

and Assignment of Certain Executory Contracts and Unexpired Leases, and (E) Granting Related Relief; and (II) Amended Order (A) Approving Purchase Agreement, (B) Authorizing Sale Free and Clear of All Liens, Claims, Encumbrances, and Other Interests, and (C) Granting Related Relief (the “**Motion**”) for entry of orders as follows:

A. With respect to the Amended Sales and Bidding Procedures (as defined below), an Order in substantially the form attached hereto as **Exhibit A** (the “**Amended Sales and Bidding Procedures Order**”), which grants the following relief:

- approving sales and bidding procedures, substantially in the form attached to the Sales and Bidding Procedures Order as **Exhibit 1** (the “**Amended Sales and Bidding Procedures**”),² to govern the sale of all or substantially all assets of the Debtors (the “**Sellers Assets**”);
- approving the form and manner of notice of the proposed sale transactions, the Amended Sales and Bidding Procedures, the Auction, and the Sale Hearing; and
- granting related relief.

B. With respect to the sale of the Sellers Assets, an order, the form of which shall be filed with the Court and served on the entities receiving this Motion before the Sale Hearing (the “**Sale Order**”), which shall include the following relief:

- authorizing the sale (the “**Sale**”) of the Sellers Assets and the assumption and assignment of the Assigned Contracts (as defined herein) to the Prevailing Purchaser at the Auction free and clear of all liens, claims, encumbrances, and

² The Debtors reserve the right to modify the Sales and Bidding Procedures if the Debtors, in consultation with the Agent and the Committee (collectively, the “**Creditor Constituencies**”) to designate one or more “stalking horse bidders” with respect to some or all of the assets and to seek related protections with respect to the same by separate motion.

other interests³ (collectively, “*Liens*”), other than any Liens permitted by the purchase agreement between the Debtors and the Prevailing Purchaser; and

- granting related relief.

In support of this Motion, the Debtors respectfully represent to the Court the following:

Jurisdiction

1. The Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2) (A) and (M). Venue is proper in this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

2. The statutory predicates for the relief requested herein are sections 105, 363, 365, and 507 of the Bankruptcy Code and Rules 2002, 3007, 6004, 6006, 9007, and 9014 of the Federal Rules of Bankruptcy Procedure (the “*Bankruptcy Rules*”).

Background

3. On October 27, 2014 (the “*Petition Date*”), the Debtors filed their voluntary petitions for relief and thereby commenced these Bankruptcy Cases under chapter 11, title 11 of the United States Code (the “*Bankruptcy Code*”), in the United States Bankruptcy Court for the

³ Specifically, the Debtors seek to sell the Sellers Assets to the Prevailing Purchaser, and the assumption, assignment, and sale of the Executory Contracts to the Prevailing Purchaser, free and clear of all liens and claims of any kind or nature whatsoever in respect of the following: (1) any labor agreements; (2) all mortgages, deeds of trust and security interests; (3) any pension, welfare, compensation or other employee benefit plans, agreements, practices and programs, including, without limitation, any pension plan of any Debtor; (4) any other employee, worker's compensation, occupational disease or unemployment or temporary disability related claim, including, without limitation, claims that might otherwise arise under or pursuant to: (a) the Employee Retirement Income Security Act of 1974, as amended, (b) the Fair Labor Standards Act, (c) Title VII of the Civil Rights Act of 1964, (d) the Federal Rehabilitation Act of 1973, (e) the National Labor Relations Act, (f) the Worker Adjustment and Retraining Act of 1988, (g) the Age Discrimination and Employee Act of 1967 and Age Discrimination in Employment Act, as amended, (h) the Americans with Disabilities Act of 1990, (i) the Consolidated Omnibus Budget Reconciliation Act of 1985, (j) state discrimination laws, (k) state unemployment compensation laws or any other similar state laws, or (1) any other state or federal benefits or claims relating to any employment with any of the Debtors or any of their respective predecessors; (5) any bulk sales or similar law; (6) any tax statutes or ordinances, including, without limitation, the Internal Revenue Code of 1986, as amended; (7) any theories of successor liability; and (8) any environmental laws, provided, however, nothing in the Sale Order authorizing and permitting such sale will be construed to release, nullify, or enjoin a governmental body from seeking to enforce any environmental laws under which a purchaser of property would otherwise be determined to be liable as a current owner or current operator after the date of closing of the sale and purchase of the Sellers Assets.

Southern District of Mississippi, Southern Division (the “**Court**”). Pursuant to Sections 1107(a) and 1108 of the Bankruptcy Code, the Debtors are operating their businesses and managing their properties as debtors-in-possession.

4. An Official Committee of Unsecured Creditors (the “**Committee**”) was appointed by the United States Trustee in these Bankruptcy Cases on November 12, 2014 [Dkt. # 161], and the Court has approved the Committee’s retention of Burr & Forman LLP as counsel for the Committee [Dkt. # 473].

5. On June 22, 2015, the Debtors filed that certain *Motion of the Debtors Pursuant to §§ 105 and 363 of the Bankruptcy Code and Federal Rule of Bankruptcy Procedure 9019 for an Order Approving Settlement among the Debtors, Phosphate Holdings, Inc., the Lender Parties, and the Environmental Agencies* [Dkt. # 818] (the “**9019 Motion**”).⁴

I. Interim DIP Order

6. On October 29, 2014, the Court entered its *Interim Order Under Sections 105, 361, 362, 363, 364 and 507 of the Bankruptcy Code and Federal Rules of Bankruptcy Procedure 2002, 4001 and 9014 (I) Authorizing the Debtors to Incur Post-Petition Senior Secured Superpriority Indebtedness; (II) Authorizing Use of Cash Collateral; (III) Granting Post-Petition Priming and Senior Priority Security Interests and Superpriority Claims; (IV) Granting Adequate Protection; (V) Modifying the Automatic Stay; and (VI) Scheduling a Final Hearing On the Motion* (the “**Interim DIP Order**”) [Dkt. # 66]. The Interim DIP Order has been renewed and extended on several occasions [Dkt. ## 575, 717, and 802], and is now in effect through July 31, 2015.

⁴ All capitalized terms not otherwise defined in the Motion shall have the meaning ascribed to such terms in the 9019 Motion.

II. Proposed Amended Sales and Bidding Procedures

7. To ensure that the highest or otherwise best offer is received for the Sellers Assets, the Debtors, in consultation with the Environmental Agencies, the Committee, and the Lenders, have established the proposed Amended Sales and Bidding Procedures to govern the submission of competing bids at an Auction. Accordingly, the Debtors seek the Court's approval of the Amended Sales and Bidding Procedures set forth in **Exhibit 1** to the Amended Sales and Bidding Procedures Order and incorporated herein in their entirety by this reference.

8. The Debtors' proposed timeline with respect to the Amended Sales and Bidding Procedures, the Auction, the Sale Hearing, and the closing of the Sale is as follows:⁵

- Entry of the Amended Sales and Bidding Procedures Order no later than **Friday, July 24, 2015, at 5:00 p.m.** (prevailing Central Time);
- Submission deadline for bids (the "***Bid Deadline***") shall be **Friday, July 24, 2015, at 5:00 p.m.** (prevailing Central Time);
- The Debtors will determine which competing bids are Qualified Bids (as defined in the Amended Sales and Bidding Procedures) on or before **Tuesday, July 28, 2015, at 12:00 p.m. noon** (prevailing Central Time);
- The Debtors will provide to each Qualified Bidder notice of the terms of the highest or otherwise best Qualified Bid or Qualified Bids received (such highest or otherwise best Qualified Bid, the "***Auction Baseline Bid***") not later than **Tuesday, July 28, 2015, at 5:00 p.m.** (prevailing Central Time);
- In the event that there is more than one Qualified Bidder, the Debtors will Conduct the Auction on **Friday, July 31, 2015, beginning at 9:30 a.m.** (prevailing Central Time);
- The final hearing to approve the sale of the Sellers Assets to the Prevailing Purchaser (the "***Sale Hearing***") is scheduled to take place on **Thursday, August 6, 2015, beginning at 9:30 a.m.** (prevailing Central Time); and
- The Sale of Sellers Assets is to be closed and consummated on or before **Tuesday, September 1, 2015** (the "***Closing Deadline***"), provided that the Parties

⁵ The dates in this timeline are subject to the terms of the Sales and Bidding Procedures Order and the Sales and Bidding Procedures.

may, by mutual agreement, extend the Closing Deadline subject to any required approval by the Bankruptcy Court.

III. Assumption Procedures for Contracts and Leases

9. To facilitate and effect the sale of the Sellers Assets, the Debtors seek authority to assume and assign certain of the Debtors' executory contracts and unexpired leases (each a "**Contract or Lease**" and, collectively, the "**Contracts and Leases**"), consistent with the procedures previously approved by the Court (the "**Assumption Procedures**") attached as Exhibit "2" to that certain *Amended Order Granting Motion of Debtors, Pursuant to Bankruptcy Code Sections 105(a), 363, 365, 503, and 507, and Bankruptcy Rules 2002, 3007, 6004, 6006, 9007, and 9014 for Entry of: (I) Order (A) Approving Sales and Bidding Procedures in Connection with Sale of Assets of the Debtors, (B) Approving Form and Manner of Notice, (C) Scheduling Auction and Sale Hearing, (D) Authorizing Procedures Governing Assumption and Assignment of Certain Executory Contracts and Unexpired Leases, and (E) Granting Related Relief* [Dkt. # 597] and in accordance with that certain *Order Granting Motion of Debtors to Determine Cure Amounts for Executory Contracts and Unexpired Leases that May Be Assumed and Assigned as Part of the Sales Motion* (the "**Cure Amount Order**") [Dkt. # 628].

10. Pursuant to the Cure Amount Order, the objections of the following parties have been resolved by agreed order: (a) Trammo, Inc. [Dkt. # 752]; (b) Brock Services, LLC [Dkt. # 758]; (c) Alabama Electric Motor Services, LLC d/b/a TMC Electric Motor Services [Dkt. # 795]; and, (d) Sulcom, Inc. [Dkt. # 800].

RELIEF REQUESTED

11. By this Motion, the Debtors seek entry of the two Orders:

(a) the Amended Sales and Bidding Procedures Order which will grant the following relief: (1) approving the Amended Sales and Bidding Procedures; (2) approving the form and manner of notice of the proposed sale transactions, the Amended Sales and Bidding Procedures, the Auction, and the Sale Hearing; (3) authorizing the Debtors to hold the Auction; (4) scheduling the Sale Hearing; (5) authorizing procedures governing the assumption and assignment of the Assigned Contracts; and (6) granting related relief; and

(b) the Sale Order after the Sale Hearing which will grant the following relief: (1) approving the purchase agreement between the Debtors and the Prevailing Purchaser at the Auction; (2) authorizing the Sale of the Sellers Assets and the assumption and assignment of the Assigned Contracts to the Prevailing Purchaser at the Auction free and clear of all Liens, other than any permitted Liens set forth in the purchase agreement with the Prevailing Purchaser; and (3) granting related relief.

BASIS FOR RELIEF

V. Approval of the Amended Sales and Bidding Procedures is Appropriate and in Best Interests of the Bankruptcy Estates.

A. The Proposed Notice of Sale, Amended Sales and Bidding Procedures, Auction, and Sale Hearing are Appropriate.

12. The Debtors believe that the sale of the Sellers Assets in accordance with the Amended Sales and Bidding Procedures will obtain the maximum recovery for their creditors if the Sellers Assets are sold through a well-advertised Auction.

13. Under Bankruptcy Rules 2002(a) and (c), the Debtors are required to notify creditors of the proposed sale of the Sellers Assets, including disclosure regarding the Auction, the terms and conditions of the Sale, and the deadline for filing any objections. The Debtors

request notice of the Sale, the Auction, the Sale Hearing, and the Amended Sales and Bidding Procedures Order be deemed adequate and sufficient if:

(a) No later than three business days after the entry of the Amended Sales and Bidding Procedures Order, the Debtors (or their agents) serve by first class mail, postage prepaid, copies of (i) the Amended Sales and Bidding Procedures Order, and (ii) the Amended Sales and Bidding Procedures on those entities and individuals appearing on the Debtors' creditor matrix.

14. In addition, the Debtors request the establishment of an objection deadline, prior to the Sale Hearing, such that that any objections related to the proposed Sale be served upon (such as to be **received** by) the following parties (the “***Objection Notice Parties***”), **on or before 5:00 p.m. (prevailing Central Time) on Monday, August 3, 2015** (the “***Sale Objection Deadline***”):

- (a) Counsel to the Debtors, Butler Snow LLP, 1020 Highland Colony Parkway, Suite 1400, Ridgeland, MS 39157, Attn: Stephen W. Rosenblatt (steve.rosenblatt@butlersnow.com) and Christopher R. Maddux (chris.maddux@butlersnow.com);
- (b) Chief Restructuring Officer of the Debtors: Jonathan J. Nash, 601 Industrial Drive, Pascagoula, MS 39581 (jonnash@deloitte.com);
- (c) Chief Financial Officer of the Debtors: Robert P. Kerley, 601 Industrial Drive, Pascagoula, MS 39581 (r.kerley@missphosphates.com);
- (d) Investment Banker for the Debtors: Sandler O'Neill + Partners, L.P. (the “***Investment Banker***”), 1251 Avenue of the Americas, 6th Floor, New York, NY 10020, Attn: Sunny Cheung (scheung@sandleroneill.com) and Timur Hubey (thubey@sandleroneill.com);
- (e) Office of the United States Trustee for the Southern District of Mississippi, 501 East Court Street, Suite 6430, Jackson, MS 39201, Attn: Christopher J. Steiskal (Christopher.J.Steiskal@usdoj.gov);
- (f) Counsel to the Lender Parties: (i) Haynes and Boone, LLP, 1221 McKinney Street, Suite 2100, Houston, TX 77010, Attn: Lenard M. Parkins (lenard.parkins@haynesboone.com) and Karl D. Burrer (karl.burrer@haynesboone.com); and (ii) Byrd & Wiser, 145 Main Street, Biloxi, MS 39530-4333, Attn: Robert A. Byrd (rab@byrdwiser.com);

- (g) Counsel for the Mississippi Department of Environmental Quality, Post Office Box 2261, Jackson, MS 39225-2261, Attn: Roy H. Furrh (roy_furrh@deq.state.ms.us) and Theodore D. Lampton (ted_lampton@deq.state.ms.us);
- (h) Counsel for the United States, on behalf of the United States Environmental Protection Agency, 601 D Street, N.W., PH Room 2121, Washington, D.C. 20004, Attn: Kenneth G. Long (kenneth.long@usdoj.gov) and Karl J. Fingerhood (karl.fingerhood@usdoj.gov); and
- (i) Counsel for any statutory committee appointed in the Chapter 11 Cases.

15. The Debtors submit that the foregoing notice and Sale Objection Deadline comply fully with Bankruptcy Rule 2002 and are reasonably calculated to provide timely and adequate notice of the Amended Sales and Bidding Procedures, the Auction, the Sale Hearing, and the Sale to the Debtors' creditors and other parties in interest, including any additional entities that have a legitimate interest in purchasing the Sellers Assets and in in bidding on the Sellers Assets. Based upon the foregoing, the Debtors respectfully request that this Court approve the notice procedures and the Sale Objection Deadline proposed above.

B. The Amended Sales and Bidding Procedures are Appropriate and Will Maximize Value Received in Sale of Sellers Assets.

16. Courts have made clear that a debtor's business judgment is entitled to substantial deference with respect to the procedures to be used in selling assets from the estate. *See In re Asarco, L.L.C.*, 650 F.3d 593, 602-03 (5th Cir. 2011) (the application of the business judgment standard was appropriate where the bankruptcy court issued its expense reimbursement order before any potential qualified bidders had incurred due diligence and work fees).

17. The paramount goal in any proposed sale of property of the estate is to maximize the proceeds received by the estate. *In re Food Barn Stores, Inc.*, 107 F.3d 558, 564-65 (8th Cir. 1997) (noting that in bankruptcy sales, "a primary objective of the [Bankruptcy] Code [is] to

enhance the value of the estate at hand.”); *see also In re Edwards*, 228 B.R. 552, 561 (Bankr. E.D. Pa. 1998) (“The purpose of procedural bidding orders is to facilitate an open and fair public sale designed to maximize value for the estate.”).

18. To that end, courts uniformly recognize that procedures intended to enhance competitive bidding are consistent with the goal of maximizing the value received by the estate and, therefore, are appropriate in the context of bankruptcy sales. *See In re Asarco, L.L.C.*, 650 F.3d 593 (5th Cir. 2011)⁶; *see also In re Integrated Res. Inc.*, 147 B.R. 650, 659 (S.D.N.Y. 1992) (observing that bidding procedures “encourage bidding and . . . maximize the value of the debtor’s assets”).

19. The Debtors believe that the Amended Sales and Bidding Procedures will establish sound parameters by which the proffered sale price of the Sellers Assets may be tested at the Auction, as well as the ensuing Sale Hearing, and evaluated as described herein. Such procedures will increase the likelihood that the Debtors will receive the greatest possible consideration for the Sellers Assets in a sale because they will ensure a competitive and fair bidding process. *Id.* (noting that Break-up Fees “encourage bidding and to maximize the value of the debtor’s assets”). The Amended Sales and Bidding Procedures will also allow the Debtors to undertake the sale and auction process expeditiously, which the Debtors believe is essential to maintaining and maximizing the value of their estates.

⁶ The Court of Appeals for the Fifth Circuit affirmed the ruling of the District Court which found that an order which allowed a reimbursement of expenses for participating bidders “was designed to maximize the value of ASARCO’s estate, and was fair, reasonable, and appropriate.” The bankruptcy court further determined that the Reimbursement Order was “in the best interests of ASARCO and its estate, creditors, interest holders, stakeholders, and all other parties in interest.” On this basis, the bankruptcy court concluded that ASARCO had demonstrated a compelling and sound business justification for the reimbursement authority. The district court similarly concluded that, “ASARCO’s reimbursement motion satisfied the business judgment standard. The court determined that there was no evidence in the record of self-dealing or manipulation among the parties who negotiated the reimbursement procedures; the Reimbursement Order facilitated, not hindered, the auction process; and the approved maximum available size of the reimbursement fee was reasonable.” *Id.* at 603, citing *In re ASCARCO LLC*, 441 B.R. 813 (S.D. Tex 2010).

20. The Debtors believe that the proposed sales process and Auction and the proposed Amended Sales and Bidding Procedures will promote active bidding from seriously interested parties and will dispel any doubt as to the best or otherwise highest offer reasonably available at this time for the purchase of the Sellers Assets. Moreover, the proposed Amended Sales and Bidding Procedures will allow the Debtors to conduct the Auction in a controlled, fair, and open fashion conducted by the Investment Banker that will encourage participation by financially capable bidders who demonstrate the ability to close a transaction. The Debtors believe that the Amended Sales and Bidding Procedures will encourage bidding for the Sellers Assets, are consistent with other procedures previously approved by this Court, and are appropriate under the relevant standards governing auction proceedings and bidding incentives in bankruptcy proceedings.

21. Thus, the proposed Amended Sales and Bidding Procedures are reasonable, appropriate, and within the Debtors' sound business judgment under the circumstances and are a permissible use of the Debtors' property pursuant to Section 363 of the Bankruptcy Code because they will serve to maximize the value that the Debtors will obtain on account of the Sale of the Sellers Assets. *See In re Asarco, L.L.C.*, 650 F.3d at 603.

C. The Proposed Notice Procedures for the Assigned Contracts and Leases and the Identification of Related Cure Amounts are Appropriate.

22. As the Debtors also seek authority to assume and assign the Assigned Contracts to the Prevailing Purchaser in connection with the Prevailing Bid. Further, as soon as practicable, and in no event later than twenty-one (21) days prior to the Contract Objection Deadline, the Cure Notices, which shall describe corresponding Cure Amounts, shall be served on all necessary parties. To the extent that there are disputes regarding any of the Cure Amounts or

other issues, the applicable parties may resolve such dispute by mutual agreement or by seeking recourse from the Court.

23. No later than the closing of the Sale (the “***Designation Deadline***”), the Prevailing Purchaser may designate in writing any Contract or Lease to be assumed and assigned to it at the closing. Upon the closing of the Sale, except as may otherwise be agreed to by the Contract Parties or as the Court may otherwise order, the Prevailing Purchaser shall pay the Cure Amount under the Assigned Contracts in accordance with Section 365(b) of the Bankruptcy Code as soon as practicable after the later of (a) such Cure Amounts are finally determined by the Court and (b) the assumption and assignment of such Assigned Contract is effective.

24. In addition, the Prevailing Purchaser may designate additional Contracts and Leases, which had not previously been designated for assumption and assignment (the “***Additional Assigned Contracts***”), to be assumed and assigned to the Prevailing Purchaser notwithstanding the occurrence of the closing.

25. Upon the election of the Prevailing Purchaser to seek the assignment of the Additional Assigned Contracts, the Debtors, at the sole expense of the Prevailing Purchaser, shall take all actions reasonably necessary to assume and assign the Additional Assigned Contracts to the Prevailing Purchaser. Any Cure Amounts with respect to the Additional Assigned Contracts shall be paid by the Prevailing Purchaser as soon as practicable after the later of: (a) such Cure Amount is finally determined by the Bankruptcy Court; and (b) the assumption and assignment of such Additional Assigned Contract is effective.

VI. Approval of Proposed Sale Transaction is Appropriate and in Best Interest of the Bankruptcy Estates.

26. In accordance with Bankruptcy Rule 6004(f)(1), sales of property rights outside

the ordinary course of business may be by private sale or public auction. The Debtors determined that a public Auction of the Sellers Assets will enable the Debtors to obtain the highest or otherwise best offer in a sale of their assets at this time and is in the best interests of the Debtors, the bankruptcy estates, and their creditors.

A. Sale of Sellers Assets is Sound Exercise of the Debtors' Business Judgment.

27. Section 363 of the Bankruptcy Code provides, in relevant part, that a debtor, “after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.” Further, Section 105(a) of the Bankruptcy Code provides, in relevant part that “[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.”

28. Although Section 363 of the Bankruptcy Code does not specify a standard for determining when it is appropriate for a court to authorize the use, sale, or lease of property of the estate, bankruptcy courts routinely authorize sales of a debtor's assets if such sale is based upon the sound business judgment of the debtor. *See, e.g., In re TWA*, 2001 Bankr. LEXIS 980 (Bankr. D. Del. Apr. 2, 2001); *In re Martin*, 91 F.3d 389, 395 (3d Cir. 1996).

29. As noted by the Court of Appeals for the Fifth Circuit in *Asarco*:

Subsection 363(b) provides that “a debtor-in-possession, ‘after notice and hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.’” *In re Cont'l Air Lines, Inc.*, 780 F.2d 1223, 1226 (5th Cir. 1986) (quoting 11 U.S.C. § 363(b)(1)). In such circumstances, “for the debtor-in-possession or trustee to satisfy its fiduciary duty to the debtor, creditors and equity holders, there must be some articulated business justification for using, selling, or leasing the property outside the ordinary course of business.” *Id.*; *see also In re Moore*, 608 F.3d 253, 263 (5th Cir. 2010) (“A sale of assets under § 363 . . . is subject to court approval and must be supported by an articulated business justification, good business judgment, or sound business reasons.”).

The business judgment standard in section 363 is flexible and encourages discretion. “Whether the proffered business justification is sufficient depends on

the case. . . . [T]he bankruptcy judge ‘should consider all salient factors pertaining to the proceeding and, accordingly, act to further the diverse interests of the debtor, creditors and equity holders, alike.’“ *Cont’l Air Lines*, 780 F.2d at 1226 (quoting *In re Lionel Corp.*, 722 F.2d 1063, 1071 (2d Cir. 1983)).

650 F.3d at 601.

30. Courts typically consider the following factors in determining whether a proposed sale satisfies this standard: (a) whether a sound business justification exists for the sale; (b) whether adequate and reasonable notice of the sale was given to interested parties; (c) whether the sale will produce a fair and reasonable price for the property; and (d) whether the parties have acted in good faith. *See In re Del. & Hudson Ry.*, 124 B.R. 169, 176 (D. Del. 1991). In *Del. & Hudson Ry.*, the court held:

[o]nce a court is satisfied that there is a sound business reason or an emergency justifying the pre-confirmation sale, the court must also determine that the trustee has provided the interested parties with adequate and reasonable notice, that the sale price is fair and reasonable and that the [proposed] purchaser is proceeding in good faith.

Id.

31. The business judgment rule shields a debtor’s management from judicial second-guessing. *See In re Tower Air*, 416 F.3d 229, 238 (3d Cir. 2005). Once a debtor articulates a valid business justification, “[t]he business judgment rule is a presumption that directors act in good faith, on an informed basis, honestly believing that their action is in the best interests of the company.” *Id.* Thus, if a debtor’s actions satisfy the business judgment rule, then the transaction in question should be approved under Section 363(b)(1) of the Bankruptcy Code.

32. A sound business purpose for the sale of a debtor’s assets outside the ordinary course of business may be found where such a sale is necessary to preserve the value of assets for the estates, the creditors, or interest holders. *See, e.g., In re Lionel Corp.*, 722 F.2d 1063,

1071 (2nd Cir. 1983). In fact, the paramount goal in any proposed sale of property of the bankruptcy estate is to maximize the proceeds received by the bankruptcy estate. *See In re Food Barn Stores, Inc.*, 107 F.3d 558, 564-65 (8th Cir. 1997) (noting that in bankruptcy sales, “a primary objective of the [Bankruptcy] Code [is] to enhance the value of the estate at hand”); *see also In re Integrated Res., Inc.*, 147 B.R. at 659 (“It is a well-established principle of bankruptcy law that the . . . [Debtors’] duty with respect to such sales is to obtain the highest price or greatest overall benefit possible for the estate.”) (*quoting In re Atlanta Packaging Prods., Inc.*, 99 B.R. 124, 130 (Bankr. N.D. Ga. 1988)).

33. Courts uniformly recognize that procedures intended to enhance competitive bidding are consistent with the goal of maximizing the value received by the bankruptcy estate and, therefore, are appropriate in the context of bankruptcy sales. *In re Fin. News Network, Inc.*, 126 B.R. 152, 156 (S.D.N.Y. 1991) (as amended) (“[C]ourt-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.”)

34. The sale of the Sellers Assets will be consummated only after thorough consideration of all viable alternatives and after concluding that such transactions are supported by sound business justifications.

35. The value of the Sale Assets will be established through the Auction and the sale process consistent with the requirements of the Bankruptcy Code, the Bankruptcy Rules and applicable law pursuant to the Amended Sales and Bidding Procedures. *See Bank of Am. Nat’l Trust & Sav. Ass’n v. 203 N. LaSalle St. P’ship*, 526 U.S. 434, 457 (1999) (stating that “the best way to determine value is exposure to a market”); *Assocs. Commer. Corp. v. Rash*, 520 U.S. 953, 960 (1997) (holding that “the value of the property . . . is the price a willing buyer in the debtor’s

trade, business, or situation would pay to obtain like property from a willing seller”); *Malik v. Falcon Holdings, LLC*, 675 F.3d 646, 647-648 (7th Cir. 2012) (“what a willing buyer will pay a willing seller in an arms’-length transaction . . . is the *gold standard of valuation*; *other measures are approximations. The value of a thing is what people will pay.* The judiciary should not reject actual [transaction] prices when they are available.”) (emphasis added); *In re SW Boston Hotel Venture, LLC*, 479 B.R. 210 (B.A.P. 1st Cir. 2012) (price obtained in postpetition sale of substantial portion of collateral in arm’s-length transaction provided best evidence of collateral’s value). Consequently, the fairness and reasonableness of a sale to the Prevailing Purchaser(s) ultimately will be considered in light of “market exposure” through an open and fair auction process.

B. Sale of Sellers Assets and Assigned Contracts Free and Clear of Liens is Authorized by Section 363(f) of the Bankruptcy Code.

36. The Debtors further submit that it is appropriate to sell the Sellers Assets and to assign the Assigned Contracts free and clear of any permitted Liens as set forth in the purchase agreement with the Prevailing Purchaser pursuant to Section 363(f) of the Bankruptcy Code, with any such Liens attaching to the net sale proceeds of the Sellers Assets, as and to the extent applicable. Section 363(f) of the Bankruptcy Code authorizes a debtor to sell assets free and clear of liens, claims, interests, and encumbrances if:

- (1) applicable nonbankruptcy law permits sale of such property free and clear of such interests;
- (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 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.

37. Because Section 363(f) of the Bankruptcy Code is drafted in the disjunctive, satisfaction of any one of its five requirements will suffice to permit the sale of the Sellers Assets “free and clear” of Liens. COLLIER ON BANKRUPTCY (16th Ed.), Section 363.06, Sale Free of Liens or Interests; § 363(f) (“The language of section 363(f) is in the disjunctive, that is, the sale free of the interest may occur if any one of the conditions of section 363(f) has been met. Case law has construed these standards expansively.”); *see also In re Nature Leisure Times, LLC*, 2007 Bankr. Lexis 4333 (Bankr. E.D. Tex. 2007) (“The language of § 363(f) is in the disjunctive such that a sale free and clear of an interest can be approved if any one of the aforementioned conditions contained in § 363(f) are satisfied.”); *In re Decora Indus., Inc.*, 2002 U.S. LEXIS 27031, at 19 (D. Del. May 20, 2002) (“Because § 363(f) is drafted in the disjunctive, the satisfaction of any of the requirements outlined is sufficient to warrant Debtors’ sale of the Acquired Assets free and clear of all Interests as provided in the Purchase Agreement, except with respect to such Interests as are assumed liabilities pursuant to the Purchase Agreement.”)

38. The Debtors believe that one or more of the tests of Section 363(f) of the Bankruptcy Code are satisfied with respect to the transfer of the Sellers Assets and the assignment of the Assigned Contracts. In particular, the Debtors believe that at least Section 363(f)(2) of the Bankruptcy Code will be met in connection with the transactions proposed hereunder because each of the parties holding Liens on the Sellers Assets, if any, will consent, or, absent any objection to this Motion, will be deemed to have consented to, the Sale.

39. Any holder of a Lien also will be adequately protected by having its Liens, if any, attach to the sale proceeds received by the Debtors for the Sale of the Sellers Assets to the

successful bidder at the Auction, in the same order of priority, with the same validity, force, and effect that such creditor had prior to such Sale, subject to any claims and defenses that the Debtors and the bankruptcy estates may possess with respect thereto. Accordingly, Section 363(f) of the Bankruptcy Code authorizes the sale of the Sellers Assets and the assignment of the Assigned Contracts free and clear of any such Liens.

C. If the Debtors Consummate Sale of Assets, Sellers Assets Should be Sold or Assumed Free and Clear of Successor Liability.

40. The purchaser of the Sellers Assets is should not be liable for any of the Debtors' liabilities as a successor to the Debtors' business or otherwise, unless the purchaser expressly assumes such liabilities. Extensive case law exists providing that claims against the winning bidder are directed to the proceeds of a free and clear sale of property and may not subsequently be asserted against a buyer.

41. Although Section 363(f) of the Bankruptcy Code provides for the sale of assets "free and clear of any interests," the term "any interest" is not defined in the Bankruptcy Code. *Folger Adam Sec. v. DeMatteis/MacGregor, J.V.*, 209 F.3d 252, 257 (3d Cir. 2000). In *TWA*, the Third Circuit specifically addressed the scope of the term "any interest." 322 F.3d 288-89. The Third Circuit observed that while some courts have "narrowly interpreted interests in property to mean *in rem* interests in property," the trend in modern cases is toward "a more expansive reading of 'interests in property' which 'encompasses other obligations that may flow from ownership of the property.'" *Id.* at 289 (citing 3 COLLIER ON BANKRUPTCY P. 363.06[1]).

42. Courts have held that a buyer of a debtor's assets pursuant to a Section 363 sale takes free from successor liability resulting from pre-existing claims. *See The Ninth Ave. Remedial Group v. Allis-Chalmers Corp.*, 195 B.R. 716, 732 (N.D. Ind. 1996) (stating that a

bankruptcy court has the power to sell assets free and clear of any interest that could be brought against the bankruptcy estate during the bankruptcy); *In re New England Fish Co.*, 19 B.R. 323, 329 (Bankr. W.D. Wash. 1982) (holding transfer of property in free and clear sale included free and clear of Title VII employment discrimination and civil rights claims of debtor's employees); *In re Hoffman*, 53 B.R. 874, 876 (Bankr. D.R.I. 1985) (holding that transfer of liquor license free and clear of any interest permissible even though the estate had unpaid taxes was permissible).

43. For obvious reasons, the very purpose of an order purporting to authorize the transfer of assets free and clear of all "interests" would be frustrated if claimants could thereafter use the transfer as a basis to assert claims against a purchaser arising from a seller's pre-sale conduct. Furthermore, the Debtors will provide notice of the proposed sale to all known parties in interest that may assert claims or interests relating to the Sellers Assets against the Debtors, including trade creditors, contract counterparties, lenders, and other parties known to the Debtors to be asserting claims relating to the Sellers Assets.

44. Under Section 363(f) of the Bankruptcy Code, a purchaser of assets is entitled to know that the Sellers Assets are not subject to latent claims that will be asserted against the purchaser after the proposed transaction is completed. Accordingly, consistent with the above-cited case law, the order approving the Sale of the Debtors may provide that the purchaser of the Sellers Assets is not liable as a successor under any theory of successor liability, for claims that encumber or relate to the Sellers Assets.

45. As expressly stated in footnote 3 of the Motion, "nothing in the Sale Order authorizing and permitting such sale will be construed to release, nullify, or enjoin a governmental body from seeking to enforce any environmental laws under which a purchaser of property would otherwise be determined to be liable as a current owner or current operator after

the date of closing of the sale and purchase of the Sellers Assets.”

D. Consistent with Section 363(k) of the Bankruptcy Code and the Interim DIP Order and the anticipated Final DIP Order, Credit Bidding by the Agent is Embodied in the Amended Sales and Bidding Procedures

46. The Agent, for and on behalf of the Lenders, is entitled to credit bid up to \$15,000,000 of the value of their respective claims under Section 363(k) of the Bankruptcy Code and the Interim DIP Order. A secured creditor is allowed to “credit bid” up to the full amount of its total claim in a sale. Section 363(k) of the Bankruptcy Code provides, in relevant part, that unless the court for cause orders otherwise, the holder of a claim secured by property that is the subject of the sale “may bid at such sale, and, if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property.” Even if a secured creditor is undersecured as determined in accordance with Section 506(a) of the Bankruptcy Code, Section 363(k) of the Bankruptcy Code allows such secured creditor to bid the total face value of its claim and does not limit the credit bid to the claim’s economic value. *See In re Submicron Sys. Corp.*, 432 F.3d 448, 459-60 (3d Cir. 2006) (providing that it is well settled among district and bankruptcy courts that creditors can bid the full face value of their secured claims under Section 363(k) of the Bankruptcy Code).

47. Here, the Amended Sales and Bidding Procedures recognize that the Agent for, and on behalf of the Lenders, is entitled to credit bid up to \$15,000,000 of their respective total claims pursuant to Section 363(k) of the Bankruptcy Code and the terms of the Interim DIP Order. The Agent, for and on behalf of the Lenders, is deemed to be a Qualified Bidder under the Amended Sales and Bidding Procedures.

E. Assumption and Assignment of the Assigned Contracts Is Authorized by Section 365 of the Bankruptcy Code.

48. Sections 365(a) and (b) of the Bankruptcy Code authorize a debtor-in-possession, subject to the court's approval, to assume executory contracts or unexpired leases of the debtor. Under Section 365(a) of the Bankruptcy Code, a debtor, "subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor." Section 365(b)(1) of the Bankruptcy Code, in turn, codifies the requirements for assuming an unexpired lease or executory contract of a debtor, providing that:

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.

49. Courts generally will not second guess a debtor's business judgment concerning the assumption of an executory contract. *In re Network Access Solutions, Corp.*, 330 B.R. 67, 75 (Bankr. D. Del. 2005) ("The standard for approving the assumption of an executory contract is the business judgment rule."); *Phar-Mor, Inc. v. Strouss Bldg. Assocs.*, 204 B.R. 948, 952 (N.D. Ohio 1997) ("Courts should generally defer to a debtor's decision whether to reject an executory contract.") (citation omitted).

50. In the present case, the Debtors' assumption and assignment of the Assigned Contracts to the Prevailing Purchaser will meet the business judgment standard and satisfy the requirements of Section 365 of the Bankruptcy Code. As discussed above, the transactions contemplated by the Bidder APA (as defined in the Amended Sales and Bidding Procedures) will

provide significant benefits to the bankruptcy estates. Because the Debtors cannot obtain the benefits of the Bidder APA without the assumption of the Assigned Contracts, the assumption of these Assigned Contracts is undoubtedly a sound exercise of the Debtors' business judgment.

51. Further, a debtor-in-possession may assign an executory contract or an unexpired lease of the debtor if it assumes the agreement in accordance with Section 365(a) of the Bankruptcy Code and provides adequate assurance of future performance by the assignee, whether or not there has been a default under the agreement. *See* 11 U.S.C. § 365(f)(2). Significantly, among other things, adequate assurance may be provided by demonstrating the assignee's financial health and experience in managing the type of enterprise or property assigned. *See, e.g., In re Bygaph, Inc.*, 56 B.R. 596, 605-06 (Bankr. S.D.N.Y. 1986) (finding adequate assurance of future performance to be present where prospective assignee of a lease from debtor had financial resources and expressed willingness to devote sufficient funding to the business in order to give it a strong likelihood of succeeding).

52. The meaning of "adequate assurance of future performance" depends on the facts and circumstances of each case, but should be given "practical, pragmatic construction." *In re Sanshoe Worldwide Corp.*, 139 B.R. 585, 592 (S.D.N.Y. 1992) (citations omitted), *aff'd*, 993 F.2d 300 (2d Cir. 1993).

53. To assist in the assumption, assignment and sale of the Assigned Contracts, the Debtors also request that the Sale Order provide that anti-assignment provisions in the Assigned Contracts shall not restrict, limit or prohibit the assumption, assignment and sale of the Assigned Contracts and are deemed and found to be unenforceable anti-assignment provisions within the meaning of Section 365(f) of the Bankruptcy Code.

54. Section 365(f)(1) of the Bankruptcy Code permits a debtor to assign unexpired

leases and contracts free from such anti-assignment restrictions, providing, in pertinent part, that:

[N]otwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law, that prohibits, restricts, or conditions the assignment of such contract or lease, the trustee may assign such contract or lease under paragraph (2) of this subsection.

55. Section 365(f)(1) of the Bankruptcy Code, by operation of law, invalidates provisions that prohibit, restrict, or condition assignment of an executory contract or unexpired lease. *See, e.g., In re The Circle K Corp.*, 127 F.3d 904, 910-11 (9th Cir. 1997) (“[N]o principle of bankruptcy or contract law precludes us from permitting the Debtors here to extend their leases in a manner contrary to the leases’ terms, when to do so will effectuate the purposes of section 365.”). Section 365 of the Bankruptcy Code prohibits enforcement of any clause creating a right to modify or terminate the contract or lease upon a proposed assumption or assignment thereof. *See, e.g., In re Jamesway Corp.*, 201 B.R. 73, 77-78 (Bankr. S.D.N.Y. 1996) (providing that Section 365 of the Bankruptcy Code prohibits enforcement of any lease clause creating right to terminate lease because it is being assumed or assigned, thereby indirectly barring assignment by debtor; all lease provisions, not merely those entitled anti-assignment clauses, are subject to court’s scrutiny regarding anti-assignment effect).

56. Other courts have recognized that provisions that have the effect of restricting assignments cannot be enforced. *See In re Rickel Home Ctrs., Inc.*, 240 B.R. 826, 831 (D. Del. 1998) (“In interpreting section 365(f), courts and commentators alike have construed the terms to not only render unenforceable lease provisions which prohibit assignment outright, but also lease provisions that are so restrictive that they constitute de facto anti-assignment provisions.”)

Similarly, in *In re Mr. Grocer, Inc.*, the court noted that:

[the] case law interpreting § 365(0)(1) of the Bankruptcy Code establishes that the court does retain some discretion in determining that lease provisions, which are not themselves *ipso facto* anti-assignment clauses, may still be refused

enforcement in a bankruptcy context in which there is no substantial economic detriment to the landlord shown, and in which enforcement would preclude the bankruptcy estate from realizing the intrinsic value of its assets.

77 B.R. 349, 354 (Bankr. D.N.H. 1987). Thus, the Debtors request that any anti-assignment provisions be deemed not to restrict, limit, or prohibit the assumption, assignment and sale of the Assigned Contracts and be deemed and found to be unenforceable anti-assignment provisions within the meaning of Section 365(f) of the Bankruptcy Code.

WAIVER OF BANKRUPTCY RULES 6004(a) AND 6004(h)

57. To implement the foregoing successfully, the Debtors seek a waiver of the notice requirements under Bankruptcy Rule 6004(a) and the 14-day stay of an order authorizing the use, sale, or lease of property under Bankruptcy Rule 6004(h).

RESERVATION OF RIGHTS

58. Nothing contained herein is intended or should be construed as an admission of the validity of any claim against the Debtors, a waiver of the Debtors' rights to dispute any claim, or an approval or assumption of any agreement, contract, or lease under Section 365 of the Bankruptcy Code. The Debtors expressly reserve their rights to contest any invoice or claim related to the relief requested herein in accordance with applicable law.

NOTICE

59. The Debtors have provided notice of this Motion by either electronic mail, facsimile, or overnight mail to: (a) the Office of the United States Trustee for the Southern District of Mississippi; (b) the creditors listed on the Consolidated List of Creditors Holding 20 Largest Unsecured Claims appended to the Debtors' chapter 11 petitions; (c) the United States Attorney for the Southern District of Mississippi; (d) the Internal Revenue Service; (e) the Mississippi Department of Environmental Quality; (f) the United States Environmental

Protection Agency; (g) all known taxing authorities for the jurisdictions to which the Debtors are subject; (h) all entities known or reasonably believed to have asserted a Lien on any of the Sellers Assets; (i) all creditors who are known to have or have asserted in writing secured claims; (j) all counterparties to the Debtors' executory contracts and unexpired leases [but only at such time as when the Cure Notice is filed and served]; and (k) those parties who have formally filed a request for notice in these Chapter 11 Cases pursuant to Bankruptcy Rule 2002 (who will be served through CM/ECF).

60. In addition, copies of the Sale Notice, the Amended Sales and Bidding Procedures, and the Amended Sales and Bidding Procedures Order will be served on the Notice Parties no later than three (3) business days of entry of the Amended Sales and Bidding Procedures Order by this Court. In light of the nature of the relief requested herein, the Debtors submit that no other or further notice is required.

NO PRIOR REQUEST

61. No previous request for the relief sought herein has been made by the Debtors to this or any other court.

WHEREFORE, the Debtors respectfully request that the Court enter an order, substantially in the form attached hereto, granting the relief requested herein and granting the Debtors such other and further relief as is just and proper.

[Remainder of Page Intentionally Left Blank]

THIS, the 22nd day of June 2015.

Respectfully submitted,

MISSISSIPPI PHOSPHATES CORPORATION, *et al.*

By: /s/ Stephen W. Rosenblatt

Stephen W. Rosenblatt (Miss. Bar No. 5676)
Christopher R. Maddux (Miss. Bar No. 100501)
Paul S. Murphy (Miss. Bar No. 101396)
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ATTORNEYS FOR THE DEBTORS

CERTIFICATE OF SERVICE

I certify that the foregoing Motion was filed electronically through the Court's ECF system and served electronically on all parties enlisted to receive service electronically.

Dated: June 22, 2015.

/s/Stephen W. Rosenblatt

STEPEHN W. ROSENBLATT

Exhibit A

Amended Sales and Bidding Procedures Order

26532013v3

This matter came on for consideration on the *Motion of Debtors, pursuant to Bankruptcy Code Sections 105(a), 363, 365, 503, and 507, and Bankruptcy Rules 2002, 3007, 6004, 6006, 9007, and 9014 for Entry of: (I) Amended Order (A) Approving the Amended Sales and Bidding Procedures in Connection with Sale of Assets of the Debtors, (B) Approving Form and Manner of Notice, (C) Scheduling Auction and Sale Hearing, (D) Authorizing Procedures Governing Assumption and Assignment of Certain Executory Contracts and Unexpired Leases, and (E) Granting Related Relief; and (II) Amended Order (A) Approving Purchase Agreement, (B) Authorizing Sale Free and Clear of All Liens, Claims, Encumbrances, and Other Interests, and (C) Granting Related Relief* (the “**Amended Sales Motion**”) filed by Mississippi Phosphates Corporation and each of the affiliated debtors, each as debtors-in-possession (collectively, the “**Debtors**”) for an Amended Order (“**Final Amended Sales and Bidding Procedures Order**”) with respect to the *Amended Order Granting Motion of Debtors, Pursuant to Bankruptcy Code Sections 105(a), 363, 365, 503, and 507, and Bankruptcy Rules 2002, 3007, 6004, 6006, 9007, and 9014 for Entry of: (I) Order (A) Approving Sales and Bidding Procedures in Connection with Sale of Assets of the Debtors, (B) Approving Form and Manner of Notice, (C) Scheduling Auction and Sale Hearing, (D) Authorizing Procedures Governing Assumption and Assignment of Certain Executory Contracts and Unexpired Leases, and (E) Granting Related Relief* (the “**Amended Sales and Bidding Procedures Order**”) [Dkt. # 597], as reflected in the *Notice of Hearing and Deadlines* [Dkt. # 598] (the “**Sale Hearing**”).

IT IS HEREBY ORDERED that the Sale Hearing is set for **Thursday, August 6, 2015, at 9:30 a.m. (central time)**, in the Bankruptcy Courtroom, 7th Floor, Dan M. Russell, Jr. United States Courthouse, 2012 15th Street, Gulfport, Mississippi, for the Court to consider and act upon the Amended Sales Motion and any responses that may be filed to it.

IT IS FURTHER ORDERED that any party in interest seeking to respond or object to the Sale Motion must file a written response or objection on or before **Monday, August 3, 2015 at 5:00 p.m. (central time)** (the “*Sale Objection Deadline*”) and serve any such response of Objection (such as to be **received** by) the following parties (the “*Objection Notice Parties*”), **on or before 5:00 p.m. (prevailing Central Time) on Monday, August 3, 2015** (the “*Sale Objection Deadline*”):

- (a) Counsel to the Debtors, Butler Snow LLP, 1020 Highland Colony Parkway, Suite 1400, Ridgeland, MS 39157, Attn: Stephen W. Rosenblatt (steve.rosenblatt@butlersnow.com) and Christopher R. Maddux (chris.maddux@butlersnow.com);
- (b) Chief Restructuring Officer of the Debtors: Jonathan J. Nash, 601 Industrial Drive, Pascagoula, MS 39581 (jonnash@deloitte.com);
- (c) Chief Financial Officer of the Debtors: Robert P. Kerley, 601 Industrial Drive, Pascagoula, MS 39581 (r.kerley@missphosphates.com);
- (d) Investment Banker for the Debtors: Sandler O’Neill + Partners, L.P. (the “*Investment Banker*”), 1251 Avenue of the Americas, 6th Floor, New York, NY 10020, Attn: Sunny Cheung (scheung@sandleroneill.com) and Timur Hubey (thubey@sandleroneill.com);
- (e) Office of the United States Trustee for the Southern District of Mississippi, 501 East Court Street, Suite 6430, Jackson, MS 39201, Attn: Christopher J. Steiskal (Christopher.J.Steiskal@usdoj.gov);
- (f) Counsel to the Lender Parties: (i) Haynes and Boone, LLP, 1221 McKinney Street, Suite 2100, Houston, TX 77010, Attn: Lenard M. Parkins (lenard.parkins@haynesboone.com) and Karl D. Burrer (karl.burrer@haynesboone.com); and (ii) Byrd & Wiser, 145 Main Street, Biloxi, MS 39530-4333, Attn: Robert A. Byrd (rab@byrdwiser.com);
- (g) Counsel for the Mississippi Department of Environmental Quality, Post Office Box 2261, Jackson, MS 39225-2261, Attn: Roy H. Furrh (roy_furrh@deq.state.ms.us) and Theodore D. Lampton (ted_lampton@deq.state.ms.us);
- (h) Counsel for the United States, on behalf of the United States Environmental Protection Agency, 601 D Street, N.W., PH Room 2121, Washington, D.C. 20004, Attn: Kenneth G. Long

(kenneth.long@usdoj.gov) and Karl J. Fingerhood
(karl.fingerhood@usdoj.gov).

IT IS FURTHER ORDERED that the Amended Sales and Bidding Procedures, which are attached hereto as **Exhibit 1** (the “***Amended Sales and Bidding Procedures***”) should be, and hereby are, approved.

IT IS FURTHER ORDERED that no later than three business days after the entry of this Final Amended Sales and Bidding Procedures Order, the Debtors shall cause to be served by first class mail, postage prepaid, copies of (i) the Amended Sales and Bidding Procedures Order and (ii) the Amended Sales and Bidding Procedures on those entities and individuals appearing on the Debtors’ creditor matrix.

IT IS FURTHER ORDERED that the Debtors are authorized to take such actions as are necessary or appropriate to implement the Amended Sales and Bidding Procedures.

IT IS FURTHER ORDERED that the Debtors are authorized to assume and assign certain of the Debtors’ executory contracts and unexpired leases (each a “***Contract or Lease***” and, collectively, the “***Contracts and Leases***”), consistent with the procedures previously approved by the Court (the “***Assumption Procedures***”) attached as Exhibit “2” to that certain *Amended Order Granting Motion of Debtors, Pursuant to Bankruptcy Code Sections 105(a), 363, 365, 503, and 507, and Bankruptcy Rules 2002, 3007, 6004, 6006, 9007, and 9014 for Entry of: (I) Order (A) Approving Sales and Bidding Procedures in Connection with Sale of Assets of the Debtors, (B) Approving Form and Manner of Notice, (C) Scheduling Auction and Sale Hearing, (D) Authorizing Procedures Governing Assumption and Assignment of Certain Executory Contracts and Unexpired Leases, and (E) Granting Related Relief* [Dkt. # 597] and in accordance with that certain *Order Granting Motion of Debtors to Determine Cure Amounts for*

Executory Contracts and Unexpired Leases that May Be Assumed and Assigned as Part of the Sales Motion (the “**Cure Amount Order**”) [Dkt. # 628].

IT IS FURTHER ORDERED that Bidders are advised that the transfer of assets may involve the transfer of necessary permits and licenses, subject to governmental approval, and compliance with environmental laws and regulations.

IT IS FURTHER ORDERED that approval of this Order is without prejudice to any objections the United States, Mississippi Department of Environmental Quality, the Committee, or the Objecting Creditors may assert with respect to any proposed Sale Order.

IT IS FURTHER ORDERED that the Court will consider at the Sale Hearing the Debtors’ request for an Order (A) Approving Purchase Agreement, (B) Authorizing Sale Free and Clear of All Liens, Claims, Encumbrances, and Other Interests, and (C) Granting Related Relief.

IT IS FURTHER ORDERED that any issues with respect to the rights to the proceeds of any sale will be addressed in any proposed Sale Order or such other Order of the Court.

###END OF ORDER###

ORDER PREPARED AND SUBMITTED BY:

/s/ Stephen W. Rosenblatt

Stephen W. Rosenblatt (Miss. Bar No. 5676)

Christopher R. Maddux (Miss. Bar No. 100501)

Paul S. Murphy (Miss. Bar No. 101396)

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ATTORNEY FOR THE DEBTORS

AGREED TO AND APPROVED FOR ENTRY:

**UNITED STATES DEPARTMENT OF JUSTICE, ENVIRONMENTAL
ENFORCEMENT SECTION**

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ATTORNEYS FOR COMMITTEE

**STUW LLC, AS ADMINISTRATIVE AGENT;
HUDSON BAY FUND LP; HUDSON BAY INTERMEDIATE FUND, LTD.; AND
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– and –

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THEIR ATTORNEYS

EXHIBIT “1”

SALES AND BIDDING PROCEDURES

These sales and bidding procedures (the “*Sales and Bidding Procedures*”) set forth the process by which Mississippi Phosphates Corporation, *et al.* are authorized to conduct a sale by auction of substantially all of the assets of Sellers in accordance with the Sales and Bidding Procedures Order (defined below).

These Sales and Bidding Procedures initially were approved by order of the Bankruptcy Court dated February 20, 2015 (the “*Sales and Bidding Procedures Order*”) [Dkt. # 509], as amended by the *Amended Sales and Bidding Procedures Order* [Dkt. # 597], and as further amended by *Order Re-Setting Sale Hearing, Objection Deadline and Related Dates and Events* [Dkt. # 761] and *Amended Order Re-Setting Sale Hearing, Objection Deadline and Related Dates and Events* [Dkt. # 790]² seeking certain relief. Due to a change of circumstances, it is necessary to amend the Sales and Bidding Procedures Order to provide as follows:

- (a) With respect to the Amended Sales and Bidding Procedures Order:
- (b) Approving these Amended Sales and Bidding Procedures;
- (c) Authorizing the Debtors to schedule an auction to sell the Sellers’ Assets (the “*Auction*”) to be held on ***Friday, July 31, 2015***;
- (d) Scheduling the final hearing to approve a sale of the Sellers’ Assets (the “*Sale Hearing*”) for ***August 6, 2015, beginning at 9:30 a.m.***, at the United States Bankruptcy Courtroom, 7th Floor, Dan M. Russell, Jr. United States Courthouse, 2012 15th Street, Gulfport, MS 39501;
- (e) Approving the form and manner of notice of the proposed sale transactions, the Amended Sales and Bidding Procedures, the Auction, and the Sale Hearing;

²Capitalized terms used but not otherwise defined herein shall have the meanings given to them in the *Sales Motion*, the *Sales and Bidding Procedures Order*, the *Amended Sales and Bidding Procedures Order*, and the *Amended Order Re-Setting Sale Hearing, Objection Deadline and Related Dates and Events* as applicable.

(f) The procedures governing the assumption by the Debtors and the assignment of certain executory contracts and unexpired leases (the “**Assigned Contracts**”) to the purchaser who submits the highest or otherwise best offer at the Auction in accordance with the Sales and Bidding Procedures (the “**Prevailing Purchaser**”) was approved by the Court in the Amended Sales and Bidding Procedures Order and are not modified herein, provided, however, that any transfer of control any permit, license or administrative order issued by the United States Environmental Protection Agency or the Mississippi Department of Environmental Quality is subject to the approval of those regulatory agencies; and

(g) Granting related relief.

With respect to the Sale of the Sellers’ Assets, the filing of the form of a proposed Order on the docket of this case on or before **Friday, July 17, 2015** at 5:00 p.m. prevailing Central Time (the “**Sale Order**”) which:

(a) Authorizes the sale (the “**Sale**”) of the Sellers’ Assets and the assumption and assignment of the Assigned Contracts (as defined herein) to the Prevailing Purchaser at the Auction free and clear of all liens, claims, encumbrances, and other interests (as more fully described in Paragraph 2 below) (collectively, “**Liens**”), other than any Liens permitted by the purchase agreement between the Debtors and the Prevailing Purchaser; and

(b) Grants other related relief.

1. Assets to Be Sold.

The Debtors provide these Sales and Bidding Procedures whereby prospective bidders may qualify for and participate in the Auction, thereby competing to make the highest or otherwise best offer for all or substantially all assets of the Sellers (the “**Sellers’ Assets**”). The Sellers’ Assets consist of all of the Debtors’ rights, title and interest in the following:

(a) all real and tangible personal property, plant, machinery, equipment, and inventory, including the phosphogypsum stack(s) and associated ditches and ponds for process water management (hereafter “**Gyp Stacks**”) and the wastewater treatment equipment;

(b) all rights under the agreement between the Debtors and Trammo, Inc. with respect to ammonia terminalling operations; and

(c) all rights under any contracts, leases, permits or licenses specified by the Prevailing Purchaser.

For avoidance of doubt, however, the Sellers' Assets shall not include the following:

- (i) the estates' claims or causes of action under Chapter 5 of the Bankruptcy Code (including such claims under state law that may be asserted by the Debtors pursuant to 11 U.S.C. § 544);
- (ii) any claims or causes of action against any of the Debtors' officers or directors;
- (iii) any rights under any insurance policies of the Debtors; and
- (iv) the BP Claim or the Protective Claim.³

2. Sale Free and Clear of Liens, Interests, Claims and Encumbrances.

The Debtors seek to sell the Sellers' Assets to the Prevailing Purchaser, and the assumption, assignment and sale of the Executory Contracts to the Prevailing Purchaser, free and clear of all Liens and Claims (as defined below) of any kind or nature whatsoever in respect of the following: (1) any labor agreements; (2) all mortgages, deeds of trust and security interests; (3) any pension, welfare, compensation or other employee benefit plans, agreements, practices and programs, including, without limitation, any pension plan of any Debtor; (4) any other employee, worker's compensation, occupational disease or unemployment or temporary disability related claim, including, without limitation, claims that might otherwise arise under or pursuant to: (a) the Employee Retirement Income Security Act of 1974, as amended, (b) the Fair Labor Standards Act, (c) Title VII of the Civil Rights Act of 1964, (d) the Federal Rehabilitation Act of 1973, (e) the National Labor Relations Act, (f) the Worker Adjustment and Retraining Act of 1988, (g) the Age Discrimination and Employee Act of 1967 and Age Discrimination in Employment Act, as amended, (h) the Americans with Disabilities Act of 1990, (i) the Consolidated Omnibus Budget Reconciliation Act of 1985, (j) state discrimination laws, (k) state

³ As those terms are defined in the *Motion of the Debtors Pursuant to §§ 105 and 363 of the Bankruptcy Code and Federal Rule of Bankruptcy Procedure 9019 for an Order Approving Settlement among the Debtors, Phosphate Holdings, Inc., the Lender Parties, and the Governments* (the "**Environmental Agencies - Lenders Settlement Motion**") [Dkt. # ____]

unemployment compensation laws or any other similar state laws, or (1) any other state or federal benefits or claims relating to any employment with any of the Debtors or any of their respective predecessors; (5) any bulk sales or similar law; (6) any tax statutes or ordinances, including, without limitation, the Internal Revenue Code of 1986, as amended; (7) any theories of successor liability; and (8) any environmental laws, provided, however, nothing in the Sale Order authorizing and permitting such sale will be construed to release, nullify, or enjoin a governmental body from seeking to enforce any environmental laws under which a purchaser of property would otherwise be determined to be liable as a current owner or current operator after the date of closing of the sale and purchase of the Sellers' Assets.

3. Confidentiality Agreements.

Upon execution of a confidentiality agreement in a form and substance satisfactory to the Debtors, the DIP Agent, for and on behalf of the DIP Lenders, and the Agent, for an on behalf of the Pre-Petition Lenders, any prospective bidder that wishes to conduct due diligence on the Sellers' Assets may be granted access to all marketing information. The information to be provided to such parties will be information that the Debtors reasonably believe is appropriate in light of the Debtors' need to protect their confidential commercial information.

Each party expressing an interest in the Sellers' Assets shall comply with all reasonable requests for additional information and due diligence access by the Debtors regarding such party and its contemplated transaction. Failure by a party to comply with such reasonable requests for additional information and due diligence access may be a basis for the Debtors, in consultation with the Investment Banker (as defined herein) and the Creditor Constituencies and the Environmental Agencies to determine that such bidder is not a Qualified Bidder (as defined herein).

By submitting a bid, each bidder shall be deemed to acknowledge and represent as follows: (a) it has had an opportunity to conduct due diligence on the Sellers' Assets prior to making its bid; (b) it has relied solely upon its own independent review, investigation, and/or inspection of any documents and/or the assets in making its bid; and (c) it did not rely upon any written or oral statement, representations, promises, warranties, or guaranties whatsoever, whether express, implied, by operation of law, or otherwise, regarding the Sellers' Assets, or the completeness of any information provided in connection therewith.

4. Notice Parties.

The following persons or entities are the "Notice Parties" who are entitled to receive a copy of any initial bid that is submitted by a Qualified Bidder:

Investment Banker for the Debtors: Sandler O'Neill + Partners, L.P. (the "**Investment Banker**"), 1251 Avenue of the Americas, 6th Floor, New York, NY 10020, Attn: Sunny Cheung (scheung@sandleroneill.com) and Timur Hubey (thubey@sandleroneill.com);

Chief Restructuring Officer of the Debtors: Jonathan J. Nash, 601 Industrial Drive, Pascagoula, MS 39581 (jonnash@deloitte.com);

Chief Financial Officer of the Debtors: Robert P. Kerley, 601 Industrial Drive, Pascagoula, MS 39581 (r.kerley@missphosphates.com);

Counsel to the Debtors, Butler Snow LLP, 1020 Highland Colony Parkway, Suite 1400, Ridgeland, MS 39157, Attn: Stephen W. Rosenblatt (steve.rosenblatt@butlersnow.com) and Christopher R. Maddux (chris.maddux@butlersnow.com);

Office of the United States Trustee for the Southern District of Mississippi, 501 East Court Street, Suite 6-430, Jackson, MS 39201, Attn: Christopher J. Steiskal (Christopher.J.Steiskal@usdoj.gov);

Counsel to the DIP Agent and the Agent for the Pre-Petition Lenders (collectively, the "**Agent**"): (i) Haynes and Boone, LLP, 1221 McKinney Street, Suite 2100, Houston, Texas 77010, Attn: Lenard M. Parkins (lenard.parkins@haynesboone.com) and Karl D. Burrer (karl.burrer@haynesboone.com); and (ii) Byrd & Wiser, 145 Main Street, Biloxi, MS 39530-4333, Attn: Robert A. Byrd (rab@byrdwiser.com); and

Counsel for the Official Committee of Unsecured Creditors appointed in the Chapter 11 Cases (the “**Committee**”): Burr & Forman LLP, 420 North 20th Street, Suite 3400, Birmingham, AL 35203, Attn: Derek F. Meek (dmeek@burr.com) and Marc P. Solomon (msolomon@burr.com); and

Counsel for the United States, on behalf of the United States Environmental Protection Agency (the “**EPA**”): Kenneth G. Long, Environmental Enforcement Section, United States Department of Justice, 601 D Street, N.W., PH Room 2121, Washington, D.C. 20004 (Kenneth.Long@usdoj.gov);

Counsel for Mississippi Department of Environmental Quality (the “**MDEQ**”): Roy H. Furrh, Mississippi Department of Environmental Quality, Legal Division, P.O. Box 2261, Jackson, MS 39225-2261 (Roy_Furrh@deq.state.ms.us).

The Agent, the DIP Agent and the Committee may be collectively referred to herein as the “**Creditor Constituencies**”. The EPA and the MDEQ may be collectively referred to herein as the “**Environmental Agencies**”.

5. Determination of “Qualified Bidder” Status.

To participate in the sales and bidding process, and to be deemed a “**Qualified Bidder**,” each potential bidder (a “**Bidder**”) (except the DIP Agent, for and on behalf of the DIP Lenders, and the Agent, for and on behalf of the Pre-Petition Lenders, which are deemed to be Qualified Bidders) must comply with the requirements of this Paragraph 5 and deliver to the Notice Parties a written offer, so as to be received by no later than **Friday, July 24, 2015 at 5:00 p.m. (prevailing Central Time)** (the “**Bid Deadline**”), that meets the following requirements:

(a) states that the Bidder offers to purchase the Sellers’ Assets, with a specific indication of which Sellers’ Assets are subject to the bid;

(b) is based on the Form Asset Purchase Agreement (the “**Form APA**”) and includes executed transaction documents, including a definitive purchase agreement and all schedules and exhibits thereto (in the same detail as those attached to the Form APA that was filed with the Bankruptcy Court [Dkt. # 511], signed by an authorized representative of the Bidder, pursuant to which the Bidder proposes to effectuate a transaction for purchase of all or substantially all of the Sellers’ Assets, including but not limited to the phosphogypsum stacks and related process water management system (the “**Bidder APA**”), and such Bidder APA shall also include a copy of the Bidder APA marked against the Form Asset Purchase Agreement to show all changes requested by the bidder;

- (c) includes a summary term sheet with the material terms of the bid;
- (d) provides for a minimum of \$15,000,000 cash consideration payable to the Lender Parties for their collateral in addition to any other consideration or liabilities assumed or paid by the bidder, although the Agent may waive or modify the minimum bid requirement.
- (e) provides for the assumption of environmental liabilities to the Environmental Agencies related to the Sellers' Assets, including without limitation, the Gyp Stacks, and satisfies financial assurance requirements of the Environmental Agencies under non-bankruptcy law including, but not limited to, the financial assurance requirements in RCRA Subtitle C, all of which shall be subject to the approval of the Environmental Agencies.
- (f) provides for a closing of the sale no later than September 1, 2015.
- (g) demonstrates that the Bidder has the financial means, technical competence, and commitment to operate the Debtors' facility, including, without limitation, the Gyp Stacks, in compliance with federal and state environmental requirements, including without limitation financial assurance requirements.
- (h) provides for the immediate payment at closing of all obligations, including principal, fees, interest and expenses, arising under or related to the Debtors' post-petition financing at the closing of the sale transaction;
- (i) provides for the purchase of all or substantially all of the Sellers' Assets, including but not limited to the phosphogypsum stacks and related process water management system;
- (j) is irrevocable unless and until the Debtors accepts a higher or otherwise better bid and the bidder is not selected as the Back-Up Bidder;
- (k) unless it is a Stalking Horse Bid approved by the Bankruptcy Court prior to the Bid Deadline, does not request any expense reimbursement, break-up fee, "topping," termination, contribution, or other similar fee or payment;
- (l) contains such financial and other information that will reasonably allow the Debtors, in consultation with the Investment Banker and the Creditor Constituencies and the Environmental Agencies, to make a determination as to the bidder's financial and other capabilities to consummate the transactions contemplated by the Bidder APA, which information shall be satisfactory to the Debtors, the Agent and the DIP Agent, including:
 - (i) contact names and numbers for verification of financing sources;
 - (ii) evidence of such bidder's internal resources and proof of unconditional debt or equity funding commitments from a recognized financial institution in the amount of the bid or the posting of an irrevocable letter of credit

from a recognized financial institution issued in favor of the Debtors in the amount of the bid, in each case, as are needed to consummate the Bidder APA;

(iii) such bidder's current financial statements (audited, if they exist) or other similar financial information reasonably acceptable to the Debtors and the Creditor Constituencies and the Environmental Agencies;

(iv) such financial and other information setting forth adequate assurance of future performance under section 365 of the Bankruptcy Code, in a form requested by the Debtors to allow the Debtors to serve on counterparties to any contracts or leases being assigned or both assumed and assigned in connection with the proposed sale in a timely manner so as to not disrupt the sale process; and

(v) any such other form of financial disclosure or credit-quality support information or enhancement reasonably acceptable to the Debtors, demonstrating that such Bidder has the ability to consummate the Bidder APA;

(m) contains such information requested by the Debtors, including any and all executory contracts and unexpired leases of the Debtors that the bidder wishes to have assigned to it pursuant to the Bidder APA, and provides that the bidder will pay all cure costs necessary to assign such executory contracts and unexpired leases at the closing of the sale transaction;

(n) contains such information requested by the Debtors, regarding the identity of each entity that will be bidding for the Sellers' Assets or otherwise participating in connection with such bid, and the complete terms of any such participation, which information is satisfactory to the Debtors;

(o) includes evidence of authorization and approval from the bidder's board of directors (or comparable governing body) with respect to the submission, execution, delivery, and closing of the Bidder APA, which evidence is satisfactory to the Debtors;

(p) includes covenants and conditions, if any, reasonably acceptable to the Debtors (in consultation with the Investment Banker and the Creditor Constituencies and the Environmental Agencies), but under no circumstances shall a bid be conditioned on the obtaining or the sufficiency of financing or any internal or credit committee approval, syndication requirements, or on the outcome or review of due diligence, but may be subject to the accuracy at the closing of specified representations and warranties or the satisfaction at the closing of specified conditions, all of such shall be specifically set forth in the Bidder APA; and

(q) is accompanied by a good faith cash deposit in an amount no less than 10% of the purchase price set forth in the Bidder APA, which shall be deposited in an escrow account to be established by the Debtors subject to an escrow agreement satisfactory to the Debtors, and which will be credited against the purchase price, provided, however, that the DIP Agent, for and on behalf of the DIP Lenders, and the

Agent, for an on behalf of the Pre-Petition Lenders, shall not be required to provide any such cash deposit.

Further, any Qualified Bidder and Bidder APA shall be subject to the approval of the Debtors, the Creditor Constituencies, and the Environmental Agencies, and the financial assurance requirements, including but not limited to RCRA Subtitle C requirements, provided for under the successful bid shall be subject to the approval of the Environmental Agencies.

By submitting a bid, a bidder shall be deemed to waive the right to assert or seek payment of any post-filing claim, including administrative expense claims, and to the extent otherwise applicable, a substantial contribution claim under section 503 of the Bankruptcy Code, with respect to its bid or the marketing or auction process.

A competing bid meeting the above requirements, as may be supplemented by the Debtors in consultation with the Investment Banker and the Creditor Constituencies and the Environmental Agencies will constitute a “*Qualified Bid.*” The Debtors will make a determination, in consultation with the Investment Banker and the Creditor Constituencies and the Environmental Agencies, regarding whether a bid is a Qualified Bid and will notify each such bidder of such determination on or before **Tuesday, July 28, 2015 at 12:00 p.m. noon (Central Time).**

The DIP Agent, for and on behalf of the DIP Lenders, and the Agent, for an on behalf of the Pre-Petition Lenders, are each a Qualified Bidder without having to comply with the requirements of this Paragraph 5, but subject to the approval of the Environmental Agencies. Nothing contained herein or in the sale order shall affect the right of the Agent or DIP Agent to assert any claims held by either of them against the Debtors and their respective bankruptcy estates including, any administrative priority claims.

6. Environmental Matters.

The Debtors and their advisors will reasonably consult with the Environmental Agencies with respect to material aspects of the sale process described in these Sales and Bidding Procedures. Further, during the sales process, the Debtors and their advisors will coordinate and facilitate communication between (i) potential bidders and Qualified Bidders and (ii) the Environmental Agencies with respect to the Sale Assets.

7. Modifications of Qualified Bids Prior to Auction.

Between the date that the Debtors notify a bidder that it is a Qualified Bidder and the Auction, the Debtors may discuss, negotiate, or seek clarification of any Qualified Bid from a Qualified Bidder. Without the written consent of the Debtors, a Qualified Bidder may not modify, amend, or withdraw its Qualified Bid, except for proposed amendments to increase the consideration contemplated by, or otherwise improve the terms of, the Qualified Bid, during the period of time such Qualified Bid remains binding as specified herein; provided that any Qualified Bid may be improved between the date of its submission and the conclusion of the Auction as set forth herein.

8. Auction Baseline Bid.

No later than **Tuesday, July 28, 2015 at 5:00 p.m. (Central Time)**, the Debtors, in consultation with the Creditor Constituencies and the Environmental Agencies, will determine the highest or otherwise best Qualified Bid (the “**Auction Baseline Bid**”) and will provide to each Qualified Bidder notice of the terms of the Auction Baseline Bid.

9. Auction.

In the event that the Debtors determine there is more than one Qualified Bidder, the Debtors are authorized to conduct an Auction. Other than as expressly set forth herein, the Debtors may conduct an Auction in the manner it determines, in consultation with the

Investment Banker and the Creditor Constituencies and the Environmental Agencies, will result in the highest or otherwise best offer for the Sellers' Assets consistent with the requirements for a Qualified Bid. The Auction will be held on **Friday, July 31, 2015, beginning at 9:30 a.m. (Central Time)** at the offices of Butler Snow LLP, 1020 Highland Colony Parkway, Suite 1400, Ridgeland, MS 39157, or such other location as will be timely communicated to all entities entitled to attend the Auction.

The Debtors, Qualified Bidders, the Creditor Constituencies, the Pre-Petition Lenders, the DIP Lenders, the United States Trustee, representatives of any of the Environmental Agencies, and the respective advisors of any of the foregoing, will be permitted to attend the Auction.

10. Overbid.

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

- (a) any Overbid after and above the Auction Baseline Bid shall be made in increments valued at not less than \$250,000 of the Auction Baseline Bid;
- (b) any Overbid shall remain open and binding on the Qualified Bidder until and unless (i) the Debtors accepts as an Overbid a higher Qualified Bid for the Sellers' Assets, and (ii) such Overbid is not selected as the Back-Up Bid (as defined below);
- (c) to the extent not previously provided, a Qualified Bidder submitting an Overbid must submit, as part of its Overbid, evidence demonstrating such Qualified Bidder's ability to close the transactions proposed by such Overbid; and
- (d) the Debtors reserve the right, in their reasonable business judgment and in consultation with the Investment Banker and the Creditor Constituencies and the Environmental Agencies, to make one or more continuances of the Auction to, among other things: facilitate discussions among the Debtors and Qualified Bidders; allow Qualified Bidders to consider how they wish to proceed; and give Qualified Bidders the opportunity to provide the Debtors and Creditor Constituencies with such additional information as the Debtors in their reasonable business judgment, after consultation with the Creditor Constituencies and the Environmental Agencies, may require.

11. Credit Bidding.

The Agent, for and on behalf of DIP Lenders and for and on behalf of the Pre-Petition Lenders, agrees that in the event there is a Qualified Bid by a Qualified Bidder at the Auction, it will not credit bid at the Auction, although the Agent otherwise may participate fully at the Auction.

12. Alternative Transaction.

In the event that there is no Qualified Bid by a Qualified Bidder at the Auction, or if a Prevailing Purchaser does not enter into an asset purchase agreement with the Debtors that closes on or before September 1, 2015, the DIP Agent, for and on behalf of DIP Lenders, and the Agent, for and on behalf of the Pre-Petition Lenders, shall be deemed to have submitted a Bid for an “*Alternative Transaction*”.⁴ In the Alternative Transaction, subject to the Court’s Order granting the Environmental Agencies – Lenders Settlement Motion, the Debtors shall implement and immediately close the Alternative Transaction that will:

(a) Establish an Environmental Trust⁵ that will take title to the Gyp Stacks, commence the closure process for the Gyp Stacks described in the Environmental Agencies - Lenders Settlement Motion, and apply funds made available to it from the sale of assets and from recovery under the BP Claim for use in addressing environmental conditions with respect to the Facility, including satisfying closure and post-closure requirements, in accordance with federal and state law.

(b) Facilitate the sale of the real and personal property of the Liquidation Trust,⁶ to a Buyer or Buyers⁷ and allocation of the sale proceeds to the DIP Agent, for and on behalf of DIP Lenders, and the Agent, for and on behalf of the Pre-Petition Lenders and Environmental Trust as provided in the Environmental Agencies - Lenders Settlement Motion.

⁴ As that term is defined in the Environmental Agencies - Lenders Settlement Motion.

⁵ As that term is defined in the Environmental Agencies - Lenders Settlement Motion.

⁶ As that term is defined in the Environmental Agencies - Lenders Settlement Motion.

⁷ As that term is defined in the Environmental Agencies - Lenders Settlement Motion.

13. Auction Procedures.

In addition to complying with the above requirements, the Auction will be governed by the following procedures:

(a) the Auction will be conducted openly by the Debtors, and only the Qualified Bidders will be entitled to: (i) make any subsequent bids at the Auction; (ii) make statements on the record at the Auction; or (iii) otherwise participate at the Auction in any manner whatsoever;

(b) each Qualified Bidder will be required to represent that it has not engaged in any collusion with respect to the bidding or the sale;

(c) the Qualified Bidders will appear in person at the Auction, through a duly authorized representative, or as otherwise agreed by the Debtors;

(d) bidding will commence and proceed as determined by the Debtors, in consultation with the Investment Banker and the Creditor Constituencies and the Environmental Agencies;

(e) the bidding at the Auction will be transcribed or videotaped, at the Debtors' election;

(f) all Qualified Bidders will have the right to submit additional bids and make additional modifications to their respective Bidder APA at the Auction consistent with the requirements for a Qualified Bid, provided that any such modifications to the Bidder APA, on an aggregate basis and viewed in whole, shall not be less favorable to the Debtors than such Qualified Bidder's previous bid in the Debtors' discretion, in consultation with the Investment Banker and the Creditor Constituencies and the Environmental Agencies;

(g) any Auction will continue until the Debtors determines, in consultation with the Investment Banker and the Creditor Constituencies and the Environmental Agencies, that a Qualified Bid or Overbid, as applicable, is the highest or otherwise best offer from among the Qualified Bids (including Overbids) (the "**Prevailing Bid**," and the party or parties that submitted such Prevailing Bid, the "**Prevailing Purchaser**"), which shall be subject to Bankruptcy Court approval; and

(h) in selecting the Prevailing Bid, the Debtors, in consultation with the Investment Banker and the Creditor Constituencies and the Environmental Agencies, may consider all factors, including the amount of the purchase price, the likelihood of each bidder's ability to close a transaction and the timing thereof, the form and substance of the purchase agreement requested by each bidder, and the net benefit to the Debtors' bankruptcy estates.

14. Sale Hearing.

The final hearing to approve the sale of the Sellers' Assets to the Prevailing Purchaser (the "***Sale Hearing***") is scheduled to take place on **Thursday, August 6, 2015, beginning at 9:30 a.m. (prevailing Central Time)**, at the United States Bankruptcy Courtroom, 7th Floor, Dan M. Russell, Jr. United States Courthouse, 2012 15th Street, Gulfport, MS 39501. The Sale Hearing may be adjourned from time to time by the Debtors with the consent of the DIP Lenders and with the approval of the Court and with notice to any other party in interest by announcement of the adjournment in open court on the date scheduled for the Sale Hearing or a notice filed with the Bankruptcy Court. Any objections to the relief requested at the Sale Motion shall be filed and served by **Monday, August 3, 2015 at 5:00 p.m. (prevailing Central Time)**.

15. The Sale Order

The form of any Sale Order shall be subject to the approval of the Debtors, the Creditor Constituencies, and the Environmental Agencies, which approval shall not be unreasonably withheld.

16. Closing Deadline.

The Prevailing Purchaser at the Auction shall close and consummate the sale of the Sellers' Assets (a) on or before **Tuesday, September 1, 2015**, provided that the Parties may, by mutual agreement, extend this Closing Deadline subject to any required approval by the Bankruptcy Court. Requests for extension of this Closing Deadline are subject to approval of the Parties, which shall not be unreasonably withheld.

17. Failure to Consummate Purchase by the Prevailing Purchaser.

As discussed in Section 12 above, in the event there is no Qualified Bidder or in the event a proposed sale to the Prevailing Purchaser fails to close the sale of the Sellers' Assets in accordance with the Prevailing Bid because of a breach or failure to perform on the part of such

Prevailing Purchaser by the Closing Deadline, the Debtors, in consultation with the Investment Banker and the Creditor Constituencies and the Environmental Agencies, are authorized to consummate the Alternative Transaction without further order of the Bankruptcy Court upon at least three days written notice to the Creditor Constituencies and the Environmental Agencies. In such case, (a) the defaulting Prevailing Purchaser's deposit, if any, shall be forfeited to the Debtors and (b) all parties in interest, and the Debtors specifically, reserve the right to seek all available damages from the defaulting Prevailing Purchaser.

18. Return of Deposits.

Except as otherwise provided herein, all deposits shall be returned to each bidder not selected by the Debtors as the Prevailing Purchaser by no later than the tenth (10th) business day following the conclusion of the Auction.

19. Status of Stalking Horse.

Notwithstanding anything in these Sales and Bidding Procedures to the contrary, the Debtors reserve the right to modify and amend these Sales and Bidding Procedures on three (3) business days' notice, in consultation with the Creditor Constituencies and the Environmental Agencies, to designate one or more "stalking horse bidder(s)" and to seek related relief from the Court on notice and hearing.

20. Consultation Rights.

The Debtors and their advisors will reasonably consult regularly with the respective Creditor Constituencies and the Environmental Agencies and their advisors on all material aspects of the sale process described in these Sales and Bidding Procedures and all material decisions and documents contemplated herein reasonably prior to their implementation, including, without limitation, all instances in which the Creditor Constituencies and the Environmental Agencies have express consultation rights elsewhere in these Sales and Bidding

Procedures. The Debtors and their advisors will also respond reasonably promptly to reasonable requests of the respective Creditor Constituencies and the Environmental Agencies and their advisors for information and/or documents relating to the sale process, Qualified Bids, the Auction, and the Sale Hearing.

21. Reservation of Rights; Consent to Jurisdiction.

The Debtors reserve their rights, in the exercise of their fiduciary obligations, and in consultation with the Investment Banker and the Creditor Constituencies and the Environmental Agencies, (a) to modify the Sales and Bidding Procedures or impose, at or prior to the Auction, different and/or additional terms and conditions on the sale of the Sellers' Assets, and (b) to announce at the Auction additional procedural rules that are reasonable under the circumstances for conducting the Auction.

All Qualified Bidders, and all such Bidders at the Auction shall be deemed to have consented to the core jurisdiction of the Bankruptcy Court to enter an order or orders, which shall be binding in all respects, in any way related to the Debtors and the Sellers' Assets, and have waived any right to a jury trial in connection with any disputes relating to the Debtors, the Cases, the Sales and Bidding Procedures, the Auction, or the construction and enforcement of any Bidder APA.