

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

IN RE:

WC BRAKER PORTFOLIO, LLC,

DEBTOR.¹

CHAPTER 11

CASE NO. 22-10293 (TMD)

CHAPTER 11 TRUSTEE’S MOTION FOR ENTRY OF (I) AN ORDER (A) APPROVING BID PROCEDURES IN CONNECTION WITH THE SALE OF THE DEBTOR’S PROPERTY, (B) APPROVING PROCEDURES FOR THE ASSUMPTION AND ASSIGNMENT OF EXECUTORY CONTRACTS AND UNEXPIRED LEASES, (C) APPROVING STALKING HORSE BIDDER (D) SCHEDULING AN AUCTION AND HEARING TO APPROVE SALE OF PROPERTY, (E) APPROVING FORM AND MANNER OF NOTICES RELATED THERETO, AND (F) GRANTING RELATED RELIEF; AND (II) AN ORDER AUTHORIZING AND APPROVING (A) THE SALE OF THE DEBTOR’S PROPERTY FREE AND CLEAR OF LIENS, CLAIMS, RIGHTS, ENCUMBRANCES, AND OTHER INTERESTS, AND (B) RELATED RELIEF

This pleading requests relief that may be adverse to your interest.

If no timely response is filed within 21 days from the date of service, the relief requested herein may be granted without a hearing being held.

A timely filed response is necessary for a hearing to be held.

Dawn Ragan (“Trustee”), the chapter 11 trustee for the bankruptcy estate of WC Braker Portfolio, LLC (“Debtor”) files her motion (“Motion”), pursuant to §§ 363, and 365, 503, and 507 of title 11 of the United States Code (the “Bankruptcy Code”), Rules 2002, 4001, 6004, 6006, 9007 and 9014 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), for entry of an order (a) approving the proposed sale process and bidding procedures, by which the Trustee will solicit and select the highest or otherwise best offer for the sale of its real properties; (b) authorizing and approving procedures for the assumption and assignment of

¹ The last four digits of the Debtor’s federal employer identification number are 2115. The Debtor’s address is 814 Lavaca Street, Austin, Texas 78701.

executory contracts and unexpired leases; (c) approving the form and manner of notices related thereto; (d) approving the Trustee's selection of the stalking horse bidder; (e) scheduling an auction if necessary and final hearing to approve the proposed sale; and (f) granting related relief. In support of her Motion, the Trustee respectfully represents as follows:

RELIEF REQUESTED

By this Motion, the Trustee requests entry of the following:

- (a) Entry of a Bid Procedures Order substantially in the form attached hereto as **Exhibit A**;
 - (i) authorizing and approving the bid procedures attached as Schedule 1 to the proposed Bid Procedures Order ("Bid Procedures")²
 - (ii) authorizing and approving assumption and assignment procedures (the "Assumption and Assignment Procedures") for the assumption and assignment of certain executory contracts and unexpired leases;
 - (iii) authorizing and approving the Trustee's selection of the Stalking Horse Bidder (defined herein);
 - (iv) scheduling the auction ("Auction"), if necessary;
 - (v) scheduling the final hearing ("Sale Hearing") following the Auction;
 - (vi) approving the form and manner of service of notices in connection with the sale and assumption and assignment procedures, described herein and attached as **Exhibits C, D and E**; and
- (b) following the Sale Hearing, entry of final order ("Sale Order"):
 - (i) approving the sale ("Sale") to the successful bidder (or next highest backup bidder), free and clear of all liens, claims, encumbrances, and other interests;
 - (ii) approving the assumption and assignment of certain executory contracts and unexpired leases; and
 - (iii) granting related relief.

² Capitalized terms used but not defined herein shall have the meanings ascribed to them in the Bidding Procedures.

PRELIMINARY STATEMENT

1. The Trustee's primary goal has been to stabilize Debtor's business affairs and maximize value for the benefit of the estate. Debtor owns and operates 14 parcels of commercial properties in north, central Austin (the "Properties"). The Debtor currently has approximately 40 commercial tenants from which the Debtor generates monthly rent income to pay operating expenses, taxes and debt service. After considering all available options, the Trustee has determined that the best path forward to maximize value to the estate is to sell Debtor's Properties through a competitive marketing process.

2. To this end, the Trustee has now, with Court approval, employed a marketing agent. The Trustee has also on behalf of the Debtor, negotiated and has now entered into a stalking horse purchase agreement with the prepetition secured lender for the purchase of Debtor's Properties in exchange for a purchase price which includes a credit bid representing all of the prepetition lender's claims ("Stalking Horse Bid"). Consonant with her belief that the ability to maximize value of the Debtor's estate is best achieved through a competitive bidding and sale process - the Trustee now seeks approval to conduct a marketing and sale process to solicit further bids and once received, conduct an auction.

3. As set forth more fully in the Bid Procedures, upon receipt of any other bids, the Trustee will analyze all proposed bids to determine whether there are any qualified bids other than the Stalking Horse Bid. If so, the Trustee will hold an auction to identify the highest and best offer. Following which the Trustee will seek approval by the Court at the Sale Hearing of the sale to the Successful Bid whether it be the Stalking Horse Bid or alternative bidder. The Trustee intends to file a plan as expeditiously as possible with confirmation on or around the Sale Hearing and closing on the Sale.

4. Accordingly, the Trustee seeks approval of the proposed marketing and Bid Procedures (and related assumption and noticing procedures) which will enable her to run a full and robust marketing process, solicit bids and sell the Debtor's Properties and maximize value to pay creditors through a plan.

JURISDICTION AND VENUE

5. This Court has jurisdiction to consider the Motion pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A), (G), (M) and (N). Venue of these cases and this Motion in this district is proper under 28 U.S.C. §§ 1408 and 1409.

6. The legal predicates for the relief requested herein are §§ 105(a), 363(b), (f), and (m), 364, 365, 503 and 507 of the Bankruptcy Code, Bankruptcy Rules 2002, 4001, 6004, 6006, 9007 and 9014.

BACKGROUND

7. On May 2, 2022 (the "Petition Date"), the Debtor filed a voluntary petition under Chapter 11 and began operating as debtor in possession. The next day the Court entered an Order to Show Cause why a chapter 11 trustee should not be appointed in this case. On May 23, 2022, after conducting a hearing, the Court directed the appointment of a chapter 11 trustee. On May 31, 2022, the Court approved the appointment of Ms. Ragan as chapter 11 trustee. Ms. Ragan has been serving as chapter 11 trustee and managing the Debtor and its business affairs since. No official committee of creditors or equity interest holders have been established in this case.

8. Debtor's primary secured lender, is ATX Braker SR, LLC (the "Prepetition Secured Lender" or "ATX") as a result of a prepetition loan agreement between the Debtor and

JP Morgan Chase Bank, in the original principal amount of \$71 million, secured by the Properties, and proceeds, including rents, therefrom.

9. Following her appointment, the Trustee reached an initial agreement with ATX for the short term use of cash collateral for the limited purpose of securing insurance and paying utilities, and later to pay a license fee required for the Trustee to access the Debtor's accounting systems. Later, the Trustee negotiated terms for the use of cash collateral through September 30, 2022. The Trustee filed her *Chapter 11 Trustee's Motion for Entry of Order (I) Authorizing Use of Cash Collateral (II) Granting Adequate Protection (III) Modifying the Automatic Stay and (IV) Granting Related Relief* ("Cash Collateral Motion") on August 23, 2022 [Dkt. 137], which the Court approved on a final basis on September 9, 2022 [Dkt. 163] ("Cash Collateral Order"). ATX later agreed to the Trustee's continued use of cash collateral through November 15, 2022, per Stipulations entered on October 10, 2022 and November 11, 2022 [Dkt. Nos. 187 and 220].

10. After considering all available options, the Trustee has determined the best path forward to maximize value for the estate is through a marketing process for the sale of Debtor's Properties. To this end, the Trustee filed an application to employ a marketing agent and broker on October 26, 2022, which was approved by the Court by order entered on October 31, 2022 [Dkt. No. 211].

11. Following extensive, good-faith negotiations with ATX, the Trustee has agreed to terms of a Purchase and Sale Agreement, subject to the Trustee's consideration of other potential Qualified Bidders and Qualified Bids (as defined in and pursuant to the proposed Bid Procedures.

12. The Trustee now seeks approval of the proposed marketing process, including bidding and assumption and assignment procedures, approval of ATX as the Stalking Horse

Bidder and its Purchase Agreement, the Stalking Horse Bid, and following the sale process, approval of the proposed Sale to the Stalking Horse Bidder or alternative bidder if the Trustee determines it to be the highest and best offer for the Debtor's Property following the sale process and auction.

I. The Bid Procedures

13. The Bid Procedures are designed to promote participation and active bidding and to ensure an orderly marketing process for the sale of Debtor's Properties. The proposed Bid Procedures describe the procedures for interested parties to access due diligence, the process for written offers ("Bids"), the manner in which bidders and bids become "qualified," the receipt and negotiation of Bids received, the conduct of any auction, the selection and approval of any ultimately successful bidders, and the deadlines with respect to the foregoing. The Bid Procedures allow the Trustee to conduct a sale process in a controlled, fair, and open manner to maximize value for all stakeholders.

14. The Stalking Horse Bidder is a "Qualified Bidder", and the Stalking Horse Purchase Agreement a "Qualified Bid." In the event that no other Qualified Bids are submitted by the Bid Deadline, the Stalking Horse Bidder shall be the Successful Bidder and no Auction shall take place.

15. The Bid Procedures provides that each Bid must provide for a Purchase Price equal to or greater than (i) \$75,836,418.00, which is the aggregate of the Credit Bid Amount purchase price components set forth in the Stalking Horse PSA, *plus* (ii) \$125,000 the on account of the Expense Reimbursement, *plus* the minimum overbid amount of \$250,000.00 (the "Minimum Bid Amount").

16. In accordance with the Cash Collateral Order, the Stalking Horse Bidder shall have the right to credit bid its secured claim in the amount of \$75,461,418.00 based on its

stipulated secured claim as of the Petition Date, plus additional accrued interest as of the Target Closing Date. Further, in the event of a competing Qualified Bid, the Stalking Horse Bidder will be entitled, but not obligated, to submit overbids.

17. The Trustee will conduct and preside over any auction, which will be held at 2:00 p.m. **(prevailing Central Time) on February 14, 2023**, at a venue that the Trustee shall announce to all Qualified Bidders. The Trustee reserves the right to conduct the auction live, in-person, or through a virtual platform and to change the location and time of the Auction. The Auction will be conducted openly and interested parties and creditors will be permitted to attend subject to their compliance with the notice and other procedures set forth in the Bid Procedures required in advance for attendance.

18. Upon consummation of the Sale with a purchaser other than the Stalking Horse Bidder, the Expense Reimbursement Amount shall become an allowed superpriority administrative expense claim under §§ 503(b) and 507 of the Bankruptcy Code for which Debtor and its estate is liable, and shall be payable to the Stalking Horse Bidder in accordance with the terms of the Stalking Horse PSA.

19. The below chart further summarizes the proposed Bid Procedures and procedures for conducting the Auction, all of which are more specifically set forth in the Bid Procedures attached hereto as **Schedule 1 to Exhibit A**:

Bid Deadline	February 7, 2023 at 5:00 p.m. (prevailing Central Time)
Potential Bidders	Each person or entity that enters into the Confidentiality Agreement with the Trustee on or before the Bid Deadline. Only those Potential Bidders whose financials, the financials of their equity holder(s), or whose written commitments, as applicable, demonstrate the financial capability to consummate the Sale shall be eligible to receive due diligence information.

<p>Qualified Bidders</p>	<p>A proposal, solicitation, or offer for a purchase and sale of all or part of the Property (each, a “Bid”) by a bidder that is submitted in writing and satisfies at least each of the Bid Requirements set forth in the Bid Procedures, as determined by the Trustee, in her reasonable business judgment, shall constitute a (“Qualified Bid.”)</p>
<p>Qualified Bids</p>	<p>To constitute a Qualified Bid, a Bid must, among other things:</p> <ul style="list-style-type: none"> a) Be accompanied by a letter or email: <ul style="list-style-type: none"> i. stating with specificity the Property (including the specific executory contracts and unexpired leases) such Potential Bidder wishes to bid on and the liabilities and obligations (including applicable cure costs) to be assumed by the Potential Bidder in the Sale; ii. detailing (A) a duly executed purchase agreement (the “Purchase Agreement”); and (B) a redline of the Purchase Agreement marked against the Stalking Horse Agreement, schedules and exhibits; iii. agreeing that the Potential Bidder’s offer is binding and irrevocable until the later of (i) the Closing Date, or (ii) thirty (30) days after the Sale Hearing (unless selected as the “Next-Highest Bidder” (as defined below) in which case such offer will remain open until the Closing Date); iv. providing for a Closing Date that occurs on or before February 28, 2023; v. offering to pay a price, in cash, equal to \$75,836,418.00 or greater, such amount being calculated as the sum of (a) the Stalking Horse Bid, (b) the \$125,000 Expense Reimbursement, and (c) \$250,000 (such sum, the “Minimum Bid”); vi. providing that such Bid is not subject to any due diligence or financing contingency; vii. written evidence of a commitment for financing or other evidence of ability to consummate the transaction as the Trustee may request; and viii. the Potential Bidder agrees to serve as a backup bidder (the “Next-Highest Bidder”) if the Potential Bidder’s Qualified Bid (as defined below) is the next highest and best bid after the Successful Bid (as defined below) (the “Next-Highest Bid”);

	<p>b) Be accompanied by adequate assurance of future performance information, including (i) information about the Potential Bidder’s financial condition, (ii) the Potential Bidder has the financial capacity to consummate the proposed Sale, (iii) evidence that the Potential Bidder has obtained authorization or approval from its board of directors (or comparable governing body) with respect to the submission of its Bid, (iv) the identity and exact name of the Potential Bidder (including any equity holder or other financial backer if the Potential Bidder is an entity formed for the purpose of consummating the proposed Sale), and (</p> <p>A Bid must be accompanied by (a) a deposit in the form of a certified check or wire transfer, payable to the order of the Trustee, in the amount of ten percent (10%) of the Bid, which funds will be deposited into an interest bearing escrow account to be identified by the Trustee (a “<u>Good Faith Deposit</u>”) and (b) written evidence, documented to the Trustee’s satisfaction, that demonstrates the Potential Bidder has available cash, a commitment for financing if selected as the Successful Bidder.</p> <p>The Trustee will review each Bid received from a Potential Bidder to determine whether it meets the requirements set forth above. A Bid received from a Potential Bidder that meets the above requirements, and is otherwise satisfactory to the Trustee, will be considered a “<u>Qualified Bid</u>” and each Potential Bidder that submits a Qualified Bid will be considered a “<u>Qualified Bidder.</u>”</p>
Credit Bid	<p>The Trustee has stipulated that the Stalking Horse Bidder has a perfected security interest in the Property, and is entitled to credit bid some or all of its claims for its collateral pursuant to section 363(k) of the Bankruptcy Code. The Stalking Horse Bidder shall be considered a Qualified Bidder with respect to its right to acquire the Property by Credit Bid. All other Qualified Bids shall be cash bids.</p>
Bid Protections	<p>The Trustee has agreed to provide the Stalking Horse Bidder with customary bid protections in the form of reimbursement of expenses in the maximum amount of \$125,000.00</p>
Date, Time of Auction	<p>February 14, 2023 at 2:00 p.m. (prevailing Central Time) at a venue to be determine by the Trustee and notified to Qualified Bidders</p>
No Collusion	<p>Each Qualified Bidder participating in the Auction will be required to confirm, in writing, and on the record at the Auction, that (a) it has not engaged in any collusion with respect to the Bidding Process, and (b) its Qualified Bid is a good faith <i>bona fide</i> offer that</p>

	it intends to consummate if selected as the Successful Bidder.
Auction Participants	Professionals and principals for the Trustee, the Stalking Horse Bidder, each Qualified Bidder, the chapter 11 trustee for WC Braker Portfolio B, LLC, Nate Paul, and the United States Trustee, and their advisors may attend the Auction; any creditor of the Debtor and their counsel upon written request delivered to the Trustee at least three days prior to the Auction and approved by the Trustee; and the Trustee shall be authorized to exclude other parties
Transcription or Video Recording	Bidding at the Auction will be transcribed.

II. Timeline

20. The anticipated timeline for the sale process under the proposed Bid Procedures is as follows:

<u>Event</u>	<u>Date / Deadline</u>
Sale Notice	Within three (3) Business Days after entry of the Bid Procedures Order
Bid Deadline	February 7, 2023 at 5:00 p.m. (prevailing Central Time)
Auction (if necessary)	February 14, 2023 at 2:00 p.m. (prevailing Central Time)
Sale Objection Deadline	February 7, 2023 at 4:00 p.m. (prevailing Central Time)
Assumption Notice Date	Within three (3) Business Days after entry of the Bid Procedures Order
Assumption Objection Deadline	February 7, 2023 at 4:00 p.m. (prevailing Central Time)
Adequate Assurance Objection Deadline	February 17, 2023 at 4:00 p.m. (prevailing Central Time)

Sale Hearing	February 23, 2023 at 2:45 p.m. (prevailing Central Time)
Targeted Sale Closing	On or before February 28, 2023

21. The Trustee reserves the right to modify the above timeline in accordance with the provisions of the Bid Procedures.

III. The Stalking Horse Purchase Agreement

22. Following extensive, good-faith negotiations, with ATX, the Trustee has agreed to enter into the Purchase and Sale Agreement, attached hereto as **Exhibit B** (“Stalking Horse Purchase Agreement”) for the sale of Debtor’s Properties, subject to the Trustee’s consideration of other potential Qualified Bidders and Qualified Bids (as defined in the Bid Procedures):

23. As noted, the Stalking Horse Purchase Agreement contemplate the acquisition of the Debtor’s Properties, while also permitting the Trustee to attempt to solicit other bids in accordance with the Bid Procedures. In the event the Stalking Horse Bidder is deemed the Successful Bidder, the Trustee’s marketing process will terminate, and the Trustee will pursue the Sale in accordance with the terms of the Stalking Horse Purchase Agreement.

24. The following table sets forth a summary of the material terms and conditions of the Stalking Horse Purchase Agreement:³

Seller	Debtor WC Braker Portfolio, LLC
Stalking Horse Bidder	ATX Braker SR, LLC
Assets to be Purchased	Debtor’s real property and related assets as defined therein
Consideration	The consideration for the transfer of the Property and the transactions contemplated hereby shall be (a) the assumption of the Assumed Obligations, and (b) a credit

³ If there are any inconsistencies between the summary set forth herein and the Stalking Horse Purchase Agreements, the terms and conditions of the Stalking Horse Purchase Agreements shall govern.

	bid pursuant to section 363(k) of the Bankruptcy Code in an amount equal to the principal amount and interest due under the Loan as of the Target Closing Date of February 28, 2023 in the amount of \$75,461,418.00 .
Competitive Bidding	The Trustee is proposing, and the Purchase Agreement contemplates, an open marketing and auction process.
Conditions to Closing	Conditions to Closing for the Purchaser include, among other things, if the Stalking Horse Bidder is the Successful Bidder then the Chapter 11 Plan shall have been consummated (or shall be consummated concurrently with the Closing);
Good Faith Deposit	The Purchase Agreement contemplates a good faith deposit in the amount equal to 10% of the Purchase Price for any other Qualified Bidder other than the Stalking Horse Bidder.

IV. Assumption and Assignment Procedures

25. The Trustee is also seeking approval of the Assumption and Assignment Procedures to facilitate the fair and orderly assumption and assignment of certain executory contracts and unexpired leases in connection with the Sale. The Assumption and Assignment Procedures are as set forth below.

26. **Assumption Notice.** Within three business days after entry of the Bid Procedures Order, the Trustee shall file with the Court the Notice of Assumption and Assignment, which includes a list that specifies: (a) each of the Debtor’s executory contracts and unexpired leases that may be assumed and assigned in connection with the Sale (the “Available Contracts”), including the name of and address for each non-Debtor counterparty to such Available Contract (the “Contract Counterparty”); and (b) the proposed amount necessary, if any, to cure all monetary defaults, if any, under the Available Contract (the “Cure Costs”). The Trustee shall serve, via first class mail, the Notice of Assumption and Assignment, in substantially the form attached hereto as **Exhibit C**, on all contract counterparties.

27. **Assumption Objections.** A contract counterparty listed on the Notice of Assumption may file an objection (“Assumption Objection”) to the proposed assumption and assignment of the applicable Available Contract, the proposed Cure Costs, if any, and the ability of the Stalking Horse Bidder to provide adequate assurance of future performance. All Assumption Objections must: (a) be in writing; (b) state with specificity the basis for the objection as well as any Cure Costs that the objector asserts to be due, including each and every asserted default in the applicable contract or lease (in all cases with appropriate documentation in support thereof); (c) comply with the Bankruptcy Rules and the Local Rules; and (d) be filed and served on the following parties by no later than 5:00 p.m. (prevailing Central time) on February 7, 2023 (the “Assumption Objection Deadline”) upon the following (the “Objection Recipients” or “Notice Parties”): (a) counsel to the Trustee, Kelly Hart & Hallman LLP, 201 Main Street, Suite 2500, Fort Worth, TX 76102, Attn: Michael McConnell (michael.mcconnell@kellyhart.com) and Nancy Ribaldo (nancy.ribaldo@kellyhart.com); (b) counsel to the Stalking Horse Bidder, (i) Polsinelli P.C., 2950 N. Harwood, Suite 2100, Dallas, TX 75201, Attn: Liz Boydston (lboydston@polsinelli.com); and (ii) Gibson, Dunn & Crutcher LLP, 200 Park Ave. New York, New York 10166, Attn: Keith R. Martorana (kmartorana@gibsondunn.com) and Matthew Bouslog (mbouslog@gibsondunn.com); and (c) the Office of the United States Trustee for the Western District of Texas.

28. Objections to the ability of a Successful Bidder(s) other than the Stalking Horse Bidder to provide adequate assurance of future performance (an “Adequate Assurance Objection”) shall be raised by 4:00 p.m. (prevailing Central Time) on February 17, 2023 (the “Adequate Assurance Objection Deadline”).

29. **Supplemental Assumption Notice.** Although the Trustee intends to make a good-faith effort to identify in the Assumption Notice all Available Contracts that may be assumed and assigned in connection with a Sale, the Trustee may discover that certain executory contracts were inadvertently omitted from the Available Contracts Notice, or the Successful Bidder may identify other executory contracts that they desire to assume and assign in connection with the Sale Transaction. Accordingly, the Trustee reserves the right at any time before 5:00 p.m. (prevailing Central Time) on the date three (3) business days prior to the Sale Hearing to (i) supplement the list of Available Contracts with previously omitted Available Contracts, (ii) remove Available Contracts from the list of Available Contracts that a Successful Bidder proposes be assumed and assigned, and/or (iii) modify the previously stated Cure Cost associated with any Available Contract. In the event the Trustee exercises any of these reserved rights, the Trustee will promptly file with the Court and serve, by overnight delivery on the applicable counterparties, a revised Assumption Notice (a **“Supplemental Assumption Notice”**), as applicable, and such counterparties shall file any Assumption Objection not later than (a) the Assumption Objection Deadline in the event that such Supplemental Assumption Notice was filed and served at least ten (10) days prior to the Assumption Objection Deadline, (b) two (2) days prior to the Sale Hearing in the event that such Supplemental Assumption Notice was filed and served at least seven (7) days prior to the commencement of the Sale Hearing, and (c) seven (7) days from the date such Supplemental Assumption Notice was filed and served, in the event that such Supplemental Assumption Notice was filed and served less than seven (7) days prior to the commencement of the Sale Hearing. In the event that the Supplemental Assumption Notice is filed and served less than seven (7) days prior to the commencement of the Sale Hearing, the Trustee shall file with the Court a proposed order

authorizing the assumption and assignment of the newly added Available Contracts no later than fourteen (14) days after the date of service of such revised Assumption Notice, which order shall provide (a) that the assumption of the proposed newly added Available Contracts is approved, final and effective, pursuant to § 365 of the Bankruptcy Code, and (b) that the Successful Bidder provided adequate assurance of future performance under such newly added Available Contract in accordance with §365(f)(2)(B) of the Bankruptcy Code.

30. If a contract counterparty files an Assumption Objection and the parties are unable to consensually resolve the dispute prior to the Sale Hearing, the amount to be paid or reserved with respect to such objection will be determined at the Sale Hearing, or such later hearing date that the Trustee determines in her discretion, with the consent of the Successful Bidder(s), or such other date determined by this Court.

31. If the contract counterparty does not file and serve an Assumption Objection, (a) the Cure Costs, if any, set forth in the Notice of Assumption shall be controlling, and (b) the Contract Counterparty will be deemed to have consented to the assumption and assignment of the Available Contract and the Cure Costs, if any, and will be forever barred from asserting any objection with regard to such assumption and assignment, including, without limitation, with respect to adequate assurance of future performance by the Successful Bidder; (ii) any and all defaults under such Available Contract and any and all pecuniary losses related thereto shall be deemed cured and compensated pursuant to Bankruptcy Code section 365(b)(1)(A) and (B) upon payment of the Cure Costs set forth in the Assumption Notice for such Available Contract, and such counterparty shall be forever barred from asserting any objection with regard thereto; (iii) the Cure Amount set forth in the Assumption Notice for such Available Contract shall be controlling, notwithstanding anything to the contrary in such Available Contract, or any other

related document, and such counterparty shall be deemed to have consented to the Cure Amount and shall be forever barred from asserting any other Claims related to such Available Contract against the Debtor and its estate or the Successful Bidder, or the property of any of them, that existed prior to the entry of the order resolving the Assumption and Assignment Objections and the Sale Order; and (iv) such counterparty shall be deemed to have consented to the Transaction and to any related relief.

32. The inclusion of an Available Contract on the Notice of Assumption (or any Supplemental Assumption Notice) will not: (a) obligate the Trustee or the Debtor to assume any Available Contract listed thereon or the Stalking Horse Bidder or any other Successful Bidder(s) to take assignment of such Available Contract; or (b) constitute any admission or agreement of the Trustee or the Debtor that such Available Contract is an executory contract. Only those Available Contracts that are included on a schedule of assumed and acquired contracts and leases attached to one or more of the Stalking Horse Purchase Agreements, as applicable, at Closing (or the final asset purchase agreement with the Successful Bidder(s) at Closing), if any (including amendments or modifications to such schedules in accordance with the Stalking Horse Purchase Agreements or asset purchase agreement, as applicable), will be assumed and assigned to the applicable Stalking Horse Bidder (or other Successful Bidder(s) following the Auction, if any).

V. Notice Procedures

33. **Sale Notice.** On or before three (3) business days after entry of this Bid Procedures Order, the Trustee will cause a sale notice, substantially in the form annexed hereto as **Exhibit D** (the “Sale and Auction Notice”) to be sent by first-class mail postage prepaid, to the following: (a) counsel to the Debtor, (b) counsel to the Stalking Horse Bidder, (c) the US Trustee, (d) all persons known or reasonably believed to have asserted an interest in the Property;

(e) all state and local taxing authorities in the State where the Property is located; (f) the Internal Revenue Service; and (g) all other known creditors of the Debtor.

34. In addition to the foregoing, on or before five (5) business days after entry of the Bid Procedures Order, the Trustee shall, subject to applicable submission deadlines, publish the Notice of Auction and Sale Hearing once in the national edition of *The New York Times*, *Wall Street Journal*, or other comparable national publication.

35. **Notice of Successful Bidder.** Within two business days after the conclusion of the Auction (or the cancellation thereof if no Auction is necessary), the Trustee shall file on the docket, but not serve, a notice substantially in the form attached hereto as **Exhibit E** ("Post-Auction Notice") which shall identify the Successful Bidder and Backup Bidder, if any.

BASIS FOR RELIEF AND APPLICABLE AUTHORITY

A. A Section 363 Asset Sale Represents A Sound Exercise Of The Trustee's Business Judgment.

36. Selling the Debtor's Property as proposed herein is critical to maximizing value of the Debtor's estate and, therefore, should be approved as reflecting a sound exercise of the Trustee's business judgment. Section 363(b) of the Bankruptcy Code provides, in relevant part, that a trustee "may use, sell, or lease, other than in the ordinary course of business, property of the estate" after notice and a hearing. 11 U.S.C. § 363(b)(1). Generally, the trustee is only required to "show that a sound business purpose" justifies the proposed use of property. *In re Montgomery Ward Holding Corp.*, 242 B.R. 147, 153 (D. Del. 1999); *see also In re Phx. Steel Corp.*, 82 B.R. 334, 335-36 (Bankr. D. Del. 1987) (requiring "good business reason" for use under section 363(b) of the Bankruptcy Code). This standard prohibits other parties from second-guessing the trustee's business judgment if the trustee has shown that the proposed use will benefit the debtor's estate. *See In re Johns-Manville Corp.*, 60 B.R. 612, 616 (Bankr.

S.D.N.Y. 1986) (“Where the debtor articulates a reasonable basis for its business decisions (as distinct from a decision made arbitrarily or capriciously), courts will generally not entertain objections to the debtor’s conduct.”); *see also In re Tower Air, Inc.*, 416 F.3d 229, 238 (3d Cir. 2005) (“Overcoming the presumptions of the business judgment rule on the merits is a near-Herculean task.”).

37. The Trustee determined to sell Debtor’s Property after careful consideration of all potential alternatives, and consultation with the Debtor’s primary prepetition secured lender. Of the available restructuring paths, the sale of assets to the Stalking Horse Bidder was and remains the most efficient means to obtaining the greatest value for the Debtor’s assets. The Trustee already has a floor-setting Stalking Horse Bid and now seeks a marketing process with the benefits of the § 363 sale process available to interested bidders. After this market check, the Trustee, the Debtor’s creditors, and other parties in interest can be confident that the Trustee will have obtained the highest and best value for the Purchased Assets.

B. Approval Of The Sale Notice Procedures And Bid Procedures Is Appropriate And In The Best Interests Of The Debtor’s Estate.

1. The Proposed Notice of Sale, Bid Procedures, Auction and Sale Hearing, and the Sale Objection Deadline Are Appropriate.

38. The Trustee submits that the procedures for noticing the sale and the Sale Objection Deadline comply fully with Bankruptcy Rule 2002 and are reasonably calculated to provide timely and adequate notice of the Bid Procedures, the Auction, the Sale Hearing, and the Sale to the Debtor’s creditors and other parties in interest, and, if the Trustee believes that additional entities have a legitimate interest, then also to those who have expressed an interest, or may express an interest, in bidding on the Assets. Based upon the foregoing, the Trustee respectfully requests that this Court approve the procedures for noticing the Sale and the Sale Objection Deadline proposed above.

2. The Bid Procedures Are Appropriate and Will Maximize Value Received in Sale of Assets.

39. Courts have made clear that a trustee's business judgment is entitled to substantial deference with respect to the procedures to be used in selling assets of the estate. *See, e.g., In re Efoora, Inc.*, 472 B.R. 481, 488 (Bankr. N.D. Ill. 2012) ("A trustee has considerable discretion when it comes to the sale of estate assets, and that discretion is entitled to great judicial deference as long as a sound business reason is given.") (internal quotations and citations omitted).

40. The paramount goal in any proposed sale of property of the estate is to maximize the proceeds received by the estate. *See, e.g., Corp. Assets, Inc. v. Paloian*, 368 F.3d 761, 765 (7th Cir. 2004) (in a bankruptcy sale, the "governing principle . . . is to secure the highest price for the benefit of the estate and creditors").

41. To that end, courts uniformly recognize that procedures intended to enhance competitive bidding are consistent with the goal of maximizing the value received by the estate and, therefore, are appropriate in the context of bankruptcy sales. *See, e.g., Calpine Corp. v. O'Brien Env'tl. Energy, Inc. (In re O'Brien Env'tl. Energy, Inc.)*, 181 F.3d 527, 537 (3d Cir. 1999); *Official Comm. of Subordinated Bondholders v. Integrated Res. Inc. (In re Integrated Res. Inc.)*, 147 B.R. 650, 659 (S.D.N.Y. 1992) (observing that Bid Procedures "encourage bidding and . . . maximize the value of the debtor's assets.").

42. The Trustee believes that the Bid Procedures will establish sound parameters by which the Purchase Price for the Property under the Staling Horse Agreements may be tested at the Auction, as well as the ensuing Sale Hearing, and evaluated as described herein. Such procedures will increase the likelihood that the Trustee will receive the greatest possible consideration for the Property in a sale because they will ensure a competitive and fair bidding process. The Bid Procedures will also allow the Trustee to undertake the Auction process in an

orderly fashion, which the Trustee believes is essential to maintaining and maximizing the value of the Debtor's estate.

43. The Trustee believes that the Auction and proposed Bid Procedures promote active bidding from seriously interested parties and will dispel any doubt as to the best or otherwise highest offer reasonably available at this time for the purchase of the Assets. Moreover, the proposed Bid Procedures will allow the Trustee to conduct the Auction in a controlled, fair, and open fashion that will encourage participation by financially capable bidders who demonstrate the ability to close a transaction. The Trustee believes that the Bid Procedures will encourage bidding for the Property, are consistent with other procedures previously approved by courts in this and other circuits, and are appropriate under the relevant standards governing auction proceedings and bidding incentives in bankruptcy proceedings.

44. Thus, the proposed Bid Procedures are reasonable, appropriate, and within the Trustee's sound business judgment under the circumstances because they will serve to maximize the value that the Trustee will obtain on account of the Sale of the Debtor's Property.

C. The Initial And Subsequent Overbid Amounts Are Appropriate.

45. The Trustee submits that the proposed requirements for a valid overbid are appropriate and should be approved. Courts frequently authorize trustees to require bidders to submit minimum initial bids to ensure that the trustee receives the highest and best offers possible in asset sales. *See, e.g., In re Grede Foundries, Inc.*, Case No. 09-14337 (RDM) (Bankr. W.D. Wis. Nov. 25, 2009) (authorizing minimum initial bid of \$500,000, or .47% of purchase price, plus break-up fees and certain other costs and expenses of approximately \$1.95 million).

46. In addition, the Trustee intends to conduct the Auction such that each bid at the Auction is higher or otherwise better than the previous bid. To this end, incorporating the

concept of overbids in the Bidding Procedures is reasonable under the circumstances and will enable the Trustee to maximize the value for the sale of the Debtor's assets while limiting any chilling effect on the Sale process.

D. The Proposed Assumption And Assignment Procedures Are Appropriate.

47. In connection with the Sale, the Trustee believes it is necessary to establish a process by which: (a) the Trustee and counterparties to the Available Contracts can reconcile the Cure Amounts proposed by the Trustee, if any, in accordance with § 365 of the Bankruptcy Code; and (b) the counterparties to such contracts can object to the assumption and assignment of the Available Contracts and/or related proposed Cure Amounts. As described above, the proposed Assumption and Assignment Procedures comply with Bankruptcy Rule 2002 and provide all counterparties to Available Contracts with due and adequate notice of the potential assumption and assignment of their contracts, objection deadlines, and the time and place for the Sale Hearing. Accordingly, the Trustee requests that the Assumption and Assignment Procedures be approved.

E. Approval Of The Proposed Sale Transaction Is Appropriate And In The Best Interest Of The Debtor's Estate.

48. In accordance with Bankruptcy Rule 6004(f)(1), sales of property rights outside the ordinary course of business may be by private sale or public auction. The Trustee determined that a sale subject to higher and better bids and action will enable the Trustee to obtain the highest or otherwise best offer in a sale of the Debtor's Property at this time and is in the best interests of the Debtor, the estate, and creditors.

1. The Sale of Assets and Designated Contracts Free and Clear of Interests Is Authorized by Section 363(f) of the Bankruptcy Code.

49. The Trustee further submits that it is appropriate to sell the Property and to assign the Assumed Contracts free and clear of all Interests, other than any Assumed Obligations as set forth in the Purchase Agreement.

50. Section 363(f) of the Bankruptcy Code authorizes a trustee to sell assets free and clear of liens, claims, interests, and encumbrances if:

- i. applicable non-bankruptcy law permits sale of such property free and clear of such interest;
- ii. such entity consents;
- iii. 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;
- iv. such interest is in *bona fide* dispute; or
- v. 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).

51. The Trustee believes that one or more of the tests of § 363(f) are satisfied with respect to the proposed Sale and the assignment of the Available Contracts pursuant to the Stalking Horse Purchase Agreement or an applicable purchase agreement of another Successful Bidder. In particular, the Trustee believes that at least § 363(f)(2) of the Bankruptcy Code will be met in connection with the transactions proposed under the Stalking Horse Purchase Agreement because the Trustee expects that the Debtor's prepetition secured lenders and any other party asserting an interest in the Property will consent to the Sale or, absent any objection to this Motion, will be deemed to have consented to the Sale.

2. If the Trustee Consummates the Sale, Such Property Should Be Sold or Assumed Free and Clear of Successor Liability.

52. The Successful Bidder is unlikely to be liable for any of the Debtor's liabilities as a successor owner of the Properties or otherwise, unless the Successful Bidder expressly assumes such liabilities. However, a provision that any sale is free and clear of successor liability relating to the Debtor's Properties, except as may be expressly assumed by the Successful Bidder pursuant to the applicable sale agreement, would ensure that any claims premised on the theory that the Successful Bidder is a successor in interest to the Debtor are directed to the proceeds of the sale, if any, and may not be asserted against the Successful Bidder.

53. Courts have consistently held that a buyer of a debtor's assets pursuant to a Bankruptcy Code § 363 sale takes free and clear from successor liability relating to the debtor's business. *See, e.g., In re Trans World Airlines, Inc.*, 322 F.3d 283, 288–93 (3d Cir. 2003) (sale of assets pursuant to section 363(f) barred successor liability claims for employment discrimination and rights under travel voucher program); *United Mine Workers of Am. 1992 Benefit Plan v. Leckie Smokeless Coal Co. (In re Leckie Smokeless Coal Co.)*, 99 F.3d 573, 585–87 (4th Cir. 1996) (affirming the sale of Debtor's assets free and clear of certain taxes); *Amphenol Corp. v. Shandler (In re Insilco Techs., Inc.)*, 351 B.R. 313, 322 (Bankr. D. Del. 2006) (stating that a 363 sale permits a buyer to take ownership of property without concern that a creditor will file suit based on a successor liability theory); *see also In re Gen. Motors Corp.*, 407 B.R. 463, 505–06 (Bankr. S.D.N.Y. 2009) (holding that “[t]he law in this Circuit and District is clear; the Court will permit GM's assets to pass to the purchaser free and clear of successor liability claims, and in that connection, will issue the requested findings and associated injunction.”); *In re Chrysler LLC*, 405 B.R. 84, 111 (Bankr. S.D.N.Y. 2009) (“[I]n personam claims, including any potential state successor or transferee liability claims against New

Chrysler, as well as *in rem* interests, are encompassed by section 363(f) and are therefore extinguished by the Sale.”).

54. The purpose of an order authorizing the transfer of assets free and clear of all liens, claims, encumbrances and all other interests would be frustrated if claimants could thereafter use the transfer as a basis to assert claims arising from the Debtor’s pre-sale conduct against the Successful Bidder. Moreover, without such assurances, the Trustee would run the risk that potential bidders may not enter the Auction or, if they do, may do so with lower bid amounts than otherwise. To that end, the Successful Bidder should not be liable under any theory of successor liability relating to the Debtor’s business and Property, but should hold the Property free and clear, except to the extent specifically set forth in the applicable purchase agreement.

3. The Stalking Horse Bidder Are Good Faith Purchasers Entitled to the Full Protections of the Bankruptcy Code.

55. The Trustee believes that the Stalking Horse Agreement has been submitted in good faith and has been, and will continue to be, negotiated in good faith and at arm’s-length. Thus, the Stalking Horse Bidder is entitled to the full protections of § 363(m) of Bankruptcy Code, which 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).

56. While the Bankruptcy Code does not define “good faith,” several Circuit Courts have determined that:

The requirement that a purchaser act in good faith . . . speaks to the integrity of her conduct in the court of the sale proceedings. Typically, the misconduct that would destroy a purchaser's good faith status at a judicial sale involves fraud, collusion between the purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders.

In re Andy Frain Servs., Inc., 798 F.2d 1113, 1125 (7th Cir. 1986) (quoting *In re Rock Indus. Machinery Corp.*, 572 F.2d 1195, 1198 (7th Cir. 1978); *In re Abbotts Dairies of Pa., Inc.*, 788 F.2d 143, 147 (3d Cir. 1986). There has been no fraud, improper insider dealing, or collusion in connection with the negotiation or submission of the Stalking Horse Agreements.

57. The Stalking Horse Bidder or other Successful Bidder(s) should receive the protections afforded good faith purchasers by § 363(m) of the Bankruptcy Code. Accordingly, the Trustee requests that the Court make a finding at the Sale Hearing and in the Sale Order that the purchase agreement reached with the Stalking Horse Bidder or any other Successful Bidder(s) was at arm's-length and is entitled to the full protections of § 363(m) of the Bankruptcy Code.

F. Credit Bidding Should Be Authorized Under § 363(k) of the Bankruptcy Code.

58. A secured creditor is allowed to "credit bid" the amount of its claim in a sale. Section 363(k) of the Bankruptcy Code provides, in relevant part, that unless the court for cause orders otherwise, the holder of a claim secured by property that is the subject of the sale "may bid at such sale, and, if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property." 11 U.S.C. § 363(k). Even if a secured creditor is undersecured as determined in accordance with § 506(a) of the Bankruptcy Code, § 363(k) allows such secured creditor to bid the total face value of its claim and does not limit the credit bid to the claim's economic value. *See Cohen v. KB Mezzanine Fund II, LP (In re Submicron Sts. Corp.)*, 432 F. 3d 448, 459-60 (3d Cir. 2006) (stating that interpreting section

363(k) of the Bankruptcy Code to cap credit bids at the economic value of the underlying collateral “is theoretically nonsensical”).

59. The Bid Procedures are consistent with the Cash Collateral Order provides for a right of ATX to credit bid all or a portion of its secured claim against the Debtor to the extent permitted by § 363(k). As such, the Credit Bid is permissible, and the aspect of the Bid Procedures providing for such rights should be approved.

VI. Assumption and Assignment of the Designated Contracts Is Authorized by the Bankruptcy Code.

60. Sections 365(a) and (b) of the Bankruptcy Code authorize a trustee to assume, subject to the court’s approval, executory contracts or unexpired leases of the debtor. Under section 365(a) of the Bankruptcy Code, a trustee, “subject to the court’s approval, may assume or reject any executory contract or unexpired lease of the debtor.” 11 U.S.C. § 365(a). Section 365(b)(1) of the Bankruptcy Code, in turn, codifies the requirements for assuming an unexpired lease or executory contract of a debtor, providing that:

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).

61. The standard applied by courts to determine whether an executory contract or unexpired lease should be assumed is the “business judgment” test, which requires a trustee to determine that the requested assumption or rejection would be beneficial to the debtor’s estate. *See ReGen Capital I, Inc. v. UAL Corp. (In re UAL Corp.)*, 635 F.3d 312, 319 (7th Cir. 2011) (“The bankruptcy court reviews the debtor’s business judgment with respect to the proposed assumption to determine if it would be beneficial or burdensome to assume the executory contract by evaluating whether assumption would serve the reorganization or whether it would take away funds available to other creditors.”) (citing *Orion Pictures Corp. v. Showtime Networks, Inc. (In re Orion Pictures Corp.)*, 4 F.3d 1095, 1099 (2d Cir. 1993)); *In re Network Access Sols., Corp.*, 330 B.R. 67, 75 (Bankr. D. Del. 2005).

VII. Relief Under Bankruptcy Rules 6004(H) And 6006(D) Is Appropriate

62. Bankruptcy 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.” Fed. R. Bankr. P. 6004(h). Additionally, Bankruptcy Rule 6006(d) provides that an “order authorizing the trustee to assign an executory contract or unexpired lease . . . is stayed until the expiration of 14 days after the entry of the order, unless the court orders otherwise.” Fed. R. Bankr. P. 6006(d). The Trustee requests that each of the Bid Procedures Order and the Sale Order be effective immediately upon its entry by providing that the fourteen-day stays under Bankruptcy Rules 6004(h) and 6006(d) are waived.

63. The purpose of Bankruptcy Rules 6004(h) and 6006(d) is to provide sufficient time for an objecting party to request a stay pending appeal before an order can be implemented. *See Fed R. Bankr. P. 6004(h), 6006(d) advisory committee’s note to 1999 amendment.* The stay pursuant to Bankruptcy Rule 6004(h) may be waived to allow a sale to close immediately “where there has been no objection to the procedure.” *See 10 COLLIER ON BANKRUPTCY 6004.11* (16th

ed. 2016). Furthermore, if an objection is filed and overruled, and the objecting party informs the court of its intent to appeal, the stay may be reduced to the amount of time actually necessary to file an appeal. *Id.*

64. Following the Sale Hearing, the Trustee seeks to close the Sale as soon as possible following the Sale Hearing in order to maximize value received. Accordingly, the Trustee hereby requests that the Court waive the fourteen-day stay period under Bankruptcy Rules 6004(h) and 6006(d).

VIII. Notice

65. Notice of this Motion will be provided to: (i) the Debtor; (ii) the Office of the United States Trustee for the Western District of Texas; (iii) counsel to the Stalking Horse Bidder.; (iv) governmental entities having a regulatory or statutory interest in this case, (v) the unsecured creditors of the Debtor; (viii) all secured creditors of the Debtor; and (ix) any other party that as requested notice pursuant to Rule 2002. The Trustee respectfully submits that no further notice of this Motion is required under the circumstances.

CONCLUSION

The Trustee respectfully requests that this Court enter the Bid Procedures Order and, following the Sale Hearing, the Sale Order, granting the relief sought herein and granting such other and further relief as may be just and proper.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 23, 2022, a true and correct copy of the foregoing document was electronically filed with the Court and served through the CM-ECF system to all counsel of record registered to receive a Notice of Electronic Filing for this case and via first class mail or via CM-ECF as indicated to the parties listed below and on the attached list.

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