

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
MALIBU LIGHTING CORPORATION, et al., <sup>1</sup>	)	Case No. 15-12082 (___)
	)	
Debtors.	)	(Joint Administration Requested)

**MOTION OF DEBTOR NATIONAL CONSUMER OUTDOORS CORPORATION  
F/K/A DALLAS MANUFACTURING COMPANY, INC. FOR ORDER  
(A) APPROVING ASSET PURCHASE AGREEMENT AND  
AUTHORIZING THE SALE OF SUBSTANTIALLY ALL OF THE  
DEBTOR’S OPERATING ASSETS; (B) AUTHORIZING THE SALE OF ASSETS  
FREE AND CLEAR OF ALL LIENS, CLAIMS, RIGHTS, ENCUMBRANCES AND  
OTHER INTERESTS PURSUANT TO BANKRUPTCY CODE SECTIONS 105, 363(b),  
363(f) AND 363(m); (C) ASSUMING AND ASSIGNING CERTAIN EXECUTORY  
CONTRACTS AND UNEXPIRED LEASES; AND (D) GRANTING RELATED RELIEF**

Debtor National Consumer Outdoors Corporation f/k/a Dallas Manufacturing Company, Inc., one of the above-captioned debtors and debtors in possession herein (the “Debtor” or “NCOC”), files this motion (the “Sale Motion”) for the entry of an order:

(a) approving the *Asset Purchase Agreement* dated October 8, 2015 (the “Agreement,” a copy of which is attached hereto as Exhibit A),<sup>2</sup> between the Debtor, as seller, and DMC Acquisition Holdings, LLC, a Delaware limited liability company (the “Purchaser”), an affiliate of Summit Investment Management LLC, as buyer, and authorizing the sale (the “Sale”) of substantially all of the operating assets of the Debtor (the “Assets”); (b) authorizing the sale of the assets free and clear of all liens, claims, rights, encumbrances, and other interests pursuant to sections 105,

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<sup>1</sup> The Debtors, together with the last four digits of each Debtor’s tax identification number, are: Malibu Lighting Corporation (8205); Outdoor Direct Corporation f/k/a The Brinkmann Corporation (9246); National Consumer Outdoors Corporation f/k/a Dallas Manufacturing Company, Inc. (1153); Q-Beam Corporation (1560); Smoke ‘N Pit Corporation (9951); Treasure Sensor Corporation (9938); and Stubbs Collections, Inc. (6615). The location of the Debtors’ headquarters and service address is 4215 McEwen Road, Dallas, TX 75244.

<sup>2</sup> All capitalized terms not defined herein and referencing the Agreement have the meanings ascribed to them in the Agreement.

363(b), 363(f), and 363(m) of the Bankruptcy Code; (c) assuming and assigning certain executory contracts and unexpired leases, and (d) granting related relief.

Concurrently herewith, the Debtor is filing the *Motion of Debtor National Consumer Outdoors Corporation f/k/a Dallas Manufacturing Company, Inc. for Order: (A) Approving Bid Procedures for the Sale of Substantially All of the Debtor's Assets; (B) Scheduling an Auction and Sale Hearing to Consider the Sale and Approve the Form and Manner of Notice Related Thereto; (C) Approving Payment of a Break-Up Fee; and (D) Approving Procedures for the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases; and (E) Granting Related Relief* (the "Bidding Procedures Motion"), which seeks approval of certain sale and bidding procedures for the Sale, as more particularly set forth therein (the "Bidding Procedures").

In support of this Sale Motion, the Debtor respectfully states as follows:

**Preliminary Statement**

1. By this Sale Motion, the Debtor seeks approval of the Sale of the substantially all of the operating assets of the Debtor to the Purchaser pursuant to the Agreement, or to the highest and best bidder for such assets at the auction provided for in the Bidding Procedures Motion (the "Auction"), to take place in accordance with the order to be entered by the Court on the Bidding Procedures Motion (the "Bidding Procedures Order"). The proposed Agreement contemplates that the assets will be sold free and clear of liens, claims, encumbrances, rights, and other interests other than those liens and interests expressly permitted under the Agreement.

2. As discussed below, the Debtor's sale process is in the best interests of the Debtor and its estate and creditors. The Sale will provide for the payment of the sum of \$36,850,000 in cash, plus the assumption of the Assumed Liabilities. The Debtor submits that the sale is in the best interests of this estate.

**Jurisdiction and Venue**

3. The United States Bankruptcy Court for the District of Delaware (the "Court") has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order of Reference from the United States District Court for the District of Delaware*, dated February 29, 2012. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2), and the Debtor confirms its consent pursuant to Rule 9013-1(f) of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the "Local Rules") to the entry of a final order by the Court in connection with this Motion to the extent that it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments in connection herewith consistent with Article III of the United States Constitution.

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

5. The statutory predicates for the relief sought herein are sections 105, 362, 363, 365, 1107, and 1108 of Title 11 of the United States Code (the "Bankruptcy Code"), Rules 2002, 6004, 6006, and 9014 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), and Rules 2002-1(b) and 6004-1 of the Local Rules of Bankruptcy Practice and

Procedure of the United States Bankruptcy Court for the District of Delaware (the “Local Rules”).

### **General Background**

6. On the date hereof (the “Petition Date”), the Debtor, along with certain affiliates (together, the “Debtors”), each filed with this Court a voluntary petition for relief under chapter 11 of the Bankruptcy Code. The Debtors are operating their businesses and managing their properties as debtors and debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

7. No request has been made for the appointment of a trustee or an examiner in these cases, and no official committee has yet been appointed by the Office of the United States Trustee.

8. The factual background regarding the Debtors, including their current and historical business operations and the events precipitating the chapter 11 filing, is set forth in detail in the *Declaration of David M. Baker in Support of First Day Motions* (the “First Day Declaration”) filed concurrently herewith and fully incorporated herein by reference.<sup>3</sup>

### **Prepetition Marketing and Sale Efforts**

9. The Debtors commenced the process of evaluating restructuring and sale options in March 2015 with the hiring of Piper Jaffray & Co. (“PJC”) as their exclusive investment banker. Under the terms of its agreement, PJC explored a sale or capital placement

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<sup>3</sup> Capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the First Day Declaration except, as provided in footnote no. 2, those capitalized terms otherwise undefined herein that reference the Agreement shall have the meaning ascribed to them in the Agreement.

transaction for the Debtors. On March 27, 2015, as directed by the Board of Directors of the Debtors, PJC began contacting parties to determine their interest in the acquisition of or investment in the Debtors, either together or as separate companies. Specifically, PJC contacted 165 potential bidders, representing both financial and strategic potential buyers. Of these contacted bidders, 134 either reviewed a teaser document or participated in high-level discussions about the transaction, 87 of which ultimately negotiated confidentiality agreements and were provided a Confidential Information Memorandum. Interested parties were asked to participate in an initial discussion with PJC to hear about the opportunity and ask questions about the Debtors' assets. Parties that demonstrated sufficient interest in the transaction were then given access to further initial due diligence information via a virtual data room (36 parties to date).

10. Between April and June 2015, 23 parties provided verbal or written indications of interest and 15 of the highest bidders were invited to more detailed diligence discussions and presentations with management. Subsequent to these discussions and presentations, these parties were given access to additional due diligence information via a virtual data room and follow up discussions, and were asked to provide written letters of intent for the Board of Directors to consider by June 2, 2015. By early June 2015, PJC had received 13 letters of intent. At this time, Debtors Malibu Lighting Corporation ("MLC") and Outdoor Direct Corporation ("ODC") were operating as going concern entities and, consequently, PJC solicited and received letters of intent for different combinations of the Debtors, as well as bids for all Debtor assets together.

11. Subsequent to receiving these letters of intent, the Debtors received notice that Home Depot terminated its relationships with MLC and ODC. At the direction of the Debtors' Board of Directors, PJC re-approached interested parties to determine interest for the Debtors' assets without the go-forward relationship with MLC's and ODC's major customer. Buyers expressed a lack of interest in moving forward with a purchase of MLC's and ODC's assets at that time. After re-approaching interested parties, the Debtors observed a considerable decrease in interest in the MLC and ODC assets from prospective parties as a result of the terminated relationship with Home Depot. As a result, the Debtors refocused the sale process for NCOC as a separate entity. PJC reached out to all parties who had expressed interest in NCOC on a stand-alone basis or as the key area of focus for the formerly consolidated sale process. PJC and the Debtors' management team held follow-up due diligence conversations with several interested parties in mid-June and early July. During this time frame, many parties expressed to PJC an interest in participating in an auction process for NCOC in order to provide certainty and the opportunity to purchase the assets free and clear of all liens. Of parties with continued interest, Summit Investment Management LLC ("Summit") emerged as the highest and best bid, with the ability to reduce risk of further process uncertainty.

12. On August 20, 2015, NCOC entered into a non-binding letter of intent with Summit regarding a sale of substantially all of NCOC's operating assets, plus the assumption of certain liabilities. Summit's letter of intent provided an exclusivity provision that expired on September 14, 2015, but this provision permitted NCOC's representatives to continue to provide due diligence information to, and have discussions with, prospective purchasers who

had already been included in the process and those who reached out to NCOC during the exclusivity period. This structure has allowed PJC to provide updated and additional information to potential interested parties to consider submitting an overbid in an auction process.

13. Thereafter, NCOC entered into the Agreement with the Purchaser, which is an affiliate of Summit. The Agreement is subject to higher and better bids and, ultimately, the approval of this Court.

### **Secured Debt Obligations of the Debtor**

14. NCOC is a party to that certain *Amended and Restated Credit Agreement*, dated as of June 30, 2013, as amended, between NCOC and Comerica Bank (the “NCOC Comerica Credit Agreement”). NCOC is the only obligor under the NCOC Comerica Credit Agreement, which is secured by substantially all of NCOC’s assets. As of October 5, 2015, Comerica Bank (“Comerica”) is owed \$25,801,582.89 in principal obligations, plus accrued interest and fees, under the NCOC Comerica Credit Agreement.

15. NCOC is also a guarantor of the obligations under that certain *Amended and Restated Credit Agreement*, dated as of March 8, 2012, as amended (the “BofA Credit Agreement”), by and between Debtor ODC and Bank of America, N.A., as administrative agent (the “Guaranty Agent”).<sup>4</sup> The Guaranty Agent holds security interests and liens in substantially all of the Debtor’s assets (the “Guaranty Collateral”). The Guaranty Collateral secures all indebtedness owed by the Debtor under certain loan documents. Such indebtedness is referred to as the “Guaranty Indebtedness.” The Guaranty Indebtedness, as of October 7, 2015, is not less

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<sup>4</sup> Pursuant to an intercreditor agreement, NCOC’s guaranty obligations under the BofA Credit Agreement are junior to NCOC’s obligations to Comerica Bank under the NCOC Comerica Credit Agreement.

than \$44,413,950.20, consisting of principal in the amount of \$44,060,185.37 and accrued and unpaid interest in the amount of \$353,764.83.

16. In addition, Comerica is the proposed postpetition lender pursuant to the *Motion of Debtor National Consumer Outdoors Corporation f/k/a Dallas Manufacturing Company, Inc., for Entry of Interim and Final Orders (A) Authorizing Post-Petition Financing and Use of Cash Collateral, (B) Granting 363(c) and 364(d) Lien, a Superpriority Administrative Claim, and Adequate Protection, (C) Approving Agreements with Comerica Bank, and (D) Setting a Final Hearing* (the "DIP Motion"), filed in connection with the petition and other first day pleadings. The DIP Motion seeks, inter alia, authorization to enter into a senior debtor-in-possession term loan facility extended by Comerica in the principal amount of up to \$21,500,000 (the "DIP Loan"). The proceeds of the DIP Loan will be used to fund the operational expenditures of the Debtor's chapter 11 case, and to roll-up certain prepetition debt. The Debtor is in need of this postpetition financing in order to sustain operations in the ordinary course and satisfy chapter 11 administrative expenses.

#### **Sale of the Assets**

17. The Debtor seeks approval of the sale of substantially all of the assets necessary to the operation of NCOC, including, *inter alia*, unexpired leases and executory contracts, personal property, intellectual property, intangible property, inventory, vendor items, and certain claims and liabilities to be assumed by the Purchaser, all as more fully set forth in the Agreement (collectively, the "Assets").

18. The principal deadlines set forth in the Agreement are summarized below:



- Entry of an order approving the Bidding Procedures Motion (the “Bidding Procedures Order”) by no later than 21 days after the Petition Date;
- Deadline to (a) submit competing bids, (b) object to the sale, (c) object to assumption/assignment and cure claims (no deadline in Agreement; the Debtor proposes **November 12, 2015**);
- Auction no later than the forty-ninth (49<sup>th</sup>) day after the Petition Date (the Debtor proposes **November 17, 2015**);
- Sale Hearing no later than the fifty-second (52<sup>nd</sup>) day after the Petition Date (the Debtor proposes **November 19, 2015**); and
- Closing of the Sale to occur no later than (a) the fifty-fifth (55<sup>th</sup>) day after the Petition Date or (b) the fifth (5<sup>th</sup>) Business Day after entry of the Sale Order, whichever is first to occur.

19. In light of the prepetition marketing efforts, the Debtor believes that the sale process provides sufficient time to fully expose the Assets for sale in the hope of achieving a competitive bidding process.

#### **Continued Sale Process**

20. While the prepetition marketing and sale process was thorough, as discussed above, the Debtor will send, or will have sent, notice of the Sale Motion and Bidding Procedures to all parties that the Debtor believes may be potentially interested in acquiring the Assets. The Debtor will also maintain its electronic data room with key documents and company-specific information in order to streamline the due diligence process going forward. The data room has been, and will be, available to interested parties who have, or will, execute confidentiality agreements acceptable to the Debtor. The Debtor will continue to respond to inquiries from prospective buyers through the bid deadline approved by the Court for alternative bidders to bid on the Assets. The Debtor will also continue to use PJC, subject to Court approval, as its investment banker to solicit any further offers for the Assets.

**Agreement With Purchaser**

21. The Debtor believes that the consummation of the Sale to the Purchaser or other successful bidder will provide creditors and other stakeholders with the best opportunity possible for maximizing the value of the Assets.

22. The key terms of the Agreement and the proposed Sale Order, attached hereto as **Exhibit B**, are summarized below. The description below only summarizes certain provisions of the Agreement and the Sale Order as a convenience to the Court and parties in interest, and the terms of the Agreement control in the event of any inconsistency.

- a. **Purchase Price.** The total consideration to be paid by the Purchaser to the Debtor for the Assets shall be: (a) \$36,850,000 in cash and (b) the assumption of the Assumed Liabilities, including the assumption of Assumed Contracts and Assumed Leases (together, the “Purchased Contracts”) subject to the agreed amount of related cure costs. *See* Agreement §§ 1.3, 2.1, 2.3, and 2.5.
- b. **Purchased Assets.** The Assets (inclusive of the Purchased Contracts) are those assets necessary to operate the Debtor’s business including, but not limited to, the Assumed Real Property Leases, Equipment, Inventory, Receivables, prepaid expenses, Intellectual Property Assets, Business Permits, Books and Records, goodwill and other intangibles, Assigned Avoidance Actions, and claims related to the Purchased Assets, rights to the name National Consumer Outdoors Corporation, and hardware. *See* Agreement § 1.1. The Purchased Assets do not include the Excluded Assets. The Excluded Assets are set forth in section 1.2 of the Agreement. Within two business days after the entry of an order approving the bid procedures, the Purchaser shall make an earnest money deposit of \$1,612,500, to be held in escrow. *See* Agreement § 2.2.
- c. **Closing.** Subject to the terms and conditions of the Agreement and the Sale Order, the sale and purchase of the Assets and the assumption of the Purchased Contracts contemplated by the Agreement shall take place at a closing (the “Closing”) to be held no later than the third (3rd) day following the satisfaction or waiver of all conditions to the obligations of the parties hereto set forth in sections 4.4 of the Agreement (other than those conditions which by their nature can only be satisfied at the Closing), or at such other place, at such other time, on such other date or

in such other manner as Debtor and Purchaser may mutually agree upon in writing. However, in no event shall the Closing occur later than (a) the fifty-fifth (55<sup>th</sup>) day after the Petition Date or (b) the fifth (5th) Business Day after entry of the Sale Order, whichever is first to occur.

- e. **Identity of Purchaser.** The Purchaser is DMC Acquisition Holdings, LLC, an affiliate of Summit Investment Management LLC.
- f. **Assumption of Executory Contracts and Unexpired Leases.** The proposed sale contemplates that the Debtor may assume and assign to the Purchaser certain of the executory contracts and unexpired leases associated with the Assets. Pursuant to the Agreement, the Purchaser will designate the Purchased Contracts not later than the Bid Submission Deadline. *See* Agreement § 1.3.
- g. **Break Up Fee.** Subject to approval of the Bankruptcy Court, in consideration for the Purchaser having expended considerable time and expense in connection with the Agreement and the negotiation thereof and to compensate Purchaser as a stalking-horse bidder, in the event that the Debtor consummates an alternative transaction instead of the proposed Sale to the Purchaser under the terms of the Agreement, the Debtor shall pay Purchaser a breakup fee equal to \$1,117,500 and an expense reimbursement not to exceed \$225,000 (the “Break Up Fee”). *See* Agreement § 11.1.
- h. **Representations, Warranties and Covenants.** The Debtor made various representations customary for a transaction of this kind including, but not limited to, those relating to organization and good standing, authorization and validity, foreign qualification, absence of conflicts, product liability, litigation, compliance with legal requirements, environmental matters, business permits, title to and use of property, assets necessary to conduct business, real property, contracts, intellectual property, other personal property, and employees and labor relations. *See* Agreement § 5. The Purchaser has made certain representations, among others, relating to organization, good standing and authorization, absence of conflict, financial resources, and absence of broker’s or finder’s fee. *See* Agreement § 6. The Debtor also agreed to various affirmative and negative covenants including, but not limited to, actions before closing, conduct of business, preservation of permits, access to information, certain employee matters, payment of undisputed post-petition accounts payable, filing of tax returns. *See* Agreement § 10.
- i. **Conditions.** The Closing is conditioned upon the occurrence of certain events customary for transactions of this kind, including the truthfulness of all representations and warranties, no material adverse change in the Debtor’s business, and all consents and approvals, including approvals of the Bankruptcy Court, having been obtained. *See* Agreement § 4.

- j. **Rule 6004/6006 Waiver.** The proposed Sale Order provides that, upon entry, the Sale Order will be immediately enforceable, notwithstanding Bankruptcy Rules 6004 and 6006. *See* Sale Order ¶ 17. As discussed herein, the sale and prompt consummation thereof are in the best interest of the Debtor and its estate in order to maintain and otherwise maximize the going concern value of the Debtor's assets for the benefit of the estate and its stakeholders and to comply with certain timing deadlines as discussed above.
- k. **Successor Liability Findings.** The Sale Order provides that the Purchaser and its employees, officers, directors, advisors, lenders, affiliates, owners and successors and assigns shall not have any successor or vicarious liabilities. *See* Sale Order, ¶¶ R and 6.
- m. **Record Transfer and Access.** The Agreement provides for the transfer to the Purchaser of all Books and Records for the period of the four years prior to the Closing subject to certain exclusions. Agreement §§ 1.1(i) and 1.2(q). The Debtor will have access to the books and records to enable it to administer its chapter 11 case. *See* Agreement § 14.3.
- n. **Distribution of Sale Proceeds.** The proposed Sale Order contains provisions regarding the distribution of proceeds to the Debtor's principal secured lenders, after payment of certain expenses. *See* Sale Order ¶ 13.

23. The Debtor believes that the sale of the Assets as a going concern to the Purchaser or other successful bidder is in the best interests of the Debtor's estate and its creditors. The Debtor further believes that obtaining the stalking horse bid, marketing the Assets with the assistance of PJC, and holding the Auction on the date specified by the Court will result in the highest or otherwise best consideration for the Assets and will provide for either the payment or assumption of all known claims against the Debtor.

24. The Debtor has examined the alternatives to a sale of the Assets and has determined that a more viable alternative to sale of the Assets does not exist. The Debtor believes that the sale of the Assets optimizes value for its estate and creditors.

25. For the reasons stated above, and in light of the obvious benefits to the estate, the Debtor has determined, in the exercise of its business judgment, to consummate the

proposal submitted under the Agreement with the Purchaser or, if applicable, another bidder in the event that the Debtor receives a higher or otherwise better bid to the transaction set forth in the Agreement.

**Relief Requested**

26. The Debtor is requesting that this Court, *inter alia*, (a) authorize the sale of the Assets to the Purchaser pursuant to the Agreement, or alternatively, to another successful bidder pursuant to such competing agreement(s) with such other successful bidder entered into in accordance with the Bidding Procedures Order, (b) authorize such sale of the Assets to be free and clear of all liens, claims, rights, encumbrances, or other interests pursuant to sections 105, 363(b), 363(f), 363(m), and 365 of the Bankruptcy Code, with such liens, claims, rights, encumbrances and interests (collectively, the “Liens, Claims, and Encumbrances”) attaching to the sale proceeds of the Assets (the “Sale Proceeds”) with the same validity (or invalidity), priority and perfection as existed immediately prior to such sale; and (c) grant such other relief as may be necessary or appropriate.

**Basis for Relief**

27. Section 363(b)(1) of the Bankruptcy Code 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). Section 105(a) provides in relevant part that “[t]he Court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” 11 U.S.C. § 105(a).

28. A sale of the debtor's assets should be authorized pursuant to section 363 of the Bankruptcy Code if a sound business purpose exists for doing so. *See, e.g., In re Martin*, 91 F.3d 389, 395 (3d Cir. 1996) (citing *Fulton State Bank v. Schipper (In re Schipper)*, 933 F.2d 513, 515 (7th Cir. 1991)); *In re Abbotts Dairies of Pennsylvania, Inc.*, 788 F.2d 143 (3d Cir. 1986); *Stephens Indus., Inc. v. McClung*, 789 F.2d 386, 390 (6th Cir. 1986); *In re Lionel Corp.*, 722 F.2d 1063 (2d Cir. 1983); *In re Titusville Country Club*, 128 B.R. 396 (W.D. Pa. 1991); *In re Delaware & Hudson Railway Co.*, 124 B.R. 169, 176 (D. Del. 1991). The *Delaware & Hudson Railway* court rejected the pre-Code "emergency" or "compelling circumstances" standard, finding the "sound business purpose" standard applicable and, discussing the requirements of that test under *McClung* and *Lionel*, observing:

A non-exhaustive list of factors to consider in determining if there is a sound business purpose for the sale include: the proportionate value of the asset to the estate as a whole; the amount of elapsed time since the filing; the likelihood that a plan of reorganization will be proposed and confirmed in the near future; the effect of the proposed disposition of the future plan of reorganization; the amount of proceeds to be obtained from the sale versus appraised values of the Property; and whether the asset is decreasing or increasing in value.

*Delaware & Hudson Railway*, 124 B.R. at 176.

29. The *Delaware & Hudson Railway* court further held that "[o]nce a court is satisfied that there is a sound business reason or an emergency justifying the pre-confirmation sale, the court must also determine that the trustee has provided the interested parties with adequate and reasonable notice, that the sale price is fair and reasonable and that the Buyer is proceeding in good faith." *Id.*

30. The Debtor has proposed the sale of the Assets after thorough consideration of all viable alternatives and has concluded that the sale is supported by many sound business reasons. The Debtor has extensively marketed the Assets as described above and has proposed Bidding Procedures designed to maximize the purchase price realized from the sale of the Assets. Further, the prepetition and postpetition marketing of the Assets up to the proposed deadline for competing bids will provide a sufficient opportunity to generate any potential overbids and maximize recovery for the Debtor's creditors.

31. The Debtor believes that the proposed timetable for the sale is reasonable by minimizing exposure of the Debtor's business to the uncertainties associated with bankruptcy, while at the same time providing an adequate opportunity for competing bids to be solicited. The Purchaser has also imposed certain deadlines on the Debtor under the Agreement in order to accomplish the sale.

32. Based on the foregoing, the Debtor has articulated sound business reasons for a sale of the Assets on the proposed schedule. *See, e.g., In re Tempo Tech.*, 202 B.R. 363, 369-70 (D. Del. 1996) (approving a sale of all of the debtor's assets, within a month after the petition date, where the debtor faced a cash shortfall, operated in an industry where there were few potential buyers, and anticipated continuing losses and a decline in value of the bankruptcy estates); *Delaware & Hudson Railway*, 124 B.R. at 177 (affirming the bankruptcy court's approval of a sale of substantially all of the debtor's assets where the debtor would have been "in liquidation mode if required to delay a sale until after filing a disclosure statement and obtaining approval for a reorganization plan"); *Titusville Country Club*, 128 B.R. at 400 (granting an

expedited hearing on a motion to approve a sale as a result of “deterioration” of the debtor’s assets); *Coastal Indus., Inc. v. Internal Revenue Service (In re Coastal Indus., Inc.)*, 63 B.R. 361, 366-69 (Bankr. N.D. Ohio 1986) (approving an expedited sale pursuant to section 363(b) five weeks after the petition date where the debtor was suffering operating losses).

33. The Debtor believes that, as a result of the marketing efforts that have been undertaken and that it will continue to undertake, the highest or otherwise best offer obtained through the proposed Bidding Procedures and Auction will provide maximum value to the Debtor under the current circumstances. Other potential buyers and parties that have expressed interest in the acquisition of the Assets will be served with this Sale Motion and/or notice thereof. The fairness and reasonableness of the consideration to be paid by the successful bidder is demonstrated by the marketing efforts that the Debtor has undertaken, and will continue to undertake, followed by a fair and reasonable sale process including a potential auction, and culminating in the sale of the Assets. As noted herein, notice of this Sale Motion, as well as of the Bidding Procedures Motion, will be served by the Debtor on or shortly after the Petition Date on potential bidders, as well as known putative lienholders and other parties in interest.

34. The sale of the Assets is supported by sound business reasons and is in the best interests of the Debtor and its estate. Accordingly, the Debtor requests approval under section 363(b) of the Bankruptcy Code of the Sale to the Purchaser or other Successful Bidder, as set forth herein.



**The Proposed Sale Satisfies the Requirements of Section 363(f) of the Bankruptcy Code for a Sale Free and Clear of Liens, Claims, and Encumbrances**

35. Section 363(f) of the Bankruptcy Code provides:

The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such Property of an entity other than the estate, only if –

- (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
- (2) such entity consents;
- (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
- (4) such interest is in a 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).

36. Section 363(f) of the Bankruptcy Code provides for the sale of assets “free and clear of any interests.” The term “any interest,” as used in section 363(f), is not defined anywhere in the Bankruptcy Code. *Folger Adam Security v. DeMatteis/MacGregor, JV*, 209 F.3d 252, 259 (3d Cir. 2000). In *Folger Adam*, the Third Circuit specifically addressed the scope of the term “any interest.” 209 F.3d at 258. The Third Circuit observed that while some courts have “narrowly interpreted that phrase to mean only *in rem* interests in Property,” the trend in modern cases is toward “a broader interpretation which includes other obligations that may flow from ownership of the Property.” *Id.* at 258 (citing 3 *Collier on Bankruptcy* ¶ 363.06[1]). As determined by the Fourth Circuit in *In re Leckie Smokeless Coal Co.*, 99 F.3d 573, 581-582 (4th Cir. 1996), a case cited approvingly and extensively by the Third Circuit in *Folger Adam*, the

scope of 11 U.S.C. § 363(f) is not limited to *in rem* interests. Thus, the Third Circuit in *Folger Adam* made clear that debtors “could sell their assets under §363(f) free and clear of successor liability that otherwise would have arisen under federal statute.” *Folger Adam*, 209 F.3d at 258.

37. Section 363(f) is drafted in the disjunctive. Thus, satisfaction of any of the requirements enumerated therein will suffice to warrant the sale of the Assets free and clear of all of the applicable Liens, Claims and Encumbrances, except with respect to any Liens, Claims and Encumbrances permitted under the Agreement. *See Citicorp Homeowners Services, Inc. v. Elliot*, 94 B.R. 343, 345 (E.D. Pa. 1988). The Debtor submits that each Lien, Claim, and Encumbrance that is not an assumed liability satisfies at least one of the five conditions of section 363(f) of the Bankruptcy Code, and that any such Lien, Claim, or Encumbrance will be adequately protected by either being paid in full at the time of closing, or by having it attach to the Sale Proceeds, subject to any claims and defenses the Debtor may possess with respect thereto. The Debtor accordingly requests authority to convey the Assets to the Purchaser or other successful bidder(s), free and clear of all Liens, Claims, and Encumbrances except for the Liens, Claims, and Encumbrances that expressly permitted under the terms of the Agreement, with such Liens, Claims, and Encumbrances to attach to the Sale Proceeds, with the same validity (or invalidity), priority and perfection as existed immediately prior to the Sale, subject to the terms of the Agreement and the Sale Order. Further, as noted above, the Sale Order contains provisions regarding the distribution of proceeds to the Debtor’s principal secured lenders. *See* Sale Order ¶ 13.

38. The Debtor has conducted a UCC search and other lien searches of purported lienholders in conjunction with the proposed sale of the Assets. The Debtor will serve such purported lienholders with notice of this Sale Motion and will serve notice of the Sale Order Out of an abundance of caution, to the extent there are any other secured creditors, (a) applicable non bankruptcy law permits sale of the Assets free and clear of such creditors' claims, or (b) such creditors could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of their claims.

39. Accordingly, this Court should approve the sale of the Assets to the Purchaser or other successful bidder free and clear of Liens, Claims, and Encumbrances under Bankruptcy Code section 363(f), and any potential claimants should be compelled to look exclusively to the proceeds of the sale for satisfaction of their claims.

**Good Faith Under Section 363(m) of the Bankruptcy Code;  
Sale Not In Violation of Section 363(n) of the Bankruptcy Code**

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

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

11 U.S.C. § 363(m). Section 363(n) of the Bankruptcy Code, among other things, provides, in turn, that a trustee may avoid a sale under such section if the sale price was controlled by an agreement among potential bidders as the sale. *See* 11 U.S.C. § 363(n). Although the

Bankruptcy Code does not define “good faith,” the Third Circuit in *In re Abbotts Dairies of Pennsylvania, Inc.*, 788 F.2d 143 (3d Cir. 1986), held that:

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

788 F.2d at 147 (citations omitted).

41. The Agreement was negotiated at arms’ length and the Purchaser has acted in good faith, without collusion or fraud of any kind, and in compliance with the *Abbotts Dairies* standards. Neither the Debtor nor the Purchaser (to the best of the Debtor’s knowledge) has engaged in any conduct that would prevent the application of section 363(m) of the Bankruptcy Code or otherwise implicate section 363(n) of the Bankruptcy Code with respect to the consummation of the Sale or the transfer of the Assets to the Purchaser. In addition, if a party other than the Purchaser is the successful bidder, the Debtor intends to make an appropriate showing at the Sale Hearing that the purchase agreement with the other Successful Bidder is a negotiated, arms’ length transaction, in which the Successful Bidder at all times has acted in good faith under and otherwise in accordance with such standards.

42. The Debtor thus requests that the Court find that the Purchaser or the successful bidder has purchased the Assets in good faith within the meaning of section 363(m) of the Bankruptcy Code and is entitled to the protections of sections 363(m) and (n) of the Bankruptcy Code.

**Authorization of Assumption and Assignment of Assigned Contracts**

43. As required by the Agreement, and in order to enhance the value to the Debtor's estate, the Debtor requests approval of the potential assumption and assignment of the Purchased Contracts to Purchaser or the other successful bidder upon the closing of the transactions contemplated under the Agreement.

44. Pursuant to the Agreement, the Purchaser (or other successful bidder) is responsible for payment of all cure amounts up to a cap required to be paid to the counterparties to the Purchased Contracts assumed and assigned (each a "Counterparty" and collectively, the "Counterparties") under section 365(b)(1) of the Bankruptcy Code.

45. The Purchased Contracts are those contracts or leases that are to be assumed by the Debtor and assigned to the Purchaser or the other successful bidder as part of the sale transaction under the Agreement. The Debtor further requests that the Sale Order provide that the Assigned Contracts will be assigned to, and remain in full force and effect for the benefit of, the Purchaser or the other successful bidder, notwithstanding any provisions in the Assigned Contracts, including those described in sections 365(b)(2) and (f)(1) and (3) of the Bankruptcy Code, that prohibit such assignment.

46. Pursuant to the Bidding Procedures Motion, the Debtor proposes that an initial list (or lists) of Assigned Contracts be served on all counterparties to such contracts and leases no later than two (2) business days after entry of the Bidding Procedures Order.

47. Section 365(f) of the Bankruptcy Code provides, in pertinent part, that:

The trustee may assign an executory contract or unexpired lease of the debtor only if –

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

(B) adequate assurance of future performance by the assignee 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). Under section 365(a), a debtor “subject to the court’s approval, may assume or reject any executory contract or unexpired lease of the debtor.” 11 U.S.C. § 365(a).

Section 365(b)(1), in turn, codifies the requirements for assuming an unexpired lease or executory contract of a debtor, providing that:

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

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

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

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

11 U.S.C. § 365(b)(1).

48. Although section 365 of the Bankruptcy Code does not set forth standards for courts to apply in determining whether to approve a debtor in possession’s decision to assume an executory contract, courts have consistently applied a “business judgment” test when reviewing such a decision. *See, e.g., Group of Institutional Investors v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 318 U.S. 523, 550 (1953); *Matter of Talco, Inc.*, 558 F.2d 1369, 1173 (10th Cir. 1977). A debtor satisfies the “business judgment” test when it determines, in

good faith, that assumption of an executory contract will benefit the estate and the unsecured creditors. *In re FCX, Inc.*, 60 B.R. 405, 411 (Bankr. E.D.N.Y. 1986). The potential assumption and assignment of the Purchased Contracts, or any of them, set forth in the Agreement, will be a necessary part of the deal that Debtor has struck with the Purchaser or other successful bidder and, as stated above, will benefit the estate of Debtor.

49. As set forth above, with respect to Purchased Contracts to be potentially assumed and assigned pursuant to the Sale Hearing, the Debtor has or will send the Cure Notices to all Counterparties in connection with the Court's approval of the Bid Procedures, thereby notifying such Counterparties of the potential assumption by the Debtor and assignment to the Purchaser or the successful bidder of the Assigned Contracts at the Sale Hearing. The Cure Notices set forth the "cure" amounts owing on each of the Assigned Contracts, according to Debtor's books and records and, in accordance with the provisions set forth in the Bid Procedures, shall be the amounts required to be paid pursuant to section 365(b)(1) of the Bankruptcy Code ("Cure Amounts"). The Bidding Procedures Motion proposes that objections, if any, to either the Cure Amounts or the assumption or assignment of Assigned Contracts to Purchaser or adequate assurance of future performance be filed on or before the objection deadline to the proposed sale. Objections to the adequate assurance of future performance of a successful bidder (other than the Purchaser), may be raised at the Sale Hearing.

50. Counterparties to the Purchased Contracts will have a sufficient opportunity to file an objection to the proposed Cure Amounts set forth in the Cure Notices. To the extent no objection is filed with regard to a particular Cure Amount, such Cure Amount shall

be binding on the applicable contract or lease Counterparty. The payment of the Cure Amounts specified in the Cure Notices (or a different amount either agreed to by the Purchaser, or the successful bidder, or resolved by the Court as a result of a timely-filed objection filed by a contract or lease counterparty) will be in full and final satisfaction of all obligations to cure defaults and compensate the counterparties for any pecuniary losses under such contracts or leases pursuant to section 365(b)(1) of the Bankruptcy Code, unless the Debtor determines (with the consent of the Purchaser or Successful Bidder) that a particular lease or contract is not truly executory, and does not need to be cured to transfer the lease or contract to the Successful Bidder or Purchaser.

51. Cure Amounts disputed by any Counterparty will either be considered by the Court either at the Sale Hearing or at some later date as may be scheduled by the Court to determine contested objections regarding Cure Amounts, that have not been resolved in advance or at the Sale Hearing. With respect to payment of Cure Amounts, the Purchaser or other successful bidder shall bear and pay the entire amount of such cure costs up to a cap.

52. The Purchaser or other successful bidder is responsible for providing evidence of “adequate assurances of future performance” to the extent required in connection with the assumption and assignment of any Assigned Contract. The meaning of “adequate assurance of future performance” for the purpose of the assumption of executory contracts and unexpired leases pursuant to section 365 of the Bankruptcy Code depends on the facts and circumstances of each case, but 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 an 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). If necessary, the Purchaser or the other Successful Bidder shall provide evidence of its ability to provide adequate assurances to Counterparties to the Assigned Contracts at the Sale Hearing. Moreover, any Successful Bidder will be required to provide evidence that the bidder can provide adequate assurance of future performance with respect to the Assigned Contracts at the time it submits its bid.

#### Notice

53. A copy of this Motion will be provided to (a) the Office of the United States Trustee; (b) the thirty-five (35) largest unsecured creditors of the Debtors; (c) all parties who are known by the Debtor to assert liens with respect to the Assets, if any; (d) all entities who executed non-disclosure agreements with the Debtor in connection with a potential acquisition of any or all of the Assets or whom the Debtor believes may have an interest in bidding; (e) all counterparties to the Assigned Contracts; (f) the Purchaser and its counsel; and (g) all parties who have timely filed requests for notice under Rule 2002 of the Federal Rules of Bankruptcy Procedure. The Debtor respectfully submits that such notice is sufficient, and requests that the Court find that no further notice of the relief requested herein is required.

54. The Debtor requests, pursuant to Bankruptcy Rules 6004(h) and 6006(d), that the order approving this Sale Motion become effective immediately upon its entry.

**No Prior Request**

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

**Conclusion**

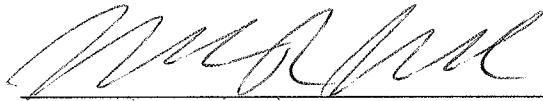
56. The Debtor's proposed sale of the Assets as described in this Sale Motion is supported by sound business reasons, as set forth herein. The proposed sale is proper, necessary and serves the best interests of the Debtor, its estate and creditors, and all parties in interest. The Debtor thus requests that the Court approve the proposed Sale of the Assets free and clear of all interests, liens, claims, and encumbrances, as requested, to the Purchaser or other Successful Bidder.

*[remainder of page intentionally left blank]*

WHEREFORE, the Debtor respectfully requests that this Court (i) grant this Sale Motion and authorize the sale of the Assets to the Purchaser or other successful bidder and approve the Agreement, pursuant to the attached proposed order; (ii) approve the form and manner of notice of this Sale Motion, and of the proposed sale and assumptions and assignments of the Assigned Contracts; and (iii) grant such other and further relief as is just and proper.

Dated: October 8, 2015

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