

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

In re:) Chapter 11
)
GULF PACKAGING, INC.,) Case No. 15-15249
)
Debtor.) Honorable Pamela S. Hollis
)
) **Hearing Date: June 30, 2015**
) **Hearing Time: 10:00 a.m.**
) **Court Room: 644**

NOTICE OF MOTION

PLEASE TAKE NOTICE that on **June 30, 2015 at 10:00 a.m.**, or as soon thereafter as counsel may be heard, we shall appear before the Honorable Pamela S. Hollis of the United States Bankruptcy Court for the Northern District of Illinois, 219 South Dearborn Street, Chicago, Illinois, Courtroom No. 644, or whomever may be sitting in her place and stead, and then and there present the **DEBTOR’S MOTION PURSUANT TO SECTIONS 363 AND 365 OF THE BANKRUPTCY CODE AND BANKRUPTCY RULES 2002, 6004 AND 6006 TO (A) APPROVE COMPREHENSIVE SALE PROCESS, (B) APPROVE BIDDING PROCEDURES AND CERTAIN BID PROTECTIONS, (C) SCHEDULE A SALE HEARING, (D) APPROVE FORM AND MANNER OF NOTICE RELATED THERETO, (E) AUTHORIZE SALE FREE AND CLEAR OF ALL LIENS, CLAIMS, INTERESTS AND ENCUMBRANCES, (F) AUTHORIZE ASSUMPTION AND ASSIGNMENT OF CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES AND PROPOSED CURE AMOUNTS WITH RESPECT THERETO AND (G) GRANT RELATED RELIEF DEBTOR’S MOTION FOR ENTRY OF ORDER AUTHORIZING TERMINATION OF DEBTOR’S 401(K) PLAN**, a copy of which is attached hereto and hereby served upon you.

Dated: June 23, 2015

Respectfully submitted,

GULF PACKAGING, INC.

By: /s/ Joseph D. Frank
One of its attorneys

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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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In re:))	Chapter 11
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GULF PACKAGING, INC., ¹))	Case No. 15-15249 (PSH)
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Debtor.))	
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DEBTOR’S MOTION PURSUANT TO SECTIONS 363 AND 365 OF THE BANKRUPTCY CODE AND BANKRUPTCY RULES 2002, 6004 AND 6006 TO (A) APPROVE COMPREHENSIVE SALE PROCESS, (B) APPROVE BIDDING PROCEDURES AND CERTAIN BID PROTECTIONS, (C) SCHEDULE A SALE HEARING, (D) APPROVE FORM AND MANNER OF NOTICE RELATED THERETO, (E) AUTHORIZE SALE FREE AND CLEAR OF ALL LIENS, CLAIMS, INTERESTS AND ENCUMBRANCES, (F) AUTHORIZE ASSUMPTION AND ASSIGNMENT OF CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES AND PROPOSED CURE AMOUNTS WITH RESPECT THERETO AND (G) GRANT RELATED RELIEF

Gulf Packaging, Inc., the above-captioned debtor and debtor in possession (the “Debtor,” “GPI” or the “Company”), for its Motion (the “Motion”) for entry of an order, substantially in the form attached hereto as Exhibit “A,” (the “Bidding Procedures Order”) pursuant to sections 363 and 365 of title 11 of the United States Code (the “Bankruptcy Code”) and Rules 2002, 6004 and 6006 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”) (A) approving comprehensive sale process, (B) approving the bidding procedures set forth herein and attached hereto as Exhibit “B” (the “Bidding Procedures”) and certain bidding protections as described herein, and (C) scheduling an auction to be held on July 29, 2015 (the “Auction”) and a hearing to approve the results of the Auction on July 30, 2015 or as soon thereafter as the Court’s calendar permits (the “Sale Hearing”). The Debtor further requests that, at the Sale Hearing, the Court (i) approve the sale (the “Sale”) of the Debtor’s business as a going concern or certain (or all) of its assets, free and clear of liens, claims, interests and encumbrances, (ii) approve the

assumption and assignment of such executory contracts and unexpired leases of the Debtor (if any) as may be requested by the Stalking Horse (if any) or the Successful Bidder (collectively, the “Assumed Contracts”) and the proposed cure amounts with respect thereto, (iii) the assumption of certain liabilities (the “Assumed Liabilities”) and (iv) grant related relief. In support of this Motion, the Debtor respectfully represents as follows:

JURISDICTION AND VENUE

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), (N), and (O).

2. Venue in this Court is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

INTRODUCTION

3. On April 29, 2015 (the “Petition Date”), the Debtor filed with this Court its petition for relief under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”). The Debtor is operating its business and managing its properties as debtor in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

4. On May 11, 2015, the Office of the United States Trustee appointed an official committee of unsecured creditors (the “Committee”). No request has been made for the appointment of a trustee or examiner.

BACKGROUND

5. GPI is a national distributor of packaging equipment and supplies, which sells its product by and through several independent entities (“Affiliates”).² When GPI is combined with the Affiliates, there are over twenty (20) warehousing locations to better serve GPI’s customer

¹ The last four digits of the Debtor’s tax identification number are 5030.

² As used herein, “Affiliate” means a company that has a relationship – formal or informal – to the Debtor, and sells packaging products under a variation of the Gulf name. Unless otherwise set forth, use of the term “Affiliate” is not

base. Additional information about the Debtor, its business and corporate and capital structure is set forth in the *Declaration of Edward T. Gavin, CTP in Support of Chapter 11 Petition and First Day Pleadings* [Docket No. 14] (the "Gavin Declaration"), filed on the Petition Date.

6. As set forth more fully in the Gavin Declaration, the Debtor is liquidating and winding down its business. To that end, the Court recently approved the Debtor's retention of Equity Partners HG LLC ("Equity Partners") as investment banker, to facilitate a going concern sale or other sale (or sales) of the Debtor's assets. *See* Docket Nos. 98 and 131 (Equity Partners retention application and retention order, respectively).

7. Since its retention was authorized by the Court, Equity Partners has contacted over 1,600 potential purchasers via email and hard copy, made over 100 outreach calls, established a data room, executed confidentiality agreements with 58 parties, placed ads on trade-related websites and in newspapers,³ including running a print ad three times in the International edition of *The Wall Street Journal*, on Tuesday and Wednesday, June 9 and 10, 2015. No going concern or liquidation bids or other offers (whether official or unofficial) have yet been submitted, nor have any specific transaction terms been negotiated.

RELIEF REQUESTED

8. By this Motion, the Debtor seeks approval of a process that is designed to generate the greatest value for its constituents, be it through a going concern sale of the Debtor to potential strategic or financial buyers, or a liquidation of all or a portion of the Debtor's assets to

intended to have the same meaning as the "affiliate" term of art defined in section 101(2) of the Bankruptcy Code. All rights with respect to this issue are reserved.

³ GPI was listed during the week of June 1, 2015 on the largest Internet listing service, *Bizbuysell.com*. Because Equity Partners is a member of *BrokerWorks.com*, the listing was also included on over 135 partner websites across the U.S., including: *Bloomberg Businessweek*, *Bizjournals*, and *The Wall Street Journal Small Business*. The opportunity has been posted on *Bizquest.com*, and *PE-Nexus*, which is a service to pair private equity, investment bankers and opportunities, and on the Equity Partners website, www.EquityPartnersHG.com, and its auction division's site: www.hgpauktion.com. In addition, Equity Partners placed advertising in the June 23rd edition of

one or more buyers or liquidation specialists. Equity Partners has been running, and will continue to run, processes on parallel tracks, seeking bids from both going concern purchasers and maximizing interest from parties who may wish to purchase some or all of the Debtor's inventory and other assets through a liquidation.

9. The Debtor proposes to solicit bids, conduct an auction and have the Sale approved on the following time line: (A) the deadline to submit a bid to act as the Debtor's stalking horse shall be July 10, 2015 (the "Stalking Horse Bid Deadline"); (B) the deadline for the Debtor to declare a particular bid to be the base-line stalking horse bid at the Auction (in the Debtor's sole discretion, after consultation with the Committee) (the "Stalking Horse Bid") shall be July 11, 2015 (the "Stalking Horse Declaration Deadline"); (C) the deadline to submit Qualified Bids shall be July 27, 2015 at 12:00 Noon Central Time (the "Bid Deadline"); (D) if one or more Qualified Bids is received, the Debtor will conduct the Auction at 10:00 a.m. prevailing Central Time on July 29, 2015; and (E) the Sale Hearing, to approve the results of the Auction, will be on July 30, 2015 (or as soon thereafter as the Court's calendar permits).

10. The Debtor believes that the above time line is reasonable. Equity Partners was retained effective as of May 18, and their marketing process has been under way since June 1. Thus, by the time the Stalking Horse Bid Deadline arrives, marketing will have been under way for 41 days, 57 days will have elapsed prior to the Bid Deadline, and 60 days will have elapsed prior to the Auction. These deadlines are not only consistent with deadlines often established in other chapter 11 cases where bulk assets sales take place, but "the market" has known that the Debtor was for sale since before it filed for chapter 11 on April 29. In addition, the proposed time frames will also help to ensure that the Debtor's inventory does not become "stale" or

Packaging World's eNewsletter,. The ad was also featured in the June 19 edition of *Packaging Digest's* eNewsletter, and will run again in that newsletter on June 27, July 7 and July 10.

otherwise decline significantly in value, and will help expedite bringing this case to a conclusion (thus minimizing the accrual of administrative expenses and erosion of the estate's value).

11. The Debtor will use its best efforts to secure offers for both a going concern sale and a liquidation sale or sales of the Debtor's assets, in order to maintain maximum optionality and maximize value. Any single bid or a combination of bids, individually or in the aggregate, for the Debtor's assets must exceed any going concern bid by 5% (which is the value of the Break Up Fee (defined below) of 2.5% plus an additional 2.5%).

12. Attached hereto as Exhibit "C" is a general form asset purchase agreement ("APA"), for use, and to be marked up and revised, by potential bidders. The Debtor seeks approval of the general form of the APA, subject to such modifications as the Debtor may accept, after consultation with the Committee, in connection with an actual Sale transaction and in the exercise of the Debtor's business judgment.

13. The Debtor proposes that any party interested in being a stalking horse bidder for a Sale transaction return a marked up form of the APA no later than the Stalking Horse Bid Deadline. If any bids are received from a potential stalking horse, the Debtor may declare one or more such bids as the Debtor deems appropriate in its business judgment, in consultation with the Committee, to be the Stalking Horse Bid(s), against which all other bids will be measured (the person or entity making such Stalking Horse Bid being the "Stalking Horse"). If the Debtor declares one or more Stalking Horses, it shall file a notice of the same with the Court no later than the Stalking Horse Declaration Deadline, along with a copy of the Stalking Horse Bid(s).

14. Further, to the extent the Debtor declares a Stalking Horse, the APA provides for – and the Debtor requests that the Court approve – a break-up fee of 2.5% of the total consideration to be received by the Debtor's estate pursuant to the Stalking Horse Bid (the

“Break-Up Fee”), if the Stalking Horse is not the winning bidder at auction (the “Successful Bidder”), the Debtor accepts and the Court approves an alternative transaction, and such alternative transaction actually closes.

BASIS FOR RELIEF

A. The general form of APA should be approved, and the Debtor should be authorized, in the sound exercise of its business judgment, to accept modifications thereto as may be proposed by potential bidders.

15. The APA attached hereto is a basic form of APA for the sale of the Debtor’s assets. It provides a base from which interested parties may work when formulating the terms of their respective bids, and is a form with which the Debtor is comfortable and which the Debtor believes is fair to both the Debtor and prospective bidders.

16. The Debtor further believes, and respectfully submits, that the terms of the APA are typical, customary and reasonable under the circumstances, in the exercise of its business judgment.

17. Given that there is no current Stalking Horse Bidder, however, the Debtor presumes, that modifications will be submitted by not only by potential Stalking Horse Bidders, but also general bidders. The Debtor thus requests authorization to accept such modifications and edits to the form of APA as may be submitted by potential bidders and as the Debtor may agree to in its discretion and business judgment, after consultation with the Committee.⁴

B. The Break-Up Fee should be approved.

18. As has been demonstrated repeatedly over the years, obtaining a stalking horse bidder is key to a successful, efficient, and value-maximizing sale process. The presence of a stalking horse sets a floor for the auction and encourages bidding, thereby maximizing the

⁴ To the extent a going concern sale prevails at Auction over a liquidation sale or sales, the terms of such going concern sale and any accompanying agreement will be presented to the Court for approval at the Sale Hearing.

seller's return. To receive this benefit, however, the Debtor needs to be able to compensate the Stalking Horse for the risk it takes by (i) entering into an agreement that is subject to higher and better offers without any assurances that its transaction will ultimately be consummated, (ii) exposing its bid to the market and (iii) standing by its bid commitment while the marketing and process plays itself out.

19. The Debtor, therefore, requests that the Court approve the Break-Up Fee, to the extent that the Debtor declares a Stalking Horse (or more than one Stalking Horse) by the Stalking Horse Declaration Deadline.

20. Break-up fees and other bid protections are a normal and customary – and sometimes necessary – component of sales outside the ordinary course. *E.g.*, *In re Keywell, L.L.C.*, Case No. 13-37603 (ERW) (Bankr. N.D. Ill. Oct. 21, 2013) [Docket No. 121]; *In re CXM, Inc.*, 307 B.R. 94, 104 (Bankr. N.D. Ill. 2004) (approving \$200,000 break-up fee protecting stalking horse bidder); *In re Outboard Marine Corp.*, Case No. 00-37405-EIK-11 (Bankr. N.D. Ill. Jan. 10, 2001) [Docket No. 217] (authorizing payment of a 3% break-up fee to potential bidders); *In re Integrated Resources, Inc.*, 147 B.R. 650, 660 (S.D.N.Y. 1992) (noting that a break-up fee may be necessary to entice a “white knight” to enter the bidding in exchange for the risk it undertakes); *In re Financial News Network, Inc.*, 126 B.R. 152, 157 (S.D.N.Y. 1991), *appeal dismissed*, 931 F.2d 217 (2d Cir. 1991) (refusing to impose strict comparability where the original bidding party had the benefit of a break-up fee); *In re Crowthers McCall Pattern, Inc.*, 114 B.R. 877, 879 (Bankr. S.D.N.Y. 1990) (approving break-up fees in merger agreement); *In re 995 Fifth Ave. Assoc., L.P.*, 96 B.R. 24, 28-29 (Bankr. S.D.N.Y. 1989) (finding that \$500,000 break-up fee was not unreasonable absent evidence that it chilled the bidding). In the bankruptcy context, to determine whether break-up fees should be approved, courts must

evaluate whether such fees are in the best interest of the estate. *In re S.N.A. Nut Co.*, 186 B.R. 98, 104 (Bankr. N.D. Ill. 1995); *see also In re Tiara Motorcoach Corp.*, 212 B.R. 133, 137 (Bankr. N.D. Ind. 1997) (adopting the test set forth in *S.N.A. Nut Co.*).

21. The proposed Break-Up Fee of 2.5% is well within the range of reasonableness. Generally speaking, courts have found break-up fees to be reasonable, and approved the same, ranging up to approximately five percent (5%) of the consideration to be received. *See In re Integrated Resources, Inc.*, 147 B.R. at 662 (noting expert testimony that 3.3% is industry average for break-up fees); *see also, e.g., Consumer News & Business Channel P'ship v. Financial News Network, Inc. (In re Financial News Network, Inc.)*, 980 F.2d 165, 167 (2d Cir. 1992) (5.5%); *Cottle v. Stores Comms.*, 849 F.2d 570, 578-79 (11th Cir. 1988) (1.16%); *LTV Aerospace & Defense Co. v. Thomson-CSF, S.A. (In re Chateaugay Corp.)*, 198 B.R. 848, 861 (S.D.N.Y. 1996) (approving "reverse break-up fee" of 4.4%); *In re Women's First Healthcare, Inc.*, 332 B.R. 115, 122 (Bankr. D. Del. 2005) (3%); *In re Mirant Corp.*, Case No. 03-46590-DML-11 (Bankr. N.D. Tex. Oct. 28, 2004) [Docket No. 6092] (3%); *In re Fruit of the Loom, Inc.*, Case No. 99-4497 (PJW) (Bankr. D. Del. Dec. 11, 2000) [Docket No. 1700] (3%).

22. If a Stalking Horse Bid(s) is submitted and accepted by the Debtor, the Break-Up Fee will be beneficial to the Debtor's estate and creditors, as such Stalking Horse Bid(s) will establish a floor for further bidding, and establish a metric against which all other bids may be measured. The Debtor, in its business judgment, believes that in order for it to receive this benefit, it is reasonable and appropriate to provide the requested 2.5% Break-Up Fee.

C. The Bidding Procedures should be approved.

23. The Debtor also requests that the Court approve the overall Bid Procedures, attached hereto as Exhibit “B”. The Debtor has determined that the proposed procedure to be implemented by the Bidding Procedures is the one most likely to maximize values for the Debtor’s estate.

24. The Bidding Procedures describe, among other things, the manner in which bidders and bids become “qualified,” the receipt and negotiation of bids received, the conduct of any Auction (as defined below), the ultimate selection of the Successful Bidder, and the Court’s approval thereof.

25. The proposed Bidding Procedures provide, in relevant part, as follows :⁵

(a) Sale of Assets or Going Concern Transaction: The Debtor is entertaining bids for (i) a going concern transaction, (ii) a sale of all or substantially all of the Debtor’s assets and (iii) a sale of such smaller portion of the Debtor’s assets as may be subject to a purchase agreement and as may be bid upon at Auction. The Debtor may enter into one transaction, or several transactions with multiple parties, depending upon the bids received. The transaction to be entered into will be determined via auction to be conducted on July 29, 2015 at the offices of Perkins Coie LLP, 131 South Dearborn Street, Suite 1700, Chicago, Illinois 60603, commencing at 10:00 a.m. (prevailing Central Time).

(b) “As Is, Where Is”: Any transaction(s) entered into with the Debtor shall be on an “as is, where is” basis and without representations or warranties of any kind, nature, or description by the Debtor, its agents, or estate, except as may be set forth in a purchase agreement(s) with a Successful Bidder(s).

(c) Free of Any and All Claims and Interests: Any transaction entered into with the Debtor shall be free and clear of all liens, claims, interests and encumbrances (collectively, the “Claims and Interests”) with such Claims and Interests to attach to the net proceeds of the sale.

(d) Participation and Bid Requirements: To ensure that only bidders with a *bona fide* interest in a transaction participate in the Bidding Process, the Bidding Procedures provide for certain minimal requirements for a potential bidder to become a

⁵ The terms of the Bidding Procedures are merely summarized in this Motion, and such summary is qualified in its entirety by reference to the actual terms of the Bidding Procedures. Capitalized terms used but not otherwise defined in this summary have the meanings ascribed to them in the Bidding Procedures.

“Qualified Bidder.” Each Qualified Bidder will be required to deliver the following documents to the Debtor, the Committee, Equity Partners, and Gavin/Solmonese, at the addresses set forth in the Bidding Procedures, in advance of the Bid Deadline (as defined below), in a form and substance acceptable to the Debtor and its advisors (the “Required Bid Documents”):

i. Evidence of the Potential Bidder’s financial ability to close a transaction, in a form and substance acceptable to the Debtor in its sole discretion, in consultation with FCC and the Committee. Such evidence may take the form of, among other things, current audited financial statements, bank statements, evidence of a financing commitment, or such other documentation as the Debtor may accept in its sole discretion;

ii. A letter stating that the bidder’s offer is irrevocable until immediately following the closing of the Sale, and setting forth (i) the nature of the transaction as a going concern or asset sale, which specifically identifies the specific assets or groups of assets to be purchased, and which includes the proposed consideration for the transaction and the liabilities (if any) to be assumed, (ii) any assets expected to be excluded from the transaction, and (iii) the structure and financing of the transaction (including, but not limited to, the sources of financing);

iii. A binding, executed and definitive copy a of the form Asset Purchase Agreement attached to the Sale Motion (the “APA”), together with all schedules thereto marked to show changes to the APA and schedules that the Potential Bidder proposes (a “Marked APA”), including the amount of consideration to be paid;

iv. A good faith earnest money cash deposit in an amount equal to not less than (i) \$200,000 if the bid in question is a going concern bid, or a bid for substantially all of the Debtor’s assets or (ii) \$50,000 if the bid in question is for a sale of what the Debtor deems to be 50% or less of its assets;

v. evidence of corporate authority to enter into the transaction;

vi. An executed confidentiality agreement (a “Confidentiality Agreement”) in a form and substance acceptable to the Debtor; and

vii. Any additional information reasonably requested by the Debtor.

(e) Due Diligence: Following execution of a Confidentiality Agreement, the Debtor shall afford each interested party an opportunity to perform due diligence with respect to the Acquired Assets and the Business. Due diligence access may include management presentations as may be scheduled by the Debtor, on-site inspections, and such other matters which an interested party may reasonably request and as to which the Debtor, in its sole discretion, may agree.

(f) Bid Deadline: A Qualified Bidder (other than the potential Stalking Horse) who desires to make a bid shall deliver written copies of its bid to the parties set forth in

the Bidding Procedures, no later than 12:00 Noon Central Time on July 27, 2015 (the “Bid Deadline”)

(g) Qualified Bids: A bid will be deemed a “Qualified Bid” and considered by the Debtor only if the bid:

i. (A) is on terms and conditions (other than the amount of the consideration and the particular liabilities being assumed) that are substantially similar to, and are not materially more burdensome or conditional to the Debtor than, those contained in the APA, and (B) has a value, either individually or, when evaluated in conjunction with any other Qualified Bid, greater than 5% of any Stalking Horse Bid designated as such by the Debtor by the Stalking Horse Declaration Deadline.

ii. contains no contingencies of any type, other than Bankruptcy Court approval of the transaction;

iii. other than any Stalking Horse Bid(s) designated as such by the Debtor, is not conditioned upon any bid protections (such as a topping fee, termination fee, expense reimbursement, or similar type of payment);

iv. contains an acknowledgement and representation that the bidder: (i) has had an opportunity to conduct any and all due diligence regarding the Debtor and its assets and business prior to making its offer, (ii) has relied solely upon its own independent review, investigation and/or inspection of any documents and/or the business and assets of the Debtor in making its bid, and (iii) did not rely upon any written or oral statements, representations, promises, warranties, or guaranties whatsoever, whether express, implied, by operation of law or otherwise, regarding the Debtor’s business or assets, or the completeness of any information provided in connection therewith or the Auction, except as expressly stated in the APA or the Marked APA;

v. includes a a list of Assumed Contracts and Assumed Liabilities (if any), and a commitment to consummate the transaction and the assumption of the Assumed Liabilities (if any) within not more than ten (10) days after entry of an order by the Bankruptcy Court approving such transaction;

vi. discloses (i) the identity of the Potential Bidder and each entity participating in connection with the Potential Bidder and the complete terms of such participation, and (ii) any other term sheets and other written or oral understandings between the Potential Bidder and its affiliates on one hand, and any insider (as defined in section 101(31) of the Bankruptcy Code) of the Debtor, on the other; and

vii. is received by the Bid Deadline.

All bids for a transaction must contemplate payment in cash, in full, upon the closing of the transaction, unless the Debtor agrees otherwise, with the consent of FCC and after consultation with the Committee. Notwithstanding the foregoing, the Debtor shall have the right,

in its sole and absolute discretion, after consultation with FCC and the Committee, to entertain bids that do not conform to one or more of the requirements specified herein and deem such bids to be Qualified Bids; *provided, however*, that no bid shall be deemed by the Debtor to be a Qualified Bid unless such bid proposes a transaction that the Debtor determines, in its sole discretion after consultation with FCC and the Committee, has a value in excess of 5% of any Stalking Horse Bid(s) designated by the Debtor by the Stalking Horse Declaration Deadline, plus the assumption of the Assumed Liabilities, taking into account all material terms of any such bid. A Qualified Bid will be valued, among other things, based upon factors such as the net value provided by such bid, the likelihood and timing of consummating such transaction and any other factors that the Debtor may deem relevant to the transaction.

(h) Stalking Horse Declaration and Break-Up Fee: Any bidder wishing to be considered as a Stalking Horse must submit its bid no later than July 10, 2015 (the "Stalking Horse Bid Deadline"). If any bids are received from a potential stalking horse, the Debtor may declare one or more such bids as the Debtor deems appropriate in its business judgment, in consultation with FCC and the Committee, to be the Stalking Horse Bid(s), against which all other bids will be measured. If the Debtor declares one or more Stalking Horses, it shall file a notice of the same with the Bankruptcy Court no later than July 11, 2015 (the "Stalking Horse Declaration Deadline"), along with a copy of the Stalking Horse Bid(s).

(i) Conduct Of Auction: If the Debtor receives at least one Qualified Bid, an auction (the "Auction") will be conducted, upon notice to all Qualified Bidders who have submitted Qualified Bids, at 10:00 a.m. (prevailing Central Time) on July 29, 2015, at the offices of Perkins Coie LLP, 131 South Dearborn Street, Suite 1700, Chicago, Illinois 60603, in accordance with the terms of the Bidding Procedures.

(j) Selection of Successful Bid: At the conclusion of the Auction, or as soon thereafter as practicable, the Debtor, in consultation with FCC and the Committee, shall select the highest or otherwise best Qualified Bid (or Qualified Bids) received at the Auction after taking into account such factors as the Debtor deems pertinent including, but not limited to, facts affecting the speed and certainty of consummating the transaction (the "Successful Bid" and the bidder making such bid, the "Successful Bidder").

(k) Back-Up Bidder. If there is an Auction, the Qualified Bidder that submits the second highest Bid at the Auction shall be required to serve as the back-up bidder (the "Back-Up Bidder") and keep such Back-Up Bidder's last Bid (the "Back-Up Bid") open and irrevocable until the earlier of (i) 5:00 p.m. (prevailing Central Time) on the date which is thirty (30) days after the date of the Sale Hearing, and (ii) the closing of the transaction with the Successful Bidder (the "Outside Back-Up Date"). If, following the Sale Hearing and prior to the Outside Back-Up Date, the Successful Bidder fails to consummate an approved transaction because of a breach or failure to perform on the part of such Successful Bidder, the Back-Up Bidder will be deemed to have the new Successful Bid, and the Debtor will be authorized, without further order of the Bankruptcy Court, to consummate the transaction with the Back-Up Bidder. The Debtor will provide notice to the Committee and FCC of any failure by the Successful Bidder to close the transaction and the election to proceed to close a transaction with the Back-Up Bidder.

(l) Right to Credit Bid. Any creditor that has a valid, perfected and enforceable security interest (a “Security Interest”) in the Debtor’s assets (any such creditor, a “Secured Party”) shall have the right to make one or more credit bids of all or any portion of the secured claim(s) held by such Secured Party at the Auction to the full extent permitted by section 363(k) of the Bankruptcy Code (a “Credit Bid”). FCC shall be permitted to Credit Bid in an amount up to the amount of its allowed secured claim, pursuant and subject to that certain *Final Order Authorizing Debtor to: (A) Use Cash Collateral on an Emergency Basis; and (B) Grant Adequate Protection and Provide Security and Other Relief to FCC, LLC d/b/a First Capital, as Lender* [Docket No. 153] (the “Cash Collateral Order”), including, without limitation, the Committee’s right to pursue a Challenge, as defined in the Cash Collateral Order. FCC is deemed to be a Qualified Bidder.

(m) Reservation of Rights: Notwithstanding any term to the contrary in the Bidding Procedures, the Debtor, in consultation with FCC and the Committee, reserves the right to: (i) modify the Bidding Procedures at any time; (ii) determine which Qualified Bid, if any, is the highest or otherwise best offer; and (iii) reject at any time, any bid that is: (a) inadequate or insufficient (in the Debtor’s sole and absolute discretion); (b) not in conformity with the requirements of the Bankruptcy Code, the Bidding Procedures, or the terms and conditions of the APA; or (c) contrary to the best interests of the Debtor, its estate, and creditors as determined by the Debtor in its sole discretion.

26. Section 363(b)(1) of the Bankruptcy Code provides, in pertinent part, that “[t]he trustee, 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). A court will approve a debtor’s request to sell property under section 363(b), when, *inter alia*, the debtor articulates a business justification for the same. *Fulton State Bank v. Schipper (In re Schipper)*, 933 F.2d 513, 515 (7th Cir. 1991) (citations omitted); *In re Cont’l Air Lines, Inc.*, 780 F.2d 1223, 1226 (5th Cir. 1986) (for a “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”); *see also Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1070-71 (2d Cir. 1983); *In re Efoora, Inc.*, 472 B.R. 544, 552 (Bankr. N.D. Ill. 1999); *In re Del. & Hudson Ry. Co.*, 124 B.R. 169, 175-76 (D. Del. 1991); *Comm. of Asbestos-Related Litigants v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 60 B.R. 612, 616 (Bankr. S.D.N.Y. 1986) (“Where the debtor articulates a reasonable basis for its

business decisions (as distinct from a decision made arbitrarily or capriciously), courts will generally not entertain objections to the debtor's conduct"). If a debtor's decision to use property out of the ordinary course of business is supported by a legitimate business justification, the debtor is presumed to have "acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." See *In re S.N.A. Nut Co.*, 186 B.R. 98, 102 (Bankr. N.D. Ill. 1995); *Official Comm. of Subordinated Bondholders v. Integrated Res., Inc. (In re Integrated Res., Inc.)*, 147 B.R. 650, 656 (S.D.N.Y. 1992) (citations and internal quotations omitted).

27. The paramount goal in any proposed sale of property of a debtor's estate is to maximize the proceeds received by the estate. See *Cadle Co. v. Moore (In re Moore)*, 608 F.3d 253, 263 (5th Cir. 2010) (debtor in possession "has the duty to maximize the value of the estate"); *Commodity Future Trading Comm'm v. Weintraub*, 471 U.S. 343, 353 (1985) (same); *Four B. Corp. v. Food Barn Stores, Inc. (In re Barn Stores, Inc.)*, 107 F.3d 558, 564-65 (8th Cir. 1997) (in bankruptcy sales, "a primary objective of the Code [is] to enhance the value of the estate at hand"); *In re S.N.A. Nut Co.*, 186 B.R. 98, 104-06 (Bankr. N.D. Ill. 1995) (pursuant to § 363 of the Bankruptcy Code, "[t]he goal of a bankruptcy auction . . . is to maximize the return to the estate").

28. It is appropriate to approve bidding procedures that benefit a debtor's estate by maximizing the value of the debtor's assets. See *In re Edwards*, 228 B.R. 552, 561 (Bankr. N.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"). Therefore, courts generally recognize that procedures to enhance competitive bidding are consistent with the goal of maximizing the value received by the estate and are appropriate in the context of bankruptcy transactions. See *In re*

O'Brien Env'tl Energy, Inc., 181 F.3d 527, 537 (3d Cir. 1999); *see also Official Comm. of Subordinated Bondholders v. Integrated Res. Inc. (In re Integrated Res. Inc.)*, 147 B.R. 650, 659 (S.D.N.Y. 1992) (bidding procedures “encourage bidding [and] . . . maximize the value of the debtor’s assets”).

29. At least one court has held that approval of bidding procedures is appropriate when they are the product of good business judgment. *See In re The Bombay Co., Inc.*, Case No. 07-44084, 2007 WL 2826071, at *4 (Bankr. N.D. Tex. Sept. 26, 2007) (“The principal question the court thus faces is whether management of the Debtor in fact exercised good business judgment”). The Debtor has sound business justifications for pursuing the Sale and seeking approval of the Bidding Procedures at this time. The Debtor is liquidating and winding down its business, and has engaged Equity Partners as its investment banker to actively solicit offers for the sale of some or all of the Debtor’s assets, including a going concern sale. The Debtor believes that the Bidding Procedures will establish the parameters by which the value of the Debtor’s assets and the overall transaction value may be established and tested, and will increase the likelihood that the Debtor will receive the greatest possible consideration therefor because a competitive and fair bidding process will be ensured. The Debtor thus believes that the proposed Bidding Procedures will maximize the value of its assets and estate.

30. The Debtor also believes that the Bidding Procedures will promote active bidding from seriously interested parties, and will dispel any doubt as to the highest and best offer reasonably available for the Debtor’s assets (or the business, to the extent there is a going concern transaction). The Bidding Procedures will allow the Debtor to conduct the Auction in a controlled, fair and open fashion that will encourage participation by financially capable bidders who demonstrate an ability to close the Sale. The Debtor believes that the Bidding Procedures

will encourage bidding, that they are consistent with other procedures previously approved by courts in this and other districts, and that the Bidding Procedures are appropriate under the relevant legal standards.

D. The form and manner of notice of the Bidding Procedures, the Auction and the Sale Hearing are reasonable, adequate and appropriate.

31. The Debtor requests that the Court schedule two hearings in connection with this Motion: first, a hearing to consider and approve the Bidding Procedures and schedule the Auction, Sale Hearing and related deadlines; and second, the Sale Hearing itself.

32. The Debtor proposes that, within five (5) business days after entry of the Bidding Procedures Order, the Debtor serve this Motion, the APA, the Bidding Procedures, Notice of (I) Auction and (II) Hearing to Approve Auction Results in the form attached hereto as Exhibit “D” (the “Auction Notice”), and a copy of the Bidding Procedures Order (the “Bid Package”), by first-class U.S. mail, postage prepaid, upon: (a) all entities known to have expressed an interest in a liquidation or going concern sale transaction with the Debtor during the past year; (b) the U.S. Trustee; (c) counsel to the Committee; (d) counsel to the Debtor’s secured lender, FCC; (d) counterparties to the Debtor’s executory contracts and unexpired leases; (h) all parties who have requested notice in this chapter 11 case; and (i) all parties with whom Equity Partners has been in contact and who have expressed an interest in potentially making a bid.⁶

33. The date proposed for the Sale Hearing complies with Bankruptcy Rules 2002(a)(2), 6004 and 6006(c), as such date will be more than twenty one (21) days after service of the Bid Package. Further, the materials in the Bid Package will comply with Bankruptcy Rules 2002(c)(1) and 6004(f)(1), as the same will contain the information required by such Rules. As a result, the Debtor respectfully submits that the Bid Package, including the Auction

⁶ All such entities will also be served by electronic mail to the extent the Debtor has electronic mail addresses for such parties.

Notice, satisfies the notice and information requirements of Bankruptcy Rules 2002, 6004 and 6006(c), and section 363 of the Bankruptcy Code, and that such notice is good and sufficient that no other or further notice should be required.

E. The assumption, assignment and cure relating to the Assumed Contracts are appropriate and should be approved.

34. In connection with the proposed Sale, the Debtor seeks authority to assume and assign the Assumed Contracts (if any) to the Stalking Horse (if any) or the Successful Bidder. In the event the Debtor seeks to assume and assign any contracts or leases, the Debtor proposes to file with the Court and serve upon affected counter-parties to Assumed Contracts a “Notice of Cure Amounts” (the “Cure Notice,” with such amounts set forth therein being “Cure Amounts”) no later than the day of the Auction. The Debtor requests that objections, if any, to the assumption and assignment of the Assumed Contracts or to the Cure Notice and any Cure Amount be filed and served so as to be actually received no later than the date that is three (3) calendar days after the Auction. If an objection to the assumption and assignment of the Assumed Contracts or to the Cure Notice and any Cure Amount cannot be resolved consensually among the parties, then the Debtor requests that the Court set a hearing to determine such matters no later than six (6) calendar days after the Auction concludes. The Cure Amounts set forth in the Cure Notice shall be binding on all parties unless an objection thereto is timely filed and served. The failure to timely file and serve an objection shall be deemed consent to the assumption and assignment of the Assumed Contracts and to the Cure Amount, and any and all objections thereto shall be deemed forever released and waived.

35. Section 365(f)(2) of the Bankruptcy Code provides that:

[t]he trustee may assign an executory contract or unexpired lease of the debtor only if –

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

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

36. 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.” 11 U.S.C. § 365(a). Section 365(b)(1) of the Bankruptcy Code, in turn, codifies the requirements for assuming an unexpired lease or executory contract of a 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.

37. The standard governing bankruptcy court approval of a debtor’s decision to assume or reject executory contracts or unexpired leases of nonresidential real property is whether the debtor’s reasonable business judgment supports assumption or rejection. *See, e.g., In re UAL Corp.*, 635 F.3d 312, 319 (7th Cir. 2011); *Orion Pictures Corp. v. Showtime Networks, Inc. (In re Orion Pictures Corp.)*, 4 F.3d 1095, 1099 (2d Cir. 1993); *In re Taylor*, 913 F.2d 102, 107 (3d Cir. 1990); *Sharon Steel Corp. v. Nat’l Fuel Gas Distrib. Corp.*, 872 F.2d 36, 39-40 (3d Cir. 1989); *Richmond Leasing Co. v. Capital Bank, N.A.*, 762 F.2d 1303, 1309 (5th Cir. 1985); *In re Edison Mission Energy*, Case No. 12-49219 (JPC), 2013 WL 5220139, at *5

(Bankr. N.D. Ill. Sept. 16, 2013) [Docket No. 1017]; *In re Bullet Jet Charter, Inc.*, 177 B.R. 593, 601 (Bankr. N.D. Ill. 1995) (“Courts determining whether to approve a debtor’s decision to reject an executory contract apply the ‘business judgment rule.’”) (citations omitted).

38. Courts give the phrase “adequate assurance of future performance” a “practical, pragmatic construction.” *See, e.g., In re Resource Tech. Corp.*, 624 F.3d 376, 383-84 (7th Cir. 2010) (adequate assurance required showing that performance was more likely to occur than not); *In re Sanshoe Worldwide Corp.*, 139 B.R. 585, 592 (S.D.N.Y. 1992) (the presence of adequate assurance should be “determined under the facts of each particular case”); *In re Fifth Avenue Originals*, 32 B.R. 648, 652 (Bankr. S.D.N.Y. 1983) (holding that adequate assurance was furnished on two separate grounds). Courts have consistently held that the phrase does not provide “total” assurances. *See, e.g., In re Prime Motor Inns Inc.*, 166 B.R. 993, 997 (Bankr. S.D. Fla. 1994) (“[a]lthough no single solution will satisfy every case, the required assurance will fall considerably short of an absolute guarantee of performance”); *In re Carlisle Homes, Inc.*, 103 B.R. 524, 538 (Bankr. D. N.J. 1988) (“the required assurance will fall considerably short of an absolute guarantee of performance”); *In re Natco Indus., Inc.*, 54 B.R. 436, 440 (Bankr. S.D.N.Y. 1985) (“[I]t does not mean absolute insurance that the debtor will thrive and make a profit”).

39. To the extent the Stalking Horse (if any), or the Successful Bidder, desires that the Debtor assume and assign some or all of the Debtor’s executory contracts or unexpired leases, the Debtor has determined that such assumption and assignment is an exercise of sound business judgment and is in the best interest of the Debtor, its estate and creditors. To the extent that any defaults exist under any Assumed Contract, the Debtor will cure, or make provisions for the cure of, any such default, as set forth in the Cure Notice.

F. Any sale, whether as going concern or a liquidation, should be approved free and clear of liens, claims, interests and encumbrances

40. Under section 363(f) of the Bankruptcy Code, a debtor in possession may sell property free and clear of any lien, claim, interest or encumbrance in such property if, among other things:

- (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 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.

Because section 363(f) is stated in the disjunctive, satisfaction of any one of its five requirements will suffice to warrant approval of the proposed sale. *See, e.g., In re Collins*, 180 B.R. 447, 449-50 (Bankr. E.D. Va. 1995) (“Section 363(f) is phrased in the disjunctive, such that only one of the enumerated conditions must be met in order for the Court to approve the proposed sale”); *In re P.K.R. Convalescent Ctrs., Inc.*, 189 B.R. 90, 93-94 (Bankr. E.D. Va. 1995) (“[S]ection 363 covers more situation than just sales involving liens . . . Section 363(f) addresses sales free and clear of any interest . . .”); *Scherer v. Fed. Nat’l Mortg. Ass’n (In re Terrace Chalet Apts., Ltd.)*, 159 B.R. 821, 827 (N.D. Ill. 1993) (sale extinguishes liens under section 363(f) as long as *one* of the five specified exceptions applies).

41. Section 363(f) permits the Sale to proceed free and clear of all liens, claims, interests and encumbrances, except for any liabilities specifically assumed by the Successful Bidder. Each lien, claim, interest or encumbrance that is not the result of an Assumed Liability

satisfies at least (1) of the five (5) conditions of section 363(f) of the Bankruptcy Code. Indeed, the Debtor believes that its primary secured lender with a lien on inventory and accounts receivable, FCC, will likely not oppose the underlying Sale at the Sale Hearing. Assuming such, any proposed sales of FCC's collateral free and clear of liens, claims, mortgages, encumbrances, and other interests would satisfy the requirements of section 363(f)(2) of the Bankruptcy Code. To the extent the Debtor seeks to sell any Assets on which an entity other than FCC has a lien, such party will receive the Sale Notice and will have an opportunity to object. Further, to the extent FCC has an objection but the Debtor nonetheless decides to proceed with the Sale, the Debtor will present appropriate evidence and lay the necessary foundation at the Sale Hearing to support approval of the Sale.

42. The Debtor further submits that any lien, claim, interest or encumbrance will be adequately protected by attachment to the net proceeds of the Sale. Accordingly, the Debtor requests that the Sale to the Successful Bidder be free and clear of all liens, claims, interest and encumbrances, with such liens, claims, and encumbrances to attach to the proceeds of the Sale.

G. The Stalking Horse, or the Successful Bidder, is a good faith purchaser pursuant to section 363(m) of the Bankruptcy Code, and the Sale should be deemed not avoidable pursuant to section 363(n) of the Bankruptcy Code.

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

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

44. While the Bankruptcy Code does not define "good faith," the Seventh Circuit has held that the good faith status of a purchaser may be "challenged after the fact" with evidence of

“collusion, fraud, or [other evidence of] bad faith.” *Hower v. Molding Systems Eng’g Corp.*, 445 F.3d 935, 938 (7th Cir. 2006). Similarly, in *In re Sullivan Cent. Plaza I, Ltd.*, 106 B.R. 934 (Bankr. N.D. Tex. 1998), the court stated that:

[t]he type of conduct of a Buyer which would destroy its good faith status under § 363(m) involves fraud, collusion between the Buyer and other bidders of the trustee, or an attempt to take grossly unfair advantages of other bidders.

106 B.R. at 938 (citing *Matter of Bleaufontaine, Inc.*, 634 F.2d 1383, 1388 (5th Cir. 1981)).

Further, the Third Circuit has stated that:

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

In re Abbotts Dairies of Pennsylvania, Inc., 788 F.2d 143, 147 (3d Cir. 1986) (citations omitted).

45. Typically, the kind of misconduct that would destroy a purchaser’s good faith status involves “fraud, collusion between the purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders.” *Hoese Corp. v. Vetter Corp. (In re Vetter Corp.)*, 724 F.2d 52, 56 (7th Cir. 1983) (quoting *In re Rock Indus. Mach. Corp.*, 572 F.2d 1195, 1198 (7th Cir. 1978)) (interpreting Bankruptcy Rule 805, the precursor to section 363(m)).

46. The Debtor submits, and will present evidence at the Sale Hearing that, the proposed Sale is an arms’-length transaction, in which the Stalking Horse, or Successful Bidder, and the Debtor at all times acted in good faith. In connection with approval of the proposed Sale, the Debtor requests that the Court make a finding that the Stalking Horse, or Successful Bidder, is a good faith purchaser and entitled to the protections of section 363(m) of the Bankruptcy Code.

CONCLUSION

47. The Debtor respectfully submits that entering an Order (i) approving the Bidding Procedures and the form and manner of the same and the Auction and Sale Hearing and (ii) (a) approving the Sale of the Acquired Assets free and clear of liens, claims, interests and encumbrances to the Purchaser(s) or to the Successful Bidder, (b) approving the assumption and assignment of the Assumed Contracts to the Successful Bidder and approving the Cure Amounts with respect thereto, and (c) approving the assumption of the Assumed Liabilities by the Successful Bidder, are in the best interests of the Debtor's estate and will maximize value for all constituents as described above.

NOTICE

48. Notice of this Motion has been provided to (i) the Office of the United States Trustee for the Northern District of Illinois, (ii) counsel to FCC, (iii) counsel to the Committee, and (iv) all other parties requesting notice in this chapter 11 case. The Debtor respectfully submits that no other or further notice need be provided.

WAIVER OF BANKRUPTCY RULE 6004(h)

49. The Debtor requests that the Court waive the fourteen (14) day stay period under Bankruptcy Rule 6004(h).

WAIVER OF PAGE LIMIT RESTRICTIONS

50. Given the nature of the issues addressed herein, the Debtor respectfully requests that the Court waive the fifteen (15) page limit established by Local Rule 5005-3(D).

NO PRIOR REQUEST

51. No prior request for the relief sought in this Motion has been made to this or any other court.

WHEREFORE the Debtor respectfully requests that the Court (A) enter an Order (i) approving the Bidding Procedures and the Break-Up Fee, (ii) scheduling the Auction and the Sale Hearing, and associated deadlines, and (iii) approving the form and manner of notice of the Auction and the Sale Hearing and certain bidding protections as described herein; (B) enter a second Order, at the Sale Hearing, (x) authorizing and approving the Sale free and clear of liens, claims, interests and encumbrances to the Stalking Horse (if any), or the Successful Bidder, (y) the assumption and assignment of the Assumed Contracts, and (z) the assumption of the Assumed Liabilities by the Successful Bidder; and (C) grant such other and further relief as may be just and proper.

Respectfully submitted this 23rd day of June, 2015.

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