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**UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEW JERSEY**

In re:

Big M, Inc.,<sup>1</sup>

Debtor.

Chapter 11

Case No. 13-10233 (DHS)

**DEBTOR'S MOTION PURSUANT TO 11 U.S.C. §§ 105(a), 363 AND 365, AND BANKRUPTCY RULES 2002, 6004 and 6006 FOR (I) ENTRY OF AN ORDER (A) APPROVING BIDDING PROCEDURES AND NOTICE OF THE AUCTION RELATING THERETO, (B) SCHEDULING HEARING TO CONSIDER SALE OF SUBSTANTIALLY ALL OF THE DEBTOR'S ASSETS; (C) APPROVING BID PROTECTIONS AND EXPENSE REIMBURSEMENT; AND (II) ENTRY OF AN ORDER (A) AUTHORIZING AND APPROVING THE SALE OF THE DEBTOR'S ASSETS FREE AND CLEAR OF LIENS, CLAIMS, ENCUMBRANCES, AND INTERESTS, (B) AUTHORIZING AND APPROVING THE ASSET PURCHASE AGREEMENT WITH RESPECT THERETO, (C) AUTHORIZING AND APPROVING THE ASSUMPTION AND ASSIGNMENT OF CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES AS NECESSARY IN CONNECTION WITH THE SALE, AND (D) GRANTING RELATED RELIEF**

Big M, Inc., the above-captioned debtor and debtor in possession (the "**Debtor**"), by and through its undersigned counsel, hereby files this motion (the "**Motion**") for (I) entry of an order (the "**Bidding Procedures Order**"), pursuant to 11 U.S.C. §§ 105(a) and 363(b), (a) authorizing and approving certain bidding procedures (the "**Bidding Procedures**"), including a

<sup>1</sup> The last four digits of the Debtor's federal tax identification number are 8631.

break-up fee and an expense reimbursement for the designated “stalking horse” (the “**Stalking Horse Protections**”), (b) approving the form and manner of notice of the auction (the “**Auction**”), and (c) scheduling a hearing (the “**Sale Approval Hearing**”) to consider the sale of substantially all of the Debtor’s assets; and (II) entry of an order (the “**Sale Order**”) pursuant to 11 U.S.C. §§ 105(a), 363(b) and 365(a) (a) authorizing and approving the sale of the Debtor’s assets free and clear of liens, claims, encumbrances, and interests, (b) authorizing and approving the Stalking Horse Agreement (as defined below) or such other asset purchase agreement(s) as may be approved by the Court with respect thereto, (c) authorizing and approving the assumption and assignment of certain executory contracts and unexpired leases as necessary in connection with the sale, and (d) granting related relief. In support of the Motion, the Debtor respectfully states as follows:

### **JURISDICTION**

1. This Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334. Venue is proper in this District pursuant to 28 U.S.C. §§ 1408 and 1409. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b).

2. The statutory and legal predicates for the relief sought herein are 11 U.S.C. §§ 105(a), 363 and 365 of the Bankruptcy Code.

3. This Motion also conforms to the November 25, 2009 *General Order Adopting Guidelines for Sale of Estate Property* (the “**Guidelines**”).

### **GENERAL BACKGROUND**

4. On January 6, 2013 (the “**Petition Date**”), the Debtor filed a voluntary petition for relief under chapter 11 of Title 11 of the United States Bankruptcy Code (the “**Bankruptcy Code**”) in the United States Bankruptcy Court for the District of New Jersey (the “**Court**”).

5. The Debtor continues to manage its businesses and properties as a debtor

in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

6. On January 16, 2013, the Office of the United States Trustee appointed the Official Committee of Unsecured Creditors (the “Committee”). No trustee or examiner has been appointed in this case.

7. Big M was established after World War II by brothers Leon, Max and Bernard Mandelbaum upon their return from the war. Their first store was opened in Brooklyn, New York, but not under the *Mandee* or *Annie sez* name. The first *Mandee* store was opened in Kearny, New Jersey and still operates to this day. The *Mandee* stores developed through the years by adapting to the needs of their customers and to the demographics of the communities they served, ultimately adopting their current business personality as a junior specialty retailer. During the early 1970s, the Debtor opened its first *Annie sez* store. Over time, the *Annie sez* stores evolved into an off-price apparel and specialty retailer. Today, more than sixty years after it was founded, Big M remains a private family-owned business, operating primarily through the two exclusive brands that it developed, *Mandee*, *Annie sez*, as well as *Afaze*.

8. As of the Petition Date, Big M operated 129 store locations in eight states, consisting of 84 *Mandee* stores, 35 *Annie sez* stores and 10 *Afaze* stores. Also, as of the Petition Date, Big M employed approximately 1,200 employees, consisting of 490 full-time employees, 710 part-time employees and an additional 600 employees hired periodically during the busiest portions of the year. Of that total, approximately 250 of the Debtor’s employees are members of Local 108, Retail, Wholesale and Department Store Union UFCW (“UFCW”). The Debtor is a party to two collective bargaining agreements with UFCW covering certain store employees in New York and New Jersey.

9. A more detailed description of the Debtor, its businesses, and the facts and circumstances that led the Debtor to initiate this Chapter 11 case is included in the Declaration of Glenn R. Langberg in Support of Chapter 11 Petition and First Day Motions, filed on the Petition Date [Docket No. 3].

## **RELEVANT BACKGROUND**

### **A. Sale Preparation**

10. Prior to the Petition Date, the Debtor engaged PricewaterhouseCoopers (“**PwC**”) as restructuring advisors to assist the Debtor in exploring its alternatives including a potential sale of its assets.

11. Since being retained, PwC conducted extensive due diligence on the Debtor as well as meetings with the Debtor’s senior management. With that information, PwC and the Debtor identified parties interested in purchasing the assets and moved forward with a full marketing process. PwC contacted more than 213 potential acquirors, of whom approximately 182 were strategic or financial buyers, five were liquidators/hybrids and one was interested only in the owned real estate. Of those 213 parties, approximately 40 expressed initial interest and entered into non-disclosure agreements (“**NDA’s**”), permitting initial due diligence.

### **B. The Asset Purchase Agreement**

12. Subsequent to the Petition Date, the Debtor and YM Inc. (“**YM**” or the “**Stalking Horse Bidder**”) engaged in discussions regarding a potential transaction involving the Debtor’s assets. Those discussions resulted in the issuance of YM’s letter of intent (“**LOI**”) to purchase from the Debtor substantially all of the Debtors’ assets, including substantially all of the Debtor’s inventory, equipment and intellectual property, and to take assignment of certain unexpired leases and leasehold interests to the Stalking Horse Bidder.

13. Following the execution of the LOI on or about March 22, 2013, the Debtor and YM continued discussions regarding a potential sale and, after extensive negotiation, those discussions have culminated in an agreement. YM, as buyer, and Debtor, as seller, have entered into an Asset Purchase Agreement dated as of April 5, 2012 (the “**Stalking Horse Agreement**”).<sup>2</sup> Pursuant to the Stalking Horse Agreement, the Debtor proposes to sell,

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<sup>2</sup> The Stalking Horse Agreement shall be substantially in the form annexed to the Bidding Procedures Order as **Exhibit “D.”** All capitalized terms used but not defined herein shall have the meanings ascribed to them in the Stalking Horse Agreement.

assign and transfer (the “**Sale**”) the assets set forth and identified in the Stalking Horse Agreement (the “**Purchased Assets**”, and together with the other rights as set forth in the Stalking Horse Agreement, the “**Assets**”) free and clear of liens, claims, charges, encumbrances, and interests, with such encumbrances to attach to the proceeds of the Sale.

14. The Debtor has determined that it is in the best interest of its estate to proceed with the Stalking Horse Bid pursuant to the Stalking Horse Agreement based on the cash consideration (and assumption of certain liabilities) to be received by the Debtor for the Debtor’s inventory, equipment, and certain leased locations. In an effort to identify the highest or best value for the Assets, the Debtor proposes to subject the transaction embodied in the Stalking Horse Agreement to higher and better offers pursuant to the Bidding Procedures described below.

15. Pursuant to the Stalking Horse Agreement, the Debtor proposes to sell, assign and transfer, convey and deliver the Assets free and clear of all liens, claims, charges, encumbrances or interests (collectively, the “**Interests**”), subject to higher or better offers. The Sale provides that no bulk sales law or similar laws of any state or other jurisdiction will apply to the transactions contemplated by the Stalking Horse Agreement. To the extent that such laws apply, the Debtor seeks a waiver therefrom. The salient points of the Stalking Horse Agreement are as follows:<sup>2</sup>

<b><i>Consideration and Purchase Price:</i></b>	\$5,000,000 for Purchased Assets other than Inventory, In-Transit Inventory and Pre-Paid Inventory, plus Maximum aggregate sum of \$17,500,000 for Inventory Cash Portion and Pre-Paid Inventory; plus An amount equal to Security Deposits; plus Assumption of Assumed Liabilities
<b><i>Purchased Assets:</i></b>	Purchased Assets include: Assumed Real Property Leases and Assumed Contracts; CBAs; Intellectual Property; FF&E; Inventory;

<sup>2</sup> The following description of the principal terms of the Stalking Horse Agreement and all of the exhibits, schedules and attachments thereto is intended solely to give the Court and interested parties an overview of the significant terms of the Stalking Horse Agreement. The Court and interested parties are urged to consult the Stalking Horse Agreement for the complete and detailed terms thereof.

	In-Transit Inventory, Pre-Paid Inventory; Intellectual Property
<b><i>Closing Date:</i></b>	No later than May 20, 2013 at Noon
<b><i>Stalking Horse Protections:</i></b>	Break-Up Fee equal to three (3%) percent of the cash portion of the Purchase Price and Expense Reimbursement of up to \$300,000

**SUMMARY OF RELIEF REQUESTED**

16. The Debtor seeks entry of a Bidding Procedures Order substantially in the form attached hereto as Exhibit 1:

- (i) Approving Bidding Procedures for the solicitation and consideration of competing offers for the Sale of the Assets including (i) procedures for submitting bids for any or all of the Assets, and (ii) conducting an auction (the “Auction”) with respect to any Assets on which the Debtors receive more than one bid;
- (ii) Authorizing the Stalking Horse Protections (as defined below);
- (iii) Scheduling a hearing to approve any Sale of the Assets no later than May 15, 2013, subject to the Court’s availability, with any objections to the Sale to be filed on or before 4:00 p.m. (prevailing Eastern time) on May 10, 2013;
- (iv) Approving procedures, as set forth below, for the assumption, assignment and/or transfer of certain executory contracts and unexpired leases (collectively, the “**Assumed and Assigned Contracts**” ) to any purchaser of the Assets and /or to resolve any objections thereto; and
- (v) Approving (i) the form of notice of the Bidding Procedures, Auction and Sale Approval Hearing (the “**Notice of Auction**”) substantially in the form attached to the Bidding Procedures Order as Exhibit B, to be served on the Notice Parties (as defined below); and (ii) the notice of the Debtor’s intent to assume, assign and/or transfer the Assumed and Assigned Contracts, and the corresponding cure amounts required to be paid in connection with such assumption, assignment and/or transfer (the “**Cure Notice**”), substantially in the form attached as Exhibit C to the Bidding Procedures Order.

17. At the Sale Approval Hearing, the Debtor will seek approval of the Stalking Horse Agreement or such other asset purchase agreement(s) of the successful bidder at Auction, and the assumption and assignment of certain executory contracts and unexpired leases as necessary in connection with the sale.

18. The Debtor expressly reserves the right to modify the relief requested in this Motion, including the proposed Bidding Procedures, prior to or at the applicable hearing.

**Proposed Bidding Procedures for Purchased Assets**

19. The Debtor desires to receive the greatest value for its Assets. The Debtor believes the proposed Bidding Procedures, which are annexed as Exhibit A to the proposed Bidding Procedures Order, will maximize the realizable value of the Assets for the benefit of the Debtor's estate, creditors and other parties-in-interest. Although the Debtor believes the terms of the Stalking Horse Agreement are fair and reasonable and reflect the highest and best value for the Assets as of the date of this Motion, it nevertheless desires to place the Stalking Horse Agreement to the test of the broader public marketplace in the hope that higher and better offers are generated for the Assets. Accordingly, the Bidding Procedures (as set forth in pertinent part below) were developed consistent with the Debtor's need to expedite the sale process but with the objective of promoting active bidding that will result in the highest and best offer the marketplace can sustain for the Assets while affording appropriate protections to the Stalking Horse Bidder. Moreover, the Bidding Procedures reflect the Debtor's objective of conducting an Auction in a controlled, but fair and open, fashion that promotes interest in the Assets by financially-capable, motivated bidders who are likely to close a transaction, while simultaneously discouraging non-serious offers and offers from persons the Debtor does not believe are sufficiently capable or likely to actually consummate a transaction.

20. As described below and more fully in the Bidding Procedures, the Debtor proposes a two-phase auction process whereby bids are solicited from Qualifying Bidders (as defined below) and (assuming the Debtor receives at least one Qualified Bid (as defined below) in addition to the Stalking Horse Agreement), an Auction occurs. Only Qualified Bids will be eligible to participate in an Auction. The following paragraphs in this section summarize key provisions of the Bidding Procedures, but are qualified in their entirety by reference to the actual Bidding Procedures attached to the Bidding Procedures Order as **Exhibit "A"**:

**(a) Assets to Be Sold**

21. The assets to be offered for sale consist of those identified in the Stalking Horse Agreement and defined as the “**Purchased Assets**” and are listed in Section 2.1(b) of the Stalking Horse Agreement.

**(b) Provisions Governing Qualification of Bidders**

22. As a prerequisite to becoming a Qualifying Bidder (and thus being able to conduct due diligence), a potential bidder must:

- (i) deliver an executed confidentiality agreement in form and substance acceptable to the Debtor no later than May 12, 2013 at 5:00 p.m. (ET); and
- (ii) provide such financial and other information (the “**Financial Information**”) as the Debtor shall reasonably deem necessary to provide sufficient support for the ability of the potential bidder to consummate a transaction to purchase the Assets, if such potential bidder is selected as the Successful Bidder.
- (iii) The Stalking Horse Bidder is deemed a Qualified Bidder and the Stalking Horse Agreement constitutes a Qualified Bid for all purposes.

**(c) Access to Due Diligence Materials**

23. The Debtor will afford Qualified Bidders the opportunity to conduct reasonable due diligence, subject to parameters that the Debtor, in consultation with its advisors, determine are business-sensitive or otherwise not appropriate for disclosure to such Qualified Bidder in order to avoid disclosure of competitively sensitive or proprietary information that could be damaging to the value of the Debtor’s estate if disclosed to a potential bidder in actual or potential competition with the Debtor or strategically situated with respect to the Debtor as an actual or potential supplier or customer. The Debtor will continue to maintain its electronic data room and make it available to any Qualified Bidder that has executed a confidentiality agreement. The due diligence period shall extend thorough and including **May 12, 2013 at 5:00 p.m. (ET)**. The Debtor and its representatives and advisors shall not be obligated to furnish any due diligence information after the Bid Deadline.

**(d) Provisions Governing Qualified Bid Requirements**

24. A Qualifying Bidder that desires to make a bid shall deliver a written or electronic copy of its Bid so that it is served upon and actually received by the Debtor, counsel to the Debtor, PricewaterhouseCoopers LLP, the DIP Lender, and counsel to the Creditors' Committee, on or before 5:00 p.m., prevailing Eastern Time, on May 13, 2013 (the "**Bid Deadline**"). Bids must be sent to: (a) the Debtor, Big M, Inc., Attn: Glenn Langberg, 12 Vreeland Avenue, Totowa, New Jersey 07512; (b) counsel to the Debtor, Lowenstein Sandler LLP, Attn: Kenneth A. Rosen, 65 Livingston Avenue, Roseland, NJ 07068; (c) PricewaterhouseCoopers LLP, Attn: Perry Mandarino and Steven J. Fleming, 300 Madison Avenue, New York, NY 10017; (d) counsel to the DIP Lender, Choate, Hall & Stewart LLP, Attn: John F. Ventola, Esq., Two International Place, Boston, MA 02110; (e) counsel to the Creditors' Committee, Cooley LLP, Attn: Jay Indyke, 1114 Avenue of the Americas New York, NY 10036 (collectively, the "**Notice Parties**") so as to be received no later than the Bid Deadline.

25. An entity that desires to submit a Bid to purchase the Assets may do so in writing as follows:

- (i) All Bids must state that the Qualified Bidder offers to purchase all or substantially all of the Purchased Assets, or a specified portion of the Purchased Assets, upon the terms and conditions substantially as set forth in the Stalking Horse Agreement or pursuant to an alternative structure that the Debtor determines, in consultation with the DIP Lender and the Creditors' Committee, is no less favorable than the terms and conditions of the Stalking Horse Agreement, and provided further that the aggregate consideration offered by any bid or combination of bids for all or substantially all of the Debtor's assets satisfies the Initial Overbid requirements set forth below;
- (ii) All Bids must be on terms that, in the Debtor's business judgment, are the same or better than the terms of the Stalking Horse Agreement.
- (iii) All Bids must include a clean and duly executed asset

purchase agreement, blacklined to show any changes from the Stalking Horse Agreement (“**Modified Purchase Agreement**”), clearly setting forth any conditions for closing and stating that the Bid is irrevocable as set forth below;

- (iv) all Bids must propose a purchase price equal to or greater than the aggregate of the sum of (i) the actual cash value of the Purchase Price<sup>3</sup> (maximum of \$22,500,000); plus (ii) the dollar value of the Stalking Horse Protections (maximum of Break-up fee of \$675,000 plus Expense Reimbursement up to \$300,000) in cash, plus (iii) \$100,000 in cash (the “**Initial Overbid**”);
- (v) all Bids must include a minimum cash Deposit of \$1,000,000 plus \$975,000 (maximum of Break-up Fee and Expense Reimbursement);
- (vi) the Bid must identify with particularity each and every unexpired lease or executory contract (each, an “**Assumed And Assigned Contract**”) sought to be assumed and assigned, the assumption and assignment of which is a condition precedent to closing;
- (vii) a Bid must set forth in the applicable asset purchase agreement the bidder’s proposal with respect to payment of Cure Amounts;
- (viii) a Bid must clearly set forth the purchase price to be paid, and must not request or entitle such Qualified Bidder to any expense reimbursement, breakup fee, termination or other similar type of fee or payment except as to the Stalking Horse Bidder;
- (ix) a Bid shall not be contingent upon any due diligence investigation, any permitting requirements (e.g. building permits, licenses, inspections, zoning, approvals, or certificates of any kind), any material adverse change, the receipt of financing, or approval by any board of directors, shareholders, or other entity;
- (x) a Bid must include evidence, including financial statements (or such other form of financial disclosure and credit-quality support or enhancement reasonably acceptable to the Debtor, upon consultation with the DIP Lender and the

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<sup>3</sup> Actual Purchase Price shall be calculated by the Debtor in accordance with the formula set forth in Section 3.1 of the Stalking Horse Agreement.

Creditors' Committee) sufficient to establish the financial wherewithal of the interested party to complete the contemplated transactions and, to the extent the interested party will rely upon the financial wherewithal of an affiliate, franchisor, bid partner, or other sponsor (each, a "Sponsor"), evidence sufficient to establish the financial wherewithal and intent of the Sponsor to provide appropriate financial support;

- (xi) a Bid must contain such financial and/or other information that will allow the Debtor, following consultation with the DIP Lender and the Creditors' Committee, to make a reasonable determination as to the bidder's financial and other capabilities to consummate the transactions contemplated by the Stalking Horse Agreement, including such financial and other information setting forth adequate assurance of future performance under Section 365 of the Bankruptcy Code in a form requested by the Debtor to allow the Debtor to serve on counterparties to any contracts or leases being assigned in connection with the proposed sale that have requested, in writing, such information;
- (xii) a Bid must fully disclose the identity of the Qualified Bidder's organization, including confirmation that the competing Bid is made as principal for the bidder's account and, if not, the basis upon which the bidder is acting and the identities of all other participants (if any);
- (xiii) a Bid must include evidence of authorization and approval from the bidder's board of directors (or comparable governing body) with respect to the submission, execution, delivery, and closing of such bidder's Modified Purchase Agreement;
- (xiv) a Bid must state that the bidder is willing and able to consummate and fund the proposed transaction by no later than May 20, 2013;
- (xv) a Bid must include a cashier's check or be accompanied by a wire transfer payable or delivered to the Debtor, its counsel or other agreed upon escrow agent, in an amount equal to \$1,000,000 plus \$975,000 (the "Good Faith Deposit"); a Bid must disclose any agreements or understandings between the bidder and any third party with respect to the Purchased Assets or with respect to any possible transaction involving the Debtor; and

- (xvi) a Bid must clearly state that it is irrevocable through the conclusion of the Sale Hearing, provided that if such bid is accepted as the Successful Bid or the Backup Bid (as defined below), such Bid shall continue to remain irrevocable, subject to the terms and conditions of the Bidding Procedures, throughout the closing of the Sale.

26. Prior to the Auction, the Debtor shall determine in its reasonable judgment and in consultation with the DIP Lender and the Creditors' Committee, which of the Qualified Bids constitutes the highest or best value to the Debtor.

**(e) The Auction and Auction Rules**

27. In the event that the Debtor timely receives one or more Qualified Bids other than the Stalking Horse Agreement, the Debtor shall conduct an Auction on Wednesday, May 14, 2013 at 10:00 a.m. prevailing Eastern Time (the "**Auction Date**") at the offices of Lowenstein Sandler LLP, 65 Livingston Avenue, Roseland, New Jersey 07068, and shall be conducted according to the following procedures:

*a. The Debtor Shall Conduct the Auction*

28. The Debtor and its professionals shall direct and preside over the Auction. At the start of the Auction, the Debtor shall describe the terms of the highest and best Qualified Bid received prior to the Bid Deadline (the "**Auction Baseline Bid**"). Each Qualified Bidder participating in the Auction must again confirm that it has not engaged in any collusion with respect to the bidding or sale of the Assets.

*b. Terms of Overbids*

29. An "**Overbid**" is any bid made at the Auction subsequent to the Debtor's announcement of the Auction Baseline Bid. To submit an Overbid for purposes of this Auction, a Bidder must comply with the following conditions:

*c. Minimum Overbid Increment*

30. An Overbid after the Auction Baseline Bid shall be made in an initial minimum increment of \$100,000 and minimum Overbid increments of not less than \$100,000. Additional consideration in excess of the amount set forth in the Auction Baseline Bid may

include cash and/or noncash consideration, and, in the case of a Bid by the Stalking Horse Bidder, a credit bid of the Stalking Horse Protections.

*d. Remaining Terms Are the Same as for Qualified Bids*

31. An Overbid must comply with the conditions for a Qualified Bid set forth above, provided, however, that the Bid Deadline shall not apply. Any Overbid must remain open and binding on the Bidder until and unless the Debtor accepts a higher Overbid.

32. To the extent not previously provided (which shall be determined by the Debtor), a Bidder submitting an Overbid (other than the Stalking Horse Bidder) must submit, as part of its Overbid, written evidence (in the form of financial disclosure or credit-quality support information or enhancement reasonably acceptable to the Debtor) demonstrating such Bidder's ability to close all proposed transactions contemplated in and proposed by such Overbid.

*e. Announcing Overbids*

33. The Debtor shall announce at the Auction the material terms of each Overbid, the basis for calculating the total consideration offered in each such Overbid, and the resulting benefit to the Debtor's estate based on, *inter alia*, the Bid Assessment Criteria.

*f. Consideration of Overbids*

34. The Debtor reserves the right, in its reasonable business judgment to make one or more continuances of the Auction over the course of the day to, among other things: facilitate discussions between the Debtor and individual bidders; allow individual bidders to consider how they wish to proceed; and give bidders the opportunity to provide the Debtor with such additional evidence as the Debtor in its reasonable business judgment may require that the bidder has sufficient internal resources, or has received sufficient non-contingent debt and/or equity funding commitments, to consummate the proposed competing transaction represented by the Overbid at the prevailing Overbid amount.

35. At the conclusion of the Auction, and subject to Court approval following

the Auction, the successful Bid or Bids shall be selected and announced by the Debtor, in consultation with the DIP Lender and the Creditors' Committee (the "**Successful Bid or Bids**"), and the backup Bid or Bids shall be selected and announced by the Debtor, in consultation with the DIP Lender and the Creditors' Committee (the "**Backup Bid or Bids**").

36. Within 24 hours of completion of the Auction, the entity or entities that made the Successful Bid or Bids (the "**Successful Bidder**") and the entity or entities that made the Backup Bid or Bids shall complete and sign all agreements, contracts, instruments and other documents evidencing and containing the terms and conditions upon which such Successful Bid or Bids and Backup Bid or Bids were made.

37. If no Qualified Bids are received for the Purchased Assets, the Stalking Horse Bidder shall be deemed the Successful Bidder with respect to the Purchased Assets, and the Debtor shall seek Court approval of the Stalking Horse Agreement without offering the Purchased Assets for sale at the Auction.

38. The Auction may be adjourned or canceled as the Debtor, after consultation with the DIP Lender and the Creditors' Committee, deems appropriate. Reasonable notice of such adjournment and the time and place for the resumption of the Auction or cancellation shall be given to all participants and to the DIP Lender and the Creditors' Committee

39. The Debtor submits that implementation of the Bidding Procedures on the time table set forth herein is critical to maximize the value of the assets of the Debtor's estate. Indeed, although somewhat aggressive, the Debtor believes that the time table is necessary in order to maximize the value of the Debtor's Assets and to minimize the administrative expenses incurred by the chapter 11 estate.

40. The Debtor submits that the Bidding Procedures will not chill the bidding for the Assets. Quite the contrary, approval of the Bidding Procedures is in the best interests of the Debtor, its estate and its stakeholders. Failure to approve the Bidding Procedures may jeopardize the sale to the Stalking Horse Bidder and the opportunity created by the Stalking

Horse Bidder's offer to the detriment of the Debtor's creditors and stakeholders.

### **BASIS FOR RELIEF**

#### **A. The Bidding Procedures, Including the Bidding Protections, Should be Approved**

41. To compensate the Stalking Horse Bidder for serving as a "stalking horse" whose bid will be subject to higher or better offers, the Debtor seeks authority to provide the Stalking Horse Bidder with the Stalking Horse Protections (including the Expense Reimbursement and the Break-Up Fee, each as defined and payable in accordance with Article VII of the Stalking Horse Agreement) in the event that it is not the successful bidder. The Debtor believes (i) that the Stalking Horse Protections are reasonable, given the benefits to the estate of having a definitive agreement and the risk to the Stalking Horse Bidder that a third-party offer ultimately may be accepted, and (ii) that the Stalking Horse Protections are necessary to preserve and enhance the value of the Debtor's estate.

42. Bidding incentives encourage a potential purchaser to invest the requisite time, money and effort to negotiate with a debtor and perform the necessary due diligence attendant to the acquisition of a debtor's assets, despite the inherent risks and uncertainties of the chapter 11 process. Historically, bankruptcy courts have approved bidding incentives similar to the Stalking Horse Protections under the "business judgment rule," which proscribes judicial second-guessing of the actions of an entity's board taken in good faith and in the exercise of honest judgment. *See In re 995 Fifth Ave. Assocs., L.P.*, 96 B.R. 24, 28 (Bankr. S.D.N.Y. 1989) (bidding incentives may "be legitimately necessary to convince a 'white knight' to enter the bidding by providing some form of compensation for the risks it is undertaking") (citation omitted).

43. Under the "business judgment rule," the Bidding Protections contemplated by the Stalking Horse Agreement (including the Breakup Fee and the Expense Reimbursement) are appropriate. The Stalking Horse Agreement and the Stalking Horse Protections are the product of extensive good faith, arms'-length negotiations between the

Debtor and the Stalking Horse Bidder. The Stalking Horse Protections are fair and reasonable in amount, particularly in view of the Stalking Horse Bidder efforts to date, the willingness to create value for the Debtor (while assuming the risks relating thereto) and the risk to the Stalking Horse Bidder of being used as a “stalking horse.”

44. The United States Court of Appeals for the Third Circuit established standards for determining the appropriateness of expense reimbursement and other financial protections in the bankruptcy context in *Calpine Corp. v. O'Brien Env'tl Energy, Inc. (In re O'Brien Env'tl. Energy, Inc.)*, 181 F.3d 527 (3d Cir. 1999). See also *In re Reliant Energy Channelview LP*, 594 F.3d 200 (3d Cir. 2010). In *O'Brien*, the Third Circuit identified at least two instances in which an award of a break-up fee or expense reimbursement may benefit the estate. First, a break-up fee or expense reimbursement may be necessary to preserve the value of the estate if assurance of the fee “promote[s] more competitive bidding, such as by inducing a bid that otherwise would not have been made and without which bidding would have been limited.” *O'Brien*, 181 F.3d at 537. Second, if the availability of break-up fees and expenses were to induce a bidder to research the value of the debtor and convert the value to a dollar figure on which other bidders can rely, the bidder may have provided a benefit to the estate by increasing the likelihood that the price at which the debtor is sold will reflect its true worth. *Id.* The Third Circuit held that although payment of expenses and break-up fees are measured against a business judgment standard in non-bankruptcy transactions, the administrative expense provisions in section 503(b) of the Bankruptcy Code govern in the bankruptcy context. Therefore, to be approved, the debtor must demonstrate that the expenses to be reimbursed provide a benefit to its estate. *Id.* at 533.

45. In *O'Brien*, the court reviewed the nine factors set forth by the lower court as relevant in deciding whether to award a break-up fee. Such factors are:

- (i) the presence of self-dealing or manipulation in negotiating the break-up fee;
- (ii) whether the fee harms, rather than encourages, bidding;

- (iii) the reasonableness of the break-up fee relative to the purchase price;
- (iv) whether the unsuccessful bidder placed the estate property in a “sales configuration, mode” to attract other bidders to the auction;
- (v) the ability of the request for a break-up fee to serve to attract or retain a potentially successful bid, establish a bid standard or minimum for other bidders, or attract additional bidders;
- (vi) the correlation of the fee to a maximum of value of the debtor’s estate;
- (vii) the support of the principal secured creditors and creditors committees of the break-up fee;
- (viii) the benefits of the safeguards to the debtor’s estate; and
- (ix) the substantial adverse impact of the break-up on unsecured creditors, where such creditors are in opposition to the break-up fee.

*See O’Brien*, 181 F.3d at 536.

46. The Stalking Horse Protections will enable the Debtor to secure an adequate sale price floor for the Assets and, thus, require that competing bids be materially higher or otherwise better than the Stalking Horse Agreement – a clear benefit to the Debtor’s estate. Moreover, the Stalking Horse Bidder would not agree to act as a stalking horse without approval of the Stalking Horse Protections. Without the commitments under the Stalking Horse Agreement, the Debtor will lose the opportunity to test the stalking horse offer for the Assets in the marketplace, and would lose the downside protection afforded by the existence of the Stalking Horse Bidder and the Stalking Horse Agreement. Furthermore, without the benefit of the Stalking Horse Bid, the bids received at Auction for the Assets, if any, could be substantially lower than that offered by the Stalking Horse Bidder and the Debtor will lose the opportunity to recover value for the Assets.

47. In the present case, the Break-Up Fee approximates 3% of the cash value

of the Stalking Horse Bid and, together with the Expense Reimbursement (of up to a maximum of \$300,000), is consistent with break-up fees approved in other cases. *See, e.g., Consumer News & Business Channel P'ship v. Fin. News Network, Inc. (In re Fin. News Network, Inc.)*, 980 F.2d 165, 167 (2d Cir. 1992) (noting without discussion \$8.2 million Break-up fee on \$149.3 million transaction, or 5.5% of consideration offered, is fair); *Cottle v. Stores Comm'ns*, 849 F.2d 570, 578-79 (11th Cir. 1988) (approving \$29 million fee on \$2.5 billion transaction, or 1.16%); *see also LTV Aerospace & Defense Co. v. Thomson-CSF, S.A. (In re Chateaugay Corp.)*, 1998 B.R. 848, 861 (S.D.N.Y. 1996) (enforcing \$20 million "reverse Break-up fee" payable to debtor on \$450 million offer, or 4.4% of the consideration). The prospect of the protection offered by the Stalking Horse Protections induced the Stalking Horse Bidder's substantial and valued bid in advance of the sale procedures and any Auction made Stalking Horse Agreement possible; the Stalking Horse Agreement establishes a committed baseline, or asset value floor, upon which any other bids can be compared and evaluated, and therefore, is beneficial to the Debtor's estate and its stakeholders.

48. The Debtor respectfully submits that the proposed Stalking Horse Protections will not be found to have chilled bidding (and will induce more bidding than would exist without the Stalking Horse Agreement) and is fair and reasonable under the circumstances and, therefore, meets the requirements of the business judgment rule, as well as the Third Circuit's standards as set out in *O'Brien*.

49. In sum, the Debtor's ability to offer the Stalking Horse Protections enables it to ensure the sale of the Assets to a contractually-committed bidder at a price it believes to be fair, while, at the same time, providing it with the potential of even greater benefit to the estate. Thus, the Stalking Horse Protections should be approved.

**B. The Sale of the Assets Pursuant to the Stalking Horse Agreement is Authorized By Bankruptcy Code Section 363(b)**

50. Section 363(b)(1) of the Bankruptcy Code provides that a debtor, "after notice and a hearing, may use, sell or lease, other than in the ordinary course of business,

property of the estate . . . .” 11 U.S.C. § 363(b)(1). Section 105(a) provides, in relevant part, that “[t]he Court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” 11 U.S.C. § 105(a).

51. A sale of a debtor’s assets should be authorized pursuant to section 363 of the Bankruptcy Code if a sound business justification exists for doing so. *See, e.g., Meyers v. Martin (In re Martin)*, 91 F.3d 389, 395 (3d Cir. 1996) (citing *Fulton State Bank v. Schipper (In re Schipper)*, 933 F.2d 513, 515 (7th Cir. 1991)); *In re Abbotts Dairies of Pennsylvania, Inc.*, 788 F.2d 143 (3d Cir. 1986); *Stephens Indus., Inc. v. McClung*, 789 F.2d 386, 390 (6th Cir. 1986); *In re Lionel Corp.*, 722 F.2d 1063 (2d Cir. 1983); *In re Titusville Country Club*, 128 B.R. 396 (W.D. Pa. 1991); *In re Delaware & Hudson Railway Co.*, 124 B.R. 169, 176 (D. Del. 1991). The *Delaware & Hudson Railway* court rejected the pre-Code “emergency” or “compelling circumstances” standard, finding the “sound business purpose” standard applicable and, discussing the requirements of that test under *McClung* and *Lionel*, observing:

A non-exhaustive list of factors to consider in determining if there is a sound business purpose for the sale include: the proportionate value of the asset to the estate as a whole; the amount of elapsed time since the filing; the likelihood that a plan of reorganization will be proposed and confirmed in the near future; the effect of the proposed disposition of the future plan of reorganization; the amount of proceeds to be obtained from the sale versus appraised values of the assets; and whether the asset is decreasing or increasing in value.

124 B.R. at 176.

52. The *Delaware & Hudson Railway* court further held that “[o]nce a court is satisfied that there is a sound business reason or an emergency justifying the pre-confirmation sale, the court must also determine that the trustee has provided the interested parties with adequate and reasonable notice, that the sale price is fair and reasonable and that the purchaser is proceeding in good faith.” *Id.*

53. The Debtor has proposed the sale of the Assets after thorough consideration of viable alternatives, and has concluded that the sale is supported by a number of sound business reasons. Hence, the Debtor has determined that a sale of the Debtor’s assets,

including the Purchased Assets pursuant to the Stalking Horse Agreement, provides the best and most efficient means for the Debtor to maximize the value of these particular assets for its estate.

54. As discussed *supra*, the Debtor, with the assistance of PwC, has been marketing the Debtor's assets for sale, including the Assets. Indeed, such marketing has culminated in, among other things, various expressions of interest from potential suitors. As a result of the Debtor's preparation, the Debtor submits that it is now able to go out to the market and not only test the Stalking Horse Bidder's offer but attempt to attract higher and better offers as well.

55. The Debtor submits that the sale of the Assets is justified by sound business reasons and is in the best interests of the Debtor and its estate. Accordingly, pursuant to section 363(b) of the Bankruptcy Code, the Debtor requests approval of the sale to the Stalking Horse Bidder (or to another party submitting a higher and better offer) consistent with the Stalking Horse Agreement as set forth herein.

**C. The Sale of Assets Free and Clear of Liens, Claims and Interests  
is Authorized Under Bankruptcy Code Section 363(f)**

56. Section 363(f) of the Bankruptcy Code provides:

The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if –

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

11 U.S.C. § 363(f)

57. As quoted above, section 363(f) of the Bankruptcy Code provides for the sale of assets “free and clear of any interests.” The term “any interest,” as used in section 363(f), is not defined anywhere in the Bankruptcy Code. *Folger Adam Security, Inc. v. DeMatteis / MacGregor, JV*, 209 F.3d 252, 259 (3d Cir. 2000).

58. In *Folger Adam*, the Third Circuit specifically addressed the scope of the term “any interest.” 209 F.3d at 258. The court observed that while some courts have “narrowly interpreted that phrase to mean only *in rem* interests in property,” the trend in modern cases is towards “a broader interpretation which includes other obligations that may flow from ownership of the property.” *Id.* at 258 (citing 3 Lawrence P. King, *Collier on Bankruptcy*, 363.06[1]).

59. As determined by the Fourth Circuit in *In re Leckie Smokeless Coal Co.*, 99 F.3d 573, 581-82 (4th Cir. 1996), a case cited approvingly and extensively by the Third Circuit in *Folger Adam*, the scope of 11 U.S.C. § 363(f) is not limited to *in rem* interests. Thus, the Third Circuit in *Folger Adam* stated that *Leckie* held that the debtors “could sell their assets under §363(f) free and clear of successor liability that otherwise would have arisen under federal statute.” *Folger Adam*, 209 F.3d at 258.

60. The language of Section 363(f) is in the disjunctive, so that a sale free and clear of interests can be approved if any one of the enumerated conditions is satisfied. *In re Heine*, 141 B.R. 185, 189 (Bankr. D.S.D. 1992); *In re Elliot*, 94 B.R. 343, 345 (E.D. Pa. 1988).

61. As made clear by the statute, under Section 363(f)(2), a bankruptcy debtor may sell estate property free and clear of interests where the interest holders consent to such a sale. 11 U.S.C. § 363(f)(2). The requisite consent may either be express or implied from the circumstances surrounding the sale.

62. Here, the sale of the Assets free and clear of Interests, except with respect to any “claims” that constitute Assumed Liabilities under the Stalking Horse Agreement or otherwise are expressly assumed by the Stalking Horse Bidder in the Stalking Horse

Agreement, should be approved under Section 363(f)(2) of the Bankruptcy Code by virtue of the express consent of the DIP Lender to a sale of the Assets, provided that its Interests attach to the proceeds of the sale with the same validity (or invalidity), priority and perfection as existed immediately prior to the sale.

63. To the extent that any other creditor with an Interest in the Assets receives notice of the sale and does not file an objection, such creditor should be deemed to have implicitly consented to the contemplated transactions. *See Veltman v. Whetzal*, 93 F.3d 517 (8th Cir. 1996) (failure to object to proposed sale, coupled with agreement to stipulate regarding authority to sell free of interest, constituted consent to the sale free and clear of interests); *Hargrove v. Pemberton (In re Tabore, Inc.)*, 175 B.R. 855 (Bankr. D.N.J. 1994) (failure to object to notice of sale or attend hearing deemed consent to sale for purposes of § 363); *In re Shary*, 152 B.R. 724 (Bankr. N.D. Ohio 1993) (failure to object to transfer of liquor license issued by state constituted consent to sale). Therefore, either expressly or implicitly, the requirements of Section 363(f)(2) for the sale or transfer of the Assets free and clear of interests, including the Interests, will be satisfied.

64. Moreover, to the extent any other party asserting an interest in or lien upon the Assets objects, the Debtor submits that they can establish the propriety of the sale under Section 363(f)(3) because the Purchase Price will exceed any purported lien and, thus, the Assets will be sold at a price which is “greater than the aggregate value of all liens on such [Assets].” *See* 11 U.S.C. § 363(f)(3).

65. Indeed, all Interests in the Assets will be satisfied or will attach to the proceeds of the sale with the same force, effect and priority as such liens have on the Assets. Accordingly, the Debtor submits that the sale of the Assets free and clear of all Interests satisfies the statutory prerequisites of § 363(f) of the Bankruptcy Code.

66. Thus, the sale should be free and clear of such Interests. Additionally, the Debtor submits that authorizing the Debtor to sell, and the Stalking Horse Bidder to take, the Assets free and clear of “successor liability” type claims also is justified under *Folger Adam*

and *Leckie*.

**D. The Stalking Horse Bidder is a Good Faith Purchaser and is Entitled to the Full Protections of Bankruptcy Code Section 363(m)**

67. Section 363(m) of the Bankruptcy Code provides:

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

11 U.S.C. § 363(m).

68. While the Bankruptcy Code does not define “good faith,” the Third Circuit in *In re Abbotts Dairies of Pennsylvania, Inc.*, 788 F.2d 143 (3d Cir. 1986), has stated:

[t]he requirement that a purchaser act in good faith...speaks to the integrity of his conduct in the course of the sale proceedings. Typically, the misconduct that would destroy a purchaser’s good faith status at a judicial sale involves fraud, collusion between the purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders.

788 F.2d at 147 (citations omitted).

69. Moreover, the Second Circuit has indicated that a party would have to show fraud or collusion between the buyer and the debtor-in-possession or trustee or other bidders in order to demonstrate a lack of good faith. *See In re Colony Hill Assocs.*, 111 F.3d 269, 276 (2d Cir. 1997) (“Typically, the misconduct that would destroy a purchaser’s good faith status at a judicial sale involves fraud, collusion between the purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders”).

70. The Debtor intends to make an appropriate showing at the Sale Hearing that the Stalking Horse Agreement with the Stalking Horse Bidder is the result of a vigorous negotiation process in which all parties acted at arm’s-length and in good faith at all times, and

in which all parties were represented by sophisticated counsel and advisors. With respect to potential bidders, the Bidding Procedures are designed to ensure that no party is able to exert undue influence over the process. The Debtor thus requests that this Court find that the sale of the Assets and the assignment of the Assumed and Assigned Leases are in good faith within the meaning of section 363(m) of the Bankruptcy Code. Under the circumstances, the Stalking Horse Bidder or another Successful Bidder (as defined in the Bidding Procedures) should be afforded the protection that Section 363(m) of the Bankruptcy Code provides to a good faith purchaser. Furthermore, the Bidding Procedures are designed to prevent the Debtor or the Successful Bidder from engaging in conduct that would cause or permit the Stalking Horse Agreement, or the sale of the Assets to the Stalking Horse Bidder or another Successful Bidder pursuant thereto, to be avoided under Section 363(n) of the Bankruptcy Code.

71. All parties in interest will receive notice of the sale and will be provided with an opportunity to be heard. Additionally, all counterparties to the Assumed Leases will be provided notice of assumption and assignment and an opportunity to be heard. The Debtor submits that notice is adequate for entry of the Sale Order and satisfies the requisite notice provisions required under Sections 363(b) and 365 of the Bankruptcy Code.

**E. The Court Should Approve the Assumption, Assignment and Sale of Assumed And Assigned Contracts**

72. As required by Stalking Horse Agreement, the Debtor requests approval of the assumption, assignment and sale of the Assumed and Assigned Contracts to the Stalking Horse Bidder.

73. The Assumed and Assigned Contracts are those unexpired leases and executory contracts that are to be assumed by the Debtor and assigned and sold to the Stalking Horse Bidder as part of the sale transaction under the Stalking Horse Agreement. The Debtor further requests that the Sale Order provide that the Assumed and Assigned Contracts will be assigned to, and remain in full force and effect for the benefit of the Stalking Horse Bidder notwithstanding any provisions in the Assumed and Assigned Contracts, including those

described in sections 365(b)(2) and (f)(1) and (3) of the Bankruptcy Code, that prohibit such assignment.

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

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

(A) the trustee assumes such contract or lease in accordance with the provisions of this section; and

(B) adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease. 11 U.S.C. § 365(f)(2).

75. Under section 365(a), a debtor “subject to the court’s approval, may assume or reject any executory contract or unexpired lease of the debtor.” 11 U.S.C. § 365(a). Section 365(b)(1), in turn, codifies the requirements for assuming an unexpired lease or executory contract of a debtor, providing that:

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

(A) cures, or provides adequate assurance that the trustee will promptly cure, such default . . . ;

(B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and

(C) provides adequate assurance of future performance under such contract or lease.

11 U.S.C. § 365(b)(1).

76. Although section 365 of the Bankruptcy Code does not set forth standards for courts to apply in determining whether to approve a debtor in possession’s decision to assume an executory contract, it is well established that the decision to assume or reject an executory contract or unexpired lease is a matter within the “business judgment” of the debtor.

*See In re Taylor*, 913 F.2d 102 (3d Cir. 1990); *Sharon Steel Corp. v. Nat'l Fuel Gas Distrib. Corp.*, 872 F.2d 36 (3d Cir. 1989). Accordingly, assumption or rejection of any executory contract is appropriate where the assumption or rejection would benefit the estate. *Sharon Steel*, 872 F.2d at 39-40.

77. The assumption, assignment and sale of the Assumed and Assigned Contracts will be a necessary part of the Stalking Horse Agreement and, as stated above, will benefit the Debtor's estate. Indeed, absent the Debtor's ability to assume, assign and sell the Assumed and Assigned Contracts, the Stalking Horse Bidder will not consummate the transaction.

78. The Debtor shall be responsible for the timely payment of any and all applicable Cure Amounts. The Stalking Horse Bidder is responsible for providing evidence of "adequate assurance of future performance" to the extent required in connection with the assumption and assignment of any Assumed and Assigned Contract. The meaning of "adequate assurance of future performance" for the purpose of the assumption of executory contracts and unexpired leases pursuant to section 365 of the Bankruptcy Code 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); *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 make a profit). To the extent necessary, the Stalking Horse Bidder shall provide evidence of its ability to provide adequate assurance to relative to the Assumed and Assigned Contracts at the Sale Hearing.

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

79. Bankruptcy Rule 6004(h) provides that an "order authorizing the use, sale, or lease of property ... is stayed until the expiration of 14 days after entry of the order, unless the court orders otherwise." Fed. R. Bankr. P. 6004(h). Also, Bankruptcy Rule 6006(d)

provides that an “order authorizing the trustee to assign an executory contract or unexpired lease ... is stayed until the expiration of 14 days after the entry of the order, unless the court orders otherwise.” Fed. R. Bankr. P. 6006(d). The Debtor requests that any order approving the proposed Stalking Horse Agreement (or the Bidding Procedures in connection with the sale proposed thereunder) be effective immediately by providing that the 14-day stay under Bankruptcy Rules 6004(h) and 6006(d) are waived.

80. The purpose of Bankruptcy Rules 6004(h) and 6006(d) is to provide sufficient time for an objecting party to appeal before an order can be implemented. *See* Advisory Committee Notes to Fed. R. Bankr. P. 6004(h) and 6006(d). Although Bankruptcy Rules 6004(h) and 6006(d) and the Advisory Committee Notes are silent as to when a court should “order otherwise” and eliminate or reduce the day stay period, *Collier* suggests that the stay period should be eliminated to allow a sale or other transaction to close immediately “where there has been no objection to the procedure.” 10 Lawrence P. King, *Collier on Bankruptcy*, 6004.10 (15th rev. ed. 2006). *Collier* further provides that if an objection is filed and overruled, and the objecting party informs the court of its intent to appeal, the stay may be reduced to the amount of time actually necessary to seek a stay, unless the court determines that the need to proceed sooner outweighs the interests of the objecting party. *Id.*

81. As described above, time is clearly of the essence. The Debtor is required to meet certain case milestones under the postpetition DIP credit agreement with the DIP Lender, which includes the consummation of a sale transaction on or before May 20, 2013. The Stalking Horse Agreement also requires that the Debtor consummate and close on the proposed sale on or before May 20, 2013. A prompt closing of the Sale is therefore of critical importance and the Debtor requests that any Sale Order be effective immediately by providing that the 14-day stays under Bankruptcy Rules 6004(h) and 6006(d) are waived.

82. The Debtor, requests that the Court waive the 14-day stay period under Bankruptcy Rules 6004(h) and 6006(d) or, in the *alternative*, if an objection to the sale is filed, reduce the stay period to the minimum amount of time needed by the objecting party to seek a

stay pending appeal.

**NOTICE AND PROCEDURES THEREFOR**

83. The Debtor proposes to serve a copy of the Motion (without exhibits) and the Bidding Procedures Order (without exhibits) by hand delivery, overnight delivery or other expeditious means upon (i) the Office of the United States Trustee for the District of New Jersey; (ii) counsel for the Creditors' Committee; (iii) counsel to the DIP lender; (iv) counsel to the Stalking Horse Bidder; (v) all other parties that have filed a notice of appearance and demand for service of papers in this chapter 11 case under Bankruptcy Rule 2002 (the "**Bidding Procedures Notice Parties**").

84. Provided the Court enters the proposed Bidding Procedures Order, the Debtor requests that pursuant to the Bidding Procedures Order, no later than one (1) day after entry of the Bidding Procedures Order, the Debtor shall serve a copy of the Bidding Procedures Order (including the Notice of Auction and Sale Hearing substantially in the form attached as **Exhibit "C"** thereto) upon the following by first-class mail: upon (i) the Office of the United States Trustee for the District of New Jersey; (ii) counsel for the Committee; (iii) counsel to the DIP lender; (iv) counsel to the Stalking Horse Bidder; (v) all other entities (or counsel therefor) known to have asserted any liens, claims or encumbrances in or upon the Assets; (vi) all federal, state and local regulatory or taxing authorities that are reasonably known by the Debtor to have an interest in the relief requested by the Motion; (vii) all parties known by the Debtor to have expressed a *bona fide* interest in acquiring the Assets; (viii) the Internal Revenue Service; (ix) the United States Attorney's office; and (x) all entities who have filed a notice of appearance and request for service of papers in the Debtor's case (collectively, the "**Auction and Sale Notice Parties**").

85. Additionally, no later than two (2) days after entry of the Bidding Procedures Order by the Bankruptcy Court, the Debtor shall cause the Notice of Auction and Sale Hearing substantially in the form attached as **Exhibit "B"** to the Bidding Procedures Order

to be served upon all other known creditors of the Debtor.

86. In addition, to facilitate a potential sale that would involve the assumption and assignment of certain of the Debtor's unexpired leases, license agreements, and executory contracts (collectively referred to as the "**Designated Leases**"), the Debtor proposes to serve the Notice of Possible Assumption, Sale and Assignment of Certain Unexpired Leases of Non-Residential Real Property (the "**Assignment Notice**"), in the form attached as **Exhibit "C"** to the Bidding Procedures Order, not later than two (2) days after the entry of the Bidding Procedures Order and requests that the Court approve the following procedures for fixing any cure amounts owed on all unexpired leases, license agreements and executory contracts:

87. The Debtor will attach to the Assignment Notice its calculation of the undisputed cure amounts that the Debtor believes are to be paid to cure all defaults under all unexpired leases, license agreements and executory contracts (the "**Cure Amounts**"). If no amount is listed on the Assignment Notice, the Debtor believes that there is no Cure Amount. The Debtor requests that unless the non-debtor party to an unexpired lease, license agreement or executory contract files and serves an objection (the "**Cure Amount Objection**") to its scheduled Cure Amount on or before 4:00 p.m. (prevailing Eastern time) on May 7, 2013, so as to be received no later than 4:00 p.m. on the same day, upon: (i) the Debtor, Big M, Inc., 12 Vreeland Avenue, Totowa NJ 07512, Attn: Glenn Langberg (CRO); (ii) counsel to the Debtor, Lowenstein Sandler LLP, Attn: Kenneth A. Rosen, 65 Livingston Avenue, Roseland, New Jersey 07068; (iii) PricewaterhouseCoopers LLP, Attn: Perry Mandarino and Steven J. Fleming, 300 Madison Avenue, New York, NY 10017; (iv) Office of the United States Trustee, Attn: Fran Steele, Esq., One Newark Center, 1085 Raymond Blvd., Newark, New Jersey 07102; (v) counsel to the DIP lender, Choate, Hall & Stewart LLP, Attn: John F. Ventola, Esq., Two International Place, Boston, MA 02110; (vi) counsel to the prepetition secured lender, Choate, Hall & Stewart LLP, Attn: John F. Ventola, Esq., Two International Place, Boston, MA 02110; (vii) counsel to the Committee, Cooley, LLP, The Grace Building, 1114 Avenue of the Americas, New York, NY 10036, Attn: Jay Indyke, Esq.; and (viii) counsel to the Stalking

Horse Bidder, Troutman Sanders LLP, the Chrysler Building, 405 Lexington Avenue, New York, NY 10174, Attn: James Kaplan, Esq., and subject to the Bidding Procedures Order, such non-debtor party should (a) be forever barred from objecting to the Cure Amount and from asserting any additional cure or other amounts with respect to such unexpired lease, license agreement or executory contract and the Debtor shall be entitled to rely solely upon the Prepetition Cure Amount, and (b) be forever barred and estopped from asserting or claiming against the Debtor, the Successful Bidder or any other assignee of the relevant unexpired lease, license agreement or executory contract that any additional amounts are due or defaults exist, or conditions to assumption and assignment must be satisfied under such unexpired lease, license agreement or executory contract.

88. In the event that a Cure Amount Objection is timely filed, the Cure Amount Objection must set forth (i) the basis for the objection, and (ii) the amount the party asserts as the Prepetition Cure Amount. After receipt of the Cure Amount Objection, the Debtor will attempt to reconcile any differences in the Prepetition Cure Amount believed by the non-debtor party to exist. In the event, however, the Debtor and the non-debtor party cannot consensually resolve the Cure Amount Objection and such dispute must be resolved, the Debtor will segregate any disputed cure amounts pending the resolution of any such disputes by this Court or mutual agreement of the parties.

89. The Debtor further requests, pursuant to Fed. R. Bankr. P. 9014, that objections, if any, to the relief requested in the Sale Motion, including the assumption and assignment of any unexpired lease, contract or license agreement, must: (a) be in writing; (b) comply with the Bankruptcy Rules and the Local Bankruptcy Rules; (c) be filed with the Clerk of the Bankruptcy Court for the District of New Jersey, 50 Walnut Street, Newark, New Jersey 07102, on or before May 10, 2013 at 4:00 p.m. (prevailing Eastern Time) and (d) be served so as to be received no later than 4:00 p.m. (prevailing Eastern Time) on the same day, upon the Bidding Procedures Notice Parties.

90. The Debtor believes that the foregoing notice procedures to the Bidding

Procedures Notice Parties, the Auction and Sale Notice Parties and other parties in interest is sufficient to provide effective notice of the Bidding Procedures, the Auction and the Sale to potentially interested parties in a manner designed to maximize the chance of obtaining the broadest possible participation while minimizing the costs to the estate. Accordingly, the Debtor requests that the Court find that notice in this manner is sufficient and that no further notice of the Auction or the Bidding Procedures is required.

### **HIGHLIGHTED DISCLOSURES**

91. The Guidelines require specific disclosure of certain provisions affecting a sale of a debtor's assets, the justification therefor, and the location of any such provisions in the proposed sale order and any agreement related to the sale. The disclosures required by the Guidelines are as follows:

#### **Bidding Procedures – Disclosures**

<b>Category</b>	<b>Provision Contained</b>	<b>Justification</b>
Provisions Governing Qualification of Bidders	Yes.	It is the Debtor's intent to ensure that only serious bidders undertake the considerable disruption of management and professionals attendant to due diligence.
Provisions Governing Qualified Bids	Yes.	It is the Debtor's intent to ensure that only serious bidders participate in the bidding process.
Provisions Providing Bid Protections to "Stalking Horse" or Initial Bidder	Yes.	The Stalking Horse Bidder would not enter into the APA without the Stalking Horse Protections.
Closing with Alternative Backup Bidders	Yes.	This is consistent with the Debtor's goal to maximize value for the estate.

#### **Sale Disclosures**

<b>Category</b>	<b>Provision</b>	<b>Location of</b>	<b>Justification</b>
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	<b>Contained</b>	<b>Provision</b>	
Sale to Insider	No.	N/A	N/A
Releases	No.	N/A	
Closing and Other Deadlines	Yes.	APA, Article 4	The closing must occur before May 20, 2013.
Good Faith Deposit	Yes.	APA, Article 3	The Debtor required a good faith deposit, totaling \$ 1,000,000, which the Stalking Horse Bidder will forfeit under certain circumstances if it does not consummate the transaction.
Record Retention	Yes.		The Debtor will be retaining records or have access to records to enable the administration of the estate.
Sale of Avoidance Actions	No	APA, Article 2	The Sale will not transfer to the Stalking Horse Bidder the right to bring certain causes of action, including Chapter 5 causes of action or other litigation. .
Requested Findings as to Successor Liability.	Yes.	APA, Article 2	The Stalking Horse Bidder is purchasing only certain assets of the Debtor and will not consummate the transaction if it was liable as a successor of the Debtor.
Sale Free and Clear of Liens	Yes.	APA, Article 2	The Stalking Horse Bidder is purchasing the Purchased Assets in bankruptcy and will not consummate the transaction if it was not purchasing such Purchased Assets "free and clear."
Relief from Bankruptcy Rule 6004(h) and 6006(d)	Yes.	APA, Article 7 & Proposed Sale Order	

**NO PRIOR REQUEST**

92. No previous motion for relief requested herein has been made to this or any other court.

**CONCLUSION**

**WHEREFORE**, the Debtor respectfully requests that this Court enter the Bidding Procedures Order submitted herewith; and after a hearing on shortened notice (a) approving the Bidding Procedures; (b) approving the Bidding Protections; (c) scheduling an Auction and Sale Hearing; and (d) approving the Notice of Auction and Sale Hearing and Assignment Notice. In addition, the Debtor respectfully requests that this Court at the Sale Hearing enter an order (a proposed draft form of which is attached hereto as **Exhibit “2”**): (a) authorizing the Debtor to sell the Assets free and clear of all liens, claims, encumbrances and interests, and (b) approving the Stalking Horse Agreement. The Debtor further requests that this Court grant such other and further relief as is just and proper.

Dated: Roseland, New Jersey  
April 5, 2013

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