

<sup>1</sup> The Debtors are: (i) Banyan Cay Investment, LLC; (ii) Banyan Cay Mezzanine Borrower, LLC; (iii) Banyan Cay Resort & Golf LLC; (iv) Banyan Cay Dev. LLC; (v) Banyan Cay Villas, LLC; and (vi) Banyan Cay Maintenance, LLC. The address of the Debtors is 1900 Banyan Club Road, West Palm Beach, Florida 33401.

Stalking Horse Agreement (as defined below), (e) approving certain bid protections for the Stalking Horse Bidder (as defined below), and (f) granting related relief; and (ii) an order, substantially in the form attached hereto as **Exhibit C** (the “Sale Order”), (a) approving the Sale of the Assets free and clear of liens, claims, encumbrances, and other interests, and (b) granting related relief. In further support of this Motion, the Debtors, by and through their undersigned counsel, respectfully represent:

### **JURISDICTION AND VENUE**

1. This Court has jurisdiction to consider this Motion pursuant to 28 U.S.C. §§ 157 and 1334. The Debtors confirm their consent, pursuant to Bankruptcy Rule 7008, to the entry of a final order by the Bankruptcy Court in connection with this Motion to the extent that it is later determined that the Bankruptcy Court, absent consent of the parties, cannot enter final orders or judgments in connection herewith consistent with Article III of the United States Constitution.

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

3. The statutory predicates for the relief requested in this Motion are Bankruptcy Code §§ 105, 363, 365, 503, and 507 and Bankruptcy Rules 2002, 6004, 6006, 9007, 9014.

### **BACKGROUND**

#### **A. The Debtors’ Chapter 11 Cases**

4. On March 29, 2023 (the “Petition Date”), each of the Debtors other than Banyan Cay Mezzanine Borrower, LLC filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code, commencing the above-captioned chapter 11 cases (the “Chapter 11 Cases”) before the Bankruptcy Court. Banyan Cay Mezzanine Borrower, LLC filed its voluntary petition for relief on February 16, 2023.

5. The Debtors are operating their business and managing their property as debtors and debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. As of

the filing of this Motion, no request has been made for the appointment of a trustee or examiner and no statutory committee has been appointed in the Chapter 11 Cases.

6. No committee has been appointed in the Debtor's Chapter 11 Case pursuant to section 1102 of the Bankruptcy Code.

7. On March 16, 2023, the Debtors retained Keen-Summit Capital Partners ("Keen-Summit") to act as their marketing agent and broker.

### **RELIEF REQUESTED**

8. By this Motion, the Debtors seek entry of the Bid Procedures Order in substantially the form attached hereto as **Exhibit B**:

- (a) authorizing and approving the Bid Procedures attached to the Bid Procedures Order as **Exhibit 1** in connection with the sale (the "Sale") of certain property of the Debtors, as more specifically identified in the Stalking Horse Agreement (the "Assets");
- (b) scheduling an auction (the "Auction") and sale hearing (the "Sale Hearing") with respect to the Sale of the Assets;
- (c) approving the form and manner of notice of the Auction and the Sale Hearing, a copy of which is attached to the Bid Procedures Order as **Exhibit 2** (the "Sale Notice");
- (d) approving the form and manner of notice of the Successful Bidder and Backup Bidder with respect to the Auction, a copy of which is attached to the Bid Procedures Order as **Exhibit 3** (the "Post-Auction Notice");
- (e) authorizing the Debtors to enter into that certain Asset Purchase Agreement with Westside Property Investment Company, Inc., dated April 2, 2023 (including all schedules and exhibits attached thereto, as it may be amended from time to time in accordance with its terms, the "Stalking Horse Bidder"), a copy of which is attached hereto as **Exhibit A** (the "Stalking Horse Agreement"), pursuant to which the Stalking Horse Bidder seeks to purchase the Assets from the Debtors pursuant to the consideration as set forth therein;
- (f) approving certain bid protections as set forth in the Stalking Horse Agreement, consisting of:
  - (i) a break-up fee of \$3,063,000.00 (the "Break-Up Fee"); and

- (ii) an expense reimbursement of \$300,000.00 (the “Expense Reimbursement”); and
- (iii) an initial overbid of **\$5,000,000.00** (the “Initial Overbid” and, together with the Break-Up Fee and Expense Reimbursement, the “Bid Protections”); and
- (g) granting related relief.

9. Second, the Debtors may seek entry of the Sale Order at the conclusion of the Sale Hearing in substantially the form attached hereto as **Exhibit C**:

- (a) if an Auction is conducted, authorizing and approving the sale of the Assets (as defined in the Stalking Horse Agreement) to the Qualified Bidder (as defined in the Bid Procedures) that the Debtors determine has made the highest and best Qualified Bid (as defined in the Bid Procedures) for the Assets (the “Successful Bidder”) (or, if the Successful Bidder fails to consummate the Sale, to the Qualified Bidder with the next-highest or second-best Qualified Bid at the Auction for the Assets (the “Backup Bidder”), free and clear of all liens, claims, encumbrances, and other interests other than Permitted Liens and Assumed Liabilities (as such terms are defined in the Stalking Horse Agreement);
- (b) if an Auction is not conducted, authorizing and approving the Sale of the Assets to the Stalking Horse Bidder free and clear of liens, claims, encumbrances, and other interests other than Permitted Liens and Assumed Liabilities; and
- (c) granting any related relief.

10. The Debtors reserve the right to file and serve any supplemental pleading or declaration that the Debtors deem appropriate or necessary in their reasonable business judgment, including any pleading summarizing the competitive bidding and sale process and the results thereof, in support of their request for entry of the Sale Order before the Sale Hearing, subject to the terms of the Stalking Horse Agreement.

### **STALKING HORSE AGREEMENT**

11. The key terms of the proposed transaction can be found in the Stalking Horse Agreement attached hereto as **Exhibit A**. The material terms of the Stalking Horse Agreement

and other key provisions governing the Sale, as set forth and required in Local Rule 6004-1, are as follows:

- The identity of the Stalking Horse Bidder is Westside Property Investment Company, Inc., or an affiliated assignee.
- The legal description of the real property to be sold pursuant to the Stalking Horse Agreement or the Auction, as applicable, is identified in Schedule 1 of the Stalking Horse Agreement.
- The Assets to be purchased consist of:
  - i. All of the Debtors' real property except for certain of the real property owned by Debtor Banyan Cay Dev. LLC, comprising of single-family estate lots lying in Tract "L1" as recorded in Plat Book 127, Page 18 of the Public Records of Palm Beach County, Florida, and Tract "L2" as recorded in Plat Book 125, Page 114 of the Public Records of Palm Beach County, Florida.
  - ii. All of the Debtors' personal property except for:
    - Debtor Banyan Cay Investment, LLC's membership interests in Banyan Cay Mezzanine Borrower, LLC;
    - Debtor Banyan Cay Mezzanine Borrower's membership interests in Banyan Cay Resort & Golf, LLC; Banyan Cay Dev. LLC; and Banyan Cay Villas, LLC;
    - The Debtors' cash, cash equivalents, accounts, accounts receivable, securities, credits, rights of reimbursement, set off frights, and rights of recoupment; Debtors' causes of action, other than those that could affect the operation of the Assets or any Assumed Contract or Assumed Liabilities
    - The Debtors' rights and interest under any insurance policies, except as set forth in the Stalking Horse Agreement; and
    - Various employment related plans and agreements.
- The Stalking Horse Bidder shall deposit the sum of \$3,063,000.00 into an escrow as a good faith deposit.
- The Assets shall be sold free and clear of all liens, claims, and interests, except for the Permitted Encumbrances and any Assumed Liabilities.

- The known potential lienholders and interest holders, the nature and extent of such liens or interests, and whether such liens or interests are disputed are as follows:
  - i. U.S. Real Estate Credit Holdings III-A, LP, an Irish limited partnership, holds a foreclosure judgment on substantially all of the Assets (subject to dispute).
  - ii. ZJC, LLC, a Florida limited liability company, holds a mortgage on certain real property of Banyan Cay Maintenance, LLC (subject to dispute).
  - iii. Bellefrau Group, LLC, a Florida limited liability company, holds a mortgage on certain real property of Banyan Cay Maintenance, LLC (subject to dispute).
  - iv. Property taxes on the Assets in the aggregate amount of approximately \$719,773.89 are owed to the Palm Beach County Tax Collector. The property taxes are not disputed.
  - v. Various parties have asserted construction, supplier, subcontractor or materialmen's liens against the Assets, some of which are disputed. All known and potential lienholders shall receive notice of the Sale and Auction.
- The Purchase Price (as such term is defined in the Stalking Horse Agreement) shall be \$102,100,000.00 , subject to adjustments, prorations, and credits set forth in the Stalking Horse Agreement.
- Unless otherwise agreed to by the Seller and Successful Bidder in writing, the closings of transactions contemplated by the Stalking Horse Agreement (the "Closing") shall occur on or within thirty (30) days after the date upon which the Sale Order becomes a Final Order (the "Closing Date").
- Pursuant to the terms of the Stalking Horse Agreement, the Bid Procedures shall provide for, *inter alia*: (i) a break-up fee of \$3,063,000 to be paid to Purchaser in the event of and upon the closing of a sale of the Assets to any other bidder, which break-up fee shall be treated as a senior priority post-petition debt second only to the lien of U.S. Real Estate Credit Holdings III-A, LP; (ii) an expense reimbursement of up to \$300,000 limited to actual legal fees and actual costs incurred in connection with this Agreement, which expense reimbursement shall be treated as a senior priority post-petition debt second only to the lien of U.S. Real Estate Credit Holdings III-A, LP; (iii) "credit" bidding protections for such bidding protections in the case in which Purchaser participates in an auction, in addition to Purchaser's credit bidding rights under Section 2.5 of the Stalking Horse Agreement;

and (iv) a requirement that any competing bid must be at least \$5,000,000 greater than the Purchase Price under the Stalking Horse Agreement.

- All executory contracts and unexpired leases selected by the Stalking Horse Bidder (the “Assumed Contracts”) shall be assumed by the Debtors and assigned to the Stalking Horse Bidder at the Closing pursuant to Section 365 of the Bankruptcy Code. Any cure costs shall be paid by the Stalking Horse Bidder.
- The Debtors do not have a policy of prohibiting the transfer of personally identifiable information, no consumer privacy ombudsman is required under section 332 of the Bankruptcy Code in connection herewith, and the Sale contemplated in the Stalking Horse Agreement and Bid Procedures would not pose any threat to any personally identifiable information or consumer privacy concerns.

### **THE PROPOSED SALE**

12. The Debtors believe that a prompt sale of the Assets represents the best option available to maximize value for all stakeholders in the Chapter 11 Cases. Time is of the essence.

13. By this Motion, the Debtors respectfully request that the Court approve the following general timeline, with the assumption that the Bankruptcy Court will enter an order granting this Motion on shortened notice. These dates are subject to change in the event the Bankruptcy Court does not enter an order at that hearing:

- (a) ***Bid Deadline:*** Bids for the Assets, including a marked-up form of the Stalking Horse Agreement, as well as the deposit and the other requirements for a bid to be considered a Qualified Bid (as defined in the Bid Procedures) must be received by no later than **June 8, 2023 at 5:00 p.m. (prevailing Eastern Time)** or such later date as may be agreed to by the Debtors (the “Bid Deadline”).
- (b) ***Sale Objection Deadline:*** Objections to the Sale will be filed and served no later than **June 16, 2023 at 5:00 p.m. (prevailing Eastern Time)**.
- (c) ***Auction:*** The Auction, if necessary, will be held on **June 13, 2023 at 10:00 a.m. (prevailing Eastern Time)**, or such other location as identified by the Debtors after notice to all Qualified Bidders.
- (d) ***Sale Hearing:*** Consistent with the Court’s availability and schedule, the Sale Hearing will commence on or before **June 20, 2023**.

14. The Debtors believe this timeline maximizes the prospect of receiving the highest and best offer without unduly prejudicing their estates. The Debtors believe that the proposed timeline is sufficient to complete a fair, robust and open sale process that will maximize the value received for the Assets, particularly in light of the fact that such Assets have been marketed in excess of three-months on the open market. To further ensure that the Debtors' proposed Auction and Sale process maximizes value for the benefit of the Debtors' estates, and in accordance with the Stalking Horse Agreement, the Debtors and their professionals will continue to actively market the Assets in an attempt to solicit the highest or best bids available. The Debtors believe the relief requested by this Motion is in the best interests of its creditors, its other stakeholders, and all other parties in interest, and should be approved.

### **THE BID PROCEDURES ORDER**

#### **A. The Bid Procedures**

15. To optimally and expeditiously solicit, receive, and evaluate bids in a fair and accessible manner, the Debtors have developed and proposed the Bid Procedures, attached as **Exhibit 1** to the Bid Procedures Order. The Bid Procedures were developed to permit an expedited sale process, to promote participation and active bidding, and to ensure that the Debtors receive the highest or best offer for the Assets. As such, the Debtors believe the timeline for consummating the sale process established pursuant to the Bid Procedures is in the best interest of their estates and all parties in interest.

16. The Bid Procedures describe, among other things, the requirements for prospective purchasers to participate in the bidding process, the availability and conduct of due diligence, the deadline for submitting a competing bid, the method and factors for determining qualifying bids, and the criteria for selecting a successful bidder.



17. Importantly, the Bid Procedures recognize the Debtors' fiduciary obligations to maximize the value of its assets and, as such, do not impair the Debtors' ability to consider all qualified bid proposals. Additionally, as noted above, the Bid Procedures preserve the Debtors' rights to modify the Bid Procedures as necessary or appropriate to maximize value of the Debtors' estates.

18. The Debtors believe the proposed Bid Procedures are in the best interest of the Debtors, their estates, their creditors, and all parties in interest.

**B. The Auction and Sale**

19. If a Qualified Bid is received prior to the Bid Deadline (other than the Stalking Horse Agreement), the Debtors will conduct an Auction to determine the highest and best Qualified Bid. This determination shall take into account any factors the Debtors reasonably deem relevant to the value of the Qualified Bid to the Debtors' estates, including, without limitation, the Bid Assessment Criteria. If no Qualified Bid (other than the Stalking Horse Agreement) is received by the Bid Deadline, the Debtors will deem the Stalking Horse Agreement to be the Successful Bid without conducting the Auction. The Debtors seek authority from the Court to schedule the Auction on a date as further described in the Bid Procedures.

**C. Form and Manner of Sale Notice and Post-Auction Notice**

20. On or within two (2) business days after entry of the Bid Procedures Order, the Debtors will cause the Sale Notice to be served on (a) the Office of the United States Trustee, (b) all parties who have filed and served requests for notice pursuant to Bankruptcy Rule 2002, (c) all parties who have communicated, through Keen-Summit, an interest in potentially submitting a Qualified Bid and/or participating in the Auction, and (d) all known and potential lienholders with liens on the Assets (collectively, the "Notice Parties").

21. As soon as reasonably practicable after the entry of the Bid Procedures Order, the Debtors shall publish the Sale Notice in The Wall Street Journal, and the Debtors respectfully request that such publication notice be deemed sufficient and proper notice of the Sale to any other interested parties whose identities are unknown to the Debtors.

22. Subsequent to the conclusion of the Auction, the Debtors shall serve the Post-Auction Notice on the Notice Parties.

### **BASIS FOR RELIEF**

#### **A. The Relief Sought in the Bid Procedures Order Is in the Best Interests of the Debtors' Estates and Should Be Approved**

##### **1. The Proposed Notice of the Bid Procedures and the Sale Process Is Appropriate**

23. The Debtors seek authority to sell the Assets through an Auction and related sale process, subject to the Debtors' right to seek an alternative course of action to maximize the value of their estates. The Debtors and their advisors have conducted and will conduct an extensive marketing process. The Bid Procedures are designed to elicit bids from one or more parties and to encourage a robust auction of the Assets, thus maximizing the value of the Debtors' estates for the benefit of its creditors and other stakeholders.

24. Under Bankruptcy Rule 2002(a) and (c), the Debtors are required to notify creditors of the proposed sale of the Assets, including a disclosure of the time and place of any auction, the terms and conditions of a sale, and the deadline for filing any objections.

25. The Debtors respectfully submit that the Sale Notice is reasonably calculated to provide all interested parties with timely and proper notice of the proposed Sale, including: (i) the date, time, and place of the Auction (if one will be held), (ii) the Bid Procedures, (iii) the deadline for filing objections to the Sale and entry of the Sale Order, and the date, time, and place of the Sale Hearing, (iv) a reasonably specific identification of the Assets, and (v) a description of the

Sale as being free and clear of liens, claims, encumbrances, and other interests other than Permitted Exceptions and Assumed Liabilities (as such terms are defined in the Stalking Horse Agreement)<sup>2</sup>, if any, with all such liens, claims, encumbrances, and other interests attaching with the same validity and priority to the Sale proceeds.

26. The Debtors further submit that notice of this Motion and the related hearing to consider entry of the Bid Procedures Order, coupled with service of the Sale Notice and Post-Auction Notice, as provided for herein, constitutes good and adequate notice of the Sale and the proceedings with respect thereto in compliance with, and satisfaction of, the applicable requirements of Bankruptcy Rule 2002. The Debtors further submit the proposed notice procedures are designed to maximize the chance of obtaining the broadest possible participation in the Debtors' marketing process, while minimizing costs to the estates. Accordingly, the Debtors respectfully request the Court find the proposed notice procedures set forth in this Motion are sufficient, and no other or further notice of the Bid Procedures, Auction, Sale, or Sale Hearing is required.

## **2. The Bid Procedures Are Appropriate and Will Maximize Value**

27. Bid procedures should be approved when they provide a benefit to the debtor's estate by maximizing the value of the debtor's assets. *See In re Edwards*, 228 B.R. 552, 361 (Bankr. E.D. Pa. 1998) ("The purpose of procedural bidding orders is to facilitate an open and fair public sale designed to maximize value for the estate."). Courts have made clear that a debtor's business judgment is entitled to substantial deference with respect to the procedures to be used in selling an estate's assets. *See, e.g., In re Schipper*, 933 F.2d 513, 515 (7th Cir. 1991) ("Under

---

<sup>2</sup> Section 2.5 of the Stalking Horse Agreement provides that no liabilities shall be assumed pursuant to the Stalking Horse Agreement, unless otherwise specified therein.

Section 363, the debtor in possession can sell property of the estate . . . if he has an ‘articulated business justification’”) (internal citations omitted)); *In re Martin*, 91 F.3d 389, 395 (3d Cir. 1996) (quoting *Schipper*); *In re Montgomery Ward Holding Corp.*, 242 B.R. 147, 153 (D. Del. 1999) (same); *see also In re Integrated Resources, Inc.*, 147 B.R. 650, 656-57 (S.D.N.Y. 1992) (noting that bid procedures that have been negotiated by a trustee are to be reviewed in accordance with the deferential “business judgment” standard, under which such procedures and arrangements are “presumptively valid”).

28. The paramount goal in any proposed sale of property of the estate is to maximize the proceeds received by the estate. *See Mushroom Transp. Co., Inc.*, 382 F.3d 325, 339 (3d Cir. 2004); *Official Comm. Of Unsecured Creditors of Cybergenics, Corp. v. Chinery*, 330 F.3d 548, 573 (3d Cir. 2003); *see also In re Food Barn Stores, Inc.*, 101 F.3d 558, 564-65 (8th Cir. 1997) (in bankruptcy sales, “a primary objective of the Code [is] to enhance the value of the estate at hand”); *Integrated Resources*, 147 B.R. at 659 (“[I]t is a well-established principle of bankruptcy law that the objective of the bankruptcy rules and the trustee’s duty with respect to such sales is to obtain the highest price or greatest overall benefit possible for the estate.”) (internal citations omitted); *Edwards*, 228 B.R. at 561.

29. 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 appropriate in the context of bankruptcy transactions. *See, e.g., In re O’Brien Envtl. Energy, Inc.*, 181 F.3d 527, 537 (3d Cir. 1999); *Integrated Resources*, 147 B.R. at 659 (bid procedures “are important tools to encourage bidding and to maximize the value of the debtor’s assets”); *In re Fin. News Network, Inc.*, 126 B.R. 152, 156 (Bankr. S.D.N.Y. 1991) (“court-imposed

rules for the disposition of assets . . . [should] provide an adequate basis for comparison of offers, and [should] provide for a fair and efficient resolution of bankrupt estates”).

30. The Debtors believe the proposed Bid Procedures will establish the parameters under which the value of the Sale may be tested at the Auction. The Bid Procedures will increase the likelihood the Debtors will receive the greatest possible consideration because they will ensure a competitive and fair bidding process.

31. The Debtors believe that the proposed Bid Procedures will promote active bidding from seriously interested parties and will elicit the highest or best offers available for the Assets. The proposed Bid Procedures will enable the Debtors to conduct the Sale in a controlled, fair, and open fashion that will encourage participation by financially capable bidders who will offer the best package for the Assets and who can demonstrate the ability to close the transaction.

32. Specifically, the proposed Bid Procedures contemplate an open auction process with minimum barriers to entry and provide potential bidding parties with sufficient time to perform due diligence and acquire the information necessary to submit a timely and well-informed bid.

33. At the same time, the proposed Bid Procedures provide the Debtors with a robust opportunity to consider competing bids and select the highest or best offer for the completion of the Sale. Additionally, entering into the Stalking Horse Agreement with the Stalking Horse Bidder ensures the Debtors obtain fair market value by making a minimum purchase price for the Assets available to the Debtors that will be tested in the marketplace. As such, creditors of the Debtors’ estates can be assured the consideration obtained will be fair and reasonable and at or above the market.

34. Thus, the Bid Procedures are reasonable, appropriate, and within the Debtors' sound business judgment under the circumstances because the Bid Procedures are designed to maximize the value to be received by the Debtors' estates.

**3. The Minimum Overbid Increment Is Appropriate**

35. One important component of the proposed Bid Procedures is the "Overbid" provision. Once the Debtors determine the Baseline Bid, which shall equal or exceed the value of the Stalking Horse Agreement, as determined by the Debtors, plus the Initial Overbid, and hold the Auction, bidding on the Assets must be in initial Minimum Overbid Increments of at least **\$250,000.00**, which increment may be reduced as appropriate.

36. The Debtors believe such Minimum Overbid Increment is reasonable under the circumstances and in light of the value of the Assets, and will enable the Debtors to maximize the value received for the Assets while limiting any potential chilling effect in the marketing process.

**4. Entering into the Stalking Horse Agreement with Bid Protections Has a Sound Business Purpose and Should Be Approved**

37. Pursuant to the Motion, the Debtors are seeking the approval of this Court of the Stalking Horse Bidder and to offer the Bid Protections. The Debtors believe that, in this case, such relief is warranted to ensure the Debtors' ability to take advantage of a potentially value-maximizing bid. The ability of the Debtors to offer the Stalking Horse Bidder the Bid Protections is beneficial to the Debtors' estates and creditors in that, by providing these incentives, the Debtors will have an opportunity to induce a potential Bidder to submit or increase its bid prior to the Auction.

38. Specifically, bid protections "may be legitimately necessary to convince a 'white knight' bidder to enter the bidding by providing some form of compensation for the risks it is undertaking." 995 *Fifth Ave.*, 96 B.R. at 28 (quotation omitted); *see also Integrated Resources*,

147 B.R. at 660-61 (bid protections can prompt bidders to commence negotiations and “ensure that a bidder does not retract its bid”); *In re Hupp Int’l Indus., Inc.*, 140 B.R. 191, 194 (Bankr. N.D. Ohio 1992) (“[W]ithout such fees, bidders would be reluctant to make an initial bid for fear that their first bid will be shopped around for a higher bid from another bidder who would capitalize on the initial bidder’s . . . due diligence.”).

39. As a result, courts routinely approve bid protections similar to the Bid Protections in connection with proposed bankruptcy sales where a proposed fee or reimbursement provides a benefit to the estate. See *In re O’Brien Envtl. Energy, Inc.*, 181 F.3d 527 (3d Cir. 1999). The Debtors believe the allowance of the Bid Protections is in the best interests of the Debtors’ estates and their creditors, as these protections will only be employed where a stalking horse bid will establish a floor for further bidding that may increase the consideration given in exchange for the Assets for the benefit of the Debtors’ estates.

40. The Stalking Horse Bidder has expended, and will continue to expend, time and resources negotiating, drafting, and performing due diligence activities necessitated by the Sale transactions, and its bid will be subject not only to Court approval, but also to overbidding by third parties. The Bid Protections granted to the Stalking Horse Bidder were negotiated in good faith and at arm’s length, with significant give-and-take with respect to those Bid Protections. The Debtors agreed to the Bid Protections in the Stalking Horse Agreement because they ensure the Debtors will have the benefit of the option to accept the transaction with the Stalking Horse offered through the Stalking Horse Agreement, without sacrificing the potential for interested parties to submit overbids at the Auction.

**B. Approval of the Proposed Sale Is Appropriate and in the Best Interest of the Estate**

**1. The Sale of the Assets Should Be Authorized Pursuant to Bankruptcy Code Section 363 as a Sound Exercise of the Debtor's Business Judgment**

41. 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). A sale of the debtor’s assets should be authorized pursuant to § 363 if a sound business purpose exists for the proposed transaction. *See, e.g., Meyers v. Martin (In re Martin)*, 91 F.3d 389, 395 (3d Cir. 1996) (“Under Section 363, the debtor-in-possession can sell property of the estate . . . if he has an ‘articulated business justification’ . . . .”); *In re Montgomery Ward Holding Corp.*, 242 B.R. 147, 153 (Bankr. D. Del. 1999); *In re Del. & Hudson Ry. Co.*, 124 B.R. 169, 174 (Bankr. D. Del. 1991); *see also In re Schipper*, 933 F.2d 513, 515 (7th Cir. 1991); *Comm. Of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1070 (2d Cir. 1983); *In re Telesphere Commc’ns, Inc.*, 179 B.R. 544, 552 (Bankr. N.D. Ill. 1999).

42. Courts typically consider the following factors in determining whether a proposed sale satisfies this standard: (i) whether a sound business justification exists for the sale, (ii) whether adequate and reasonable notice of the sale was given to interested parties, (iii) whether the sale will produce a fair and reasonable price for the property, and (iv) whether the parties have acted in good faith. *See Del. & Hudson*, 124 B.R. at 176; *In re Phoenix Steel Corp.*, 82 B.R. 334, 335-36 (Bankr. D. Del. 1987).

43. A sound business purpose for the sale of a debtor’s assets outside the ordinary course of business may be found where such a sale is necessary to preserve the value of assets for the estate, creditors, or interest holders. *See, e.g., In re Abbotts Dairies of Pa, Inc.*, 788 F.2d 143 (3d Cir. 1986); *In re Lionel Corp.*, 722 F.2d 1063 (2d Cir. 1983).



44. “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.” *Comm. Of Asbestos-Related Litigants and/or Creditors v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 60 B.R. 612, 616 (Bankr. S.D.N.Y. 1986). There is a presumption that “in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action was in the best interests of the company.” *In re Integrated Res.*, 147 B.R. at 656 (quoting *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985)); *see also In re S.N.A. Nut Co.*, 186 B.R. 98, 102 (Bankr. N.D. Ill. 1995) (“The business judgment rule ‘is a presumption that in making the business decision the directors of a corporation acted on an informed basis, in good faith, and in the honest belief that the action was in the best interests of the company.’”) (citations omitted); *In re Filene’s Basement, LLC*, No. 11-13511 (KJC), 2014 WL 1713416, at \*12 (Bankr. D. Del. Apr. 29, 2014) (“If a valid business justification exists, then a strong presumption follows that the agreement at issue was negotiated in good faith and is in the best interests of the estate.”) (citations omitted). Thus, if a debtor’s actions satisfy the business judgment rule, then the transaction in question should be approved under Bankruptcy Code § 363(b)(1). Indeed, when applying the business judgment standard, courts show great deference to a debtor’s business decisions. *See Pitt v. First Wellington Canyon Assocs. (In re First Wellington Canyon Assocs.)*, 1989 WL 106838, at \*3 (N.D. Ill. 1989) (“Under this test, the debtor’s business judgment . . . must be accorded deference unless shown that the bankrupt’s decision was taken in bad faith or in gross abuse of the bankrupt’s retained discretion.”).

45. The Debtors have a sound business justification for selling the Assets. The value of the Assets will be tested through the Auction conducted pursuant to and according to the Bid Procedures. Ultimately, the Successful Bid, after being subject to a “market check” in the form of

the Auction and accepted by the Debtors in the exercise of their reasonable business judgment, will constitute the highest and best offer for the Assets and at this time the Debtors believe will provide a recovery for its estate greater than any known or practically available alternative. *See, e.g., In re Trans World Airlines, Inc.*, No. 01-00056, 2001 WL 1820326, at \*4 (Bankr. D. Del. 2001) (while a “section 363(b) sale transaction does not require an auction procedure . . . the auction procedure has developed over the years as an effective means for producing an arm’s-length fair value transaction”). Consequently, the fairness and reasonableness of the consideration to be paid by the Successful Bidder ultimately will be demonstrated by adequate “market exposure” and an open and fair auction process—the best means for establishing whether a fair and reasonable price is being paid.

46. Thus, absent a change in circumstances that causes the Debtors to abandon the sale process, the Debtors submit the Successful Bidder’s purchase agreement will constitute the highest or otherwise best offer for the Assets and will provide a greater recovery for the Debtors’ estates than would be provided by any other available alternative. As such, the Debtors’ determination to explore selling the Assets through an Auction process and subsequently to enter into the asset purchase agreement with the Successful Bidder (to the extent the Successful Bidder is someone other than the Stalking Horse Bidder) will be a valid and sound exercise of the Debtors’ business judgment. The Debtors will submit evidence at the Sale Hearing to support these conclusions. Therefore, the Debtors request the Court make a finding the proposed sale of the Assets is a proper exercise of the Debtors’ business judgment and is rightly authorized.

## **2. Adequate and Reasonable Notice of the Sale Will Be Provided**

47. As described above, the Sale Notice will: (i) be served in a manner that provides at least 21-days’ notice of the date, time, and location of the Sale Hearing, (ii) inform parties in interest of the deadlines for objecting to the Sale, and (iii) otherwise include all information

relevant to parties interested in or affected by the Sale. Significantly, the form and manner of the Sale Notice and Post-Auction Notice will have been approved by this Court pursuant to the Bid Procedures Order, after notice and a hearing, before it is served on parties in interest.

**3. The Sale and Purchase Price Will Reflect a Fair-Value Transaction**

48. It is well settled that, where there is a court-approved auction process, a full and fair price is presumed to have been obtained for the assets sold, as the best way to determine value is exposure to the market. *See Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 457 (1999). The Debtors will continue to market the Assets and solicit offers consistent with the Bid Procedures and Stalking Horse Agreement. In this way, the number of Bidders that are eligible to participate in the competitive Auction process will be maximized. On the other hand, if the Debtors enters into the Stalking Horse Agreement and no Auction is held because no Auction is necessary, the Stalking Horse Agreement's purchase price conclusively will have been demonstrated to be fair value.

**4. The Sale of the Assets Should Be Free and Clear of Interests Pursuant to Bankruptcy Code Section 363(f)**

49. The Debtors further submit it is appropriate to sell the Assets free and clear of all liens, claims, encumbrances, and other interests (collectively, the "Interests") other than Permitted Exceptions and Assumed Liabilities (as such terms are defined in the Stalking Horse Agreement), if any, pursuant to § 363(f) of the Bankruptcy Code, with any such Claims and Interests attaching to the net sale proceeds of the Assets, as and to the extent applicable.

50. Bankruptcy Code section 363(f) permits a debtor to sell property free and clear of another party's interest in the property if (i) applicable nonbankruptcy law permits such a free and clear sale, (ii) the holder of the interest consents, (iii) the interest is a lien and the sale price of the property exceeds the value of all liens on the property, (iv) the interest is the subject of a bona fide

dispute, or (v) the holder of the interest could be compelled in a legal or equitable proceeding to accept a monetary satisfaction of its interest. *See* 11 U.S.C. § 363(f).

51. Section 363(f) is drafted in the disjunctive. Thus, satisfaction of any of the requirements enumerated therein will suffice to permit the Debtors' sale of the Assets free and clear of all interests (*i.e.*, all liens, claims, rights, interests, charges, or encumbrances), except with respect to any interests that may be assumed liabilities under the applicable purchase agreement. *See In re Kellstrom Indus., Inc.*, 282 B.R. 787, 793 (Bankr. D. Del. 2002) (“[I]f any of five conditions are met, the debtor has the authority to conduct the sale free and clear of all liens.”); *see also In re Dundee Equity Corp.*, 1992 Bankr. LEXIS 436, at \*12 (Bankr. S.D.N.Y. March 6, 1992) (“[s]ection 363(f) is in the disjunctive, such that the sale free of the interest concerned may occur if any one of the conditions of § 363(f) have been met.”); *Citicorp Homeowners Servs., Inc. v. Eliot (In re Eliot)*, 94 B.R. 343, 345 (E.D. Pa. 1988) (same); *Michigan Employment Sec. Comm’n v. Wolverine Radio Co. (In re Wolverine Radio Co.)*, 930 F.2d 1132, 1147 n.24 (6th Cir. 1991) (stating section 363(f) of the Bankruptcy Code is written in the disjunctive; holding the court may approve the sale “free and clear” provided at least one of the subsections of Bankruptcy Code section 363(f) has been satisfied).

52. The Debtors submit that the Assets may be sold free and clear of liens, claims, encumbrances, and other interests—all in accordance with at least one of the five conditions of section 363(f). Consistent with section 363(f)(2), subject to the terms of the Stalking Horse Agreement, each of the parties holding liens on the Assets, if any, will consent, or absent any objection to this Motion, will be deemed to have consented to, the Sale and transfer of the Assets. Furthermore, any party holding a valid lien against the Assets will be adequately protected by having its liens, if any, attach to the sale proceeds received by the Debtors from the sale of the

Assets to the Successful Bidder, in the same order of priority, with the same validity, force, and effect such creditor had prior to such sale, subject to any order by this Court, and claims and defenses the Debtors and their estates may possess with respect thereto. Accordingly, section 363(f) authorizes the sale and transfer of the Assets free and clear of any such Interests including.

**5. Assumption and Assignment of the Assumed Contracts (if Any) is an Exercise of the Debtors' Sound Business Judgment and is in the Best Interest if the Debtors' Estates; the Debtors Will Cure All Defaults.**

53. Section 365(a) of the Bankruptcy Code provides, in relevant part, that a debtor in possession, "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). It is well established that a debtor's decision to assume or reject an executory contract or unexpired lease pursuant to section 365(a) of the Bankruptcy Code is a matter within the "business judgment" of the debtor. *See In re Gardinier, Inc.*, 831 F.2d 974, 976 n.2 (11th Cir. 1987) ("[S]ince courts review a trustee's decision to assume or reject a contract under a traditional 'business judgment' standard, the scope of review in this area is narrow.").

54. The Debtors, together with the Stalking Horse Bidder or Successful Bidder, as applicable, will weigh the various pros and cons to assuming and assigning any Assumed Contracts (as such term is defined in the Staling Horse Agreement) and believe that assuming and assigning any Assumed Contracts, to the extent contemplated in the Sale process, will not only be an important consideration in operating the Debtors' business after the conclusion of these Chapter 11 Cases, but necessary to consummate the Sale. Indeed, the Stalking Horse Bidder or Successful Bidder, as applicable, will only include contracts on the Assumed Contracts list to the extent it deems such contracts important to such business. The Debtors accordingly submit that the decision to assume such Assumed Contracts satisfies the business judgment standard as articulated by the Eleventh Circuit and the Bankruptcy Court.

55. Furthermore, section 365(b) of the Bankruptcy Code provides that a debtor may assume an unexpired lease of real property under which a default has occurred only if the debtor “cures” the default and provides “adequate assurance of future performance” under the lease. *See* 11 U.S.C. § 365(b)(1).

56. As the Stalking Horse Agreement makes clear, any Cure Amounts (as defined therein) necessary to assume an Assumed Contract shall be paid by the Stalking Horse Bidder in connection with the Debtors’ motion to assume and assign such Assumed Contracts. Accordingly, in light of this guarantee of cure and the Stalking Horse Bidder’s determination that such Assumed Contracts should be assumed by the Debtors and assigned thereto, the requisite cure and adequate assurance demanded by section 365 shall be present as to any Assumed Contract contemplated in connection with the Sale.

**6. The Sale Has Been Proposed in Good Faith and Without Collusion, and the Successful Bidder Will Be a “Good-Faith Purchaser” Entitled to the Full Protection of Bankruptcy Code Section 363(m); and the Sale of the Assets Does Not Violate Bankruptcy Code Section 363(n)**

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

58. Section 363(m) provides, in pertinent part:

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

11 U.S.C. § 363(m).

59. Section 363(m) thus protects the purchaser of assets sold pursuant to section 363 from the risk it will lose its interest in the purchased assets if the order allowing the sale is reversed

on appeal, as long as such purchaser purchased or leased the assets in “good faith.” Although the Bankruptcy Code does not define “good faith,” courts have held a purchaser shows its good faith through the integrity of its conduct during the course of the sale proceedings, finding that, where there is a lack of such integrity, a good-faith finding may not be made. *See, e.g., Abbotts Dairies of Pa.*, 788 F.2d at 147 (“Typically, the misconduct that would destroy a [buyer’s] good faith status at a judicial sale involves fraud, collusion between the [proposed buyer] and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders.”); *In the Matter of Andy Frain Servs., Inc.*, 798 F.2d 1113 (7th Cir. 1986) (same); *In re Sasson Jeans, Inc.*, 90 B.R. 608, 610 (S.D.N.Y. 1988) (same).

60. The Debtors submit the Stalking Horse Bidder, or any other Successful Bidder arising from the Auction, would be a “good faith purchaser” within the meaning of Bankruptcy Code section 363(m), and the resulting purchase agreement would be a good-faith agreement on arm’s-length terms entitled to the protections of section 363(m).<sup>3</sup> The Debtors will submit evidence at the Sale Hearing to support these conclusions.

## **7. Credit Bidding Should Be Authorized Pursuant to Bankruptcy Code Section 363(k)**

61. A secured creditor is allowed to “credit bid” the amount of its claims in a sale of assets in which it has a security interest. 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

---

<sup>3</sup> The Debtors believe a finding of good faith within the meaning of section 363(m) will be appropriate for the Successful Bidder arising from the Auction and the Bid Procedures. Pursuant to the Bid Procedures, any Successful Bidder will have had to present a proposal in accordance with the Bid Procedures. In addition, the Debtors will not choose as the Successful Bidder or the Backup Bidder any entity whose good faith under section 363(m) can reasonably be doubted, and will be prepared to present the Court with sufficient evidence to allow the Court to find that the “good faith” standard of section 363(m) has been satisfied.

purchases such property, such holder may offset such claim against the purchase price of such property.” 11 U.S.C. § 363(k).

62. Thus, pursuant to section 363(k) of the Bankruptcy Code and subject to the Bid Procedures, the Stalking Horse Bidder, to the extent the same is the Debtors’ DIP Lender will be allowed to credit bid its secured claim, the maximum amount of such credit bid to be the amount of the DIP Obligations plus the amount of the Bid Protections.

**D. Relief Pursuant to Bankruptcy Rules 6004(h) and 6006(d) Is Appropriate**

63. 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 the entry of the order, unless the court orders otherwise.” Additionally, Bankruptcy Rule 6006(d) provides an “order authorizing the trustee to assign an executory contract or unexpired lease . . . is stayed until the expiration of 14 days after the entry of the order, unless the court orders otherwise.” The Debtors request the Sale Order be effective immediately upon its entry by providing the 14-day stay under Bankruptcy Rules 6004(h) and 6006(d) be waived.

64. The purpose of Bankruptcy Rules 6004(h) and 6006(d) is to provide sufficient time for objecting party to appeal before an order can be implemented. *See* Advisory Committee Notes to Fed. R. Bankr. P. 6004(h) and 6006(d). Although Bankruptcy Rules 6004(h) and 6006(d) and the Advisory Committee Notes are silent as to when a court should “order otherwise” and eliminate or reduce the 14-day stay periods, the leading treatise on bankruptcy suggests the 14-day stay periods should be eliminated to allow a sale or other transaction to close immediately “where there has been no objection to procedure.” 10 *Collier on Bankruptcy* ¶ 6004.10 (15th rev. ed. 2006). Furthermore, if an objection is filed and overruled, and the objecting party informs the court of its



intent to appeal, the stay may be reduced to the amount of time actually necessary to file such appeal. *Id.*

65. To maximize the value received from the Assets, the Debtors seek to close the Sale as soon as possible after the Sale Hearing. Accordingly, the Debtors hereby request that the Court waive the 14-day stay periods under Bankruptcy Rules 6004(h) and 6006(d).

### **CONSENT TO JURISDICTION**

66. The Debtors consent to the entry of a final judgment or order with respect to this Motion if it is determined the Court would lack Article III jurisdiction to enter such final order or judgment absent consent of the parties.

### **NOTICE**

67. Notice of this Motion will be given to: (a) the Office of the United States Trustee, (b) all parties who have filed and served requests for notice pursuant to Bankruptcy Rule 2002, (c) all parties who have communicated, through Keen-Summit, an interest in potentially submitting a Qualified Bid and/or participating in the Auction, and (d) all other parties entitled to notice hereof.

68. In addition, copies of the Sale Notice, the Bid Procedures, the Bid Procedures Order, and the Post-Auction Notice will be served on the applicable parties no later than three (3) business days after entry of the Bid Procedures Order by this Court. In light of the nature of the relief requested herein, the Debtors submit no other or further notice is required.

**NO PRIOR REQUEST**

69. No previous request for the relief sought herein has been made to this Court or any other court.

WHEREFORE, the Debtors respectfully request this Court: (i) enter the Bid Procedures Order, the form of which is attached as **Exhibit B** hereto, (ii) enter the Sale Order, the form of which is attached as **Exhibit C** hereto, and (iii) grant such other and further relief as is just and proper.

Dated: April 2, 2023

Respectfully submitted,

**PACK LAW**

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

51 Northeast 24th Street, Suite 108

Miami, Florida 33137

Telephone: (305) 916-4500

By: /s/ Jessey J. Krehl

Joseph A. Pack

Email: joe@packlaw.com

Florida Bar No. 117882

Jessey J. Krehl

Email: jessey@packlaw.com

Florida Bar No. 1025848