

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:)	Chapter 11
)	
DESA HOLDINGS CORPORATION, et al.,¹)	Case No. 02-11672 (PJW)
)	(Jointly Administered)
Debtors.)	

Sale Hearing:	November 15, 2002 at 1:30 p.m.
Objections to Sale Motion due:	October 20, 2002 at 4:00 p.m.
Objections to Cure Amounts:	(21 Days after Notice of Assumption Served)

**MOTION FOR AN ORDER UNDER SECTIONS 105(a), 363, 365 AND 1146(c) OF THE
BANKRUPTCY CODE (a) AUTHORIZING THE SALE OF SUBSTANTIALLY ALL OF
THE DEBTORS' ASSETS OR EACH OF THE DEBTORS' DIVISIONS, FREE AND
CLEAR OF LIENS, CLAIMS AND ENCUMBRANCES, (b) APPROVING AN ASSET
PURCHASE AGREEMENT, AND (c) AUTHORIZING THE ASSUMPTION AND
ASSIGNMENT OF CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED
LEASES IN CONNECTION WITH SUCH SALE**

DESA Holdings Corporation and its domestic subsidiary, DESA International, Inc., as debtors and debtors in possession (the "Debtors") in the above-captioned cases, hereby move the Court for an order under sections 105(a), 363, 365 and 1146(c) of title 11 of the United States Code (as amended, the "Bankruptcy Code") (a) authorizing the sale of substantially all of the Debtors' assets or each of the Debtors' Divisions (as defined herein) (collectively, the "DESA Assets"), free and clear of liens, claims and encumbrances, (b) approving an asset purchase agreement, and (c) authorizing the assumption and assignment of certain executory contracts and unexpired leases (the "Assumed Contracts") in connection with such sale (the "Sale Motion"). In support of the Sale Motion, the Debtors respectfully state as follows:

Jurisdiction

1. The Court has jurisdiction over the Sale Motion under 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2).
2. Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.
3. The statutory predicates for the relief requested herein are sections 105, 363, 365 and 1146(c) of the Bankruptcy Code and Rules 2002, 6004 and 9014 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules").
4. As there are no novel issues of law presented herein, the Debtors waive their right to file a brief in support of the Sale Motion pursuant to D. DEL. LR 7.1.2(a), incorporated by reference into the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the "Court") by DEL. BANKR. LR 1001-1(b). Because of the nature of the relief requested in this Sale Motion, the Debtors assert that no briefing is required.

¹ The Debtors consist of the following two entities: DESA Holdings Corporation and DESA International, Inc.

Background

5. On June 8, 2002 (the “Petition Date”), each of the Debtors filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code and a motion to procedurally consolidate their chapter 11 cases for administrative purposes only (the “Chapter 11 Cases”). The Debtors are continuing to operate their businesses and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No request has been made for the appointment of a trustee or examiner.

Introduction

6. The Debtors and their non-debtor subsidiaries and affiliates (collectively, “DESA”) are the leading manufacturer, distributor, and marketer of vent-free heating appliances, outdoor heaters, motion sensor lighting, wireless doorbells, lawn and garden electrical products, and consumer fastening systems in the United States. Through their ability to consistently offer consumers quality products with innovative features at competitive prices, DESA has developed leading market positions in: (i) vent-free indoor heaters; (ii) vent-free hearth products; (iii) outdoor heaters; (iv) motion sensor lighting; (v) door chimes and switches; (vi) lawn and garden electrical products; and (vii) consumer fastening systems.

Business Segments and Products

7. The Debtors’ operations are divided into three divisions (collectively, the “Divisions”). The Debtors have a zone heating division and an international division that supports the zone heating division (together, the “Zone Heating Operation”). The Zone Heating Operation includes all of the Debtors’ operations related to (i) indoor vent-free heating products, (ii) vent-free hearth products, (iii) vented hearth products, (iv) outdoor heating products, and (v) all of the international operations and nondebtor subsidiaries. The Debtors also have a specialty products division (the “Specialty Products Division”). The Specialty Products Division includes all of the Debtors’ operations related to, in part, (i) motion sensor lighting, (ii) door chimes and switches, (iii) lawn and garden electrical products, and (iv) consumer fastening systems.

8. In the past several years, DESA has grown rapidly through the introduction of new products and through increased penetration into existing and new channels of distribution, as well as through acquisitions. From 1998 to 2002, net sales, excluding sales from generators, increased from \$217.7 million to \$364.0 million. DESA’s net sales for fiscal year ending February 28, 2002, were approximately \$366 million and are projected to be approximately \$399 million for fiscal year ending February 28, 2003. Approximately 96% of DESA’s sales are generated from domestic markets. DESA sells its products through multiple consumer and commercial channels, including construction and industrial equipment dealers, leading home centers, mass merchants, hardware cooperatives, LP gas distributors, and farm supply outlets.

Industry Overview

Zone Heating

9. The zone heating market includes a broad range of products that are used to heat limited areas, such as a room or a cluster of rooms, as distinguished from central heating systems that are used to heat entire buildings. Zone heating products include hearth products, indoor

vent-free gas heaters, outdoor heaters, and accessories for these products. The zone heating market is currently estimated to be approximately \$1.05 billion in size, consisting of (i) hearth products, accounting for \$680.4 million or approximately 64.9% of the total market; (ii) indoor gas heaters, comprising \$63.9 million; (iii) outdoor heaters, accounting for \$103.3 million; and (iv) accessories, comprising approximately \$200.0 million. The zone heating market is estimated to grow to approximately \$1.5 billion by 2005. The increasing popularity of zone heating products can be attributed to: (i) a preference for gas-based over electricity-based products; (ii) the lower cost and greater efficiency of zone heating versus central heating; and (iii) the increasing popularity of fireplaces as both heating sources, as well as decorative home furnishings.

10. Sales of DESA's zone heating products follow seasonal patterns that affect the results of operations. Demand for zone heating products has been historically highest in the fiscal third quarter as consumers prepare for winter. For this reason, DESA's net sales and fiscal operating profit have also been historically highest during DESA's fiscal third quarter. Warm fall or winter weather generally reduces demand for zone heating products.

Specialty Products

11. The specialty products industry contains a wide array of products — from power tools to doorbells. DESA participates in certain niche segments of the broader specialty products industry, such as (i) motion sensor lighting; (ii) door chimes and switches (wireless and wired); (iii) lawn and garden electrical products, such as chain saws, pole saws and garden tillers; and (iv) consumer fastening systems, including stapling/rivet tools, as well as tools and accessories used to fasten wood, concrete and steel. The majority of specialty products sold in the United States are manufactured by either divisions of large foreign corporations or small niche companies. The estimated total market for these specialty products is approximately \$800 million, with the retail segment approximately \$450 million in size.

DESA's Prepetition Efforts to Solicit Potential Buyers for the DESA Assets

12. In November 2001, DESA retained the investment banking firm of Berenson Minella & Company ("Berenson") to identify and target potential buyers who could have provided the necessary capital to purchase the company and/or invest to facilitate an out-of-court restructuring. Beginning in March 2002, the Debtors initiated a formal auction process to solicit potential buyers and/or investors for the company. With the assistance of Berenson, DESA engaged in discussions with twenty-two investor groups, twelve of which executed confidentiality agreements, six received presentations from management, and three of which pursued due diligence.

13. Near the end of the second calendar quarter of 2002, DESA faced severe financial troubles and the solicitation efforts, while positive, had not resulted in a consummated sale transaction. After considering all reasonably available alternatives, and in light of the Debtors' liquidity crisis, the Debtors determined that it was necessary to restructure their financial affairs and reorganize their businesses for the benefit of all their creditors through the commencement of these Chapter 11 Cases.

DESA's Postpetition Efforts to Solicit Potential Buyers for the DESA Assets

14. On July 15, 2002, the Court entered an order authorizing the Debtors to retain Berenson to serve as their financial advisors and investment bankers in these Chapter 11 Cases.

15. Since the Petition Date, the Debtors, with the assistance of Berenson, have solicited interest in the purchase of the DESA Assets. Berenson has been in contact with over one hundred potential purchasers of the DESA Assets, including, entities with financial and strategic interests in purchasing the DESA Assets. Of the parties who were contacted by Berenson, over seventy-five different entities entered into confidentiality agreements. After executing the confidentiality agreements, the parties received an information memorandum that educated the parties about the Debtors and the DESA Assets. The information memorandum contains information about the industry, customers, competitors, and future of the Debtors.

16. Over twenty-five of the entities who received the information memorandum presented the Debtors with a preliminary indication of interest. From these indications, the Debtors, in consultation with their advisers, invited over fifteen parties to attend management presentations and to perform additional due diligence. As of the date hereof, nine parties have attended management presentations. Berenson continues to work with these parties and to solicit additional interest to facilitate a process that ensures that the Sale maximizes the value of the Debtors' estates for the benefit of creditors.

The Sale Procedures

17. On June 14, 2002, the Debtors sought to establish procedures for the sale of the DESA Assets by filing the Motion for Order (a) Authorizing and Scheduling a Public Auction for the Sale of Any and All of the Debtors' Assets Free and Clear of All Liens, Claims and Encumbrances (the "Auction"), (b) Approving Procedures for the Submission of Qualifying Bids (the "Bidding Procedures"), and (c) Approving the Form and Manner of Notice Pursuant to FED. R. BANKR. P. 2002 [Docket No. 56] (the "Bidding Procedures Motion").

18. Pursuant to the Bidding Procedures Motion, on July 3, 2002, the Debtors filed a form asset purchase agreement to be used by each potential bidder [Docket No. 115] (as may be amended, the "Form Asset Purchase Agreement," attached hereto as Exhibit A).² Pursuant to the Bidding Procedures Motion, parties interested in purchasing the DESA Assets must execute (or mark-up and execute) a version of the Form Asset Purchase Agreement in order to participate in the Auction.

19. On August 7, 2002, the Court approved the Bidding Procedures Motion [Docket No. 224] and the Bidding Procedures (the "Bidding Procedures Order").³

20. Pursuant to the Bidding Procedures, (a) on August 9, 2002, the Debtors mailed a copy of the Bidding Procedures Order (with the Bidding Procedures, the Form Asset Purchase Agreement, and a notice of the Auction attached thereto) to (i) the Office of the United States Trustee, (ii) all parties who have requested notice pursuant to FED. R. BANKR. P. 2002, (iii) Shearman & Sterling, counsel to the agents for the entities funding the \$195 million credit facility dated November 26, 1997 and the \$35 million debtor in possession loan facility dated June 9, 2002 (the "Lenders"), (iv) counsel to the official committee of unsecured creditors in the Debtors' Chapter 11 Cases (the "Creditors' Committee"), (v) federal, state and local regulatory and taxing authorities that are reasonably ascertainable by the Debtors to have a known interest

² If there are substantive revisions to the Form Asset Purchase Agreement, the Debtors will file the amended Form Asset Purchase Agreement with the Court. The revised Form Asset Purchase Agreement will be available by (i) accessing the Court's website at <http://ecf.deb.uscourts.gov>, (ii) accessing the Debtors' website at <http://www.bmccorp.net/DESA>, or (iii) making a written request to the Debtor's undersigned counsel.

³ A copy of the Bidding Procedures is attached hereto as Exhibit B.

in the DESA Assets, and (vi) those parties identified by the Debtors (and their representatives) as potential purchasers of the DESA Assets; (b) on August 12, 2002, the Debtors mailed a copy of a notice of the Auction (with the Bidding Procedures attached thereto) to those entities included on the Debtors' Creditor Matrix and the list of the Debtors' equity interest holders of record submitted to the Court; and (c) on August 21, 2002, the Debtors published a notice of the Auction in the Wall Street Journal.

21. Parties interested in bidding on the DESA Assets must submit a Qualifying Bid (as such term is defined in the Bidding Procedures) on or before November 8, 2002 in accordance with the Bidding Procedures.

22. Prior to the Auction, the Debtors, together with the Lenders and the Creditors' Committee, shall evaluate each Conforming Qualifying Bid (as defined in the Bidding Procedures) they have received and shall select, with the consent of the Lenders, and the Creditors' Committee if necessary, the Confirming Qualifying Bid that they determine to be the highest and best offer.

23. In accordance with the Bidding Procedures, qualified bidders will be invited to the Auction to compete to make the highest and best offer for all of the DESA Assets or either the Zone Heating Operation or the Specialty Products Division. The bid that the Debtors, with the consent of the Lenders, and the Creditors' Committee if necessary, select as the highest and best Conforming Qualifying Bid will serve as the opening bid at the Auction. The Auction will commence and attendees will be invited to offer a bid that is higher and better than the opening bid.

24. In addition to establishing procedures for bidding on the DESA Assets, the Bidding Procedures, inter alia, set the following deadlines:

- i. Deadline for submission of bids (with an executed Form Asset Purchase Agreement): November 8, 2002 at 4:00 p. m. (Eastern Time);
- ii. Date for the Auction of the DESA Assets: November 13, 2002 at 10:00 a.m. (Eastern Time);
- iii. Date for the Sale Hearing: November 15, 2002 at 1:30 p.m. (Eastern Time); and
- iv. Deadline for closing the Sale: November 26, 2002 (the "Closing").

The Assumed Contracts

25. The Bidding Procedures provide that a Conforming Qualifying Bid (as defined in the Bidding Procedures Order) must indicate the Assumed Contracts upon which the Conforming Qualifying Bid is conditioned. As a result thereof, the Debtors will seek to assign the Assumed Contracts to the Buyer at time of the Closing. Therefore, the Debtors will file a Notice of Potential Assumption and Assignment of Assumed Contracts, substantially in the form attached hereto as Exhibit C (the "Cure Notice"), with the Court and serve such Cure Notice on each counterparty to the Assumed Contract (each, a "Counterparty").

26. The Cure Notice will (a) describe the Assumed Contract, (b) state the cure amount that the Debtors believe is necessary to cure all defaults due and owing under section 365 of the Bankruptcy Code (the "Cure Amount"), (c) notify each Counterparty that such party's executory

contract or unexpired lease may be assumed by the Debtors and assigned to the Buyer and that the Cure Amount included in the Cure Notice will be deemed to cure all defaults under section 365 of the Bankruptcy Code unless the Counterparty properly (i) files an objection to the Cure Amount on or before 4:00 p.m. (Prevailing Eastern Time) on the day that is twenty-one (21) days after the notice of assumption and assignment of Assumed Contracts is served (all as described more fully in the Cure Notice), and (ii) makes any other objections to the assumption and assignment of the Assumed Contract, including, but not limited to, whether the Assumed Contract may be assumed and assigned under section 365 of the Bankruptcy Code. Objections will be heard at the Sale Hearing. Any counterparty to an Assumed Contract who does not object to the proposed Cure Amount shall be deemed to have agreed to the Cure Amount set forth in the Cure Notice.

27. At the Sale Hearing, the Debtors shall request the entry of an order authorizing, but not requiring, the assumption of the Assumed Contracts and the assignment of the Assumed Contracts to the Buyer of the DESA Assets. The Debtors, however, reserve the right to withdraw the request to assume any and all of the Assumed Contracts at any time before the Closing of the Sale of the DESA Assets to the Buyer by filing and serving a notice of withdrawal of such request.

The Asset Purchase Agreement

28. The Form Asset Purchase Agreement provides for the sale of the DESA Assets, free and clear of all liens, claims, and encumbrances other than those created by the Buyer (collectively, the “Liens”) for consideration to be paid by the Buyer (as defined herein) of the DESA Assets.

29. The following briefly summarizes certain provisions of the Form Asset Purchase Agreement and is qualified entirely by reference to the Form Asset Purchase Agreement itself. The terms of the Form Asset Purchase Agreement are as follows:⁴

Purchase of DESA Assets	The DESA Assets to be purchased (collectively, the “Acquired Assets”) include all of the DESA Assets except for the assets that the Buyer specifically excludes (the “Excluded Assets”) in the Form Asset Purchase Agreement that is executed (the “Final Asset Purchase Agreement”).
Excluded Assets	The Excluded Assets includes all of the DESA Assets that are specifically listed in the Final Asset Purchase Agreement as Excluded Assets and, among other things, cash, certain Claims, and certain corporate documents.

⁴ Capitalized terms used in the summary of the Asset Purchase Agreement that are not defined herein shall have the meaning given in the Asset Purchase Agreement attached hereto as Exhibit A.

Assumption of Certain Liabilities (collectively, the “Assumed Liabilities”)	The Assumed Liabilities include those certain liabilities of the Debtor that the Buyer agrees to assume; <u>provided, however</u> , that the Buyer will specifically exclude those liabilities that it does not assume in the Final Asset Purchase Agreement (the “Excluded Liabilities”).
Excluded Liabilities (collectively, the “Excluded Liabilities”)	The Excluded Liabilities includes all of the liabilities of the Debtors that are specifically listed in the Final Asset Purchase Agreement as Excluded Liabilities and, among other things, certain liabilities for taxes and liabilities under certain agreements.
Purchase Price (the “Purchase Price”)	The Purchase Price is the amount of the total cash and non-cash consideration that the Buyer agrees to pay to DESA at the Closing for the DESA Assets.
Representations and Warranties	The representations and warranties are customary representations and warranties for a transaction of this type, including, without limitation, representations and warranties regarding: the authority to enter into the Sale transaction, the agreement to abide by all laws with respect to the Sale, and a general disclaimer regarding representations and warranties not specifically enumerated.
Covenants	The covenants are customary covenants for a transaction of this type, including, without limitation, covenants regarding: the best efforts of the parties, notices and consents, access to information, and the risk of loss.
Events of Default	The events of default are customary events of default for a transaction of this type.

After the Auction

30. After the Auction, the bid for all of the DESA Assets or bids for each of the Divisions that the Debtors determine, with the consent of the Lenders, and the Creditors’ Committee if necessary, to be the highest and best offer(s) for the DESA Assets (collectively, the “Final Accepted Bid”) will be submitted to the Court at the hearing to consider the Sale Motion

(the “Sale Hearing”). The Debtors shall seek approval of the Final Accepted Bid at the Sale Hearing; provided, however, that pursuant to the Bidding Procedures, the Debtors reserve the right, with the consent of the Lenders, and the Creditors’ Committee if necessary, to reject any and all bids at the Auction.

Applicable Authority

I. The Proposed Sale Is Proper and Should Be Approved

31. The Debtors submit that ample authority exists for the approval of the proposed sale of the DESA Assets pursuant to the Final Asset Purchase Agreement. Section 363 of the Bankruptcy Code, which authorizes a debtor to sell assets of the estate other than in the ordinary course of business free and clear of liens, claims and encumbrances, provides, in relevant part, as follows: “(b)(1) The [debtor-in-possession], after notice and a hearing, may use, sell or lease, other than in the ordinary course of business, property of the estate.” 11 U.S.C. § 363(b)(1); see also FED. R. BANKR. P. 6004(f)(1) (“All sales not in the ordinary course of business may be by private sale or by public auction.”).

32. Although section 363 of the Bankruptcy Code does not set forth a standard for determining when it is appropriate for a court to authorize the sale or disposition of a debtor’s assets, courts in the Third Circuit have held that approval of a proposed sale of property pursuant to section 363(b) of the Bankruptcy Code is appropriate if the transaction is supported by the “sound business judgment” of the debtor. See In re Delaware & Hudson Ry. Co., 124 B.R. 169, 176 (D. Del. 1991) (holding that a court must be satisfied that there is a “sound business reason”); In re Phoenix Steel Corp., 82 B.R. 334, 335-36 (Bankr. D. Del. 1987) (stating that the elements necessary for approval of a section 363 sale in a chapter 11 case are “that the proposed sale is fair and equitable, that there is a good business reason for completing the sale and the transaction is in good faith”); see also In re Titusville Country Club, 128 B.R. 396, 399 (Bankr. W.D. Pa. 1991); In re Industrial Valley Refrig. & Air Cond. Supp., 77 B.R. 15, 20 (Bankr. E.D. Pa. 1987).

33. The “sound business purpose” test, followed in the Third Circuit, requires a debtor to establish the following four elements to sell property outside the ordinary course of business:

- a. a “sound business purpose” justifies the sale of assets outside the ordinary course of business;
- b. adequate and reasonable notice has been provided to interested persons;
- c. the sale price is a fair and reasonable price; and
- d. the sale was negotiated in good faith.

See Delaware & Hudson Ry., Co., 124 B.R. at 176; Titusville Country Club, 128 B.R. at 399; In re Sovereign Estates, Ltd., 104 B.R. 702, 703 (Bankr. E.D. Pa. 1989); Phoenix Steel Corp., 82 B.R. at 335-36.

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

34. The Debtors operations are not generating sufficient revenue to maintain the Debtors’ businesses as a going concern without additional credit support or other liquidity. The Debtors believe that the value of the DESA Assets as a going concern is greater than as a piecemeal liquidation, and a prompt sale will minimize the administrative expenses of the estates. The Bidding Procedures have provided the Debtors with a mechanism to seek out potential purchasers of the DESA Assets that will compete to purchase the DESA Assets at the Auction. This enables the Debtors to test the market value for the DESA Assets and ensure that the Sale will maximize the value of such assets.

35. Additionally, sale of the DESA Assets, to the extent sold as a going concern, will increase the probability that the jobs of the Debtors’ employees will be preserved. Therefore, the Debtors have determined that the sale of the DESA Assets is in the best interests of their estates and creditors.

B. Ample Notice of the Proposed Sale Has Been Provided to Interested Parties.

36. The Debtors have employed various methods of notification to ensure that all interested parties have been informed of the Sale and to maximize the exposure to interested parties.

37. In order to generate the greatest number of bidders possible for the DESA Assets and to satisfy the requirements of Bankruptcy Rule 2002, the Debtors notified the following parties of the Debtors’ intent to sell the DESA Assets: (i) the over one-hundred parties that were identified by the Debtors (and their representatives) as potential purchasers of the DESA Assets, (ii) all of the entities included on the Debtors’ Credit Matrix filed with the Court, and (iii) all of the Debtors’ equity interest holders of record submitted to the Court. Also, the Debtors published notice of the Auction of the DESA Assets in the Wall Street Journal, a newspaper of national circulation.

38. The process of notification of the Sale described above was included in the Bidding Procedures Motion, and consequently, was reviewed by the parties who were served with that motion. Moreover, the Court approved as satisfactory, these notice procedures which were set forth in the Bidding Procedures Motion.

39. The service of this Sale Motion will provide additional notice of the Debtors’ intent to sell the DESA Assets. The Sale Motion will be served on: (i) the United States Trustee; (ii) Shearman & Sterling, counsel to the Lenders; (iii) Stroock & Stroock & Lavan, counsel to the Official Committee of Unsecured Creditors; (iv) all parties who have filed requests for notice pursuant to FED. R. BANKR. P. 2002; (v) federal, state and local regulatory and taxing authorities that are reasonably ascertainable by the Debtors to have a known interest in the DESA Assets; (vi) those parties identified by the Debtors (and their representatives) as potential purchasers of the DESA Assets; (vii) counterparties to those executory contracts or unexpired leases that may be assumed and assigned in conjunction with the Sale; and (viii) those entities included on the Debtors’ Creditor Matrix and the list of the Debtors’ equity interest holders of record submitted to the Court.

C. The Proposed Sale Is For a Fair and Reasonable Price.

40. The active and thorough marketing process conducted by the Debtors, with the assistance of Berenson, fully “tested” the market to achieve the highest and best price for the

DESA Assets. These efforts have yielded parties interested in the DESA Assets, whose bids will be subject to an auction to determine the highest and best price for the DESA Assets. Accordingly, the Debtors submit that the Purchase Price, when ultimately determined at the conclusion of the Auction, will be fair and reasonable. See, e.g., In re Abbotts Dairies of Pennsylvania, Inc., 788 F.2d 143, 149 (3d. Cir. 1986) (finding that “[g]enerally speaking, an auction may be sufficient to establish that one has paid ‘value’ for the assets of a bankrupt.”). Because the Purchase Price of the DESA Assets will be determined by the Auction, it will be fair and reasonable as contemplated by section 363 of the Bankruptcy Code. See In re National Health & Safety Corp., 1999 WL 703208 *2 (Bankr. E.D.Pa. Sept. 02, 1999) (citing Abbotts Dairies for the proposition that an auction may be sufficient to establish that one has paid value for the assets of a debtor and relying upon the result from the auction to verify that the purchase price represented value).

D. The Proposed Sale Will Be Negotiated in Good Faith

41. The Final Asset Purchase Agreement will be the product of good faith, arm’s length negotiations between the Debtors and the Buyer, and will be negotiated with the active involvement of the Debtors’ officers and representatives. Pursuant to the Bidding Procedures, the negotiation process will involve the Debtors’ Board of Directors, the Creditors’ Committee and the Lenders, and the Bidding Procedures require that the Debtors receive the consent of the Lenders (and the Creditors’ Committee in certain circumstances) regarding the bid that prevails at the Auction.

42. As required by section 363(m) of the Bankruptcy Code, the Debtors and the Buyer will act in good faith in negotiating the Final Asset Purchase Agreement. Although the Bankruptcy Code does not define “good faith purchaser,” the Court of Appeals for the Third Circuit, construing section 363(m) of the Bankruptcy Code, has stated that “the phrase encompasses one who purchases in ‘good faith’ and for ‘value’.” Abbotts Dairies, 788 F.2d at 147. To constitute lack of good faith, a party’s conduct in connection with the sale must amount to “fraud, collusion between the purchaser and other bidders or the trustee or an attempt to take grossly unfair advantage of other bidders.” Id. (citing In re Rock Indus. Mach. Corp., 572 F.2d 1195, 1998 (7th Cir. 1978)); see also In re Bedford Springs Hotel, Inc., 99 B.R. 302, 305 (Bankr. W.D. Pa. 1989); Matter of Perona Bros., Inc., 186 B.R. 833, 839 (D.N.J. 1995). Due to the absence of a bright-line test for good faith, the determination is based on the facts of each case, concentrating on the “integrity of [an actor’s] conduct during the sale proceedings.” In re Pisces Leasing Corp., 66 B.R. 671, 673 (E.D.N.Y. 1986) (quoting Rock Indus. Machinery, 572 F.2d at 1998).

43. The Bidding Procedures establish a process whereby interested parties compete to establish the value of the DESA Assets. The Auction will result in a bid for the DESA Assets that represents substantial value to the Debtors’ estates because it will provide favorable terms for the disposition of the DESA Assets for a price that represents the market values of the assets. See Abbotts Dairies, 788 F.2d at 149.

II. Sale of the DESA Assets Free and Clear of Liens, Claims and Encumbrances

44. The Debtors propose to sell the DESA Assets pursuant to section 363(b) and (f) of the Bankruptcy Code which, among other things, authorizes a debtor to sell property outside of the ordinary course of business, free and clear of any interest, lien, claim, encumbrance or security interest of any other party, including but not limited to, any administrative expense or

priority claim asserted in these Chapter 11 Cases. Specifically, section 363(f) of the Bankruptcy Code states:

- (f) The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if --
 - (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
 - (2) such entity consents;
 - (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
 - (4) such interest is in bona fide dispute; or
 - (5) such entity could be compelled, in a legal or equitable proceeding to accept a money satisfaction of such interest.

11 U.S.C. § 363(f); see In re Elliot, 94 B.R. 343, 345 (E.D. Pa. 1988) (section 363(f) written in disjunctive; court may approve sale “free and clear” provided at least one of the subsections is met).

45. To the extent that any Liens other than the Permitted Encumbrances (as defined in the Final Asset Purchase Agreement) relate to the DESA Assets, pursuant to section 363(f) of the Bankruptcy Code, such assets should be sold free and clear of such Liens. Liens on the DESA Assets, if any, are capable of being satisfied by money, and should transfer and attach to the net proceeds of the Sale with the same validity, priority, force and effect that the Liens had on the DESA Assets immediately prior to the Closing, subject to further order of this Court and subject to the rights and defenses, if any, of the Debtors and any other party in interest with respect thereto.

46. The Sale satisfies the criterion set forth in section 363(f) of the Bankruptcy Code. The Debtors will provide notice of the Sale to all parties who are creditors and therefore all parties who could potentially assert Liens against the DESA Assets. Any holder of an alleged Lien against the DESA Assets could be compelled, in a legal or equitable proceeding, to accept a monetary satisfaction equal to the amount of their claim, or interests in, such assets.

47. Accordingly, the Debtors submit that the sale of the DESA Assets free and clear of any Liens satisfies the statutory prerequisites of section 363(f) of the Bankruptcy Code.

III. Assumption and Assignment of Certain Executory Contracts and Unexpired Leases

48. The Debtors seek authority to assume and assign the Assumed Contracts to the Buyer under section 365 of the Bankruptcy Code. Assumption and assignment or rejection of executory contracts and unexpired leases are an integral part of the proposed sale and should be approved by the Court.

49. Section 365(a) of the Bankruptcy Code authorizes a debtor in possession to assume an executory contract or unexpired lease subject to the Court’s approval. Section 365(b)

of the Bankruptcy Code requires such debtor in possession to satisfy certain requirements at the time of assumption if a default exists under the contract to be assumed.

50. Section 365 of the Bankruptcy Code states in relevant part:

(a) Except as provided in...subsections (b), (c), and (d) of this section, the [debtor in possession], subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.

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

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

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

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

(f)(1) Except as provided in subsection (c) of this section, notwithstanding 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...

(2) The trustee may assign an executory contract or unexpired lease of the debtor only if --

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

(B) adequate assurance of future performance by the assignee or such contract or lease is provided, whether or not there has been a default in such contract or lease.

11 U.S.C. § 365(a), (b)(1), (f). Accordingly, section 365 of the Bankruptcy Code authorizes the proposed assumption and assignments of the Assumed Contracts, provided that the defaults under the Assumed Contracts are cured and adequate assurance of future performance is provided.

51. The standard that is applied by the Third Circuit in determining whether an executory contract or unexpired lease should be assumed is the debtor's "business judgment." See Sharon Steel Corp. v. Nat'l Fuel Gas Distrib. Corp. (In re Sharon Steel Corp.), 872 F.2d 36, 40 (3d Cir. 1989); see also NLRB v. Bildisco & Bildisco, 465 U.S. 513, 523 (1984) (describing business judgment test as "traditional"); In re III Enterprises, Inc. V, 163 B.R. 453, 469 (Bankr.

E.D. Pa. 1994) (citations omitted) (“Generally, a court will give great deference to a debtor’s decision to assume or reject the contract. A debtor need only show that its decision to assume or reject the contract is an exercise of sound business judgment--a standard which we have concluded many times is not difficult to meet.”).

52. Adequate business justifications merit judicial approval to assume the Assumed Contracts. The Debtors have reached the business decision to sell the DESA Assets pursuant to the Final Asset Purchase Agreement. A substantial component of the value of the DESA Assets and the going concern value of DESA is the Assumed Contracts.

53. In order to assign an executory contract or unexpired lease that has been assumed, the counterparty must be provided with adequate assurance of future performance. See 11 U.S.C. § 365(f). Among other things, adequate assurance may be given by demonstrating the assignee’s financial health and experience in managing the type of enterprise or property assigned. See In re Bygaph, Inc., 56 B.R. 596, 605-606 (Bankr. S.D.N.Y. 1986) (adequate assurance is present when assignee has financial resources and has expressed a willingness to devote sufficient funding to business to give it a strong likelihood of succeeding); In re Natco Industries, Inc., 54 B.R. 436, 440 (Bankr. S.D.N.Y. 1985).

54. Pursuant to Section 365 of the Bankruptcy Code and in accordance with the Final Asset Purchase Agreement, each counterparty owed a cure amount for their Assumed Contract will be provided with a cure payment or adequate assurance of such payment. Moreover, the Buyer will have the financial capabilities to satisfy any and all obligations it will incur in connection with the contracts and leases to be assumed and assigned to the Buyer under the Final Asset Purchase Agreement.

55. Based on the foregoing, the Debtors respectfully request that the Court approve the assumption and assignment of the Assumed Contracts that are scheduled in the Final Asset Purchase Agreement, as such schedules may be modified or supplemented before the Closing, with a reservation of rights to withdraw any particular executory contract or unexpired lease prior to Closing.

IV. Exemption from Transfer Taxes

56. Pursuant to section 1146 of the Bankruptcy Code, the “transfer... or the making or delivery of an instrument of transfer under a plan confirmed under section 1129 of this title, may not be taxed under any law imposing a stamp or similar tax.” 11 U.S.C. §1146 (c) This provision has been broadly construed to include sales and transfers which occur outside a chapter 11 plan and before or after plan confirmation, provided that such sales and transfers enable the confirmation and consummation of a chapter 11 plan for the Debtors. See In re GST Telecom, Inc., 2002 WL 442233 *2 (D. Del.); In re Hechinger Investment Co., 254 B.R. 306, 317 (Bankr. D. Del. 2000), aff’d 276 B.R. 43 (Dist. Ct. 2002), (section permits a debtor to sell assets during the case to maximize proceeds in anticipation of the plan it intends to propose); Director of Revenue, State of Delaware v. CCA Partnership (In re CCA Partnership), 70 B.R. 696 (Bankr. D. Del. 1987), aff’d 72 B.R. 765 (Bankr. D. Del. 1987), aff’d 833 F.2d 304 (3d Cir. 1987).

57. The Debtors’ sale of the DESA Assets is essential to the consummation of a plan, and therefore should be deemed to be “under a plan” for purposes of section 1146(c) of the Bankruptcy Code. The Debtors intend to use the net sale proceeds to satisfy claims asserted against the Debtors. Accordingly, the Debtors submit that the sale of the DESA Assets falls within the scope of the exemption provided for under section 1146(c) of the Bankruptcy Code.

V. **The Debtors Reserve Their Rights to Request that the Court Eliminate or Reduce the 10-Day Stay Under Rule 6004(g) of the Federal Rules of Bankruptcy Procedure**

58. Pursuant to Bankruptcy Rule 6004(g), unless the court orders otherwise, all orders authorizing the sale of property pursuant to section 363 of the Bankruptcy Code are automatically stayed for 10 days after entry of the order, see FED. R. BANKR. P. 6004(g) (added by the 1999 Amendments to the Federal Rules of Bankruptcy Procedure). The purpose of Bankruptcy Rule 6004(g) is to provide sufficient time for an objecting party to request a stay pending appeal before the order can be implemented. See Advisory Committee Notes to Bankruptcy Rule 6004(g).

59. Although Bankruptcy Rule 6004(g) and the Advisory Committee Notes are silent as to when a court should “order otherwise” and eliminate or reduce the 10-day stay period, Collier on Bankruptcy suggests that the 10-day stay period should be eliminated to allow a sale or other transaction to close immediately “where there has been no objection to the procedure.” 10 Collier on Bankruptcy ¶ 6004.09 (15th ed. 1999). Furthermore, Collier on Bankruptcy provides that if an objection is filed and overruled, and the objecting party informs the court of its intent to appeal, the stay may be reduced to the amount of time necessary to file such appeal. Id.

60. The Debtors need to close the Sale as soon as possible after all closing conditions have been met or waived. Pursuant to the Bidding Procedures, the Closing must occur by November 26, 2002. Accordingly, the Debtors hereby reserve their rights to request that the Court eliminate the 10-day stay period under Bankruptcy Rule 6004(g) or, in the alternative, if an objection to the Sale is filed, reduce the stay period to the minimum amount of time needed by the objecting party to file its appeal in order to permit the sale to close as provided under the Form Asset Purchase Agreement.

61. Based upon the foregoing, the Debtors submit that the relief requested herein is necessary and appropriate, is in the best interests of the Debtors and their estates, and should be granted in all respects.

Notice

62. Notice of this Motion has been given to (i) the United States Trustee; (ii) Shearman & Sterling, counsel to the Lenders; (iii) Stroock & Stroock & Lavan, counsel to the Official Committee of Unsecured Creditors; (iv) all parties who have filed requests for notice pursuant to FED. R. BANKR. P. 2002; (v) federal, state and local regulatory and taxing authorities that are reasonably ascertainable by the Debtors to have a known interest in the DESA Assets; (vi) those parties identified by the Debtors (and their representatives) as potential purchasers of the DESA Assets; (vii) counterparties to those executory contracts or unexpired leases that may be assumed and assigned in conjunction with the Sale; and (viii) those entities listed on the Debtors’ Schedules filed with the Court pursuant to Bankruptcy Rule 1007. In light of the nature of the relief requested, the Debtors submit that no further notice is required.

No Prior Request

63. No previous motion for the relief requested herein has been made to this or any other Court.

WHEREFORE the Debtors respectfully request that the Court enter an order (a) authorizing the Debtors' sale of the DESA Assets, free and clear of the Liens, subject to higher and better offers, (b) approving an asset purchase agreement, (c) approving procedures for and authorizing the assumption and assignment of certain executory contracts and unexpired leases in connection with such sale, and (d) granting such other and further relief as the Court deems appropriate.

Dated: September 30, 2002

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