Protections are reasonable and appropriate.

F. The Debtors have demonstrated a sound business justification for authorizing payment of the Break-Up Fee and Expense Reimbursement under the circumstances, timing and procedures set forth herein and pursuant to the APA.

G. The agreement of the Debtors (as set forth in the APA) to pay the Break-Up Fee and Expense Reimbursement (which Expense Reimbursement shall not exceed \$750,000, but may include reasonable legal fees of outside counsel) under the circumstances, timing and procedures set forth therein and pursuant to this Order is (a) an actual and necessary cost of preserving the value of the Debtors' estate, within the meaning of 11 U.S.C. § 503(b), (b) of substantial benefit to the Debtors' estates, (c) reasonable and appropriate, in light of the size and nature of the proposed sale and the efforts that have been and will be expended by Purchaser notwithstanding that the proposed sale is subject to higher or better offers, and (d) necessary to ensure that Purchaser will continue to pursue the proposed sale. The Debtors' agreement to pay the Break-Up Fee and Expense Reimbursement was a material inducement for, and condition of, Purchaser's entry into the APA. Purchaser is unwilling to commit to hold open its offer to purchase the assets under the terms of the APA unless it is assured of payment of the Break-Up Fee and Expense Reimbursement. Thus, assurance to Purchaser of the Break-Up Fee and Expense Reimbursement has promoted more competitive bidding by inducing Purchaser's bid

that otherwise would not have been made, and without which bidding would have been limited. Because the Break-Up Fee and Expense Reimbursement induced Purchaser to research the value of the assets and submit a bid that will serve as a minimum or floor bid on which other bidders can rely, Purchaser has provided a benefit to the Debtors' estates by increasing the likelihood that the price at which the assets are sold will reflect their true worth. Absent authorization of the Break-Up Fee and Expense Reimbursement, the Debtors and their estates may lose the opportunity to obtain the highest and best available offer.

H. The entry of this Order is in the best interests of the Debtors and their estates, creditors, and interest holders.

I. Good and sufficient notice of the relief sought in the Sales Procedure Motion with respect to the approval of the Bidding Procedures and the Bidding Protections, including but not limited to approval of the payment of the Break-Up Fee and Expense Reimbursement under the terms and conditions of the APA, has been provided and no further notice is required.

J. In connection with offering a product or a service, the Debtors disclose to individuals a policy prohibiting the transfer of personally identifiable information about individuals to persons that are not affiliated with the Debtors, and such policy was in effect on the Petition Date.

NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

THE SALE APPROVAL HEARING

1. The Sale Approval Hearing shall be held before the Court on **March 13, 2009**, at 12:30 p.m. (Eastern Time) in the United States Bankruptcy Court, 824 Market Street, Wilmington, Delaware 19801, at which time the Court shall consider approval of the Sale to Purchaser or the Successful Bidder. Except as otherwise specified herein, objections to approval of the Sale shall be filed and served so as to be actually received by counsel to the Debtors and

the Notice Parties (defined below) no later than noon (Eastern Time) on **March 6, 2009** (the "Objection Deadline").

2. The failure of any objecting person or entity to file its objection to the Sale, or the Debtors' consummation and performance of the transactions contemplated thereby, on or before the Objection Deadline shall be a bar to the assertion, at the Sale Approval Hearing or thereafter, of any objection to the Sale, or the Debtors' consummation and performance of the transactions contemplated thereby, if authorized by the Court.

3. The Sale Approval Hearing may be adjourned from time to time without further notice to creditors or parties in interest other than by announcement of the adjournment in open court or on the Court's calendar on the date scheduled for the Sale Approval Hearing or any adjourned date, provided that nothing in this paragraph shall be determined to prejudice any rights or remedies of Purchaser contained in the APA.

**NOTICE OF SALE APPROVAL HEARING, AUCTION AND
ASSUMPTION OF EXECUTORY CONTRACT AND LEASES**

4. Notice of: (a) the Sale; (b) the Auction and Sale Approval Hearing; and (c) the proposed assumption and assignment of the Assigned Contracts to Purchaser under the APA, or otherwise to the Successful Bidder, shall be good and sufficient, and no other or further notice shall be required, if given as follows:

(a) **Notice of Sale Approval Hearing.** The Debtors shall have served the Motion (with exhibits) on all creditors, and all parties set forth below, on or before **December 12, 2008**. As soon as practicable but no later than **February 5, 2009**, the Debtors (or their agents) shall serve a notice in substantially the form attached to the Motion as Amended Exhibit C with changes to dates which are consistent with this Order (the "Sale Notice"), the APA and a copy of this Order by hand delivery, facsimile, overnight mail or first-class mail, postage prepaid, upon all creditors (provided that given the size of the APA and the fact that a prior version was served upon all creditors of the Debtors, the APA shall be served upon those parties that have either signed confidentiality agreements, have expressed an interest in the Sale, all federal, state, and local regulatory or taxing authorities, all non-debtor parties to executory contracts and leases with the Debtors, the Environmental Protection Agency, the United States

Attorney's Office for the District of Delaware and all other entities that have filed requests for notices pursuant to Bankruptcy Rule 2002) and (i) the United States Trustee (the "UST"); (ii) counsel for Purchaser; (iii) counsel for Wells Fargo Foothill, Inc. and counsel for Ableco Finance LLC (Wells Fargo Foothill, Inc. and Ableco Finance LLC are collectively referred to herein as "Secured Lender"); (iv) counsel for the official committee of unsecured creditors (the "Creditors' Committee") (hereinafter, the parties listed in (i) through (iv) are referred to as the "Notice Parties"); (v) all entities known to have an Interest in the Purchased Assets (as defined in the APA); (vi) all federal, state, and local regulatory or taxing authorities or recording offices which have a known interest in the relief requested by the Motion; (vii) all non-Debtor parties to executory contracts and leases with the Debtors; (viii) the Internal Revenue Service; (ix) the Environmental Protection Agency; (x) the United States Attorney's Office for the District of Delaware; and (xi) all other entities that have filed requests for notices pursuant to Bankruptcy Rule 2002.

(b) Assumption and Assignment Notice. No later than **February 6, 2009**, the Debtors shall serve on all non-Debtor parties to executory contracts and leases with the Debtors ("Leases and Contracts"), and counsel to the Notice Parties, by first-class mail, a notice in substantially the form attached to the Motion as Exhibit B provided that changes to the dates set forth therein will be made to be consistent with this Order (the "Assumption Notice"). The Debtors may amend the Assumption Notice to remove Leases and Contracts from time to time without further order of this Court until five days prior to the closing date of the Sale. Adequate assurance packages regarding the Leases and Contracts shall be filed and served on the non-debtor parties to the Leases and Contracts on or before **March 10, 2009**. Service of such adequate assurance packages shall be made by electronic mail, facsimile or overnight mail to the extent possible. Objections to the Cure Costs, the assumption and assignment of any of the Leases and Contracts and all other objections to the Sale (other than objections of the non-debtor parties to Leases and Contracts based exclusively on arguments regarding adequate assurance of future performance) shall be filed and served so as to be actually received by counsel to the Debtors and the Notice Parties by no later than Noon (Eastern Time) on **March 6, 2009**. Cure Costs objections must state with specificity what Cure Costs are required and whether and the precise nature of any other defaults that may exist under the Leases and Contracts (with appropriate documentation in support thereof). Objections based solely on arguments regarding adequate assurance of future performance shall be filed and served so as to be actually received by counsel to the Debtors and the Notice Parties by no later than 10 a.m.(Eastern Time) on **March 12, 2009**. Subject to 11 U.S.C. § 365(c)(1), 41 U.S.C. § 15 and other applicable federal law, if no objection is timely received as herein set forth, the Leases and Contracts designated as assumed contracts shall be deemed assumed and assigned to Purchaser or the Successful Bidder (the "Assigned Contracts") on the closing date of the Sale and the Cure Costs, as set forth in the Debtors' notice of assumption shall be controlling, notwithstanding anything to the contrary in any Assigned Contract or any other document, and the non-Debtor party to the Assigned Contract shall be forever barred from asserting any other claims (including, without limitation, additional Cure Costs claims and claims arising out of non-monetary defaults) against the Debtors, Purchaser, the Successful Bidder or the property of any of them, as to the Cure Costs with respect to such Lease or Contract.

BIDDING PROTECTION AND AUCTION PROCEDURES

5. All objections to the Sales Procedures Motion with regard to the Bidding Procedures that have not been withdrawn, waived or settled, and all reservations of rights therein, are overruled on the merits. Notwithstanding the foregoing, the Committee's right to raise objections to the Sale, including, objections which do not relate specifically to the Bidding Procedures but which may have been expressed in the Committee's Objection to the Sale Procedure Motion dated December 23, 2009, is preserved. The following Bidding Procedures are hereby approved and shall govern the Auction and all proceedings relating to the APA and any submission of bids for the Purchased Assets pursuant to this Order:

(a) Bidding Process Generally

The Debtors and the Debtors' representatives, after consultation with Secured Lender and the Creditors' Committee, shall (i) determine whether any person is a Qualified Bidder (as defined below), (ii) coordinate the efforts of Qualified Bidders in conducting their respective due diligence investigations regarding the Purchased Assets, (iii) receive bids from Qualified Bidders and (iv) negotiate any bid made to purchase the Purchased Assets (collectively, the "Bidding Process"); provided, however that the Secured Lender retains its right to credit bid its outstanding indebtedness pursuant to Section 363(k) of the Bankruptcy Code. Any person who wishes to participate in the Bidding Process must be a Qualified Bidder. Neither the Debtors nor their representatives shall be obligated to furnish any information of any kind whatsoever relating to the Purchased Assets to any person who is not a Qualified Bidder.

(b) Participation Requirements

To participate in the Bidding Process, each interested Person (a "Potential Bidder") must deliver the following (unless previously delivered) to the Debtors and their bankruptcy counsel:

- (i) an executed confidentiality agreement in form and substance satisfactory to the Debtors (the "Confidentiality Agreement"); and
- (ii) evidence satisfactory to the Debtors, in the Debtors' business judgment, after consultation with Secured Lender and the Creditors' Committee, that such Potential Bidder (i) is qualified to bid on, and intends to bid on, the Purchased Assets, (ii) has the financial capability to consummate the Sale and (iii) is able to

consummate the Sale if selected as the Successful Bidder (as defined below).

A "Qualified Bidder" is a Potential Bidder that satisfies the conditions set forth in subparagraphs (i) and (ii) above. Purchaser shall be designated a Qualified Bidder when it provides its Deposit in accordance with these terms and conditions and so long as its conditions to closing the transaction of financing and due diligence are removed in accordance with the provisions of the APA. Secured Lender shall be designated a Qualified Bidder and, upon submission of a Qualified Bid (as defined below), entitled to credit bid.

Within three days after the Debtors receipt of a signed Confidentiality Agreement from a Potential Bidder, the Debtors shall provide a Potential Bidder (with a copy to the Purchaser, the Secured Lender and the Committee (provided however that any information regarding the Initial Cash Amount provided to the Purchaser shall not disclose the identity of the Potential Bidder)) a written estimate of the Initial Bid Cash Amount (as defined below) calculated based on an estimated closing date of March 27, 2009. Within three (3) business days after the Debtors receipt of all of the materials required by subparagraphs (i) and (ii) above from a Potential Bidder, the Debtors shall determine in their business judgment and sole discretion, after consultation or good faith attempts at consultation with Secured Lender and the Creditors' Committee, and shall notify the Potential Bidder in writing (with a copy to Purchaser), whether the Potential Bidder is a Qualified Bidder. At the same time (or as soon as reasonably practicable thereafter) that the Debtors notify the Potential Bidder that it is a Qualified Bidder, the Debtors shall deliver (unless previously delivered) to the Qualified Bidder a copy of the APA.

(c) Obtaining Due Diligence Access

At the time that the Debtors determine that a Potential Bidder is a Qualified Bidder, the Debtors shall take such actions, on a reasonably prompt basis, and in a manner, as necessary to provide such Qualified Bidder with reasonable access to information that will provide it a fair opportunity to evaluate such information and to prepare a Qualified Bid.

Neither the Debtors nor any of their affiliates (or any of their respective representatives) are obligated to furnish any information relating to the Purchased Assets to any person except to Purchaser and other Qualified Bidders. The Debtors shall give Purchaser access to all due diligence information provided to any other Qualified Bidder, and such other Qualified Bidder shall have access to all due diligence information provided to Purchaser.

No conditions relating to the completion of due diligence shall be permitted to exist after the Bid Deadline (as defined below).

(d) Bid Requirements

The Debtors shall consider proposals to purchase the Purchased Assets from Qualified Bidders only in accordance with the terms below (if a proposal meets such terms it shall be deemed a "Qualified Bid"):

- (i) All initial Qualified Bids (including the Purchaser's Bid) must be binding, shall be for the purchase of all or substantially all of the Purchased Assets, shall be irrevocable, shall be served by the Bid Deadline (hereinafter defined) and shall remain open until the consummation of the Sale or until **March 31, 2009**, whichever occurs first.
- (ii) The initial purchase price offered by a Qualified Bidder must be in U.S. dollars and must be at least (i) the Purchase Price (as defined in the APA) plus (ii) the Break-Up Fee of \$1,650,000, plus (iii) the Expense Reimbursement of up to \$750,000 as provided for in the APA plus (iv) \$500,000 (the sum of (i) through (iv), the "Initial Bid Cash Amount") plus the assumption by the Qualified Bidder of the Assumed Liabilities (including the Letter of Credit Liabilities).
- (iii) The Qualified Bid must be accompanied by a certified or bank check or wire transfer payable to the Debtors or for the Debtors' benefit for \$1,000,000 (the "Deposit"), such funds representing a refundable Deposit to be held in escrow and applied toward the purchase price if the Qualified Bid is accepted and the sale of the Purchased Assets is approved by the Bankruptcy Court or immediately returned to the Qualified Bidder if the Qualified Bidder is not designated as the Successful Bidder or the Back-Up Bidder at the conclusion of the Auction and upon the occurrence of other circumstances to be set forth in the APA. No deposit shall be required to be delivered by the Secured Lender should the Secured Lender submit a Qualified Bid.
- (iv) The Qualified Bid must be accompanied by a form of purchase agreement, and ancillary documents, if any, that are not materially more burdensome or conditional than the terms of the APA, and that are marked to show any amendments or modifications from the APA and must:
 - (A) not be conditioned on the outcome of unperformed due diligence by the Qualified Bidder with respect to the Purchased Assets, but may be subject to the accuracy at the closing of specified representations and warranties or the satisfaction at the closing of specified conditions, none of which shall be more burdensome than those set forth in the APA, and not request or entitle the Qualified Bidder to any

- break-up fee, expense reimbursement or similar type of payment;
- (B) fully disclose the identity of each entity that will be bidding for the Purchased Assets or otherwise participating in connection with such bid, and the complete terms of any such participation; and
 - (C) contain a statement that the Qualified Bidder has received all necessary corporate or other organizational governance approvals, and the Qualified Bidder is prepared to enter into and consummate the Sale no later than ten (10) days after approval of the Sale by the Bankruptcy Court if selected as the Successful Bidder (as defined below).
 - (D) not be conditioned on obtaining financing by the Qualified Bidder on terms more conditioned or contingent than the Purchaser, so long as the APA between the Purchaser and Debtors has not been terminated.
- (v) The Qualified Bid must be accompanied by the name(s), telephone number(s) and email address(es) of a contact person or people who will be available to answer questions regarding the Qualified Bid, as well as the names, telephone numbers and email addresses of any financial or legal advisors retained by the Qualified Bidder, as applicable.
 - (vi) The Qualified Bid must be accompanied by a statement that the Qualified Bid is fully financed and a statement regarding the sources of financing. If financing is to be provided by external sources, the Qualified Bid must include the terms and present status of all financing arrangements, if any, and the forms of all commitment agreements anticipated to be obtained. Qualified Bids must be accompanied by the names, telephone numbers and email addresses of the contact persons at the institutions providing the financing and the Debtors shall inform the Qualified Bidder that such persons may be contacted by the Debtors or their representatives.
 - (vii) The Qualified Bid must be accompanied by an adequate assurance package (the "Adequate Assurance Package") which contains sufficient information to enable non-debtor parties to Leases and Contracts to determine whether the proposed Qualified Bidder has the wherewithal to perform its obligations under the Assigned Contracts (as defined in the APA). In the event that the Qualified Bidder or the Purchaser believe that any part of the Adequate Assurance Package contains information of a confidential or

proprietary nature, the Qualified Bidder or Purchaser, as the case may be, may require the non-debtor parties to the Assigned Contracts to execute a confidentiality agreement prior to providing such party with the confidential or proprietary information. Notwithstanding the foregoing, the Purchaser's Adequate Assurance Package shall be delivered to the Debtors, their bankruptcy counsel, counsel to the Creditors' Committee, counsel to Wells Fargo Foothill, Inc. and Ableco Finance LLC on or before **noon on March 6, 2009**.

- (viii) The Qualified Bid must be accompanied by such other information reasonably requested by the Debtors.
- (ix) The Qualified Bid must be substantially on the same or better terms as those set forth in the APA, together with all exhibits and schedules attached thereto.

Notwithstanding any provision contained herein, the APA executed by Purchaser shall constitute a Qualified Bid upon approval of this Procedures Order and submission of the Deposit, provided however that to remain a Qualified Bidder, the Purchaser's due diligence condition to closing shall expire on the Bid Deadline (defined below) (unless such condition is eliminated earlier by the Purchaser) and its financing condition to closing shall expire on the Bid Deadline (unless such condition is eliminated earlier by the Purchaser). Purchaser shall deliver the Deposit within two (2) Business Days of the date that this Order is entered. Such Deposit shall be held in escrow as provided in the APA. Moreover, under no circumstances shall Purchaser be required to have its offer, bid(s) or obligations under the APA remain open or otherwise binding except as expressly set forth in the APA.

(e) Bid Deadline

A Qualified Bidder that desires to make a Qualified Bid shall submit the Qualified Bid in writing and executed by an individual authorized to bind the Qualified Bidder. Each Qualified Bid must be served by courier, facsimile, email or as otherwise specified by the Debtors so that it is actually received no later than noon (Eastern Time) on **March 6, 2009** (the "Bid Deadline"), by the undersigned counsel to the Debtors, with copies of the bids to (i) counsel to the Creditors' Committee, (ii) counsel to Wells Fargo Foothill, Inc. (Paul Hastings Janofsky and Walker LLP, Park Avenue Tower, 75 East 55th Street, New York, New York 10022, Attention: Kristine Shryock, Esquire) and counsel to Ableco (Schulte Roth & Zabel LLP 919 Third Avenue, New York, NY 10022, Attention: Lawrence Gelber, Esquire) and (iii) counsel to Purchaser (Orrick Herrington & Sutcliffe LLP 666 Fifth Avenue, New York, NY, Attention: Stuart Goldfarb, Esquire).

(f) Auction

- (i) If Qualified Bids (other than the Qualified Bid by Purchaser) are received by the Bid Deadline, the Debtors shall conduct an auction

(the "Auction") with respect to the sale of the Purchased Assets. THE AUCTION SHALL TAKE PLACE AT 10:00 A.M. EASTERN TIME ON **March 9, 2009** at Reed Smith LLP, 1201 North Market Street, Wilmington, Delaware 19801 or such later time or other place as the Debtors shall notify all Qualified Bidders who have submitted Qualified Bids. All Qualified Bidders who wish to participate in the Auction shall be present through representatives who are authorized to make binding bids on behalf of the Qualified Bidder. Only Qualified Bidders who have submitted Qualified Bids will be eligible to participate at the Auction. Only the authorized representatives of each of the Qualified Bidders, Purchaser, the Debtors and their professionals, Secured Lender and its professionals, and the members of the Creditors' Committee and their professionals shall be permitted to attend the Auction. If the Debtors do not receive any Qualified Bids apart from the one from Purchaser, then the Debtors will not conduct the Auction; the Debtors will promptly report the same to the Bankruptcy Court and seek the approval of the Bankruptcy Court to effect the sale of the Purchased Assets to Purchaser pursuant to the APA;

- (ii) At the Auction, Qualified Bidders will be permitted to increase the amount of their Qualified Bids. The bidding at the Auction shall start at the purchase price stated in the highest and best Qualified Bid, as determined by the Debtors, in their sole discretion, after consultation with Secured Lender and the Creditors' Committee (the "Starting Bid"). If Purchaser's Qualified Bid is not the Starting Bid, then the Starting Bid shall be at least the aggregate of (a) the Purchase Price (as defined in the APA) plus (b) the Break-Up Fee of \$1,650,000 plus (c) the Expense Reimbursement of up to \$750,000 as set forth in the APA plus (d) \$500,000 together with the Assumed Liabilities (including, without limitation, the Letter of Credit Liabilities). The bidding will then continue in increments of at least \$500,000.
- (iii) At the Auction, the Debtor, in its reasonable discretion, but after consulting with the Secured Lender and the Creditors' Committee, may alter the auction procedures stated in this section (f).

Unless extended by the Debtors in their discretion, on or before noon. (Eastern Time) on **March 10, 2009**, after consultation with Secured Lender and the Creditors' Committee, the Debtors shall notify each Qualified Bidder and Purchaser which Qualified Bid they consider to be the highest and best Qualified Bid.

(g) Acceptance of Qualified Bids

Following the Auction: the Debtors, in consultation with Secured Lender and the Creditors' Committee, shall (i) review each bid on the basis of its financial and contractual terms and the factors relevant to the sale process and the best interests of the Debtors' estates, including, without limitation, the aggregate purchase price (including the willingness and ability to assume the Assumed Liabilities (including the Letter of Credit Liabilities)), those factors affecting the speed and certainty of consummating the sale of the Purchased Assets, antitrust and competition law considerations, and the impact of the payment of the Break-Up Fee and Expense Reimbursement to Purchaser, and (ii) determine in their business judgment, which Qualified Bid, if any, is the highest and best offer (the "Successful Bid" and such bidder being the "Successful Bidder") and which Qualified Bid, if any, is the second highest and best offer (the "Backup Bid" and such bidder being the "Backup Bidder"). In the event that there are no Qualified Bids other than Purchaser's, the bid of Purchaser shall be the Successful Bid.

The Debtors will be deemed to have accepted a Qualified Bid only when such Qualified Bid has been approved by the Court at the Sale Approval Hearing. Upon failure to consummate the Sale because of a breach or failure on the part of the Successful Bidder, the Debtors may proceed with a sale to the Backup Bidder without further order of the Court.

After consultation with Secured Lender and the Creditors' Committee, the Debtors, in their sole discretion, may reject, at any time before entry of the Sale Approval Order (as defined below), any bid (other than Purchaser's Qualified Bid) that is (i) inadequate or insufficient, (ii) not in conformity with the requirements of the Bankruptcy Code, these Bidding Procedures or the terms and conditions of the Sale or (iii) contrary to the best interests of the Debtors and their estates.

(h) Sale Approval Hearing

The Debtors shall present the results of the Auction and the agreement in connection with the Successful Bid to the Bankruptcy Court at a hearing (the "Sale Approval Hearing"), at which the Debtors will request the Bankruptcy Court to enter an order (i) confirming the results of the Auction, including that the Auction complied with these Bidding Procedures and the order approving these Bidding Procedures and (ii) approving the selection of the Successful Bidder and the Successful Bid as the highest and best offer for the Purchased Assets and the Backup Bidder and the Backup Bid as the second highest and best offer for the Purchased Assets (the "Sale Approval Order").

The Debtors will be obligated to consummate the sale of the Purchased Assets only when the Bankruptcy Court approves the sale of the Purchased Assets and the Successful Bid. The closing of the sale of the Purchased Assets to the Successful Bidder (if such Successful Bidder is not the Purchaser) shall occur on or prior to **March 31, 2009** (unless such date is extended by the Successful Bidder and the Debtors) provided that if the Successful Bidder is the Purchaser, the closing of the sale of the Purchased Assets shall occur on or prior to **March 30, 2009** (unless such date is extended by the Purchaser and the Debtors).

(i) Payment of the Break-Up Fee and Expense Reimbursement

If Purchaser is not designated as the Successful Bidder at the conclusion of the Auction, the Debtors are hereby authorized and directed, without need for further order of this Court, to pay Purchaser in cash from the proceeds of a sale regardless of the form of consideration received by the Debtors, a break-up fee in the amount of equal to 3% of the Cash Portion of the Purchase Price (\$1,650,000, based on the maximum cash portion of Purchaser's bid of \$55,000,000) plus the Expense Reimbursement not to exceed \$750,000, to the extent payable pursuant to the APA. If the APA is terminated for any reason and if payment of the Break-Up Fee and Expense Reimbursement is triggered under the terms of the APA, such payments shall be made in accordance with the terms of the APA. For the avoidance of doubt, unless Purchaser otherwise elects in its sole discretion, the Break-Up Fee and Expense Reimbursement shall be payable to the Purchaser entirely in cash irrespective of the form of consideration paid by the Successful Bidder (including by credit bid or otherwise). The Break-Up Fee and Expense Reimbursement shall be in addition to the return of Purchaser's Deposit.

**PROCEDURES FOR ASSUMPTION AND ASSIGNMENT OF
EXECUTORY CONTRACTS AND UNEXPIRED LEASES**

6. A hearing on the assumption and assignment of the proposed Assigned Contracts shall be held at the Sale Approval Hearing. Notice to the non-Debtor parties to the Assigned Contracts shall be as set forth in decretal paragraph 4(b) herein. Objections based solely on arguments regarding adequate assurance of future performance shall be filed and served so as to be actually received by counsel to the Debtors and the Notice Parties no later than 10:00 a.m. (Eastern time) on **March 12, 2009**. Objections to the Cure Costs, the assumption and assignment of any Leases and Contracts which are not based on the adequate assurance of future performance and any other objections to the Sale shall be filed and served so as to be actually received by counsel to the Debtors and the Notice Parties no later than Noon Eastern Time on **March 6, 2009**.

7. Subject to 11 U.S.C. § 365(c)(1), 41 U.S.C. § 15 and other applicable federal law, if a non-Debtor party to an Assigned Contract does not timely object, the Cure Costs set forth in the Assumption Notice shall be controlling notwithstanding anything to the contrary in any Assigned Contract, and the non-debtor party to the Assigned Contract shall be barred and

estopped from asserting any other claim arising prior to the assignment against the Debtors or Purchaser (or the Successful Bidder) as to the Assigned Contract other than a claim pertaining to the adequate assurance of future performance by the assignee. If an objection to the assumption and assignment is made, a hearing on such objection shall be held at the Sale Approval Hearing. If an objection by the non-debtor contracting party is made only with respect to the Cure Costs, a hearing to fix the Cure Costs will be set for the first hearing date available from the Court after the Sale Approval Hearing and materially agreeable to the parties after the Sale Approval Hearing; provided, however, that the Debtors and Purchaser (or the Successful Bidder) reserve their right to reject an executory contract until such time as the Cure Costs are agreed to by the parties or fixed by the Bankruptcy Court.

8. The effective date of any assumption and assignment of any Assigned Contract shall be the date on which the Sale closes. Accordingly, any Cure Costs (all of which are payable by Purchaser from the Cash Portion of the Purchase Price (as defined in the APA) or the Successful Bidder, not the Debtors) to be paid under any Assigned Contract will also be paid as soon as practicable following the closing of the Sale or as soon thereafter as the Cure Costs are fixed by the Court or agreed upon by the parties,

9. This Order does not affect any right of recoupment or setoff or any defenses of the United States or any agency thereof arising under applicable federal law.

10. Pursuant to 11 U.S.C. sec. 363(b)(1) and 332(a), the United States Trustee is directed to appoint, as soon as is practicable and not later than 5 days before the commencement of the Sale Hearing, one disinterested person (other than the United States Trustee) to serve as the consumer privacy ombudsman in this case. The Debtors shall give timely notice of the Sale

Hearing to the consumer privacy ombudsman. The reasonable fees of the consumer privacy ombudsman shall be paid by the Debtors.

GENERAL

11. The Debtors are hereby authorized and empowered to take such steps, expend such sums of money, and do such other things as may be necessary to implement and effect the terms and requirements of this Order.

12. The Court shall retain jurisdiction over any matter or dispute arising from or relating to the implementation of this Order.

13. The terms of this Order shall survive any termination of the APA.

14. Notwithstanding Bankruptcy Rules 6004(g) and 6006(d), this Order shall not be stayed for ten (10) days after the entry hereof and shall be effective and enforceable immediately upon signature hereof.

Dated: Wilmington, Delaware
February 4, 2009



KEVIN GROSS
UNITED STATES BANKRUPTCY JUDGE