

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

Caption in Compliance with D.N.J. LBR 9004-2(c)

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In re:

**LAFAYETTE YARD COMMUNITY
DEVELOPMENT CORPORATION,**

Debtor.

Chapter 11

Case No. 13-30752 (MBK)

DEBTOR’S MOTION SEEKING ENTRY OF (I) SALE PROCEDURES ORDER: (A) APPROVING BIDDING PROCEDURES, (B) APPROVING THE FORM AND MANNER OF NOTICE, (C) SCHEDULING AN AUCTION AND SALE HEARING, AND (D) ESTABLISHING EXECUTORY CONTRACT CURE AMOUNTS AND DEADLINES; (II) SALE APPROVAL ORDER: (A) AUTHORIZING THE SALE OF SUBSTANTIALLY ALL OF THE DEBTOR’S ASSETS FREE AND CLEAR OF ALL LIENS, CLAIMS INTERESTS AND ENCUMBRANCES, (B) AUTHORIZING THE ASSUMPTION AND ASSIGNMENT AND, REJECTION, AS APPLICABLE OF CERTAIN EXECUTORY CONTRACTS AND LEASES IN CONNECTION THEREWITH, (C) GRANTING THE SUCCESSFUL BIDDER GOOD FAITH STATUS, (D) APPROVING A BREAK-UP FEE, (E) WAIVING THE FOURTEEN DAY STAY OF SALE ORDER, AND (F) GRANTING RELATED RELIEF; AND (III) GRANTING REQUEST FOR HEARING TO CONSIDER ENTRY OF BIDDING PROCEDURES ORDER ON SHORTENED NOTICE PURSUANT TO BANKRUPTCY RULE 9006(c)

**TO: THE HONORABLE MICHAEL B. KAPLAN,
UNITED STATES BANKRUPTCY JUDGE:**

Lafayette Yard Community Development Corporation (“**LYCDC**” or the “**Debtor**”) the debtor and debtor-in-possession in the above captioned case, by and through their undersigned proposed counsel, hereby move this Court, pursuant to sections 105(a), 363(b), (f) and (m), 365, 503, 507, 1146(a) of title 11 of the United States Code, 11 U.S.C. §§ 101, et seq. (the “**Bankruptcy Code**”), Rules 2002(a)(2), 6004(a), (b), (c), (e), (f) and (g), 6006(a) and 9c), 9007 and 9014 of the Federal Rules of Bankruptcy Procedure (the “**Bankruptcy Rules**”) and Rules 2014-1 and 6004-1 of the Local Rules for the United States Bankruptcy Court for the District of New Jersey (the “**Local Rules**”) and General Order for the United States Bankruptcy Court for the District of New Jersey Adopting Guidelines for Sale of Estate Property dated November 25, 2009 (the “**Guidelines**”), for entry of three Orders:

- **Sale Procedures Order** (substantially in the form annexed hereto as **Exhibit A**):
(i) approving bidding procedures, annexed hereto as **Exhibit B**; (ii) approving the form and manner of notice of the Sale, the Bidding Procedures, the Auction and the Sale Hearing; (iii) scheduling an auction to sell the Assets, subject to higher and better bids (the “**Auction**”) and scheduling a hearing to approve the Sale of the Assets in accordance with the Auction (the “**Sale Hearing**”); and (vi) Establishing Executory Contract Cure Amounts and Deadlines.
- **Sale Approval Order**: (i) approving the Sale of the Debtor’s Assets in accordance with the results of the Auction to the highest bidder (the “**Successful Bidder**”), (ii) authorizing the assumption and assignment and rejection, as applicable, of certain executory contracts and leases in connection with the Sale; (iii) granting the Successful Bidder good faith status; (iv) approving a Break-Up Fee; and (iv) waiving the fourteen day stay of the Order;
- **Order Scheduling Hearing on Shortened Notice** (substantially in the form

annexed here to as **Exhibit C**) granting the Debtor's request for a hearing to consider entry of the Bidding Procedures Order on shortened notice pursuant to Bankruptcy Rule 9066(c).

JURISDICTION AND VENUE

1. The Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334. Consideration of the Motion is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A).
2. Venue is proper in this District pursuant to 28 U.S.C. §§ 1408 and 1409.
3. This proceeding has been initiated pursuant to Bankruptcy Code §§ 105(a), 363(b), (f) and (m), 365, 503, 507, 1146(a), Bankruptcy Rules 2002(a)(2), 6004(a), (b), (c), (e), (f) and (g), 6006(a) and 9c, 9007 and 9014, and Local Rules 2014-1 and 6004-1.

BACKGROUND

4. On September 23, 2013, (the "**Filing Date**"), the Debtor filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. Thereafter the Debtor's proceeding was referred to this Court for administration under the Bankruptcy Code.

5. The Debtor has continued as a Debtor-in-Possession pursuant to §1107 and 1108 of the Bankruptcy Code.

6. No trustee, examiner or creditors' committee has been heretofore appointed in this proceeding.

7. The Debtor owns and operates the Lafayette Yard Hotel and Conference Center, formerly the Trenton Marriott Hotel (the "**Hotel**") located at 1 West Lafayette Street, Trenton, New Jersey, the State's capital. Set amidst the attractions of downtown Trenton, the hotel is within walking distance to the New Jersey State Capital Complex, the Old Barracks, the New Jersey Soldiers and Sailors War Memorial and other historic sites. LYCDC is an ideal hotel for business travelers; and it is ideally situated near Sesame Place, Six Flags Great Adventure,

Waterfront Park and home to Trenton Devils hockey team and Trenton Thunder Baseball Team. LYCDC is also an ideal meeting location, offering state-of-the-art meeting facilities, dining and event planning services.

The Debtor's Exigent Need For A Strategic Transaction

8. Prior to the Filing Date, twelve (12) interested parties had expressed an interest in buying the Hotel. However, due to the Debtor's lack of cash and revenue to maintain its operations, the Debtor found itself in a position where it could not sustain operations without an immediate infusion of cash. The Debtor had met with City representatives and state officials regarding the financial needs, but each had indicated that additional funding is not available from City or state sources for the Hotel. Due to the Debtor's significant long term debt of approximately \$29.9 million, the only circumstances in which the Debtor was able to obtain funding to maintain operations through the closing on a sale of its Assets was through lending in chapter 11 scenario, where the lender would be able to "prime" the existing \$29.9 million of debt under Section 364(d) of the Bankruptcy Code. Thus, the Debtor filed its Chapter 11 petition with the principal objective to reorganize through the marketing and competitive sale of its assets and business as a going concern under Bankruptcy Code § 363.

9. The Debtor was able to obtain DIP funding in the amount of \$2 million, which the Debtor projects will be enough to sustain the Hotel's operations only through the end of the year. Accordingly, the Debtor is seeking an expeditious marketing and sale process, with a four (4) week marketing campaign, culminating with an auction on November 25, 2013, a sale hearing on November 25, 2013, or as soon as possible thereafter, and closing within ten (10) days of entry of the Sale Order.

10. If the Debtor cannot continue as an ongoing business, its current value will be

greatly diminished, its employees terminated, and a forced liquidation in Chapter 7 would be likely unavoidable.

11. Accordingly, the Debtor and its advisors have concluded that an immediate sale or other strategic transaction is necessary in order to avoid a cessation of business operations and thereby irreparable harm to the creditors and the estate, respectively.

The Debtor's Marketing Efforts

12. For several months prior to the Filing Date, the Debtor has been approached on an unsolicited basis by numerous entities expressing an interest in either acquiring the Debtor or effectuating a strategic transaction, all of these activities having occurred without the hiring of any business consultant, investment bank, business broker or other similar professional.

13. To further the Debtor's marketing efforts and expand the field of potential suitors for the company, the Debtor is seeking to retain, pursuant to Court Order, Sheldon Good & Company ("**Sheldon Good**") as its auctioneers to, *inter alia*, market and sell the hotel, and FTI Consulting Inc. ("**FTI**") as its financial advisor to, *inter alia*, develop and execute a sale of the Hotel, including determining a range of estimated values for the property, communicating directly with potential purchasers, and accessing FTI's network of potential purchasers.

14. Sheldon Good proposes the following marketing plan:

Sheldon Good & Company's auction program will expose the property on a regional and national basis. Sheldon Good & Company's process will allow the property to be placed under contract on a noncontingent all cash basis and effectuate an immediate sale.

Competitive bidding will motivate buyers into the marketplace and generate market pricing without setting a ceiling on pricing. The marketing strategy has been designed to capitalize on both a targeted direct outreach effort coupled with a very broad promotional message. This approach will provide a compelling message that will drive the prospective bidders to the purchase opportunity.

MEDIA PLANNING

Newspaper advertising is one of the most effective ways to establish the auction message in a regional and national marketing campaign. The following is the proposed print media schedule for the sale:

DIGITAL MEDIA

In addition to Sheldon Good & Company's continued web presence and proprietary database of investors, owners, and operators of hospitality properties, Sheldon Good & Company proposes advertising in the following online media venues:

PUBLIC RELATIONS CAMPAIGN

An aggressive public relations campaign will be implemented. We will prepare a press release announcing the sale, which will be distributed to the appropriate media outlets, including the print media vehicles mentioned above, as well as all other major metropolitan daily and weekly newspapers and other local publications as well.

BROKER OUTREACH

Broker outreach will be an essential component of our program to identify qualified buyers for the property. Utilizing our broker database we will announce the auction through direct mail and an Emarketing campaign.

DEDICATED WEB PAGE / BIDDER ACTIVITY COLLECTION & DATA ANALYTICS TOOL

A dedicated website will be created to highlight the offering. This web page will be a critical measurement tool to gauge buyer interest. The dynamic site will feature a photo gallery, satellite map (linked to Google Maps), any public relation articles generated during the program and an opportunity to review further detail about inspection and bidding procedures and deadlines.

In order for an individual to download a brochure or receive detailed property information, the person will be required to "Register to Continue". An individual's registration allows Sheldon Good & Company to better manage the auction-marketing program and provide status reports to our clients. Sheldon Good & Company's platform is a fully integrated system that allows the company to provide real-time analysis on marketing programs. This state-of-the-art information technology platform immediately feeds the individual's registration information into Sheldon Good & Company's SGC-CRM™ management software. With the registration information entered into the SGC-CRM™ software, Sheldon Good & Company is able to provide up-to-the-minute status reports, measure individual interest, source tallies showing what marketing is generating the greatest response, and thus better manage

marketing decisions and expenditures throughout the entire auction program.

DUE DILIGENCE PACKETS (BIDDER INFORMATION PACKAGES)

Serving the same role as a prospectus in capital markets, the presentation of the property-specific information creates the “deal” to which the buyers ascribe value. Completeness, accuracy and presentation in a commercially reasonable way are the hallmark of a Sheldon Good & Company auction. Incomplete presentations and unresolved issues will always lead to uncertainty in the buyer’s mind, preventing maximum pricing, or giving way to pre-closing issues as the buyer will not have achieved a satisfactory comfort level.

The key elements to be reviewed and prepared for dissemination include:

- Purchase & Sale Agreement
- Copies of any utility bills
- Property specific cost to complete Information
- Insurance certificates
- Preliminary title report
- Equipment, system or roof warranties (if any)
- Current survey of the property
- Engineering report, if applicable
- Service agreements (if any).
- Zoning/Variance information
- Copies of all current real estate tax bills
- Environmental Impact Statements
- Information on any pending tax appeals
- Floor plans/Site plans/Renderings.
- Copies of any notices of code violations

VIRTUAL DEAL ROOM (DATA MANAGEMENT SITE)

A Virtual Deal Room will be utilized to disseminate all of the due diligence and underwriting materials for the property. Once users are approved in the Virtual Deal Room, they will have traceable access and be tracked every time they download or view the available information. Buyers can share information with their attorneys, brokers, and advisors within the Virtual Deal Room. In addition, they will receive automatic updates on new revisions and additional due diligence materials as they are posted.

15. Over the past week, the Debtor has been extensively in negotiations with Edison Broadcasting, LLC (“**Purchaser**”). The Purchaser has, upon information and belief, no connection or relationship to the Debtor, or any of its insiders, professionals, or creditors. The

Debtor and the Purchaser negotiated, at arms' length, an Asset Purchase Agreement (the "APA").

A copy of the negotiated, but unexecuted APA is annexed hereto as **Exhibit D**. The executed APA will be filed prior to the hearing on the Sale Procedures.

The Asset Purchase Agreement

16. On October 16, 2013, after arms-length negotiations, the Debtor and the Purchaser executed the APA. Subject to this Court's approval of higher and/or better offers through an auction process, the Debtor seeks approval to sell the Assets (as defined in the APA) to the Purchaser on the following terms and conditions:

Seller	Lafayette Community Development Corporation
Purchaser	Edison Broadcasting, LLC (or such other entity that they may form)
Purchase Price	\$5,500,000
Deposit	\$500,000
Acquired Assets	<p>The real property known as the Lafayette Yard Hotel and Conference Center located at 1 West Lafayette Street, Trenton, New Jersey (the "<u>Real Property</u>"), as more particularly described on Schedule 1.1(a) attached hereto, together with all of the right, title and interest of Seller pertaining to all appurtenant rights and easements, including without limitation any water, air, mineral, oil or gas rights, if any;</p> <p>(b) Fixtures and other improvements within the Real Property, including specifically, without limitation, that certain 197-room hotel commonly known as "Lafayette Yard Hotel and Conference Center" (the "<u>Hotel</u>"), containing without limitation, hotel rooms, ballroom and banquet facilities, meeting facilities, bars and lounges, restaurant (the "<u>Restaurant</u>"), retail shop ("<u>Shop</u>") (the property described in this clause (b) of this Section 1.1 being herein referred to collectively as the "<u>Improvements</u>");</p> <p>(c) All tangible personal property owned by Seller and located within the Real Property (as defined below) and used solely in connection with the operation of the Real Property including, without limitation, appliances, furniture, furnishings, artwork, equipment, carpeting, draperies and window treatments, computers, computer equipment and manuals, tools and supplies, decorations, china, glassware, linens, silver, utensils, and other items of personal property (excluding cash and deposit accounts) in all cases subject to (i) depletion, resupply, substitution, replacement and disposition in the ordinary course of business, and the provisions of Section 4.7.7 regarding unopened inventories (the property set forth in this Section 1.1(c) being herein referred to collectively as the "<u>Personal Property</u>");</p> <p>(d) Subject to Section 4.7 below, all contracts or reservations for the use of guest rooms, the Restaurant, ballroom and banquet facilities, meeting rooms or other facilities of the Hotel or located within the Improvements ("<u>Bookings</u>");</p> <p>(e) (i) The Management Agreement dated as of May 1, 2013, pursuant to which Marshall Hotels & Resorts, Inc. ("<u>Manager</u>") Manager operates and manages the Hotel (as so assigned and amended, and as may be further amended, the "<u>Management Agreement</u>") and any other agreements regarding the management or operation of the Real Property and Hotel (referred to collectively as the "<u>Operating Agreements</u>");</p> <p>(f) All contracts and agreements made by Seller or by Manager in Seller's name and relating to the development, upkeep, repair, maintenance or operation of the Real</p>

Property and/or the Personal Property or other property used in connection with the operation of the Hotel which are (i) listed on Schedule ____ attached hereto (collectively, the "Service Contracts") or (ii) listed on Schedule ____ (the "Equipment Leases");

(g) All leases for the lease and occupancy of space at the Hotel, if any (collectively, the "Leases") listed and described on Schedule 1.1(g) attached hereto and made a part hereof, including any deposits relating to the Leases and held by Seller;

(h) (i) All existing warranties and guaranties (expressed or implied) issued to Seller in connection with the Improvements or the Personal Property listed on Schedule 1.1(h)-1 attached hereto (collectively, the "Warranties"); (ii) all licenses (other than the Liquor License, as hereinafter defined) and permits used in or relating to the ownership, occupancy or operation of the Units, the Improvements or the Personal Property or any part thereof listed on Schedule 1.1(h)-2 attached hereto; and (iii) all signage rights, development rights and privileges, general intangibles, business records, site plans, surveys, environmental and other physical reports (subject to any limitations imposed by the applicable consultants with respect to the use of, or reliance upon, such reports by third parties), plans and specifications pertaining to the Real Property and the Personal Property (the property described in this clause (h) of this Section 1.1 being herein referred to collectively as the "Intangibles");

(i) Seller's interests under that certain Parking Garage Lease Agreement dated April 26, 2000 between the Parking Authority of the City of Trenton, New Jersey ("Parking Authority"), as landlord, and Seller as tenant, covering the parking garage for the Hotel ("Garage");

(j) Subject to Section 4.7.4 below, (i) all food and beverages (subject to any legal restrictions pertaining to the sale or transfer of alcoholic beverages); (ii) inventory held for sale to Hotel guests and others in the ordinary course of business including all opened and unopened retail inventory in any area at the Hotel conducting retail sales (collectively, "Retail Inventory"); (iii) engineering, maintenance and housekeeping supplies, including soap and cleaning materials, and materials; stationery and printing items and supplies; and (iv) other supplies of all kinds, whether used, unused or held in reserve storage by or on behalf of Seller for future use in connection with the maintenance and operation of the Units, the Improvements or the Personal Property, in each case wherever located, together with any additions thereto prior to Closing (defined below) and subject to depletion, resupply, substitution, replacement and disposition in the ordinary course of business (all of the foregoing being referred to herein as the "Consumable Inventory" and, to the extent contained in unopened boxes, bottles, jars or containers of any type as of the Closing Date (defined below), shall collectively be referred to, together with unopened packages of china, glass, silver and linens, as the "Unopened Inventory"); and

(k) All files and records owned by Seller and pertaining to the Real Property (including but not limited to all files and records relating to the Hotel and the development, operation, management, maintenance and repair thereof, such as financial records and statements, maintenance records, building plans, specifications and drawings, regardless of whether such files and records are stored in paper form, on computer hard drive, computer disk, CD Rom, DVD or other medium).

Excluded Assets

(i) All cash on hand or on deposit in any operating account or other bank account or reserve, except for security deposits held by Seller as landlord with respect to any Lease and the House Bank Funds and the Restaurant Funds which are to be transferred at Closing subject to the provisions of Section 4.7.9;

(ii) The Purchase Price;

(iii) All causes of action belonging to Seller's bankrupt estate, including but not limited to causes of action arising under Sections 544 through 553 of the Bankruptcy Code;

(iv) All pre-paid expenses;

(v) Deposits, including security deposits;

(vi) All tax refunds and benefits;

- (vii) All insurance, insurance benefits and unearned insurance premiums and premium refund claims;
- (viii) Any tangible or intangible property (including, without limitations, fixtures, personal property or intellectual property) owned by (A) the supplier, vendor, licensor, lessor or other party under any Service Contracts or Equipment Leases, (B) the tenants under any Leases, (C) Manager, (D) any employees, or (E) any Garage users or guests or customers of the Hotel;
- (ix) All accounts receivable of the Hotel, Garage and related operations which are outstanding as of the Closing Date (collectively, "Receivables"), provided that, from and after the Closing Date Purchaser shall cause Manager to continue to collect Receivables in the ordinary course of business of the operation of the Hotel and the Garage, respectively, in a manner consistent with the Manager's and Parking Operator's collection of accounts receivable owed to Purchaser and shall promptly deliver to Seller any funds received by Purchaser, Manager or Parking Operator after the Closing Date in connection with the Receivables. The provisions of this Section 1.2(b)(iii) shall survive Closing.

Assumed Agreements The Debtor shall assume and assign to the Purchaser all of its rights under the contracts that are listed on Schedule 1.1F-1 of the APA. The Debtor shall be responsible for all Cure Costs associated with such assumption and assignment.

Assumed Liabilities The Purchaser will not assume any obligations of the Debtor other than the Assumed Liabilities (APA §1.7) from and after the Closing Date. All liabilities, obligations or commitments of Debtor other than the Assumed Liabilities shall remain the sole responsibility of Debtor's estate.

Representations and Warranties; Covenants The representations and warranties and covenants are customary for a transaction of this type, including, without limitation, representations warranties regarding the authority to enter into the sale transaction and the agreement to abide by all laws with respect to the sale, litigation, material contracts, permits, environmental matter, employee benefits, ownership of assets, taxes and condition of the Acquired Assets, and covenants regarding conduct of the business in the pre-Closing period, contract cure obligations, the best efforts of the parties, notices and consents, access to information and the risk of loss.

Continued Operations and Ordinary Course of Business As a condition precedent to the Purchaser's obligation to close on the sale, the Debtor's business and operations shall continue to maintain the Acquired Assets and operate the Business as a going concern (§6.1 of the APA).

Closing Date The consummation of the transaction contemplated hereby ("Closing"), as evidenced by the payment and release of the Purchase Price to Seller, shall occur on or before 3:00 pm (eastern time) on the date (with the actual date of Closing being referred to herein as the "Closing Date") which is the fifteenth (15th) day following entry by the Bankruptcy Court of the Sale Approval Order as a Final Order ("Outside Closing Date"). The Closing shall occur through an escrow administered by Escrow Agent, with the Purchase Price and all transaction documents (unless otherwise mutually agreed) deposited with the Escrow Agent as escrowee. At Closing, Seller and Purchaser shall perform the obligations set forth in, respectively, Section 4.5 and Section 4.6, the performance of which obligations shall be concurrent conditions to

Closing.

RELIEF REQUESTED

17. By this motion, the Debtor is seeking entry of two orders, the Sale Procedures Order and the Sale Approval Order.

BASIS FOR RELIEF

I. The Sale Procedures Order

A. The Proposed Bidding Procedures

18. The Sale of the Assets pursuant to the APA is subject to higher and/or better offers. In order to ensure that the highest and best offer is received for the Assets, the Debtor has established the proposed Bidding Procedures to govern the submission of competing bids at an auction. Accordingly, the Debtor seeks this Court's approval of the Bidding Procedures set forth in **Exhibit B** and incorporated herein in their entirety.

19. The Debtor's Bidding Procedures are structured for a two (2) track bidding procedure at the auction. Track 1 Bidders are those Bidders that wish to purchase the Assets and operate the Property as a hotel. Track 2 Bidders are those Bidders that wish to purchase the Assets and will **NOT** operate the Property as a hotel (specifying the intended use of the Property).

20. The Debtor believes that the this 2 track bidding procedure will yield all potential serious purchasers in that there may exist a potential purchaser, that is interested in acquiring the Property, and does not wish or intend to operate the Property as a hotel.

21. In addition, the Bidding Procedures provide that bidders submit initial overbids in an amount of \$5,635,000, which represents \$135,000 in excess of the aggregate Purchase Price under the APA, which \$110,000 amount is equal to the Break-Up Fee¹ plus \$25,000.00 in an

¹ The Debtor is not seeking approval of the Break-Up Fee as part of the Sale Procedures Order.

initial overbid increment.

22. All bids submitted for the purchase of the Debtor's assets shall remain open, and all deposits held in the attorney escrow account of the Debtor's counsel until the sale of the Debtor's Assets to the Successful Bidder is consummated. In the event that the Successful Bidder is unable to consummate on the sale of the Debtor's Assets, the next highest and/or best bidder (the "**Backup Bidder**") will then be required to consummate on the sale of the Debtor's assets.

B. Bidder Qualification

23. In order for a purchaser of the Debtor's Assets to qualify as a Bidder, the Debtor proposes that the purchaser's Competing Bid must be received by November 21, 2013 at 12:00 p.m. (the "**Bid Deadline**") and must comply with all of the following requirements:

- (a) it is in writing and is irrevocable through a closing of the sale of the Property;
- (b) it includes a duly authorized and executed asset purchase agreement substantially in the form of the Purchase Agreement together with all exhibits thereto, as well as copies of such materials marked to show any amendments and modifications to the Purchase Agreement (the "**Marked Agreement**") and a marked copy of the proposed order to approve the Sale by the Bankruptcy Court;
- (c) it provides for (i) a cash purchase price for the Property, expressed in U.S. Dollars, of not less than Five Million Six Hundred Thirty-Five Dollars (\$5,635,000);
- (d) it includes written evidence of a firm, irrevocable commitment for financing, or other evidence of ability to consummate the proposed transaction, that will allow the Seller to make a reasonable determination as to the Bidder's financial and other capabilities to consummate the transaction contemplated by the Marked Agreement;
- (e) it is not conditioned on any contingencies, such as, without limitation: (i) the outcome of unperformed due diligence by the Bidder, and/or (ii) obtaining financing;
- (f) it includes an acknowledgement and representation that the Bidder: (i) has had an opportunity to conduct any and all required diligence regarding the

Property prior to making its offer; (ii) has relied solely upon its own independent review, investigation and/or inspection of any documents and/or the Property in making its bid; (iii) did not rely upon any written or oral statements, representations, promises, warranties or guaranties whatsoever, whether express or implied (by operation of law or otherwise), regarding the Property or the completeness of any information provided in connection therewith or the Auction, except as expressly stated in the Marked Agreement; and (iv) is not entitled to any expense reimbursement or break-up fee in connection with its bid;

- (g) it includes evidence, in form and substance reasonably satisfactory to the Seller, 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 the Marked Agreement; and
- (h) it is accompanied by a good faith deposit in the form of a wire transfer (to a bank account specified by the Seller), certified check or such other form acceptable to the Seller, payable to the order of the Seller (or such other party as the Seller may determine) in an amount equal to ten (10%) percent of the Competing Bid.

24. For the avoidance of doubt, and notwithstanding the foregoing, any overbid submitted by the Buyer at any Auction on substantially the same terms as its initial offer (apart from any increase in price) shall be a Qualified Competing Bid.

25. The Debtor believes that this aforementioned proposed Bidding Procedures are fair and reasonable and will permit all parties truly interested in acquiring the Debtor's business an opportunity to submit a bid that can be weighed or compared against the Purchaser's stalking horse offer.

C. The Proposed Bidding Procedures Are Adequate and Should Be Approved

26. The purpose of procedural bidding orders is to facilitate an open and fair public sale designed to maximize value for the estate. *In re Edwards*, 228 B.R. 552, 561 (Bankr. E.D. Pa. 1998). Bankruptcy courts in the Third Circuit may only approve bidding procedures that provide a benefit to the estate by maximizing the value of the assets to be sold. *See, e.g., In re Dura Auto. Sys., Inc.*, 2007 Bankr. LEXIS 2764, at *253 (Bankr. D. Del. Aug. 15, 2007)(citing

Calpine Corp. v. O'Brien Envtl. Energy, Inc. (In re O'Brien Envtl. Energy, Inc.), 181 F.3d 527, 535-37 (3rd Cir. 1999), *See also Dura Auto. Sys.*, 2007 Bankr. LEXIS 2764, at * 253 ("[t]he paramount goal in any proposed sale of property of the estate is to maximize the proceeds received by the estate").

27. To maximize the proceeds received by the estate, courts recognize that bidding procedures must be fair and reasonable, and should enhance competitive bidding. *See id.* at *254 (citing *Calpine Corp. v. O'Brien*, 181 F.3d at 537; *In re Integrated Res., Inc.*, 147 B.R. 650, 656-57 (Bankr. S.D.N.Y. 1992)).

28. The Debtor believes that the Bidding Procedures proposed will additionally procure serious parties interested in acquiring the Debtor's Assets and will result in realizing the full value of the Debtor's Assets. The Debtor's Bidding Procedures are designed to facilitate a competitive bidding process in an expeditious manner, especially in light of the fact that the Debtor has significant time constraints to sell and close under the APA. The Bidding Procedures will allow the Debtor to conduct the Auction in an open fashion that will encourage participation from those bidders that demonstrate they are financially capable to consummate the transaction.

29. In addition, the Bidding Procedures provide for an "overbid" provision. For a qualified Bid to be considered, it must be in a cash amount of \$5,635,000, which amount equals the aggregate Purchase Price under the APA, plus the Break-Up Fee of \$110,000, plus \$25,000 in an additional overbid increment (the "**Initial Minimum Overbid**").

30. The Initial Minimum Overbid is necessary not only to compensate the Debtor for the risk that it assumes in foregoing a known, willing and able purchaser for a new potential acquirer, and additionally to ensure that there is an increase in the net proceeds to the estate, after payment of the Break-Up Fee and expense reimbursement. The Debtor believes that the Initial

Minimum Overbid will enable competitive bidding and maximize the value of the Debtor's Assets, without a chilling effect.

31. The Debtor believes, in its business judgment that the Bidding Procedures are adequate and will result in maximizing the value of its assets and are therefore appropriate under the relevant standards governing auction proceedings.

D. The Proposed Form and Manner of Notice of Sale is Adequate

32. Bankruptcy Rule 2002(a) and (c) requires the Debtor to notify creditors of the proposed sale of the Assets, including the date, time and place of the Auction, terms of the Sale, and the deadline for filing any objections.

33. The Debtor proposes to comply with these requirements by serving via first class mail within three (3) days of entry of the Sale Procedures Order copies of: (i) Sale Procedures Order, (ii) Bidding Procedures, and (iii) this Motion.

34. The Debtor proposes to serve the following parties: (i) the Office of the U.S. Trustee; (ii) the Debtor's secured creditors and their respective counsel; (iii) all taxing authorities; (iv) counsel to the Purchaser, (v) the Debtor's DIP Lender, and its counsel; (vi) all counterparties to each of the Debtor's executory contracts and/or leases; (vii) all creditors; and (viii) all potential buyers known by the Debtor as having previously expressed interest in acquiring any of the Debtor's assets.

35. The Debtor submits that the foregoing notice fully complies with the requirements set forth in Bankruptcy Rule 2002. Based upon the foregoing, the Debtor respectfully requests that this Court approve the form and manner of the notice proposed above.

E. Procedures for Lease Cure Claims and Adequate Assurance of Future Performance

36. Set forth on the schedule annexed to the APA as Schedule 1.1F-1 are the executory contracts the Purchaser intends to assume as part of the Sale, together with amounts the Debtor has determined will be, as of the closing date of the Sale to Purchaser or the Successful Bidder, as the case may be, the amounts necessary to be paid by the Debtor pursuant to §365 in order to assume and assign such executory contract and/or unexpired lease to Purchaser or the successful bidder (the “**Cure Amount**”). The Debtor requests that unless the non-Debtor party to an executory contract or unexpired lease (each a “**Third Party**”, and collectively, the “**Third Parties**”) files an objection to this Motion asserting a claim for any amounts due and owing under an executory contract and/or unexpired lease in an amount different than the Cure Amount referenced **Exhibit E** (the “**Disputed Cure Amount**”) on the objection deadline for the Sale Approval Hearing (the “**Cure Objection Deadline**”), that such third party to the subject Executory Contract and/or Unexpired Lease will be forever barred from asserting a Cure Amount different from that set forth on Exhibit E and from asserting any additional cure or other amounts with respect to its Unexpired Lease and/or Executory Contract, as the case may be, relating to the period prior to assignment.

37. Furthermore, the Debtor requests that any Cure Amounts, or Disputed Cure Amount that is fixed by the Court or otherwise agreed by the Debtor (as the case may be, the “Resolved Cure Amount”) be deemed to include any such other pecuniary or other losses, if any, under the respect executory contract and/or unexpired leases. Consequently, payment of any Cure Amounts and/or Resolved Cure Amount, as the case may be, as determined by the Court or otherwise agreed to by the Debtors will compensate the appropriate party for any such other loss.

38. The Sale Approval Hearing (at which the assumption on assignment of an Executory Contract and/or Unexpired Lease, as the case may be, will be considered) gives the

other parties in interest an opportunity to consider any assignment issues that may be resolved only after identification of a particular assignee and an opportunity to file objections, if any, to such matters.

39. Under these circumstances, the Debtor submits that it has established, or will establish at the Auction and/or the Sale Approval Hearing, the requisite adequate assurance of future performance pursuant to § 365 of the Bankruptcy Code with respect to the potential assumption and assignment of the Executory Contracts and/or Unexpired Leases, as the case may be.

II. The Sale Approval Order

A. This Court Should Approve the Sale of the Debtor's Assets to the Successful Bidder

40. On **October 16, 2013**, the Debtor received a Letter of Intention from the Purchaser which provides for a sale of substantially all of the Debtor's Assets. The Purchase Price is \$5,500,000, payable by a good faith deposit of \$500,000 upon execution of the APA, with the balance to be paid in cash at the Closing.

41. Following the Auction, the Debtor will seek this Court's approval of the sale of the Debtor's Assets free and clear of all liens, claims and encumbrances to the bidder that submits the highest and best offer at the Auction (the "**Successful Bidder**"). In the event that there are Track 1 and Track 2 bidders, the Debtor will seek this Court's assistance in determining which bid maximizes the value of the Debtor's estate and thereby determining which of the bidders is the Successful Bidder.

42. All of the sale proceeds will be received by the Debtor, with all liens, claims and encumbrances to attach to the proceeds in accordance with Section 363(f) of the Bankruptcy Code.

43. Pursuant to Section 363 (b) and (f) of the Bankruptcy Code, the Debtor seeks entry of an order authorizing the sale, assignment and transfer the Assets. Section 363(b)(1) of the Bankruptcy Code provides, in pertinent part, "The trustee, after notice and a hearing, may use, sell or lease, other than in the ordinary course of business, property of the estate." §363 (f) of the Code states as follows:

(f) 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 property;

(4) such interest is in bona fide dispute; or

(5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

44. The conditions set forth in 11 U.S.C. §363(f) are in the disjunctive, which means that only one of the tests must be met. The Debtor believes that the Purchase Price for the sale of the Assets in this manner is in the best interests of the estates and their creditors, for a variety of reasons, including the following: (i) the Debtor believes that an immediate sale of the Assets is in the best interests of creditors and the estate at large; (ii) the Purchase Price is adequate and represents fair market value of the Assets to be sold; and (iii) the sale proceeds will be used to fund a liquidating plan of reorganization and will likely result in an orderly distribution to non-insider creditors.

45. Courts in this Circuit and others have required that the decision to sell assets outside the ordinary course of business be based upon the sound business judgment of the debtors. *See In re*

Abbotts Dairies of Pennsylvania, Inc., 788 F.2d 143 (3d Cir. 1986); *see also Myers v. Martin (In re Martin)*, 91 F.3d 389,395 (3d Cir. 1996); *Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1071 (2d Cir. 1983); *Dai-Ichi Kangyo Bank, Ltd. v. Montgomery Ward Holding Corp., (In re Montgomery Ward Holding Corp.)*, 242 B.R. 147, 153 (D. Del. 1999); *In re Delaware & Hudson Ry. Co.*, 124 B.R. 169, 176 (D.D.C. 1991).

46. The "sound business judgment" test requires a debtor to establish four elements in order to justify the sale or lease of property outside the ordinary course of business, namely, (a) that a "sound business purpose" justifies the sale of assets outside the ordinary course of business, (b) that adequate and reasonable notice has been provided to interested persons, (c) that the debtors have obtained a fair and reasonable price, and (d) good faith. *Abbotts Dairies*, 788 F.2d 143; *Titusville Country Club v. Pennbank: (In re Titusville Country Club)*, 128 B.R. 396, 399 (Bankr. W.D. Pa. 1991); *In re Sovereign Estates, Ltd.*, 104 B.R. 702, 704 (Bankr. E.D. Pa. 1989).

47. In this case, the Debtors submit that the decision to proceed with the Sale of the Assets and the Sale Procedures related thereto is based upon their sound business judgment and should be approved. A debtor's showing of a sound business purpose need not be unduly exhaustive but, rather, a debtor is "simply required to justify the proposed disposition with sound business reasons." *In re Baldwin United Corp.*, 43 B.R. 888,906 (Bankr. S.D. Ohio 1984). Whether or not there are sufficient business reasons to justify a transaction depends upon the facts and circumstances of each case. *Lionel*, 722 F.2d at 1071; *Montgomery Ward*, 242 B.R. at 155 (approving funding of employee incentive and severance program; business purpose requirement fulfilled because stabilizing turnover rate and increasing morale were necessary to successful reorganization).

48. It is therefore submitted that Section 363(f) is satisfied and an immediate sale of the Assets is in the best interests of creditors and the estate and will prevent unnecessary, irreparable harm to the creditors and the estate.

49. In connection with this motion, the Debtor proposes to invite interested parties to make higher or better offers by way of conducting an auction of the Debtor's Assets in contemplation of sales free and clear of all liens, claims and encumbrances, with all such liens, claims and encumbrances to attach to the sale proceeds.

50. The Debtor respectfully submits that the APA, subject to higher and better offers received at an Auction, will provide the greatest recovery for the Debtor's estate than would be provided by any other available alternative. In addition, the terms and conditions of the APA will be tested in the market through an auction process, which will support the fairness and reasonableness of the consideration being received. Therefore, the Debtor requests that the Court authorize and approve the Sale of the Debtor's assets.

C. The Debtor's Tax-Exempt Status is not Impacted or Impaired by this Sale

51. The Debtor was established as a non-profit corporation on June 8, 1998 to assist the City of Trenton and State of New Jersey with a redevelopment project, i.e., the construction of a hotel in downtown Trenton. Subsequently, in 2001, the Debtor obtained tax exempt bond funding, and other loans totaling \$48 million to construct a 197-room hotel and conference center.

52. The Debtor's Articles of Incorporation, bylaws and tax covenants, state that the Debtor was formed consistent with the provisions of Internal Revenue Service Revenue Ruling 63-20 and Revenue Procedure 82-26 which require, in short, that title to all property of the the Debtor must be conveyed to the City upon payment or provision of payment of all indebtedness of the Debtor.

53. The Debtor takes the position that conducting an auction pursuant to §363 of the Bankruptcy Code does not jeopardizes the tax-exempt status of the Bonds and the Debtor can

maintain the tax-exempt status of bonds while selling its Assets. *In re: La Guardia Associates, L.P.*, 2006 Bankr. LEXIS 4735 at *1 (Bankr. E.D. Pa. Sept. 13, 2006). In *La Guardia*, the debtor proposed the sale of real estate encumbered and affected by a lien in favor of bondholders. The property involved in the *La Guardia* matter was a hotel whose construction was funded by public-sector bonds. *La Guardia* was a New York limited partnership that operated a franchised, Holiday Inn Crowne Plaza, 358-room, 7-story hotel located at 104-04 Ditmars Boulevard in East Elmhurst, New York (in the Borough of Queens and sat within a mile from the *La Guardia* Airport). *Id.* at *5. In its bankruptcy plan, *La Guardia* proposed to sell an “Outparcel” of real property located adjacent to the main hotel premises, which parcel was used as a parking garage. *Id.* at *7, *35. SunTrust, which represented the secured bondholders, held a first mortgage on all real property and improvements owned by *La Guardia* based upon two rounds of \$50,000,000.00 bond issuances by the New York Industrial Development Agency. *Id.* at *6, *7.

54. To avoid a modification of tax-exempt status, the debtor, *LaGuardia Associates, L.P.*, expressly provided in its bankruptcy plan that: “[a] portion of the proceeds of the sale, in an amount determined by (i) bond counsel; or (ii) the Internal Revenue Service in a private letter ruling, as being the sum necessary to preserve the exemption from federal income taxation of interest on the Bonds...shall be transferred to the [secured lender] and applied to the redemption of bonds in accordance with terms of the Indenture.” *In re La Guardia Associates, L.P., supra*, at *156 - *157 (summarizing the treatment of the applicable bondholders under the debtor’s bankruptcy plan). In ruling upon whether the debtor’s Chapter 11 plan could be confirmed over the objection of another creditor, the Court found that the debtor’s plan was confirmable. In ruling that such a provision could be inserted into the debtor’s plan, the Court reasoned that this

plan provision satisfied the requirements of 11 U.S.C. § 1129 to leave claims of secured creditors unimpaired. *In re La Guardia Associates, L.P.*, *supra*, at *1, *156 - *157.

55. Thus, the Debtor is not subject to a change in tax-exempt status of bonds by allotting for the necessary redemption of an appropriate amount of secured bonds as part of a bankruptcy sale.

D. The Break-Up Fee is Appropriate

56. As part of the Bidding Procedures, the Debtor seeks approval of a Break-Up Fee and expense reimbursement in favor of the Purchaser in the aggregate amount of \$110,000, which represents 2.0% of the aggregate Purchase Price under the APA. The Break-Up Fee and Expense Reimbursement is payable upon the closing of a transaction involving a sale of all or substantially all of the Assets by the Debtor to a Successful Bidder, other than the Purchaser, that is higher and/or better than the terms and conditions of the APA, following an Auction in which the Purchaser is the stalking horse bidder (an “**Alternative Transaction**”). Pursuant to the APA, the payment of the Break-Up Fee will constitute an allowed administrative expense of the Debtor’s estate

57. The paramount goal in any proposed sale of property of the estate is to maximize the proceeds received by the estate. *See In re Mushroom Transp. Co.*, 382 F.3d 325, 339 (3d Cir. 2004) (debtor in possession "had a fiduciary duty to protect and maximize the estate's assets"); *Official Comm. of Unsecured Creditors of Cybergenics, Corp v. Chinery*, 330 F.3d 548, 573 (3d Cir. 2003) (same); *Four B. Corp. v. Food Barn Stores, Inc. (In re Barn Stores, Inc.)*, 107 F.3d 558, 564-65 (8th Cir. 1997) (in bankruptcy sales, "a primary objective of the Code [is] to enhance the value of the estate at hand"). To that end, the United States Court of Appeals for the Third Circuit recognizes that bid protections, including traditional breakup fees and expense reimbursement provisions, will be approved where they are necessary for the preservation of the debtor's estate. *See, e.g., In re Reliant*

Energy Channelview LP, 594 F.3d 200,206 (3d Cir. 2010) (citing *Calpine Corp. v. O'Brien Environmental Energy, Inc. (In re O'Brien Environmental Energy, Inc.)*, 181 F.3d 527,537 (3d Cir. 1999); see also *Official Comm. of Subordinated Bondholders v. Integrated Res. Inc. (In re Integrated Res. Inc.)*, 147 B.R. 650, 659 (S.D.N.Y. 1992) (bidding procedures "encourage bidding and ... maximize the value of the debtor's assets"), See, *In re Reliant Energy Channelview LP*, 594 F.3d 200, 205 (3d Cir. 2010).

58. Allowance of break-up fees must be determined by the same standard applied to the allowance of any administrative expense. That is, break-up fees may be allowed when it is shown that the fees are actually necessary to preserve the value of the estate assets. *In re Beth Israel Hosp. Ass'n of Passaic*, 06-16186 (NLW), 2007 WL 2049881 (Bankr. D.N.J. July 12, 2007)

59. In *O'Brien*, the Third Circuit referred to nine factors that the bankruptcy court viewed as relevant in deciding whether to award a break-up fee or expense reimbursement: (1) the presence of self-dealing or manipulation in negotiating the break-up fee; (2) whether the fee harms, rather than encourages, bidding; (3) the reasonableness of the break-up fee relative to the purchase price; (4) whether the "unsuccessful bidder place [d] the estate property in a sales configuration mode to attract other bidders to the auction"; (5) the ability of the request for a break-up fee "to attract or retain a potentially successful bid, establish a bid standard or minimum for other bidders, or attract additional bidders"; (6) the correlation of the fee to a maximization of value of the debtor's estate; (7) the support of the principal secured creditors and creditors' committees of break-up fee; (8) the benefits of the safeguards to the debtor's estate; and (9) the "substantial adverse impact [of the break-up fee] on unsecured creditors, where such creditors are in opposition to the break-up fee." *Id.* at 536.

60. Under the standards adopted by the Third Circuit in *Reliant* and *O'Brien*, the Expense Reimbursement, Break-Up Fee and Minimum Overbid should be approved. Paying a Break-Up Fee

of 2.0% in the event the Debtor sells the Assets to a bidder other than Purchaser is reasonable and customary in this type of transaction. *See, e.g., In re Filene's Basement, LLC*, Case No. 11-13511 (KJC) (Bankr. D. Del. Apr. 9, 2012)(Court approved break-up fee of 3% and \$25,000 in expense reimbursement); *In re Magic Brands, LLC*, Case No. 10-11310 (BLS) (Bankr. D. Del. Apr. 22, 2010) (Court approved breakup fee and reimbursement expense equal to 3.5% of cash portion of purchase price); *In re ChiChi's, Inc.*, Case No. 03-13063 (Bankr. D. Del. Nov. 4, 2003) (fee of 5.1 % permitted).

61. Additionally, payment of the Expense Reimbursement and Break-Up Fee will not diminish the Debtor's estate. The Debtor will not incur the obligation to pay the Break-Up Fee or the Expense Reimbursement unless a higher and better bid is accepted and such transaction closes. Perhaps most importantly, absent authorization of the Expense Reimbursement, Break-Up Fee and Minimum Overbid, the Debtor will lose the Purchaser's bid and thus may lose the opportunity to obtain the highest and best offer for the Assets, thereby making the bid protections necessary to preserve the value of the Debtor's estate. Providing the Purchaser payment of the Break-Up Fee and Expense Reimbursement and the setting of the Minimum Overbid have promoted and will promote more competitive bidding by inducing the Purchaser's bid that otherwise would not be made, and without which bidding would have been and would continue to be limited. Furthermore, the Breakup Fee, Expense Reimbursement and Minimum Overbid induced the Purchaser to submit a bid that will serve as a minimum or floor bid on which other bidders and the Debtor can rely. If the bidding protections are not approved, the Purchaser will not go forward with the Stalking Horse Purchase Agreement. Because, among other things, approval of the bidding protections is a prerequisite for going forward with the APA, the bidding protections are in the best interests of the Debtor's estate and necessary to preserve the value of the Debtor's estate.

62. Finally, the bidding protections were negotiated in good faith and were the product of

arm's-length negotiations.

63. Accordingly, the Debtor requests that the Court authorize payment of the Expense Reimbursement and Break-Up Fee.

**C. Assumption and Assignment of the Assumed Leases
To the Successful Bidder is Proper**

64. In connection with the sale of Assets, the Debtor seeks authority to assume and assign the Debtor's interest in certain leases and executory contracts (the "**Assumed Agreements**"), to the Successful Bidder pursuant to §365 of the Bankruptcy Code. To enable the Debtor to sell all of the Assets, the Debtor requests authority to assume and assign the Assumed Agreements to the Successful Bidder following the Auction.

65. A debtor's decision to assume or reject an executory contract or unexpired lease must only satisfy the "business judgment rule" and will not be subject to review unless such decision is clearly an unreasonable exercise of such judgment. *Group of Institutional Investors v. Chicago, Milwaukee, St. Paul & Pacific Ry. Co.*, 318 U.S. 523 (1943) (applying Bankr. Act section 77 subsection (b), the predecessor to Bankruptcy Code section 365) (rejecting the test of whether the executory contract was burdensome in favor of whether rejection is within the debtor's business judgment); *Lubrizol Enter., Inc. v. Richmond Metal Finishers, Inc.*, 756 F.2d 1043, 1046-47 (4th Cir. 1985).

66. Section 365(b)(1) of the Bankruptcy Code authorizes a debtor-in-possession to assume, assume and assign, or reject executory contracts and unexpired leases subject to the approval of the Bankruptcy Court, on the condition, *inter alia*, that the Debtor cures any default under the executory contract or unexpired lease and provides adequate assurance of future performance under such contract or lease.

67. The meaning of "adequate assurance of future performance" depends on the facts and circumstances of each case, but should be given "practical, pragmatic construction." *See Carlisle Homes, Inc. v. Azzari (In re Carlisle Homes, Inc.)*, 103 B.R. 524, 538 (Bankr.D.N.1. 1989). Among other things, adequate assurance may be given by demonstrating the assignee's financial health and experience in managing the type of enterprise or property assigned. *In re Bygaph, Inc.*, 56 B.R. 596, 605-6 (Bankr. S.D.N.Y. 1986) (finding adequate assurance of future performance present when the prospective assignee of a lease from the debtors has the financial resources and has expressed a willingness to devote sufficient funding to the business in order to give it a strong likelihood of succeeding; "chief determinant of adequate assurance of future performance is whether rent will be paid").

68. In connection with the Bidding Procedures, bidders will be required to submit, among other things, written evidence of their ability to provide adequate assurance of future performance under the applicable leases, such as current financial statements or current bank account statements. In order to facilitate the Auction, and to not cause any potentially chilling effect, the Debtor believes that any objection relating to a prospective assignee's ability to provide adequate assurance of future performance under §365 of the Bankruptcy Code should be heard and adjudicated at the Sale Hearing.

69. Any assumption and assignment of the Assumed Agreements will be subject to all of the provisions of such lease, to the extent required by applicable law, and will be subject to all of the applicable provisions of the Bankruptcy Code. The proposed terms and conditions of the Auction are designed to ensure that any assignees are financially healthy and prepared to undertake the obligations for which they are bidding.

70. Accordingly, the Debtor submits that it will have established, or will establish, adequate assurance of future performance pursuant to section 365 of the Bankruptcy Code with respect to prospective assignment of the Assumed Agreements.

D. Granting the Successful Bidder Good Faith Status is Appropriate

71. Section 363(m) of the Bankruptcy Code provides as follows:

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.

72. Section 363(m) of the Bankruptcy Code thus protects the purchaser of assets sold pursuant to section 363 of the Bankruptcy Code from the risk that it will lose its interest in the purchased assets if the order allowing the sale is reversed on appeal. Additionally, the Third Circuit has indicated that section 363(m) of the Bankruptcy Code also protects the assignee of a debtor's interest in executory contracts under section 365 of the Bankruptcy Code. *Krebs Chrysler-Plymouth, Inc. v. Valley Motors, Inc.*, 141 F.3d 490,497-98 (3d. Cir. 1998). In *Krebs*, the Third Circuit considered "whether assignments of [certain automobile dealership] franchises under section 365 are also sales of estate property subject to section 363(m)." *Id.* at 497. Despite the absence of an explicit reference to assignments of executory contracts under section 365 of the Bankruptcy Code, the Third Circuit in *Krebs* concluded that section 363(m) of the Bankruptcy Code protected an assignment of a debtor's interest in certain automobile franchise agreements pursuant to an auction sale. Like the franchise agreements protected in *Krebs*, the Executory Contracts and Leases may be assumed and assigned pursuant to section 365 of the Bankruptcy Code. In light of *Krebs*, the Debtor respectfully submit that section 363(m) applies to protect the Successful Bidder (or the Back-Up Bidder) with respect to both the Executory Contracts and Leases designated for assumption and assignment and the assets and other property comprising the Assets that are included in such bids.

73. As required by section 363(m) of the Bankruptcy Code, the Sale Procedures have been proposed in good faith and provide for both the Debtor and the potential purchasers to act in good faith in negotiating the Sale and the assignment of the designated Executory Contracts and Leases. Although the Bankruptcy Code does not define "good faith purchaser," the Third Circuit, construing section 363(m) of the Bankruptcy Code, has stated that "the phrase encompasses one who purchases in 'good faith' and for 'value.'" *Abbotts Dairies*, 788 F.2d at 147. To constitute lack of good faith, a party's conduct in connection with the sale must usually amount to "fraud, collusion between the purchaser and other bidders or the trustee or an attempt to take grossly unfair advantage of other bidders." *Id.* (citing *In re Rock Indus. Mach. Corp.*, 572 F.2d 1195, 1198 (7th Cir. 1978)). See also *In re Bedford Springs Hotel, Inc.*, 99 B.R. 302, 305 (Bankr. W.D. Pa. 1989); *In re Perona Bros., Inc.*, 186 B.R. 833, 839 (D.N.J. 1995). Due to the absence of a bright line test for good faith, the determination is based on the facts of each case, concentrating on the "integrity of [an actor's] conduct during the sale proceedings." *In re Pisces Leasing Corp.*, 66 B.R. 671, 673 (E.D.N.Y. 1986) (quoting *In re Rock Indus. Mach. Corp.*, 572 F.2d 1195, 1198 (7th Cir. 1978)).

74. Here, the Sale of the Assets, and the assignment and/or transfer of those Executory Contracts and Leases designated by the Purchaser or such other purchaser who may submit a higher or better bid, is in good faith. There is no evidence of fraud or collusion in the Debtor's marketing process. To the contrary, as discussed throughout this Motion, and as will be further demonstrated at the Sale Hearing, the APA or such other purchase agreement that the Court is ultimately asked to approve will be the culmination of a solicitation and negotiation process in which all parties are expected to be represented by counsel.

75. Based upon the foregoing, the Debtor respectfully submits that Purchaser has taken part in the transaction contemplated hereby in a manner consistent with granting it "good faith purchaser" status, and the protections concomitant with such status.

E. The Fourteen Day Stay of the Sale Approval Order Should be Waived

76. Federal Rule of Bankruptcy Procedure 6004(g) provides that “[a]n order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of 14 days after entry of the order, unless the court orders otherwise.”

77. The Debtor hereby requests that the Court, in its discretion, waive the fourteen-day stay imposed by Rule 6004(g).

78. The Debtor suggests that good cause exists for such a waiver. According to the Debtor’s projected cash flows and budget, the Debtor is currently losing approximately \$100,000 per week. Thus, the Debtor will incur additional losses if it is prevented from closing before such time and as such, the Debtor seeks such a waiver. Artificially expanding the time that the Debtor must continue in business prior to a closing only increases these losses.

79. For the foregoing reasons, the Debtor therefore requests that the Court waive the fourteen-day stay consistent with the provisions of Federal Rule of Bankruptcy Procedure 6004(g).

**REQUEST PURSUANT TO LOCAL BANKRUPTCY RULE
9077 FOR HEARING TO CONSIDER ENTRY OF THE
BIDDING PROCEDURES ORDER ON SHORTENED NOTICE
PURSUANT TO BANKRUPTCY PROCEDURE 9006(C)**

80. As set forth above, the Debtor is urgently in need of consummating a strategic transaction in order to sustain the viability of its business operations.

81. The Debtor lacks any working capital or safety net to ensure stability and future viability.

82. The continued stigma associated with the uncertainty and pending litigation in the Chapter 11 case has contributed to the Debtor’s tenuous status and ability to preserve or bolster operations.

83. In order for the Debtor to maintain its operation in order to achieve this Sale, the Debtor was required to borrow up to \$2 million, which the Debtor believes is sufficient only to support operations until the end of the 2013 calendar year. Thus, in order to conduct an auction on November 25, 2013, with a closing in December, 2013, the Debtor must immediately begin marketing its assets. Furthermore, Sheldon Good, the Debtor's auctioneer, has a print deadline of October 24, 2013 to run the advertisement of the auction sale of the Debtor's assets.

84. Therefore, the Debtor hereby requests that the Court enter an order shortening time pursuant to Rule 9006(c) of the Federal Rules of Bankruptcy Procedure so that the hearing to consider entry of (a) the Bidding Procedures Order may be heard on or prior to October 23, 2013 and (b) the Sale Approval Order may be heard on or prior to November 27, 2013.

85. The Federal Rules of Bankruptcy Procedure provide for a shortening of time under certain circumstances.

86. Federal Rule of Bankruptcy Procedure 9006(c) provides as follows:

(c) Reduction.

(1) *In General.* Except as provided in paragraph (2) of this subdivision, when an act is required or allowed to be done at or within a specified time by these rules or by a notice given thereunder or by order of court, the court for cause shown may in its discretion with or without motion or notice order the period reduced.

(2) *Reduction Not Permitted.* The court may not reduce the time for taking action under Rules 2002 (a)(4) and (a)(8), 2003(a), 3002(c), 3014, 3015, 4001(b)(2), (c)(2), 4003(a), 4004(a), 4007(c), 8002, and 9033(b).

87. Thus, the Federal Rules of Bankruptcy Procedure specifically authorize the Court to hear an application such as the Motion herein on shortened notice, for cause shown.

88. The Debtor respectfully submits that sufficient cause exists for scheduling a hearing on shortened notice to consider the Motion and refers the Court to the Affidavit of

Robert L. Rattet pursuant to Local Bankruptcy Rules 1007-2 and 9077-1 in support of a hearing on shortened notice on the Motion ("9077-1 Affidavit") filed contemporaneously herewith.

89. In light of the substantial marketing efforts of the Debtor and its advisors to date, the Debtor submits that the above timeline is sufficient to further and finally market the Debtor's assets and provides adequate time for any potential purchasers to conduct any further inquiries into the Debtor's assets.

NOTICE

90. Notice of this Motion has been provided to (i) the Office of the U.S. Trustee; (ii) the Debtor's secured creditors and their respective counsel; (iii) all taxing authorities; (iv) counsel to the Purchaser, (v) the Debtor's DIP Lender, and its counsel; (vi) all counterparties to each of the Debtor's executory contracts and/or leases; (vii) all creditors; and (viii) all potential buyers known by the Debtor as having previously expressed interest in acquiring any of the Debtor's assets. The Debtor submits that said notice is adequate and proper.

NO PRIOR REQUEST

91. No prior Motion for the relief requested herein has been made to this or any other Court.

CONCLUSION

92. For all of the foregoing reasons, the Debtor respectfully requests entry of the Sale Procedures Order, substantially in the form annexed hereto as **Exhibit A**, and after the Auction and a Sale Hearing, entry of the Sale Approval Order.

WHEREFORE, the Debtor respectfully requests that the Court grant all of the relief requested herein, together with such other and further relief as is just and proper under the circumstances.

Respectfully Submitted,

WONG FLEMING

Proposed Counsel to the Debtor and Debtor-in-Possession

By: /s/ Gregory G. Johnson
Gregory G. Johnson, Esq.

-and-

DELBELLO DONNELLAN WEINGARTEN

WISE & WIEDERKEHR, LLP

Proposed Co-Counsel to the Debtor and Debtor-in-Possession

By: /s/ Robert L. Rattet
Robert L. Rattet, Esq.

Dated: October 16, 2013

