

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In re:

MIDWEST CHRISTIAN VILLAGES, INC.
et al.,¹

Debtors.

Chapter 11

Case No. 24-42473-659
(Joint Administration Requested)

Hearing Date: July 17, 2024
Hearing Time: 2:00 p.m. (CT)
Hearing Location: Courtroom 7 North

- DEBTORS' MOTION FOR THE ENTRY OF: (A) AN ORDER:**
- (1) APPROVING AUCTION SALE FORMAT AND BIDDING PROCEDURES;**
 - (2) APPROVING PROCESS FOR DISCRETIONARY SELECTION OF STALKING HORSE BIDDER AND BID PROTECTIONS;**
 - (3) APPROVING FORM OF NOTICE TO BE PROVIDED TO INTERESTED PARTIES;**
 - (4) SCHEDULING A COURT HEARING TO CONSIDER APPROVAL OF THE SALE TO THE HIGHEST AND BEST BIDDER; AND**
 - (5) APPROVING PROCEDURES RELATED TO THE ASSUMPTION OF CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES; AND**
- (B) AN ORDER AUTHORIZING THE SALE OF PROPERTY FREE AND CLEAR OF ALL CLAIMS, LIENS AND ENCUMBRANCES**

The above-captioned debtors and debtors-in-possession (the “**Debtors**”), by and through their proposed counsel, submit this motion (the “**Sale Motion**”) for entry of (A) an interim order that: (1) approves a process by which interested parties may bid (a “**Bid**”) to purchase substantially

¹ The address of the Debtors headquarters is 2 Cityplace Dr, Suite 200, Saint Louis, MO 63141-7390. The last four digits of the Debtors’ federal tax identification numbers are: (i) Midwest Christian Villages, Inc. [5009], (ii) Hickory Point Christian Village, Inc. [7659], (iii) Lewis Memorial Christian Village [3104], (iv) Senior Care Pharmacy Services, LLC [1176], (v) New Horizons PACE MO, LLC [4745], (vi) Risen Son Christian Village [9738], (vii) Spring River Christian Village, Inc. [1462], (viii) Christian Homes, Inc. [1562], (ix) Crown Point Christian Village, Inc. [4614], (x) Hoosier Christian Village, Inc. [3749], (xi) Johnson Christian Village Care Center, LLC [8262], (xii) River Birch Christian Village, LLC [7232], (xiii) Washington Village Estates, LLC [9088], (xiv) Christian Horizons Living, LLC [4871], (xv) Wabash Christian Therapy and Medical Clinic, LLC [2894], (xvi) Wabash Christian Village Apartments, LLC [8352], (xvii) Wabash Estates, LLC [8743], (xviii) Safe Haven Hospice, LLC [6886], (xix) Heartland Christian Village, LLC [0196], (xx) Midwest Senior Ministries, Inc. [3401] and (xxi) Shawnee Christian Nursing Center, LLC [0068].



all, or a portion of, the Debtors' assets (collectively, the "**Assets**"), including the assignment and assumption of Assumed Executory Contracts, together with the payment of Cure Costs (as such terms are defined below); (2) approves a process by which, at the Debtors' election and with the consent of the Bond Trustee, one or more stalking horse bidder(s) may be selected from among those parties making a Bid, and bidding protections may be granted to such stalking horse bidder without further order of the Court; (3) sets notice and bid procedures to establish guidelines for parties interested in making initial Bids and overbids to such initial Bids; (4) if multiple Qualified Bids (as defined below) are received, schedules an auction for the Purchased Assets (the "**Auction**") and a Court hearing on the same; (5) sets various notice procedures about each of the items above and regarding assumption and assignment of executory contracts and unexpired contracts (the "**Assumption Procedures**") and (6) schedules a sale hearing for the Court to approve the highest and best Qualified Bid (the "**Sale Hearing**") (the "**Bid and Sale Procedures Order**") and (B) upon final hearing of this motion at that sale hearing, an order approving the sales(s) to the winning bidder(s) free and clear of all liens, claims, and encumbrances (the "**Sales Order(s)**"), pursuant to §§ 105, 363 and 365 of title 11 of the United States Code (the "**Bankruptcy Code**") and Rules 6004 and 6006 of the Federal Rules of Bankruptcy Procedure (the "**Bankruptcy Rules**"). In support of this Sale Motion, the Debtors respectfully represent as follows:

BACKGROUND

1. On July 16, 2024 (the "**Petition Date**"), the Debtors filed voluntary petitions for relief pursuant to chapter 11 of the Bankruptcy Code.
2. The Debtors continue in the operation and management of their business as debtors-in-possession pursuant to §§ 1107 and 1108 of the Bankruptcy Code.

3. No trustee, examiner or official committee has been appointed in these chapter 11 cases. Presuming that one does get appointed in the ordinary course of the case, the same shall be referred to herein after as the Committee.

4. Simultaneously with the filing of this Sale Motion, the Debtors filed the *Declaration of Kate Bertram in Support of the Debtors' Chapter 11 Petition and First Day Motions* (the "**First Day Declaration**"). As described in more detail in the First Day Declaration, the Debtors operate a mix of independent, assisted living, and skilled nursing campuses in 11 locations across the Midwest, serving over 1,200 residents.

5. The Debtors filed Chapter 11 cases to pursue one or more going concern sales and/or affiliations for each of their facilities.

6. Prior to filing the instant bankruptcy cases, the Debtors engaged Healthcare Management Partners ("**HMP**") as strategic advisors in assessing its business and strategic alternatives for continued operations and/or sales of a portion or all of its assets. HMP is a turnaround and consulting firm that specialized on assisting healthcare organizations experiencing financial challenges. At the recommendation of HMP, and after due consideration of HMP's recommendation by the Debtors, the Debtors engaged B.C. Ziegler and Company ("**Ziegler**") as investment bankers to assist the Debtors with locating potential buyers for some or all of their facilities. Ziegler is a privately held investment bank, capital markets and proprietary investments firm that specializes in the healthcare, senior living and education sectors.

7. The Debtors, with assistance from HMP and Ziegler, prepared marketing materials for the Debtors assets in April 2024. Beginning in May 2024, the Debtors solicited interest from the most likely potential buyers the Debtors and their advisors identified in this time frame (approximately 50) for acquisition of the Debtors' assets, whether as individual assets, as a group

of assets or all of the facilities. As of the date of the filing of this motion, 35 different parties of those solicited have signed non-disclosure agreements (“NDAs”) and have been provided more detailed information via a data room set up by Ziegler for the parties who have executed NDAs to be able to conduct their due diligence (the “Data Room”). As of the date of the filing of this motion, 6 interested parties submitted letters of intent.

8. The Data Room, as supplemented and updated will be used for any additional potential buyers who are identified and execute an appropriate NDA during the course of the process set out in this Sale Motion.

9. The Debtors and their advisors will continue to market the Debtors’ assets through the Bid Deadline. Specifically, the Debtors and their advisors will conduct a robust marketing effort to a broader audience of both financial and strategic investors. Further, except as set forth in the Bid and Sale Procedures Order, neither the Debtors nor their advisors will place any conditions on potentially interested parties regarding bid levels, structure, financing or management in connection with their solicitations of potential bids. All interested parties will be given an opportunity to execute an NDA and, thereupon, provided access to the Data Room.

JURISDICTION AND VENUE

10. This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334. Venue is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).

11. The statutory predicates for the relief sought herein are §§ 363 and 365 of the Bankruptcy Code and Bankruptcy Rules 2002, 6004, and 6006.

RELIEF REQUESTED

12. By this Motion, the Debtors seek entry of an order, pursuant to §§ 105, 363 and 365 of the Bankruptcy Code. For the reasons set forth below in greater detail, and in order to conduct a full and fair bidding process for the purpose of maximizing the consideration to be received by the Debtors’ estates for the Assets, the Debtors respectfully request that the Court enter the Bid and Sale Procedures Order:

- (a) authorizing and approving the “Bid Procedures,” in substantially the form attached to the Bid and Sale Procedures Order as **Exhibit 1** thereto;
- (b) authorizing the Debtors, subject to the consent of the Bond Trustee, to grant the Bid Protections to a Stalking Horse Bidder, if any;
- (c) scheduling the Auction and the Sale Hearing;
- (d) approving the Assumption Procedures, including approval of the form and manner of notices with respect thereto; and
- (e) granting related relief.

13. Through this motion, the Debtors request that the Court approve the following timeline:

Date	Event
July 23, 2024	Date by which the Debtors shall serve the Bid and Sale Procedure Order and Exhibit A thereto and Data Room made available to Potential Bidders
August 30, 2024	Deadline to Object to Initial Cure Notice regarding Assumption of Lease and Executory Contracts
September 15, 2024	Debtors to File Initial Cure Notice regarding Leases and Executory Contracts
September 19, 2024	Deadline to submit bids for consideration to be designated as Stalking Horse Bidder (the “ <u>Stalking Horse Bid Deadline</u> ”).
September 23, 2024	Designation of Stalking Horse Bidder, if any
November 7, 2024	Bid Deadline for Qualified Bids (the “ <u>Overbid Deadline</u> ”).
November 12, 2024	Auction

November 13, 2024	Debtors File Announcement of Winning Bidder(s)
November 13, 2024	Deadline to file any Objections to Sale
November 14, 2024	Sale Hearing

The Debtors believe that the foregoing timeline maximizes the prospect of receiving the highest and best offer while taking into consideration the Debtors' liquidity constraints.

PROPOSED SALE AND BIDDING PROCEDURES

14. In connection with the proposed sale (the "**Sale**") of the Purchased Assets, and to optimally and expeditiously solicit, receive and evaluate bids in a fair and accessible manner, the Debtors have developed and hereby propose the Bid Procedures. The Bid Procedures describe, among other things, the requirements for prospective purchasers to participate in the bid process, the availability and conduct of due diligence, the deadline for submitting both a bid to be selected as a stalking horse bidder and/or a competing bid, the method and factors for determining Qualified Bids, and the criteria for selecting a Successful Bidder and a Back-Up Bid. The following summary describes the most salient points of the Bid Procedures:²

Requirements to Participate in Due Diligence

15. The Bidding Procedures provide that only Qualified Bidders may participate in the Auction. To be a Qualified Bidder (hereinafter defined), a party wishing to submit a Bid must first become a Potential Bidder. To become a "**Potential Bidder**", an interested party shall execute, or shall be currently subject to, a confidentiality agreement in form and substance satisfactory to the Debtors and the following information to the Debtors: (i) the identity of the potential bidder and a

² This summary of the Bid Procedures is qualified in its entirety by the Bid Procedures. To the extent there is any inconsistency between this Motion and the Bid Procedures, the Bid Procedures shall control.

list of contacts for such potential bidder; (ii) description of the due diligence information and/or investigation the Potential Bidder may require to submit a Bid.

16. Upon submission of the Preliminary Bid Documents, the party shall hereinafter be defined as a “**Potential Bidder.**” Upon qualifying as a Potential Bidder, a party may receive due diligence information from the Debtors, including access to the Data Room and potentially other nonpublic information relating to the Debtor’s assets

17. For potential Stalking Horse Bidders, the due diligence period will end on the Stalking Horse Bid Deadline of **September 19, 2024**. For all other bidders, the due diligence period will end on the Overbid Deadline of **November 7, 2024 at 4:00 p.m. (prevailing Central Time)**. Within one day of receipt, the Debtors will provide copies of any such bids received to counsel to each of the Consultation Parties.

18. Each Potential Bidder shall comply with all reasonable requests for additional information and due diligence access by the Debtors or their advisors regarding such Potential Bidder and its contemplated transaction.

Stalking Horse Bids

19. No later than **September 19, 2024 at 4:00 p.m.** (prevailing Central Time) (the “**Stalking Horse Bid Deadline**”), each bidder that is interested in serving as a stalking horse bidder (each, a “**Potential Stalking Horse Bidder**”) must (i) submit to the Debtors (x) a cover letter, including the information set forth below, and (y) an executed asset purchase agreement and a ‘redline’ mark-up of the same against the form of asset purchase agreement available in the Data Room, (the “**Base APA**”), which is available to Potential Bidders in the Data Room (the redline against the Base APA and the cover letter together being the “**Stalking Horse Submission**”) and

(ii) complete all of the other Bid Requirements set forth below, unless waived by the Debtors following consultation with the Consultation Parties.³

20. Each Potential Stalking Horse Bidder's cover letter must include:

- The identity of the Potential Stalking Horse Bidder;
- A statement identifying which of the Assets is the subject of this particular bid;
- Proposed structure of the transaction, including purchase price and any other material terms;
- Proposed break-up fee and expense reimbursement (to the extent different than the Bid Protections, as defined below); and
- Identification of each regulatory and third-party approval required for Potential Stalking Horse Bidder to consummate the proposed transaction, and the timetable within which the Potential Stalking Horse Bidder expects to receive such regulatory and third-party approvals.

21. By its submission of the Stalking Horse Submission, each Potential Stalking Horse Bidder agrees to refrain from and expressly waives any assertion or request for reimbursement on any basis, including pursuant to § 503(b) of the Bankruptcy Code, except as expressly set forth within its Stalking Horse Submission.

22. The Debtors, in consultation with UMB Bank, N.A., in its capacity as bond trustee (the "**Bond Trustee**") and any committee of general unsecured creditors duly formed in the Bankruptcy Cases (the "Committee," and together with the Bond Trustee, the "Consultation Parties"), will coordinate and negotiate with each Potential Stalking Horse Bidder regarding any potential issues regarding its Stalking Horse Submission or the terms set forth therein.

23. Subject to the procedures set forth herein and in the Bid and Sale Procedures Order, the Debtors are authorized, but not obligated, in exercise of their business judgment, following consultation with the Committee and with the consent of the Bond Trustee, to (i) select one or

³ In accordance with the Court's Chapter 11 Guidelines for sales and sales procedures guidelines part 2(c)(x), the Base APA has extensive provisions regarding what records will be transferred, which will be sold, and which records the Buyer and Sellers shall retain and provide access to the other party in what circumstances in Sections 2.01, 2.02 and 8.02.

more Potential Stalking Horse Bidder to act as the stalking horse bidder in connection with the sale of the Assets (such selected bidder(s), the “Stalking Horse Bidder”), and (ii) upon execution of an asset purchase agreement with such Stalking Horse Bidder (the “**Stalking Horse APA**”), provide (a) a break-up fee in an amount equal to no more than two and a half percent (2.5%) of the proposed cash purchase price (the “**Break-Up Fee**”) and (b) an expense reimbursement in an amount equal to no more than one percent (1%) of the proposed cash purchase price (the “**Expense Reimbursement**,” and together with the Break-Up Fee, the “**Bid Protections**”).

24. In addition, the Debtors may, in their discretion, but only with the consent of the Bond Trustee, reimburse up to \$100,000 to any one or more Potential Stalking Horse Bidders, and no more than \$300,000 in the aggregate, for actual expenses incurred in connection with diligence conducted in consideration of submitting a Stalking Horse Submission (the “**Diligence Incentive**”) in order to incentivize such Potential Stalking Horse Bidders to complete their due diligence and submit complete Stalking Horse Submissions by the Stalking Horse Bid Deadline. Any agreement to grant the Diligence Incentive to a party must be in writing to be enforceable. Any party designated as the Stalking Horse Bidder will receive the Bid Protections in lieu of the Diligence Incentive.

25. As soon as practicable following the Stalking Horse Bid Deadline and if a Stalking Horse Bidder is chosen, but no later than **September 23, 2024**, the Debtors shall file a notice with the Bankruptcy Court of the Debtors’ selection of a Stalking Horse Bidder, which notice shall include a copy of the executed and binding Stalking Horse APA.

Participating in the Auction

26. The Bidding Procedures also set forth the requirements for a Potential Bidder to become a “**Qualified Bidder**”, including (without limitation) that a Potential Bidder: (i) submit an

Bid to purchase the Purchased Assets to the Debtors on or before **November 7, 2024, at 4:00 p.m.**

(prevailing Central Time) which includes:

- If a Stalking Horse Bidder is designated, a bid shall propose a cash purchase price that is greater than or equal to (a) the cash purchase price under the Stalking Horse Agreement, plus (b) at least (i) the amount of the Bid Protections and (ii) \$100,000 (the “Minimum Qualified Bid”);
- Provide a clean copy of the proposed asset purchase agreement, together with a ‘redline’ mark-up of the same against the Stalking Horse APA or, if no Stalking Horse is Designated, against the Baseline APA (the “**Modified APA**”);
- Include a written statement that (i) there are no conditions precedent to the bidder’s ability to entered into the Modified APA or other definitive documents, including an express statement that there are no financing or diligence contingencies to the bid, and that all necessary approvals have been obtained prior to submission of the bid, and (ii) the bid constitutes a binding and irrevocable offer, and shall remain binding and irrevocable until the approval of a Successful Bid by the Court; provided that if such bid is designated as the Successful Bid or the Back-Up Bid (each as defined below), then the bid shall remain a binding and irrevocable offer for a period of thirty (30) days following entry of an order approving the Successful Bid;
- Provide a copy of the draft Sale Order included in the Data Room (the “**Draft Sale Order**”) marked to reflect any amendments and modifications;
- Disclose the identity of each entity that will be bidding or otherwise participating in connection with such bid, and the complete terms of any such participation;
- Disclose the bidder’s affiliations (including, without limitation, any known connections between the bidders, bid participants and affiliates, on the one hand, and the Debtors and its affiliates, on the other hand);
- Provide the name and contact information of members of the bidder who will be available to answer any questions regarding the bid, including the names of and contact information for such bidder’s advisors and related parties;
- Deliver a good-faith deposit by wire transfer of immediately available funds in an amount equal to the greater of \$250,000 or five percent (5%) of the proposed cash purchase price (a “**Deposit**”);
- Provide satisfactory written evidence of available funds or a firm commitment for financing sufficient to consummate the transaction;
- Identify each regulatory and third-party approval required for the bidder to consummate the transaction, and the time period within which the bidder expects to receive such regulatory and third-party approvals;
- Represent and warrant that the bidder has had an opportunity to conduct any and all due diligence regarding the Debtors’ businesses and the Assets prior to submitting its bid and a statement that the bidder has relied solely upon its own independent review, investigation and/or inspection of the Assets and of any relevant documentation in making its bid, and did not rely on any written or oral statements, representations, promises, warranties or guaranties whatsoever, whether express or implied, by operation of law or otherwise, regarding the Debtors’ businesses or the Assets, or the completeness of any information provided in connection therewith, except as expressly stated in the

representations and warranties contained in such bidder's Modified APA, as and when ultimately accepted and executed by the Debtors;

- Submit to the jurisdiction of the Bankruptcy Court to enter an order or orders, which shall be binding in all respects, in any way related to the Debtors, these Bid and Sale Procedures or the Auction; and
- Disclaim any right to receive a break-up fee, expense reimbursement, termination fee or any other similar form of compensation (other than any Diligence Incentive agreed to in writing as set forth above). For the avoidance of doubt, no Qualified Bidder (other than the Stalking Horse Bidder) will be permitted to request, nor will the Debtors be permitted to grant, at any time, whether as part of the Auction or otherwise, a break-up fee, expense reimbursement, termination fee or any other similar form of compensation (other than any Diligence Incentive agreed to in writing). By submitting its bid, each bidder (other than the Stalking Horse Bidder) agrees to refrain from and expressly waives any assertion or request for reimbursement on any basis, including pursuant to Section 503(b) of the Bankruptcy Code.

27. The Bidding Procedures further provide that a Bid shall propose cash consideration, and that Bids shall be evaluated based upon the amount of cash consideration but with due consideration being given to other factors, including a bidder's ability to close the transaction and the continuing commitment to resident care.

28. A Bid that satisfies each of the Bid Requirements (including but not limited to those mentioned in the foregoing paragraph), as determined by the Debtors in their reasonable discretion, in consultation with the Committee, shall constitute a "**Qualified Bid**," and such Potential Bidder submitting such Bid will be deemed a "**Qualified Bidder**" and the APA each Qualified Bidder submits shall be termed a "**Qualified APA**." Prior to, or immediately before the commencement of any Auction, the Debtors shall file and serve on each Potential Bidder a notice indicating the identity of all Qualified Bidders, and a copy of the Bid which is deemed to be the Opening Bid at the Auction. If only one Qualified Bid is received, the Debtors, at their discretion following consultation with the Consultation Parties, may declare that party the Winning Bidder (hereinafter defined) and proceed to the Sale Hearing without conducting an Auction.

Auction

29. If the Debtors receive more than one Qualified Bid, the Debtors will conduct an **Auction** at Dentons US LLP, 101 S. Hanley, Suite 600, St. Louis, MO 63105 on **November 12, 2024, at 10:00 a.m.** prevailing Central time in accordance with the Bidding Procedures.

30. The Auction shall be governed by the following procedures:

- Only Qualified Bidders, in person or through duly-authorized representatives at the Auction may bid at the Auction, and every Qualified Bidder must have at least one (1) such duly-authorized representative with authority to bind the Qualified Bidder at the Auction;
- Only such authorized representatives of each of the Qualified Bidders, the Debtors, the Committee (including its members), a representative of the bondholders of the Debtors, and their respective legal and financial advisors shall be permitted to attend the Auction;
- Prior to the commencement of the Auction, representatives of the Debtors and/or the Consultation Parties may have discussions with each Qualified Bidder with respect to the terms and conditions of such Qualified Bids, and the Debtors will have selected, in consultation with the Committee, a Qualified Bid to become the opening bid at the Auction (the bid submitted by such Qualified Bidder shall be referred to as the “**Opening Bid**” and the Qualified Bidder shall be referred to as the “**Opening Bidder**”);
- Bidding shall commence at the amount of the Opening Bid. The Opening Bid shall be announced by the Debtors at or before the commencement of the Auction. Other Qualified Bidders may then submit successive bids in increments of at least \$500,000 (plus, with respect to the first successive bid, the amount of the Break-Up Fee, if any) higher than the Opening Bid, and all subsequent bids must be at least \$500,000 higher than the previous bid. To the extent a Stalking Horse Bidder submits higher bids, such Stalking Horse Bidder shall have the right (but not the obligation) to increase its Opening Bid by using, as a credit, the amount of the Break-Up Fee when determining whether any Stalking Horse Bidder has topped the previous bid by the required amount;
- Qualified Bidders shall have the right to submit additional bids that include modifications to their Qualified APA at the Auction, consistent herewith, provided that any such modifications to the Qualified APA, on an aggregate basis and viewed in whole, shall not be less favorable to the Debtors than any prior bid by such party (as determined by the Debtors, following consultation with the Committee). The Debtors, in consultation with the Consultation Parties, reserve the right to separately negotiate the terms of any Qualified Bids at the Auction, provided the terms are fully disclosed at the time such Qualified Bid is formally submitted;
- Bidding will be transcribed by a certified court reporter employed by the Debtors to ensure an accurate recording of the bidding at the Auction;

- Each Qualified Bidder shall be required to confirm that it has not engaged in any collusion with respect to the bidding or the proposed Sale and is not in violation of § 363(n) of the Bankruptcy Code; and
- Absent irregularities in the conduct of the Auction, the Debtors will not consider any Potential Bids made after the Auction is closed.
- Upon the conclusion of the Auction (if such Auction is conducted), the Debtors, in the exercise of their reasonable, good-faith business judgment and following consultation with the Consultation Parties, shall identify:
 - the highest and best Qualified Bid submitted at the Auction (the “**Winning Bid**,” and the party that submitted such Winning Bid, the “**Winning Bidder**”); and
 - the next highest and best Qualified Bid (the “**Back-Up Bid**” and the party submitting the Back-Up Bid, the “**Back-Up Bidder**”).
- In evaluating Qualified Bids, if some Qualified Bidder is bidding on less than all of the Debtors’ assets, the Debtors may designate in its discretion, following consultation with the Consultation Parties, numerous Winning Bids and Back-Up Bids in order to maximize the overall return to the estate and may negotiate the addition of or removal of certain assets from bid packages to be able to both maximize the return to the estate but also be able to conduct an “apples-to-apples” bid comparison.
- Each of the Winning Bidder(s) and the Back-Up Bidder(s) are required to execute a definitive Qualified Bid conformed to the provisions of the Winning Bid and the Back-Up Bid, as applicable, as soon as practicable but, in no event, prior to the Sale Hearing. The definitive agreement executed by the (i) Winning Bidder(s) shall be defined as the “**Winning Bid APA**” and (ii) Back-Up Bidder(s) shall be defined as the “**Back-Up Bid APA**.”
- The Back-Up Bidder must keep the Back-Up Bid open and irrevocable until the earlier of (i) 5:00 p.m. (Central Time) on the date which is thirty (30) days after the entry of the Sale Order (the “**Outside Back-Up Date**”), or (ii) the date of closing of the Sale to the Winning Bidder.
- Within two business days after the conclusion of the Auction, the Winning Bidder and the Back-Up Bidder shall each deposit with the Debtors an additional amount in cash such that, when combined with their existing Deposit, each such bidder’s aggregate Deposit equals the greater of five-hundred thousand dollars (\$500,000) or ten percent (10%) of the Purchase Price reflected in the final bid of the Winning Bidder and of the Back-Up Bidder, respectively (such additional amounts shall be included in the definition of such parties’ Deposit).
- Debtors shall file a Notice Identifying the Winning Bid(s) and Back-Up Bidder(s) at the Auction on or before November 13, 2024.
- If an Auction is held, the Debtors shall be deemed to have accepted a Qualified Bid as the winner of the Auction (conditioned upon approval by the Bankruptcy Court) only when (i) such bid is declared the Winning Bid; (ii) definitive documentation has been executed in respect thereof; and (iii) any additional Deposit required as a result of a bid submitted at the Auction has been provided to the Debtors. Such acceptance is also conditioned upon approval by the Court of the Winning Bid and (if applicable) the Back-Up Bid.

- The Deposits of any Qualified Bidders other than the Winning Bidder and the Back-Up Bidder will be returned within two (2) business days after the conclusion of the Sale Hearing; provided, that, the Deposit of the Back-Up Bidder shall be returned to the Back-Up Bidder at the earlier of (i) the closing of the Sale to the Winning Bidder, and (ii) thirty (30) days after entry of the Sale Order.

Credit Bidding by Bond Trustee

31. The Bond Trustee reserves its right to submit a credit bid for the Assets pursuant to § 363(k) of the Bankruptcy Code at any time prior to or during the Auction. If and when the Bond Trustee submits a credit bid, the Bond Trustee shall be deemed a Qualified Bidder and its credit bid will be deemed a Qualified Bid in all respects. In the event that that Bond Trustee submits a credit bid, it shall immediately no longer have any consultation or related information rights otherwise set forth herein and shall no longer be a “Consultation Party” as defined herein.

Representations and Warranties

32. Except as explicitly set forth in the Winning Bid APA, the Purchased Assets will be transferred on an “as is, where is” basis, with all faults, and without representations or warranties of any kind, nature or description by the Debtors, its agents or estate, whether written, oral, express, implied, or by operation of law.

Reservation of Rights

33. The Debtors, in consultation with the Consultation Parties, request the Court to allow them to: (i) modify these Bid and Sale Procedures in any manner that will best promote the goals of the bidding process and to impose, at or prior to the Auction, additional or different customary terms and conditions, including, without limitation, (x) modifying the requirements for a Qualified Bid (except as to matters relating to the Bid Protections as set forth herein) or (y) concluding the Auction with a final, sealed bid among Qualified Bidders; (ii) extend the deadlines set forth in these Bid and Sale Procedures; (iii) adjourn the Auction at or prior to the Auction

and/or adjourn any related hearing prior to such hearing or in open court without further notice; and (iv) reject any or all Qualified Bids if the Debtors determine, in their reasonable, good-faith, business judgment, that such Qualified Bid is (a) inadequate or insufficient, (b) not in conformity with the requirements of the Bankruptcy Code or any related rules or the terms set forth herein, or (c) contrary to the best interests of the Debtors.

34. The Debtors also request the right, at any time, for any reason and in their reasonable, good-faith, business judgment, in consultation with the Consultation Parties, to decline to pursue the transaction contemplated herein and to withdraw any motion filed in the Bankruptcy Court seeking to approve such a transaction.

35. Notwithstanding the foregoing, the Debtors may not (i) modify the consultation or consent rights of the Committee or the Bond Trustee or (ii) abridge the rights of the Bond Trustee to credit bid.

The Sale Hearing

36. As part of this Motion, the Debtors ask this Court to schedule a sale hearing (the “**Sale Hearing**”) on **November 14, 2024, at 9:00 a.m.** prevailing Central Time. The Debtors will present the results of the Auction to the Court at the Sale Hearing, at which time certain findings will be sought from the Court regarding the Auction, including, among other things, that: (i) the Auction was properly conducted, and the Winning Bidder and the Back-Up Bidder were properly selected, in accordance with the Bidding Procedures; (ii) the Auction was fair in substance and procedure; (iii) each of the Winning Bid and the Back-Up Bid was a Qualified Bid; (iv) the closing of the Sale in accordance with the Winning Bid (or if applicable, the Back-Up Bid) will provide the highest or otherwise best value for the Purchased Assets and is in the best interests of the

Debtors' estates; and (v) each of the Winning Bidder and the Back-Up Bidder are deemed to be purchasers of the Purchased Assets in good faith as set forth in § 363(m).

37. At the Sale Hearing, the Debtors shall request the Bankruptcy Court to enter an order approving the Winning Bid and, if applicable, the Back-Up Bid (the "**Sale Order**"). Except to the extent revised by the Debtors in its discretion, after consultation with the Committee and the Winning Bidder, the proposed Sale Order presented to the Bankruptcy Court at the Sale Hearing shall be in the form submitted as part of the Winning Bid.

38. At the Sale Hearing, the Debtors shall also request, as part of the Sale Order, authorization from the Bankruptcy Court to accept the Back-Up Bid as the Winning Bid, and consummate such bid, if the Winning Bid is not consummated when and as required by its terms without further order of the Bankruptcy Court. The Debtors and the Back-Up Bidder shall be bound to consummate the Back-Up Bid if the Winning Bid terminates, at which time the Back-Up Bidder shall be deemed the Winning Bidder. The Debtors shall promptly give notice to the Back-Up Bidder if the Winning Bid is terminated and shall provide the Back-Up Bidder a reasonable period within which to close as set forth in the Back-Up Bid APA.

Return of Deposits

39. Upon closing of the Sale with the Winning Bidder (or Back-Up Bidder, if applicable), the Deposit of the Winning Bidder or Back-Up Bidder shall be credited to the Purchase Price. The Deposit of the Winning Bidder or Back-Up Bidder will be forfeited to the Debtor if the Winning Bidder or Back-Up Bidder fails to enter into the required definitive documentation or to consummate the applicable sale transaction in accordance with these Bidding Procedures and the terms of the applicable transaction documents with respect to the Winning Bid and Back-up Bid

as shall be set forth in the Winning Bid APA and Back-Up Bid APA or as otherwise ordered by the Bankruptcy Court.

40. The Deposits of any Qualified Bidders other than the Winning Bidder and the Back-Up Bidder will be returned within two (2) business days after the conclusion of the Sale Hearing; provided, that, the Deposit of the Back-Up Bidder shall be returned to the Back-Up Bidder at the earlier of (i) the closing of the Sale to the Winning Bidder, and (ii) thirty (30) days after entry of the Sale Order.

Notice Procedures

41. The Debtors propose that any objections to the Sale (other than an Assumption Objection (defined herein) which shall be governed by the procedures set forth below) (a “Sale Objection”), must be filed with the Court on or before the Sale Objection Deadline set forth in the Bidding Procedures Order and also: (i) be in writing; (ii) comply with the Rules and the Local Bankruptcy Rules of the United States Bankruptcy Court for the Eastern District of Missouri; (iii) set forth the specific basis for the Sale Objection; and (iv) be served, so as to be actually received on or before the Sale Objection Deadline, upon the Notice Parties. If a Sale Objection is not filed and served on or before the Sale Objection Deadline, the Debtors request that the objecting party be barred from objecting to the Sale and not be heard at the Sale Hearing, and this Court may enter the Sale Order without further notice to such party.

42. The Debtors also request that the Court approve the form of the notice of sale procedures as follows: Debtors shall serve a conformed copy of Bid and Sale Procedures Order and Exhibit A thereto on the Master Service List No. 1, the Master Notice List No. 1, any additional party-in-interest requesting Notice under Rule 2002 of the Bankruptcy Rules of Procedure, and any party who expresses an interest in becoming a Potential or Qualified Bidder either prior to or

subsequent to the entry of this Order. Moreover, after the Initial Cure Notice is filed in accordance with the Bid and Sale Procedures, the Debtors shall serve a copy of this Order upon each of the counterparties identified in the Initial Cure Notice or any subsequently filed Cure Notices. Any party that has not received a copy of the Sale Motion or this Bid and Sale Procedure Order that wishes to obtain a copy of the Sale Motion or this Bid and Sale Procedure Order, including all exhibits thereto, may make such a request in writing to Dentons US LLP, Attn: Samantha Ruben, 233 S. Wacker Drive, Suite 5900, Chicago, IL 60606 (samantha.ruben@dentons.com). Debtors shall file Certificates of Service with regard to the service of this Bid and Sale Procedure Order on or before July 23, 2024.

43. The Debtors submit that the foregoing notices comply fully with Rule 2002 and are reasonably calculated to provide timely and adequate notice of the Bid and Sale Procedures and Sale Hearing to the Debtors' creditors and other parties in interests as well as to those who have expressed an interest or are likely to express an interest in bidding on the Purchased Assets. Based on the foregoing, the Debtors respectfully request that this Court approve these proposed notice procedures.

Assumption and Assignment of Executory Contracts and Unexpired Leases and Procedures Related Thereto

44. As part of the Sale, the Debtors also seek to assume and assign certain of their executory contracts and unexpired leases (collectively, the "**Assumed Executory Contracts**") pursuant to § 365.

45. The Assumed Executory Contracts will be those contracts and leases that the Debtors believe may be assumed and assigned as part of the orderly transfer of the Purchased Assets; provided, that, the Winning Bidder may choose to exclude (or to add) contracts or leases

to the list of Assumed Executory Contracts, subject to notice to the counterparties to any Assumed Executory Contracts which are added.

46. The Debtors will file with the Court and serve a cure notice (the “**Cure Notice**”), (along with a copy of this Motion) upon each counterparty to potentially Assumed Executory Contracts on or before September 15, 2024 (the “**Initial Cure Notice**”). The Cure Notice will state the date, time and place of the Sale Hearing as well as the date by which any objection to the assumption and assignment of Assumed Executory Contracts (including the Cure Amount (defined below)) must be filed and served. The Cure Notice also will identify the counter-party(ies) to the contract, the date of the contract (if known), the title of the contract (if known) and the amounts, if any, that the Debtors believe are owed to each counterparty to an Assumed Executory Contract in order to cure any defaults that exist under such contract (the “**Cure Amounts**”). The Debtors request that the deadline to Object to the Cure Notice be set for October 15, 2024. To the extent there is a contract subsequently added to the list of contracts to be assumed by the Winning Bidder pursuant to the Winning Bid APA selected at the Auction, this Motion constitutes a separate motion to assume and assign that contract to the Winning Bidder pursuant to § 365; each such contract will be listed in the Winning Bid APA, and will be given a separate Cure Notice filed and served by overnight delivery within five (5) business days of the conclusion of the Auction and announcement of the Winning Bidder. The Debtors request that any party sent a Cure Notice after the Initial Cure Notice have two weeks following the filing of the subsequent Cure Notice to Object to the Cure Notice provided the same was sent both electronically to any party known to represent then party and the business e-mail address for the counter-party (if known) and provision of the subsequent Cure Notice via overnight mail.

47. The inclusion of a contract, lease, or other agreement on a Cure Notice shall not constitute or be deemed a determination or admission by the Debtors and their estates or any other party in interest that such contract, lease, or other agreement is, in fact, an executory contract or unexpired lease within the meaning of the Bankruptcy Code, and any and all rights with respect thereto shall be reserved.

48. If a Contract or Lease is assumed and assigned pursuant to Court order, then unless the Assumed Executory Contract counterparty properly files and serves an objection to the Cure Amount contained in the Cure Notice by the Assumption Objection Deadline (defined below), the Assumed Executory Contract counterparty will receive at the time of the Closing of the Sale (or as soon as reasonably practicable thereafter), the Cure Amount as set forth in the Cure Notice, if any. If an objection is filed by a counterparty to an Assumed Executory Contract, the Debtors propose that such objection must set forth a specific default in the executory contract or unexpired lease, claim a specific monetary amount that differs from the amount, if any, specified by the Debtors in the Cure Notice, and set forth any reason why the counterparty believes the executory contract or unexpired lease cannot be assumed and assigned to the Winning Bidder.

49. Any counterparty may raise at the Sale Hearing an objection to the assumption and assignment of its Assumed Executory Contract solely with respect to the Winning Bidder's ability to provide adequate assurance of future performance under such Assumed Executory Contract.

50. After receipt of an Assumption Objection, the Debtors will attempt to reconcile any differences in the Cure Amount or otherwise resolve the objection with the counterparty. In the event that the Debtors and the counterparty cannot resolve an Assumption Objection, or if the deadline for that counterparty to respond or object has not yet passed, and the Court does not otherwise make a determination at the Sale Hearing regarding an Assumption Objection related to

a Cure Amount, the Debtors shall segregate from the sale proceeds a portion of the disputed Cure Amount, in an amount set by the Court or otherwise agreed by the parties, pending the resolution of any such Cure Amount disputes by the Bankruptcy Court or mutual agreement of the parties.

51. The Winning Bidder shall be responsible for satisfying any requirements regarding adequate assurance of future performance that may be imposed under §365(b) in connection with the proposed assignment of any Assumed Executory Contract, and the failure to provide adequate assurance of future performance to any counterparty to any Assumed Executory Contract shall not excuse the Winning Bidder from performance of any and all of its obligations pursuant to the Winning Bid APA. The Debtors propose that the Bankruptcy Court make its determinations concerning adequate assurance of future performance under the Assumed Executory Contracts pursuant to § 365(b) at the Sale Hearing. Cure Amounts disputed by any counterparty will be resolved by the Bankruptcy Court at the Sale Hearing or such later date as may be agreed to or ordered by the Bankruptcy Court.

52. Except to the extent otherwise provided in the Winning Bid APA, the Debtors and the Debtors' estates shall be relieved of all liability accruing or arising after the assumption and assignment of the Assumed Executory Contracts pursuant to § 365(k).

ARGUMENT

A. Approval of the Bidding Procedures Is Appropriate and in the Best Interests of the Debtors' Estates and Stakeholders

53. Section 363(b)(1) provides that “[t]he trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate [.]” 11 U.S.C. § 363(b)(1). Section 105(a) provides in pertinent part that “[t]he Court may issue any order, process or judgment that is necessary and appropriate to carry out the provisions of this title.” 11 U.S.C. §

105(a). Rules 2002 and 6004 govern the scope of the notice to be provided in the event a debtor elects to sell property of the estate under § 363.

54. With respect to the procedures to be adopted in conducting a sale outside the ordinary course of a debtor's business, Rule 6004 provides only that such sale may be by private sale or public auction, and requires only that the debtor provide an itemized list of the property sold together with the prices received upon consummation of the sale. Fed. R. Bankr. P. 6004(f).

55. Neither the Bankruptcy Code nor the Rules contain specific provisions with respect to the procedures to be employed by a debtor in conducting a public or private sale. Nonetheless, as one court has stated, “[i]t is a well-established principle of bankruptcy law that the objective of bankruptcy rules and the [debtors’] duty with respect to such sales is to obtain the highest price or greatest overall benefit possible for the estate.” *In re Atlanta Packaging Prods., Inc.*, 99 B.R. 124, 131 (Bankr. N.D. Ga. 1988). Additionally, courts have long recognized the need for competitive bidding at hearings; “[c]ompetitive bidding yields higher offers and thus benefits the estate. Therefore, the objective is ‘to maximize bidding, not restrict it.’” *Id.*; see also *Burtch v. Ganz (In re Mushroom Transp. Co.)*, 382 F.3d 325, 339 (3d Cir. 2004) (finding that debtor’s fiduciary duties included maximizing and protecting the value of the estate’s assets); *Four B. Corp. v. Food Barn Stores, Inc. (In re Food Barn Stores, Inc.)*, 107 F.3d 558, 564-65 (8th Cir. 1997) (“[A] primary objective of the [Bankruptcy] Code [is] to enhance the value of the estate at hand.”). Courts uniformly recognize that procedures established for the purpose of enhancing competitive bidding are consistent with the fundamental goal of maximizing the value of a debtor’s estate and, therefore, are appropriate. See *Calpine Corp. v. O’Brien Envtl. Energy, Inc. (In re O’Brien Envtl. Energy, Inc.)*, 181 F.3d 527, 536-37 (3d Cir. 1999) (noting that bidding procedures that promote competitive bidding provide benefit to debtor’s estate); *Official Comm. of Subordinated*

Bondholders v. Integrated Res. Inc. (In re Integrated Res. Inc.), 147 B.R. 650, 659 (S.D.N.Y. 1992) (such sale procedures “encourage bidding and to maximize the value of the Assets”).

56. Here, the Bidding Procedures are designed to promote the paramount goal of any proposed sale of property of the Debtors’ estates: providing continuity of care, and maximizing the value of sale proceeds received by the estate. The Bidding Procedures provide for an orderly and appropriately competitive process through which interested parties may submit offers to purchase the Purchased Assets. Specifically, the Debtors, with the assistance of its advisors, has structured the Bidding Procedures to promote active bidding by interested parties and to confirm the highest or otherwise best offer reasonably available for the Purchased Assets. Additionally, the Bidding Procedures will allow the Debtors to conduct the Auction in a fair and transparent manner that will encourage participation by financially capable bidders with demonstrated ability to consummate a timely Sale. Accordingly, the Bidding Procedures should be approved because, under the circumstances, they are reasonable, appropriate and in the best interests of the Debtors, their estates, creditors, and all parties in interest.

B. If a Stalking Horse Bidder Is Subsequently Designated, the Break-Up Fee Has A Sound Business Purposes and Is Necessary to Preserve the Value of the Debtors’ Estates

57. The Debtors submit that the potential Break-Up Fee if a Stalking Horse Bidder is subsequently designated is a normal and oftentimes necessary component of sales outside the ordinary course of business under § 363. In particular, such a protection encourages a potential purchaser to invest the requisite time, money, and effort to conduct due diligence and sale negotiations with a debtor despite the inherent risks and uncertainties of the chapter 11 process. *See, e.g., Integrated Resources*, 147 B.R. at 660 (noting that fees may be legitimately necessary to convince a “white knight” to offer an initial bid, for the expenses such bidder incurs and the risks such bidder faces by having its offer held open, subject to higher and better offers); *In re Hupp*

Indus., 140 B.R. 191, 194 (Bankr. N.D. Ohio 1997) (without any reimbursement, “bidders would be reluctant to make an initial bid for fear that their first bid will be shopped around for a higher bid from another bidder who would capitalize on the initial bidder’s. . . due diligence”); *In re Marrose Corp.*, 1992 WL 33848, at *5 (Bankr. S.D.N.Y. 1992) (stating that “agreements to provide reimbursement of fees and expenses are meant to compensate the potential acquirer who serves as a catalyst or ‘stalking horse’ which attracts more favorable offers”); *In re 995 Fifth Ave. Assocs.*, 96 B.R. 24, 28 (Bankr. S.D.N.Y. 1989) (finding that bidding incentives may be “legitimately necessary to convince a white knight to enter the bidding by providing some form of compensation for the risks it is undertaking”) (citations omitted).

58. A proposed bidding incentive, such as a Break-Up Fee, should be approved when it is in the best interests of the estate. *See In re S.N.A. Nut Co.*, 186 B.R. 98, 104 (Bankr. N.D. Ill. 1995); *see also In re America West Airlines, Inc.*, 166 B.R. 908 (Bankr. D. Ariz. 1994); *In re Hupp Indus., Inc.*, 140 B.R. 191 (Bankr. N.D. Ohio 1992). Typically, this requires that the bidding incentive provide some benefit to the debtor’s estate. *Calpine Corp. v. O’Brien Env’tl. Energy, Inc. (In re O’Brien Env’tl. Energy, Inc.)*, 181 F.3d 527, 533 (3d Cir. 1999) (holding even though bidding incentives are measured against a business judgment standard in non-bankruptcy transactions the administrative expense provisions of § 503(b) govern in the bankruptcy context).

59. In evaluating the appropriateness of a break-up fee, the appropriate question for the Court to consider is “whether the break-up fee served any of three possible useful functions: (1) to attract or retain a potentially successful bid; (2) to establish a bid standard or minimum for other bidders to follow; or (3) to attract additional bidders.” *In re Integrated Resources, Inc.*, 147 B.R. at 662 (where the Court heard testimony that the average breakup fee in the industry is 3.3%). Break-up fees in the same general range as the proposed Break-Up Fee have been routinely

approved in the context of bankruptcy sales. See *In re Tama Beef Packing Inc.*, 321 B.R. 469, 498 (B.A.P. 8th Cir. 2005) (noting that the bankruptcy court correctly concluded that break-up fees are “usually limited to one to four percent of the purchase price”), *In re Verity Health System of California, Inc.*, No. 18-20151 (Bankr. C.D. Cal. Oct. 30, 2018) (approving break-up fee equal to 4% of the cash purchase price); *In re CXM, Inc.*, 307 B.R. 94, 103–04 (Bankr. N.D. Ill. 2004) (court approved break-up fee in amount equal to the actual expenses that the stalking horse incurred in connection with its bid to buy the Sale Assets, subject to a maximum cap of \$200,000, which equaled 3% of the cash purchase price); *In re T Asset Acquisition Company, LLC*, No. 09-31853 (Bankr. C.D. Cal. Jan. 28, 2010) (approving break-up fee equal to 3% of the cash purchase price); *In re Women First Healthcare, Inc.*, 332 B.R. 115, 118 (Bankr. D. Del. 2005) (court approved break-up fee that equaled 4.7% percent of the purchase price); *In re Dan River, Inc.*, No. 04-10990 (Banker. N.D. Ga. Dec. 17, 2004) (court approved break-up fee equal to 5.3% of the cash purchase price); *In re Lake Burton Dev., LLC*, 2010 WL 5563622, *43 (Bankr. N.D. Ga. Mar. 18, 2010) (court approved break-up fee equal to 4.75% of cash purchase price); *In re Case Engineered Lumber, Inc.*, No. 09–22499 (Bankr. N.D. Ga. Sept. 1, 2009) (approving break-up fee equal to 3.5% of the cash purchase price).

60. The Debtors submit that the Bidding Procedures, including the proposed Break-Up Fee to any Stalking Horse Bidder, satisfy all three of the useful functions set forth above: (1) to attract or retain a potentially successful bid; (2) to establish a bid standard or minimum for other bidders to follow; and (3) to attract additional bidders. The proposed Break-Up Fee of up to 2.5% of the purchase price is well within, and below, the percentage parameters that have been approved by many other courts. Thus, the Debtors believe that the proposed Break-Up Fee if a Stalking Horse Bidder is selected would fairly and reasonably compensate any Stalking Horse Bidder for

taking actions that will benefit the Debtors' estates. The Break-Up Fee would compensate such a Stalking Horse Bidder for diligence and professional fees incurred in negotiating the terms of any Stalking Horse APA on an expedited timeline.

61. Additionally, the Debtors do not believe that the Break-Up Fee will have a chilling effect on the sale process. Rather, any Stalking Horse Bidder will increase the likelihood that the best possible price for the Purchased Assets will be received, by permitting other qualified bidders to rely on the diligence performed by any Stalking Horse Bidder, and moreover, by allowing qualified bidders to utilize any Stalking Horse APA as a platform for negotiations and modifications in the context of a competitive bidding process. Any Stalking Horse Bidder would only be designated after consultation with the Committee.

62. Finally, any Break-Up Fee will be paid only if, among other things, the Debtors enter into a transaction for the Purchased Assets with a bidder other than any Stalking Horse Bidder. Accordingly, no Break-Up Fee will be paid unless a higher and better offer is received and consummated. In sum, the potential Break-Up Fee is reasonable under the circumstances and will enable the Debtors to maximize the value for the Purchased Assets while limiting any chilling effect in the sale process.

C. The Procedure for Assumption and Assignment of Certain Executory Contracts and Unexpired Leases Is Appropriate

63. Section 365(a) provides that, subject to the court's approval, a trustee "may assume or reject any executory contracts or unexpired leases of the debtor." 11 U.S.C. § 365(a). Upon finding that a trustee has exercised its sound business judgment in determining to assume an executory contract or unexpired lease, courts should approve the assumption under § 365(a). *See Nostas Assocs. v. Costich (In re Klein Sleep Prods., Inc.)*, 78 F.3d 18, 25 (2d Cir. 1996); *see also*

Orion Pictures Corp. v. Showtime Networks, Inc. (In re Orion Pictures Corp.), 4 F.3d 1095, 1099 (2d Cir. 1993).

64. Pursuant to § 365(f)(2), a trustee may assign an executory contract or unexpired lease of nonresidential real property if:

- (A) the trustee assumes such contract or lease in accordance with the provisions of this section; and
- (B) adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease.

11 U.S.C. § 365(f)(2).

65. The meaning of “adequate assurance of future performance” depends on the facts and circumstances of each case, and should be given “practical, pragmatic construction.” *See Carlisle Homes, Inc. v. Arrari (In re Carlisle Homes, Inc.)*, 103 B.R. 524, 538 (Bankr. D.N.J. 1989); *see also In re Natco Indus., Inc.*, 54 B.R. 436, 440 (Bankr. S.D.N.Y. 1985) (adequate assurance of future performance does not mean absolute assurance that debtor will thrive and pay rent); *In re Bon Ton Rest. & Pastry Shop, Inc.*, 53 B.R. 789, 803 (Bankr. N.D. Ill. 1985) (“Although no single solution will satisfy every case, the required assurance will fall considerably short of an absolute guarantee of performance.”).

66. 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. *In re Bygaph, Inc.*, 56 B.R. 596, 605-6 (Bankr. S.D.N.Y. 1986) (adequate assurance of future performance is present when prospective assignee of lease has financial resources and expressed willingness to devote sufficient funding to business to give it strong likelihood of succeeding; chief determinant of adequate assurance is whether rent will be paid).

67. The Debtors and the Winning Bidder(s) will present evidence at the Sale Hearing to prove the financial credibility, willingness, and ability of the Winning Bidder(s) to perform under the contracts or leases. The Court and other interested parties therefore will have the opportunity to evaluate the ability of any Winning Bidder to provide adequate assurance of future performance under the contracts or leases, as required by § 365(b)(1)(C).

68. In addition, the Debtors submit that the cure procedures set forth herein are appropriate, reasonably calculated to provide notice to any affected party, and afford the affected party opportunity to exercise any rights affected by the Motion, and consistent with § 365. To the extent that any defaults exist under any Assumed Executory Contracts, any such defaults will be cured pursuant to the Winning Bid APA. Except as otherwise limited by § 365, any provision in the Assumed Executory Contracts that would restrict, condition, or prohibit an assignment of such contracts will be deemed unenforceable pursuant to § 365(f)(1).

69. Accordingly, the Debtors submit that the cure procedures for effectuating the assumption and assignment of the Assumed Executory Contracts as set forth herein are appropriate and should be approved.

D. Approval of the Sale Is Warranted under § 363

70. As discussed above, § 363(b)(1) provides that a debtor “after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.” 11 U.S.C. § 363(b)(1).

The Sale of the Assets is Authorized by § 363 as a Sound Exercise of the Debtors’ Business Judgment

71. In accordance with Rule 6004, sales of property rights outside the ordinary course of business may be by private sale or public auction. The Debtors have determined that the Sale of the Purchased Assets by public auction will enable it to obtain the highest and best offer for

these assets (thereby maximizing the value of the estate) and is in the best interests of the Debtors' creditors. The Debtors have determined in their business judgment that a sale of the Purchased Assets through a competitive, public auction is the best way to maximize the value of those assets. Sections 363 provides that a trustee, "after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b). Although § 363 does not specify a standard for determining when it is appropriate for a court to authorize the use, sale or lease of property of the estate, a sale of a debtor's assets should be authorized if a sound business purpose exists for doing so. *See, e.g., Meyers v. Martin (In re Martin)*, 91 F.3d 389, 395 (3d Cir. 1996); *In re Abbotts Dairies of Pa., Inc.*, 788 F.2d 143 (2d Cir. 1986); *In re Titusville Country Club*, 128 B.R. 396 (W.D. Pa. 1991); *In re Delaware & Hudson Ry. Co.*, 124 BR. 169, 176 (D. Del. 1991); *see also Official Comm. of Unsecured Creditors v. The LTV Corp. (In re Chateaugay Corp.)*, 973 F.2d 141, 143 (2d Cir. 1992); *Committee of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1070 (2d Cir. 1983); *Committee of Asbestos-Related Litigants and/or Creditors v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 60 B.R. 612, 616 (Bankr. S.D.N.Y. 1986).

72. The paramount goal in any proposed sale of property of the estate is to maximize the proceeds received by the estate. *See, e.g., In re Food Barn Stores, Inc.*, 107 F.3d 558, 564-65 (8th Cir. 1997) (in bankruptcy sales, "a primary objective of the Code [is] to enhance the value of the estate at hand"); *Integrated Resources*, 147 B.R. at 659 ("It is a well-established principle of bankruptcy law that the. . . [trustee's] duty with respect to such sales is to obtain the highest price or greatest overall benefit possible for the estate.") (*quoting In re Atlanta Packaging Prods., Inc.*, 99 BR. 124, 130 (Bankr. N.D. Ga. 1988)). As long as the sale appears to enhance a debtor's estate, court approval of a debtor's decision to sell should only be withheld if the debtor's judgment is

clearly erroneous, too speculative, or contrary to the provisions of the Bankruptcy Code. *GBL Holding Co., Inc. v. Blackburn/Travis/Cole, Ltd.*, 331 B.R. 251, 255 (N.D. Tex. 2005); *In re Lajijani*, 325 B.R. 282, 289 (B.A.P. 9th Cir. 2005); *In re WPRV-TV, Inc.*, 143 B.R. 315, 319 (D.P.R. 1991) (“The trustee has ample discretion to administer the estate, including authority to conduct public or private sales of estate property. Courts have much discretion on whether to approve proposed sales, but the trustee’s business judgment is subject to great judicial deference.”).

73. Applying § 363, the proposed Sale of the Purchased Assets should be approved. As set forth above, the Debtors have determined that the best method of maximizing the recovery of the Debtors’ creditors would be through the Sale of the Purchased Assets. As assurance of value, bids will be tested through the Auction consistent with the requirements of the Bankruptcy Code, the Bankruptcy Rules, and pursuant to the Bidding Procedures approved by the Court. Consequently, the fairness and reasonableness of the consideration to be paid by the Winning Bidder ultimately will be demonstrated by adequate “market exposure” and an open and fair auction process—the best means, under the circumstances, for establishing whether a fair and reasonable price is being paid.

74. The Debtors and their advisors have been contacting potential interested parties and have assembled the Data Room which is available upon the execution of an appropriate NDA.

The Sale of the Debtors’ Assets Free and Clear of Liens and Other Interests is Authorized by § 363(f)

75. The Debtors further submit that it is appropriate to sell the Purchased Assets free and clear of liens pursuant to § 363(f), with any such liens attaching to the sale proceeds of the Purchased Assets to the extent applicable. Section 363(f) authorizes a trustee to sell assets free and clear of liens, claims, interests and encumbrances if:

- (1) applicable nonbankruptcy law permits the sale of such property free and clear of such interests;
- (2) such entity consents;
- (3) such interest is a lien and the price at which such property is to be sold is greater than the value of all liens on such property;
- (4) such interest is in bona fide dispute; or
- (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

11 U.S.C. § 363(f). This provision is supplemented by § 105(a), which provides that “[t]he Court may issue any order, process or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code].” 11 U.S.C. § 105(a).

76. Because § 363(f) is drafted in the disjunctive, satisfaction of any one of its five requirements will suffice to permit the sale of the Debtors’ Assets “free and clear” of liens and interests. *In re Dundee Equity Corp.*, 1992 Bankr. LEXIS 436, at *12 (Bankr. S.D.N.Y. Mar. 6, 1992) (“Section 363(f) is in the disjunctive, such that the sale free of the interest concerned may occur if any one of the conditions of § 363(f) have been met.”); *In re Bygaph, Inc.*, 56 B.R. 596, 606 n.8 (Bankr. S.D.N.Y. 1986) (same); *Michigan Employment Sec. Comm’n v. Wolverine Radio Co.* (*In re Wolverine Radio Co.*), 930 F.2d 1132, 1147 n.24 (6th Cir. 1991) (stating that § 363(f) is written in the disjunctive; holding that the court may approve the sale “free and clear” provided at least one of the subsections of § 363(f) is met).

77. At least one of the tests of § 363(f) is satisfied with respect to the transfer of the Purchased Assets pursuant to the APA. Additionally, at least § 363(f)(2) will be met in connection with the transactions proposed under the Purchase Agreement because each of the parties holding liens on the Purchased Assets will consent or, absent any objection to this motion, will be deemed to have consented to the Sale. Any lienholder also will be adequately protected by having its liens,

if any, in each instance against the Debtors or their estates, attach to the sale proceeds ultimately attributable to the Purchased Assets in which such creditor alleges an interest, in the same order of priority, with the same validity, force and effect that such creditor had prior to the Sale, subject to any claims and defenses the Debtors may possess with respect thereto. Accordingly, § 363(f) authorizes the transfer and conveyance of the Purchased Assets free and clear of any such claims, interests, liabilities, or liens.

78. Although § 363(f) provides for the sale of assets “free and clear of any interests,” the term “any interest” is not defined anywhere in the Bankruptcy Code. *Folger Adam Security v. DeMatteis/MacGregor JV*, 209 F.3d 252, 257 (3d Cir. 2000). Courts have interpreted “any interest” expansively to include not only *in rem* interests in property, but also other obligations that are “connected to or arise from the property being sold” or that could “potentially travel with the property being sold.” *In re Gardens Regional Hospital and Medical Center, Inc.*, 567 B.R. 820, 825 (Bankr. C.D. Cal. 2017) (California Attorney General imposed conditions are an “interest in property” that can be stripped off the assets through a sale under § 363); *In re La Paloma Generating, Co.*, 2017 WL 5197116, *4 (Bankr. D. Del. Nov. 9, 2017) (holding that emission surrender obligations created by California regulations and statutes and enforced by the California Air Resources Board are an interest in property which can be cut off by a § 363 sale); *see also In re Trans World Airlines, Inc.*, 322 F.3d 283, 285, 288 (3d Cir. 2001) (holding that plaintiff’s interests in travel vouchers that were issued to settle employment discrimination are an interest under § 363 because they arise from the property being sold); *PBBPC, Inc. v. OPK Biotech, LLC (In re PBBPC, Inc.)*, 484 B.R. 860, 867-870 (1st Cir. B.A.P. 2013) (holding that debtor’s assets could be sold free and clear of Commonwealth of Massachusetts’s right to treat a purchaser of substantially all of the assets of chapter 11 debtor as a “successor employer” to which debtor’s

experience rating could be imputed to determine purchaser's unemployment insurance contribution); *In re ARSN Liquidating Corp. Inc.*, 2017 WL 279472, *5 (Bankr. D.N.H. Jan. 20, 2017) (Nat'l Council on Compensation Ins. violated sale order by imputing debtor's workers' compensation experience rating to buyer in setting buyer's workers' compensation experience rating); *In re Vista Marketing Group Ltd.*, 557 B.R. 630, 635-39 (Bankr. N.D. Ill. 2016) (free and clear language in sale order prevented a state sanitary district from asserting claim against asset purchaser for connection fee surcharge that was calculated based entirely on debtor's use of the district's sewer facilities); *United Mine Workers of Am. Combined Benefit Fund v. Walter Energy, Inc.*, 551 B.R. 631, 641 (N.D. Ala. 2016) (sale under § 363 cuts off Coal Act obligations despite language in Act imposing successor liability on buyer); *In re Christ Hospital*, 502 B.R. 158, 76-79 (Bankr. D.N.J. 2013) (section 363 sales cut off tort claims against purchaser of nonprofit hospital); *In re Tougher Indus.*, 2013 WL 1276501 at **6-9 (Bankr. N.D.N.Y. Mar. 27, 2013) (holding that debtor's assets could be sold free and clear of New York State Department of Labor's right to use the debtor's experience rating to access the buyer's tax liability as successor to the debtor); *In re Grumman Olson Indus. Inc.*, 467 B.R. 694, 702-03 (S.D.N.Y. 2012) ("Section 363(f) can be used to sell property free and clear of claims that could otherwise be assertable against the buyer of the assets under the common law doctrine of successor liability"); *WBO P'ship v. Va. Dep't of Med. Assistance Servs. (In re WBO P'ship)*, 189 B.R. 97, 104-05 (Bankr. E.D. Va. 1995) (holding that Commonwealth of Virginia's right to recapture depreciation is an "interest" as that term is used in § 363(f)).

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

(stating that a bankruptcy court has the power to sell assets free and clear of any interest that could be brought against the bankruptcy estate during the bankruptcy); *MacArthur Company v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 837 F.2d 89, 93-94 (2d Cir. 1988) (channeling of claims to proceeds consistent with intent of sale free and clear under § 363(f)). The purpose of an order purporting to authorize the transfer of assets free and clear of all “interests” would be frustrated if claimants could thereafter use the transfer as a basis to assert claims against the purchaser arising from the Debtors’ pre-sale conduct. Under § 363(f), the purchaser is entitled to know that the Purchased Assets are not infected with latent claims that will be asserted against the purchaser after the proposed transaction is completed. Accordingly, consistent with the above-cited case law, the order approving the Sale should state that the Winning Bidder is not liable as a successor under any theory of successor liability, for claims that encumber or relate to the Purchased Assets.

The Winning Bidder Should be Afforded All Protections Under § 363(m) as a Good Faith Purchaser

80. Section 363(m) protects a good-faith purchaser’s interest in property purchased from the debtor’s estate notwithstanding that the sale conducted under § 363(b) is later reversed or modified on appeal. Specifically, § 363(m) states that:

The reversal or modification on appeal of an authorization under [section 363(b)] . . . does not affect the validity of a sale . . . to an entity that purchased . . . such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale were stayed pending appeal.

11 U.S.C. § 363(m). Section 363(m) “codifies Congress’s strong preference for finality and efficiency” in bankruptcy proceedings. *In re Energytec, Inc.* 739 F.3d 215, 218-19 (5th Cir. 2013). Under § 363(m), “[w]hen a sale of assets is made to a good faith purchaser, it may not be modified or set aside unless the sale was stayed pending appeal.” *Paulman v. Gateway Venture Partners*

III, L.P. (In re Filtercorp, Inc.), 163 F.3d 570, 576 (9th Cir. 1998); *In re Ewell*, 958 F.2d 276, 282 (9th Cir. 1992) (“Because the Buyer was a good faith purchaser, under 11 U.S.C. § 363(m) the sale may not be modified or set aside on appeal unless the sale was stayed pending appeal.”); *Onouli-Kona Land Co. v. Estate of Richards (In re Onouli-Kona Land Co.)*, 846 F.2d 1170, 1172 (9th Cir. 1988) (“Finality in bankruptcy has become the dominant rationale for our decisions [...]”).

81. The selection of the Winning Bidder will be the product of arms’ length, good faith negotiations in an anticipated competitive purchasing process. The Debtors intend to request at the Sale Hearing a finding that the Winning Bidder is a good faith purchaser entitled to the protections of § 363(m).

E. Relief From the 14-Day Waiting Period under Rules 6004(h) and 6006(d) Is Appropriate

82. Rule 6004(h) provides that an “order authorizing the use, sale, or lease of property . . . is stayed until the expiration of 14 days after entry of the order, unless the court orders otherwise.” Similarly, Rule 6006(d) provides that an “order authorizing the trustee to assign an executory contract or unexpired lease . . . is stayed until the expiration of 14 days after the entry of the order, unless the court orders otherwise.” The Debtors request that the Order be effective immediately by providing that the 14-day stays under Rules 6004(h) and 6006(d) are waived.

83. The purpose of Rules 6004(h) and 6006(d) is to provide sufficient time for an objecting party to appeal before an order can be implemented. *See* Advisory Committee Notes to Fed. R. Bankr. P. 6004(h) and 6006(d). Although 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 14-day stay period, *Collier* suggests that the 14-day stay period should be eliminated to allow a sale or other transaction to close immediately “where there has been no objection to the

procedure.” *Collier on Bankruptcy*, ¶ 6004.11 (Alan N. Resnick & Henry J. Sommer eds., 16th ed.). Furthermore, *Collier* provides that if an objection is filed and overruled, and the objecting party informs the court of its intent to appeal, the stay may be reduced to the amount of time actually necessary to file such appeal. *Id.*

84. The Debtors hereby request that the Court waive the 14-day stay periods under Rules 6004(h) and 6006(d) or, in the alternative, if an objection to the Sale is filed, reduce the stay period to the minimum amount of time needed by the objecting party to file its appeal.

NO PREVIOUS REQUEST

85. No previous application for the relief sought herein has been made to this or any other Court.

NOTICE

86. This Motion and notice of this Motion will be served respectively on Master Service List No. 1 (dated July 16, 2024) and Master Notice List No. 1 (dated July 16, 2024). Notice of this Motion and any order entered hereon will be served in accordance with Local Rule 9013-3(A)(1). The Debtors submit that, under the circumstances, no other or further notice is required.

The Debtors respectfully request entry of an order granting the relief requested herein, together with such other and further relief as the Court deems just and proper.

Dated: July 16, 2024
St. Louis, Missouri

Respectfully submitted,

DENTONS US LLP

/s/ Stephen O'Brien

Stephen O'Brien
MoBar # 43977
DENTONS US LLP
211 N Broadway Ste 3000
St. Louis, MO 63102
Telephone: (314) 241-1800
stephen.obrien@dentons.com

Robert E. Richards (*pro hac vice* pending)
Samantha Ruben (*pro hac vice* pending)
Elysa Chew (*pro hac vice* pending)
DENTONS US LLP
233 S. Wacker Drive, Suite 5900
Chicago, Illinois 60606-6404
Telephone: (312) 876-8000
robert.richards@dentons.com
samantha.ruben@dentons.com
elysa.chew@dentons.com

– and –

David A. Sosne
MoBar # 28365
**SUMMERS COMPTON WELLS
LLC**
903 South Lindbergh Blvd., Suite 200
St. Louis, Missouri 63131
Telephone: (314) 991-4999
dsosne@scw.law

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