Docket #0200 Date Filed: 07/24/2023

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
PLASTIQ INC., *et al.*,[1]	Case No. 23-10671-BLS
Debtors.	(Jointly Administered)
	Re: D.I. 23, 127, 186

REPLY OF COLONNADE ACQUISITION CORP. II IN SUPPORT OF THE PROPOSED SALE OF THE DEBTORS' ASSETS TO PLASTIQ, POWERED BY PRIORITY, LLC PURSUANT TO THE STALKING HORSE AGREEMENT

Colonnade Acquisition Corp. II ("Colonnade") hereby replies to the *Limited Objection of Official Committee of Unsecured Creditors to Approval of Sale of Debtors' Assets and Distribution of Sale Proceeds Under Stalking Horse Bid* (D.I. 186) (the "Objection") and in support of the proposed sale (the "Sale") of the assets of the above-captioned debtors and debtors in possession (the "Debtors") pursuant to the *Debtors' Motion for Entry of (A) an Order (I) Approving Bidding Procedures in Connection with Sale of the Debtors' Assets and Related Bid Protections; (II) Approving Form and Manner of Notice; (III) Scheduling Auction and Sale Hearing; (IV) Authorizing Procedures Governing Assumption and Assignment of Certain Contracts and Unexpired Leases; and (V) Granting Related Relief; and (B) an Order (I) Approving the Purchase Agreements, and (II) Authorizing a Sale Free and Clear of All Liens, Claims, Encumbrances, and Other Interests* (D.I. 23) (the "Sale Motion") to Plastiq, Powered by Priority, LLC ("Priority"), as the Stalking Horse Bidder[2] and Successful Bidder, in accordance

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: Plastiq Inc. (6125), PLV Inc. d/b/a/ PLV TX Branch Inc. (5084), and Nearside Business Corp. (N/A). The corporate headquarters and the mailing address for the Debtors is 1475 Folsom Street, Suite 400, San Francisco, California 94103.

[2] Undefined terms used herein shall have the meanings ascribed to them in the Bidding Procedures Order (defined herein).

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with the Stalking Horse Agreement. In support of this reply, Colonnade respectfully states as follows:

PRELIMINARY STATEMENT

1. In the Objection, the Committee baselessly attacks an arms-length agreement between Priority, the only party to submit a Qualified Bid, and Colonnade, whereby Priority commits to issue to Colonnade $2 million and 5% equity in Priority (the "Colonnade Payment") in exchange for a release by Colonnade of its claims and causes of action against the Debtors arising from the failed prepetition merger of the Debtors with Colonnade, which exceed $82,000,000 and are by far the largest unsecured claims in these chapter 11 cases. The Colonnade Payment amounts to the assumption of an estate liability by Priority using non-estate property, one that Priority is entitled to assume (as the Committee freely admits in its Objection), and that benefits the Debtors and their estates, ***including unsecured creditors***, by drastically improving the pro rata distributions that unsecured creditors may receive under a chapter 11 plan.

2. According to the Committee's false and oft-repeated assertions, however, the Colonnade Payment is the product of a nefarious effort to extract sale proceeds that would otherwise be available for the Debtors' estates and unsecured creditors and transforms the Sale into a *sub rosa* plan. The Committee requests that the Court disregard binding Third Circuit precedent to rewrite the Stalking Horse Agreement to require Priority to increase its bid—again, the only Qualified Bid received by the Debtors—by rerouting the Colonnade Payment to the estates and reinstating Colonnade's claims. It is unclear how the Committee could possibly believe general unsecured creditors are better off without the release of Colonnade's claims, but it is of no import. The bottom line is that nothing in the Bankruptcy Code prohibits the

Colonnade Payment, and the Debtors' request for authority to sell their assets to Priority pursuant to the Stalking Horse Agreement, without modification, falls well-within their business judgment. Therefore, the Court should overrule the Objection outright.

BACKGROUND

3. On May 24, 2023, each of the Debtors filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code.

4. That same day, the Debtors filed the Sale Motion requesting the entry of separate orders approving the Bidding Procedures for the sale of substantially all of their assets and authorizing the sale of their assets (subject to the Bidding Procedures) to Plastiq, as the Stalking Horse Bidder, pursuant to the Stalking Horse Agreement.

5. The Stalking Horse Agreement provides for the Colonnade Payment, the terms of which are more fully set forth in the Letter Agreement Terms attached to the Stalking Horse Agreement as Exhibit B and the Letter Agreement between Priority and Colonnade, in exchange for Colonnade's release of claims and causes of action against the Debtors resulting from the failed prepetition merger of the Debtors with Colonnade, which exceed $82,000,000.[3]

6. On June 15, 2023, the Official Committee of Unsecured Creditors (the "Committee") filed the *Omnibus Objection of the Official Committee of Unsecured Creditors to Approval of Bidding Procedures and Entry of Final Order Approving Postpetition Financing* (D.I. 79), objecting, in part, to the Colonnade Payment.

7. Thereafter, the Debtors, Committee, Prepetition Secured Parties and DIP Secured Parties agreed to a settlement (the "Committee Settlement") set forth in the final DIP

[3] On July 7, 2023, Colonnade submitted proofs of claim against each of the Debtors (Claim Nos. 38, 39, 40). For the Court's reference, one of Colonnade's proofs of claim may be found at the following link to the Debtors' claims agent's website: https://www.kccllc.net/plastiq/document/231067123070700000000003.

financing order (D.I. 138) (the "Final DIP Order") that, among other things, (i) continued the Committee's objection to the Sale Hearing and (ii) provided for the reallocation of the Colonnade Payment if the Committee's objection is successful or if Priority is not the Successful Bidder.

8. On June 21, 2023, the Court entered an order approving the Bidding Procedures (D.I. 127) (the "Bidding Procedures Order"). The next day, the Court entered the Final DIP Order embodying the Committee Settlement.

9. On July 17, 2023, the Committee filed the Objection.

10. On July 21, 2023, after having received no Qualified Bids for their Assets other than the Stalking Horse Bid from Priority, the Debtors filed the *Notice of Cancelation of Auction* (D.I. 189), canceling the Auction and stating that the Debtors will request at the Sale Hearing that the Court approve the Sale pursuant to the Stalking Horse Agreement.

REPLY

11. The crux of the Committee's Objection is that the Colonnade Payment transforms the Sale into a *sub rosa* plan because it "favors one unsecured creditor (Colonnade) over other unsecured creditors, and it seeks to channel consideration to a specific creditor at the expense of others." Obj. ¶ 20. The Committee mislabels this a "restructuring of creditors' rights and diversion of value [that] is impermissible in the context of a section 363 sale." *Id.* The Committee's arguments are without merit and should be rejected for several reasons.

12. ***First***, the Committee's assertion that the Colonnade Payment is consideration that, absent the agreement between Colonnade and Priority, would otherwise be available to the Debtors' estates is false and misconstrues the nature of the Colonnade Payment. The Colonnade Payment is a payment directly to Colonnade using non-estate property which

Priority determined to make in exchange for Colonnade's release of its substantial claims against the Debtors and to secure a business relationship with Colonnade for the go-forward business. As such, the agreement amounts to an assumption of liability by Priority, which agreement could also exist outside of the Stalking Horse Agreement and the Debtors' sale process. Because the Colonnade Payment is not intended for, nor will become part of, the Debtors' estates, the aggregate sale proceeds available to the Debtors' estates would not increase ***at all*** absent this agreement, despite the Committee's desire. Moreover, as the Committee freely admits in the Objection, there is nothing objectionable about a purchaser choosing specific liabilities to assume, which indeed occurs in nearly every section 363 sale. *See* Obj. ¶ 29 (stating that the assumption of liability by a purchaser is not objectionable "where the purchaser *independently* determines that full payment of the relevant unsecured creditors is important to its ongoing relationship with those creditors and essential to its ability to profitably operate the purchased business on a going-forward basis") (emphasis in original). There is no evidence that Priority did not independently determine to make the Colonnade Payment, notwithstanding the Committee's baseless assertions in its Objection to the contrary. Therefore, by the Committee's own admission, the Colonnade Payment is perfectly appropriate.

13. In fact, the Third Circuit in *In re ICL Holding Co., Inc.*, 802 F.3d 547 (3d Cir. 2015) rejected the same arguments that the Committee raises in its Objection when it held that payments by a purchaser directly to third parties in connection with acquiring a debtor's assets in a section 363 sale is permissible. *Id.* at 558. There, the successful bidder for the debtors' assets agreed to deposit $3.5 million into a trust for general unsecured creditors and to place into escrow funds for the payment of the debtors' and committee's professional fees and wind-down expenses. *Id.* at 550-51. The United States Government, which asserted a substantial

administrative expense claim against the debtors' estates, argued that the payments to general unsecured creditors and the professionals violated the Bankruptcy Code's distribution scheme, just as the Committee does here. *Id.* at 551.

14. The Third Circuit rejected the Government's arguments, finding that the payments were being made from funds of the purchaser, not the debtors, and the funds were not intended for, nor were paid into, the debtors' estates. *Id.* As such, the funds were not property of the debtors' estates, and the payments were permissible. The Third Circuit explained:

> As noted, the Bankruptcy Code's creditor-payment hierarchy only becomes an issue when distributing estate property. Thus, even assuming the rules forbidding equal-ranked creditors from receiving unequal payouts and lower-ranked creditors from being paid before higher ranking creditors apply in the § 363 context, neither was violated here.

Id. at 558.[4]

15. So too here, the Colonnade Payment will be made directly to Colonnade using non-estate property of Priority, as approved by the Third Circuit in *ICL*. *See also In re TSIC, Inc.*, 393 B.R. 71, 77 (Bankr. D. Del. 2008) (approving proposed payment from the purchaser of the debtor's assets for the benefit of general unsecured creditors because the funds were not property of the estate).

16. ***Second***, the older and mostly out-of-district case law the Committee twists to support its arguments is completely inapposite. ***None*** of the cases cited by the Committee involve a finding that a sale constituted a *sub rosa* plan because the purchaser agreed to assume a liability in exchange for a release of claims against the debtor. In fact, many of the cases the Committee distorts in support of its arguments do not even involve section 363(b) sales. And, the

[4] Notably, the Third Circuit did not hold that the absolute priority rule applied to payments of estate property in connection with a section 363 sale.

case law cited by the Committee where courts have found sales to constitute *sub rosa* plans involve facts that are a far cry from the present circumstances. For example, in *In re Braniff Airways, Inc.*, 700 F.2d 935 (5th Cir. 1983), the case credited with establishing the *sub rosa* doctrine and relied on by the Committee in the Objection, the Fifth Circuit rejected a sale that provided for the transfer of the debtor's cash, airplanes and equipment, terminal leases and landing slots to the buyer in return for travel scrip, unsecured notes, and a profit participation in the buyer's proposed operation. *Id.* at 939-40. Under the agreement between the debtor and buyer, the scrip could only be used in a future reorganization of the debtor and could only be issued to the debtor's former employees, shareholders and certain unsecured creditors. *Id*. The sale also required certain creditors to vote their claims in support of any future plan of reorganization and provided for a release of claims by all parties against the debtor, its secured creditors and its officers and directors. *Id.* at 940.

17. The present situation is nothing like *Braniff*. Nothing about this Sale, including the Colonnade Payment, bears the hallmarks of a *sub rosa* plan as described by *Braniff* and its progeny. The terms regarding the Colonnade Payment do not (i) specify the terms of any future chapter 11 plan, (ii) affect in any way other creditors' rights, including those of general unsecured creditors, (iii) provide for general releases by parties against the Debtors, its officers and directors, or other creditors, other than Colonnade's release of its claims and causes of action, or (iv) restrict or dictate creditors' rights to vote. *See In re Shubh Hotels Pittsburgh, LLC*, 439 B.R. 637, 644 (Bankr. W.D. Pa. 2010) ("[A] transaction would amount to such a sub rosa plan of reorganization if it: 1) specifies the terms of any future reorganization plan; 2) restructures creditors' rights; and 3) requires that all parties release claims against the Debtor, its officers and directors, and its secured creditors."); *In re Capmark Fin. Grp. Inc.*, 438 B.R. 471,

513 (Bankr. D. Del. 2010) (stating that a settlement constitutes a *sub rosa* plan if it "has the effect of dictating the terms of a prospective chapter 11 plan" by either "(i) dispos[ing] of all claims against the estate or (ii) restrict[ing] creditors' rights to vote.").

18. In fact, at least one court within the Third Circuit has held that a section 363(b) sale did not constitute a *sub rosa* plan where the purchaser agreed to provide equity to certain parties as a component of the sale. In *In re Summit Global Logistics, Inc.*, 2008 WL 819934 (Bankr. D.N.J. March 26, 2008), the debtors sought approval of the sale of their assets pursuant to section 363(b), the terms of which included an agreement among the Debtors, the Debtors' secured lenders and a group of noteholders whereby the Debtors' lenders and noteholders would each receive equity in the purchaser, the purchaser would pay the noteholders' professional fees, and the parties would exchange general releases. *Id.* at *6. One of the debtors' creditors raised numerous objections to the sale, including that the sale constituted a *sub rosa* plan. *Id.* at *8. The Court overruled each of the objections. In finding that the agreement did not transform the sale into a *sub rosa* plan, the Court explained that the agreement was permissible and that such compromises are common in the bankruptcy process. *Id.* at *13. The Court further found that the creditor was unable to establish its detriment through the sale, and that the Debtors' satisfaction of the sound business judgment and good faith requirements mandated a finding that the proposed sale did not constitute a *sub rosa* plan. *Id.* at *14.

19. Similarly, the Colonnade Payment is not unusual in the context of section 363 sales and the bankruptcy process. As discussed, it is simply an assumed liability that confers a direct benefit on the Debtors' estates. [5] It is also unrefuted that the Debtors' sale of their assets

[5] In an effort to minimize Colonnade's release, the Committee argues that Colonnade's claims against the Debtors "may be subject to offset by significant claims that the Debtors' estates likely have against Colonnade." Obj. ¶ 34. Despite its musings, the Committee does not identify what those claims could be.

to Priority pursuant to the Stalking Horse Agreement is being done in good faith and is an exercise of the Debtors' sound business judgment to maintain the going concern value of the company and maximize value for the Debtors' estates. Further, notwithstanding the Committee's vague allegations of harm to other unsecured creditors, the Committee fails to demonstrate any harm that could justify a finding that the Sale constitutes a *sub rosa* plan. *See In re Trans World Airlines, Inc.*, 2001 WL 1820326, at *11 (Bankr. D. Del. April 2, 2001) (finding that a sale did not constitute a *sub rosa* plan and stating that "the disparate treatment of creditors occurs as a consequence of the sale transaction itself and is not an attempt by the debtor to circumvent the distribution scheme of the Code" and that "[t]here is nothing in the statute that requires a § 363(b) sale to provide a pro rata distribution to all unsecured creditors or even any distribution to all unsecured creditors. Had Congress intended that result it could have easily drafted the section to so provide.").

20. ***Finally***, the Committee relies on inapplicable legal standards to attack the Colonnade Payment. To bolster its baseless argument that the Colonnade Payment "unfairly discriminates" against other creditors, the Committee attempts to bootstrap the requirements applicable to confirmation of a chapter 11 plan to a sale under section 363(b). *See* Obj. ¶ 28. The case law in this District is clear, however, that the Code requirements applicable to plan confirmation are entirely separate and inapplicable in other contexts, including sales under section 363(b). *See Trans World Airlines*, 2001 WL 1820326, at *11 ("Section 363(b) makes no reference to § 1123 and vice versa, so it seems quite clear that § 363(b) has application with respect to the sale of some or substantially all of the estate's assets independent of the plan provisions, including § 1123."); *In re W.R. Grace & Co.*,475 B.R. 34, 76 n. 29 (D. Del. 2012) ("Approval of a settlement agreement and confirmation of a reorganization plan are two entirely

distinct matters, governed by different provisions of the law and sections of the Bankruptcy Code."); *In re Nortel Network, Inc.,* 522 B. R. 491, 507 (Bankr. D. Del. 2014) ("Judge Sontchi found that '[a]s a matter of law, Section 1129(a)(7) does not apply to the decision whether to approve a settlement outside of the chapter 11 plan.'" (citing *In re Capmark Fin. Grp.,* 438 B.R. 471, 513 (Bankr. D. Del. 2010))).

21. Moreover, the Committee relies on case law involving ***preference actions*** to argue that the Colonnade Payment represents "precisely the kind of handpicking of favored unsecured creditors for preferential treatment that is the antipathy of the Bankruptcy Code's distribution rules and that courts have not hesitated to reject." Obj. ¶ 30 (*citing In re S.E.L. Maduro (Fla.), Inc.*, 205 B.R. 987, 992 (Bankr. S.D. Fla. 1997) and *Warsco v. Preferred Tech. Grp.*, 258 F.3d 557, 565 (7th Cir. 2001)). In both cases, the court simply determined that the ***prepetition*** disbursement of proceeds to certain creditors from a ***prepetition*** sale constituted preferences under section 547. These cases have absolutely no bearing on a section 363 sale, and the Committee's reliance on such cases demonstrates the frailty of its arguments.

CONCLUSION

22. The Debtors conducted a successful sale process to maintain the going-concern value of their assets and maximize value for their estates, including through the release by Colonnade in exchange for the Colonnade Payment. Nothing in the Bankruptcy Code prohibits the Colonnade Payment, and the Committee's desire for a bid higher than Priority's Stalking Horse Bid does not alter that conclusion. Therefore, and for the reasons discussed herein, the Court should overrule the Committee's Objection and approve the Sale to Priority pursuant to the Stalking Horse Agreement, without modification.

RESERVATION OF RIGHTS

23. Colonnade is conferring with the Debtors and Priority on the form of order approving the Sale in order to reserve and preserve its rights, counterclaims, and defenses in the event that any action is brought against Colonnade. To that end, Colonnade requests that the following language be added to the sale order:

> Notwithstanding anything contained in this Order, Purchase Agreement or Letter Agreement to the contrary, Colonnade's release in Section 1(a) of the Letter Agreement shall not deprive or extinguish Colonnade's right to assert rights, counterclaims and defenses in any litigation brought against Colonnade in connection with the Merger Agreement or otherwise, including, without limitation, any right of recoupment or set off, all such rights, counterclaims and defenses being expressly preserved and reserved by Colonnade.

24. Colonnade reserves all of its rights with respect to the foregoing language, including to revise it in consultation with the Debtors and Priority. Colonnade further reserves all of its rights with respect to the form of sale order, including to review and be heard on the sale order prior to its entry.

25. Further, Colonnade reserves the right to call any witness, including any rebuttal and/or impeachment witnesses, as necessary, and to cross-examine any witness called by any other party at the Sale Hearing. Colonnade further reserves the right to use introduce any evidence, including evidence for purposes of rebuttal or impeachment, as necessary.

Dated: July 24, 2023
Wilmington, Delaware

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