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**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY**

In re:

INVITAE CORPORATION, *et al.*,

Debtors.¹

Chapter 11

Case No. 24-11362 (MBK)

(Joint Administration Requested)

¹ The last four digits of Debtor Invitae Corporation's tax identification number are 1898. A complete list of the Debtors in these chapter 11 cases and each such Debtor's tax identification number may be obtained on the website of the Debtors' proposed claims and noticing agent at www.kccllc.net/invitae. The Debtors' service address in these chapter 11 cases is 1400 16th Street, San Francisco, California 94103.



**DEBTORS' MOTION FOR ENTRY OF AN ORDER
(I) APPROVING BIDDING PROCEDURES AND BID PROTECTIONS,
(II) SCHEDULING CERTAIN DATES AND DEADLINES WITH
RESPECT THERETO, (III) APPROVING THE FORM AND MANNER OF
NOTICE THEREOF, (IV) ESTABLISHING NOTICE AND PROCEDURES
FOR THE ASSUMPTION AND ASSIGNMENT OF CONTRACTS AND
LEASES, (V) AUTHORIZING THE ASSUMPTION AND ASSIGNMENT
OF ASSUMED CONTRACTS, AND (VI) AUTHORIZING THE SALE OF ASSETS**

TO THE HONORABLE UNITED STATES BANKRUPTCY JUDGE:

The above-captioned debtors and debtors in possession (collectively, the “Debtors”) respectfully state the following in support of this motion (this “Motion”):²

Relief Requested

1. The Debtors seek entry of an order, substantially in the form attached hereto as **Exhibit A** (the “Bidding Procedures Order”), (a) approving the Bidding Procedures, by which the Debtors will solicit and select the highest or otherwise best offer(s) for the sale or sales of all, substantially all, or any portion of the Assets; (b) approving the Bid Protections relating to Stalking Horse Bidder(s), if any; (c) scheduling certain dates with respect thereto; (d) approving the manner of notice of the Auction and Sale Hearing; (e) approving procedures for the assumption and assignment of certain Executory Contracts and Unexpired Leases in connection with the Sale Transaction(s), if any; and (f) authorizing the assumption and assignment of assumed contracts.

2. Additionally, the Debtors will seek entry of one or more orders (the “Sale Order”) at the proposed hearing on May 2, 2024, or as soon thereafter as the Debtors may be heard (subject

² A detailed description of the Debtors and their businesses, including the facts and circumstances giving rise to the Debtors’ chapter 11 cases, is set forth in the *Declaration of Ana Schrank, Chief Financial Officer of Invitae Corporation, in Support of Chapter 11 Filing, First Day Motions, and Access to Cash Collateral* (the “First Day Declaration”), filed contemporaneously herewith. Capitalized terms used but not immediately defined are defined later in this Motion or in the First Day Declaration, the Cash Collateral Order, the Swift Declaration, or the Bidding Procedures, as applicable.

to court availability) (the “Sale Hearing”), (a) authorizing and approving the Sale Transaction(s) with the Successful Bidder(s) on the terms substantially set forth in the Successful Bid(s); (b) authorizing and approving the sale of the Debtors’ Assets free and clear of liens, claims, encumbrances, and other interests to the extent set forth in an asset purchase agreement with any Successful Bidder(s); and (c) authorizing the assumption and assignment of Executory Contracts and Unexpired Leases as set forth in an asset purchase agreement with any Successful Bidder(s).

3. In support of this Motion, the Debtors respectfully submit the *Declaration of Andrew Swift, Managing Director of Moelis & Company LLC, in Support of the Debtors’ Motion for Entry of an Order (I) Approving Bidding Procedures and Bid Protections, (II) Scheduling Certain Dates and Deadlines with Respect Thereto, (III) Approving the Form and Manner of Notice Thereof, (IV) Establishing Notice and Procedures for the Assumption and Assignment of Contracts and Leases, (V) Authorizing the Assumption and Assignment of Assumed Contracts, and (VI) Authorizing the Sale of Assets* (the “Swift Declaration”), filed contemporaneously herewith.

Jurisdiction and Venue

4. The United States Bankruptcy Court for the District of New Jersey (the “Court”) has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the *Standing Order of Reference to the Bankruptcy Court Under Title 11*, entered July 23, 1984, and amended on September 18, 2012 (Simandle, C.J.). The Debtors confirm their consent to the Court entering a final order in connection with this Motion to the extent that it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments in connection herewith consistent with Article III of the United States Constitution.

5. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

6. The bases for the relief requested herein are sections 105(a), 363, 365, 503, and 507 of title 11 of the United States Code (the “Bankruptcy Code”), rules 2002, 6004, and 6006(a) of

the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), and rules 6004-1, 6004-2, and 9013-1(a)(3) of the Local Bankruptcy Rules for the District of New Jersey (the “Local Rules”).

Background

7. On February 13, 2024 (the “Petition Date”), each Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. The Debtors are operating their businesses and managing their property as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. Concurrent with the filing of this Motion, the Debtors filed a motion requesting procedural consolidation and joint administration of these chapter 11 cases pursuant to Bankruptcy Rule 1015(b). No request for the appointment of a trustee or examiner has been made in these chapter 11 cases, and no official committees have been appointed or designated.

Introduction

8. As described in the First Day Declaration, the Debtors commenced these chapter 11 cases to address their balance sheet and liquidity issues. In light of the Debtors’ mounting liquidity challenges on December 14, 2023, the Debtors, with the assistance of their proposed investment banker Moelis & Company LLC (“Moelis”), launched a third-party marketing process (the “Marketing Process”) to solicit proposals for one or more potential sales of all, substantially all, or any portion of the Debtors’ assets (the “Assets,” and such sale(s), the “Sale Transaction(s)”). The Debtors, with Moelis’ assistance, prepared a confidential information memorandum with extensive information on the Assets and populated a virtual data room containing significant diligence documentation. The Debtors then commenced the Marketing Process, which has included outreach to twenty-five (25) identified strategic parties and has resulted in nineteen (19) introductory calls, execution of thirteen (13) non-disclosure agreements with access granted to virtual data rooms, financial models, and business segment standalone models, and the granting of further access to clean team virtual data rooms to a subset of these parties. On January 19, 2024,

Moelis distributed a formal process letter informing these strategic investors that initial indications of interest needed to be submitted no later than February 9, 2024. Moelis' outreach culminated in the receipt of several proposals that reflect strong prospects for a robust in-court sale process and competitive Auction.

9. The prepetition Marketing Process ran in parallel with the Company's engagement with the Required Holders, represented by Sullivan & Cromwell LLP, as legal counsel, and Perella Weinberg Partners L.P., as investment banker, on the terms of a broader restructuring transaction, as memorialized in the Transaction Support Agreement, executed February 13, 2024 (the "TSA"). In accordance with the TSA, the Debtors filed these chapter 11 cases to continue the Marketing Process in court, which the Debtors believe is the most value-maximizing path forward. The contemplated Sale Transaction(s) includes an expedited timeline that allows the Debtors to administer these chapter 11 cases quickly and efficiently.

10. Pursuant to the TSA, the Debtors must satisfy certain milestones (the "TSA Milestones") for the sale of their Assets, including:

- no later than sixty-six (66) days after the Petition Date, the auction or auctions for the Sale Transaction(s), if any (the "Auction"), shall have occurred;
- no later than fifteen (15) days after the conclusion of the Auction, the Bankruptcy Court shall have entered the Sale Order;
- no later than twenty-five (25) days after entry of the Sale Order, subject to the Bankruptcy Court availability, a hearing to approve the Debtors' disclosure statement (the "Disclosure Statement") on a conditional basis shall have occurred;
- no later than forty-one (41) days after the Disclosure Statement is approved on a conditional basis, subject to Bankruptcy Court availability, a joint hearing to consider the adequacy of the Disclosure Statement and confirmation of the Debtors' chapter 11 plan of reorganization (the "Plan") shall have occurred; and
- no later than one hundred fifty-nine (159) days after the Petition Date, the closing of the Sale Transaction(s) and the effective date of the Plan shall have occurred.

11. Conducting a thorough yet expedited bidding process and consummating a Sale Transaction(s) is vitally important to the Debtors' efforts to maximize value. Failure to comply with the TSA Milestones would place the Debtors in default under the TSA and the Cash Collateral Order. Such a result can, and should, be avoided in order to provide the Debtors with the best chance to maximize the value of their estates. Such Sale Transaction(s) would benefit not only the Debtors, but their vendors, dedicated employees, lenders, and other key stakeholders, as well.

12. To preserve the value of the Debtors' estates—and to offer the Debtors a chance to increase the ultimate value provided by the monetization and disposition of their Assets—the Debtors propose the bidding procedures attached as Exhibit 1 to the Bidding Procedures Order (the "Bidding Procedures"). The Bidding Procedures provide substantial flexibility with respect to the structure of any Sale Transaction(s). Furthermore, while the Debtors have not yet selected a stalking horse (if any) to serve as a committed buyer of some or all of the Assets (the "Stalking Horse Bidder"), the Bidding Procedures provide the Debtors with flexibility to select a Stalking Horse Bidder and grant Bid Protections prior to the Sale Hearing after notice and an opportunity to object. The Debtors will consider all viable options in accordance with the Bidding Procedures before determining if selling Assets will, in their business judgment, maximize value for the estate. Any delay to the sale timeline would hinder the Debtors' efforts to maximize value. Accordingly, the proposed Bidding Procedures should be approved.

Proposed Sale Process and Selection of Stalking Horse Bidder

I. The Bidding Procedures.

13. The Debtors seek approval of the Bidding Procedures to establish an open process for the solicitation, receipt, and evaluation of bids in a fair, accessible, and expeditious manner. The Bidding Procedures facilitate the continuation of the Marketing Process to solicit interest in a

sale of the Assets, which is a process the Debtors have been diligently progressing through with the assistance of Moelis.

14. The timeline set forth in the Bidding Procedures is calculated to balance the need to provide adequate notice to parties in interest and any person or entity interested in purchasing the Assets (a “Potential Bidder”) with the need to run an expeditious and efficient sale process. The Bidding Procedures are designed to generate the highest or otherwise best available recoveries to the Debtors’ stakeholders by encouraging prospective bidders to submit competitive, value-maximizing bids. The Debtors believe that the Bidding Procedures and the timeline set forth therein are in the best interests of the Debtors’ estates, will establish the extent of the market for the Debtors’ Assets, and provide interested parties with sufficient opportunity to participate. Because the Bidding Procedures are attached as Exhibit 1 to the Bidding Procedures Order, they are not restated in their entirety herein. Generally speaking, however, the Bidding Procedures establish the following, among other things:³

- a. **Public Announcement of Auction.** Within two (2) business days after entry of the Bidding Procedures Order, the Debtors shall serve on the parties that receive notice of this Motion (a) a notice in the form attached to the Bidding Procedures as Schedule 1 (the “Auction Notice”) setting forth the date, time, and place of the Auction and the Sale Hearing and the deadlines and procedures for objecting to the proposed Sale Transaction(s), and (b) the Bidding Procedures Order and the Bidding Procedures. Within three (3) business days after entry of the Bidding Procedures Order, the Debtors shall publish the Auction Notice, with any modifications necessary for ease of publication, on one occasion in *The New York Times* (National Edition) to provide notice to any other potential interested parties, and (iii) post the Auction Notice on their case website,

³ This summary is provided in accordance with Local Rule 6004-2(b), for the convenience of the Court, and for parties in interest. To the extent there is any conflict between this summary and the Bidding Procedures, the Bidding Procedures govern in all respects.

<https://www.kccllc.net/invitae>. The Auction Notice shall include a complete list and general description of the Assets for sale.

See Bid. Proc., at § II.

b. **Potential Bidder Qualifications.** Each Potential Bidder must deliver or have previously delivered to the Debtors the following preliminary documentation:

1. an executed confidentiality agreement (a “Confidentiality Agreement”) in form and substance acceptable to the Debtors;
2. a statement of what portion of the Assets that the Potential Bidder intends to acquire;
3. sufficient information that the Potential Bidder has or can reasonably obtain the financial capacity to close a purchase of any portion, all, or substantially all of the Debtors’ Assets, the adequacy of which must be acceptable to the Debtors, in consultation with the Consultation Parties;⁴ and
4. a statement detailing whether the Potential Bidder is partnering with or otherwise working with any other interested party in connection with the potential submission of a joint Bid, the identity of any such party or parties, and a concise description of the nature of such partnership or joint Bid to the extent reasonably practicable.

See Bid. Proc., at § III.

c. **Qualified Bid Requirements.** To participate in the Auction, Potential Bidders that have submitted necessary and acceptable documentation (each, an “Acceptable Bidder”) must submit to the Debtors and their advisors an irrevocable offer for the purchase of some or all of the Assets (each, a “Bid”) meeting the criteria set forth in the Bidding Procedures prior to the Bid Deadline, (each, a “Qualified Bid”), including:

1. **Purchased Assets and Assumed Liabilities:** Each Bid must clearly state the following: (a) the particular Assets, or the portion thereof, identified with reasonable specificity to be purchased and/or liquidated or otherwise disposed of; (b) the liabilities and obligations to be assumed, including any debt and cure costs to be

⁴ “Consultation Parties” means the Required Holders and any statutory committee appointed in these cases; *provided, however*, that to the extent the Required Holders submit a Bid, including a credit bid (a “Credit Bid”), for any Assets, such Required Holders shall not be a Consultation Party with respect to the evaluation and qualification of competing Bids for such Assets included in the Required Holders’ Bid, including a Credit Bid, or with respect to seeking and/or obtaining information about other Bids, but shall remain a Consultation Party for other purposes set forth in the Bidding Procedures and Bidding Procedures Order.

assumed; (c) any executory contracts (the “Executory Contracts”) and any unexpired leases (the “Unexpired Leases”) to be received by assignment, and (d) as applicable, whether the Acceptable Bidder intends to operate the Debtors’ business as a going concern;

2. **Good Faith Deposit:** The Bid must be accompanied by a cash deposit in the amount equal to ten (10) percent of the aggregate purchase price of the Bid to be held in an interest-bearing escrow account to be identified and established by the Debtors (the “Good Faith Deposit”). To the extent that a Bid is modified at or prior to the Auction, the applicable Acceptable Bidder must adjust its Good Faith Deposit so that it equals ten (10) percent of the increased aggregate purchase price promptly and in no event later than one (1) business day following the conclusion of the Auction;
3. **Purchase Price:** Each Bid must (a) clearly set forth the purchase price to be paid, assuming a purchase of the applicable Assets and any assumption of liabilities (the “Purchase Price”), (b) identify separately the cash and non-cash components of the Purchase Price, and (c) indicate the allocation of the Purchase Price among the applicable Assets. The Purchase Price should be a single point value in U.S. Dollars for the applicable Assets on a cash-free, debt-free basis. Any Bid for substantially all of the Assets must also include a statement as to whether the Bid is conditioned on purchasing all Assets or whether the Qualified Bid should be viewed as a separate Bid for one or more sets of Assets. The Debtors reserve the right, in consultation with the Consultation Parties, to ask any Acceptable Bidder to allocate the value ascribed to a Bid for any particular Asset and to inquire about any significant assumptions on which such valuations are based;
4. **Sources of Financing:** To the extent that the Bid is not accompanied by evidence of the Acceptable Bidder’s capacity to consummate the Sale Transaction(s) set forth in its Bid with cash on hand, the Bid must include committed financing, documented to the Debtors’ satisfaction, that demonstrates that the Acceptable Bidder has received sufficient debt and/or equity funding commitments to satisfy the Acceptable Bidder’s obligations under the proposed Sale Transaction(s) and other obligations under its Bid. Such funding commitments or other financing must be unconditional and must not be subject to any internal approvals, syndication requirements, diligence, or credit committee approvals, and shall have covenants and conditions acceptable to the Debtors;
5. **Same or Better Terms; Bid Documents:** Each Bid must include duly executed and non-contingent, where applicable, transaction documents necessary to effectuate the transactions contemplated in

the Bid (the “Bid Documents”). The Bid Documents shall include: (a) a purchase agreement, based on a form that the Debtors shall make available to Acceptable Bidders via the Debtors’ electronic data room pursuant to the due diligence process (the “Form APA”), duly executed by such bidder, containing only changes to the Form APA that are reasonably necessary to effectuate the Bid, (b) a schedule of contracts and leases to be assumed or rejected to the extent applicable to the Bid, (c) with respect to the form of purchase agreement, a redline of such agreement marked to reflect the amendments and modifications made to the Form APA, (d) any other material documents integral to such Bid, and (e) a statement from the Acceptable Bidder that (i) it is prepared to enter into and consummate the transactions contemplated in the Form APA, no later than ten (10) business days after the conclusion of the Auction, subject to any necessary regulatory approvals, as specified by the Acceptable Bidder (or, if no Auction is held, the deadline by which all binding Bids must be actually received pursuant to the Bidding Procedures (the “Bid Deadline”)) and (ii) the Qualified Bid will be irrevocable (whether or not such Qualified Bid is selected as the highest or otherwise best bid to purchase the applicable Assets (each, a “Successful Bid”) or next highest or otherwise best bid (the “Back-Up Bid”) until the consummation of the Sale Transaction(s));

6. **No Qualified Bidder Bid Protections:** Unless such Qualified Bid is selected as a stalking horse bid (a “Stalking Horse Bid”), a Qualified Bid must include a statement that the bid does not entitle such bidder to any break-up fee, termination fee, expense reimbursement, or similar type of payment or reimbursement and a waiver of any substantial contribution administrative expense claim under section 503(b) of the Bankruptcy Code related to bidding for the applicable Assets;
7. **Employee Obligations:** Each Bid must indicate whether the Acceptable Bidder intends to hire all employees of the Debtors. If the Acceptable Bidder does not intend to hire all employees of the Debtors, the Acceptable Bidder must include a description of the Acceptable Bidder’s intentions with respect to the relevant members of the Debtors’ current management team and other employees who are employed primarily in connection with the applicable Assets, and a description of any contemplated incentive plan, to the extent applicable;
8. **Authorization:** Each Bid must contain evidence that the Acceptable Bidder has obtained all necessary authorizations or approvals from its shareholders and/or its board of managers or directors, or any other internal and other approvals, as applicable,

with respect to the submission of its Bid and the consummation of the transactions contemplated in such Bid;

9. **Contingencies; No Financing or Diligence Outs:** The Bid must not contain any contingencies as to the validity, effectiveness, or binding nature of the Bid, including, without limitation, contingencies for due diligence and inspection or financing of any kind (including any conditions pertaining to financial performance, conditions, or prospects) and all diligence must be completed before the Bid Deadline;
10. **Identity:** Each Bid must fully disclose the identity of each entity and each entity's shareholders, partners, investors, and ultimate controlling entities that will be bidding for or purchasing the applicable Assets or otherwise participating in connection with such Bid, including each equity holder or other financial backer of the bidder (including if such bidder is an entity formed for the purpose of consummating the transactions contemplated by such Bid), and the complete terms of any such participation, along with sufficient evidence that the Acceptable Bidder is legally empowered to complete the transactions on the terms contemplated by the parties. Each Bid must also include contact information for the specific person(s) whom Moelis and Kirkland & Ellis LLP should contact regarding such Bid;
11. **As-Is, Where-Is:** Each Bid must include a written acknowledgement and representation that the Acceptable Bidder: (i) has had an opportunity to conduct any and all due diligence regarding the Sale Transaction(s) prior to making its offer; (ii) has relied solely upon its own independent review, investigation, and/or inspection of any documents and/or the assets in making its Bid; (iii) did not rely on or receive from any person or entity (including any of the Debtors or their advisors or other representatives) any written or oral statements, representations, promises, warranties, or guaranties whatsoever, whether express, implied, by operation of law, or otherwise, regarding the completeness of any information provided in connection therewith or the Auction (if any), except as expressly stated in the Acceptable Bidder's purchase agreement; and (iv) did not engage in collusive conduct and acted in good faith in submitting its Bid
12. **Joint Bids and Merger Proposals:** The Debtors will be authorized to approve joint bids in their business judgment, including, but not limited to, any bids that contemplate acquiring equity or assets through a merger or similar transaction, including if a proposed bid contemplates additional financing from one or several participating parties, on a case by case basis, so long as such bid meets the

Qualified Bid Requirements and the applicable bidders otherwise comply with the Bidding Procedures;

13. **Adequate Assurance of Future Performance:** Each Bid must (i) identify the Executory Contracts and Unexpired Leases to be assumed or assumed and assigned in connection with the proposed Sale Transaction(s), (ii) provide for the payment of all cure amounts (the “Cure Amounts”) related to such Executory Contracts and Unexpired Leases by the Acceptable Bidder, (iii) demonstrate, in the Debtors’ business judgment, in consultation with the Consultation Parties, that the Acceptable Bidder can provide adequate assurance of future performance under all such Executory Contracts and Unexpired Leases sufficient to satisfy the requirements of sections 365(b)(3) and 365(f)(2)(B) of the Bankruptcy Code; and (iv) provide the following documentation: (a) the proposed assignee (the “Proposed Assignee”) and any guarantors, as applicable; (b) financial statements for the calendar or fiscal years ended 2022 and 2023 for the Proposed Assignee and any guarantors, as applicable, and other financial information about the Proposed Assignee to demonstrate its ability to provide adequate assurance of future performance; and (c) a summary of the Proposed Assignee’s proposed use of the premises;
14. **Acknowledgement of Compliance with Bidding Procedures, Bidding Procedures Order, Bankruptcy Code, and Non-Bankruptcy Law:** Each Bid must acknowledge that it has complied, and will continue to comply, in all respects with these Bidding Procedures, the Bidding Procedures Order, the Bankruptcy Code, and any applicable non-bankruptcy law;
15. **Privacy Policies.** The Acceptable Bidder must comply in all respects with the Debtors’ consumer privacy practices, which do not restrict the transfer of personally identifiable information of the Debtors’ customers in connection with a bankruptcy, merger, acquisition, or other business transaction, involving all or a portion of the Debtors’ assets or business, and each Bid must contain a statement acknowledging such compliance;
16. **No Collusion:** The Acceptable Bidder must (a) acknowledge in writing that it has not engaged in any collusion with respect to any Bids or the Sale Transaction(s), specifying that it did not agree with any Acceptable Bidders or Potential Bidders to control price or otherwise with respect to any of the Assets or the Sale Transaction(s) and processes contemplated by the Bidding Procedures; and (b) agree not to engage in any collusion with respect to any Bids, the Auction, or the Sale Transaction(s). The Acceptable Bidder must further indicate if it has or intends to coordinate its bid, or otherwise

bid with, any current or former member of the Debtors' or their affiliates' executive management or board of directors. For the avoidance of doubt, this requirement does not restrict Potential Bidder(s) from working with other Potential Bidder(s) with the Debtors' prior written consent (email shall suffice);

17. **Good Faith Offer:** Each Bid must constitute a good faith, *bona fide* offer to consummate the Sale Transaction(s);
18. **Irrevocable:** Each Bid must state that in the event a Bid is chosen as the Back-Up Bid, it shall remain irrevocable until the Debtors and the any Qualified Bidder that submits a Successful Bid (a "Successful Bidder") consummate the applicable Sale Transaction(s);
19. **Back-Up Bidder:** Each Bid shall provide that the Acceptable Bidder will serve as a back-up bidder (the "Back-Up Bidder") if the Acceptable Bidder's Bid is the Back-Up Bid with respect to the applicable Assets;
20. **Regulatory and Third-Party Approvals and Covenants:** A Bid must set forth each regulatory and third-party approval, if any, required for the Acceptable Bidder to consummate the applicable Sale Transaction(s), the time period within which the Acceptable Bidder expects to receive such regulatory and third-party approvals, and those actions the Acceptable Bidder will take to ensure receipt of such approvals as promptly as possible;
21. **Regulatory Forms and Covenants:** Each Bid by an Acceptable Bidder must include the forms necessary for submission of regulatory approval (other than HSR and non-U.S. antitrust filings) of the Sale Transaction(s) (as applicable), including, for the avoidance of doubt, to the Office of Health Care Affordability pursuant to the California Health Care Quality and Affordability Act;
22. **Expected Closing Date and Time Frame for Closing:** Each Bid must state the Acceptable Bidder's expected date of closing of the Sale Transaction(s) (the "Closing") and must be reasonably likely (based on antitrust or other regulatory issues, experience, and other considerations) to be consummated, if selected as the Successful Bid, within a time frame acceptable to the Debtors in consultation with the Consultation Parties;
23. **No Fees:** Except to the extent the Acceptable Bidder is approved, prior to the Bid Deadline and in accordance with Bidding Procedures Order, to be eligible to receive (x) a break-up fee

(the “Break-Up Fee”) and/or (y) reimbursement of reasonable and documented out of pocket fees and expenses (the “Expense Reimbursement” and together with the Break-Up Fee, the “Bid Protections”) in an aggregate amount for (x) and (y) combined not to exceed three (3) percent of the Purchase Price as a Stalking Horse Bidder, each Acceptable Bidder presenting a Bid or Bids will bear its own costs and expenses (including legal fees) in connection with the proposed transaction, and by submitting its Bid(s) is agreeing to disclaim any right to receive any payments or amounts analogous to a break-up fee, expense reimbursement, termination fee, or other similar form of compensation;

For the avoidance of doubt, each Acceptable Bidder by submitting its Bid is agreeing to refrain from and waive any assertion or request for reimbursement on any basis, including under section 503(b) of the Bankruptcy Code; *provided* that the Debtors are authorized in their business judgment to provide the Bid Protections to the Stalking Horse Bidder(s) in connection with any stalking horse asset purchase agreement (each, a “Stalking Horse APA”) in accordance with these Bidding Procedures; *provided further* that to the extent any Stalking Horse Bidder has submitted a Credit Bid, the Bid Protections shall not be permitted;

24. **Adherence to Bidding Procedures:** By submitting its Bid, each Acceptable Bidder is agreeing to abide by and honor the terms of these Bidding Procedures and agrees not to submit a Bid or seek to reopen the Auction after conclusion of the Auction;
25. **Consent to Jurisdiction:** The Acceptable Bidder must submit to the jurisdiction of the Court and waive any right to a jury trial in connection with any disputes relating to the Debtors’ qualification of Bids, to the Auction, the Sale Transaction(s) and the construction and enforcement of these Bidding Procedures, preliminary bid documents, the Bids, the Bid Documents, and any and all other agreements entered into in connection with any proposed Sale Transaction(s), the Closing, and any other related matter; and
26. **Conditions to Closing:** Each Bid must identify with particularity each and every condition to closing, including the Executory Contract and Unexpired Leases for which assumption and assignment is required.

See Bid. Proc., at § IV.

- d. **Stalking Horse Bid Protections.** Pursuant to the Bidding Procedures Order, the Debtors may select one or more Acceptable Bidders to act as a

Stalking Horse Bidder in connection with the Auction and enter into a Stalking Horse APA with each Stalking Horse Bidder.

In the event that the Debtors, with the consent of the Required Holders (not to be unreasonably withheld, delayed, or conditioned) and in consultation with any statutory committees appointed in these cases, enter into a Stalking Horse APA with one or more Stalking Horse Bidders, within two (2) business days of entry, the Debtors shall file a notice and proposed form of order with the Court (the “Stalking Horse Notice”) and serve the Stalking Horse Notice on the Stalking Horse Bidder, the U.S. Trustee, and the Consultation Parties. The Stalking Horse Notice shall: (i) set forth the identity of the Stalking Horse Bidder (and if the Stalking Horse Bidder is a newly formed entity, then the Stalking Horse Bidder’s parent company or sponsor); (ii) set forth the amount of the Stalking Horse Bid and what portion (if any) is cash; (iii) state whether the Stalking Horse Bidder has any connection to the Debtors other than those that arise from the Stalking Horse Bid; (iv) specify any proposed Bid Protections (including the amount and calculation thereof); (v) attach the Stalking Horse APA, including all exhibits, schedules and attachments thereto; (vi) specify the Assets to which the Stalking Horse Bid relates; and (vii) sets forth the deadline to object to the Stalking Horse Bidder designation and any Bid Protections. If there are no objections to the Stalking Horse Notice within five (5) days of filing with the Court, (the “Notice Period”), the Debtors may submit an order to the Court that incorporates any comments received during the Notice Period that authorizes the Debtors to designate a Stalking Horse Bidder and to enter into a Stalking Horse APA, without the need for further hearing. If a party files an objection to the Stalking Horse Notice, the Court shall hold a hearing after the expiration of the Notice Period and as soon thereafter as the Court is available.

Upon entry of the order approving the designation of a Stalking Horse Bidder and Stalking Horse APA, the Debtors are authorized to incur and pay the Bid Protections to each Stalking Horse Bidder in accordance with the terms of the Stalking Horse APA.

Except as otherwise set forth herein, no person or entity, other than a Stalking Horse Bidder that has not submitted a Credit Bid, shall be entitled to any expense reimbursement, breakup fees, “topping,” termination, or other similar fee or payment, and by submitting a bid, such person or entity is deemed to have waived their right to request or to file with this Court any

request for expense reimbursement or any fee of any nature, whether by virtue of Bankruptcy Code section 503(b) or otherwise.

See Bid. Proc., at § IX.

15. Importantly, the Bidding Procedures recognize the Debtors’ fiduciary obligations to maximize value, and, as such, do not impair the Debtors’ ability to consider all Qualified Bid proposals, and preserve the Debtors’ right to modify the Bidding Procedures in accordance with its terms as necessary or appropriate to maximize value for their estates.

II. The Proposed Schedule.

16. The Debtors are seeking approval of the Bidding Procedures and the following proposed timeline for the Sale Transaction(s) (the dates set forth below, the “Sale Schedule”) to establish a clear and open process for the solicitation, receipt, and evaluation of third-party bids on a timeline that allows the Debtors to consummate a Sale Transaction(s) that is, above all else, value maximizing. Moreover, the Debtors, in their sound business judgment, reserve the right to alter the timing of the Sale Schedule as necessary under the circumstances, or to conduct multiple Sale Transaction(s) across one or more Auctions in order to maximize the value of the estates, in each case in accordance with the Bidding Procedures. The Debtors respectfully request that the Court approve the following Sale Schedule:

Action	Description	Deadline
Stalking Horse Deadline	The deadline by which the Debtors may choose a Stalking Horse Bidder and enter into a Stalking Horse APA.	March 29, 2024, at 4:00 p.m., prevailing Eastern Time.
Stalking Horse Notice Deadline (if applicable)	The deadline by which the Debtors must file a Stalking Horse Notice.	Within two (2) business days after entry into a Stalking Horse APA.
Bid Deadline	The deadline by which all binding Bids must be actually received pursuant to the Bidding Procedures.	April 10, 2024, at 4:00 p.m., prevailing Eastern Time.
Auction (if any)	The date and time of the Auction, which will be held at the offices of Kirkland & Ellis, LLP, 601	April 17, 2024, at 10:00 a.m. prevailing Eastern Time, if any.

Action	Description	Deadline
	Lexington Avenue, New York, New York, 10022.	
Notice of Successful Bidder	Within two (2) business days upon the conclusion of the Auction, the Debtors will file on the docket, but not serve, a notice identifying the Successful Bidder (the " <u>Notice of Successful Bidder</u> "), identifying the applicable Successful Bidder, Assets, and key terms of the agreement.	Within two (2) business days upon the conclusion of the Auction (if any).
Sale Objection and Adequate Assurance of Future Performance Objection Deadline	The deadline by which objections to the Successful Bidder and Sale Transactions, if any, or to dispute the ability of the Successful Bidder to provide adequate assurance of future performance with respect to any Executory Contract or Unexpired Lease, must be made.	April 28, 2024, at 4:00 p.m., prevailing Eastern Time.
Sale Hearing	The hearing, if any, before the Court to consider approval of the Successful Bid or Successful Bids, pursuant to which the Debtors and the Successful Bidder or Successful Bidders will consummate the Sale Transaction(s).	May 2, 2024, or as soon thereafter as the Debtors may be heard.

17. The timelines contemplated in the foregoing Sale Schedule are essential to maximize value for the Debtors’ estates and enable a faster emergence from chapter 11. The Debtors believe that the relief sought by this Motion appropriately balances the need to provide all parties in interest with notice and due process, affords the Debtors sufficient time to generate interest in any or all of the Assets, and provides the Debtors with an expeditious process commensurate with the Debtors’ liquidity constraints, prepetition processes, and the terms and conditions of the TSA. In short, the relief sought by this Motion is the Debtors’ best chance to maximize value. Accordingly, the Debtors believe the relief requested herein is in the best interest of the Debtors’ estates, will provide interested parties with sufficient opportunity to participate in the process, and, therefore, should be approved.

III. Form and Manner of Auction Notice.

18. The Auction will be held on Wednesday, April 17, 2024, at 10:00 a.m., prevailing Eastern Time (or such other date as selected by the Debtors), at the offices of the proposed co-counsel to the Debtors: Kirkland & Ellis LLP, 601 Lexington Ave., New York, NY 10022.

19. Within two (2) business days after entry of the Bidding Procedures Order, the Debtors will cause the Auction Notice to be served on the parties that receive notice of this Motion. In addition, within three (3) business days after entry of the Bidding Procedures Order, the Debtors will post the Auction Notice on their restructuring website, www.kcellc.net/invitae, and publish the Auction Notice, with any modifications necessary for ease of publication, on one occasion in *The New York Times* (National Edition), to provide notice to any other potential interested parties. The Debtors submit that, in light of the nature of the relief requested, no other or further notice need be given.

20. The Auction Notice is reasonably calculated to provide all interested parties with timely and proper notice of the proposed Sale Transaction(s), including the date, time, and place of the Auction (if any), the Bidding Procedures, and the dates and deadlines related thereto. Accordingly, the Debtors request that the form and manner of the Auction Notice be approved and no other or further notice of the Auction be required.

Basis for Relief

I. The Relief Sought in the Bidding Procedures Order Is in the Best Interests of the Debtors' Estates and Should Be Approved.

21. Courts have made clear that a debtor's business judgment is entitled to substantial deference with respect to the procedures to be used in selling an estate's assets. *See, e.g., In re Culp*, 550 B.R. 683, 697 (D. Del. 2015) (“In determining whether to authorize use, sale or lease of property of the estate under Section 363, courts require the [debtor] to show that a sound

business purpose justifies such actions.’ If the [debtor’s] decision evidences a sound business purpose, then the Bankruptcy Court should approve the sale.”) (quoting *In re Montgomery Ward Holding Corp.*, 242 B.R. 147, 153 (D. Del. 1999)); *In re Martin*, 91 F.3d 389, 395 (3d Cir. 1996) (citing *In re Schipper*, 933 F.2d 513, 515 (7th Cir. 1991)); *In re Schipper*, 933 F.2d at 515 (internal citations and quotations omitted) (“Under Section 363, the debtor in possession can sell property of the estate . . . if he has an ‘articulated business justification’”); see *In re Integrated Res., Inc.*, 147 B.R. 650, 656 (S.D.N.Y. 1992) (applying business judgment rule to bidding procedures and incentives and noting that “[c]ourts are loath to interfere with corporate decisions absent a showing of bad faith, self-interest, or gross negligence”).

22. The paramount goal in any proposed sale of property of the estate is to maximize the proceeds received by the estate. See *In re Edwards*, 228 B.R. 552, 561 (Bankr. E.D. Pa. 1998) (“The purpose of procedural bidding orders is to facilitate an open and fair public sale designed to maximize value for the estate.”); *In re Food Barn Stores, Inc.*, 107 F.3d 558, 564–65 (8th Cir. 1997) (in bankruptcy sales, “a primary objective of the [Bankruptcy] Code [is] to enhance the value of the estate at hand.”); *Integrated Res., Inc.*, 147 B.R. at 659 (“It is a well-established principle of bankruptcy law that the objective of the bankruptcy rules and the [Debtor]’s duty with respect to such sales is to obtain the highest price or greatest overall benefit possible for the estate.”) (citation omitted).

23. To that end, courts uniformly recognize that procedures intended to enhance competitive bidding are consistent with the goal of maximizing the value received by the estate and, therefore, are appropriate in the context of bankruptcy transactions. See *Integrated Res., Inc.*, 147 B.R. at 659 (bidding procedures “are important tools to encourage bidding and to maximize the value of the debtor’s assets”); *In re Fin. News Network, Inc.*, 126 B.R. 152, 156 (Bankr.

S.D.N.Y. 1991) (“court-imposed rules for the disposition of assets . . . [should] provide an adequate basis for comparison of offers, and [should] provide for a fair and efficient resolution of bankrupt estates”). Where there is a court-approved auction process, the assets are presumed to sell for a full and fair price because the best way to determine value is exposure to the market. *See Bank of Am. Nat’l Trust & Sav. Ass’n. v. LaSalle St. P’ship*, 526 U.S. 434, 457 (1999); *see also In re Trans World Airlines, Inc.*, No. 01-00056, 2001 WL 1820326, at *4 (Bankr. D. Del. 2001) (while a “sale transaction does not require an auction procedure,” “the auction procedure has developed over the years as an effective means for producing an arm’s length fair value transaction.”).

24. Approval of bidding procedures on or around the Petition Date following the first-day hearing is appropriate where the debtors have demonstrated that such approval maximizes estate value, and this Court has approved bidding procedures on such a timeline several times. *See, e.g., In re Rite Aid Corp.*, No. 23-18993 (MBK) (Bankr. D.N.J. Oct. 18, 2023); *In re Bed Bath & Beyond Inc.*, No. 23-13359 (VFP) (Bankr. D.N.J. April 25, 2023); *In re David’s Bridal, LLC*, No. 23-13131 (CMG) (Bankr. D.N.J. April 17, 2023); *In re SLT Holdco, Inc.*, No. 20-18368 (MBK) (Bankr. D.N.J. July 13, 2020).

25. Here, the proposed Bidding Procedures will promote active bidding from seriously interested parties and will maximize the value of their Assets for the benefit of the Debtors’ estates. The proposed Bidding Procedures will allow the Debtors to conduct any Sale Transaction(s) in a controlled, fair, and open fashion that will encourage participation by financially capable bidders who can demonstrate the ability to close a Sale Transaction(s). In particular, the Bidding Procedures contemplate an open and public marketing process with minimum barriers to entry and provide Potential Bidders with sufficient time to perform due diligence and acquire the information

necessary to submit a timely and well-informed bid. The timelines for the Bidding Procedures are also reflective of the milestones contained in the TSA.

26. The proposed Bidding Procedures will encourage competitive bidding, are appropriate under the relevant standards governing auction proceedings in bankruptcy proceedings and are consistent with the controlling legal standard in the Third Circuit. Approval of the Bidding Procedures and entry of the proposed Bidding Procedures Order is necessary on an expedited basis in order to facilitate the time-sensitive Sale Transaction(s) process: delay will significantly erode estate value available to the Debtors' stakeholders. Accordingly, the Debtors request that the Court approve the Bidding Procedures as a valid exercise of the Debtors' business judgment.

II. The Bid Protections Have a Sound Business Purpose and Should Be Approved.

27. The Debtors seek authority, after notice as set forth in the proposed Bidding Procedures Order, to offer customary bid protections to Stalking Horse Bidder(s) consisting of a Break-Up Fee and Expense Reimbursement, in an aggregate amount not to exceed three (3) percent of the Purchase Price. The use of a stalking horse in a public auction process for the sale of a debtor's assets is a customary practice in chapter 11 cases, as the use of a stalking horse bid is, in many circumstances, the best way to maximize value in an auction process by "establish[ing] a framework for competitive bidding and facilitat[ing] a realization of that value." *Off. Comm. of Unsecured Creditors v. Interforum Holding LLC*, No. 11-CV-219, 2011 WL 2671254, No. 11-219, *1 (E.D. Wis. July 7, 2011).

28. Generally, bidding protections, such as break-up fees, are a normal and, in many cases, necessary component of significant sales under the Bankruptcy Code. *See Integrated Res.*, 147 B.R. at 659–60 ("Break-up fees are important tools to encourage bidding and to maximize the value of the debtor's assets. . . . In fact, because the . . . corporation has a duty to encourage bidding, break-up fees can be *necessary* to discharge [such] duties to maximize value.") (emphasis

added). As a result, courts routinely approve such bidding protections in connection with proposed bankruptcy sales where a proposed fee or reimbursement provides a benefit to the estate. *See In re Energy Future Holdings Corp.*, 904 F.3d 298, 313 (3d Cir. 2018) (“[T]he allowability of break-up fees . . . depends upon the requesting party’s ability to show that the fees [a]re actually necessary to preserve the value of the estate.”) (internal quotations omitted) (alterations in original); *In re Reliant Energy Channelview LP*, 594 F.3d 200, 206 (3d Cir. 2010) (“Under *O’Brien*, we must decide whether an award of a break-up fee was necessary to preserve the value of the Debtors’ estate.”); *O’Brien*, 181 F.3d at 536 (“[W]e consider whether the record evidence supports the Bankruptcy Court’s implicit conclusion that awarding Calpine break-up fees was not necessary to preserve the value of O’Brien’s estate. . . . that inquiry stems directly from § 503(b)(1)(A), which requires that an expense provide some benefit to the debtor’s estate.”). The Debtors believe that the allowance of the Bid Protections is in the best interests of the Debtors’ estates and their creditors, as a Stalking Horse Bidder, if designated, will establish a floor for further bidding that may increase the consideration given in exchange for the Assets for the benefit of the Debtors’ estates.

29. In the Third Circuit, bidding protections, such as those proposed here, are subject to the general standard used for administrative expenses under section 503 of the Bankruptcy Code. *See Energy Future*, 904 F.3d at 313 (citing *O’Brien*, 181 F.3d at 535); *Reliant Energy*, 594 F.3d at 206 (holding that the general standard used for all administrative expenses applies to break-up fees). Thus, “the allowability of break-up fees, like that of other administrative expenses, depends upon the requesting party’s ability to show that the fees were actually necessary to preserve the value of the estate.” *Reliant Energy*, 594 F.3d at 206 (internal quotations omitted) (quoting *O’Brien*, 181 F.3d at 535).

30. The Debtors propose to pay the Bid Protections only in the event they determine, after good faith, arm's-length negotiations, with the consent of the Required Holders (not to be unreasonably withheld, delayed, or conditioned) and in consultation with any statutory committees appointed in these cases, that designating a Stalking Horse Bidder would be necessary and beneficial for their estates and after notice and an opportunity to object to such Bid Protections. Courts in this district have routinely approved break-up fees and/or expense reimbursements offered to stalking horse bidders. *See, e.g., In re Directbuy Home Improvement, Inc.*, No. 23-19159 (SLM) (Bankr. D.N.J. Nov. 9, 2023) (approving bidding procedures and bidding protections including a break-up fee and expense reimbursement payable to the stalking horse bidder); *In re Rite Aid Corp.*, No. 23-18993 (MBK) (Bankr. D.N.J. Oct. 18, 2023) (same); *In re Cyxtera Technologies, Inc.*, No. 23-14853 (JKS) (Bankr. D.N.J. June 29, 2023) (same); *In re Bed Bath & Beyond Inc.*, No. 23-13359 (VFP) (Bankr. D.N.J. Apr. 25, 2023) (same); *In re David's Bridal, LLC*, No. 23-13131 (CMG) (Bankr. D.N.J. Apr. 19, 2023) (same).

31. Without the Bid Protections, a potential bidder may elect not to participate in the process at all to the detriment of the Debtors' estates. The Bidding Procedures do not require the payment of the Bid Protections. Rather, the Debtors have the option of paying or otherwise incurring such obligations in the event that offering such Bid Protections is necessary to foster a competitive bidding process that will maximize the value of the Debtors' estates. In that instance, the value created for the Debtors' estates will likely greatly outweigh the cost of any Bid Protections. In any case, granting the Debtors authority to offer the Bid Protections sends a strong signal to the market that the Debtors are serious about running a competitive sale process to generate the best result for the Debtors and their estates.

32. The Bid Protections shall not exceed three (3) percent of the proposed purchase price in an aggregate amount. This is an amount that is well within market for transactions of this type, and which has been routinely approved by courts in this district. *See, e.g., In re Directbuy Home Improvement, Inc.*, No. 23-19159 (SLM) (Bankr. D.N.J. Nov. 9, 2023) (approving a break-up fee of up to three percent of the proposed purchase price); *In re Rite Aid Corp.*, No. 23-18993 (MBK) (Bankr. D.N.J. Oct. 18, 2023) (approving break-up fees and expense reimbursements in an aggregate amount not to exceed (a) three and a half (3½) percent of the proposed purchase price with respect to a specific sale transaction and (b) three (3) percent of the proposed purchase price with respect to a retail sale transaction); *In re Cyxtera Technologies, Inc.*, No. 23-14853 (JKS) (Bankr. D.N.J. June 29, 2023) (approving a break-up fee of up to three (3) percent of the proposed purchase price); *In re Bed Bath & Beyond Inc.*, No. 23-13359 (VFP) (Bankr. D.N.J. Apr. 25, 2023) (approving a break-up fee and expense reimbursement in an aggregate amount not to exceed three (3) percent of the proposed purchase price); *In re David's Bridal, LLC*, No. 23-13131 (CMG) (Bankr. D.N.J. Apr. 19, 2023) (approving a break-up fee of up to three (3) percent of the proposed purchase price).

33. Accordingly, for the reasons set forth above, the Debtors respectfully submit that the Court grant the Debtors the authority to incur and pay the Bid Protections to the extent the Bid Protections are necessary to preserve the value of the Debtors' estates.

III. The Form and Manner of Notice Should Be Approved.

34. Pursuant to Bankruptcy Rule 2002(a), the Debtors are required to provide creditors with twenty-one (21) days' notice of the Auction. Pursuant to Bankruptcy Rule 2002(c), such notice must include the time and place of the Auction and the deadline for filing any objections to such a sale.

35. Within two (2) business days following entry of the Bidding Procedures Order, the Debtors will cause the Auction Notice to be served upon (a) the office of the United States Trustee for the District of New Jersey; (b) the Debtors' thirty (30) largest unsecured creditors (on a consolidated basis); (c) counsel for any statutory committees appointed in these case; (d) counsel to the agent to the Secured Notes; (e) the indenture trustee to the 2024 Convertible Notes; (f) the indenture trustee to the 2028 Convertible Notes; (g) Sullivan & Cromwell LLP, as counsel to the Required Holders; (h) Wollmuth Maher & Deutsch LLP, as counsel to the Required Holders; (i) counsel to the 2028 Convertible Noteholders; (j) the U.S. Securities and Exchange Commission; (k) the United States Attorney's Office for the District of New Jersey; (l) the attorneys general in the states where the Debtors conduct their business operations; (m) the Internal Revenue Service; (n) all parties who have expressed a written interest in the Assets; (o) all known holders of liens, encumbrances, and other claims secured by the Assets; (p) each governmental agency that is an interested party with respect to the Sale Transaction; and (q) any party that has requested notice pursuant to Bankruptcy Rule 2002

36. The Debtors submit that the Auction Notice constitutes good and adequate notice of the Auction and the proceedings with respect thereto in compliance with, and satisfaction of, the applicable requirements of Bankruptcy Rule 2002 and Local Rule 2002-1. Accordingly, no further notice is necessary and the Debtors request that this Court approve the form and manner of the notice of the Auction Notice.

IV. The Assumption and Assignment Procedures Are Appropriate and Should Be Approved.

37. As set forth above, the Sale Transaction(s) contemplates the assumption and assignment of Executory Contracts and Unexpired Leases to the Successful Bidder. In connection with this process, the Debtors believe it is necessary to establish assumption and assignment

procedures by which: (a) the Debtors and counterparties to the Executory Contracts or Unexpired Leases (the “Contract Counterparties”) can reconcile cure obligations, if any, in accordance with section 365 of the Bankruptcy Code; and (b) such Contract Counterparties can object to the assumption and assignment of the Contracts and/or related cure payments (the “Assumption and Assignment Procedures”). As set forth in the Bidding Procedures Order, the Debtors also request that any Contract Counterparty that fails to object to the proposed assumption and assignment of any Executory Contract or Unexpired Lease be deemed to consent to the assumption and assignment of the applicable Executory Contract or Unexpired Lease pursuant to section 365 of the Bankruptcy Code on the terms set forth in the Sale Order, along with the cure payments identified in the Contract Assumption Notice. *See, e.g., In re Boy Scouts of Am.*, 642 BR 504, 569 (Bankr. D. Del. 2022) (“The lack of objection of a [creditor] is also consensual for purposes of § 363 and, again, permissible under § 363(f)(2).”); *In re Christ Hosp.*, No. CIV.A. 14-472 ES, 2014 WL 4613316, at *14 (D.N.J. Sept. 12, 2014) (same); *In re Congoleum Corp.*, No. 03-51524, 2007 WL 1428477, at * 1 (Bankr. D.N.J. May 11, 2007) (same); *Hargrave v. Township of Pemberton (In re Tabone, Inc.)*, 175 B.R. 855, 858 (Bankr. D.N.J. 1994) (same); *In re Elliot*, 94 B.R. 343, 345 (E.D. Pa. 1988) (same).

38. The Debtors believe that the Assumption and Assignment Procedures are fair and reasonable, provide sufficient notice to parties to the Executory Contracts and Unexpired Leases, and provide certainty to all parties in interest regarding their obligations and rights in respect thereof. Accordingly, the Debtors request the Court approve the Assumption and Assignment Procedures set forth in the Bidding Procedures Order.

V. The Sale Transaction(s) Should be Approved as an Exercise of Sound Business Judgment.

39. Section 363(b) of the Bankruptcy Code permits a debtor, subject to court approval, to enter into a transaction outside the ordinary course of its business so long as there is a “sound business purpose” that justifies such action. *See* 11 U.S.C. § 363(b)(1); *see also Myers v. Martin (In re Martin)*, 91 F.3d 389, 395 (3d Cir. 1996) (“[U]nder normal circumstances the court would defer to the trustee’s judgment so long as there is a legitimate business justification.”) (citation omitted); *Stanziale v. Nachtomi (In re Tower Air, Inc.)*, 416 F.3d 229, 238 (3d Cir. 2005) (stating that “[o]vercoming the presumptions of the business judgment rule on the merits is a near-Herculean task”); *Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1071 (2d Cir. 1983) (holding that judicial approval under section 363 of the Bankruptcy Code requires a showing that there is a good business reason).

40. The business judgment rule shields a debtor’s decisions from judicial second-guessing. Once a debtor articulates a valid business justification, the business judgment rule “is a presumption that in making a business decision the directors of a corporation 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.” *In re S.N.A. Nut Co.*, 186 B.R. 98, 102 (Bankr. N.D. Ill 1995) (citations omitted); *In re Filene’s Basement, LLC*, 11-13511 (KJC), 2014 WL 1713416, at *12 (Bankr. D. Del. Apr. 29, 2014) (“If a valid business justification exists, then a strong presumption follows that the agreement at issue was negotiated in good faith and is in the best interests of the estate.”) (citations omitted); *see also In re Johns-Manville Corp.*, 60 B.R. 612, 615–16 (Bankr. S.D.N.Y. 1986) (“[A] presumption of reasonableness attaches to a debtor’s management decisions.”). Thus, if a debtor’s actions satisfy the business judgment rule, then the transaction in question should be approved under section 363(b)(1) of the Bankruptcy Code.

41. Generally, courts in the Third Circuit have applied four factors in determining whether a sale of a debtor's assets should be approved: (a) whether a sound business purpose exists for the sale; (b) whether the proposed sale price is fair; (c) whether the debtor has provided adequate and reasonable notice; and (d) whether the buyer acted in good faith. *See In re Summit Glob. Logistics, Inc.*, No. 08-11566, 2008 WL 819934, at *9 (Bankr. D.N.J. Mar. 26, 2008) (citing *In re Exaeris, Inc.*, 380 B.R. 741, 744 (Bankr. D. Del. 2008)); *see also In re Abbotts Dairies of Pennsylvania, Inc.*, 788 F.2d 143, 149–50 (3d Cir. 1986) (noting that the element of “good faith” is of particular importance in the Third Circuit); *In re Delaware & Hudson Ry.*, 124 B.R. 169, 176 (D. Del. 1991) (“Once a court is satisfied that there is a sound business reason or an emergency justifying the pre-confirmation sale the court must also determine that the trustee has provided the interested parties with adequate and reasonable notice, that the sale price is fair and reasonable and that the purchaser is proceeding in good faith.”).

a. A Sound Business Purpose Exists for the Sale Transaction(s).

42. Here, a sound business purpose exists for the Sale Transaction(s) because the Debtors believe that the Sale Transaction(s) will maximize the value of their Assets, exposing them to the market as part of a competitive, arms' length process. It is well-settled that, where there is a court-approved auction process, a full and fair price is presumed to have been obtained for the assets sold, as the best way to determine value is exposure to the market. *See Bank of Am. Nat 'l Trust & Sav. Ass'n. v. 203 N. LaSalle St. P 'ship*, 526 U.S. 434, 457 (1999); *see also In re Trans World Airlines, Inc.*, No. 01-00056, 2001 WL 1820326, *4 (Bankr. D. Del. 2001) (“[I]t is worth noting that a [section] 363(b) sale transaction does not require an auction procedure. The auction procedure has developed over the years as an effective means for producing an arm's length fair value transaction.”). Consequently, the ultimately successful bid, after being subject to a “market check” in the form of the Auction, will constitute, in the Debtors' business judgment,

the highest or otherwise best offer for the Assets and will provide a greater recovery for their estates than any known or practicably available alternative. *See, e.g., In re Trans World Airlines, Inc.*, No. 01-00056, 2001 WL 1820326, at *4 (Bankr. D. Del. 2001) (while a “section 363(b) sale transaction does not require an auction procedure, [t]he auction procedure has developed over the years as an effective means for producing an arm’s length fair value transaction.”). Also, because any sale of the Debtors’ Assets will likely contemplate the assumption of certain of the Debtors’ Executory Contracts and Unexpired Leases, it will result in payment in full for a number of the Debtors’ creditors.

43. As noted above, prior to the Bid Deadline, Moelis will continue to market the Assets and solicit other offers consistent with the Bidding Procedures, including, for example, by contacting previously solicited parties, continuing to provide Acceptable Bidders with data room access and requested information, considering a variety of alternative transaction structures, and otherwise assisting the Debtors with all efforts to increase transaction value. In this way, the number of bidders that are eligible to participate in a competitive Auction process will be maximized, or, if no Auction is held because no Auction is necessary the purchase price will, conclusively, be deemed fair value.

44. Thus, the Debtors submit that the Successful Bid will constitute the highest or otherwise best offer for the Assets and will provide a greater recovery for the Debtors’ estates than would be provided by any other available alternative. As such, the Debtors’ determination to sell the Assets through an Auction process and subsequently to enter into a purchase agreement with the Successful Bidder will be a valid and sound exercise of the Debtors’ business judgment. The Debtors will submit evidence at the Sale Hearing to support these conclusions. Therefore, the

Debtors request that the Court make a finding that the proposed sale of the Assets is a proper exercise of the Debtors' business judgment and is rightly authorized.

b. Adequate and Reasonable Notice of the Auction and Sale Transaction(s) Will be Provided.

45. The Auction Notice: (a) will be served in a manner that provides parties in interest notice of the date, time, and location of the Sale Hearing; (b) informs parties in interest of the deadlines for objecting to the Sale Transaction(s) or the assumption and assignment of the Executory Contracts and Unexpired Leases; and (c) otherwise includes all information relevant to parties interested in or affected by the Sale Transaction(s). Significantly, the form and manner of the Auction Notice will have been approved by this Court pursuant to the Bidding Procedures Order after notice and a hearing before it is served on parties in interest.

c. The Sale Transaction(s) Has Been Proposed in Good Faith Without Collusion, and the Successful Bidder Is a "Good-Faith Successful Bidder."

46. The Debtors request that the Court find the Successful Bidder is entitled to the benefits and protections provided by section 363(m) of the Bankruptcy Code in connection with the sale of Assets. Section 363(m) of the Bankruptcy Code provides in pertinent part:

[t]he 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.

11 U.S.C. § 363(m).

47. Section 363(m) of the Bankruptcy Code thus protects the purchaser of assets sold pursuant to section 363 of the Bankruptcy Code from the risk that it will lose its interest in the purchased assets if the order allowing the sale is reversed on appeal, as long as such purchaser leased or purchased the assets in "good faith." *See id.* While the Bankruptcy Code does not define

“good faith,” courts have held that a purchaser shows its good faith through the integrity of its conduct during the course of the sale proceedings, finding that where there is a lack of such integrity, a good faith finding may not be made. *See, e.g., In re Abbotts Dairies of Pennsylvania, Inc.*, 788 F.2d 143, 147 (3d Cir. 1986) (quoting *In re Rock Indus. Mach. Corp.*, 572 F.2d 1195, 1198 (7th Cir. 1978)) (“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 or the trustee, or an attempt to take grossly unfair advantage of other bidders.”); *In re Andy Frain Services, Inc.*, 798 F.2d 1113, 1125 (7th Cir. 1986) (same); *In re Sasson Jeans, Inc.*, 90 B.R. 608, 610 (S.D.N.Y. 1988) (same), *abrogated on other grounds, Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P’ship*, 507 U.S. 380 (1993).

48. The Debtors submit that the Successful Bidder(s), will be “good faith purchasers” within the meaning of section 363(m) of the Bankruptcy Code, and the Stalking Horse APA, if any, or the Form APA, and any marked versions thereof, would be a good-faith, arm’s-length agreement entitled to the protections of section 363(m) of the Bankruptcy Code.⁵

49. *First*, as set forth in more detail above, the consideration to be received by the Debtors from a Successful Bidder will be substantial, fair, and reasonable. *Second*, any sale agreement with a Successful Bidder will presumably be the culmination of a competitive Auction process in which all parties will be represented by counsel and all negotiations will be conducted on an arm’s-length, good-faith basis. *Third*, there is no indication of any “fraud, collusion between the purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of

⁵ The Debtors believe that a finding of good faith within the meaning of section 363(m) of the Bankruptcy Code will be appropriate for any Successful Bidder. Pursuant to the Bidding Procedures, any Successful Bidder will have had to present a proposal in accordance with the Bidding Procedures. In addition, the Debtors will not choose as the Successful Bidder or Back-Up Bidder any entity whose good faith under section 363(m) of the Bankruptcy Code can reasonably be doubted and will be prepared to present the Court with sufficient evidence to allow the Court to find that the “good faith” standard of section 363(m) of the Bankruptcy Code has been satisfied.

other bidders” or similar conduct that would cause or permit the Sale Transaction(s) to be avoided under section 363(n) of the Bankruptcy Code. With respect to potential bidders, the Bidding Procedures are designed to ensure that no party is able to exert undue influence over the process. *Finally*, any bids that the Debtors ultimately determine to be Successful Bids will have been evaluated and approved by the Debtors in consultation with their advisors. Accordingly, the Debtors believe that the Successful Bidder, if any, and any purchase agreement associated with a Successful Bid should be entitled to the full protections of section 363(m) of the Bankruptcy Code.

d. The Sale Transaction(s) Should be Approved “Free and Clear” Under Section 363(f).

50. Section 363(f) of the Bankruptcy Code permits a debtor to sell property free and clear of another party’s interest in the property if: (a) applicable nonbankruptcy law permits such a free and clear sale; (b) the holder of the interest consents; (c) the interest is a lien and the sale price of the property exceeds the value of all liens on the property; (d) the interest is the subject of a bona fide dispute; or (e) the holder of the interest could be compelled in a legal or equitable proceeding to accept a monetary satisfaction of its interest. *See* 11 U.S.C. § 363(f).

51. Section 363(f) is drafted in the disjunctive. Thus, satisfaction of any of the requirements enumerated therein will suffice to warrant the Debtors’ sale of the Assets free and clear of all Encumbrances, except with respect to any interests that may be assumed liabilities under the applicable purchase agreement. *See In re Kellstrom Indus., Inc.*, 282 B.R. 787, 793 (Bankr. D. Del. 2002) (“[I]f any of the five conditions are met, the debtor has the authority to conduct the sale free and clear of all liens.”); *see also Citicorp Homeowners Servs., Inc. v. Elliot (In re Elliot)*, 94 B.R. 343, 354 (E.D. Pa. 1988) (holding that a sale “free and clear” may be approved provided the requirements of at least one subsection are met).

52. The Debtors submit that, to the extent that any interest in the Assets will not be an assumed liability, any such interest in the Assets satisfies or will satisfy at least one of the five conditions of section 363(f) of the Bankruptcy Code, and that any such interest in the Assets will be adequately protected by either being paid in full at the Closing, or by having it attach to the net proceeds of the Sale Transaction(s), subject to any claims and defenses the Debtors may possess with respect thereto. Accordingly, the Debtors request authority to convey the Assets to the Successful Bidder, if any, free and clear of all encumbrances, with any such encumbrances to attach to the proceeds of the Sale Transaction(s).

VI. The Assumption and Assignment of the Contracts Should be Approved.

a. The Assumption and Assignment of the Executory Contracts and Unexpired Leases Reflects the Debtors' Business Judgment.

53. Section 365 of the Bankruptcy Code authorizes a debtor to assume and/or assign its executory contracts and unexpired leases, subject to the approval of the court, *provided* that the defaults under such contracts and leases are cured and adequate assurance of future performance is provided. The Debtors' decision to assume or reject an executory contract or unexpired lease must only satisfy the "business judgment rule" and will not be subject to review unless such decision is clearly an unreasonable exercise of such judgment. *See, e.g., Grp. of Inst'l Invs. v. Chicago, Milwaukee, St. Paul & Pacific Ry. Co.*, 318 U.S. 523 (1943) (applying Bankruptcy Act section 77(b), predecessor to section 365 of the Bankruptcy Code, and rejecting test of whether executory contract was burdensome in favor of whether rejection is within debtor's business judgment); *Sharon Steel Corp. v. Nat'l Fuel Gas Distrib. Corp.*, 872 F.2d 36, 40 (3d Cir. 1989) (describing deference to a debtor's business judgment as "breathing space afforded [to] the debtor to consider whether to reject or assume executory contracts under the Code"); *In re S.A. Holding Co., LLC*, 357 B.R. 51, 56 (Bankr. D.N.J. 2006) (applying the business judgment test in

determining whether to approve a contract rejection); *In re Cent. Jersey Airport Servs., LLC*, 282 B.R. 176, 183 (Bankr. D.N.J. 2002) (“Although the [Bankruptcy Code] does not provide the standard to be applied in determining the propriety of the [debtor’s] decision [to assume or reject a contract], most Circuits, including the Third Circuit have adopted the business judgment test.”).

54. Here, the Court should approve the decision to assume and assign certain designated Executory Contracts and Unexpired Leases (the “Assumed Contracts”) in connection with the Sale Transaction(s) as a sound exercise of the Debtors’ business judgment. *First*, certain of the Executory Contracts and Unexpired Leases are necessary to operate the Assets and, as such, they are essential to inducing the best offer for the Assets. *Second*, it is unlikely that any purchaser would want to acquire the Assets unless a significant number of the Executory Contracts and Unexpired Leases needed to manage the Debtors’ day-to-day operations were included in the transaction. *Third*, the Stalking Horse APA, if any, and any marked copy of the Form APA thereof submitted by Potential Bidder will provide that the assumption and assignment of the Assumed Contracts is integral to, and inextricably integrated in, a proposed Sale Transaction(s). *Finally*, the Assumed Contracts will be assumed and assigned through the process approved by the Court pursuant to the Bidding Procedures Order and, thus, will be reviewed by key constituents in these chapter 11 cases.

55. Accordingly, the Debtors submit that the assumption and assignment of the Assumed Contracts by way of the Assumption and Assignment Procedures should be approved as an exercise of their business judgment.

b. Defaults Under the Assumed Contracts Will Be Cured Through the Sale Transaction(s).

56. Upon finding that a debtor has exercised its business judgment in determining that assuming an executory contract or unexpired lease is in the best interest of its estate, courts must

then evaluate whether the assumption meets the requirements of section 365(b) of the Bankruptcy Code, specifically that a debtor (a) cure, or provide adequate assurance of promptly curing, prepetition defaults in the executory contract, (b) compensate parties for pecuniary losses arising therefrom, and (c) provide adequate assurance of future performance thereunder. *Carlisle Homes, Inc. v. Azzari (In re Carlisle Homes, Inc.)*, 103 B.R. 524, 538 (Bankr. D.N.J. 1988). This section “attempts to strike a balance between two sometimes competing interests, the right of the contracting non-debtor to get the performance it bargained for and the right of the debtor’s creditors to get the benefit of the debtor’s bargain.” *Id.* (quoting *In re Bon Ton Restaurant & Pastry Shop, Inc.*, 53 B.R. 789, 803 (Bankr. N.D. Ill. 1985)).

57. The Debtors submit that the statutory requirements of section 365(b)(1)(A) of the Bankruptcy Code will be promptly satisfied because the Stalking Horse APA, if any, or the Form APA, and any marked copy thereof submitted by a Potential Bidder will require that the Debtors cure all defaults associated with, or that are required to properly assume, any Assumed Contracts. Because the Assumption and Assignment Procedures (once approved) provide a clear process by which to resolve disputes over cure payments or other defaults, the Debtors are confident that if defaults exist that must be cured, such cure will be achieved fairly, efficiently, and properly, consistent with the Bankruptcy Code and with due respect to the rights of Contract Counterparties.

c. Contract Counterparties Will Be Adequately Assured of Future Performance.

58. Similarly, the Debtors submit that the third requirement of section 365(b) of the Bankruptcy Code—adequate assurance of future performance—is also satisfied given the facts and circumstances present here. “The phrase ‘adequate assurance of future performance,’ adopted from section 2-609(1) of the Uniform Commercial Code, is to be given a practical, pragmatic construction based upon the facts and circumstances of each case. Although no single solution will satisfy every case, the required assurance will fall considerably short of an absolute guarantee

of performance.” *Carlisle Homes*, 103 B.R. at 538 (internal citations omitted). 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 Filene’s Basement*, 2014 WL 1713416, at *12 (holding that a contract could be assigned because the assignee had the financial ability to perform the contract obligations going forward and would not fail to perform the contract’s obligations at risk of losing a significant investment); *In re Bygaph, Inc.*, 56 B.R. 596, 605–06 (Bankr. S.D.N.Y. 1986) (holding that adequate assurance of future performance is present where a prospective assignee has the financial resources and has expressed a willingness to devote sufficient funding to a business to give it a strong likelihood of succeeding).

59. The Debtors believe that they can and will demonstrate that the requirements for assumption and assignment of the Assumed Contracts to the Successful Bidder will be satisfied. As required by the Bidding Procedures, the Debtors will evaluate the financial wherewithal of potential bidders before designating such party a Qualified Bidder (*e.g.*, financial credibility, willingness, and ability of the interested party to perform under any Contracts to be assumed) and will demonstrate such financial wherewithal, willingness, and ability to perform under any Contracts to be assumed and assigned to a Successful Bidder. Further, the Assumption and Assignment Procedures provide the Court and other interested parties ample opportunity to evaluate and, if necessary, challenge the ability of the Successful Bidder to provide adequate assurance of future performance and object to the assumption of the Contracts or proposed cure payments. The Court therefore should have a sufficient basis to authorize the Debtors to reject or assume and assign the any Executory Contract or Unexpired Lease to be assumed and assigned to any Successful Bidder.

VII. Relief Under Bankruptcy Rules 6004(h) and 6006(d) Is Appropriate.

60. Bankruptcy Rule 6004(h) provides that an “order authorizing the use, sale, or lease of property . . . is stayed until the expiration of fourteen days after the entry of the order, unless the court orders otherwise.” Additionally, Bankruptcy Rule 6006(d) provides that an “order authorizing the trustee to assign an executory contract or unexpired lease . . . is stayed until the expiration of fourteen days after the entry of the order, unless the court orders otherwise.” The Debtors request that the Sale Order be effective immediately upon its entry by providing that the fourteen-day stays under Bankruptcy Rules 6004(h) and 6006(d) are waived.

61. The purpose of Bankruptcy Rules 6004(h) and 6006(d) is to provide sufficient time for an objecting party to appeal before an order can be implemented. *In re Filene’s Basement*, 2014 WL 1713416, at *14; *see* Advisory Committee Notes to Fed. R. Bankr. P. 6004(h) and 6006(d). Although Bankruptcy Rules 6004(h) and 6006(d) and the Advisory Committee Notes are silent as to when a court should “order otherwise” and eliminate or reduce the fourteen-day stay period, the leading treatise on bankruptcy suggests that the fourteen-day stay should be eliminated to allow a sale or other transaction to close immediately “where there has been no objection to procedure.” 10 *Collier on Bankruptcy* ¶ 6004.11, ¶ 6004.04 (16th rev. ed. 2023). Furthermore, 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 actually necessary to file such appeal. *Id.*; *see In re Filene’s Basement*, 2014 WL 1713416, at *14 (reducing the stay to seven (7) days from the date of entry of the sale order).

62. To maximize the value received for the Assets, the Debtors seek to close the Sale Transaction(s) as soon as possible after the Sale Hearing. Accordingly, the Debtors hereby request that the Court waive the fourteen-day stay period under Bankruptcy Rules 6004(h) and 6006(d).

Disclosures Under Local Rule 6004-1

63. Local Rule 6004-1 requires, among other things, that a debtor include the “material terms of the proposed sale” in a sale motion. As set forth in this Motion, the Debtors and their professionals are in the midst of marketing the Assets, the continuation of a process that began over two months ago. Because the Debtors continue to have discussions with parties in interest, they cannot, as of yet, identify, with any reasonable specificity, the terms of the sale of some or all of the Assets and/or the equity. Accordingly, the Debtors are unable, at this time, to make the disclosures required under Local Rule 6004-1. In the event the Debtors secure one or multiple Stalking Horse Bidder(s), the Debtors will file the applicable Stalking Horse APA and make the requisite disclosures.

Waiver of Bankruptcy Rule 6004(a) and 6004(h)

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

Waiver of Memorandum of Law

65. The Debtors respectfully request that the Court waive the requirement to file a separate memorandum of law pursuant to Local Rule 9013-1(a)(3) because the legal basis upon which the Debtors rely is set forth herein and the Motion does not raise any novel issues of law.

Reservation of Rights

66. Nothing contained in this Motion or any order granting the relief requested in this Motion, and no action taken pursuant to the relief requested or granted (including any payment made in accordance with any such order), is intended as or shall be construed or deemed to be: (a) an admission as to the amount of, basis for, priority of, or validity of any claim against the Debtors under the Bankruptcy Code or other applicable nonbankruptcy law; (b) a waiver of the Debtors' or any other party in interest's right to dispute any claim on any grounds; (c) a promise or requirement to pay any particular claim; (d) an implication, admission or finding that any particular claim is an administrative expense claim, other priority claim or otherwise of a type specified or defined in this Motion or any order granting the relief requested by this Motion; (e) a request or authorization to reject any agreement, contract, or lease pursuant to section 365 of the Bankruptcy Code; (f) an admission as to the validity, priority, enforceability or perfection of any lien on, security interest in, or other encumbrance on property of the Debtors' estates; or (g) a waiver or limitation of any claims, causes of action or other rights of the Debtors or any other party in interest against any person or entity under the Bankruptcy Code or any other applicable law.

No Prior Request

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

Notice

68. The Debtors will provide notice of this Motion to the following parties and/or their respective counsel, as applicable: (a) the office of the United States Trustee for the District of New Jersey; (b) the Debtors' thirty (30) largest unsecured creditors (on a consolidated basis); (c) counsel to the agent to the Secured Notes; (d) the indenture trustee to the 2024 Convertible Notes; (e) the indenture trustee to the 2028 Convertible Notes; (f) Sullivan & Cromwell LLP, as counsel to the Required Holders; (g) Wollmuth Maher & Deutsch LLP, as counsel to the Required Holders; (h) counsel to the 2028 Convertible Noteholders; (i) the U.S. Securities and Exchange Commission; (j) the United States Attorney's Office for the District of New Jersey; (k) the attorneys general in the states where the Debtors conduct their business operations; (l) the Internal Revenue Service; (m) all parties who have expressed a written interest in the Assets; and (n) any party that has requested notice pursuant to Bankruptcy Rule 2002. The Debtors submit that, in light of the nature of the relief requested, no other or further notice need be given.

[Remainder of page intentionally left blank.]

WHEREFORE, the Debtors respectfully request entry of the Bidding Procedures Order, substantially in the form attached hereto as **Exhibit A**, and granting the relief requested herein.

Dated: February 14, 2024

/s/ Michael D. Sirota

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*Proposed Co-Counsel to the Debtors and
Debtors in Possession*

Exhibit A

Proposed Order

Caption in Compliance with D.N.J. LBR 9004-1(b)

UNITED STATES BANKRUPTCY COURT DISTRICT OF NEW JERSEY	
In re: INVITAE CORPORATION, <i>et al.</i> , Debtors. ¹	Chapter 11 Case No. 24-11362 (MBK) (Joint Administration Requested)

**ORDER (I) APPROVING BIDDING PROCEDURES
AND BID PROTECTIONS, (II) SCHEDULING CERTAIN DATES
AND DEADLINES WITH RESPECT THERETO, (III) APPROVING THE FORM AND
MANNER OF NOTICE THEREOF, (IV) ESTABLISHING NOTICE AND
PROCEDURES FOR THE ASSUMPTION AND ASSIGNMENT OF CONTRACTS
AND LEASES, (V) AUTHORIZING THE ASSUMPTION AND ASSIGNMENT
OF ASSUMED CONTRACTS, AND (VI) AUTHORIZING THE SALE OF ASSETS**

The relief set forth on the following pages, numbered three (3) through and including twenty-one (21), is **ORDERED**.

¹ The last four digits of Debtor Invitae Corporation's tax identification number are 1898. A complete list of the Debtors in these chapter 11 cases and each such Debtor's tax identification number may be obtained on the website of the Debtors' proposed claims and noticing agent at www.kccllc.net/invitae. The Debtors' service address in these chapter 11 cases is 1400 16th Street, San Francisco, California 94103.

Caption in Compliance with D.N.J. LBR 9004-1(b)

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(Page | 3)

Debtors: INVITAE CORPORATION, *et al.*

Case No. 24-11362 (MBK)

Caption: ORDER (I) APPROVING BIDDING PROCEDURES AND BID PROTECTIONS, (II) SCHEDULING CERTAIN DATES AND DEADLINES WITH RESPECT THERETO, (III) APPROVING THE FORM AND MANNER OF NOTICE THEREOF, (IV) ESTABLISHING NOTICE AND PROCEDURES FOR THE ASSUMPTION AND ASSIGNMENT OF CONTRACTS AND LEASES, (V) AUTHORIZING THE ASSUMPTION AND ASSIGNMENT OF ASSUMED CONTRACTS, AND (VI) AUTHORIZING THE SALE OF ASSETS

Upon the *Debtors' Motion for Entry of an Order (I) Approving Bidding Procedures and Bid Protections, (II) Scheduling Certain Dates and Deadlines with Respect Thereto, (III) Approving the Form and Manner of Notice Thereof, (IV) Establishing Notice and Procedures for the Assumption and Assignment of Contracts and Leases, (V) Authorizing the Assumption and Assignment of Assumed Contracts, and (VI) Authorizing the Sale of Assets,*² of the above-captioned debtors and debtors in possession (collectively, the "Debtors"), for entry of an order (this "Order") (a) authorizing and approving the proposed bidding procedures attached hereto as **Exhibit 1** (the "Bidding Procedures"), by which the Debtors will solicit and select the highest or otherwise best offer(s) for the sale or sales (the "Sale Transaction(s)") of all, substantially all, or any portion of the Debtors' assets (the "Assets"); (b) approving the break-up fee and expense reimbursements relating to certain stalking horse bidders (the "Bid Protections"); (c) scheduling certain dates with respect thereto; (d) approving the manner of notice of an auction or auctions, if any, for the Sale Transaction(s), if any (the "Auction"); (e) scheduling dates and deadlines in connection with approval of the Sale Transaction(s); and (f) approving procedures for the assumption and assignment of certain executory contracts (the "Executory Contracts") and unexpired leases (the "Unexpired Leases") in connection with the Sale Transaction(s), if any, all as more fully set

² Capitalized terms used but not otherwise defined herein have the meanings ascribed to them in the Motion or the Bidding Procedures, as applicable.

(Page | 4)

Debtors: INVITAE CORPORATION, *et al.*

Case No. 24-11362 (MBK)

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forth in the Motion; and upon the First Day Declaration; and the Swift Declaration filed in support of the Motion; and the Court having jurisdiction to consider the Motion and the relief requested therein pursuant to 28 U.S.C. §§ 157 and 1334 and the *Standing Order of Reference to the Bankruptcy Court Under Title 11* of the United States District Court for the District of New Jersey, entered July 23, 1984, and amended on September 18, 2012 (Simandle, C.J.); and this Court having found that venue of this proceeding and the Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and this Court having found that the Debtors' notice of the Motion was appropriate under the circumstances and no other notice need be provided; and this Court having reviewed the Motion and having heard the statements in support of the relief requested therein at a hearing before this Court; and this Court having determined that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein; and upon all of the proceedings had before the Court and after due deliberation and sufficient cause appearing therefore **IT IS HEREBY ORDERED THAT:**

1. The Motion is **GRANTED** as set forth herein.
2. The Debtors have articulated good and sufficient reasons for authorizing and approving the Bidding Procedures, which are fair, reasonable, and appropriate under the circumstances and designed to maximize the recovery on, and realizable value of the Debtors' enterprise, including with respect to the proposed procedures for providing Bid Protections as

(Page | 5)

Debtors: INVITAE CORPORATION, *et al.*

Case No. 24-11362 (MBK)

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determined by the Debtors in an exercise of their business judgment in accordance with the Bidding Procedures, which Bid Protections the Court has not yet approved.

3. The Debtors' proposed notice of the Motion and the Hearing was (i) appropriate and reasonably calculated to provide all interested parties with timely and proper notice, (ii) in compliance with all applicable requirements of the Bankruptcy Code, the Bankruptcy Rules, and the Local Rules, and (iii) adequate and sufficient under the circumstances of these chapter 11 cases, and no other or further notice is required. A reasonable opportunity to object or be heard regarding the relief granted by this Order has been afforded to all interested persons and entities.

4. All objections to the relief requested in the Motion that have not been withdrawn, waived, or settled prior to or at the Hearing are overruled.

I. Important Dates and Deadlines.

5. **Final Bid Deadline.** April 10, 2024, at 4:00 p.m., prevailing Eastern Time, is the deadline by which all Qualified Bids must be **actually received** by the parties specified in the Bidding Procedures.

6. **Stalking Horse Bidders and Bid Protections.** The Debtors, upon entry of this Order, shall be authorized, but are not obligated or directed, in an exercise of their business judgment, with the consent of the Required Holders (not to be unreasonably withheld, delayed, or conditioned) and in consultation with any statutory committees appointed in these cases, to select

(Page | 6)

Debtors: INVITAE CORPORATION, *et al.*

Case No. 24-11362 (MBK)

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one or more Stalking Horse Bidders with respect to some or all of the Debtors' Assets and enter into a Stalking Horse APA by no later than March 29, 2024, at 4:00 p.m. (prevailing Eastern time).

7. In the event that the Debtors, with the consent of the Required Holders (not to be unreasonably withheld, delayed, or conditioned) and in consultation with any statutory committees appointed in these cases, enter into a Stalking Horse APA with one or more Stalking Horse Bidders, within two (2) business days of entry, the Debtors shall file a notice and proposed form of order with the Court (the "Stalking Horse Notice") and serve the Stalking Horse Notice on the Stalking Horse Bidder, the Consultation Parties,³ and the U.S. Trustee. The Stalking Horse Notice shall: (i) set forth the identity of the Stalking Horse Bidder (and if the Stalking Horse Bidder is a newly formed entity, then the Stalking Horse Bidder's parent company or sponsor); (ii) set forth the amount of the Stalking Horse Bid and what portion (if any) is cash; (iii) state whether the Stalking Horse Bidder has any connection to the Debtors other than those that arise from the Stalking Horse Bid; (iv) specify any proposed Bid Protections (including the amount and calculation thereof); (v) attach the Stalking Horse APA, including all exhibits, schedules and attachments thereto; (vi) specify the Assets included in the Stalking Horse Bid; and (vii) sets forth

³ "Consultation Parties" means the Required Holders and any statutory committee appointed in these cases; *provided, however*, that to the extent the Required Holders submit a Bid, including a credit bid (a "Credit Bid"), for any Assets, such Required Holders shall not be a Consultation Party with respect to the evaluation and qualification of competing Bids for such Assets included in the Required Holders' Bid, including a Credit Bid, or with respect to seeking and/or obtaining information about other Bids, but shall remain a Consultation Party for other purposes set forth in the Bidding Procedures and Bidding Procedures Order.

(Page | 7)

Debtors: INVITAE CORPORATION, *et al.*

Case No. 24-11362 (MBK)

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the deadline to object to the Stalking Horse Bidder designation and any Bid Protections. If there are no objections to the Stalking Horse Notice within five (5) days of filing with the Court, (the “Notice Period”), the Debtors may submit an order to the Court that incorporates any comments received during the Notice Period that authorizes the Debtors to designate a Stalking Horse Bidder and to enter into a Stalking Horse APA, without the need for further hearing. If a party timely files an objection to the Stalking Horse Notice, the Court shall hold a hearing after the expiration of the Notice Period and as soon thereafter as the Court is available.

8. Upon entry of the order that authorizes the Debtors to designate a Stalking Horse Bidder and to enter into a Stalking Horse APA, the Debtors, with the consent of the Required Holders (not to be unreasonably withheld, delayed, or conditioned) and in consultation with any statutory committees appointed in these cases, are authorized to incur and pay (a) the Breakup Fee and (b) the Expense Reimbursement to each Stalking Horse Bidder that has not submitted a Credit Bid (as defined in the Bidding Procedures) in an aggregate amount not to exceed three (3) percent of the proposed Purchase Price.

9. No person or entity, other than the Stalking Horse Bidder, shall be entitled to any expense reimbursement, breakup fees, “topping,” termination, or other similar fee or payment, and by submitting a bid, such person or entity is deemed to have waived their right to request or to file with this Court any request for expense reimbursement or any fee of any nature, whether by virtue of section 503(b) of the Bankruptcy Code or otherwise.

(Page | 8)

Debtors: INVITAE CORPORATION, *et al.*

Case No. 24-11362 (MBK)

Caption: ORDER (I) APPROVING BIDDING PROCEDURES AND BID PROTECTIONS, (II) SCHEDULING CERTAIN DATES AND DEADLINES WITH RESPECT THERETO, (III) APPROVING THE FORM AND MANNER OF NOTICE THEREOF, (IV) ESTABLISHING NOTICE AND PROCEDURES FOR THE ASSUMPTION AND ASSIGNMENT OF CONTRACTS AND LEASES, (V) AUTHORIZING THE ASSUMPTION AND ASSIGNMENT OF ASSUMED CONTRACTS, AND (VI) AUTHORIZING THE SALE OF ASSETS

10. **Auction**. The date and time of the Auction is Wednesday, April 17, 2024, at 10:00 a.m., prevailing Eastern Time, which time may be extended by the Debtors, in consultation with the Consultation Parties, upon written notice to the Court. The Auction will be held at the offices of the proposed co-counsel to the Debtors: Kirkland & Ellis LLP, 601 Lexington Ave., New York, NY 10022. Only the Debtors, Qualified Bidders, the Consultation Parties, the U.S. Trustee, and such parties' representatives and advisors, shall be entitled to participate in the Auction (*provided* that Qualified Bidders may appear through a duly authorized representative (other than their counsel) bearing a valid and enforceable power of attorney or other written proof evidencing their ability to bind the applicable Qualified Bidder, which document(s) shall be delivered to the Debtors prior to the commencement of the Auction), and only Qualified Bidders will be entitled to participate in or make Overbids (as defined in the Bidding Procedures) at the Auction. The Debtors shall send written notice of the date, time, and place of the Auction to the Qualified Bidders, the Consultation Parties, and the U.S. Trustee no later than two (2) business days before such Auction, and will post notice of the date, time, and place of the Auction no later than two (2) business days before such Auction on the website of the Debtors' notice, claims, and solicitation agent, Kurtzman Carson Consultants LLC (the "Notice and Claims Agent"), at www.kccllc.net/invitae. For the avoidance of doubt, the Debtors may also conduct more than one Auction with respect to non-overlapping material portions of the Debtors' Assets.

(Page | 9)

Debtors: INVITAE CORPORATION, *et al.*

Case No. 24-11362 (MBK)

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11. **Notice of Successful Bidder.** Within two (2) business days upon conclusion of the Auction, the Debtors shall file a Notice of Successful Bidder.

12. **Sale Objection Deadline.** Objections to the Sale Transaction and the Notice of Successful Bidder (“Sale Objection Deadline”), if any, must be made on or before April 28, 2024, at 4:00 p.m., prevailing Eastern Time.

13. **Failure to Object.** If any party fails to timely file with the Court and serve an objection by the Sale Objection Deadline or otherwise abide by the procedures set forth in the Bidding Procedures regarding an objection to the Sale Transaction(s), such party shall be barred from asserting, at the Sale Hearing or otherwise, any objection to the relief requested in the Motion or to the consummation and performance of the Sale Transaction(s), including the transfer of the Assets to the Successful Bidder, free and clear of all liens, claims, interests, and encumbrances pursuant to section 363(f) of the Bankruptcy Code, and shall be deemed to “consent” for the purposes of section 363(f) of the Bankruptcy Code.

14. **Sale Hearing.** May 2, 2024, at [], prevailing Eastern Time, or as soon thereafter as the Debtors may be heard, is the date and time for the hearing for the Court to consider the Successful Bid or Successful Bids, if needed (the “Sale Hearing”). The Sale Hearing may be adjourned by announcement in open Court or on the Court’s calendar without any further notice required.

(Page | 10)

Debtors: INVITAE CORPORATION, *et al.*

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II. Auction, Bidding Procedures, Auction Notice, and Related Relief.

15. The Bidding Procedures, including the Auction Notice, attached to the Bidding Procedures as Schedule 1, substantially in the form attached hereto as Exhibit 1, are incorporated herein and are hereby approved in their entirety, and the Bidding Procedures shall govern the submission, receipt, and analysis of all Bids relating to any proposed Sale Transaction(s). Any party desiring to submit a Bid shall comply with the Bidding Procedures and this Order. The Debtors are authorized to take any and all actions necessary or appropriate to implement the Bidding Procedures. Subject to the terms of the Bidding Procedures, the Debtors, with the consent of the Required Holders (not to be unreasonably withheld, delayed or conditioned) and in consultation with any statutory committees appointed in these cases, may modify the Bidding Procedures as necessary or appropriate to maximize value for their estates.

16. Pursuant to the Bidding Procedures, the Debtors, in their business judgment, in consultation with the Consultation Parties, may (a) determine which Qualified Bid is the highest or otherwise best offer, (b) reject, at any time before entry of an order of the Court approving a Successful Bid, any Bid that the Debtors determine is (i) inadequate or insufficient, (ii) not in conformity with the requirements of the Bankruptcy Code, the Bidding Procedures, or the terms and conditions of the Sale Transaction(s), or (iii) contrary to the best interests of the Debtors, their estates, their creditors, and other stakeholders, and (c) impose such other terms and conditions

(Page | 11)

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Case No. 24-11362 (MBK)

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upon Qualified Bidders as the Debtors determine to be in the best interests of the Debtors' estates in these chapter 11 cases.

17. If the Debtors determine not to conduct an Auction, then the Debtors shall file a notice with the Court of such determination within one (1) business day of the making of such determination by the Debtors.

18. Any deposit (including any Good Faith Deposit) provided by a Qualified Bidder shall be held in escrow by the Debtors or their agent and shall not become property of the Debtors' bankruptcy estates unless and until released from escrow to the Debtors pursuant to the terms of the applicable escrow agreement, the Bidding Procedures, or an order of this Court, as applicable.

19. The Auction Notice, substantially in the form attached to the Bidding Procedures as Schedule 1, is hereby approved. Within two (2) business days following the entry of this Order, the Debtors will cause the Auction Notice to be served upon (a) the office of the United States Trustee for the District of New Jersey; (b) the Debtors' thirty (30) largest unsecured creditors (on a consolidated basis); (c) counsel for any statutory committees appointed in these case; (d) counsel to the agent to the Secured Notes; (e) the indenture trustee to the 2024 Convertible Notes; (f) the indenture trustee to the 2028 Convertible Notes; (g) Sullivan & Cromwell LLP, as counsel to the Required Holders; (h) Wollmuth Maher & Deutsch LLP, as counsel to the Required Holders; (i) counsel to the 2028 Convertible Noteholders; (j) the U.S. Securities and Exchange Commission; (k) the United States Attorney's Office for the District of New Jersey; (l) the attorneys general in

(Page | 12)

Debtors: INVITAE CORPORATION, *et al.*

Case No. 24-11362 (MBK)

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the states where the Debtors conduct their business operations; (m) the Internal Revenue Service; (n) all parties who have expressed a written interest in the Assets; (o) all known holders of liens, encumbrances, and other claims secured by the Assets; (p) each governmental agency that is an interested party with respect to the Sale Transaction; and (q) any party that has requested notice pursuant to Bankruptcy Rule 2002. Within three (3) business days after entry of this Order, the Debtors shall place a publication version of the Auction Notice in *The New York Times* (National Edition) and post it on to the Debtors' restructuring website at www.kccllc.net/invitae. Such notice shall be deemed sufficient and proper notice of the Sale Transaction(s) with respect to known interested parties.

20. Pursuant to Local Rule 6004-2: (a) each bidder participating at the Auction shall be required to confirm that it has not engaged in any collusion with respect to the bidding or the Sale Transaction(s), as set forth in the Bidding Procedures; (b) the Auction shall be conducted openly; and (c) the Auction shall be transcribed or videotaped.

III. Assumption and Assignment Procedures.

21. The procedures set forth below regarding the assumption and assignment of any Executory Contracts and Unexpired Leases proposed to be assumed by the Debtors pursuant to section 365(b) of the Bankruptcy Code and assigned to the Successful Bidder, if any, pursuant to section 365(f) of the Bankruptcy Code in connection with the Sale Transaction(s) are hereby approved to the extent set forth herein.

(Page | 13)

Debtors: INVITAE CORPORATION, *et al.*

Case No. 24-11362 (MBK)

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22. These Assumption and Assignment Procedures shall govern the assumption and assignment of all of the Debtors' Executory Contracts and Unexpired Leases to be assumed and assigned in connection with the Sale Transaction(s) under the Stalking Horse APA, if any, or the Form APA, and any marked versions thereof, subject to the payment of any amount necessary to satisfy all defaults and actual pecuniary loss to the counterparty resulting from such defaults including, but not limited to, all claims, demands, charges, rights to refunds and monetary and non-monetary obligations that the relevant counterparty can assert under an Executory Contract or Unexpired Lease, whether legal or equitable, secured or unsecured, matured or unmatured, contingent or non-contingent, liquidated or unliquidated, senior or subordinate, relating to money now owing or owing in the future, arising under or out of, in connection with, or in any way relating to a Contract (the foregoing amounts as stated in the Contract Assumption Notice, the "Cure Payments"):

- (a) **Notice of Contract Assumption.** As soon as reasonably practicable upon conclusion of any Auction, the Debtors shall file on the docket and serve a notice of contracts assumed and assigned to any Successful Bidder (the "Contract Assumption Notice"), in substantially the form attached hereto as **Exhibit 2**, via first class mail on the counterparties to the Executory Contracts or Unexpired Leases to be assumed and assigned in connection with the Sale Transaction(s) (the "Contract Counterparties"). The Contract Assumption Notice, shall inform each recipient of the timing and procedures relating to such assumption and assignment, and, to the extent applicable, (i) the title of the Executory Contract or Unexpired Lease, (ii) the name of the counterparty to the Executory Contract or Unexpired

(Page | 14)

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Lease, (iii) Debtors' good faith estimates of the Cure Payments, if any, required in connection with the Executory Contract or Unexpired Lease, and (iv) the Sale Objection Deadline; *provided, however*, that service of a Contract Assumption Notice does not constitute an admission that any Executory Contracts and Unexpired Leases listed thereon is an executory contract or that such stated Cure Payment constitutes a claim against the Debtors or a right against any Successful Bidder, all rights with respect thereto being expressly reserved. Further, the inclusion of a contract on the Contract Assumption Notice is not a guarantee that such contract will ultimately be assumed and assigned.

- (b) **Cure Payments.** The payment of the applicable Cure Payments by the Debtors and/or the Successful Bidder, as applicable shall (i) effect a cure of all defaults existing thereunder, (ii) compensate for any actual pecuniary loss to such counterparty resulting from such default, and (iii) together with the assumption of the ultimately assumed Executory Contract or Unexpired Lease by the Debtors and the assignment of such Executory Contract or Unexpired Lease to the Successful Bidder, constitute adequate assurance of future performance thereof.
- (c) **Supplemental Contract Assumption Notice.** To the extent the Debtors, at any time after the Auction (i) identify additional Executory Contracts or Unexpired Leases that may be assumed by and assigned to the Successful Bidder, (ii) remove any Executory Contracts or Unexpired Leases from the list attached to the Contract Assumption Notice, (iii) and/or modify the previously stated Cure Payment associated with any Executory Contract or Unexpired Lease, the Debtors will promptly file with this Court and serve by first-class mail a supplemental notice of contract assumption (a "Supplemental Assumption Notice") on each of the Contract Counterparties affected by the Supplemental Assumption Notice. Each Supplemental Assumption Notice will include the same information with respect to listed Executory Contracts or Unexpired Leases as was included

(Page | 15)

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in the Contract Assumption Notice. Except as otherwise provided in any purchase agreement, a Successful Bidder may designate additional Executory Contracts and Unexpired Leases to be assumed and assigned up to two (2) business days prior to the Closing and may remove Executory Contracts or Unexpired Leases from the list of Executory Contracts and Unexpired Leases up to two (2) business days prior to the Closing.

- (d) **Objections.** Objections, if any, to the proposed assumption and assignment or the Cure Payment proposed with respect thereto, must (i) be in writing, (ii) comply with the applicable provisions of the Bankruptcy Rules, and the Local Rules, (iii) state with specificity the nature of the objection and, if the objection pertains to the proposed Cure Payment, state the correct Cure Payment alleged by the objecting counterparty, together with any applicable and appropriate documentation in support thereof, and (iv) be filed with the Court and served upon (a) proposed counsel to the Debtors, (b) counsel to the Stalking Horse Bidder, if any, (c) the Bid Notice Parties (as defined in the Bidding Procedures), and (d) any other party that has filed a notice of appearance in these chapter 11 cases, so as to be **actually received no later than April 28, 2024, at 4:00 p.m., prevailing Eastern Time, (the “Cure Objection Deadline”)** or the deadline set forth in a **Supplemental Assumption Notice, as applicable**. The Debtors may modify the Cure Objection Deadline and the deadline set forth in a Supplemental Assumption Notice by filing a notice of such modification on the Court’s docket.
- (e) **Dispute Resolution.** In the event that the Debtors and a Contract Counterparty cannot resolve an objection to a Cure Payment, the Executory Contract or Unexpired Lease at issue may be assumed by the Debtors and assigned to the Successful Bidder, *provided* that the Debtors shall segregate the Cure Payment that the Contract Counterparty asserts is required to be paid, pending a resolution of the dispute by the Court or mutual agreement by the parties. Any objection to the proposed assumption

(Page | 16)

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and assignment of a contract or related Cure Payment proposed in connection with the Sale Transaction(s) that remained unresolved as of the Combined Hearing, shall be heard at the Combined Hearing (or at a later date as fixed by the Court).

- (f) **Contract Assumption.** No Executory Contract or Unexpired Lease shall be deemed assumed and assigned pursuant to section 365 of the Bankruptcy Code until the later of (i) the date the Court has entered an order assuming and assigning such Executory Contract or Unexpired Lease or (ii) the date the Sale Transaction(s) has closed.

23. Any party failing to timely file an objection to the Cure Payments or the proposed assumption and assignment of an Executory Contract or Unexpired Lease listed on the Contract Assumption Notice or a Supplemental Assumption Notice is deemed to have consented to (a) such Cure Payment, (b) the assumption and assignment of such Executory Contract or Unexpired Lease, (c) the related relief requested in the Motion, and (d) the Sale Transaction(s). Such party shall be forever barred and estopped from objecting to the Cure Payments, the assumption and assignment of the Executory Contract or Unexpired Lease, adequate assurance of future performance, the relief requested in the Motion, whether or not applicable law excuses such counterparty from accepting performance by, or rendering performance to, the Successful Bidder for purposes of section 365(c)(1) of the Bankruptcy Code and from asserting any additional cure or other amounts against the Debtors and the Successful Bidder with respect to such party's Executory Contract or Unexpired Lease.

(Page | 17)

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24. The Debtors shall, concurrently with the Contract Assumption Notice, provide evidence to each Executory Contract or Unexpired Lease counterparty that the Proposed Assignee has the ability to comply with the requirements of adequate assurance of future performance; provided that any such evidence that constitutes nonpublic information shall be provided on a confidential basis. All Bidders are deemed to consent to the transmission of such evidence of adequate assurances of future performance on a confidential basis to counsel for the applicable Executory Contract or Unexpired Lease counterparties via email with such information to be used only for purpose of assessing the applicable Bidder.

25. The inclusion of an Executory Contract or Unexpired Lease in the Contract Assumption Notice or a Supplemental Assumption Notice will not obligate any Debtor to assume any Executory Contract or Unexpired Lease listed thereon or a Successful Bidder to take assignment of such assumed Contract. Only those Executory Contracts and Unexpired Leases that are included on a schedule of assumed and assigned contracts attached to the executed definitive asset purchase agreement with a Successful Bidder (including amendments or modifications to such schedules in accordance with such asset purchase agreement) will be assumed and assigned to the applicable Successful Bidder. No Executory Contract or Unexpired Lease in the Contract Assumption Notice or a Supplemental Assumption Notice shall be assumed other than in connection with (and concurrently with the effectiveness of) the assignment of such Executory Contract or Unexpired Lease to the applicable Successful Bidder.

(Page | 18)

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IV. Miscellaneous.

26. Nothing in this Order or the Bidding Procedures shall be deemed a waiver of any rights, remedies or defenses that any party (including the sureties, the Debtors, the Debtors' lenders, and the agents under their respective credit agreements, the Stalking Horse Bidder, if applicable, or any other prospective purchaser) has or may have under applicable bankruptcy and non-bankruptcy law, under any indemnity agreements, surety bonds or related agreements or any letters of credit relating thereto, or any rights, remedies, or defenses of the Debtors with respect thereto, including seeking Bankruptcy Court relief with regard to the Auction, the Bidding Procedures, the Sale Transaction(s), and any related items (including, if necessary, to seek an extension of the Bid Deadline). Nothing in this Order of the Bidding Procedures waives or modifies the requirements of the TSA, including, without limitation, the consent and consultation rights contained therein.

27. The Debtors are authorized, with the consent of the Required Holders (not to be unreasonably withheld, delayed, or conditioned) and in consultation with any statutory committees appointed in these cases, to revise the Sale Schedule. The Debtors are further authorized to conduct multiple Sale Transaction(s) and/or Auctions (as necessary) in substantial conformity with the Sale Schedule and Bidding Procedures established through this Order.

28. The Debtors, in connection with offering a product or a service, have not disclosed any policies prohibiting the transfer of personally identifiable information about individuals to

(Page | 19)

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persons that are not affiliated with the Debtors. Subject to this finding, nothing contained in this Order prejudices parties in interest from seeking the appointment of a consumer privacy ombudsman at a later date in connection with any proposed sales pursuant to the Bankruptcy Code. In addition, nothing contained in this Order constitutes a determination as to whether the Debtors are healthcare businesses and does not prejudice the Court from appointing a patient care ombudsman pursuant to the Bankruptcy Code at a later date.

29. The failure to include or reference a particular provision of the Bidding Procedures in this Order shall not diminish or impair the effectiveness or enforceability of such a provision in the Bidding Procedures.

30. The Court, at the request of the Debtors, and in consultation with the Consultation Parties, and subject to its availability, may modify the dates of and adjourn any hearing set by this Order without further Order of this Court, *provided* that the Debtors will serve notice to all requisite parties informing them of such modification.

31. The Debtors may, with the consent of the Required Holders (not to be unreasonably withheld, delayed, or conditioned) and in consultation with any statutory committees appointed in these cases, modify any of the deadlines set forth herein or provide for additional deadlines within a Sale Schedule without further order of the Court, *provided* that the Debtors will disclose all applicable deadlines in a notice filed with the Court, including, as applicable, the Auction Notice.

(Page | 20)

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Case No. 24-11362 (MBK)

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32. The Debtors may, in consultation with the Consultation Parties, modify any Good Faith Deposit as necessary or appropriate, based on the Assets being sold.

33. In the event of any inconsistencies between this Order and the Motion and/or the Bidding Procedures, this Order shall govern in all respects.

34. Nothing contained in the Motion or this Order, and no action taken pursuant to the relief requested or granted (including any payment made in accordance with this Order), is intended as or shall be construed or deemed to be: (a) an admission as to the amount of, basis for, priority of, or validity of any claim against the Debtors under the Bankruptcy Code or other applicable nonbankruptcy law; (b) a waiver of the Debtors' or any other party in interest's right to dispute any claim on any grounds; (c) a promise or requirement to pay any particular claim; (d) an implication, admission or finding that any particular claim is an administrative expense claim, other priority claim or otherwise of a type specified or defined in the Motion or this Order (f) an admission as to the validity, priority, enforceability or perfection of any lien on, security interest in, or other encumbrance on property of the Debtors' estates; or (g) a waiver or limitation of any claims, causes of action or other rights of the Debtors or any other party in interest against any person or entity under the Bankruptcy Code or any other applicable law

35. The Debtors are authorized to take all actions necessary to effectuate the relief granted pursuant to this Order in accordance with the Motion.

(Page | 21)

Debtors: INVITAE CORPORATION, *et al.*

Case No. 24-11362 (MBK)

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36. Notice of the Motion as provided therein shall be deemed good and sufficient notice of such Motion and the requirements of Bankruptcy Rule 6004(a) and the Local Rules are satisfied by such notice.

37. Notwithstanding Bankruptcy Rule 6004(h), to the extent applicable, the terms and conditions of this Order shall be effective and enforceable immediately upon its entry.

38. The requirement set forth in Local Rule 9013-1(a)(3) that any motion be accompanied by a memorandum of law is hereby deemed satisfied by the contents of the Motion or otherwise waived.

39. Any party may move for modification of this Order in accordance with Local Rule 9013-5(e).

40. The Debtors shall serve a copy of this Order on all required parties pursuant to Local Rule 9013-5(f).

41. This Court retains exclusive jurisdiction with respect to all matters arising from or related to the implementation, interpretation, and enforcement of this Order.

Exhibit 1

Bidding Procedures

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KIRKLAND & ELLIS INTERNATIONAL LLP
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Proposed Co-Counsel to the Debtors and Debtors in Possession

Proposed Co-Counsel to the Debtors and Debtors in Possession

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY**

In re:

INVITAE CORPORATION, *et al.*,

Debtors.¹

Chapter 11

Case No. 24-11362 (MBK)

(Joint Administration Requested)

**BIDDING PROCEDURES FOR THE
SUBMISSION, RECEIPT, AND ANALYSIS OF BIDS
IN CONNECTION WITH THE SALE OF THE DEBTORS' ASSETS**

On February 13, 2024, the above-captioned debtors and debtors in possession (collectively, the “Debtors”) filed voluntary petitions for relief under chapter 11 of title 11 of the United States

¹ The last four digits of Debtor Invitae Corporation’s tax identification number are 1898. A complete list of the Debtors in these chapter 11 cases and each such Debtor’s tax identification number may be obtained on the website of the Debtors’ proposed claims and noticing agent at www.kccllc.net/invitae. The Debtors’ service address in these chapter 11 cases is 1400 16th Street, San Francisco, California 94103.

Code, 11 U.S.C. §§ 101-1532 (the “Bankruptcy Code”), in the United States Bankruptcy Court for the District of New Jersey (the “Court”).

The Debtors filed these chapter 11 cases after reaching an agreement in principle, memorialized in a transaction support agreement (the “TSA”). Pursuant to the TSA, the Debtors propose to sell or dispose (collectively, the “Sale Transaction(s),” and each, a “Sale”) all or substantially all of the Debtors’ Assets (as defined herein) through a competitive bidding process designed to generate maximum value to the Debtors, their creditors, and the estates.

On February [], 2024, the Court entered the *Order (I) Approving Bidding Procedures and Bid Protections, (II) Scheduling Certain Dates and Deadlines with Respect Thereto, (III) Approving the Form and Manner of Notice Thereof, (IV) Establishing Notice and Procedures for the Assumption and Assignment of Contracts and Leases, (V) Authorizing the Assumption and Assignment of Assumed Contracts, and (VI) Authorizing the Sale of Assets*, [Docket No. []] (the “Bidding Procedures Order”),² by which the Court approved the following procedures (the “Bidding Procedures”) setting forth the process by which the Debtors are authorized to solicit bids for and conduct an auction (the “Auction”), if any, and ultimately select a purchaser for the Sale of all or substantially all of the Debtors’ Assets or any portion thereof.

Any Sale will be implemented pursuant to section 363 of the Bankruptcy Code or a chapter 11 plan of reorganization (as modified, amended, or supplemented from time to time, the “Plan”).

Copies of the Bidding Procedures Order or any other documents in the Debtors’ chapter 11 cases are available upon request to Kurtzman Carson Consultants LLC by calling (866) 967-0263 (toll free) or +1 (310) 751-2663 (international) or visiting the Debtors’ restructuring website at www.kccllc.net/invitae.

I. Assets to be Auctioned.

The Debtors are seeking to sell all of their assets, or any portion thereof to the person or entity making the most value maximizing bid through the process outlined in these Bidding Procedures. These assets include, but are not limited to, the Debtors’ going-concern business, unexpired leases, executory contracts, equipment, inventory, supplies, intellectual property, insurance proceeds, prepaid expenses and deposits, and books and records, in each case, free and clear of all liens, claims, interests, or other encumbrances (collectively, the “Assets”).

II. Public Announcement of Auction.

Within two (2) business days after entry of the Bidding Procedures Order, the Debtors shall serve on the parties that receive notice of this Motion (i) the Bidding Procedures Order and the Bidding Procedures and (ii) a notice setting forth (A) the date, time, and place of the Auction and the hearing to consider the approval of the Sale Transaction(s) and (B) the deadlines and

² All capitalized terms used but not otherwise defined herein shall have the meanings given to them in the Bidding Procedures Order.

procedures for objecting to the proposed Sale Transaction(s) in the form attached hereto as **Schedule 1** (the “Auction Notice”). Within three (3) business days after entry of the Bidding Procedures Order, the Debtors shall also publish the Auction Notice, with any modifications necessary for ease of publication, on one occasion in *The New York Times* (National Edition) to provide notice to any other potential interested parties, and (iii) post the Auction Notice on their case website, www.kccllc.net/invitae. The Auction Notice shall include a complete list and general description of the Assets for sale.

III. Potential Bidder Requirements.

To participate in the bidding process or otherwise be considered for any purpose hereunder, including to receive access to due diligence materials, a person or entity interested in purchasing the Assets or part of the Assets (a “Potential Bidder”) must deliver or have previously delivered to the Debtors the following preliminary documentation (collectively, the “Preliminary Bid Documents”):

- a. an executed confidentiality agreement (a “Confidentiality Agreement”) in form and substance acceptable to the Debtors;
- b. a statement of what portion of the Assets that the Potential Bidder intends to acquire;
- c. sufficient information that the Potential Bidder has or can reasonably obtain the financial capacity to close a purchase of any portion, all, or substantially all of the Debtors’ Assets, the adequacy of which must be acceptable to the Debtors, in consultation with the Consultation Parties;³ and
- d. a statement detailing whether the Potential Bidder is partnering with or otherwise working with any other interested party in connection with the potential submission of a joint Bid, the identity of any such party or parties, and a concise description of the nature of such partnership or joint Bid to the extent reasonably practicable.

The Debtors, in consultation with their advisors, and in consultation with Consultation Parties, will determine and notify each Potential Bidder whether such Potential Bidder has submitted adequate documents so that such Potential Bidder may proceed to conduct due diligence and submit a bid (such Potential Bidder, an “Acceptable Bidder”).

IV. Qualified Bid Requirements.

To participate in the Auction, an Acceptable Bidder must deliver to the Debtors and their advisors an irrevocable offer for the purchase of some or all of the Assets (each, a “Bid”), and shall

³ “Consultation Parties” means the Required Holders and any statutory committee appointed in these cases; *provided, however*, that to the extent the Required Holders submit a Bid, including a Credit Bid, for any Assets, such Required Holders shall not be a Consultation Party with respect to the evaluation and qualification of competing Bids for such Assets included in the Required Holders’ Bid, including a Credit Bid, or with respect to seeking and/or obtaining information about other Bids, but shall remain a Consultation Party for other purposes set forth in the Bidding Procedures.

meet the following criteria, in each case, on or prior to the Bid Deadline (as defined below):

- a. **Purchased Assets and Assumed Liabilities:** Each Bid must clearly state the following: (a) the particular Assets, or the portion thereof identified, with reasonable specificity to be purchased and/or liquidated or otherwise disposed of; (b) the liabilities and obligations to be assumed, including any debt and cure costs to be assumed; (c) any executory contracts (the “Executory Contracts”) and any unexpired leases (the “Unexpired Leases”) to be received by assignment, and (d) as applicable, whether the Acceptable Bidder intends to operate the Debtors’ business as a going concern;
- b. **Good Faith Deposit:** The Bid must be accompanied by a cash deposit in the amount equal to ten (10) percent of the aggregate purchase price of the Bid to be held in an interest-bearing escrow account to be identified and established by the Debtors (the “Good Faith Deposit”). To the extent that a Bid is modified at or prior to the Auction, the applicable Acceptable Bidder must adjust its Good Faith Deposit so that it equals ten (10) percent of the increased aggregate purchase price promptly and in no event later than one (1) business day following the conclusion of the Auction;
- c. **Purchase Price:** Each Bid must (a) clearly set forth the purchase price to be paid, assuming a purchase of the applicable Assets and any assumption of liabilities (the “Purchase Price”), (b) identify separately the cash and non-cash components of the Purchase Price, and (c) indicate the allocation of the Purchase Price among the applicable Assets. The Purchase Price should be a single point value in U.S. Dollars for the applicable Assets on a cash-free, debt-free basis. Any Bid for substantially all of the Assets must also include a statement as to whether the Bid is conditioned on purchasing all Assets or whether the Qualified Bid should be viewed as a separate Bid for one or more sets of Assets. The Debtors reserve the right, in consultation with the Consultation Parties, to ask any Acceptable Bidder to allocate the value ascribed to a Bid for any particular Asset and to inquire about any significant assumptions on which such valuations are based;
- d. **Sources of Financing:** To the extent that the Bid is not accompanied by evidence of the Acceptable Bidder’s capacity to consummate the Sale Transaction(s) set forth in its Bid with cash on hand, the Bid must include committed financing, documented to the Debtors’ satisfaction, that demonstrates that the Acceptable Bidder has received sufficient debt and/or equity funding commitments to satisfy the Acceptable Bidder’s obligations under the proposed Sale Transaction(s) and other obligations under its Bid. Such funding commitments or other financing must be unconditional and must not be subject to any internal approvals, syndication requirements, diligence, or credit committee approvals, and shall have covenants and conditions acceptable to the Debtors;
- e. **Same or Better Terms; Bid Documents:** Each Bid must include duly executed and non-contingent, where applicable, transaction documents necessary to effectuate the transactions contemplated in the Bid (the “Bid Documents”). The

Bid Documents shall include: (a) a purchase agreement, based on a form that the Debtors shall make available to Acceptable Bidders via the Debtors' electronic data room pursuant to the due diligence process (the "Form APA"), duly executed by such bidder, containing only changes to the Form APA that are reasonably necessary to effectuate the Bid, (b) a schedule of Executory Contracts and Unexpired Leases to be assumed or rejected to the extent applicable to the Bid, (c) with respect to the form of purchase agreement, a redline of such agreement marked to reflect the amendments and modifications made to the Form APA, (d) any other material documents integral to such Bid, and (e) a statement from the Acceptable Bidder that (i) it is prepared to enter into and consummate the transactions contemplated in the Form APA, no later than ten (10) business days after the conclusion of the Auction, subject to any necessary regulatory approvals, as specified by the Acceptable Bidder (or, if no Auction is held, the deadline by which all binding Bids must be actually received pursuant to the Bidding Procedures (the "Bid Deadline")) and (ii) the Qualified Bid will be irrevocable (whether or not such Qualified Bid is selected as the highest or otherwise best bid to purchase the applicable Assets (each, a "Successful Bid") or next highest or otherwise best bid (the "Back-Up Bid") until the consummation of the Sale Transaction(s));

- f. **No Qualified Bidder Bid Protections:** Unless such Qualified Bid is selected as a stalking horse bid (a "Stalking Horse Bid"), a Qualified Bid must include a statement that the bid does not entitle such bidder to any break-up fee, termination fee, expense reimbursement, or similar type of payment or reimbursement and a waiver of any substantial contribution administrative expense claim under section 503(b) of the Bankruptcy Code related to bidding for the applicable Assets;
- g. **Employee Obligations:** Each Bid must indicate whether the Acceptable Bidder intends to hire all employees of the Debtors. If the Acceptable Bidder does not intend to hire all employees of the Debtors, the Acceptable Bidder must include a description of the Acceptable Bidder's intentions with respect to the relevant members of the Debtors' current management team and other employees who are employed primarily in connection with the applicable Assets, and a description of any contemplated incentive plan, to the extent applicable;
- h. **Authorization:** Each Bid must contain evidence that the Acceptable Bidder has obtained all necessary authorizations or approvals from its shareholders and/or its board of managers or directors, or any other internal and other approvals, as applicable, with respect to the submission of its Bid and the consummation of the transactions contemplated in such Bid;
- i. **Contingencies; No Financing or Diligence Outs:** The Bid must not contain any contingencies as to the validity, effectiveness, or binding nature of the Bid, including, without limitation, contingencies for due diligence and inspection or financing of any kind (including any conditions pertaining to financial performance, conditions, or prospects) and all diligence must be completed before the Bid Deadline;

- j. **Identity:** Each Bid must fully disclose the identity of each entity and each entity's shareholders, partners, investors, and ultimate controlling entities that will be bidding for or purchasing the applicable Assets or otherwise participating in connection with such Bid, including each equity holder or other financial backer of the bidder (including if such bidder is an entity formed for the purpose of consummating the transactions contemplated by such Bid), and the complete terms of any such participation, along with sufficient evidence that the Acceptable Bidder is legally empowered to complete the transactions on the terms contemplated by the parties. Each Bid must also include contact information for the specific person(s) whom Moelis & Company LLC ("Moelis") and Kirkland & Ellis LLP should contact regarding such Bid;
- k. **As-Is, Where-Is:** Each Bid must include a written acknowledgement and representation that the Acceptable Bidder: (i) has had an opportunity to conduct any and all due diligence regarding the Sale Transaction(s) prior to making its offer; (ii) has relied solely upon its own independent review, investigation, and/or inspection of any documents and/or the assets in making its Bid; (iii) did not rely on or receive from any person or entity (including any of the Debtors or their advisors or other representatives) any written or oral statements, representations, promises, warranties, or guaranties whatsoever, whether express, implied, by operation of law, or otherwise, regarding the completeness of any information provided in connection therewith or the Auction (if any), except as expressly stated in the Acceptable Bidder's purchase agreement; and (iv) did not engage in collusive conduct and acted in good faith in submitting its Bid;
- l. **Joint Bids and Merger Proposals:** The Debtors will be authorized to approve joint bids in their business judgment, including, but not limited to, any bids that contemplate acquiring equity or assets through a merger or similar transaction, including if a proposed bid contemplates additional financing from one or several participating parties, on a case by case basis, so long as such bid meets the Qualified Bid Requirements and the applicable bidders otherwise comply with these Bidding Procedures;
- m. **Adequate Assurance of Future Performance:** Each Bid must (i) identify the Executory Contracts and Unexpired Leases to be assumed or assumed and assigned in connection with the proposed Sale Transaction(s), (ii) provide for the payment of all cure amounts (the "Cure Amounts") related to such Executory Contracts and Unexpired Leases by the Acceptable Bidder, (iii) demonstrate, in the Debtors' business judgment, that the Acceptable Bidder can provide adequate assurance of future performance under all such Executory Contracts and Unexpired Leases sufficient to satisfy the requirements of sections 365(b)(3) and 365(f)(2)(B) of the Bankruptcy Code, and (iv) provide the following documentation:
 - (i) The proposed assignee (the "Proposed Assignee") and any guarantors, as applicable;

- (ii) Financial statements for the calendar or fiscal years ended 2022 and 2023 for the Proposed Assignee and any guarantors, as applicable, and other financial information about the Proposed Assignee to demonstrate its ability to provide adequate assurance of future performance; and
 - (iii) Summary of the Proposed Assignee's proposed use of the premises;
- n. **Acknowledgement of Compliance with Bidding Procedures, Bidding Order, Bankruptcy Code, and Non-Bankruptcy Law:** Each Bid must acknowledge that it has complied, and will continue to comply, in all respects with these Bidding Procedures, the Bidding Procedures Order, the Bankruptcy Code, and any applicable non-bankruptcy law;
- o. **Privacy Policies.** The Acceptable Bidder must comply in all respects with the Debtors' consumer privacy practices, which do not restrict the transfer of personally identifiable information of the Debtors' customers in connection with a bankruptcy, merger, acquisition, or other business transaction, involving all or a portion of the Debtors' assets or business, and each Bid must contain a statement acknowledging such compliance;
- p. **No Collusion:** The Acceptable Bidder must (a) acknowledge in writing that it has not engaged in any collusion with respect to any Bids or the Sale Transaction(s), specifying that it did not agree with any Acceptable Bidders or Potential Bidders to control price or otherwise with respect to any of the Assets or the Sale Transaction(s) and processes contemplated by the Bidding Procedures; and (b) agree not to engage in any collusion with respect to any Bids, the Auction, or the Sale Transaction(s). The Acceptable Bidder must further indicate if it has or intends to coordinate its bid, or otherwise bid with, any current or former member of the Debtors' or their affiliates' executive management or board of directors. For the avoidance of doubt, this requirement does not restrict Potential Bidder(s) from working with other Potential Bidder(s) with the Debtors' prior written consent (email shall suffice);
- q. **Good Faith Offer:** The Bid must constitute a good faith, *bona fide* offer to consummate the Sale Transaction(s);
- r. **Irrevocable:** Each Bid must state that in the event such Bid is chosen as the Back-Up Bid (as defined below), it shall remain irrevocable until the Debtors and the Successful Bidder consummate the applicable Sale Transaction(s);
- s. **Back-Up Bid:** Each Bid shall provide that the Acceptable Bidder will serve as a Back-Up Bidder (as defined below) if the Acceptable Bidder's Bid is the next highest or otherwise best bid with respect to the applicable Assets;
- t. **Regulatory and Third-Party Approvals and Covenants:** A Bid must set forth each regulatory and third-party approval, if any, required for the Acceptable Bidder

to consummate the applicable Sale Transaction(s), the time period within which the Acceptable Bidder expects to receive such regulatory and third-party approvals, and those actions the Acceptable Bidder will take to ensure receipt of such approvals as promptly as possible;

- u. **Regulatory Forms and Covenants:** Each Bid by an Acceptable Bidder must include the forms necessary for submission of regulatory approval (other than HSR and non-U.S. antitrust filings) of the Sale Transaction(s) (as applicable), including, for the avoidance of doubt, to the Office of Health Care Affordability pursuant to the California Health Care Quality and Affordability Act;
- v. **Expected Closing Date and Time Frame for Closing:** Each Bid must state the Acceptable Bidder's expected date of closing of the Sale Transaction(s) (the "Closing") and must be reasonably likely (based on antitrust or other regulatory issues, experience, and other considerations) to be consummated, if selected as the Successful Bid, within a time frame acceptable to the Debtors in consultation with the Consultation Parties;
- w. **No Fees:** Except to the extent the Acceptable Bidder is approved, prior to the Bid Deadline and in accordance with Bidding Procedures Order, to be eligible to receive (x) a break-up fee (the "Break-Up Fee") and/or (y) reimbursement of reasonable and documented out of pocket fees and expenses (the "Expense Reimbursement") and together with the Break-Up Fee, the "Bid Protections") in an aggregate amount for (x) and (y) combined not to exceed three (3) percent of the Purchase Price as a stalking horse bidder (a "Stalking Horse Bidder"), each Acceptable Bidder presenting a Bid or Bids will bear its own costs and expenses (including legal fees) in connection with the proposed transaction, and by submitting its Bid(s) is agreeing to disclaim any right to receive any payments or amounts analogous to a break-up fee, expense reimbursement, termination fee, or other similar form of compensation;

For the avoidance of doubt, each Acceptable Bidder by submitting its Bid is agreeing to refrain from and waive any assertion or request for reimbursement on any basis, including under section 503(b) of the Bankruptcy Code; *provided* that the Debtors are authorized in their business judgment, in consultation with the Consultation Parties, to provide the Bid Protections to the Stalking Horse Bidder(s) in connection with any stalking horse agreement (a "Stalking Horse APA") in accordance with these Bidding Procedures; *provided further* that to the extent any Stalking Horse Bidder has submitted a credit bid (a "Credit Bid"), the Bid Protections shall not be permitted;

- x. **Adherence to Bidding Procedures:** By submitting its Bid, each Acceptable Bidder is agreeing to abide by and honor the terms of these Bidding Procedures and agrees not to submit a Bid or seek to reopen the Auction after conclusion of the Auction;

- y. **Consent to Jurisdiction:** The Acceptable Bidder must submit to the jurisdiction of the Court and waive any right to a jury trial in connection with any disputes relating to the Debtors' qualification of Bids, to the Auction, the Sale Transaction(s), and the construction and enforcement of these Bidding Procedures, preliminary bid documents, the Bids, the Bid Documents, and any and all other agreements entered into in connection with any proposed Sale Transaction(s), the Closing, and any other related matter; and
- z. **Conditions to Closing:** Each Bid must identify with particularity each and every condition to closing, including the Executory Contract and Unexpired Leases for which assumption and assignment is required.

Only Bids fulfilling all of the preceding requirements contained in this section as determined or otherwise waived in the Debtors' business judgment, in consultation with the Consultation Parties, may be deemed to be qualified bids (the "Qualified Bids"), and only those parties submitting Qualified Bids, in the Debtors' business judgment, in consultation with the Consultation Parties, may be deemed to be qualified bidder (the "Qualified Bidders").

Neither the Debtors nor any of their advisors are making or have at any time made, and no bidder, Potential Bidder, or Acceptable Bidder has relied, is relying, or shall rely on any warranties or representations of any kind or character, express or implied, with respect to the Assets, including, but not limited to, any warranties or representations as to operating history or projections, valuation, governmental approvals, the compliance of the Assets with governmental laws, the truth, accuracy, or completeness of any documents related to the Assets, or any other information provided by or on behalf of the Debtors to a bidder, or any other matter or thing regarding the Assets, except as expressly stated in the Acceptable Bidder's purchase agreement. All bidders must acknowledge and agree that upon closing the Debtors shall sell and transfer to the Successful Bidder and the Successful Bidder shall accept the applicable Assets to the extent expressly provided in the Bankruptcy Court's order approving the Sale Transaction(s). Neither the Debtors nor any of their advisors will be liable for or bound by any express or implied warranties, guaranties, statements, representations, or information pertaining to the Assets or relating thereto that the Debtors, any advisor, or agent representing or purporting to represent the Debtors to whomever might have made or furnished, directly or indirectly, orally or in writing, unless (with respect to the Debtors only) specifically set forth in the Bankruptcy Court's order approving the Sale Transaction(s).

There shall be no communications between or among Potential Bidders and/or Acceptable Bidders unless the Debtors' advisors have authorized such communication in writing. The Debtors reserve the right, in their business judgment, to disqualify any Potential Bidders or Acceptable Bidders that have communications between or amongst themselves without the prior authorization of the Debtors' advisors. For the avoidance of doubt, the joining of Bids between Potential Bidders or Acceptable Bidders may be permitted by the Debtors in their business judgement.

As soon as practicable after the Bid Deadline and in any event prior to the Auction, the Debtors shall determine, in consultation with the Consultation Parties, which Acceptable Bidders are Qualified Bidders and will notify the Acceptable Bidders whether Bids submitted constitute Qualified Bids, which will enable such Qualified Bidders to participate in the Auction. Any Bid

that is not deemed a Qualified Bid shall not be considered by the Debtors; *provided* that if the Debtors receive a Bid prior to the Bid Deadline that does not satisfy the requirements of a Qualified Bid, the Debtors may provide the Acceptable Bidder with the opportunity and work with the Acceptable Bidder to remedy any deficiencies prior to the Auction.

V. Right to Credit Bid

Any party that has a valid and perfected lien on any of the Assets (a “Secured Creditor”) shall have the right to submit Credit Bids consisting of all or a portion of the value of such Secured Creditor’s claims within the meaning of section 363(k) of the Bankruptcy Code; *provided* that a Secured Creditor shall have the right to Credit Bid its claim only with respect to the collateral by which such Secured Creditor claim is secured.

Any Credit Bid made by a Secured Creditor will be deemed to be a cash Bid solely for purposes of the Debtors’ evaluation of Bids (including the Debtors’ evaluation of Qualified Bids and Subsequent Bids). Any Secured Creditor shall be deemed to be an Acceptable Bidder, shall be deemed to have submitted a Qualified Bid, and may participate in any Auction with respect to any assets constituting collateral of such Secured Creditor without the requirement to submit a Good Faith Deposit or any Bid Documents other than a marked form of the Form APA; *provided* that no other party other than the Prepetition Secured Parties (as defined in the Cash Collateral Order) may Credit Bid on the Collateral (as defined in the Cash Collateral Order) unless the entire amount of the Prepetition Secured Indebtedness (as defined in the Cash Collateral Order) will be paid in full in cash on the closing of such credit bid transaction. No Secured Creditor submitting a Credit Bid shall be required to submit a Good Faith Deposit or any Bid Documents.

VI. Obtaining Due Diligence Access.

Only Acceptable Bidders shall be eligible to receive due diligence information, access to the Debtors’ electronic data room, and additional non-public information regarding the Debtors. ***No Acceptable Bidder will be permitted to conduct any due diligence without entry into a Confidentiality Agreement.*** Beginning on the date the Debtors determine that a party is an Acceptable Bidder, or as soon as reasonably practicable thereafter, the Debtors will provide such Acceptable Bidder with access to an electronic data room and reasonable due diligence information, as requested by such Acceptable Bidder, as soon as reasonably practicable after such request. The Debtors shall post substantially all written due diligence provided to any Acceptable Bidder to the Debtors’ electronic data room for the benefit of all Acceptable Bidders, subject to the further provisions below.

Acceptable Bidders will not, directly, or indirectly, contact or initiate or engage in discussions in respect of matters relating to the Debtors or a potential transaction with any customer, supplier, or other contractual counterparty of the Debtors without the prior written consent of the Debtors. The due diligence period will end on the Bid Deadline and subsequent to the Bid Deadline the Debtors shall have no obligation to furnish any due diligence information.

In connection with the provision of due diligence information to Acceptable Bidders, the Debtors shall not furnish any confidential information relating to the Debtors or a potential transaction to any person except an Acceptable Bidder or such Acceptable Bidder’s duly

authorized representatives to the extent provided in an applicable Confidentiality Agreement.

The Debtors and their advisors shall coordinate all reasonable requests for additional information and due diligence access from Acceptable Bidders; *provided* that the Debtors may decline to provide such information to Acceptable Bidders who, in the Debtors' business judgment have not established, or who have raised doubt, that such Acceptable Bidders intend in good faith to, or have the capacity to, consummate a Sale Transaction(s). For any bidder who is a competitor or customer of the Debtors or is affiliated with any competitors or customers of the Debtors, or otherwise presents a *bona fide* competitive or strategic concern, the Debtors reserve the right, in consultation with the Consultation Parties, to withhold or modify any diligence materials that the Debtors determine are business-sensitive or otherwise inappropriate for disclosure to such bidder.

The Debtors shall keep the Consultation Parties reasonably informed of all interested parties that become Acceptable Bidders and the status of their due diligence.

A. Communications with Acceptable Bidders (including Qualified Bidders).

Notwithstanding anything to the contrary in these Bidding Procedures, all substantive direct communications, including any diligence requests, with Acceptable Bidders (including any Qualified Bidders) shall be through Moelis.

B. Due Diligence from Acceptable Bidders (including Qualified Bidders).

Each Acceptable Bidder (including any Qualified Bidder) shall comply with all reasonable requests for additional information and due diligence access requested by the Debtors or their advisors and their respective advisors, regarding the ability of such Acceptable Bidder (including any Qualified Bidder) to consummate its contemplated transaction. Failure by an Acceptable Bidder (including any Qualified Bidder, other than the Stalking Horse Bidder, if any) to comply with such reasonable requests for additional information and due diligence access may be a basis for the Debtors, to determine that such bidder is no longer an Acceptable Bidder (including any Qualified Bidder, other than the Stalking Horse Bidder, if any) or that a bid made by such bidder is not a Qualified Bid.

Barak Klein, Andrew Swift, and Amy Chen at Moelis shall coordinate all requests for additional information and due diligence access on behalf of the Debtors. They can be reached at barak.klein@moelis.com, andrew.swift@moelis.com, and amy.chen@moelis.com.

VII. Bid Deadline.

Binding Bids must be submitted in writing to the following parties (the "Bid Notice Parties") so as to be **actually received** no later than 4:00 p.m., prevailing Eastern Time, on April 10, 2024 (the "Bid Deadline").

- (i) proposed co- counsel to the Debtors, (A) Kirkland & Ellis LLP, 601 Lexington Avenue, New York, New York 10022, Attn.: Nicole L. Greenblatt, P.C.

(nicole.greenblatt@kirkland.com), Francis Petrie, (francis.petrie@kirkland.com), and Nikki Gavey (nikki.gavey@kirkland.com) and Kirkland & Ellis LLP, 300 North LaSalle, Chicago, Illinois 60654, Attn.: Spencer A. Winters, P.C. (spencer.winters@kirkland.com) and (B) Cole Schotz P.C., Court Plaza North, 25 Main Street, Hackensack, New Jersey 07601, Attn.: Michael D. Sirota (msirota@coleschotz.com); Warren A. Usatine (wusatine@coleschotz.com); Felice R. Yudkin (fyudkin@coleschotz.com); and Daniel J. Harris (dharris@coleschotz.com); and

- (ii) the Debtors' proposed investment banker, Moelis & Company LLC, 399 Park Avenue, 5th Floor, New York, NY 10022, Attn: Barak Klein (barak.klein@moelis.com), Andrew Swift (andrew.swift@moelis.com), and Amy Chen (amy.chen@moelis.com).

The Debtors may extend the Bid Deadline for any reason whatsoever, in their business judgment and in consultation with the Consultation Parties, for all or certain Acceptable Bidders.

VIII. Evaluation of Qualified Bids.

The Debtors shall, in consultation with the Consultation Parties, evaluate Qualified Bids and identify the Qualified Bid that is, in the Debtors' business judgment, the highest or otherwise best Qualified Bid or combination of Qualified Bids for any Assets (the "Starting Bid"). The Debtors shall promptly provide to the Office of the United States Trustee for the District of New Jersey (the "U.S. Trustee") and the Consultation Parties copies of all Bids received by the Debtors, including the Starting Bid; *provided* that the U.S. Trustee and the Consultation Parties must treat such Bids and any related information as confidential and shall not publicly disclose such information without the written consent of the Debtors and the applicable bidder.

When determining the highest or otherwise best Qualified Bid, as compared to other Qualified Bids, the Debtors may consider the following factors, in addition to any other factors that the Debtors deem appropriate: (a) the amount and nature of the total consideration; (b) the likelihood of the Qualified Bidder's ability to close a transaction and the timing thereof; (c) the net economic effect of any changes to the value to be received by each of the Debtors' estates from the transaction contemplated by the Bid Documents; (d) the Debtors' regulatory requirements, and (e) the tax consequences of such Qualified Bid; (f) whether the Qualified Bid contemplates a Sale Transaction that would be consummated through a Plan or a sale pursuant to section 363 of the Bankruptcy Code; (g) the certainty of a Qualified Bid leading to a confirmed Plan; and (h) any other consideration that may impact the Debtors' stakeholders. Prior to commencing the Auction, the Debtors shall notify the Stalking Horse Bidder, if any, and all Qualified Bidders as to which Qualified Bid is the Starting Bid for the Auction with respect to the applicable Assets. At such time, the Debtors shall also distribute copies of the Starting Bid to the Stalking Horse Bidder, if any, and each Qualified Bidder.

IX. Bid Protections.

Pursuant to the Bidding Procedures Order, a Stalking Horse Bidder, if any, that has not submitted a Credit Bid, is entitled to the Bid Protections in the amounts set forth herein, and in

accordance with the terms of the Bidding Procedures Order.

In the event that the Debtors receive multiple Qualified Bids, with respect to any Assets, at any time until March 29, 2024, at 4:00 p.m., prevailing Eastern Time, the Debtors shall be authorized, but not obligated, in an exercise of their business judgment, with the consent of the Required Holders (not to be unreasonably withheld, delayed, or conditioned) and in consultation with any statutory committee appointed in these cases, to (a) select one or more Acceptable Bidders to act as the Stalking Horse Bidder in connection with the Auction for such assets, and (b) in connection with any Stalking Horse APA with a Stalking Horse Bidder, (x) provide a break-up fee and (y) agree to reimburse the reasonable and documented out of pocket fees and expenses not to exceed (i) three (3) percent of the Purchase Price with respect to the foregoing clauses (x) and (y) in the aggregate. Any such Bid Protections are authorized pursuant to the Bidding Procedures Order.

In the event that the Debtors, with the consent of the Required Holders (not to be unreasonably withheld, delayed, or conditioned) and in consultation with any statutory committee appointed in these cases, enter into a Stalking Horse APA with one or more Stalking Horse Bidders, within two (2) business days of entry, the Debtors shall file a notice and proposed form of order with the Court (the "Stalking Horse Notice") and serve the Stalking Horse Notice on the Stalking Horse Bidder, the U.S. Trustee, and the Consultation Parties. The Stalking Horse Notice shall: (i) set forth the identity of the Stalking Horse Bidder (and if the Stalking Horse Bidder is a newly formed entity, then the Stalking Horse Bidder's parent company or sponsor); (ii) set forth the amount of the Stalking Horse Bid and what portion (if any) is cash; (iii) state whether the Stalking Horse Bidder has any connection to the Debtors other than those that arise from the Stalking Horse Bid; (iv) specify any proposed Bid Protections (including the amount and calculation thereof); (v) attach the Stalking Horse APA, including all exhibits, schedules and attachments thereto; (vi) specify the Assets to which the Stalking Horse Bid relates; and (vii) sets forth the deadline to object to the Stalking Horse Bidder designation and any Bid Protections. If there are no objections to the Stalking Horse Notice within five (5) days of filing with the Court, (the "Notice Period"), the Debtors may submit an order to the Court that incorporates any comments received during the Notice Period that authorizes the Debtors to designate a Stalking Horse Bidder and to enter into a Stalking Horse APA, without the need for further hearing. If a party files an objection to the Stalking Horse Notice, the Court shall hold a hearing after the expiration of the Notice Period and as soon thereafter as the Court is available.

Upon entry of the order approving the designation of a Stalking Horse Bidder and Stalking Horse APA, the Debtors are authorized to incur and pay the Bid Protections to each Stalking Horse Bidder in accordance with the terms of the Stalking Horse APA.

Except as otherwise set forth herein, no person or entity, other than a Stalking Horse Bidder that has not submitted a Credit Bid, shall be entitled to any expense reimbursement, breakup fees, "topping," termination, or other similar fee or payment, and by submitting a bid, such person or entity is deemed to have waived their right to request or to file with this Court any request for expense reimbursement or any fee of any nature, whether by virtue of Bankruptcy Code section 503(b) or otherwise.

X. No Qualified Bids.

If no Qualified Bids other than a Bid submitted by a Stalking Horse Bidder, if any, are received for the Assets included in such Stalking Horse Bid by the applicable Bid Deadline, then the Debtors may cancel the Auction with respect to such Assets in consultation with the Consultation Parties. If any Stalking Horse Bid is the only Qualified Bid received by the applicable Bid Deadline, the Debtors may decide, in their business judgment, and in consultation with the Consultation Parties, to designate such Stalking Horse Bid as the Successful Bid as to the applicable Assets and pursue entry of an order approving a Sale Transaction(s) with respect to such Assets to the Stalking Horse Bidder pursuant to the Stalking Horse APA. The Debtors shall promptly file notice of any cancellation of the Auction and/or designation of the Stalking Horse Bid, where applicable, as the Successful Bid with the Court.

XI. Auction.

Other than as expressly set forth herein, if the Debtors receive more than one Qualified Bid for any particular Asset or portion of Assets by the Bid Deadline, the Debtors shall conduct an Auction to determine the Successful Bidder (or Back-Up Bidder, as applicable) in their business judgment with respect to such Assets or portion of Assets in accordance with the Auction Procedures in consultation with the Consultation Parties. If the Debtors do not receive a Qualified Bid for any particular Asset by the applicable Bid Deadline, the Debtors will not conduct an Auction with respect to such Asset.

If the Debtors determine, in consultation with the Consultation Parties, that they have received no Qualified Bids other than any Stalking Horse Bid(s) or they have received only a single Qualified Bid, then the Auction will not occur, and the Stalking Horse Bid(s) or the Qualified Bid will be deemed to be the Successful Bid(s) for the Assets to which such Stalking Horse Bid(s) relate. The Debtors shall file a notice with the Court within one (1) business day of making such a determination.

The Auction, if necessary, shall commence on Wednesday, April 17, 2024, at 10:00 a.m., prevailing Eastern Time, or such other time or other place as the Debtors determine in consultation with the Consultation Parties.

The Auction will be conducted in accordance with the following procedures (the "Auction Procedures"):

- a. only Qualified Bidders may participate in or make subsequent Bids at the Auction;
- b. only the Debtors, Qualified Bidders, the Consultation Parties, the U.S. Trustee, and such parties' representatives and advisors may attend the Auction; *provided* that Qualified Bidders may appear through a duly authorized representative (other than their counsel) bearing a valid and enforceable power of attorney or other written proof evidencing their ability to bind the applicable Qualified Bidder, which document(s) shall be delivered to the Debtors prior to the commencement of the Auction;

- c. the Debtors, with the assistance of their advisors, shall direct and preside over any Auction;
- d. at the commencement of the Auction, the Debtors may announce modified or additional procedures for conducting the Auction and related rules governing the Auction, including time periods available to all Qualified Bidders to submit successive bid(s), or otherwise modify the Bidding Procedures, in each case in consultation with the Consultation Parties; *provided* that material modifications to the Auction Procedures may only be made with the consent of the Required Holders (not to be unreasonably withheld, delayed, or conditioned);
- e. bidding shall begin with the Starting Bid;
- f. subsequent bids (each, an “Overbid”) may only be made at the Auction and shall be at least (i) a two (2) percent increase in cash, cash equivalents, or other such consideration that the Debtors, in their business judgment, in consultation with the Consultation Parties, deem equivalent (including the right of any Secured Creditor to Credit Bid any remaining amounts of its secured claim in accordance with these Bidding Procedures) over the previous bid *plus* (ii) solely with respect to the first Overbid made by a party in the event that the Debtors have entered into a Stalking Horse APA, except with respect to any Overbid made by the Stalking Horse Bidder, if any, with respect to the Assets to which the Overbid relates, the aggregate amount of Bid Protections under such Stalking Horse APA (a “Minimum Overbid”), and each successive Overbid shall exceed the then-existing Overbid by an incremental amount that is not less than the Minimum Overbid. The Debtors may, in their business judgment and in consultation with the Consultation Parties announce increases or reductions to the Minimum Overbid at any time during any Auction. For the avoidance of doubt, each successive Bid that a Qualified Bidder may submit at any Auction must contain a Purchase Price in cash, cash equivalents, or such other consideration that the Debtors, in their business judgment in consultation with the Consultation Parties deem equivalent (including the right of any Secured Creditor to Credit Bid any remaining amounts of its secured claim in accordance with these Bidding Procedures) that exceeds the then-existing highest Bid by at least the amount of the Minimum Overbid;
- g. each Qualified Bidder will be permitted a reasonable time to respond to previous bids at the Auction, as determined by the Debtors;
- h. during the course of the Auction, the Debtors shall, after submission of each Overbid, promptly inform each Qualified Bidder of the terms of such Overbid and inform each Qualified Bidder whether such Overbid reflects, in the Debtors’ view, in consultation with the Consultation Parties, the then highest or otherwise best bid(s) for the applicable Assets;
- i. to remain eligible to participate in the Auction, in each round of bidding, each Qualified Bidder must submit an Overbid with respect to such round of bidding and to the extent a Qualified Bidder fails to submit an Overbid with respect to such

round of bidding, such Qualified Bidder shall be disqualified from continuing to participate in the Auction; *provided* that the Debtors may waive such requirement in their business judgment in consultation with the Consultation Parties;

- j. the Auction will be transcribed to ensure an accurate recording of the bidding at the Auction;
- k. each Qualified Bidder will be required to confirm on the record that it has not engaged, and will not engage, in any collusion with respect to the bidding or any Sale Transaction(s). For the avoidance of doubt, this requirement does not restrict Qualified Bidder(s) from working with other Qualified Bidder(s) with the Debtors' prior written consent;
- l. each Qualified Bidder will be required to confirm on the record that its bid is a good faith, *bona fide* offer and it intends to consummate the Sale Transaction(s) if selected as the Successful Bid in accordance with these Bidding Procedures (as may be modified in accordance herewith at the Auction);
- m. subject to each Debtor's fiduciary obligations, including as set forth herein, the Court and the Debtors will not consider bids made after the Auction has been closed;
- n. the Debtors, in their business judgment in consultation with the Consultation Parties, may (a) determine which Qualified Bid is the highest or otherwise best offer, (b) reject, at any time before entry of an order of the Court approving a Successful Bid, any Bid that the Debtors determine is (i) inadequate or insufficient, (ii) not in conformity with the requirements of the Bankruptcy Code, the Bidding Procedures, or the terms and conditions of the Sale Transaction(s), or (iii) contrary to the best interests of the Debtors, their estates, their creditors, and other stakeholders and (c) impose such other terms and conditions upon Qualified Bidders as the Debtors determine to be in the best interests of the Debtors' estates in these chapter 11 cases;
- o. the Debtors have the right to request any additional information that will allow the Debtors to make a reasonable determination as to a Qualified Bidder's financial and other capabilities to consummate the transactions contemplated by their proposal and any further information that the Debtors believe is reasonably necessary to clarify and evaluate any Bid made by a Qualified Bidder during the Auction;
- p. the Debtors reserve the right, in their business judgment in consultation with the Consultation Parties, to adjourn the Auction one or more times to, among other things, (a) facilitate discussions between the Debtors and Qualified Bidders, (b) allow Qualified Bidders the opportunity to consider how they wish to proceed, and (c) provide Qualified Bidders the opportunity to provide the Debtors with such additional evidence as the Debtors, in their business judgment, may require that the Qualified Bidder has sufficient internal resources or has received sufficient non-

contingent debt and/or equity funding commitments to consummate the proposed transaction at the prevailing amount;

- q. notwithstanding anything herein to the contrary, the Debtors may, in consultation with the Consultation Parties, at any time choose to adjourn the Auction by announcement at the Auction. The Debtors shall promptly file notice of such adjournment with the Court; and
- r. the Debtors, in consultation with the Consultation Parties, reserve the right to further amend, waive, or otherwise modify the Auction Procedures at any time.

For the avoidance of doubt, nothing in the Auction Procedures will prevent the Debtors from exercising their respective fiduciary duties under applicable law (as reasonably determined in good faith by the Debtors, in consultation with counsel).

XII. Acceptance of the Successful Bid.

The Auction shall continue until (i) there is only one Qualified Bid or a combination of Qualified Bids that the Debtors determine, in their business judgment, with the consent of the Required Holders (not to be unreasonably withheld, delayed or conditioned) and in consultation with any statutory committees appointed in these cases, and in a manner consistent with the exercise of their fiduciary duties and outlined below in further detail, is the highest or otherwise best Bid to purchase the applicable Assets (each, a “Successful Bid”), and (ii) the Debtors determine, in their business judgment in consultation with the Consultation Parties, that further bidding is unlikely to result in a different Successful Bid or Successful Bids that would be reasonably acceptable to the Debtors, at which point, the Auction will be closed.

When determining the highest or otherwise best Qualified Bid, as compared to other Qualified Bids, the Debtors, in consultation with the Consultation Parties, may consider the following factors in addition to any other factors that the Debtors deem appropriate: (a) the amount and nature of the total consideration, which includes but is not limited to, assumed liabilities (administrative liabilities, cure payments), and the amount of Executory Contracts and Unexpired Leases; (b) the likelihood of the Qualified Bidder’s ability to close a transaction and the timing thereof; (c) the net economic effect of any changes to the value to be received by each of the Debtors’ estates from the transaction contemplated by the Bid Documents; (d) the Debtors’ regulatory requirements; (e) the tax consequences of such Qualified Bid; (f) whether the Qualified Bid contemplates a Sale Transaction(s) that would be consummated through a Plan or a sale pursuant to section 363 of the Bankruptcy Code; (g) the certainty of a Qualified Bid leading to a confirmed Plan; and (h) any other consideration that may impact the Debtors’ stakeholders.

Any Qualified Bidder that submits a Successful Bid will be deemed a successful bidder (the “Successful Bidder”) with respect to the Assets contemplated for the purchase pursuant to such Successful Bid. The Debtors shall file notice of the Successful Bid and the Successful Bidder with the Court within two (2) business days after conclusion of the Auction. Following conclusion of the Auction (if any) and selection of a Successful Bidder, the Debtors shall present the results of the Auction (if any) at the Sale Hearing and shall seek Court approval to enter into a binding purchase agreement with the Successful Bidder on the terms of the Successful Bid (the order

approving such entry, the “Definitive Purchase Agreement Order”). For the avoidance of doubt, the Definitive Purchase Agreement Order shall deem the Debtors’ selection of the Successful Bid final and, subject to the designation of the Back-Up Bid, the Debtors shall not solicit and /or accept any further bids or offers to submit a bid after such selection; *provided* that, notwithstanding anything to the contrary in these Bidding Procedures, nothing in these Bidding Procedures shall require the board of directors, board of managers, or such similar governing body of any Debtor to take or refrain from taking any action that the Debtors determined in good faith, in consultation with counsel, would be inconsistent with applicable law or its fiduciary obligations under applicable law.

Within one (1) business day of the selection of the Successful Bidder, such Successful Bidder (including both the Stalking Horse Bidder, if any, and Back-Up Bidder, if applicable) shall make a cash deposit, in addition to its Good Faith Deposit, in an amount calculated on the basis of the increased aggregate purchase price, submitted by wire transfer of immediately available funds to an escrow account to be identified and established by the Debtors pursuant to a customary and reasonable escrow agreement. Each Successful Bidder and the Debtors shall, as soon as reasonably practicable, complete and sign all agreements, contracts, instruments, or other documents evidencing and containing the terms upon which each such Successful Bid was made.

XIII. Designation of Back-Up Bidder.

The Back-Up Bid to purchase any applicable Assets (the “Back-Up Bidder”) will be determined by the Debtors with the consent of the Required Holders (not to be unreasonably withheld, delayed, or conditioned) and in consultation with any statutory committees appointed in these cases at the conclusion of the Auction and will be announced at that time to all the Qualified Bidders participating in the Auction. The Debtors’ selection of a Back-Up Bid shall be deemed final, and the Debtors shall not accept any further bids or offers to submit a bid after such selection; *provided* that, notwithstanding anything to the contrary in these Bidding Procedures, nothing in these Bidding Procedures shall require the board of directors, board of managers, or such similar governing body of any Debtor to take or refrain from taking any action that the Debtors determined in good faith, in consultation with counsel, would be inconsistent with applicable law or its fiduciary obligations under applicable law. The Debtors will be authorized, but not required, to consummate the Sale Transaction(s) with the Back-Up Bidder without further order of the Court, so long as such Back-Up Bid shall have been approved in connection with the Court’s approval of the Successful Bid, or subject to Court approval if not.

If for any reason a Successful Bidder fails to consummate the purchase of such assets within the time permitted, then the Back-Up Bidder will automatically be deemed to have submitted the Successful Bid for such assets, and the Back-Up Bidder shall be deemed a Successful Bidder for such assets and shall be required to consummate any Sale Transaction(s) with the Debtors as soon as is reasonably practicable without further order of the Court, upon twenty-four (24) hours advance notice filed with the Court. To the extent any objections are raised and remain unresolved, the Court may schedule a hearing on an expedited basis to adjudicate such objection.

The Back-Up Bid shall remain open and irrevocable until the earliest to occur of (i) ninety (90) days following the hearing to consider the applicable order approving the Sale Transaction(s)

(the “Sale Order”), (ii) consummation of a Sale Transaction(s) with one or more Successful Bidders at an Auction, and (iii) the release of such Back-Up Bid by the Debtors in writing (the “Back-Up Termination Date”); *provided* that the Back-Up Termination Date shall be subject to the terms and conditions set forth in the Stalking Horse APA. The Debtors shall return the Back-Up Bidder’s deposit owed within five (5) business days of the Back-Up Termination Date.

XIV. Approval of the Sale Transaction(s).

A hearing to consider approval of each Sale Transaction(s) (the “Sale Hearing”), is currently scheduled to take place on May 2, 2024, at [], prevailing Eastern Time, before the Honorable Chief Judge Kaplan, at the United States Bankruptcy Court for the District of New Jersey, Trenton, New Jersey 08608, or conducted consistent with the procedures established pursuant to the Court’s standing orders.

At the Sale Hearing, certain findings will be sought from the Court regarding the Auction, including, among other things, that: (i) the Auction was conducted, and the Successful Bidder was selected, in accordance with the Bidding Procedures; (ii) the Auction was fair in substance and procedure; (iii) the Successful Bid was a Qualified Bid as defined in the Bidding Procedures; and (iv) consummation of any Sale Transaction(s) as contemplated by the Successful Bid in the Auction will provide the highest or otherwise best offer for the applicable Assets and is in the best interests of the Debtors and their estates. **The Sale Hearing may be continued to a later date by the Debtors, in consultation with the Consultation Parties, by sending notice to creditors or other parties in interest prior to, or making an announcement at, the Sale Hearing. No further notice of any such continuance will be required to be provided to any party (including the Stalking Horse Bidder, if any). The Sale Hearing may be the confirmation hearing with respect to the Debtors’ Plan.**

Objections to the Sale Transaction(s) and the Sale Order must: (i) be in writing and specify the nature of such objection; (ii) comply with the Bankruptcy Code, Bankruptcy Rules, Local Rules, and all orders of the Court; and (iii) be filed with the Court and served so as to be actually received by the Debtors, the Bid Notice Parties, and the foregoing parties’ respective counsel by April 28, 2024, at 4:00 p.m., prevailing Eastern Time.

XV. Return of Good Faith Deposit.

The Good Faith Deposit(s) of the Successful Bidder or Successful Bidders, if any, will, upon consummation of the Successful Bid or Successful Bids, become property of the Debtors’ estates and be credited to the portion of such Successful Bidder’s or Successful Bidders’ applicable Purchase Price.

If the Successful Bidder or Successful Bidders (or Back-Up Bidder or Back-Up Bidders, if applicable), if any, fails to consummate the Successful Bid or Successful Bids (or Back-Up Bid or Back-Up Bids, if applicable), then the Good Faith Deposit(s) of such Successful Bidder or Successful Bidders (or Back-Up Bidder or Back-Up Bidders, if applicable) will be irrevocably forfeited to the Debtors and may be retained by the Debtors as liquidated damages, in addition to any and all rights, remedies, or causes of action that may be available to the Debtors.

The Good Faith Deposits of any unsuccessful Qualified Bidders (except for any Back-Up Bidder or Back-Up Bidders and any Stalking Horse Bidders) will be returned within five (5) business days after consummation of the applicable Sale Transaction(s) or upon the permanent withdrawal of the applicable proposed Sale Transaction(s).

The Good Faith Deposit(s) of any Back-Up Bidder or Back-Up Bidders, if any, will be returned to such Back-Up Bidder or Back-Up Bidders no later than five (5) business days of the Back-Up Termination Date.

The return of any Good Faith Deposits of any Stalking Horse Bidders will be subject to the terms of the applicable Stalking Horse APA. All such Good Faith Deposits shall be held in escrow and at no time shall be deemed property of the Debtors' estates absent further order of the Court.

XVI. Reservation of Rights.

The Debtors shall be entitled to modify these Bidding Procedures in their business judgment and in a manner consistent with the exercise of their fiduciary duties, with the consent of the Required Holders (not to be unreasonably withheld, delayed, or conditioned) and in consultation with any statutory committees appointed in these cases, in any manner that will best promote the goals of the bidding process or the Bidding Procedures, or impose, at or before the Auction (if held), additional customary terms and conditions on the sale of the applicable Assets, including, without limitation: (i) extending the deadlines set forth in the Bidding Procedures; (ii) adjourning the Auction; (iii) adding procedural rules that are reasonably necessary or advisable under the circumstances for conducting the Auction (if held); (iv) canceling the Auction; (v) rejecting any or all Bids or Qualified Bids; and (vi) adjusting the applicable minimum Overbid increment.

All parties expressly reserve all of their rights (and do not waive any such rights) to seek Court relief with regard to the Auction, the Bidding Procedures, the Sale Transaction(s), and any related items (including, if necessary, to seek an extension of the Bid Deadline).

Each reference in these Bidding Procedures and the Bidding Procedures Order to the Debtors' "consultation" (or similar phrase) with the Consultation Parties in connection with making a determination or taking an action shall mean consultation in good faith and in a reasonably timely manner under the circumstances prior to making such determination or taking such action. All Consultation Parties will be permitted to seek relief from the Bankruptcy Court, on an expedited basis, if they disagree with any actions or decisions made by the Debtors as part of these Bidding Procedures.

XVII. Consent to Jurisdiction.

All Qualified Bidders at the Auction shall be deemed to have consented to the core jurisdiction of the Court and waived any right to a jury trial in connection with any disputes relating to the Auction, the Sale, the Sale Transaction(s) and the construction and enforcement of these Bidding Procedures, any written indications of interest, Preliminary Bid Documents, the Bids, the Bid Documents, and any and all other agreements entered into in connection with any proposed Sale Transaction(s), as applicable, and consented to the entry of a final order or judgment in any

way related to these Bidding Procedures, the bid process, the Auction, the Sale Hearing, or the construction and enforcement of any agreement or any other document relating to the Sale any Sale Transaction(s) if it is determined that the Court would lack Article III jurisdiction to enter such a final order or judgment absent the consent of the parties.

Any parties raising a dispute relating to these Bidding Procedures must request that such dispute be heard by the Court on an expedited basis.

XVIII. Fiduciary Out.

Notwithstanding anything to the contrary in these Bidding Procedures or any document filed with or entered by the Court, nothing in these Bidding Procedures or the Bidding Procedures Order shall require a Debtor or its board of directors, board of managers, or similar governing body of a Debtor, or special committee of any board of any Debtor, to take any action or to refrain from taking any action related to any sale transaction(s) or with respect to these Bidding Procedures, to the extent such Debtor, board of director, board of managers, or such similar governing body determines in good faith, in consultation with counsel, that taking or failing to take such action, as applicable, would be inconsistent with applicable law or its fiduciary obligations under applicable law.

Further, notwithstanding anything to the contrary in these Bidding Procedures, the Bidding Procedures Order, or any document filed with or entered by the Court, through the date of the Auction (if held), nothing in these Bidding Procedures or the Bidding Procedures Order shall diminish the right of the Debtors and their respective directors, officers, managers, employees, investment bankers, attorneys, accountants, consultants, and other advisors or representatives to: (a) consider, respond to, and facilitate alternate proposals for sales or other transactions involving any or all of the Assets (each an "Alternate Proposal"); (b) provide access to non-public information concerning the Debtors to any entity or enter into confidentiality agreements or nondisclosure agreements with any entity with respect to Alternative Proposals; (c) maintain or continue discussions or negotiations with respect to Alternate Proposals; (d) otherwise cooperate with, assist, participate in, or facilitate any inquiries, proposals, discussions, or negotiations of Alternate Proposals; and (e) enter into or continue discussions or negotiations with any person or entity regarding any Alternate Proposal.

Schedule 1

Auction Notice

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*Proposed Co-Counsel to the Debtors and
Debtors in Possession*

*Proposed Co-Counsel to the Debtors and
Debtors in Possession*

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY**

In re:

INVITAE CORPORATION, *et al.*,

Debtors.¹

Chapter 11

Case No. 24-11362 (MBK)

(Joint Administration Requested)

NOTICE OF SALE BY AUCTION AND SALE HEARING

PLEASE TAKE NOTICE that on February [], 2024, the United States Bankruptcy Court for the District of New Jersey (the “Court”) entered the *Order (I) Approving Bidding Procedures and Bid Protections, (II) Scheduling Certain Dates and Deadlines with Respect*

¹ The last four digits of Debtor Invitae Corporation’s tax identification number are 1898. A complete list of the Debtors in these chapter 11 cases and each such Debtor’s tax identification number may be obtained on the website of the Debtors’ proposed claims and noticing agent at www.kccllc.net/invitae. The Debtors’ service address in these chapter 11 cases is 1400 16th Street, San Francisco, California 94103.

Thereto, (III) Approving the Form and Manner of Notice Thereof, (IV) Establishing Notice and Procedures for the Assumption and Assignment of Contracts and Leases, (V) Authorizing the Assumption and Assignment of Assumed Contracts, and (VI) Authorizing the Sale of Assets [Docket No. [__]] (the “Bidding Procedures Order”)² in the chapter 11 cases of the above-captioned debtors and debtors in possession (collectively, the “Debtors”).

PLEASE TAKE FURTHER NOTICE that the Debtors are soliciting offers for the purchase of substantially all or a portion of the Assets consistent with the bidding procedures (the “Bidding Procedures”) approved by the Court pursuant to the Bidding Procedures Order. **All interested bidders should carefully read the Bidding Procedures and Bidding Procedures Order.** To the extent that there are any inconsistencies between this notice and the Bidding Procedures or Bidding Procedures Order, the Bidding Procedures or Bidding Procedures Order, as applicable, shall govern in all respects.

PLEASE TAKE FURTHER NOTICE that, if the Debtors receive qualified competing bids within the requirements and time frame specified by the Bidding Procedures, the Debtors will conduct an auction, if any (the “Auction”), of the Assets **on Wednesday, April 17, 2024, at 10:00 a.m., prevailing Eastern Time,** at the offices of the proposed co-counsel to the Debtors: Kirkland & Ellis LLP, 601 Lexington Ave., New York, NY 10022.

PLEASE TAKE FURTHER NOTICE that only the Debtors, Qualified Bidders, the U.S. Trustee, any official committee of unsecured creditors appointed in these chapter 11 cases, and any other parties as the Debtors may determine to include in their reasonable discretion, in each case, along with their representatives and advisors, shall be entitled to attend the Auction, and only Qualified Bidders will be entitled to make Overbids at the Auction. **All interested or potentially affected parties should carefully read the Bidding Procedures and the Bidding Procedures Order.**

PLEASE TAKE FURTHER NOTICE that the Debtors will seek approval of the Sale Transaction(s) at a hearing scheduled to commence on or before **May 2, 2024, at [__], prevailing Eastern Time,** (the “Sale Hearing”) before the Honorable Chief Judge Kaplan, at the United States Bankruptcy Court for the District of New Jersey, Trenton, New Jersey, 08608, or conducted consistent with the procedures established pursuant to the Court’s standing orders.

PLEASE TAKE FURTHER NOTICE that, except as otherwise set forth in the Bidding Procedures Order, objections to consummation or approval of the Sale Transaction(s) and any objections to proposed cure payments or the assumption and assignment of Executory Contracts or Unexpired Leases, must (a) be in writing; (b) conform to the applicable provisions of the Bankruptcy Rules and the Local Rules; (c) state with particularity the legal and factual bases for the objection and the specific grounds therefor; and (d) be filed with the Court and served so as to be **actually received on or before April 28, 2024, at 4:00 p.m., prevailing Eastern Time,** by the following parties: (i) the Debtors, Invitae Corporation, 1400 16th Street, San Francisco, California 94103, Attn: Tom Brida (tom.brida@invitae.com); (ii) proposed co-counsel to the Debtors,

² Capitalized terms used but not defined in this notice have the meanings given to them in the Bidding Procedures Order.

Kirkland & Ellis LLP, 601 Lexington Avenue, New York, New York 10022, Attn.: Nicole L. Greenblatt, P.C. (nicole.greenblatt@kirkland.com); Francis Petrie (francis.petrie@kirkland.com); and Nikki Gavey (nikki.gavey@kirkland.com) and Kirkland & Ellis LLP, 300 North LaSalle, Chicago, Illinois 60654, Attn.: Spencer A. Winters, P.C. (spencer.winters@kirkland.com); (iii) proposed co-counsel to the Debtors, Cole Schotz P.C., Court Plaza North, 25 Main Street, Hackensack, New Jersey 07601, Attn.: Michael D. Sirota (msirota@coleschotz.com); Warren A. Usatine (wusatine@coleschotz.com); Felice R. Yudkin (fyudkin@coleschotz.com); and Daniel J. Harris (dharris@coleschotz.com); (iv) the Office of the United States Trustee for the District of New Jersey, 1085 Raymond Boulevard, Suite 2100, Newark, NJ 07102, Attn: Jeffrey Sponder (jeffrey.m.sponder@usdoj.gov); and Lauren Bielskie (lauren.bielskie@usdoj.gov); (v) counsel to any official committee of unsecured creditors appointed in these chapter 11 cases; and (vi) counsel to any Stalking Horse Bidder.

CONSEQUENCES OF FAILING TO TIMELY MAKE AN OBJECTION

ANY PARTY OR ENTITY WHO FAILS TO TIMELY MAKE AN OBJECTION TO THE SALE OR A SALE TRANSACTION, AS APPLICABLE, ON OR BEFORE THE SALE OBJECTION DEADLINE IN ACCORDANCE WITH THE BIDDING PROCEDURES ORDER SHALL BE FOREVER BARRED FROM ASSERTING ANY OBJECTION TO THE SALE, INCLUDING WITH RESPECT TO THE TRANSFER OF THE APPLICABLE DEBTORS' ASSETS FREE AND CLEAR OF ALL LIENS, CLAIMS, ENCUMBRANCES, AND OTHER INTERESTS, EXCEPT AS MAY BE SET FORTH IN THE APPLICABLE PURCHASE AGREEMENT OR THE PLAN, AS APPLICABLE.

Dated: February [], 2024

/s/ DRAFT

COLE SCHOTZ P.C.

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-and-

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*Proposed Co-Counsel to the Debtors and
Debtors in Possession*

Exhibit 2

Contract Assumption Notice

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Proposed Co-Counsel to the Debtors and Debtors in Possession

Proposed Co-Counsel to the Debtors and Debtors in Possession

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY**

In re:

INVITAE CORPORATION, *et al.*,

Debtors.¹

Chapter 11

Case No. 24-11362 (MBK)

(Joint Administration Requested)

NOTICE TO CONTRACT PARTIES TO POTENTIALLY ASSUMED EXECUTORY CONTRACTS AND UNEXPIRED LEASES

¹ The last four digits of Debtor Invitae Corporation’s tax identification number are 1898. A complete list of the Debtors in these chapter 11 cases and each such Debtor’s tax identification number may be obtained on the website of the Debtors’ proposed claims and noticing agent at www.kccllc.net/invitae. The Debtors’ service address in these chapter 11 cases is 1400 16th Street, San Francisco, California 94103.

YOU ARE RECEIVING THIS NOTICE BECAUSE YOU
OR ONE OF YOUR AFFILIATES ARE A COUNTERPARTY TO AN
EXECUTORY CONTRACT OR UNEXPIRED LEASE WITH ONE OR MORE
OF THE DEBTORS AS SET FORTH ON **EXHIBIT A** ATTACHED HERETO.

PLEASE TAKE NOTICE that on February [], 2024, the United States Bankruptcy Court for the District of New Jersey (the “Court”) entered the *Order (I) Approving Bidding Procedures and Bid Protections, (II) Scheduling Certain Dates and Deadlines with Respect Thereto, (III) Approving the Form and Manner of Notice Thereof, (IV) Establishing Notice and Procedures for the Assumption and Assignment of Contracts and Leases, (V) Authorizing the Assumption and Assignment of Assumed Contracts, and (VI) Authorizing the Sale of Assets* [Docket No. []] (the “Bidding Procedures Order”)² in the chapter 11 cases of the above-captioned debtors and debtors in possession (collectively, the “Debtors”).

PLEASE TAKE FURTHER NOTICE that, pursuant to the Bidding Procedures and the terms of any Successful Bid, the Debtors **may** assume and assign to the Successful Bidder the Executory Contracts and Unexpired Leases listed on **Exhibit A** to which you are a counterparty, upon approval of the Sale Transaction(s). The Debtors have conducted a review of their books and records and have determined that the Cure Payments for unpaid monetary obligations under such Executory Contract or Unexpired Lease is as set forth on **Exhibit A**.

PLEASE TAKE FURTHER NOTICE that if you disagree with the proposed Cure Payments, object to a proposed assignment to the Successful Bidder of any Executory Contract or Unexpired Lease, or dispute the ability of the Successful Bidder to provide adequate assurance of future performance with respect to any Contract, your objection must: (i) be in writing; (ii) comply with the applicable provisions of the Bankruptcy Rules, the Local Rules, and any order governing the administration of these chapter 11 cases; (iii) state with specificity the nature of the objection and, if the objection pertains to the proposed Cure Payments; (iv) state the correct Cure Payments alleged to be owed to the objecting contract counterparty, together with any applicable and appropriate documentation in support thereof; and (v) be filed with the Court and served and **actually received no later than April 28, 2024, at 4:00 p.m. (prevailing Eastern Time) (the “Cure Objection Deadline”)** by the Court and the following parties: (i) the Debtors, Invitae Corporation, 1400 16th Street, San Francisco, California 94103, Attn: Tom Brida (tom.brida@invitae.com); (ii) proposed co-counsel to the Debtors (A) Kirkland & Ellis LLP, 601 Lexington Avenue, New York, New York 10022, Attn: Nicole L. Greenblatt, P.C. (nicole.greenblatt@kirkland.com); Francis Petrie (francis.petrie@kirkland.com); and Nikki Gavey (nikki.gavey@kirkland.com) and Kirkland & Ellis LLP, 300 North LaSalle, Chicago, Illinois 60654, Attn.: Spencer A. Winters, P.C. (spencer.winters@kirkland.com) and (B) Cole Schotz P.C., Court Plaza North, 25 Main Street, Hackensack, New Jersey 07601, Attn.: Michael D. Sirota (msirota@coleschotz.com); Warren A. Usatine (wusatine@coleschotz.com); Felice R. Yudkin (fyudkin@coleschotz.com); and Daniel J. Harris (dharris@coleschotz.com); (iii) the Office of the United States Trustee for the District of New Jersey, 1085 Raymond Boulevard, Suite

² Capitalized terms used but not defined in this notice have the meanings given to them in the Bidding Procedures Order.

2100, Newark, NJ 07102, Attn: Jeffrey Sponder (jeffrey.m.sponder@usdoj.gov); and Lauren Bielskie (lauren.bielskie@usdoj.gov); (iv) counsel any official committee of unsecured creditors appointed in these chapter 11 cases; and (v) counsel to any Stalking Horse Bidder; *provided* that the Debtors may modify the Cure Objection Deadline by filing a notice of such modification on the Court's docket.

PLEASE TAKE FURTHER NOTICE that if no objection to (a) the Cure Payments, (b) the proposed assignment and assumption of any Executory Contract or Unexpired Lease, or (c) adequate assurance of the Successful Bidder's ability to perform is filed by the Cure Objection Deadline, then (i) you will be deemed to have stipulated that the Cure Payments as determined by the Debtors are correct, (ii) you will be forever barred, estopped, and enjoined from asserting any additional Cure Payments are due under the Executory Contract or Unexpired Lease, and (iii) you will be forever barred, estopped, and enjoined from objecting to such proposed assignment to the Successful Bidder on the grounds that the Successful Bidder has not provided adequate assurance of future performance as of the closing date of the Sale Transaction(s).

PLEASE TAKE FURTHER NOTICE that any objection to the proposed assumption and assignment of an Executory Contract or Unexpired Lease or related Cure Payments in connection with the Successful Bid that otherwise complies with these procedures yet remains unresolved as of the commencement of the Sale Hearing, shall be heard at a later date as may be fixed by the Court.

PLEASE TAKE FURTHER NOTICE that, notwithstanding anything herein, the mere listing of any Executory Contract or Unexpired Lease on the Contract Assumption Notice or any Supplemental Assumption Notice does not require or guarantee that such Executory Contract or Unexpired Lease will be assumed by the Debtors at any time or assumed and assigned, and all rights of the Debtors and the Successful Bidder with respect to such Executory Contracts and/or Unexpired Leases are reserved. Moreover, the Debtors explicitly reserve the right, in their reasonable discretion, to seek to reject or assume each Executory Contract or Unexpired Lease pursuant to section 365(a) of the Bankruptcy Code and in accordance with the procedures allowing the Debtors and/or the Successful Bidder, as applicable, to designate any Executory Contract or Unexpired Lease as either rejected or assumed on a post-closing basis.

PLEASE TAKE FURTHER NOTICE that, nothing herein (i) alters in any way the prepetition nature of the Executory Contracts or Unexpired Leases or the validity, priority, or amount of any claims of a counterparty to any Contract against the Debtors that may arise under such Executory Contract or Unexpired Lease, (ii) creates a postpetition contract or agreement, or (iii) elevates to administrative expense priority any claims of a counterparty to any Executory Contract or Unexpired Lease against the Debtors that may arise under such Executory Contract or Unexpired Lease.

Dated: [____], 2024

/s/ DRAFT

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*Proposed Co-Counsel to the Debtors and
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Exhibit A

Schedule of Assumed and Assigned Executory Contracts and Unexpired Leases