

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

In re:

ARGOS THERAPEUTICS, INC.<sup>1</sup>

Debtor.

Chapter 11

Case No. 18-12714 (KJC)

Hearing Date: December 20, 2018 at 3:00 p.m. (ET)  
Objection Deadline: December 14, 2018 at 4:00 p.m. (ET)

**MOTION OF DEBTOR FOR ENTRY OF ORDERS: (A)(I) APPROVING BID PROCEDURES RELATING TO THE SALE OF SUBSTANTIALLY ALL OF THE DEBTOR'S ASSETS, (II) APPROVING BID PROTECTIONS; (III) SCHEDULING A HEARING TO CONSIDER THE SALE, (IV) APPROVING THE FORM AND MANNER OF NOTICE OF SALE BY AUCTION, (V) ESTABLISHING NOTICE AND PROCEDURES FOR THE ASSUMPTION AND ASSIGNMENT OF CONTRACTS AND LEASES, AND (VI) GRANTING RELATED RELIEF; AND (B)(I) APPROVING ASSET PURCHASE AGREEMENT AND AUTHORIZING THE SALE OF CERTAIN ASSETS OF THE DEBTOR OUTSIDE THE ORDINARY COURSE OF BUSINESS, (II) AUTHORIZING THE SALE OF ASSETS FREE AND CLEAR OF ALL LIENS, CLAIMS, ENCUMBRANCES AND INTERESTS, (III) AUTHORIZING THE ASSUMPTION AND ASSIGNMENT OF CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES, AND (IV) GRANTING RELATED RELIEF**

The above-captioned debtor and debtor-in-possession (the "Debtor"), by and through its undersigned proposed counsel, hereby files this motion (the "Motion") pursuant to sections 105(a), 363, 365, 503 and 507 of title 11 of the United States Code (as amended or modified, the "Bankruptcy Code"); rules 2002, 6003, 6004, 6006, 9007 and 9008 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"); and rule 6004-1 of the Local Rules (the "Local Rules") of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court"), for entry of two orders: (a) the first order, substantially in the form attached hereto as Exhibit A (the "Bid Procedures Order") (i) approving

<sup>1</sup> The last four digits of the Debtor's federal tax identification number are 0007. The Debtor's corporate headquarters and its mailing address is 4233 Technology Drive, Durham, NC 27704.

the procedures (the “Bid Procedures”)<sup>2</sup> in connection with the solicitation and acceptance of higher and better bids, as set forth in the asset purchase agreement (the “Stalking Horse APA”)<sup>3</sup> by and among the Debtor, Cellscript, LLC and Immune and Cell Therapies, LLC (the “Stalking Horse Bidder”) with respect to the proposed sale (the “Sale”) of substantially all of the Debtor’s assets (as defined in the Stalking Horse APA, the “Acquired Assets”), (ii) scheduling a hearing for approval of the Sale (the “Sale Hearing”) and setting objection deadlines with respect to the Sale, (iii) approving the form and manner of notice (the “Sale Notice”)<sup>4</sup> of the Sale and related auction (the “Auction”) for the Acquired Assets, (iv) establishing procedures to determine cure amounts and deadlines for objections to the potential assumption and assignment of executory contracts and unexpired leases, and (v) granting related relief; and (b) the second order, substantially in the form attached hereto as Exhibit C (the “Sale Order”)<sup>5</sup> (i) authorizing and approving the Stalking Horse APA, (ii) authorizing the Sale free and clear of Encumbrances,<sup>6</sup> with such Encumbrances to attach to the Sale Proceeds (if any) (iii) authorizing the assumption and assignment of certain executory contracts and unexpired leases, and (iv) granting related relief. In support of the Motion, the Debtor respectfully states as follows:

### JURISDICTION AND VENUE

1. The Bankruptcy Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334 and the Amended Standing Order of Reference from the United States District Court for the District of Delaware dated February 29, 2012. This matter is a core proceeding

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<sup>2</sup> A copy of the proposed Bid Procedures is attached as Exhibit 1 to the Bid Procedures Order.

<sup>3</sup> A copy of the Stalking Horse APA is attached hereto as Exhibit B.

<sup>4</sup> A copy of the proposed notice of Auction is attached as Exhibit 2 to the Bid Procedures Order.

<sup>5</sup> Exhibit C will be filed with the Bankruptcy Court prior to the objection deadline for the Motion.

<sup>6</sup> Capitalized terms used but not defined herein shall have the same meanings given to such terms as in the Stalking Horse APA, the Bid Procedures, and/or the First Day Declaration (defined below), as applicable.

within the meaning of 28 U.S.C. § 157(b)(2) and the Bankruptcy Court may enter a final order consistent with Article III of the United States Constitution.<sup>7</sup> Venue is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409.

2. The predicates for the relief sought herein are Bankruptcy Code sections 105(a), 363, 365, 503 and 507, Bankruptcy Rules 2002, 6003, 6004, 6006, 9007 and 9008, and Local Rule 6004-1.

### **BACKGROUND**

3. On the date hereof (the "Petition Date"), the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code in the Bankruptcy Court commencing the above-captioned case (the "Chapter 11 Case").

4. The Debtor continues to operate its business and manage its properties as a debtor-in-possession pursuant to Bankruptcy Code sections 1107(a) and 1108.

5. As of the date of this Motion, no trustee, examiner or statutory committee has been appointed in the Chapter 11 Case.

6. Additional information regarding the circumstances leading to the commencement of the Chapter 11 Case and information regarding the Debtor's business and capital structure is set forth in the *Declaration of Matthew Foster in Support of First Day Pleadings* (the "First Day Declaration") filed contemporaneously with this Motion and incorporated herein by reference.

#### **A. The Debtor's Marketing Process and Lack of Alternatives to a Sale**

7. As set forth in additional detail in the First Day Declaration, the Debtor has been actively marketing its assets since April 2018, the result of which is the proposed Stalking Horse APA.

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<sup>7</sup> Pursuant to Local Rule 9013-1(f) the Debtor hereby confirms its consent to entry of a final order by the Bankruptcy Court in connection with this Motion if it is later determined that the Bankruptcy Court, absent consent

8. Although the Debtor has been marketing its assets for over six (6) months, the proposed Bid Procedures contemplate a marketing process in the Chapter 11 Case and a bid deadline of January 16, 2019 (the "Bid Deadline"). The Debtor believes that the marketing period, which will have spanned over six (6) months prior to the Petition Date and approximately 7 weeks during the Chapter 11 Case, is a reasonable and sufficient period to solicit bids on the Debtor's assets. These marketing efforts will be sufficient to ensure the highest and best offer, particularly in light of the Debtor's limited financing options, ongoing cash needs and extensive prepetition marketing efforts.

9. The Debtor also believes, based on consultations with its professionals, that the Bid Procedures negotiated with the Stalking Horse Bidder will solicit the highest or otherwise best offer for the Debtor's assets under the circumstances of the Chapter 11 Case.

10. The Debtor currently values the consideration provided under the Stalking Horse Bid at \$3,820,330. This amount includes (a) \$1,675,000.00 in cash; (b) Cure Costs for Assumed Executory Contracts which are estimated to be valued at not less than \$1,000; (c) the assumption of all Assumed Liabilities which are estimated to be valued at not less than \$1,444,330; and (d) the release (and/or assignment to the Debtor's secured lender) of the Stalking Horse Bidder's approximately \$2,000,000 in unsecured claims, which are estimated to be valued at not less than \$700,000.

11. In sum, the proposed Sale to the Stalking Horse Bidder provides the best alternative for all of the Debtor's creditor constituencies and stakeholders. Given that the Debtor has no realistic restructuring options other than the transaction proposed in the Stalking Horse

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of the parties, cannot enter final orders or judgments consistent with Article III of the United States Constitution.

APA, the only alternative to the Sale would be a conversion to Chapter 7 and a piecemeal liquidation of the Debtor's assets, to the detriment of the Debtor, its estate and stakeholders.

**B. The Stalking Horse APA**

12. The following chart summarizes key provisions of the Stalking Horse APA and highlights certain provisions as required by Local Rule 6004-1(b)(iv), but are qualified in their entirety by reference to the terms set forth in the Stalking Horse APA:

<p><b><u>Purchase Price</u></b> <b>(Stalking Horse APA, Section 3.1)</b></p> <p><b>Local Rule 6004-1(b)(iv)(N)</b></p>	<p>The aggregate consideration (collectively, the "<u>Purchase Price</u>") to be paid for the acquisition of the Acquired Assets shall consist of the following, which shall be payable in accordance with the terms and conditions set forth in <u>Article III</u> and <u>Article IV</u>: (i) an amount in cash equal to US\$1,675,000 (the "<u>Cash Purchase Price</u>"); <i>plus</i> (ii) payment of all Cure Costs in respect of all Assumed Executory Contracts as of the Closing Date; <i>plus</i> (iii) assumption of the Assumed Liabilities; <i>plus</i> (iv) Purchaser's waiver and/or transfer of the Cellsript Claim, as described in <u>Section 4.2(b)</u></p>
<p><b><u>Purchase Price Allocation</u></b> <b>(Stalking Horse APA, Sections 3.4)</b></p> <p><b>Local Rule 6004-1(b)(iv)(H)</b></p>	<p>Within thirty (30) calendar days after the Closing Date, Purchaser shall deliver to Seller any different or more detailed allocation of the Purchase Price among the Acquired Assets as may exist apart from <u>Section 3.1</u> (the "<u>Allocation</u>"). Such Allocation shall become part of the Stalking Horse APA for all purposes. Seller and Purchaser agree to report, pursuant to section 1060 of the Internal Revenue Code of 1986 and the regulations promulgated thereunder, if and when required, the Allocation of the Purchase Price, as adjusted, in a manner entirely consistent with such Allocation in the preparation and filing of all Tax Returns (including IRS form 8594). Neither Seller nor Purchaser shall take any action that would call into question the bona fide nature of such Allocation; and neither party shall take any position for Tax purposes which is inconsistent with such Allocation, unless required to do so under applicable law. Notwithstanding the foregoing, the Allocation shall not be binding upon any person or entity that is not a party to the Stalking Horse APA.</p>
<p><b><u>Acquired Assets</u></b> <b>(Stalking Horse APA, Section 1.1(b))</b></p>	<p>All of the assets, properties, claims and rights of Seller used in or held in connection with the Leasehold Improvements and Equipment, the Intellectual Property, and the Other Assets, in each case as set forth in <u>Exhibit A-1</u>, <u>Exhibit A-2</u>, and <u>Exhibit A-3</u> hereto, respectively, and all Documents related thereto, and all keys, passcodes, and security codes required to access, the Acquired</p>

	Assets, the Assumed Executory Contracts and the Acquired Claims.
<b><u>Assumed Liabilities</u></b> <b>(Stalking Horse APA, Section 3.3)</b>	Only those obligations in respect of the Assumed Executory Contracts and those other obligations with respect to the Acquired Assets that accrue and are required to be performed from and after the Closing Date, including, for the avoidance of doubt, any and all continuing maintenance costs arising from the Intellectual Property that accrue and are required to be performed from and after the Closing Date.
<b><u>Excluded Assets</u></b> <b>(Stalking Horse APA, Section 2.2)</b>	All assets and properties of Seller that are not Acquired Assets, including, without limitation, those items listed on <u>Exhibit A-4</u> to the Stalking Horse APA and all cash, accounts receivable, claims, causes of action of Seller (other than the Acquired Claims), and any and all proceeds from (a) the Invetech License, to the extent actually received by Seller prior to the Closing in accordance with the terms of the applicable agreement (without acceleration) and (b) the Lummy License and/or the Lummy Intellectual Property Purchase Agreement.
<b><u>Excluded Liabilities</u></b> <b>(Stalking Horse APA, Section 2.4)</b>	Those liens, Claims, interests, Encumbrances or Liabilities of Seller or related to the Acquired Assets or any other assets of Seller, whether actual or contingent, accrued or unaccrued, matured or unmatured, liquidated or unliquidated, or known or unknown, that are not the Assumed Liabilities, including specifically any indebtedness or debt-like obligations of Seller, employment related liabilities, liabilities for taxes of Seller or the Business for the period ending prior to the Closing Date, liabilities relating to or arising from any Legal Proceeding or investigations against Seller, the Business or any of Seller's equity holders, any liabilities or obligations relating to or in connection with the Excluded Assets and any other liabilities or obligations of the Business arising or accruing prior to the Closing (in each case, other than a liability that is specifically an Assumed Liability).
<b><u>Cure Payments</u></b> <b>(Stalking Horse APA, Section 2.5(b))</b>	Purchaser shall be responsible and liable for, and shall pay, all Cure Costs in accordance with, <u>Section 3.2</u> and <u>Section 3.5</u> .

<p><b><u>Closing</u></b> <b>(Stalking Horse APA, Section 4.1)</b></p> <p><b>Local Rule 6004-1(b)(iv)(E)</b></p>	<p>Provided that the conditions to closing set forth in the Stalking Horse APA have been satisfied or, if waivable, have been waived in accordance herewith, the closing of the transactions contemplated therein (the "<u>Closing</u>") shall be held via e-mail or such other place as agreed to between Purchaser and Seller, within three (3) calendar days following the first day that all such conditions have been satisfied or, if waivable, waived, on a Business Day mutually agreeable to Purchaser and Seller. The date on which the Closing occurs in accordance with the previous sentence is referred to as the "Closing Date". Unless otherwise agreed by the parties in writing, the Closing shall be deemed effective and all right, title and interest of Seller in the Acquired Assets to be acquired by Purchaser hereunder shall be considered to have passed to Purchaser and the assumption of the Assumed Liabilities shall be considered to have occurred as of 11:59 p.m. Eastern Time on the Closing Date.</p>
<p><b><u>Termination</u></b> <b>(Stalking Horse APA, Section 4.6)</b></p>	<p>The Stalking Horse APA may be terminated at any time prior to the Closing as follows:</p> <ul style="list-style-type: none"> <li>i. by the mutual written consent of Seller and Purchaser;</li> <li>ii. by Seller, upon or immediately prior to the consummation of an Alternative Transaction as a result of any auction conducted in accordance with the Bidding Procedures, but only if Seller performs its obligations under <u>Section 4.7</u>;</li> <li>iii. by either Purchaser or Seller, if the Closing shall not have been consummated prior to February 15, 2019 (the "<u>Outside Date</u>"); <u>provided</u>, that if the Closing shall not have occurred on or before the Outside Date due to a material breach of any representations, warranties, covenants or agreements contained in the Stalking Horse APA by Purchaser or Seller, then Purchaser (if Purchaser is in breach) or Seller (if Seller is in breach), respectively, may not terminate the Stalking Horse APA pursuant to this <u>Section 4.6(c)</u>;</li> <li>iv. by Purchaser, if (a) the Bidding Procedures Order has not been entered by the Bankruptcy Court, or if the Stalking Horse Provisions have not been approved by the Bankruptcy Court, in each case within thirty-five (35) calendar days following the Petition Date (or any extension of such period of time as may be agreed by Purchaser), (b) the Bidding Procedures Order has been appealed, withdrawn, revoked, rescinded, or modified, or (c) the Bidding Procedures Order has not become a final, non-appealable order within fifteen (15) calendar days following the date on which it was entered (or any extension of such period of time as may be</li> </ul>

agreed by Purchaser);

v. by either Purchaser or Seller, if there shall be any Law that makes consummation of the transactions contemplated hereby illegal or otherwise prohibited, or there shall be in effect a final non-appealable order of a Governmental Body of competent jurisdiction restraining, enjoining or otherwise prohibiting the consummation of the transactions contemplated hereby; it being agreed that the parties hereto shall promptly appeal any such adverse determination which is appealable (and pursue such appeal with reasonable diligence);

vi. by Purchaser if the Chapter 11 Case is dismissed or converted to a case or cases under chapter 7 of the Bankruptcy Code;

vii. by Purchaser, if (i) the Sale Order shall not have been entered by the Bankruptcy Court by the close of business on January 31, 2019 (or any extension of such period of time as may be agreed by Purchaser), or (ii) the Sale Order has been appealed, withdrawn, revoked, rescinded, modified or amended in any material respect without the prior written consent of Purchaser;

viii. by Seller, if Purchaser fails to satisfy any of its material obligations at Closing and such failure has not been cured within five (5) calendar days after written notification by Seller; or

ix. by Purchaser, if Seller is in breach of any of its material obligations hereunder, including Seller's obligation pursuant to Section 7.3(x) of the Stalking Horse APA, and, to the extent such breach is reasonably capable of cure within such period, such breach has not been cured by Seller within five (5) calendar days after written notification by Purchaser.

<p><b><u>Tax Exemption</u></b>  <b>(Stalking Horse APA, Section 9.1)</b></p> <p><b>Local Rule 6004-1(b)(iv)(I)</b></p>	<p>Seller and Purchaser agree to request that the Bankruptcy Court conclude that the sale of Acquired Assets constitutes a sale in furtherance of effectuating a plan of reorganization, and in accordance with section 1146(a) of the Bankruptcy Code, all transfers in connection therewith shall be exempt from any and all sales, use, transfer, deed, fixed asset, stamp, documentary stamp or other similar type Taxes and recording charges (each, a “<u>Transfer Tax</u>”). To the extent that the Bankruptcy Court does not so order, Purchaser shall be responsible for the payment of all Transfer Taxes which may be payable by reason of the acquisition of the Acquired Assets or the assumption of the Assumed Liabilities under the Stalking Horse APA. Purchaser and Seller shall cooperate to prepare and timely file any Tax Returns required to be filed in connection with Transfer Taxes described in the immediately preceding sentence.</p>
<p><b><u>Access to Records</u></b>  <b>(Stalking Horse APA, Section 7.4)</b></p> <p><b>Local Rule 6004-1(b)(iv)(J)</b></p>	<p>i. Seller agrees that, between the Execution Date and the earlier of the Closing Date and the date on which the Stalking Horse APA is terminated in accordance with <u>Section 4.6</u>, Purchaser shall be entitled, through its officers, employees, counsel, accountants and other authorized representatives, agents and contractors (“<u>Representatives</u>”), to have such reasonable access to and make such reasonable investigation and examination of the books and records, properties, businesses, assets, accountants, auditors, counsel and operations of Seller as Purchaser’s Representatives may reasonably request, <u>provided, however</u>, that Seller shall not be obligated to provide information that it is not permitted to provide under applicable Law. Any such investigations and examinations shall be conducted during regular business hours upon reasonable advance notice and under reasonable circumstances, including Seller’s right to have its Representatives accompany Purchaser and its Representatives at the time of any on-site inspection or examination and shall be subject to restrictions under applicable Law. Pursuant to <u>Section 7.4</u>, Seller shall furnish to Purchaser and its Representatives such financial, operating and property related data and other information as such Persons reasonably request. Seller shall use commercially reasonable efforts to cause its Representatives to reasonably cooperate with Purchaser and Purchaser’s Representatives in connection with such investigations and examinations, and Purchaser shall, and use its commercially reasonable efforts to cause its Representatives to, reasonably cooperate with Seller and its Representatives and shall use their reasonable efforts to minimize any disruption to the Business. Purchaser and its Representatives shall be permitted to contact, or engage in discussions or otherwise communicate with Seller’s landlords, clients, suppliers and other Persons with which Seller has</p>

	<p>material commercial dealings, <u>provided</u>, that Purchaser must obtain the prior consent of Seller, which consent shall not be unreasonably withheld or delayed, to initiate such communications and give Seller the opportunity to be present therefor.</p> <p>ii. Purchaser agrees that, for twenty-four (24) months following the Closing Date, Seller may request and Purchaser shall use commercially reasonable efforts to provide, reasonable access to the books and records acquired by Purchaser related to the Acquired Assets for tax and other estate administrative estate purposes on an as-needed basis, <u>provided, however</u>, that Purchaser shall not be obligated to provide information that it is not permitted to provide under applicable Law.</p> <p>iii. No information received pursuant to an investigation made under <u>Section 7.4</u> shall be deemed to (i) qualify, modify, amend or otherwise affect any representations, warranties, covenants or other agreements set forth in the Stalking Horse APA or any certificate or other instrument delivered in connection with the transactions contemplated hereby, (ii) limit or restrict the remedies available to the parties under applicable Law arising out of a breach of the Stalking Horse APA or otherwise available at Law or in equity, or (iii) limit or restrict the ability of either party to invoke or rely on the conditions to the obligations of the parties to consummate the transactions contemplated by the Stalking Horse APA set forth in <u>Article VIII</u>.</p>
<p><b><u>Good Faith Deposit</u></b> <b>(Bid Procedures p. 1.1(t))</b></p> <p><b>Local Rule 6004-1(b)(iv)(F)</b></p>	<p>\$167,500.00 cash deposit made on or before the date hereof by Purchaser and held by Seller pursuant hereto and to the Bidding Procedures.</p>
<p><b><u>Releases</u></b> <b>(Stalking Horse APA, Section 8.1(e))</b></p>	<p>On or immediately following the Closing Date, the Acquired Claims shall be released and forever discharged</p>
<p><b><u>Successor Liability</u></b> <b>(Stalking Horse APA, Sections 9.2 and 9.13)</b></p> <p><b>Local Rule 6004-1(b)(iv)(L)</b></p>	<p>Except as expressly provided for in the Stalking Horse APA, none of the (a) covenants or agreements to be performed by either Seller or Purchaser prior to the Closing pursuant to the Stalking Horse APA and (b) representations and warranties by Seller or Purchaser contained in the Stalking Horse APA shall survive Closing, and neither Seller nor Purchaser shall have liability to the other party after Closing for any breach of any such covenant, agreement, representation or warranty. Except as set forth in the immediately preceding sentence, the covenants and agreements of the parties set forth in the Stalking Horse APA will survive until fully performed or until such performance is expressly waived in writing by the other</p>

	<p>party.</p> <p>Except as expressly contemplated by the Stalking Horse APA, no past, present or future director, officer, employee, advisor, lawyer, agent, representative, incorporator, member, partner or equityholder of Seller or Purchaser shall have any liability for (i) any obligations or liabilities of Seller or Purchaser under the Stalking Horse APA or the certificate of incorporation and by-laws or comparable organizational documents of Seller or Purchaser, or (ii) any claim based on, in respect of, or by reason of, the transactions contemplated by the Stalking Horse APA.</p>
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**C. Proposed Bid Procedures**

13. The Debtor seeks to conduct an open, robust and transparent sale process pursuant to which the Successful Bidder (defined below) will enter into an asset purchase agreement, substantially in the form of the Stalking Horse APA, for the purchase of substantially all of the Debtor's assets free and clear of all Encumbrances, with such Encumbrances attaching to the proceeds of the Sale.

14. The Bid Procedures, as summarized below, were developed consistent with the Debtor's need to proceed with a sale process to preserve the value of the Debtor's assets, and with the objective of promoting active bidding that will result in the highest or otherwise best offer for such assets. Moreover, the Bid Procedures reflect the Debtor's objective of conducting the Auction in a controlled, fair, and open, fashion that promotes interest in the Acquired Assets by financially-capable, motivated bidders who are likely to close the Sale.

15. The following paragraphs in this section summarize key provisions of the Bid Procedures, and are qualified in their entirety by reference to the actual Bid Procedures.

- a. Access to Due Diligence Materials. In order to access diligence materials and information related to the Debtor's assets, each Potential Bidder must first deliver (unless previously delivered) to the Debtor's investment banker and counsel (as identified below) the following items prior to the Bid Deadline (defined below) (collectively, the "Participation Requirements"): (i) an executed confidentiality and non-collusion agreement in form and substance reasonably acceptable to the

Debtor; and (ii) identification of the Potential Bidder, any required financing sources for the Potential Bidder (other than cash on hand) and any principals and representatives of the Potential Bidder who are authorized to appear and act on its behalf for all purposes regarding the contemplated Sale.

- b. Participation Requirements. In order to be eligible to participate in the Auction (defined below) for the Acquired Assets, each Potential Bidder, other than the Stalking Horse Bidder or its designee or assignee, must be determined by the Debtor, in consultation with the Committee, if any, to have submitted a Qualified Bid (each, a "Qualified Bidder"). The Debtor shall have the right, in consultation with the Committee, if any, to determine whether a bidder is a Qualified Bidder. The Stalking Horse Bidder is a Qualified Bidder, and the Stalking Horse Bidder's bid is a Qualified Bid. The Stalking Horse Bid has four (4) components of consideration (collectively, the "Baseline Consideration"): (1) the Cash Purchase Price of \$1,675,000; plus (2) Cure Costs for Assumed Executory Contracts, which are estimated for comparative purposes to be valued at not less than \$1,000; plus (3) the assumption of all Assumed Liabilities, which are estimated for comparative purposes to be valued at not less than \$1,444,330; plus (4) the release (and/or assignment to the Debtor's secured creditor) of the Stalking Horse Bidder's approximately \$2,000,000 in unsecured claims against the Debtor, which release/assignment is estimated for comparative purposes to be valued at \$700,000.
- c. Qualified Bidder. In order for any Potential Bidder to be considered a Qualified Bidder (other than the Stalking Horse Bidder and its designee or assignee, who are already considered Qualified Bidders), such Potential Bidder must submit a written offer (a "Qualified Bid") such that it is received prior to the Bid Deadline and meets the following criteria:
  - i. The Same or Better Terms. A bid must be on terms that, in the Debtor's business judgment, in consultation with the Committee, if any, are substantially the same or better than the terms of the Stalking Horse APA; provided, that such bid must (x) include a cash purchase price that, at a minimum, exceeds the aggregate sum of (a) the Baseline Consideration, plus (b) the Break-Up Fee and Expense Reimbursement (each as defined below), plus (c) the initial overbid amount of \$125,000 (i.e., \$4,095,330) (together, the "Minimum Initial Bid"); and (y) contain an additional component of consideration commensurate with the inclusion of any additional assets as Acquired Assets.
  - ii. Executed and Marked Asset Purchase Agreement. A bid must include fully executed Sale documents, pursuant to which the Qualified Bidder proposes to effectuate the contemplated Sale. A bid shall include a redlined copy of the Stalking Horse APA (the "Modified APA") to show all changes requested by the Qualified Bidder, including those related to the purchase price in accordance

with subsection (i) above, and identify each and every executory contract and unexpired lease the Qualified Bidder intends to assume.

- iii. No Contingencies. A bid may not be conditioned on obtaining internal approval, obtaining financing or on the outcome or review of due diligence, and a bid shall not contain any contingencies to the validity, effectiveness, and/or binding nature of the bid beyond those contained and that remain effective in the Stalking Horse APA.
- iv. Legal Capacity. A bid must be accompanied by documentation that, in the Debtor's reasonable business judgment, in consultation with the Committee, if any, demonstrates that the Potential Bidder has the legal capacity to fund a purchase price in the amount of the Minimum Initial Bid as set forth above, and otherwise consummate the proposed transaction.
- v. Authorization to Bid. Each bid, other than any bid by the Stalking Horse Bidder, must include evidence of authorization and approval from such Qualified Bidder's board of directors (or comparable governing body) with respect to the submission, execution, delivery and closing of the Modified APA.
- vi. Back-Up Bidder. Each bid must contain an agreement for the Qualified Bidder to be a Back-Up Bidder (defined below).
- vii. No Fees Payable to Qualified Bidder. A bid may not request or entitle the Qualified Bidder (other than the Stalking Horse Bidder and its designee or assignee) to any break-up fee, termination fee, expense reimbursement or similar type of payment.
- viii. Financing Sources. A bid, other than any bid made by the Stalking Horse Bidder, must contain evidence of the ability to consummate the Sale satisfactory to the Debtor, in consultation with the Committee, if any, with appropriate contact information for all such financing sources (whether cash or borrowings) and may not contain any financing contingency (or conditions to borrowings).
- ix. Other Evidence. Each bid, other than any bid made by the Stalking Horse Bidder, must contain evidence satisfactory to the Debtor, in its reasonable discretion, in consultation the Committee, if any, that the Qualified Bidder (based on availability of financing, experience and other considerations or conditions) will be able to timely consummate the Sale to purchase the Acquired Assets if selected as the Successful Bidder.
- x. Representation of Non-Collusion. Pursuant to Local Rule 6004-1,

each Qualified Bidder must confirm in writing that it has not engaged in any collusion with respect to the bidding on or the sale of the Acquired Assets.

- xi. Proof of Ability to Close. Written evidence that enables the Debtor and its representatives to determine, in its reasonable discretion, in consultation with the Committee, if any, that the Potential Bidder has the ability to close the contemplated Sale and provide adequate assurance of future performance under all contracts to be assumed in such contemplated Sale.
  - xii. Deposit. Before the Bid Deadline, each Potential Bidder (other than the Stalking Horse Bidder and its designee or assignee) must pay an earnest money cash deposit of ten percent (10%) of the Minimum Initial Bid and any other consideration contained in the relevant Qualified Bid (a "Qualified Bidder Deposit") by cashier's or certified check or wire transfer of immediately available funds (pursuant to instructions to be obtained from Debtor's counsel), which deposit shall be held in escrow in Debtor's counsel's IOLTA trust account in accordance with the terms of an escrow agreement to be provided by the Debtor (in a form acceptable to Debtor's counsel in its sole discretion). A Qualified Bidder Deposit will be refunded only if the bid corresponding with the Qualified Bidder Deposit is not selected as the winning bid and approved by the Bankruptcy Court. The Debtor reserves the right to hold each Qualified Bidder Deposit until five (5) days after the closing of the sale of the Acquired Assets to, as the case may be, the Stalking Horse Bidder or the Successful Bidder.
- d. Bid Deadline. The Bid Deadline for a Potential Bidder to submit a bid (other than the Stalking Horse Bidder or its designee or assignee) shall be January 16, 2019 at 12:00 p.m. (ET). No bid received after the Bid Deadline shall be considered a Qualified Bid.

Prior to the Bid Deadline, a Potential Bidder, other than the Stalking Horse Bidder, that desires to make an offer, solicitation or proposal shall deliver written copies of its bid, including each of the documents and information required under clause c above, to the Debtor's proposed investment banker, SSG Advisors, LLC, Five Tower Bridge, Suite 420, 300 Barr Harbor Drive, West Conshohocken, Pennsylvania 19428, Attn: J. Scott Victor (e-mail: jsvictor@ssgca.com) and proposed counsel to the Debtor, Landis Rath & Cobb LLP, 919 Market Street, Suite 1800, Wilmington, Delaware 19801 (Attn: Adam G. Landis, Esq. and Matthew B. McGuire, Esq.); and Wilmer Cutler Pickering Hale and Dorr LLP, 7 World Trade Center, 250 Greenwich Street, New York, New York, 10007 (Attn: George Shuster, Esq. and Lauren Lifland, Esq.). Counsel to the Debtor shall promptly provide email copies of such bids to (i) the Office of the United States

Trustee, 844 King Street, Suite 2207, Wilmington, Delaware 19801 (Attn: Jaclyn Weissgerber, Esq.), and (ii) counsel to the Committee, if any.

- e. Auction. Only in the event that the Debtor receives: at least one (1) Qualified Bid (other than that of the Stalking Horse Bidder) by the Bid Deadline, the Debtor shall conduct an auction (the "Auction") of the Acquired Assets to determine the highest or otherwise best bid with respect to the Acquired Assets. No later than 4:00 p.m. (ET) on January 18, 2019, the Debtor will notify all Qualified Bidders and, if formed, counsel to the Committee, whether the Auction will occur and will provide each Qualified Bidder with a copy of all Qualified Bids. The Auction shall commence at 10:00 a.m. (ET) on January 22, 2019 at the offices of Landis Rath & Cobb, LLP, 919 Market Street, Suite 1800, Wilmington, Delaware 19801.

The only persons or entities who will be permitted to bid at the Auction are the authorized representatives, including professionals, of each Qualified Bidder, including the Stalking Horse Bidder (collectively, the "Auction Participants"). Each Qualified Bidder must attend the Auction in person in order to bid at the Auction. While only the Auction Participants may bid at the Auction, the Auction may be attended and viewed also by the Debtor, its professionals, Auction Participants, the Committee, if any, and its professionals. Any party-in-interest wishing to attend the Auction may request to attend by contacting, no later than three (3) business days prior to the start of the Auction, Landis Rath & Cobb LLP, 919 Market Street, Suite 1800, Wilmington, Delaware 19801, Attn: Matthew R. Pierce, Esq. (e-mail: pierce@lrclaw.com).

The Debtor and its professional advisors shall direct and preside over the Auction. At the beginning of the Auction, the Debtor and its professional advisors will, in consultation with the Committee, if any, announce the highest Qualified Bid received by the Bid Deadline which shall serve as the baseline bid at the Auction (the "Baseline Bid"). All bids made thereafter shall be Overbids (defined below), and shall be made and received on an open basis, and all material terms of each bid shall be fully disclosed to all other Qualified Bidders, including the Stalking Horse Bidder. The Auction shall be transcribed and all bids shall be made on the record and announced at the Auction, including the Baseline Bid, all Overbids, and the Successful Bid (defined below).

- f. Overbids. An "Overbid" is any bid made at the Auction subsequent to the Debtor's announcement of the Baseline Bid. Any Qualified Bidder's initial Overbid shall be at least \$125,000 in cash (or cash equivalents) in excess of the aggregate sum of the Cash Purchase Price, the Break-Up Fee and the Expense Reimbursement, and each subsequent Overbid must be made in increments of at least \$100,000 in cash, cash equivalents or such other consideration that the Debtor deems equivalent, in consultation with the Committee, if any, over the previous highest or best bid (the "Minimum Overbid Increment").

Any Overbid made by a Qualified Bidder (including with respect to any Back-Up Bid (defined below)) must remain open and binding on the Qualified Bidder until

and unless the Debtor accepts a higher Qualified Bid as an Overbid. The Debtor shall announce at the Auction the material terms of each Overbid and the basis for calculating the total consideration offered in each such Overbid.

- g. Sale Hearing. The Sale Hearing shall be conducted by the Bankruptcy Court on \_\_\_\_\_, 2019 at \_\_:\_\_.m. (ET).
- h. Modifications. Except as otherwise provided in the Bid Procedures, the Debtor, after consultation with the Committee, if any, may modify the Bid Procedures; provided that all such modifications are disclosed to all Potential Bidders or Qualified Bidders, as applicable, at the start of or during the Auction.
- i. Determination and Rejection of Bids. The Debtor, in its reasonable business judgment, after consultation with the Committee, if any, may (a) determine which Qualified Bid, if any, is the highest or otherwise best offer; and (b) reject, at any time before entry of an order of the Bankruptcy Court approving a Qualified Bid, any bid that is (i) inadequate or insufficient; (ii) not in conformity with the requirements of the Bankruptcy Code, the Bid Procedures, or the terms and conditions of the Sale; or (iii) contrary to the best interests of the Debtor, its estate, its creditors and other stakeholders.
- j. Closing the Auction. Upon conclusion of the bidding process, the Auction shall be closed, and the Debtor, in consultation with the Committee, if any, shall (i) review each Qualified Bid on the basis of financial and contractual terms and the factors relevant to the Sale process, including those factors affecting the speed and certainty of consummating the Sale and the amount of the cash (or cash equivalents) consideration, and (ii) determine, the highest or otherwise best offer for the Acquired Assets (the "Successful Bid"), the entity submitting such Successful Bid (the "Successful Bidder"), the next highest or otherwise best offer after the Successful Bid (the "Back-Up Bid") and the entity submitting such Back-Up Bid (the "Back-Up Bidder"); and advise the Qualified Bidders of such determinations. The Back-Up Bid shall remain open, and the Back-Up Bidder shall be required to fully perform under such Back-Up Bid, until the earlier of consummation of the Sale with the Successful Bidder or sixty (60) days following the Sale Hearing. For the avoidance of doubt, the Stalking Horse Bidder shall not be required to, but may in its discretion, serve as the Back-Up Bidder.

16. Pursuant to Local Rule 6004-1: (i) each bidder participating at the Auction will be required to make a non-collusion representation (a "Non-Collusion Representation"); (ii) the Auction will be conducted openly and may be attended by the Debtor, its professionals, the Committee, if any, and its professionals and the Auction Participants; (iii) the only persons or entities who will be permitted to bid at the Auction are the authorized representatives of each

Qualified Bidder, including the Stalking Horse Bidder; and (iv) the Auction will be transcribed. The Bid Procedures are typical for asset sales of this size and nature and require a deposit from each Qualified Bidder, other than the Stalking Horse Bidder.

17. Other than as expressly set forth in the Bid Procedures, the Debtor reserves the right to: (a) impose additional terms and conditions with respect to any or all Potential Bidders, (b) extend the deadlines set forth herein or the date for the Auction subject to the provisions of the Stalking Horse APA, (c) cancel or extend the sale of the Acquired Assets and/or Sale Hearing in open court; and (d) amend the Bid Procedures, in each case, so long as the exercise of any such right is consistent with the Debtor's fiduciary duties and the best interests of the Debtor's estate.

18. The Stalking Horse Bidder is a Qualified Bidder, and the bid reflected in the Stalking Horse APA is a Qualified Bid.

**D. Bid Protections**

19. The Debtor seeks approval to pay a break-up fee (the "Break-Up Fee") of \$75,000 and expense reimbursement of up to \$75,000 (the "Expense Reimbursement") to the Stalking Horse Bidder upon the terms and conditions set forth in the Stalking Horse APA, including in the event that the Debtor enters into an agreement to consummate or consummates an Alternative Transaction, then Seller shall pay the Stalking Horse Bidder the Break-Up Fee and Expense Reimbursement, in immediately available funds, on the earlier of (i) thirty days following termination of the Stalking Horse APA and (ii) the closing date of an Alternative Transaction. The Break-Up Fee and Expense Reimbursement is in recognition of the Stalking Horse Bidder's substantial expenditure of time, energy and resources, and the benefits to the Debtor's estate of securing a "stalking horse" or guaranteed minimum bid. The Break-Up Fee and Expense

Reimbursement shall be super-priority administrative expense obligations with priority over all expenses of the kind specified in Sections 503(b) and 507(b) of the Bankruptcy Code.

**E. Notice of Auction and Sale**

20. The Debtor seeks to have the Auction scheduled to commence at 10:00 a.m. (ET) on January 22, 2019 at the offices of Landis Rath & Cobb LLP, 919 Market Street, Suite 1800, Wilmington, Delaware 19801. Within two (2) days of the entry of the Bid Procedures Order, the Debtor will serve by first class mail, postage prepaid, copies of: (i) the Bid Procedures Order; and (ii) the Sale Notice upon the following entities: (a) the Office of the United States Trustee for the District of Delaware; (b) counsel to the Stalking Horse Bidder; (c) counsel to the Committee, if any, or, if none formed, the creditors holding the twenty (20) largest unsecured claims as set forth on the list filed with the Debtor's petition; (d) all taxing authorities having jurisdiction over any of the Acquired Assets subject to the Sale, including the Internal Revenue Service; (e) the Environmental Protection Agency; (f) the Securities Exchange Commission; (g) the Food and Drug Administration; (h) the Stalking Horse Bidder (i) the state/local environmental agencies in the jurisdictions where the Debtor owns or leases real property; (j) all of the Debtor's known creditors; (k) all parties that have requested notice pursuant to Bankruptcy Rule 2002 as of the date prior to the date of entry of the Bid Procedures Order; (jl) all persons or entities known to the Debtor that have or have asserted a lien on, or security interest in, all or any portion of the Acquired Assets; and (m) any Potential Bidders previously identified or otherwise known to the Debtor (collectively, the "Sale Notice Parties"). In addition, the Debtor will publish notice of the Sale in the national edition of either the *Wall Street Journal National Edition* or *USA Today* or similar publication.

21. The Debtor further requests, pursuant to Bankruptcy Rule 9014, that objections, if any, to the proposed Sale: (a) be in writing; (b) comply with the Bankruptcy Rules and the Local Rules; (c) be filed with the Clerk of the Bankruptcy Court, 824 Market Street, 3<sup>rd</sup> Floor, Wilmington, Delaware 19801; and (d) be served on: (i) counsel for the Debtor, Landis Rath & Cobb LLP, 919 Market Street, Suite 1800, Wilmington, Delaware 19801 (Attn: Adam G. Landis, Esq. (e-mail: landis@lrclaw.com) and Matthew B. McGuire, Esq. (e-mail: mcguire@lrclaw.com)); and Wilmer Cutler Pickering Hale and Dorr LLP, 7 World Trade Center, 250 Greenwich Street, New York, New York, 10007 (Attn: George Shuster, Esq. (e-mail: george.shuster@wilmerhale.com) and Lauren Lifland, Esq. (e-mail: lauren.lifland@wilmerhale.com)); (ii) counsel to the Committee, if any; and (iii) the Office of the United States Trustee, 844 King Street, Suite 2207, Wilmington, Delaware 19801 (Attn: Jaclyn Weissgerber).

**F. Additional Provisions**

**Name Change**

22. The Debtor hereby requests the authority, upon and in connection with the Closing, to change its corporate name and the caption of this Chapter 11 Case, consistent with applicable law. The Debtor shall file a notice of change of case caption, containing the new caption and the proposed new corporate names of the Debtor, within ten (10) business days of the Closing, and the change of case caption for this Chapter 11 Case shall be deemed effective as of the Closing.

**G. Procedures Relating to Executory Contracts and Unexpired Leases, Including Determination of Cure Amounts and Deadlines for Objection to Assumption and Assignment of All Contracts**

23. Given the number of executory contracts and unexpired leases to which the Debtor is a party, the Debtor seeks to establish (a) procedures for determining the Cure Amounts

and (b) the deadline for objections to the Cure Amounts and/or the proposed assumption and assignment of executory contracts and unexpired leases (collectively, the “Contract Procedures”). The contracts that may be assumed and assigned as by the Debtor are listed on Exhibit B of the Stalking Horse APA (the “Contract Schedule”).

24. Within two (2) days following entry of an order approving the Bid Procedures, the Debtor shall serve by mail a notice, substantially in the form annexed as Exhibit 3 to the Bid Procedures Order (a “Cure Notice”), on the non-Debtor counterparties to all Contracts on the Contract Schedule (collectively, the “Contract Parties”). To the extent the Contracts Schedule is amended after the Sale Order, the Debtor shall promptly file and serve by mail a supplemental Cure Notice (the “Additional Cure Notice”) on the affected non-Debtor counterparties, substantially in the form attached as Exhibit 4 to the Bid Procedures Order.

#### Contract Objections

25. To facilitate a prompt resolution of (i) disputes relating to the Cure Amounts and (ii) any other objections relating to the assumption and assignment of the Contracts, the Debtor proposes the following deadlines and procedures:

- a. The Contract Parties shall have until 4:00 p.m. (ET) on the date that is fourteen (14) days following service of the Cure Notice (the “Contract Objection Deadline”), which deadline may be extended in the sole discretion of the Debtor and the Stalking Horse Bidder, to object (a “Contract Objection”) to (i) the Cure Amounts listed by the Debtor and to propose alternative Cure Amounts, and/or (ii) the proposed assumption and assignment of the Contracts in connection with the Sale, including, without limitation, the Debtor’s ability to assign the Contracts without the Contract Parties’ consent or the adequate assurance of future performance to be provided by the Successful Bidder (or any designee thereof);
  - provided, however, if the Debtor amends the Cure Notice after the Contract Objection Deadline to add a contract or lease, the non-Debtor party to the added contract or lease shall have until the earlier of (a) fourteen (14) days after service of notice of adding a contract or lease; or (b) the Sale Hearing to submit a Contract Objection with respect to the contract or lease added by the Debtor’s amendment (the “Amended Contract Objection Deadline”);

- provided further, that if the Debtor amends the Cure Notice after the Contract Objection Deadline to reduce the Cure Amount of a Contract, except where such reduction was upon mutual agreement of the parties, the non-Debtor party to the reduced Cure Amount contract or lease shall have until the Amended Contract Objection Deadline to object to the Cure Amount with respect to the contract or lease with the Cure Amount that has been reduced by the Debtor's amendment; and
  - provided further, that in the event the Auction results in a Successful Bid other than the Stalking Horse APA, the Contract Parties shall have until the Amended Contract Objection Deadline to object to the assignment of Contracts to such Successful Bidder, other than to the Cure Amount which shall be subject to the Contract Objection Deadline, with any such objection being heard at the Sale Hearing or at a later-scheduled hearing as the Bankruptcy Court deems appropriate.
- b. The Debtor, the Contract Party, and the Successful Bidder may consensually resolve the Contract Objection prior to, or after, the Sale Hearing. In the event the Contract Objection is not resolved, such Contract Objection will be heard at the Sale Hearing or thereafter. To the extent it is determined that the Cure Amount exceeds the amount set forth in the Contract Schedule, or an objection to assumption or assumption and assignment is sustained with regard to an Assigned Contract the Successful Bidder may determine to not have assumed and assigned to it such Assigned Contract.
- c. Unless a Contract Objection is filed and served before the Contract Objection Deadline or the Amended Contract Objection Deadline, as applicable, all Contract Parties shall be:
- forever barred from objecting to the proposed Cure Amounts and from asserting any additional cure or other amounts (other than as may be asserted in an Additional Cure Notice), and the Debtor and the Successful Bidder shall be entitled to rely solely upon the proposed Cure Amounts set forth in the Cure Notice or the Additional Cure Notice, as applicable;
  - deemed to have consented to the assumption or assumption and assignment of the applicable Contracts;
  - forever barred and estopped from asserting or claiming against the Debtor or the Successful Bidder that any additional amounts are due or other defaults exist (other than as may be asserted in an Additional Cure Notice), that conditions to assignment must be satisfied under such Contracts, including, without limitation, any consent rights, or that there is any objection or defense to the assumption and assignment of such Contracts, including without limitation, adequate assurance of future performance;

- precluded from objecting to the Cure Amounts (if any) and the assumption and assignment; and
- barred and estopped from asserting or claiming that an Assigned Contract contains an enforceable consent right.

Designation by the Stalking Horse or Other Qualified Bidder

26. On or before the Bid Deadline, the Stalking Horse Bidder and any Qualified Bidder shall, by delivering written notice to the Debtor, provide its initial designation of Contracts on the Contracts Schedule it wishes to become an Assigned Contract. The Stalking Horse Bidder may remove any Assigned Contract from such schedule prior to the Closing.

27. Immediately prior to the Sale Hearing, the Debtor shall file the list of Assigned Contracts as of such date.

28. The Debtor requests that the Sale Order, among other things:

- a. authorize and approve the assumption and assignment of the Assigned Contracts to the Successful Bidder upon the Closing, without the need for any further action by any party, pursuant to Bankruptcy Code section 365;
- b. provide that where the Debtor is unable to establish that a default exists under a Contract, the Cure Amount relating to such Assigned Contract shall be set at \$0.00; and
- c. find that the Successful Bidder has established adequate assurance of future performance necessary to satisfy the requirements of Bankruptcy Code section 365 in respect of the assignment to the Successful Bidder of the Assigned Contracts.

**RELIEF REQUESTED**

29. By this Motion, the Debtor seeks the entry of two orders of this Bankruptcy Court: (a) the Bid Procedures Order (i) approving the Bid Procedures in connection with the solicitation and acceptance of higher and better bids with respect to the Sale of the Acquired Assets, (ii) approving the Break-Up Fee and Expense Reimbursement; (iii) scheduling the Sale Hearing and setting objection deadlines with respect to the Sale, (iv) approving the form and

manner of notice of the Sale and related Auction, (v) establishing procedures to determine Cure Amounts and deadlines for objections to the potential assumption and assignment of executory contracts and unexpired leases, and (vi) granting related relief; and (b) the Sale Order (i) authorizing and approving the Stalking Horse APA, (ii) authorizing the Sale free and clear of Encumbrances pursuant to the Stalking Horse APA, (iii) authorizing the assumption and assignment of the Assigned Contracts, and (iv) granting related relief.

30. The Debtor believes that the proposed Sale will maximize the value of the Debtor's assets for all stakeholders. The Debtor and the Stalking Horse Bidder negotiated the terms of the Stalking Horse APA at arm's length, subject to higher or otherwise better offers.

#### **BASIS FOR RELIEF REQUESTED**

##### **A. The Bid Procedures Are Fair and Reasonable And Are Designed to Not Chill Bidding**

31. Maximization of proceeds received by the estate is one of the dominant goals of any proposed sale of estate property. *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"). In the hope of maximizing the value received by bankruptcy estates, courts typically establish procedures that are intended to enhance competitive bidding by, among other things, setting forth the rules that will govern the auction process. *See, e.g., In re Fin. News Network, Inc.*, 126 B.R. 152, 156 (Bankr. S.D.N.Y. 1991) ("court-imposed rules for the disposition of assets ... [should] provide an adequate basis for comparison of offers, and [should] provide for a fair and efficient resolution of bankrupt estates"); *In re Edwards*, 228 B.R. 552, 561 (Bankr. E.D. Pa. 1998) (bid procedures should allow for "an open and fair public sale designed to maximize value for the estate").

32. Here, the Debtor believes that the Bid Procedures are designed to maximize the value received for the Acquired Assets and prevent any chilling of potential bids by establishing a competitive and fair bidding process. The process set forth in the Bid Procedures allows for a timely and efficient auction process given the circumstances facing the Debtor, while providing Potential Bidders with ample time and information to submit a timely bid and perform diligence. The Bid Procedures are designed to ensure that the Acquired Assets will be sold for the highest or otherwise best possible purchase price by subjecting the value of the Acquired Assets to market testing and permitting prospective buyers to bid on the Acquired Assets. Accordingly, the Debtor and all parties in interest can be assured that the consideration received for the Acquired Assets will be fair and reasonable and that the proposed Bid Procedures will not chill bidding by any Potential Bidders. Moreover, the proposed Bid Procedures are fair and appropriate in light of the robust prepetition marketing process undertaken by the Debtor and its professionals.

33. Procedures to dispose of assets, similar to the proposed Bid Procedures have been approved in other large, complex chapter 11 cases in this district. *See, e.g., In re City Sports, Inc.*, Case No. 15-12054 (KG) (Bankr. D. Del. Oct. 23, 2015); *Saladworks*, Case No. 15-10327 (LSS) (Bankr. D. Del. Mar. 11, 2015); *In re iGPS Co. LLC*, Case No. 13-11459 (KG) (Bankr. D. Del. July 31, 2013); *Tri-Valley Corp.*, Case No. 12-12291 (MFW) (Bankr. D. Del. Sep. 5, 2012); *WP Steel Venture LLC*, Case No. 12-11661 (KJC) (Bankr. D. Del. June 21, 2012) *Capitol Infrastructure, LLC*, Case No. 12-11362 (KG) (Bankr. D. Del. May 15, 2012); *Traffic Control And Safety Corp.*, Case No. 12-11287 (KJC) (Bankr. D. Del. May 14, 2012); *Contract Research Solutions, Inc.*, Case No. 12-11004 (KJC) (Bankr. D. Del. April 12, 2012); *Delta Petroleum Corp.*, Case No. 11-14006 (KJC) (Bankr. D. Del. January 11, 2012); *Dallas Stars, L.P.*, Case No.

11-12935 (PJW) (Bankr. D. Del. September 22, 2011). In sum, the Debtor believes that the proposed Bid Procedures provide an appropriate framework for expeditiously establishing that the Debtor is receiving the best and highest offer for the Acquired Assets. Accordingly, the proposed Bid Procedures are reasonable, appropriate and within the Debtor's sound business judgment under the circumstances.

**B. The Overbid Protections Are Appropriate Under the Circumstances**

34. The Minimum Overbid Increment is appropriate under the circumstances and will enable the Debtor to simultaneously maximize value while limiting the chilling effect in the marketing process. This provision also is consistent with the overbid increments previously approved by courts in this district. *See, e.g., Saladworks*, Case No. 15-10327 (LSS) (Bankr. D. Del. Mar. 11, 2015); *Tri-Valley Corp.*, Case No. 12-12291 (MFW) (Bankr. D. Del. Sep. 5, 2012); *WP Steel Venture LLC*, Case No. 12-11661 (KJC) (Bankr. D. Del. June 21, 2012); *Solar Trust of Am., LLC*, Case No. 12-11136 (KG) (Bankr. D. Del. May 11, 2012); *Contract Research Solutions, Inc.*, Case No. 12-11004 (KJC) (Bankr. D. Del. April 12, 2012); *Delta Petroleum Corp.*, Case No. 11-14006 (KJC) (Bankr. D. Del. January 11, 2012).

**C. The Break-Up Fee and Expense Reimbursement are Reasonable and Appropriate**

35. Bid incentives such as the Break-Up Fee and Expense Reimbursement encourage a potential buyer to invest the time, money and effort required to negotiate with a debtor, and perform the necessary due diligence attendant to the acquisition of a debtor, despite the inherent risks and uncertainties of the chapter 11 process. The Debtor submits that approval of the Break-Up Fee and Expense Reimbursement is justified by the facts and circumstances of this case, whether considered under the business judgment rule or as an administrative expense of the estate.

36. Approval of the Break-Up Fee and Expense Reimbursement is governed by standards for determining the appropriateness of bidding incentives in the bankruptcy context established by the Third Circuit 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). In *O'Brien*, the Third Circuit concluded that “the determination whether break-up fees or expenses are allowable under section 503(b) must be made in reference to general administrative expense jurisprudence. In other words, the allowability of [these fees] . . . depends upon the requesting party’s ability to show that the fees were actually necessary to preserve the value of the estate.” *O'Brien*, 181 F.3d at 535. Here, the Break-Up Fee and Expense Reimbursement should be approved because they will provide a benefit to the Debtor’s estate. The Third Circuit identified at least two instances in which bidding incentives may benefit the estate. First, a break-up fee 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.” *Id.* at 537. Second, “if the availability of . . . [reimbursement of] expenses were to induce a bidder to research the value of the debtor and convert that 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.*

37. In recognition of the expenditure of time, energy and resources as well as the benefits to the Debtor’s estate of securing a “stalking horse” or minimum bid, the Debtor has agreed to seek approval of the Break-Up Fee and Expense Reimbursement for the Stalking Horse Bidder. The Debtor’s ability to offer the Break-Up Fee and Expense Reimbursement enables the Debtor to ensure the sale of the Acquired Assets to a contractually-committed bidder at a price the Debtor believes to be fair while, at the same time, providing the Debtor with the potential of

a greater return to the estate. Moreover, the Stalking Horse Bidder has spent, and likely will continue to spend, considerable time, money and energy pursuing the Sale and has engaged in extended and lengthy good faith negotiations. The Debtor and the Stalking Horse Bidder are not related, and each has acted in good faith throughout this process. The amount of the Break-Up Fee and Expense Reimbursement represents approximately 3.9% of the Purchase Price, is relatively small compared to the Purchase Price, and is not so high that it would cause any chilling effect on other prospective purchasers, and will have no adverse effect on any creditors. Absent authorization of the payment of the Break-Up Fee and Expense Reimbursement, the Debtor might lose the opportunity to obtain the highest and best available offer for the Acquired Assets and the downside protection that will be afforded by the Stalking Horse APA.

38. The Stalking Horse Bidder has provided a material benefit to the Debtor and its creditors by increasing the likelihood that Debtor will receive the best possible price for the Acquired Assets. Furthermore, approval of the Bid Procedures, including the Break-Up Fee and Expense Reimbursement, is required by the Stalking Horse APA as a condition to the Stalking Horse Bidder's obligation to proceed with the transaction contemplated in the Agreement. *See In re Reliant Energy Channelview, L.P.*, 594 F.3d 200 (3d Cir. 2010).

39. The Debtor believes that the Break-Up Fee and Expense Reimbursement is fair and reasonable, given the benefits to the estate of having a definitive agreement and the risk to the Stalking Horse Purchaser that a third-party offer may ultimately be accepted, and is necessary to preserve and enhance the value of the Debtor's estate. In light of the benefit to the Debtor's estate that will be realized by having a signed Stalking Horse APA, enabling the Debtor to preserve the value of its estate and promote more competitive bidding, ample support exists for the approval of the Break-Up Fee and Expense Reimbursement. The Debtor's payment of

the Break-Up Fee and Expense Reimbursement under the circumstances described herein would be (i) an actual and necessary cost and expense of preserving the Debtor's estate, within the meaning of section 503(b) of the Bankruptcy Code; (ii) of substantial benefit to the Debtor's estate; and (iii) reasonable and appropriate in light of the efforts and the significant due diligence costs and expenses that have been and will be expended by the Stalking Horse Bidder. Thus, the Debtor requests that this Court approve and authorize payment of the Break-Up Fee and Expense Reimbursement pursuant to the terms of the Agreement

**D. The Proposed Sale Notice, the Proposed Date for the Sale Objection Deadline, the Cure Objection Deadline and the Sale Hearing Are Appropriate**

40. The Debtor submits that the Sale Objection Deadline is reasonable and appropriate under the circumstances. Pursuant to Local Rule 9006-1(c)(ii), "[w]here a motion is filed and served in accordance with Local Rule 9006-1(c)(i), the deadline for objection(s) shall be no later than seven (7) days before the hearing date." Del. Bankr. L.R. 9006-1(c)(ii). As noted above, the Sale Hearing is more than twenty-one (21) days from notice of this Motion and the Sale Objection Deadline has been scheduled seven (7) days in advance thereof. As such, the Debtor submits that the proposed Sale Objection Deadline meets the requirements of the Bankruptcy Rules and the Local Rules.

41. The Debtor submits that the notice to be provided through the Sale Notice and the method of service proposed herein fully complies with the requirements set forth in Bankruptcy Rule 2002 and constitutes good and adequate notice of the Bid Procedures and the subsequent proceedings related thereto, including the proposed dates for (a) the Bid Deadline; (b) the Sale Objection Deadline; (c) the Contract Objection Deadline; and (d) the Sale Hearing. Therefore, the Debtor respectfully requests that the Bankruptcy Court to approve the proposed notice procedures.

**E. The Contract Procedures Provide Adequate Notice and Opportunity to Object and Should be Approved**

42. Bankruptcy Code section 365(a) provides, in pertinent part, that a debtor-in-possession “subject to the court’s approval, may assume or reject any executory contract or [unexpired] lease of the debtor.” 11 U.S.C. § 365(a). As discussed in greater detail below, the standard governing bankruptcy court approval of a debtor’s decision to assume or reject an executory contract or unexpired lease is whether the debtor’s reasonable business judgment supports assumption or rejection. *See, e.g., In re Stable Mews Assoc., Inc.*, 41 B.R. 594, 596 (Bankr. S.D.N.Y. 1984).

43. The Debtor respectfully submits that the proposed Contract Procedures are appropriate and reasonably tailored to provide the Contract Parties with adequate notice of the proposed assumption and assignment of the applicable Contract, as well as proposed Cure Amounts, if applicable. Such Contract Parties will then be given an opportunity to object to such notice. The Contract Procedures further provide that, in the event an objection is not resolved, the Bankruptcy Court will determine related disputed issues (including any adequate assurance of future performance issues). Accordingly, the Debtor submits that implementation of the proposed Contract Procedures is appropriate in this Chapter 11 Case.

44. The Contract Procedures comport with the requirements of Bankruptcy Code section 365 (as described fully below) and Bankruptcy Rule 6006, and the non-Debtor contract counterparties’ rights to adequate assurance are unaffected and fully preserved. The Debtor respectfully submits that the notices required by the Contract Procedures are sufficient to assume and assign the Assigned Contracts because they are reasonably tailored to provide notice and an opportunity to object to the proposed assumption and assignment. Thus, the Debtor submits that the Contract Procedures should be approved.

**F. The Sale is Within the Sound Business Judgment of the Debtor and Should Be Approved**

45. Ample authority exists for approval of the proposed Sale to the Successful Bidder. Bankruptcy Code section 363(b)(1) provides, in relevant part, that a debtor-in-possession, “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). Bankruptcy Code section 363 does not set forth a standard for determining when it is appropriate for a court to authorize the sale or disposition of a debtor’s assets prior to confirmation of a plan. However, courts in the Third 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 debtor. *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 debtor has 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). 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 and holding that the business purpose requirement was fulfilled, because stabilizing turnover rate and increasing morale were necessary to successful reorganization).

47. Additionally, Bankruptcy Code section 105(a) provides a bankruptcy court with broad powers in the administration of a case under the Bankruptcy Code. Section 105(a) provides that “[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code].” 11 U.S.C. § 105(a). Provided that a bankruptcy court does not employ its equitable powers to achieve a result not contemplated by the Bankruptcy Code, the exercise of its section 105(a) power is proper. *In re Fesco Plastics Corp.*, 996 F.2d 152, 154 (7<sup>th</sup> Cir. 1993); *Pincus v. Graduate Loan Ctr. (In re Pincus)*, 280 B.R. 303, 312 (Bankr. S.D.N.Y. 2002). Pursuant to section 105(a), a court may fashion any order or decree that helps preserve or protect the value of a debtor’s assets. *See, e.g., Chinichian v. Campolongo (In re Chinichian)*, 784 F.2d 1440, 1443 (9<sup>th</sup> Cir. 1986) (“Section 105 sets out the power of the bankruptcy court to fashion orders as necessary pursuant to the purposes of the Bankruptcy Code.”); *In re Cooper Props. Liquidating Trust, Inc.*, 61 B.R. 531, 537 (Bankr. W.D. Tenn. 1986) (noting that a bankruptcy court is “one of equity and as such it has a duty to protect whatever equities a debtor may have in property for the benefit of its creditors as long as that protection is implemented in a manner consistent with the bankruptcy laws.”).

***A “Sound Business Purpose” Supports the Sale***

48. As set forth in the First Day Declaration, in light of the lack of realistic stand-alone restructuring options, the Debtor has determined, in the exercise of its reasonable business judgment, that the most effective way to maximize the value of its estate for the benefit of its constituents is to sell the Acquired Assets pursuant to Bankruptcy Code section 363 to the highest or otherwise best bid.

49. The Stalking Horse APA establishes a floor price for what the Debtor anticipates will be a robust Auction. The Stalking Horse APA and the Bid Procedures permits the Debtor to seek out higher or otherwise better offers at the Auction. This will ensure that the market sets the value for the Acquired Assets and that the Sale will maximize value of the Debtor’s business for the benefit of all of the Debtor’s stakeholders. Accordingly, the Debtor has provided a sound business purpose in pursuing the approval of the Sale.

***Sufficient Notice of the Proposed Sale Has Been Provided to Interested Parties***

50. Pursuant to the Bid Procedures and the notice procedures set forth herein, the Debtor will employ various methods of notification to ensure that all interested and potentially affected parties will be informed of the Sale. In order to generate the greatest number of bidders possible for the Sale and to satisfy the requirements of Bankruptcy Rule 2002, the Debtor will serve the Sale Notice upon the Sale Notice Parties.

51. Additionally, the Debtor will file and serve the Cure Notice on all non-Debtor counterparties to the Contracts providing them with notice of this Motion, the potential assumption and assignment of Contracts and the Debtor’s proposed Cure Amount.

52. Finally, as explained above, the Debtor and its professionals also have reached out to over forty-five (45) potential purchasers regarding a potential transaction after and in the

months leading up to the Petition Date. The Debtor submits that more than ample notice of the Sale has been provided to interested parties under the facts and circumstances of this Chapter 11 Case.

***The Proposed Sale is for a Fair and Reasonable Price***

53. The Purchase Price is fair and reasonable for the Acquired Assets. The Purchase Price set forth in the Stalking Horse APA is the result of numerous rounds of arms' length, good faith negotiations with the Stalking Horse Bidder. As explained above, the Purchase Price in the Stalking Horse APA will serve as the floor price for competing bids.

54. The Bid Procedures have been designed to ensure that the highest or otherwise best offer for the Acquired Assets will be attained. With the assistance of SSG, the Debtor continues to (i) conduct a comprehensive marketing process in order to maximize value, (ii) solicit the interest of various potential strategic and financial buyers and (iii) entertain offers for an alternative sale transaction that will maximize the value of the Debtor's business. The Debtor expects that its continued marketing efforts will result in the submission of one or more competing bids prior to the proposed Bid Deadline of January 16, 2019. In the event that a Qualified Bid other than that of the Stalking Horse Bidder is received, the Bid Procedures provide that an Auction will be held to determine the highest or otherwise best bid.

55. Because the ultimate purchase price for the Acquired Assets will be determined in accordance with the Bankruptcy Court-approved Bid Procedures at an Auction, it will be fair and reasonable as contemplated by Bankruptcy Code section 363. *See, e.g., In re Abbotts Dairies of Pa., Inc.*, 788 F.2d at 149 (finding that “[g]enerally speaking, an auction may be sufficient to establish that one has paid ‘value’ for the assets of a bankrupt”); *In re Nat’l Health & Safety Corp.*, 1999 Bankr. LEXIS 1126 (Bankr. E.D. Pa. Sept. 2, 1999) (citing *Abbotts Dairies* for the

proposition that an auction may be sufficient to establish that one has paid value for the assets of a debtor, and relying upon auction results to verify that the purchase price represented value).

***The Proposed Sale Has Been Negotiated at Arm's Length and in Good Faith***

56. The “good faith” prong of the *Abbotts Dairies* standard is also satisfied. The Debtor requests that the Bankruptcy Court find that the Successful Bidder is entitled to the benefits and protections provided by Bankruptcy Code section 363(m) in connection with the Sale. Bankruptcy Code section 363(m) provides, in pertinent part:

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

11 U.S.C. § 363(m).

57. Bankruptcy Code section 363(m) thus protects the buyer of assets sold pursuant to Bankruptcy Code section 363 from the risk that it will lose its interest in the Acquired Assets if the order allowing the sale is reversed on appeal. By its terms, Bankruptcy Code section 363(m) applies to sales of interests in tangible assets, such as the Acquired Assets.

58. The Debtor submits, and will present evidence at the Sale Hearing, if necessary, that as set forth above, the Successful Bidder's purchase agreement was an arm's-length transaction, in which the Successful Bidder acted in good faith. The Debtor and the Successful Bidder negotiated the Successful Bidder's purchase agreement in good faith and without collusion or fraud of any kind. The Successful Bidder has not engaged in collusion or any conduct that would otherwise control or tend to control the sale price as between or among Potential Bidders. The Bid Procedures are designed to maximize rather than chill competitive bidding and the Auction promotes an open and competitive sale process. The Debtor has had its

own legal counsel in negotiations over the Stalking Horse APA or the Successful Bid and will have its own legal counsel to negotiate on its behalf throughout the Auction and the Sale. Accordingly, the Debtor requests that the Bankruptcy Court make the finding at the Sale Hearing that the Successful Bidder, including, if applicable, the Stalking Horse Bidder, has purchased the Acquired Assets in good faith within the meaning of Bankruptcy Code section 363(m).

***All Pertinent Information Regarding the Proposed Sale Has Been Fully Disclosed***

59. The Debtor has presented the proposed asset sale openly and in good faith. The Stalking Horse Bidder's identity and any connection with the Debtor has been fully disclosed in this and other pleadings filed with the Bankruptcy Court. The Debtor has fully disclosed and requested the Bankruptcy Court's approval of all of the terms and conditions of the proposed Sale. Sufficient and adequate notice of this Motion has been provided to interested parties and such parties will receive further notice of the Sale and all relevant dates and deadlines related thereto through the Bankruptcy Court-approved Sale Notice.

60. The Debtor will be prepared to introduce evidence at the Sale Hearing regarding the arm's-length, good faith nature of the Auction and the negotiation of the Stalking Horse APA. Indeed, the Debtor will be able to demonstrate that the Stalking Horse APA with the Stalking Horse Bidder or the Successful Bidder, as applicable, represents the highest or otherwise best bid available to the Debtor for the Acquired Assets following a robust marketing and competitive bidding process. Accordingly, the Sale pursuant to the Stalking Horse APA has been proposed and fully disclosed in good faith and represents the sound business judgment of the Debtor; and, as such, is entitled to Bankruptcy Court approval.

**G. The Sale Satisfies the Requirements of Bankruptcy Code Section 363(f)**

61. Under Bankruptcy Code section 363(f), a debtor-in-possession may sell all or any part of its property free and clear of any and all liens, claims or interests in such property if: (i)

such a sale is permitted under applicable non-bankruptcy law; (ii) the party asserting such a lien, claim or interest consents to such sale; (iii) the interest is a lien and the purchase price for the property is greater than the aggregate amount of all liens on the property; (iv) the interest is the subject of a *bona fide* dispute; or (v) the party asserting the lien, claim or interest could be compelled, in a legal or equitable proceeding, to accept a money satisfaction for such interest. 11 U.S.C. § 363(f); *Citicorp Homeowners Serv., Inc. v. Elliot (In re Elliot)*, 94 B.R. 343, 345 (E.D. Pa. 1988) (noting that Bankruptcy Code section 363(f) is written in the disjunctive; therefore, a court may approve a sale “free and clear” provided at least one of the subsections is met).

62. Here, the Sale satisfies the criteria set forth in Bankruptcy Code section 363(f). The Debtor believes that, at a minimum, they satisfy the fifth prong of section 363(f) because the holders of any liens, claims, encumbrances, or interests could be compelled, in a legal or equitable proceeding, to accept a monetary satisfaction equal to the amount of their lien, claim, encumbrance, or interest.

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

63. As explained above, Bankruptcy Code section 365(a) provides, in pertinent part, that a debtor-in-possession “subject to the court’s approval, may assume or reject any executory contract or [unexpired] lease of the debtor.” 11 U.S.C. § 365(a). The standard governing bankruptcy court approval of a debtor’s decision to assume or reject an executory contract or unexpired lease is whether the debtor’s reasonable business judgment supports assumption or rejection. *See, e.g., Stable Mews*, 41 B.R. at 596. If the debtor’s business judgment has been reasonably exercised, a court should approve the assumption or rejection of an unexpired lease or executory contract. *See Group of Institutional Investors v. Chicago M St. P. & P.R.R. Co.*, 318

U.S. 523 (1943); *Sharon Steel Corp.*, 872 F.2d 36, 39-40 (3d Cir. 1989). The business judgment test “requires only that the trustee [or debtor-in-possession] demonstrate that [assumption or] rejection of the contract will benefit the estate.” *Wheeling-Pittsburgh Steel Corp. v. West Penn Power Co. (In re Wheeling-Pittsburgh Steel Corp.)*, 72 B.R. 845, 846 (Bankr. W.D. Pa. 1987) (quoting *Stable Mews Assoc.*, 41 B.R. at 596). Any more exacting scrutiny would slow the administration of a debtor’s estate and increase costs, interfere with the Bankruptcy Code’s provision for private control of administration of the estate, and threaten the court’s ability to control a case impartially. See *Richmond Leasing Co. v. Capital Bank, NA.*, 762 F.2d 1303, 1311 (5th Cir. 1985). Moreover, pursuant to Bankruptcy Code section 365(b)(1), for a debtor to assume an executory contract, it must “cure, or provide adequate assurance that the debtor will promptly cure,” any default, including compensation for any “actual pecuniary loss” relating to such default. 11 U.S.C. § 365(b)(1).

64. Once an executory contract is assumed, the trustee or debtor-in-possession may elect to assign such contract. See *In re Rickel Home Centers, Inc.*, 209 F.3d 291, 299 (3d Cir. 2000) (“[t]he Code generally favors free assignability as a means to maximize the value of the debtor’s estate”); see also *In re Headquarters Dodge, Inc.*, 13 F.3d 674, 682 (3d Cir. 1994) (noting purpose of section 365(f) is to assist trustee in realizing the full value of the debtor’s assets).

65. Bankruptcy Code section 365(f) provides, in pertinent part, that a trustee may assign an executory contract or unexpired lease of a 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).

66. Bankruptcy Code section 365(a) provides that a debtor, “subject to the court’s approval, may assume or reject any executory contract or unexpired lease of the debtor.” 11 U.S.C. § 365(a). Moreover, Bankruptcy Code section 365(b) codifies the requirements for assuming an executory contract of a debtor. This provision provides that:

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

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

11 U.S.C. § 365(b)(1).

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. Arrari (In re Carlisle Homes, Inc.)*, 103 B.R. 524, 538 (Bankr. D.N.J. 1989); *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 absolute assurance that debtor will thrive and pay rent). 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. *Accord In re Bygaph, Inc.*, 56 B.R. 596, 605-06 (Bankr. S.D.N.Y. 1986) (adequate assurance of future performance is present when prospective assignee of lease from debtors has financial resources

and has expressed willingness to devote sufficient funding to business in order to give it strong likelihood of succeeding).

68. As set forth in the Stalking Horse APA, to the extent any defaults exist under any Assigned Contract sought to be assumed by the Debtor and assigned to the Successful Bidder such defaults are required to be cured as required under Bankruptcy Code section 365(b)(1).

69. The Debtor believes that the Successful Bidder has the financial capability to satisfy any and all obligations they will incur in connection with the Assigned Contracts. In addition, to be a Qualified Bid, any Qualified Bidder must establish it has the financial capability to satisfy any and all obligations it will incur in connection with the Assigned Contracts. Additionally, facts will be further adduced at the Sale Hearing to show the financial credibility of the Successful Bidder, its experience in the industry and its willingness and ability to perform under the Assigned Contracts. Because the Sale Hearing will provide the Bankruptcy Court with an opportunity to evaluate the ability of the Successful Bidder to provide adequate assurance of future performance under the Assigned Contracts, as required by Bankruptcy Code section 365(b)(1)(C), the Debtor submits that the Bankruptcy Court should authorize the assumption and assignment of the Assigned Contracts by the Debtor, effective upon the Closing of the proposed Sale.

70. Additionally, the contract procedures set forth herein provide that all of the counterparties to Contracts with the Debtor will be given notice of this Sale Motion and through the Cure Notice and any Additional Cure Notice have been provided with notice of the potential assumption and assignment of their Contract and the Debtor's proposed Cure Amounts associated therewith. Based on the foregoing, the Debtor respectfully submits that its

assumption and assignment of the Assigned Contracts satisfies the requirements under Bankruptcy Code section 365(f)(2)(A) and (B).

**I. Relief from the Fourteen Day Waiting Period Under Bankruptcy Rules 6004(h) and 6006(d) Is Appropriate**

71. The Debtor seeks a waiver of any stay of the effectiveness of the order approving this Motion. Pursuant to Bankruptcy Rule 6004(h), “[an] order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of fourteen (14) days after entry of the order, unless the court orders otherwise.” As set forth above, the relief requested herein is essential to maximize the value of the Debtor’s business for the benefit of all stakeholders.

72. Pursuant to Bankruptcy Rule 6004(h), unless the court orders otherwise, all orders authorizing the sale of property pursuant to Bankruptcy Code section 363 are automatically stayed for fourteen (14) days after entry of the order. *See* Fed. R. Bankr. P. 6004(h). The purpose of Bankruptcy Rule 6004(h) is to provide sufficient time for an objecting party to request a stay pending appeal before the order can be implemented. *See* Advisory Committee Notes to Fed. R. Bankr. P. 6004(g).

73. Similarly, Bankruptcy Rule 6006(d) stays all orders authorizing a debtor to assign an executory contract or unexpired lease pursuant to Bankruptcy Code section 365(f) for fourteen (14) days, unless the court orders otherwise. *See* Fed. R. Bankr. P. 6006(d).

74. To preserve the value of the Acquired Assets and limit the costs of administering and preserving such assets, it is critical that the Debtor close the Sale as soon as possible after all closing conditions have been achieved or waived. Additionally, the Stalking Horse APA requires the Closing to occur within seventy-five (75) days following the Petition Date.

Accordingly, the Debtor hereby requests that the Bankruptcy Court waive the fourteen (14) day stay periods under Bankruptcy Rules 6004(h) and 6006(d).

75. Based upon the foregoing, the Debtor submit that the relief requested herein is necessary and appropriate, is in the best interests of the Debtor and its estate, and should be granted in all respects.

**NOTICE AND NO PRIOR REQUEST**

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

77. Notice of this Motion as it relates to approval of the Bid Procedures has been given to the Sale Notice Parties, but excluding the Debtor's known creditors. Notice of the Motion as it relates to the approval of the Sale and related requests will be given to the Sale Notice Parties. In light of the nature of the relief requested herein, the Debtor submits that no other or further notice is necessary.

WHEREFORE, the Debtor respectfully requests (i) entry of the proposed Bid Procedures Order; (ii) entry of the proposed Sale Order; and (iii) such other and further relief as the Bankruptcy Court deems just and proper.

Dated: November 30, 2018  
Wilmington, Delaware

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