



Exhibit A (the “**Bidding Procedures Order**”), (i) authorizing and approving the proposed bidding procedures to be used (the “**Bidding Procedures**”) in connection with the sale (the “**Sale**”) of all or substantially all of the Debtor’s assets (the “**Acquired Assets**”); (ii) setting the dates for the Bid Deadline (as defined below), the auction of the Acquired Assets (the “**Auction**”), and the hearing for approving the Sale (the “**Sale Hearing**”), (iv) approving all forms of notice and notice procedures related thereto (the “**Notice Procedures**”), (v) authorizing certain procedures (the “**Assignment Procedures**”) related to the assumption and assignment of certain executory contracts and unexpired leases (the “**Designated Contracts**”), and (vi) granting related relief; and (b) an order (the “**Sale Order**”), (i) authorizing the Sale free and clear of all liens, claims, interests, and encumbrances (except for any permitted liens and encumbrances), (ii) authorizing the assumption and assignment of the Designated Contracts, and (iii) granting related relief. In support of this Motion, the Debtor respectfully represents as follows:

**JURISDICTION AND VENUE**

1. This Court has jurisdiction to consider this Motion pursuant to 28 U.S.C. §§ 157 and 1334, and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware dated as of February 29, 2012. This is a core proceeding pursuant to 28 U.S.C. § 157(b), and the Debtor consents, pursuant to rule 9013-1(f) of the Local Rules of Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the “**Local Rules**”), to the entry of a final order by the Court in connection with this Motion to the extent that it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments in connection herewith consistent with Article III of the United States Constitution. Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

2. The statutory and legal predicates for the relief requested herein are sections 105(a), 363, 365, and 503 of the Bankruptcy Code, as complemented by Bankruptcy Rules 2002, 6004, 6006, 9006, and 9014.

### **GENERAL BACKGROUND**

3. On April 13, 2020 (the “*Petition Date*”), the Debtor commenced this bankruptcy case by filing a voluntary petition for relief under chapter 11 of the Bankruptcy Code (the “*Chapter 11 Case*”). No official committees have been appointed in the Chapter 11 Case and no request has been made for the appointment of a trustee or examiner.

4. The events leading up to the Petition Date and the facts and circumstances supporting the relief requested herein are set forth in the *Declaration of Jeffrey N. Pollack in Support of the Debtor’s Chapter 11 Petition and First Day Pleadings* (the “*First Day Declaration*”) [Docket No. 8].

### **SALE PROCESS**

5. As set forth in greater detail in the First Day Declaration, prior to the Petition Date, the Debtor conducted business as the XFL professional American football league. The XFL provided high-energy professional football, reimagined for the 21st century with many innovative elements designed to bring fans closer to the players and the game they love, during the time of year when they wanted more football. The league debuted on February 8, 2020 to immediate acclaim. Nearly 70,000 fans attended the opening weekend’s games, and more than 12 million viewers tuned in on television. Just weeks after the first XFL games were played, however, the worldwide COVID-19 pandemic forced every major American sports league to suspend, if not cancel, their seasons. On March 20, 2020, the XFL canceled the remainder of its inaugural season, costing the nascent league tens of millions of dollars in revenue. The impossibility of knowing when the pandemic would sufficiently abate and allow the league to

restart only exacerbated the problems posed by the Debtor's abrupt loss of revenue and unabated operating costs. After considering all available strategic options, the Debtor and its professional advisors determined that the best course to preserve and maximize the value of the Debtor's estate is through a chapter 11 sale process. The Acquired Assets are comprised of substantially all of the intellectual and personal property utilized by the Debtor in its operation of the XFL.

6. In connection with the commencement of the Chapter 11 Case, the Debtor entered into a postpetition financing facility (the "**DIP Facility**") with Vincent McMahon (the "**DIP Lender**"), the Debtor's prepetition lender and majority owner, under which the DIP Lender has agreed to provide the Debtor with \$3.5 million in post-petition financing. As described further in the *Motion for Interim and Final Orders, Pursuant to 11 U.S.C. §§ 105, 362, 363, 364 and 507, (A) Authorizing Post-Petition Financing, (B) Authorizing use of Cash Collateral, (C) Scheduling a Final Hearing, and (D) Granting Related Relief* [Docket No. 7] (the "**DIP Motion**"), filed on the Petition Date, and the First Day Declaration, the financing provided under the DIP Facility is critical for the Debtor to implement the sale process and consummate the Sale of the Acquired Assets. The Court will consider the DIP Motion at the hearing scheduled in the Chapter 11 Case for May 13, 2020 at 10:00 a.m. (prevailing Eastern Time).

7. Following arms'-length negotiations, the Debtor and the DIP Lender reached agreement on a case timeline that adequately balances the Debtor's need to execute a robust marketing process for the Acquired Assets with the need of its secured lender to have certainty on how and when the Debtor's core assets will be monetized. To that end, the Debtor requests, pursuant to this Motion, a hearing to be held on regular notice for the approval of the Bidding Procedures. The DIP Facility is conditioned on the Court entering the Bidding Procedures Order by May 15, 2020; and the Court entering the Sale Order by July 15, 2020.

8. The Debtor is in the process of selecting an investment banker to assist with the sale process, and it is expected that its chosen candidate will be retained in the immediate future.

**RELIEF REQUESTED**

9. By this Motion, the Debtor seeks entry of the Bidding Procedures Order:
- a. authorizing and approving the Bidding Procedures in connection with the receipt and analysis of competing bids for the Acquired Assets, substantially in the form attached as Exhibit 1 to the Bidding Procedures Order;
  - b. approving the form and manner of notice of the Auction and Sale and hearing thereon, substantially in the form attached to the Bidding Procedures Order as Exhibit 2 (the “*Notice of Auction and Sale Hearing*”);
  - c. authorizing and approving the Assignment Procedures for the assumption and assignment of the Designated Contracts, as applicable, in connection with the Sale;
  - d. approving the form and manner of notice of the potential assumption and assignment of Designated Contracts, substantially in the form attached to the Bidding Procedures Order as Exhibit 3 (the “*Notice of Assumption and Assignment*”);
  - e. establishing the following dates and deadlines, subject to modification as needed, relating to competitive bidding and approval of the Sale:
    - Stalking Horse Bid Deadline: July 1, 2020 at 11:59 p.m. prevailing Eastern Time, as the deadline by which a Stalking Horse Bid (defined below) must be actually received by the Debtor (the “*Stalking Horse Bid Deadline*”);
    - Bid Deadline: July 6, 2020 at 5:00 p.m. prevailing Eastern Time, as the deadline by which all binding bids must be actually received pursuant to the Bidding Procedures (the “*Bid Deadline*”);<sup>2</sup>

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<sup>2</sup> In the event that no Qualified Bids are received by the Debtor on or prior to the Bid Deadline with respect to the Acquired Assets, the Debtor reserves the right, with the consent of the DIP Lender, to, (i) extend such Bid Deadline, (ii) withdraw the request for relief set forth in this Motion, in whole or in part, or (iii) otherwise seek to modify the relief requested in this Motion.

- Auction: July 8, 2020 at 10:00 a.m. prevailing Eastern Time, as the date and time of the Auction if more than one competing Qualified Bid (as defined in the Bidding Procedures) is received with respect to the Acquired Assets, which will be held at the offices of Young Conaway Stargatt & Taylor, LLP, Rodney Square, 1000 North King Street, Wilmington, Delaware 19801;
- Sale Objection and Cure Cost/Assignment Objection Deadline: July 6, 2020 at 4:00 p.m. prevailing Eastern Time, as the deadline to object to the Sale (the “***Sale Objection Deadline***”) and/or the assumption and assignment of Designated Contracts or cure amounts related thereto, other than objections related to the specific identity of the Successful Bidder with respect to the applicable Designated Contract (the “***Cure Cost/Assignment Objection Deadline***”);
- Post-Auction Objection Deadline: July 10, 2020 at 4:00 p.m. (prevailing Eastern Time), as the deadline to object only to (i) the conduct at the Auction (if held) or (ii) solely with respect to the Non-Debtor Counterparties (defined below) to the Designated Contracts, to the specific identity of and adequate assurance of future performance provided by the Successful Bidder with respect to the applicable Designated Contract; and
- Sale Hearing: July 13, 2020, at 10:00 a.m. prevailing Eastern Time, as the date of the sale hearing (the “***Sale Hearing***”) to be held before the Court, if any Qualified Bids are received by the Debtor.

10. Additionally, by this Motion, the Debtor seeks entry of the Sale Order authorizing: (a) the sale of the Acquired Assets free and clear of all claims, liens, liabilities, rights, interests and encumbrances (except for any permitted liens and encumbrances); (b) the Debtor to assume and assign the Designated Contracts; and (c) any and all related relief requested herein. The Debtor proposes to file a proposed form of the Sale Order no later than 14 days prior to the Sale Hearing, subject to modifications by the Debtor and the Successful Bidder following the Auction.

**OVERVIEW OF BIDDING PROCEDURES, NOTICE PROCEDURES  
AND ASSIGNMENT PROCEDURES**

**A. Bidding Procedures**

11. The Bidding Procedures are intended to permit a fair and efficient competitive sale process, consistent with the timeline of the Chapter 11 Case, and to promptly identify the bid that constitutes the highest or otherwise best offer for the Acquired Assets. The Sale may be for all of the Acquired Assets or for a portion thereof, as potential purchasers direct. The Bidding Procedures establish, among other things:<sup>3</sup>

- the requirements a Potential Bidder must satisfy to be entitled to participate in the bidding process and become a Qualified Bidder;
- the requirements for submitting bids and the method and criteria by which such bids become entitled to be a Qualified Bid;
- the availability of, access to, and conduct during due diligence by Potential Bidders;
- the deadline by which bids must be submitted;
- the procedures for conducting the Auction;
- the criteria by which a Successful Bidder will be selected by the Debtor; and
- various other matters relating to the sale process generally, the Sale Hearing, the return of any Good Faith Deposits, and the designation of Next-Highest Bidders.

12. Importantly, the Bidding Procedures recognize the Debtor's fiduciary obligations to maximize sale value, and, as such, do not impair the Debtor's ability to consider all qualified bid proposals and preserve the Debtor's right to modify the Bidding Procedures as

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<sup>3</sup> To the extent that there is any conflict between this summary and the Bidding Procedures, the latter governs in all respects. Capitalized terms used but not defined in this paragraph shall have the meanings set forth in the Bidding Procedures.

necessary or appropriate to maximize value for the estate in consultation with key parties set forth therein (the “*Consultation Parties*”).

13. The Bidding Procedures contemplate that the Debtor will continue to solicit “stalking horse” bids, which in turn will be memorialized in one or more executed asset purchase agreements by the Stalking Horse Bid Deadline (each, a “*Stalking Horse Bid*,” and any executed agreement governing the Stalking Horse Bid that memorializes the proposed transaction by and between the Stalking Horse Bidder and the Debtor for the Acquired Assets or a subset thereof, a “*Stalking Horse Agreement*”) will be binding on such bidder (a “*Stalking Horse Bidder*”) and will set the floor for all Qualified Bids at the Auction. On or before July 1, 2020, to the extent that the Debtor has secured a Stalking Horse Bid in form, substance, and on terms and conditions reasonably acceptable to the DIP Lender, the Debtor will announce the designation of such Stalking Horse Bidder by filing a notice (a “*Stalking Horse Bid Notice*”) on the Court’s docket identifying the Stalking Horse Bidder and the Acquired Assets that are the subject of the Stalking Horse Bid, and attaching any executed agreement accompanying the Stalking Horse Bid.

14. The Bidding Procedures further contemplate that the Debtor may seek Court approval, at the Bidding Procedures Hearing or on shortened notice thereafter, to provide customary bid protections to a Stalking Horse Bidder, including but not limited to a reasonable break-up fee and/or expense reimbursement.

15. With respect to all Acquired Assets that are subject to an accepted Stalking Horse Bid, all Potential Bidders on the relevant Acquired Assets will be required to submit a bid in the amount of at least the sum of (i) the Stalking Horse Bid, (ii) any break-up fee and/or expense reimbursement, if and to the extent approved by prior order of the Court prior to

the Bid Deadline, and (iii) a reasonable minimum overbid amount to be calculated by the Debtor, in consultation with the Consultation Parties, based on the aggregate price set forth in the Stalking Horse Bid (clauses (i) through (iii), the “*Stalking Horse Overbid*”) in order to meet the criteria of a Qualified Bid for the relevant Acquired Assets.

16. The Bidding Procedures contain the following provisions that are to be highlighted pursuant to Local Rule 6004-1(c), which are more fully described in the Bidding Procedures and the proposed Bidding Procedures Order:

- a. **Credit Bidding.** Pursuant to section 363(k) of the Bankruptcy Code, the DIP Lender has the right (but not the obligation) to credit bid any and all amounts due and owing to him under the Prepetition Secured Note (as defined in the DIP Motion) and the DIP Facility. Any and all bids, other than those submitted by or on behalf of the DIP Lender shall be in cash. In the event that, and at such time as, the DIP Lender submits a credit bid with respect to any of the Acquired Assets, the DIP Lender shall no longer be a Consultation Party with respect to such Acquired Assets.
- b. **Provisions Governing Qualification of Bidders.** To become a “*Potential Bidder*,” each person or entity, other than the DIP Lender, must deliver to the Debtor, on or before the Bid Deadline, an executed confidentiality agreement in form and substance satisfactory to the Debtor. Each Potential Bidder must, on or before the Bid Deadline, satisfy the “*Bid Requirements*” by submitting to the Debtor certain documents, including, among others, a duly executed binding agreement for the Sale of the Acquired Assets and information about the Potential Bidder’s financial condition evidencing the financial wherewithal of the Potential Bidder to consummate the Sale.
- c. **Provisions Governing Qualified Bids.** To participate in the Auction, each Potential Bidder must:
  - i. deliver to the Debtor by the Bid Deadline an irrevocable, good faith and bona fide offer to purchase the Acquired Assets, which Bid is accompanied by a letter: (A) disclosing the identity of the person or entity disclosing the bid; (B) stating with specificity the Acquired Assets such Potential Bidder wishes to bid on and the liabilities and obligations to be assumed by the Potential Bidder; (C) accompanied by a duly executed purchase agreement (the

“*Purchase Agreement*”) and a redline marked to reflect any proposed amendments and modifications to the Stalking Horse Agreement or Form APA, as applicable, and the applicable schedules and exhibits;<sup>4</sup> (D) specifying Bid terms that the Potential Bidder believes to be substantially the same or better than the terms of the Stalking Horse Agreement, if applicable, (it being understood that the ultimate determination of whether Bid terms are the same or better shall be made by the Debtor in the exercise of its reasonable business judgment after consultation with the Consultation Parties); (E) agreeing that the Potential Bidder’s offer is binding and irrevocable until the later of (x) the Closing Date, or (y) twenty (20) 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); (F) providing for a Closing Date that is consistent with the schedule contemplated herein; (G) offering to pay a price equal to or greater than (x) the Stalking Horse Overbid or, if applicable, (y) an amount that the Debtor determines, after consultation with the Consultation Parties, constitutes a fair and adequate price, the acceptance of which would be in the best interests of the estate; (H) providing that such Bid is not subject to any due diligence or financing contingency; and (I) providing that the Potential Bidder agrees to serve as a backup bidder (the “*Next-Highest Bidder*”) if the Potential Bidder’s Qualified Bid is the next highest or otherwise best bid after the Successful Bid (the “*Next-Highest Bid*”) with respect to the relevant Acquired Assets;

- ii. provide adequate assurance of future performance information (the “*Adequate Assurance Information*”), including (A) information about the Potential Bidder’s financial condition, such as federal tax returns for two years, a current financial statement, or bank account statements, (B) information demonstrating (in the Debtor’s reasonable business judgment) that the Potential Bidder has the financial capacity to consummate the proposed Sale, (C) evidence that the Potential Bidder has obtained authorization or approval from its board of directors (or comparable governing body) with respect to the submission

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<sup>4</sup> In the event a bid is submitted as a proposed Stalking Horse Bid, such bid must include a draft Stalking Horse Agreement and a redline highlighting any changes made to the form asset purchase agreement (the “*Form APA*”). The Debtor will make a Form APA available for Potential Bidders upon approval of the Bidding Procedures.

of its Bid, (D) 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 (E) such additional information regarding the Potential Bidder as the Potential Bidder may elect to include. By submitting a bid, Potential Bidders agree that the Debtor may disseminate their Adequate Assurance Information to contract counterparties, as applicable, in the event that the Debtor determines such bid to be a Qualified Bid; and

- iii. deliver (A) a Good Faith Deposit in the form of a certified check or wire transfer, payable to the order of the Debtor, in an amount equal to ten percent (10%) of the bid, which funds will be deposited into an escrow account to be identified and established by the Debtor; and (B) written evidence, documented to the Debtor's satisfaction, that demonstrates the Potential Bidder has available cash, a commitment for financing if selected as the Successful Bidders (as defined below) with respect to the Acquired Assets, and such other evidence of ability to consummate the transaction as the Debtor may request, including proof that such funding commitments or other financing are not subject to any internal approvals, syndication requirements, diligence or credit committee approvals (provided that such commitments may have covenants and conditions acceptable to the Debtor), provided, however, that the DIP Lender shall not be required to submit a Good Faith Deposit or otherwise provide such information as required in this paragraph in connection with the submission of a Bid or the exercise of its credit bid rights.<sup>5</sup>

- d. **Provisions Providing Bid Protections to any Stalking Horse Bidder.** Currently none; however, the Debtor expressly reserves the right, in consultation with the Consultation Parties, to seek Court authority to request customary bid protections for a Stalking Horse Bidder on shortened notice.

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<sup>5</sup> The Successful Bidder and Next-Highest Bidder (as such terms are defined Bidding Procedures) shall be required to supplement their Good Faith Deposits, if necessary, within one (1) business day of the close of the Auction so that such Good Faith Deposits shall be equal to an amount that is ten percent (10%) of the Successful Bid or Next-Highest Bid, as applicable. The Debtors reserve the right to increase or decrease the Good Faith Deposit for one or more Qualified Bidders (as defined Bidding Procedures) in their sole discretion after consulting with the Consultation Parties.

- e. **Modification of Bid and Auction Procedures.** The Debtor may, in consultation with the Consultation Parties and with the consent of the DIP Lender, which consent shall not be unreasonably withheld, announce at the Auction additional procedural rules (e.g., the amount of time to make Subsequent Bids, the amount of the Incremental Overbid, or the requirement that parties submit “best and final” Bids) for conducting the Auction or otherwise modify the Bidding Procedures; provided that such rules (1) are not materially inconsistent with the Bidding Procedures, the Bankruptcy Code, or any order of the Court, and (2) disclosed to each Qualified Bidder at the Auction. The Debtor and its estate, in consultation with the Consultation Parties and with the consent of the DIP Lender, which consent shall not be unreasonably withheld, reserves the right to modify the Bidding Procedures at or prior to the Auction, including, without limitation, to extend the deadlines set forth in the Bidding Procedures, modify bidding increments, waive terms and conditions set forth herein with respect to any or all Potential Bidders (including, without limitation, the Bid Requirements), impose additional terms and conditions with respect to any or all potential bidders, adjourn, postpone or cancel the Auction at or prior to the Auction, and adjourn the Sale Hearing.
- f. **Closing with Alternative Backup Bidders.** At the Auction, the Debtor may, in consultation with the Consultation Parties, designate the Next-Highest Bid (and the corresponding Next-Highest Bidder) in the event that a Successful Bidder does not close the Sale. In the event that a Successful Bidder fails to close prior to the date designated in writing by the Debtor (the “*Outside Closing Date*”) (or such date as may be extended by the Debtor), the Debtor, upon written notice to the Next-Highest Bidder, may designate the applicable Next-Highest Bid as the Successful Bid for the Acquired Assets, the Next-Highest Bidder will be deemed to be a Successful Bidder for such Acquired Assets, and the Debtor will be authorized, but not directed, to close with the Next-Highest Bidder subject to the terms of the Next-Highest Bid without the need for further order of the Court and without the need for further notice to any interested parties other than the Consultation Parties.
- g. **Provisions Governing the Auction.** If more than one Qualified Bid is submitted by the Bid Deadline with regard to the Acquired Assets, the Debtor will conduct an auction at the offices of proposed counsel to the Debtor, Young Conaway Stargatt & Taylor, LLP, Rodney Square, 1000 North King Street, Wilmington, Delaware 19801 at 10:00 a.m. (prevailing Eastern Time) on July 8, 2020 (or such later time or such other place as the Debtor shall designate and notify to all Qualified Bidders who

have submitted Qualified Bids) for consideration of the Qualified Bids, each as may be increased at such Auction. For the avoidance of doubt, the Debtor reserves the right, upon consultation with the Consultation Parties, to conduct the Auction telephonically.

**B. Notice Procedures for the Sale, Auction, and Sale Hearing**

17. The Debtor requests approval of the Notice of Auction and Sale Hearing, substantially in the form attached to the Bidding Procedures Order as Exhibit 2. Within two (2) business days of entry of the Bidding Procedures Order, the Debtor will serve the Notice of Auction and Sale Hearing by first-class mail upon: (a) Richard Schepacarter, Esq., Office of the United States Trustee, 844 N. King Street, Room 2207, Lockbox 35, Wilmington DE, 19801; (b) the holders of the twenty-five (25) largest unsecured claims against the Debtor or counsel to the Committee, if one has been appointed; (c) counsel to the DIP Lender, K&L Gates, LLP, 599 Lexington Avenue, New York, NY 10022, Attn: John A. Bicks; (d) all persons known or reasonably believed to have asserted an interest in any of the Acquired Assets; (e) the Attorneys General in the State(s) where the Acquired Assets are located; (f) all state and local taxing authorities in the State(s) where the Acquired Assets are located; (g) the Internal Revenue Service; (h) all parties that have asserted liens against the Acquired Assets, as applicable; and (i) all parties that have filed a notice of appearance and request for service of papers pursuant to Bankruptcy Rule 2002.

18. The Debtor shall also post the Notice of Auction and Sale Hearing and the Bidding Procedures Order on the website of the Debtor's claims and noticing agent, Donlin, Recano & Company, Inc.

19. Not later than five (5) business days following the entry of the Bidding Procedures Order, the Debtor shall cause the Notice of Auction and Sale Hearing to be published once in the national edition of *The New York Times*.

20. As soon as reasonably practicable following conclusion of the Auction, the Debtor proposes to file a notice on the Court's docket identifying the Successful Bidder(s) for the Acquired Assets and any applicable Next-Highest Bidder(s).

**C. Assignment Procedures**

21. To facilitate the Sale, the Debtor seeks authority to assume and assign to the Successful Bidder certain executory contracts and unexpired leases, as selected by such Successful Bidder in its Successful Bid, in accordance with the Assignment Procedures. The proposed Assignment Procedures are as follows:

- a. On or before May 27, 2020, the Debtor shall file with the Court and serve on each non-debtor counterparty (each a "***Non-Debtor Counterparty***") to each of the Designated Contracts. In the event that the Debtor identifies any Non-Debtor Counterparties which were not served with the Notice of Assumption and Assignment, the Debtor may subsequently serve such Non-Debtor Counterparty with a Notice of Assumption and Assignment, and the following procedures will nevertheless apply to such Non-Debtor Counterparty; provided, however, that the Cure Cost/Assignment Objection Deadline with respect to such Non-Debtor Counterparty shall be 4:00 p.m. (prevailing Eastern Time) on the date that is the earlier of July 6, 2020 or fourteen (14) days following service of the Notice of Assumption and Assignment.
- b. The Notice of Assumption and Assignment served on each Non-Debtor Counterparty shall: (i) identify each Designated Contract; (ii) list the proposed calculation of the cure amounts that the Debtor believes must be paid to cure all defaults outstanding under the Designated Contract as of such date (the "***Cure Costs***"); (iii) include a statement that assumption and assignment of such Designated Contract is not required or guaranteed; and (iv) inform such Non-Debtor Counterparty of the requirement to file any Cure Cost/Assignment Objections by the Cure Cost/Assignment Objection Deadline. Service of a Notice of Assumption and Assignment does not constitute an admission that a particular Designated Contract is an executory contract or unexpired lease of property, or confirm that the Debtor are required to assume and/or assign such Designated Contract.
- c. Objections (a "***Cure Cost/Assignment Objection***"), if any, to (i) the scheduled Cure Costs, and/or (ii) the potential assumption,

assignment and/or transfer of such Designated Contract (including the transfer of any related rights or benefits thereunder), other than objections that relate specifically to the identity of the Successful Bidder, must (x) be in writing, (y) state with specificity the nature of such objection, including the amount of Cure Costs in dispute, and (z) be filed with the Court and properly served on the Notice Parties (as defined in the Bidding Procedures Order) so as to be received no later than 4:00 p.m. (prevailing Eastern Time) on September July 6, 2020 (the “**Cure Cost/Assignment Objection Deadline**”), subject to the proviso in subparagraph (a) above.

- d. Objections (a “**Post-Auction Objection**”) of any Non-Debtor Counterparty related solely to the identity of and adequate assurance of future performance provided by the Successful Bidder must (x) be in writing, (y) state with specificity the nature of such objection, and (z) be filed with the Court and properly served on the Notice Parties so as to be received no later than 4:00 p.m. (prevailing Eastern Time) on July 10, 2020 (the “**Post-Auction Objection Deadline**”), subject to the proviso in subparagraph (a) above; provided, however, that in the event that the Debtor obtains a Stalking Horse Bid and provides notice of the identity of the Stalking Horse Bidder in the Potential Assumption and Assignment Notice, any objection of a Non-Debtor Counterparty related to the Stalking Horse Bid (including with respect to the identity of and adequate assurance of future performance provided by the Stalking Horse Bidder) must be filed as a Cure Cost/Assignment Objection by the Cure Cost/Assignment Objection Deadline.
- e. Any Non-Debtor Counterparty to a Designated Contract who fails to timely file and properly serve a Cure Cost/Assignment Objection or Post-Auction Objection as provided herein will (i) be forever barred from objecting to the Cure Costs and from asserting any additional cure or other amounts with respect to such Designated Contract in the event it is assumed and/or assigned by the Debtor and the Debtor shall be entitled to rely solely upon the Cure Costs, and (ii) be deemed to have consented to the assumption, assignment and/or transfer of such Designated Contract (including the transfer of any related rights and benefits thereunder) to the relevant Successful Bidders and shall be forever barred and estopped from asserting or claiming against the Debtor or such Successful Bidder that any additional amounts are due or defaults exist, or conditions to assumption, assignment, and/or transfer must be satisfied under such Designated Contract, or that any related right or benefit under such Designated Contract cannot or will not be available to the relevant Successful Bidder.

- f. If a Non-Debtor Counterparty files a Cure Cost/Assignment Objection satisfying the requirements of these Assignment Procedures, the Debtor and the Non-Debtor Counterparty shall meet and confer in good faith to attempt to resolve any such objection without Court intervention. If the applicable parties determine that the objection cannot be resolved without judicial intervention in a timely manner, the Court shall make all necessary determinations relating to such Cure Cost/Assignment Objection at a hearing scheduled pursuant to the following paragraph.
- g. Consideration of unresolved Cure Cost/Assignment Objections and Post-Auction Objections relating to all Designated Contracts, if any, will be held at the Sale Hearing, provided, however, that (i) any Designated Contract that is the subject of a Cure Cost/Assignment Objection with respect solely to the amount of the Cure Cost may be assumed and assigned prior to resolution of such objection and (ii) the Debtor, in consultation with the Consultation Parties, may adjourn a Cure Cost/Assignment Objection in its discretion, in consultation with the Consultation Parties.
- h. A timely filed and properly served Cure Cost/Assignment Objection or Post-Auction Objection will reserve the filing Non-Debtor Counterparty's rights relating to the Designated Contract, but will not be deemed to constitute an objection to the relief generally requested in the Motion with respect to the approval of the Sale.
- i. The Debtor's decision to assume and assign the Designated Contracts to the relevant Successful Bidder is subject to the Court's approval and the closing of the Sale. Accordingly, absent the Court's approval and the closing of the Sale, the Designated Contracts shall not be deemed assumed or assumed and assigned, and shall in all respects be subject to further administration by the Debtor and its estate under the Bankruptcy Code in connection with the Chapter 11 Case.

**BASIS FOR RELIEF REQUESTED**

**I. THE BIDDING PROCEDURES ARE APPROPRIATE AND IN THE BEST INTERESTS OF THE DEBTORS, THEIR ESTATES, AND CREDITORS**

**A. The Bidding Procedures are Reasonable, Appropriate and Will Maximize Value**

22. The paramount goal in any proposed sale of property of the estate is to maximize the proceeds received by the estate. *See In re Mushroom Transp. Co.*, 382 F.3d 325, 339 (3d Cir. 2004) (noting debtor in possession “had a fiduciary duty to protect and maximize the estate’s assets”); *Official Comm. of Unsecured Creditors of Cybergenics, Corp v. Chinery*, 330 F.3d 548, 573 (3d Cir. 2003) (same); *Four B. Corp. v. Food Barn Stores, Inc. (In re Barn Stores, Inc.)*, 107 F.3d 558, 564–65 (8th Cir. 1997) (observing in bankruptcy sales, “a primary objective of the Code [is] to enhance the value of the estate at hand”).

23. To that end, courts uniformly recognize that procedures 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 transactions. *See In re O’Brien Envtl. Energy, Inc.*, 181 F.3d 527, 537 (3d Cir. 1999); *see also Official Comm. of Subordinated Bondholders v. Integrated Res. Inc. (In re Integrated Res. Inc.)*, 147 B.R. 650, 659 (S.D.N.Y. 1992) (stating Bidding Procedures “encourage bidding and . . . maximize the value of the debtor’s assets”).

24. The Debtor believes that the Bidding Procedures will provide an orderly and uniform mechanism by interested buyers and investors can submit offers for the Acquired Assets and will ensure a competitive and fair bidding process. The Debtor also believes that the Bidding Procedures will promote active bidding from seriously interested parties and will confirm the best and highest offer reasonably available for such assets. The Bidding Procedures will allow the Debtor to conduct the Auction, subject to the terms of the Bidding Procedures, in a

controlled, fair and open manner that will encourage participation by financially capable bidders that demonstrate the ability to close a transaction. The Debtor believes that the Bidding Procedures will encourage bidding, are consistent with other procedures routinely approved by courts in this and other districts, and are appropriate under the relevant standards governing auction proceedings and bidding incentives in bankruptcy proceedings.

**B. The Qualified Bid Requirements are Reasonable and Appropriate**

25. The Debtor is seeking authority to sell the Acquired Assets without, at this time, the comfort of a stalking horse bid to set the floor for bidding. The Debtor therefore needs the flexibility to disregard bids that—in the Debtor’s business judgment—would result in an unreasonably low return to creditors and other stakeholders. Accordingly, in the event that the Debtor determines, after consultation with its advisors and the Consultation Parties, that any particular bids are not for a fair and adequate price or the acceptance of such bids would not be in the best interests of the estate or the Auction, such bids shall not be “Qualified Bids” entitling the parties making any such bids to participate at the Auction. As provided in the Bidding Procedures, the Debtor and its estate, in consultation with the Consultation Parties and with the consent of the DIP Lender, which consent shall not be unreasonably withheld, reserve the right to modify the Bidding Procedures at or prior to the Auction, including, without limitation, to extend the deadlines set forth in the Bidding Procedures, modify bidding increments, waive terms and conditions set forth herein with respect to any or all Potential Bidders (including, without limitation, the Bid Requirements), impose additional terms and conditions with respect to any or all potential bidders, adjourn, postpone or cancel the Auction at or prior to the Auction, and adjourn the Sale Hearing.

26. In the event that the Debtor obtains more than one competing Qualified Bid with respect to the Acquired Assets and the Auction is held, bidding shall commence at the

amount of the highest or otherwise best bid received for such assets, which determination will be communicated to Qualified Bidders prior to the commencement of the Auction, and the relevant Qualified Bidders may submit successive bids in higher increments (in amounts to be determined at or prior to the Auction).

**C. The Flexibility to Obtain Stalking Horse Bids is Appropriate and Warranted**

27. As discussed above, the Bidding Procedures contemplate that the Debtor will continue to solicit potential bidders to serve as Stalking Horse Bidders and deliver Stalking Horse Bids prior to the Stalking Horse Bid Deadline. Accordingly, in the event a Stalking Horse Bid is obtained prior to the Stalking Horse Bid Deadline, all bidders will be required to submit a bid in the amount of at least the Stalking Horse Overbid in order to meet the criteria of a Qualified Bid.

28. Further, the Bidding Procedures contemplate that the Debtor may seek Court approval, at the Bidding Procedures Hearing or on shortened notice thereafter, to provide customary bid protections to any Stalking Horse Bidder, including but not limited to a break-fee and/or expense reimbursement.

29. The Debtor submits that (i) the flexibility to designate a Stalking Horse Bidder and (ii) the Debtor's reservation of rights to seek bid protections for any such Stalking Horse Bidders are necessary and appropriate given the significant benefits that a Stalking Horse Bid may provide to the Debtor. A Stalking Horse Bid would provide a "floor" price that is desirable for the Debtor, thereby increasing the likelihood that the ultimate price obtained for the Acquired Assets will represent their true worth.

**D. The Notice Procedures for the Sale, Bidding Procedures, Auction, and Sale Hearing are Reasonable and Appropriate**

30. Pursuant to Bankruptcy Rules 2002(a) and (c), the Debtor is required to notify creditors of the Sale, including a disclosure of the time and place of any auction, the terms and conditions of the sale, and the deadline for filing any objections. The Debtor submits that the notice procedures described above fully comply with Bankruptcy Rule 2002 and are reasonably calculated to provide timely and adequate notice of the Sale, Bidding Procedures, Auction, and Sale Hearing to the Debtor's creditors and all other parties in interest that are entitled to notice, as well as those parties that have expressed a bona fide interest in acquiring the Acquired Assets.

31. Accordingly, the Debtor respectfully requests that the Court approve the notice procedures set forth in this Motion, including the form and manner of service and publication of the Notice of Auction and Sale Hearing, and that no other or further notice of the Sale, Bidding Procedures, Auction, or Sale Hearing is necessary or required.

**E. The Assignment Procedures are Reasonable and Appropriate**

32. As part of this Motion, the Debtor also seeks authority under sections 105(a) and 365 of the Bankruptcy Code to assume and assign the Designated Contracts to the Successful Bidder. The Bidding Procedures Order specifies the process by which the Debtor will serve the Notice of Assumption and Assignment and the procedures and deadlines for Non-Debtor Counterparties to file Cure Cost/Assignment Objections and/or Post-Auction Objections.

33. The Assignment Procedures ensure that each Non-Debtor Counterparty will have sufficient notice of such potential assumption and assignment, and an opportunity to contest the Cure Amount, if any, for its Designated Contract, as well as the ability of the relevant

Successful Bidder to provide adequate assurance of future performance with respect to such Designated Contract.

34. Accordingly, the Debtor submits that the Assignment Procedures are fair and reasonable, and requests that the Court approve such procedures.

## **II. APPROVAL OF THE SALE IS APPROPRIATE AND IN THE BEST INTERESTS OF THE DEBTOR'S ESTATE**

### **A. The Sale is Authorized by Section 363 of the Bankruptcy Code as a Sound Exercise of the Debtor's Business Judgment.**

35. Section 363 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). Although section 363 does not specify a standard for determining when it is appropriate for a court to authorize the use, sale, or lease of property of the estate, courts routinely authorize sales of a debtor's assets if such sale is based upon the sound business judgment of the debtor. *See Meyers v. Martin (In re Martin)*, 91 F.3d 389, 395 (3d Cir. 1996); *In re Montgomery Ward Holding Corp.*, 242 B.R. 147, 153 (D. Del. 1999); *In re Delaware & Hudson Ry. Co.*, 124 B.R. 169, 175–76 (D. Del. 1991); *In re Trans World Airlines, Inc.*, No. 01-00056 (PJW), 2001 WL 1820326, at \*10 (Bankr. D. Del. Apr. 2, 2001).

36. Courts typically consider the following factors in determining whether a proposed sale satisfies this standard: (a) whether a sound business justification exists for the sale; (b) whether adequate and reasonable notice of the sale was given to interested parties; (c) whether the sale will produce a fair and reasonable price for the property; and (d) whether the parties have acted in good faith. *See In re Decora Indus., Inc.*, No. 00-4459 (JJF), 2002 WL 32332749, at \*2 (D. Del. May 20, 2002) (citing *In re Delaware & Hudson Ry. Co.*, 124 B.R. at 176); *In re United Healthcare Sys. Inc.*, No. 97-1159, 1997 WL 176574, at \*4 & n. 2 (D.N.J. Mar. 26, 1997).

37. 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, its 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); *see also In re Food Barn Stores, Inc.*, 107 F.3d 558, 564–65 (8th Cir. 1997) (stating that the paramount goal in any proposed sale of property of the estate is to maximize value).

38. Furthermore, “[w]here 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., Inc.*, 147 B.R. at 656 (quoting *Smith v. Van Gorkcom*, 488 A.2d 858, 872 (Del. 1985)). Thus, if a debtor’s actions satisfy the business judgment rule, then the transaction in question should be approved under section 363(b)(1) of the Bankruptcy Code. 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.)*, No. 89 C 593, 1989 WL 106838, at \*3 (N.D. Ill. Sept. 8, 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.”).

39. Pursuant to the Bidding Procedures, the Debtor, in consultation with its advisors and the Consultation Parties, will reserve the right to disregard and disqualify any bid

that does not contain a fair and adequate price or the acceptance of which would not be in the best interests of the estate or the Auction. In addition, the value of the Acquired Assets will be tested through the Auction and Sale process provided for in the Bidding Procedures. Consequently, the fairness and reasonableness of the consideration to be paid by the Successful Bidder for the Acquired Assets ultimately will be demonstrated by adequate “market exposure” and an open and fair auction and sale process—the best means for establishing whether a fair and reasonable price is being paid. The Successful Bid will constitute the highest or best offer for the Acquired Assets, and may provide a greater recovery for the Debtor’s estate than is likely to be provided by any other available alternative. As a result, the Debtor’s determination to sell the Acquired Assets through an auction and sale process, as provided for in the Bidding Procedures, is a valid and sound exercise of the Debtor’s business judgment. Accordingly, the Debtor respectfully requests that the Sale be approved.

**B. The Sale, Free and Clear of All Encumbrances, is Authorized by Section 363(f) of the Bankruptcy Code.**

40. In the interest of attracting the highest and best bids for the Acquired Assets, the Debtor submits that the Sale should be free and clear of all encumbrances in accordance with section 363(f) of the Bankruptcy Code, with any such encumbrances attaching to the net proceeds of the Sale.

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

- (a) applicable non-bankruptcy law permits sale of such property free and clear of such interests;
- (b) such entity consents;
- (c) such interest is a lien and the price at which such property is to be sold is greater than the value of all liens on such property;

- (d) such interest is in bona fide dispute; or
- (e) 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).

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

43. Because section 363(f) of the Bankruptcy Code is drafted in the disjunctive, satisfaction of any one of its five requirements will suffice to permit the sale of the Acquired Assets “free and clear” of all Encumbrances. *See In re Kellstrom Indus., Inc.*, 282 B.R. 787, 793 (Bankr. D. Del. 2002) (“Section 363(f) is written in the disjunctive, not the conjunctive, and if any of the five conditions are met, the debtor has the authority to conduct the sale free and clear of all liens.”); *see also Citicorp Homeowners Servs., Inc. v. Elliot (In re Elliot)*, 94 B.R. 343, 345 (E.D. Pa. 1988) (same); *In re Dundee Equity Corp.*, No. 89-10233 (FGC), 1992 WL 53743, at \*4 (Bankr. S.D.N.Y. Mar. 6, 1992) (same).

44. The Debtor submits that one or more of the conditions set forth in section 363(f) of the Bankruptcy Code will be satisfied with respect to the Sale. In particular, the Debtor believes that at least section 363(f)(2) will be satisfied because each of the parties holding liens on the Acquired Assets will consent, or absent any objection to the Sale, will be deemed to have consented to, the Sale. Any lienholder also will be adequately protected by having its liens, if any, attach to the proceeds of the Sale, in the same order of priority, with the same validity, force and effect that such creditor had prior to such sale, subject to any claims and defenses that the Debtor and its estate may possess with respect thereto. For the avoidance of doubt, nothing in this Motion, the Bidding Procedures, or the Bidding Procedures Order waives or modifies any

parties' right to object to any sale proposed in connection herewith, with all such rights being expressly preserved.

45. Accordingly, the Debtor respectfully requests that the Acquired Assets be sold free and clear of any Encumbrances pursuant to section 363(f) of the Bankruptcy Code.

**C. The Successful Bidder(s) Will be Entitled to the Full Protection of Section 363(m) of the Bankruptcy Code, and the Sale Does Not Violate Section 363(n) of the Bankruptcy Code**

46. Section 363(m) of the Bankruptcy Code protects the sale of a debtor's property to a good faith purchaser. Specifically, section 363(m) 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).

47. While the Bankruptcy Code does not define "good faith," the Third Circuit in *In re Abbotts Dairies of Pennsylvania, Inc.* held that the misconduct that would destroy a purchaser's good faith status at a judicial sale typically involves "fraud, collusion between the purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders." 788 F.2d at 147 (citation omitted); *see also Kabro Assocs. of West Islip, L.L.C. v. Colony Hill Assocs. (In re Colony Hill Assocs.)*, 111 F.3d 269, 276 (2d Cir. 1997) ("Typically, the misconduct that would destroy a [buyer]'s good faith status at a judicial sale involves fraud, collusion between the [buyer] and other bidders or the trustee or an attempt to take grossly unfair advantage of other bidders.").

48. The Debtor submits, and the testimony presented at the Sale Hearing will demonstrate, that the terms and conditions of the Sale will have been negotiated by the Debtor

and the Successful Bidder at arm's-length and in good faith, with the assistance of the Debtor's professional advisors, and that the parties did not engage in any conduct that would cause or permit the Sale to be avoided under section 363(n) of the Bankruptcy Code.

49. Accordingly, the Debtor requests that the Court make a finding at the Sale Hearing that the Successful Bidder purchased the Acquired Assets in good faith and that such purchase will be entitled to the full protections of section 363(m) of the Bankruptcy Code.

**III. ASSUMPTION AND ASSIGNMENT OF THE DESIGNATED CONTRACTS IS AUTHORIZED BY SECTION 365 OF THE BANKRUPTCY CODE**

**A. The Debtor' Sound Business Judgment Supports the Assumption and Assignment of the Designated Contracts**

50. Sections 365(a) and (b) of the Bankruptcy Code authorize a debtor in possession 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 debtor, "subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor." 11 U.S.C. § 365(a). Section 365(b)(1) of the Bankruptcy Code, in turn, codifies the requirements for assuming an unexpired lease or executory contract of a debtor, providing that:

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

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

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

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

11 U.S.C. § 365(b)(1).

51. The standard applied by the Third Circuit in determining whether an executory contract or unexpired lease should be assumed is the “business judgment” test, which requires a debtor to determine that the requested assumption or rejection would be beneficial to its estate. *See Sharon Steel Corp. v. Nat’l Fuel Gas Distrib. Corp.*, 872 F.2d 36, 40 (3d Cir. 1989); *see also NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 523 (1984) (describing business judgment test as “traditional”) (superseded in part by 11 U.S.C. § 1113).

52. Courts generally will not second-guess a debtor’s business judgment concerning the assumption of an executory contract. *See In re Decora Indus., Inc.*, No. 00-4459 (JJF), 2002 WL 32332749, at \*8; *Official Comm. for Unsecured Creditors v. Aust (In re Network Access Sols., Corp.)*, 330 B.R. 67, 75 (Bankr. D. Del. 2005) (“The standard for approving the assumption of an executory contract is the business judgment rule”); *In re Exide Techs.*, 340 B.R. 222, 239 (Bankr. D. Del. 2006) (“The propriety of a decision to reject an executory contract is governed by the business judgment standard”).

53. To determine if the business judgment standard is met, the court is “required to examine whether a reasonable business person would make a similar decision under similar circumstances.” *In re AbitibiBowater Inc.*, 418 B.R. 815, 831 (Bankr. D. Del. 2009). “This is not a difficult standard to satisfy and requires only a showing that rejection will benefit the estate.” *Id.* (citations omitted). Specifically, a court should find that the assumption or rejection is elected on “an informed basis, in good faith, and with the honest belief that the assumption . . . [is] in the best interests of [the debtor] and the estate.” *Network Access Sols.*, 330 B.R. at 75. Under this standard, a court should approve a debtor’s business decision unless that decision is the product of bad faith or a gross abuse of discretion. *See In re Federal Mogul Global, Inc.*, 293 B.R. 124, 126 (D. Del. 2003).

54. In the present case, the Debtor's assumption and assignment of the Designated Contracts to the relevant Successful Bidder will meet the business judgment standard and satisfy the requirements of section 365 of the Bankruptcy Code. The assumption and assignment will likely be necessary for the Successful Bidder to conduct business going forward, and since it is anticipated that no Successful Bidder would take the Acquired Assets without certain Designated Contracts, the assumption and assignment of such agreements is essential to securing the highest or best offer for the Acquired Assets.

55. Consequently, the Debtor submits that the Assignment Procedures are fair and reasonable, and respectfully request the Court to approve such procedures and authorize the Debtor to assume and assign the Designated Contracts in the manner provided for herein.

**B. Adequate Assurance of Future Performance Will be Demonstrated with Respect to the Designated Contracts**

56. A debtor in possession may assign an executory contract or an unexpired lease of the debtor if it assumes the agreement in accordance with section 365(a) of the Bankruptcy Code, and provides adequate assurance of future performance by the assignee, whether or not there has been a default under the agreement. *See* 11 U.S.C. § 365(c)(2).

57. The meaning of "adequate assurance of future performance" depends on the facts and circumstances of each case, but should be given "practical, pragmatic construction." *EBG Midtown South Corp. v. McLaren/Hart Envtl. Eng'g Corp. (In re Sanshoe Worldwide Corp.)*, 139 B.R. 585, 592 (S.D.N.Y. 1992) (citations omitted), *aff'd*, 993 F.2d 300 (2d Cir. 1993); *In re Prime Motor Inns Inc.*, 166 B.R. 993, 997 (Bankr. S.D. Fla. 1994); *In re Rachels Indus. Inc.*, 109 B.R. 797, 803 (Bankr. W.D. Tenn. 1990); *Carlisle Homes, Inc. v. Azzari (In re Carlisle Homes, Inc.)*, 103 B.R. 524, 538 (Bankr. D.N.J. 1988).

58. Significantly, among other things, adequate assurance of future performance may be provided by demonstrating the assignee's financial health and experience in managing the type of enterprise or property assigned. *See, e.g., In re Bygaph, Inc.*, 56 B.R. 596, 605-06 (Bankr. S.D.N.Y. 1986) (stating that adequate assurance of future performance is present when the prospective assignee of a lease from the debtor has financial resources and has expressed willingness to devote sufficient funding to the business in order to give it a strong likelihood of succeeding).

59. Pursuant to the Bidding Procedures, the Potential Bidders are required to provide to the Debtor such financial and other information providing adequate assurance of future performance under any executory contracts and unexpired leases to be assumed pursuant to section 365 of the Bankruptcy Code in connection with the Sale, in a form requested by the Debtor, in consultation with the Consultation Parties, to allow the Debtor to serve, within one (1) business day after such receipt, such information on any Non-Debtor Counterparty that has requested, in writing, such information. Moreover, under the Assignment Procedures, the Non-Debtor Counterparties will have the opportunity to object to adequate assurance of future performance by the relevant Successful Bidder.

60. Accordingly, the Debtor submits that the assumption and assignment of the Designated Contracts as set forth herein should be approved pursuant to section 365 of the Bankruptcy Code.

**REQUEST FOR WAIVER OF BANKRUPTCY RULES 6004(h) AND 6006(d)**

61. Bankruptcy Rule 6004(h) provides that “[a]n order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of 14 days after entry of the order, unless the court orders otherwise.” Fed. R. Bankr. P. 6004(h). Similarly, Bankruptcy Rule 6006(d) provides that “[a]n order authorizing the [debtor] to assign an

executory contract or unexpired . . . is stayed until the expiration of 14 days after entry of the order, unless the court orders otherwise.” Fed. R. Bankr. P. 6006(d).

62. The Debtor submits that cause exists to justify a waiver of the fourteen (14) day stays under Bankruptcy Rules 6004(h) and 6006(d), as promptly closing the Sale is of critical importance. The Debtor therefore requests that the Sale Order be effective immediately by providing that the fourteen (14) day stays under Bankruptcy Rules 6004(h) and 6006(d) be waived.

### **RESERVATION OF RIGHTS**

63. Nothing contained herein is intended, or should be construed, as an admission of the validity of any claim against the Debtor or a waiver of the Debtor’s rights to dispute any claim. Nothing contained herein is intended, or should be construed, as an approval, assumption, or rejection of any agreement, contract, or lease under section 365 of the Bankruptcy Code.

### **NOTICE**

64. The Debtor has provided notice of this Motion to: (a) the U.S. Trustee; (b) the holders of the 25 largest unsecured claims against the Debtor; (c) counsel to the DIP Lender; (d) all persons known or reasonably believed to have asserted an interest in any of the Acquired Assets; (e) the Non-Debtor Counterparties to applicable Designated Contracts; (f) the Attorneys General in the State(s) where the Acquired Assets are located; (g) all state and local taxing authorities in the State(s) where the Acquired Assets are located; (h) the Internal Revenue Service; (i) all parties that have asserted liens against the Acquired Assets, if any; and (j) all parties that have filed a notice of appearance and request for service of papers pursuant to Bankruptcy Rule 2002. In light of the nature of the relief requested herein, the Debtor submit that no other or further notice is necessary.

WHEREFORE, the Debtor respectfully requests that the Court enter the Bidding Procedures Order and the Sale Order, granting the relief requested herein and such other and further relief as the Court may deem just and proper.

Dated: April 21, 2020  
Wilmington, Delaware

YOUNG CONAWAY STARGATT & TAYLOR, LLP

*/s/ Kenneth J. Enos*

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*Proposed Counsel to the Debtor and Debtor in Possession*



**Interests; and (II) the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases and (III) Related Relief (the “*Motion*”).**

**PLEASE TAKE FURTHER NOTICE** that any objections to the Motion, solely with respect to the proposed bidding procedures, must be filed on or before **May 6, 2020 at 4:00 p.m. (ET)** (the “***Objection Deadline***”) with the United States Bankruptcy Court for the District of Delaware, 3rd Floor, 824 N. Market Street, Wilmington, Delaware 19801. At the same time, you must serve a copy of any objection upon the undersigned proposed counsel to the Debtor so as to be received on or before the Objection Deadline.

**PLEASE TAKE FURTHER NOTICE THAT A HEARING TO CONSIDER THE MOTION, SOLELY WITH RESPECT TO THE PROPOSED BIDDING PROCEDURES, WILL BE HELD ON MAY 13, 2020 AT 10:00 A.M. (ET) BEFORE THE HONORABLE LAURIE SELBER SILVERSTEIN AT THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE, 824 NORTH MARKET STREET, 6TH FLOOR, COURTROOM NO. 2, WILMINGTON, DELAWARE 19801.**

**PLEASE TAKE FURTHER NOTICE THAT IF YOU FAIL TO RESPOND IN ACCORDANCE WITH THIS NOTICE, THE COURT MAY GRANT THE RELIEF REQUESTED IN THE MOTION, WITH RESPECT TO THE PROPOSED BIDDING PROCEDURES, WITHOUT FURTHER NOTICE OR A HEARING.**

Dated: April 21, 2020  
Wilmington, Delaware

YOUNG CONAWAY STARGATT & TAYLOR, LLP

*/s/ Kenneth J. Enos*

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*Proposed Counsel to the Debtor and Debtor in Possession*

**EXHIBIT A**

**Bidding Procedures Order**

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

	X	
<b>In re</b>	:	<b>Chapter 11</b>
	:	
<b>ALPHA ENTERTAINMENT LLC,</b>	:	<b>Case No. 20-10940 (LSS)</b>
	:	
<b>Debtor.<sup>1</sup></b>	:	<b>Ref. Docket No. _____</b>
	X	

**ORDER (I) APPROVING BIDDING PROCEDURES IN CONNECTION WITH THE SALE OF SUBSTANTIALLY ALL OF THE DEBTOR’S ASSETS; (II) SCHEDULING AN AUCTION FOR AND HEARING TO APPROVE THE SALE; (III) APPROVING NOTICE OF RESPECTIVE DATE, TIME AND PLACE FOR AUCTION AND FOR HEARING ON APPROVAL OF SALE; (IV) APPROVING PROCEDURES FOR THE ASSUMPTION AND ASSIGNMENT OF CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES; (V) APPROVING FORM AND MANNER OF NOTICE THEREOF; AND (VI) GRANTING RELATED RELIEF**

Upon the motion (the “*Motion*”)<sup>2</sup> of the above-captioned debtor and debtor in possession (the “*Debtor*”) for, among other relief, entry of an order authorizing or approving, (a) the bidding procedures (in the form attached hereto as Exhibit 1, the “*Bidding Procedures*”) in connection with the sale or disposition (the “*Sale*”) of substantially all of the Debtor’s assets (the “*Acquired Assets*”), (b) the notice of the Auction and Sale and hearing thereon (in the form attached hereto as Exhibit 2, the “*Notice of Auction and Sale Hearing*”), (c) the procedures (the “*Assignment Procedures*”), as set forth below, for the assumption and assignment of certain of the Debtor’s executory contracts or unexpired leases, as applicable (the “*Designated Contracts*”), and (d) the notice of the potential assumption and assignment of the Designated Contracts (in the form attached hereto as Exhibit 3, the “*Notice of Assumption and Assignment*”); and this Court having

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<sup>1</sup> The last four digits of the Debtor’s federal tax identification number, is 7778. The Debtor’s mailing address is 1266 East Main St., Stamford, CT 06902.

<sup>2</sup> Capitalized terms used but not otherwise defined herein are to be given the meanings ascribed to them in the Motion.

found that it has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334(b) and 157, and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware dated as of February 29, 2012; and this Court having found that venue of the Chapter 11 Case and the Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and this Court having found that this matter is a core proceeding pursuant to 28 U.S.C. § 157(b); and this Court having found that it may enter a final order consistent with Article III of the United States Constitution; and this Court having found that notice of the Motion has been given as set forth in the Motion and that such notice is adequate and no other or further notice need be given except as set forth herein with respect to the Auction, the Sale Hearing and the potential assumption and assignment of the Designated Contracts; and a reasonable opportunity to object to or be heard regarding the relief provided herein has been afforded to parties-in-interest pursuant to Bankruptcy Rule 6004(a); and this Court having considered the First Day Declaration; and upon the record of the hearing and all of the proceedings had before this Court; and this Court having found that the relief sought in the Motion is in the best interests of the Debtor, its estate, its creditors and all other parties in interest; and this Court having found that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein; and after due deliberation and sufficient cause appearing therefor,

**IT IS HEREBY FOUND AND DETERMINED THAT:**<sup>3</sup>

A. The Bidding Procedures attached hereto as Exhibit 1 are fair, reasonable and appropriate, and are designed to maximize the value to be achieved from the Sale.

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<sup>3</sup> The findings and conclusions set forth herein constitute this Court's findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052, made applicable to this proceeding pursuant to Bankruptcy Rule 9014. To the extent that any of the following findings of fact constitute conclusions of law, they are adopted as such. To the extent any of the following conclusions of law constitute findings of fact, they are adopted as such.

B. The Bidding Procedures comply with the requirements of Local Rule 6004-1(c).

C. The Assignment Procedures provided for herein are fair, reasonable and appropriate, and are consistent with the provisions of section 365 of the Bankruptcy Code.

D. The Debtor has articulated good and sufficient business reasons for this Court to approve (i) the Bidding Procedures, including the scheduling of bid deadlines, an auction and a sale hearing with respect to the proposed Sale; and (ii) the establishment of procedures to assume and assign the Designated Contracts and fix the Cure Costs (as defined below) to be paid pursuant to section 365 of the Bankruptcy Code.

E. The Notice of Auction and Sale Hearing, and the Debtor's proposed publication thereof, is appropriate and reasonably calculated to provide all interested parties with timely and proper notice of the Auction, the Sale, the Bidding Procedures, and the Assignment Procedures to be employed in connection therewith, including, without limitation: (i) the date, time and place of the Auction (if one is held); (ii) the Bidding Procedures and the dates and deadlines related thereto; (iii) the objection deadline for the Sale and the date, time and place of the Sale Hearing; (iv) reasonably specific identification of the Acquired Assets; and (v) representations describing the Sale as being free and clear of liens, claims, interests and other encumbrances, with all such liens, claims, interests and other encumbrances attaching with the same validity and priority to the proceeds of the Sale; and no other or further notice of the Sale shall be required.

F. The Notice of Assumption and Assignment is appropriate and reasonably calculated to provide each non-debtor party to any Designated Contracts (such parties, collectively, the "*Non-Debtor Counterparties*") with proper notice of the Assignment Procedures. The inclusion of any Designated Contract on a Notice Assumption and Assignment does not constitute an admission that a particular Designated Contract is an executory contract or unexpired lease of

property or require, or guarantee, that such Designated Contracts will be assumed and assigned, and all rights of the Debtor with respect thereto are reserved.

G. No further notice beyond that described in the foregoing paragraphs is required in connection with the Sale.

H. The entry of this order (this “*Bidding Procedures Order*”) is in the best interests of the Debtor, its estate, its creditors, and other parties-in-interest.

**IT IS HEREBY ORDERED THAT:**

1. The Motion is granted as set forth herein.
2. All objections to the Motion or the relief provided herein, as they pertain to the entry of this Order, that have not been withdrawn, waived or settled, and all reservations of rights included therein, are hereby overruled and denied on the merits.

**The Bidding Procedures**

3. The Bidding Procedures are incorporated herein and approved, and shall apply with respect to the Sale. The Debtor is authorized to take all reasonable actions necessary or appropriate to implement the Bidding Procedures.

4. The Debtor is authorized to conduct the bidding process in accordance with the Bidding Procedures and the terms hereof, without the necessity of complying with any state or local bulk transfer laws or requirements applicable to the Debtor.

5. Potential Bidders or Qualified Bidders (other than any Stalking Horse Bidder), shall not be allowed any break-up, termination or similar fee with respect to the Acquired Assets. Moreover, all Potential Bidders, Qualified Bidders, and any Stalking Horse Bidder (excluding any Bid Protections (as defined in the Bidding Procedures) approved by this Court) waive any right to seek a claim for substantial contribution pursuant to section 503 of the Bankruptcy Code, or the

payment of any broker fees or costs, unless specifically agreed to by the Debtor upon consultation with the Consultation Parties.

6. Pursuant to section 363(k) of the Bankruptcy Code, the DIP Lender has the right (but not the obligation) to credit bid any and all amounts due and owing to him under the Prepetition Secured Note and the DIP Facility as of the Bid Deadline.

### Assignment Procedures

7. The following Assignment Procedures shall govern the assumption and assignment of the Designated Contracts in connection with the Sale, and any objections related thereto:

- a. On or before May 27, 2020, the Debtor shall file with the Court and serve on each non-debtor counterparty (each a “***Non-Debtor Counterparty***”) to each of the Designated Contracts the Notice of Assumption and Assignment. In the event that the Debtor identifies any Non-Debtor Counterparties which were not served with the Notice of Assumption and Assignment, the Debtor may subsequently serve such Non-Debtor Counterparty with a Notice of Assumption and Assignment, and the following procedures will nevertheless apply to such Non-Debtor Counterparty; provided, however, that the Cure Cost/Assignment Objection Deadline (defined below) with respect to such Non-Debtor Counterparty shall be 4:00 p.m. (prevailing Eastern Time) on the date that is the earlier of July 6, 2020 or fourteen (14) days following service of the Notice of Assumption and Assignment.
- b. The Notice of Assumption and Assignment served on each Non-Debtor Counterparty shall: (i) identify each Contract; (ii) list the proposed calculation of the cure amounts that the Debtor believes must be paid to cure all defaults outstanding under the Designated Contract as of such date (the “***Cure Costs***”); (iii) include a statement that assumption and assignment of such Designated Contract is not required or guaranteed; and (iv) inform such Non-Debtor Counterparty of the requirement to file any Cure Cost/Assignment Objections (defined below) by the Cure Cost/Assignment Objection Deadline (defined below). Service of a Notice of Assumption and Assignment does not constitute an admission that a particular Designated Contract is an executory contract or unexpired lease of property, or confirm that the Debtor is required to assume and/or assign such Designated Contract.
- c. Objections (a “***Cure Cost/Assignment Objection***”), if any, to (i) the scheduled Cure Costs, and/or (ii) the potential assumption, assignment and/or transfer of such Designated Contract (including the transfer of any

related rights or benefits thereunder), other than objections that relate specifically to the identity of the Successful Bidder, must (x) be in writing; (y) state with specificity the nature of such objection, including the amount of Cure Costs in dispute and (z) be filed with the Court and properly served on the Notice Parties (as defined in the Bidding Procedures Order) so as to be received no later than 4:00 p.m. (prevailing Eastern Time) on July 6, 2020 (the “**Cure Cost/Assignment Objection Deadline**”), subject to the proviso in subparagraph (a) above.

- d. Objections (a “**Post-Auction Objection**”) of any Non-Debtor Counterparty related solely to the identity of and adequate assurance of future performance provided by the Successful Bidder must: (x) be in writing; (y) state with specificity the nature of such objection; and (z) be filed with the Court and properly served on the Notice Parties so as to be received no later than 4:00 p.m. (prevailing Eastern Time) on July 10, 2020 (the “**Post-Auction Objection Deadline**”), subject to the proviso in subparagraph (a) above; provided, however, that in the event that the Debtor obtains a Stalking Horse Bid and provides notice of the identity of the Stalking Horse Bidder in the Notice of Assumption and Assignment, any objection of a Non-Debtor Counterparty related to the Stalking Horse Bid (including with respect to the identity of and adequate assurance of future performance provided by the Stalking Horse Bidder) must be filed as a Cure Cost/Assignment Objection by the Cure Cost/Assignment Objection Deadline.
- e. Any Non-Debtor Counterparty to a Designated Contract who fails to timely file and properly serve a Cure Cost/Assignment Objection or Post-Auction Objection as provided herein will (i) be forever barred from objecting to the Cure Costs and from asserting any additional cure or other amounts with respect to such Designated Contract in the event it is assumed and/or assigned by the Debtor and the Debtor shall be entitled to rely solely upon the Cure Costs, and (ii) be deemed to have consented to the assumption, assignment and/or transfer of such Designated Contract (including the transfer of any related rights and benefits thereunder) to the Successful Bidder and shall be forever barred and estopped from asserting or claiming against the Debtor or such Successful Bidder that any additional amounts are due or defaults exist, or conditions to assumption, assignment, and/or transfer must be satisfied under such Designated Contract, or that any related right or benefit under such Designated Contract cannot or will not be available to the relevant Successful Bidder.
- f. If a Non-Debtor Counterparty files a Cure Cost/Assignment Objection satisfying the requirements of these Assignment Procedures, the Debtor and the Non-Debtor Counterparty shall meet and confer in good faith to attempt to resolve any such objection without Court intervention. If the applicable parties determine that the objection cannot be resolved without judicial intervention in a timely manner, the Court shall make all necessary

determinations relating to such Cure Cost/Assignment Objection at a hearing scheduled pursuant to the following paragraph.

- g. Consideration of unresolved Cure Cost/Assignment Objections and Post-Auction Objections relating to all Designated Contracts, if any, will be held at the Sale Hearing, provided, however, that (i) any Designated Contract that is the subject of a Cure Cost/Assignment Objection solely with respect to the amount of the Cure Cost may be assumed and assigned prior to resolution of such objection and (ii) the Debtor, in consultation with the Consultation Parties, may adjourn a Cure Cost/Assignment objection in its discretion, in consultation with the Consultation Parties.
- h. A timely filed and properly served Cure Cost/Assignment Objection or Post-Auction Objection will reserve the Non-Debtor Counterparty's rights relating to the Designated Contract, but will not be deemed to constitute an objection to the relief generally requested in the Motion with respect to the approval of the Sale.
- i. The Debtor's decision to assume and assign the Designated Contracts to the relevant Successful Bidder is subject to the Court's approval and the closing of the Sale. Accordingly, absent the Court's approval and the closing of the Sale, the Designated Contracts shall not be deemed assumed or assigned, and shall in all respects be subject to further administration by the Debtor and its estate under the Bankruptcy Code in connection with the Chapter 11 Case.

#### **Notice Procedures**

8. Service and publication of the Notice of Auction and Sale Hearing are sufficient to provide effective notice to all interested parties of, *inter alia*, the Bidding Procedures, the Auction, the Sale Hearing, the Sale, and the Assignment Procedures in accordance with Bankruptcy Rules 2002 and 6004, as applicable, and are approved.

9. On or before two (2) business days after entry of this Order, the Debtor will cause the Notice of Auction and Sale Hearing to be sent by first-class mail postage prepaid, to the following: (a) Richard Schepacarter, Esq., Office of the United States Trustee, 844 N. King Street, Room 2207, Lockbox 35, Wilmington DE, 19801; (b) the holders of the twenty-five largest unsecured claims against the Debtor or counsel to the Committee, if one has been appointed; (c) counsel to the DIP Lender, K&L Gates, LLP, 599 Lexington Avenue, New York, NY 10022,

Attn: John A. Bicks and James A. Wright III; (d) all persons known or reasonably believed to have asserted an interest in any of the Acquired Assets; (e) the Attorneys General in the State(s) where the Acquired Assets are located; (f) all state and local taxing authorities in the State(s) where the Acquired Assets are located; (g) the Internal Revenue Service; (h) all parties that have asserted liens against the Acquired Assets, as applicable; and (i) all parties that have filed a notice of appearance and request for service of papers pursuant to Bankruptcy Rule 2002

10. In addition to the foregoing, on or before five (5) business days after entry of the Bidding Procedures Order, the Debtor shall, subject to applicable submission deadlines, publish the Notice of Auction and Sale Hearing once in the national edition of *The New York Times*, and post the Notice of Auction and Sale Hearing and the Bidding Procedures Order on the website of the Debtor's claims and noticing agent, Donlin Recano & Company, Inc.

11. As soon as reasonably practicable following conclusion of the Auction, the Debtor shall file a notice on this Court's docket identifying the Successful Bidder(s) for the Acquired Assets and any applicable Next-Highest Bidder(s).

12. The Notice of Assumption and Assignment, and the other Assignment Procedures set forth herein, are sufficient to provide effective notice pursuant to Bankruptcy Rules 2002(a)(2), 6004(a) and 6006(c) to the Non-Debtor Counterparties to the Designated Contracts of the Debtor's intent to potentially assume and assign some or all of the Designated Contracts and are approved.

#### **Auction and Sale Hearing**

13. **Stalking Horse Bid Deadline**. As further described in the Motion, the deadline by which all Stalking Horse Bids must be actually received by the Debtor, in form, substance, and on terms and conditions reasonably acceptable to the DIP Lender is July 1, 2020 at 11:59 p.m. prevailing Eastern Time (the "***Stalking Horse Bid Deadline***").

14. **Bid Deadline**. The deadline for submitting bids for the Acquired Assets (the “***Bid Deadline***”) shall be 5:00 p.m. (ET) on July 6, 2020. No bid shall be deemed to be a Qualified Bid unless such bid meets the requirements set forth in the Bidding Procedures or is otherwise accepted by the Debtor upon consent of the DIP Lender, which consent shall not be unreasonably withheld.

15. **Auction**. The Debtor may sell the Acquired Assets by conducting an Auction in accordance with the Bidding Procedures. If at least two Qualified Bids (or one Qualified Bid if there is also a Stalking Horse Bid) are received by the Bid Deadline with regard to the Acquired Assets, the Debtor will conduct an Auction in accordance with the Bidding Procedures, which Auction shall take place on July 8, 2020 at 10:00 a.m. (prevailing Eastern Time) at the offices of counsel to the Debtor, Young Conaway Stargatt & Taylor, LLP, Rodney Square, 1000 North King Street, Wilmington, Delaware 19801, or such later time or such other place as the Debtor shall designate. For the avoidance of doubt, the Debtor may, upon consultation with the Consultation Parties, conduct the Auction telephonically. If the Debtor receives only one Qualified Bid with regard to the Acquired Assets: (a) the Debtor shall not hold an Auction with respect thereto; (b) that Qualified Bid may be named the Successful Bid with respect to the Acquired Assets; and (c) that Qualified Bidder may be named the Successful Bidder with respect thereto.

16. Each Qualified Bidder participating in the Auction will be required to confirm, in writing, that (a) it has not engaged in any collusion with respect to the Bidding Process or on the record at the Auction, (b) its Qualified Bid is a good faith bona fide offer that it intends to consummate if selected as the Successful Bidder, and (c) the Potential Bidder agrees to serve as a backup bidder if the Potential Bidder’s Qualified Bid is the next highest and best bid after the Successful Bid with respect to the Acquired Assets.

17. **Notice for Non-Debtor Counterparties.** The Debtor shall provide to any Non-Debtor Counterparty that is implicated by any Stalking Horse Bid or any Qualified Bid (a) the identity of the Stalking Horse Bidder or Qualified Bidder, and (b) adequate assurance information from the Stalking Horse Bidder or Qualified Bidder. The Debtor shall provide, or shall cause its counsel and/or the claims and noticing agent to provide, such information to any such affected Non-Debtor Counterparty within twenty-four (24) hours of receipt of such bid; provided, however, that each Non-Debtor Counterparty receiving adequate assurance information shall keep such adequate assurance information confidential, and shall be restricted from using or disclosing such information to any third party other than in connection with a Cure Cost/Assignment Objection, and in the event such counterparty files any such Cure Cost/Assignment Objection, it shall be permitted to file any portion of such pleading containing any Adequate Assurance Information under seal without any further order of this Court; provided further, however, that all parties' rights are reserved to object to the sealing of Adequate Assurance Information, as applicable.

18. **Sale Hearing.** The Sale Hearing shall be held before this Court on July 13, 2020 at 10:00 a.m. (prevailing Eastern Time) before the Honorable Judge Laurie Selber Silverstein, United States Bankruptcy Judge for the Bankruptcy Court for the District of Delaware, at 824 North Market Street, 6th Floor, Courtroom No. 2, Wilmington, Delaware 19801. The Debtor shall file a form of Sale Order no later than 14 days before the Sale Hearing. At the Sale Hearing, the Debtor will seek the entry of the Sale Order approving and authorizing the Sale to the Successful Bidder. The Sale Hearing (or any portion thereof) may be adjourned by this Court or the Debtor from time to time without further notice other than by announcement in open court, on this Court's calendar or through the filing of a notice or other document on this Court's docket.

19. **Sale Objection Deadline.** The deadline to object to the relief requested in the Motion, including entry of the proposed Sale Order (a “*Sale Objection*”) is July 6, 2020 at 4:00 p.m. (prevailing Eastern Time) (the “*Sale Objection Deadline*”). A Sale Objection must be filed with this Court and served in the manner set forth below such that it is *actually received* no later than the Sale Objection Deadline.

20. **Post-Auction Objection Deadline.** The deadline to object to (i) the conduct at the Auction (if held) or (ii) solely with respect to the Non-Debtor Counterparties (defined below) to the Designated Contracts, to the specific identity of and adequate assurance of future performance provided by the Successful Bidder with respect to the applicable Designated Contract (a “*Post-Auction Objection*”) is July 10, 2020 at 4:00 p.m. (ET) (the “*Post-Auction Objection Deadline*”). A Post-Auction Objection must be filed with this Court and served in the manner set forth below such that it is *actually received* no later than the Post-Auction Objection Deadline

### **Objection Procedures**

21. Any party that seeks to object to the relief requested in the Motion pertaining to approval of the Sale shall file a formal written objection that complies with the objection procedures set forth herein and in the Motion, as applicable.

22. Objections, if any, must: (i) be in writing; (ii) be signed by counsel or attested to by the objecting party; (iii) be in conformity with the applicable provisions of the Bankruptcy Rules and the Local Rules; (iv) state with particularity the legal and factual basis for the objection and the specific grounds therefor; (v) be filed with this Court; and (vi) be served on the following parties (the “*Notice Parties*”): (a) counsel to the Debtor, Young Conaway Stargatt & Taylor, LLP, Rodney Square, 1000 North King Street, Wilmington, Delaware 19801, Attn: Matthew Lunn, Esq. ([mlunn@ycst.com](mailto:mlunn@ycst.com)) and Kenneth J. Enos, Esq. ([kenos@ycst.com](mailto:kenos@ycst.com)); (b) counsel to any official

committees (if appointed); (c) Office of the United States Trustee, 844 N. King Street, Room 2207, Lockbox 35, Wilmington DE, 19801, Attn: Richard Schepacarter, Esq. ([Richard.schepacarter@usdoj.com](mailto:Richard.schepacarter@usdoj.com)); and (d) counsel to the DIP Lender, K&L Gates, LLP, 599 Lexington Avenue, New York, NY 10022, Attn: John A. Bicks, Esq. ([John.Bicks@klgates.com](mailto:John.Bicks@klgates.com)) and James A. Wright III ([James.Wright@klgates.com](mailto:James.Wright@klgates.com)).

23. Failure to file a Sale Objection on or before the Sale Objection Deadline: (a) shall forever bar the assertion, whether at any Sale Hearing or thereafter, of any objection to the Motion, to entry of the Sale Order, and/or to the consummation and performance of the Sale with a Successful Bidder, and (b) for purposes of section 363(f)(2) of the Bankruptcy Code, shall be deemed to be “consent” to entry of the Sale Order and consummation of the Sale and all transactions related thereto.

#### **Other Relief Granted**

24. Absent an Order of this Court to the contrary, this Order shall be binding in all respects upon any trustees, examiners, “responsible persons” or other fiduciaries appointed in the Debtor’s bankruptcy case or upon a conversion to chapter 7 under the Bankruptcy Code.

25. Nothing herein shall be deemed to or constitute the assumption, assignment or rejection of any executory contract or unexpired lease.

26. Notwithstanding any provision in the Bankruptcy Rules to the contrary, the stays provided for in Bankruptcy Rules 6004(h) and 6006(d) are waived and this Order shall be effective immediately and enforceable upon its entry.

27. In the event of any conflict between this Order and the Bidding Procedures, this Order shall govern in all respects.

28. The requirements set forth in Local Rules 6004-1, 9006-1, and 9013-1 are hereby satisfied or waived.

29. This Court shall retain exclusive jurisdiction over any matters related to or arising from the implementation of this Order.

**Exhibit 1**

**Bidding Procedures**

## **BIDDING PROCEDURES**

Set forth below are the bidding procedures (the “***Bidding Procedures***”) to be used with respect to the sale or disposition (the “***Sale***”) of substantially of the assets (the “***Acquired Assets***) of Alpha Entertainment LLC (the “***Debtor***”). The Sale may be for all of the Acquired Assets or for a portion thereof, as potential purchasers direct.

### **I. Introduction**

On April 13, 2020 (the “***Petition Date***”), the Debtor filed a voluntary petition for relief under title 11 of the United States Code (the “***Bankruptcy Code***”) in the United States Bankruptcy Court for the District of Delaware (the “***Bankruptcy Court***”). By a motion dated April 21, 2020 (the “***Motion***”), the Debtor sought, among other things, approval of these Bidding Procedures. On May [13], 2020, the Bankruptcy Court entered an order (the “***Bidding Procedures Order***”) authorizing the Debtor to market the Acquired Assets through, among other means, these Bidding Procedures. As part of the Bidding Procedures, the Bankruptcy Court has scheduled a hearing to consider approval of the sale of the Acquired Assets to the Successful Bidder (as defined below), to be conducted on July 13, 2020 at 10:00 a.m. (prevailing Eastern Time) before the Honorable Laurie Selber Silverstein (the “***Sale Hearing***”).

### **II. Timeline**

<b>Date</b>	<b>Event</b>
May 27, 2020	Service of Notice of Assumption and Assignment Notice
July 1, 2020	Stalking Horse Bid Deadline
July 6, 2020 4:00 p.m. (ET)	Sale Objection Deadline Cure Cost/Assignment Objection Deadline
July 6, 2020, 5:00 p.m. (ET)	Bid Deadline
July 8, 2020, 10:00 a.m. (ET)	Auction
July 10, 2020, 4:00 p.m. (ET)	Post-Auction Objection Deadline
July 13, 2020, 10:00 a.m. (ET)	Sale Hearing

**III. Credit Bidding.**

Pursuant to section 363(k) of the Bankruptcy Code, the DIP Lender has the right (but not the obligation) to credit bid any and all amounts due and owing to him under the Prepetition Secured Note (as defined in the DIP Motion) and the DIP Facility.

**IV. Confidentiality Agreement**

Unless otherwise ordered by the Bankruptcy Court for cause shown, to participate in the bidding process, each person or entity must enter into (unless previously entered into) with the Debtor, on or before the Bid Deadline (as defined below), an executed confidentiality agreement in form and substance reasonably satisfactory to the Debtor (the “**Confidentiality Agreement**”). Each person or entity that enters into the Confidentiality Agreement with the Debtor on or before the Bid Deadline is hereinafter referred to as a “**Potential Bidder.**” The Debtor, in consultation with the Consultation Parties (defined below), expressly reserves the right to reject any “joint bids” by multiple Potential Bidders or bids submitted by joint ventures formed by more than one Potential Bidder.

After a Potential Bidder enters into the Confidentiality Agreement with the Debtor, the Debtor shall deliver or make available (unless previously delivered or made available) to each Potential Bidder certain designated information (including, if applicable, financial data) with respect to the Acquired Assets.

The DIP Lender shall not be required to execute a Confidentiality Agreement in connection with the submission of a Bid or the exercise of his credit bid rights.

**V. Determination by the Debtor**

As appropriate throughout the bidding process, the Debtor will consult with the DIP Lender and the official committee of unsecured creditors appointed in the Debtor’s chapter 11 cases, if any (the “**Committee**” and, collectively with the DIP Lender, the “**Consultation Parties**” and each, a “**Consultation Party**”) and shall: (a) coordinate the efforts of Potential Bidders in conducting their respective due diligence; (b) evaluate bids from Potential Bidders on the Acquired Assets; (c) negotiate any bid made to acquire the Acquired Assets; and (d) make such other determinations as are provided in these Bidding Procedures. Neither the Debtor nor its representatives shall be obligated to furnish any information of any kind whatsoever relating to the Acquired Assets to any party that is not a Potential Bidder or a Consultation Party.

In the event that, and at such time as, the DIP Lender submits a credit bid with respect to any of the Acquired Assets, the DIP Lender shall no longer be a Consultation Party with respect to such Acquired Assets.

**VI. Due Diligence**

Up to and including the Bid Deadline (as defined below), the Debtor shall afford any Potential Bidder, and any Consultation Party, such available due diligence access or additional information as may be reasonably requested by the Potential Bidder or Consultation Party, as applicable, that the Debtor, in its business judgment, and in consultation with the DIP Lender,

determines to be reasonable and appropriate under the circumstances. The Debtor will provide, in an electronic data room to be established for these purposes, a form asset purchase agreement for the sale of the Acquired Assets (the “**Form APA**”), and will grant each Potential Bidder or Consultation Party, as applicable, access to such data room. The Debtor may designate a representative or representatives to coordinate all reasonable requests for additional information and due diligence access from such Potential Bidders and/or Consultation Parties, as applicable. Each Potential Bidder shall be required to acknowledge that it has had an opportunity to conduct any and all due diligence regarding the Acquired Assets in conjunction with submitting its Bid (as defined below). Notwithstanding the foregoing, the Debtor reserves the right, in its reasonable discretion and following consultation with the Consultation Parties, to withhold or limit access to any information that the Debtor determines not appropriate to disclose to any Potential Bidder.

## VII. Stalking Horse Bidder

The Debtor may solicit binding “stalking horse bids” for the Acquired Assets (any such bid, a “**Stalking Horse Bid**,” and the provider of such bid, a “**Stalking Horse Bidder**”) at any time up to and including July 1, 2020 (the “**Stalking Horse Bid Deadline**”). The Stalking Horse Bid shall set the floor for all bids for the Acquired Assets at the Auction. Recognizing a Stalking Horse Bidder’s expenditure of time, energy, and resources, and that a Stalking Horse Bid provides a floor bid with respect to the Acquired Assets, the Debtor, following consultation with the Consultation Parties, will seek Bankruptcy Court authority to provide any Stalking Horse Bidder with customary bid protections (collectively, the “**Bid Protections**”) as may be agreed between the Debtor and the Stalking Horse Bidder, subject to the consent of the DIP Lender, which consent shall not be unreasonably withheld. The Debtor expressly reserves the right to seek entry of an order approving such Bid Protections on shortened notice. In the event that a Stalking Horse Bid is obtained by the Debtor prior to the Stalking Horse Bid Deadline, the Debtor will, following consultation with the Consultation Parties, announce the designation of the Stalking Horse Bidder by filing a notice on the Bankruptcy Court’s docket (a “**Stalking Horse Bid Notice**”) no later than five (5) business days prior to the date the Debtor seeks to hold a hearing for approval of the Bid Protections. A Stalking Horse Bid Notice shall:

- (i) state the identity of the Stalking Horse Bidder;
- (ii) attach an agreement accompanying the Stalking Horse Bid (a “**Stalking Horse Agreement**”) memorializing the proposed transaction by and between the Stalking Horse Bidder and the Debtor with a redline of any changes made to the Form APA;
- (iii) contain a statement setting forth the terms of the Bid Protections, which the Debtor will seek expedited approval of, as applicable (the “**Bid Protection Amount**”); and
- (iv) contain a statement setting forth the adjusted Minimum Bid (as defined below), which amount shall equal the sum of: (A) the value of the Stalking Horse Bid; (B) the Bid Protection Amount; and (C) a reasonable minimum overbid amount to be calculated in the Debtor’s sole discretion, following

consultation with the Consultation Parties, based on the aggregate price set forth in the Stalking Horse Bid (a “*Stalking Horse Overbid*”).

Notwithstanding the foregoing, nothing herein is intended to or shall be deemed to be approval of, and authorization for the Debtor to pay, any Bid Protections, and authority for the Debtor to pay such Bid Protections shall be subject to further order of the Bankruptcy Court.

**VIII. Bid Deadline**

A Potential Bidder that desires to make a Bid shall deliver copies of its Bid, in Microsoft Word format, by email to: (a) counsel to the Debtor, Young Conaway Stargatt & Taylor, LLP, Rodney Square, 1000 North King Street, Wilmington, Delaware 19801, Attn: Matthew Lunn ([mlunn@ycst.com](mailto:mlunn@ycst.com)) and Kenneth J. Enos ([kenos@ycst.com](mailto:kenos@ycst.com)); (b) counsel to the DIP Lender, K&L Gates, LLP, 599 Lexington Avenue, New York, NY 10022, Attn: John A. Bicks ([john.bicks@klgates.com](mailto:john.bicks@klgates.com)) and James A. Wright III ([james.wright@klgates.com](mailto:james.wright@klgates.com)); and (c) counsel to the Committee, by no later than July 6, 2020 at 5:00 p.m. (prevailing Eastern Time) (the “*Bid Deadline*”).

**IX. Bid Requirements**

All bids (each hereinafter, a “*Bid*”), including a Bid submitted as a proposed Stalking Horse Bid, must (collectively, the “*Bid Requirements*”):

- (a) be accompanied by a letter or email:
  - (i) disclosing the identity of the person or entity submitting the Bid, as well as any party participating in or otherwise supporting the Bid, and the terms of any such participation or support (including any equity holder or other financial backer if the Potential Bidder is an entity formed for the purpose of consummating the proposed transaction contemplated by the Bid);
  - (ii) stating with specificity the Acquired Assets 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;
  - (iii) detailing the following:
    - (A) a duly executed purchase agreement with a redline to reflect the changes to the Form APA (the “*Purchase Agreement*”); and
    - (B) solely in the event that a Stalking Horse Bid Notice has been filed prior to the Bid Deadline, a redline of the Purchase Agreement marked to reflect any proposed amendments and modifications to the Stalking Horse Agreement and the applicable schedules and exhibits;

- (iv) agreeing that the Potential Bidder's offer is **binding and irrevocable** until the later of (i) the Closing Date (as defined herein), or (ii) twenty (20) 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);
- (vi) providing for a Closing Date that occurs on or before July 31, 2020;
- (vii) offering to pay a price equal to or greater than the Stalking Horse Overbid in the event that a Stalking Horse Bid Notice has been filed prior to the Bid Deadline (the "**Minimum Bid**");
- (viii) providing that such Bid is not subject to any due diligence or financing contingency; and
- (ix) providing that 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**").

(b) be accompanied by any reasonable information requested by a consumer privacy ombudsman, if one is appointed pursuant to section 363(b)(1)(B) of the Bankruptcy Code;

(c) be accompanied by adequate assurance of future performance information (the "**Adequate Assurance Information**"), including (i) information about the Potential Bidder's financial condition, such as federal tax returns for two years, a current financial statement, or bank account statements; (ii) information demonstrating (in the Debtor's reasonable business judgment) that 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; and (iv) such additional information regarding the Potential Bidder as the Potential Bidder may elect to include.

By submitting a Bid, Potential Bidders agree that the Debtor may disseminate their Adequate Assurance Information to affected contract counterparties and the Consultation Parties in the event that the Debtor determines such bid to be a Qualified Bid (as defined below); provided, however, that each counterparty receiving Adequate Assurance Information shall keep such Adequate Assurance information confidential, and shall be restricted from using or disclosing such information to any third party other than in connection with a Cure Cost/Assignment Objection, and in the event such counterparty files any such Cure Cost/Assignment Objection, it shall be permitted to file any portion of such pleading containing any Adequate Assurance Information under seal without any further order of the Court; and

(d) be accompanied by (i) a deposit in the form of a certified check or wire transfer, payable to the order of the Debtor, in an amount equal to ten percent (10%) of the Bid, which funds will be deposited into an escrow account to be identified and established by the Debtor (a "**Good Faith Deposit**") and (ii) written evidence, documented to the Debtor's satisfaction, that demonstrates the Potential Bidder has available cash, a commitment for financing if selected as

the Successful Bidder (as defined below) (provided, however, that the closing shall not be contingent in any way on the Successful Bidder's financing) and such other evidence of ability to consummate the transaction as the Debtor may request, including proof that such funding commitments or other financing are not subject to any internal approvals, syndication requirements, diligence or credit committee approvals (provided that such commitments may have covenants and conditions acceptable to the Debtor, as determined in consultation with the Consultation Parties). The DIP Lender shall not be required to submit a Good Faith Deposit, or otherwise provide such information as required in the preceding sentence in connection with the submission of a Bid or the exercise of his credit bid rights. The Successful Bidder (as defined below) and Next-Highest Bidder shall be required to supplement their Good Faith Deposits, if necessary, within one (1) business day of the close of the Auction so that such Good Faith Deposits shall be equal to an amount that is ten percent (10%) of the Successful Bid or Next-Highest Bid, as applicable. The Debtor reserves the right to increase or decrease the Good Faith Deposit for one or more Qualified Bidders (as defined below) in their sole discretion after consulting with the Consultation Parties.

The Debtor, in consultation with the Consultation Parties, will review each Bid received from a Potential Bidder to determine, in its discretion, 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 Debtor, will be considered a "**Qualified Bid**" and each Potential Bidder that submits a Qualified Bid will be considered a "**Qualified Bidder**." The Debtor shall inform Qualified Bidders that their bids have been designated as Qualified Bids no later than 48 hours after such bids are received. For the avoidance of doubt, any Stalking Horse Agreement will be deemed a Qualified Bid and any Stalking Horse Bidder will be deemed a Qualified Bidder, for all purposes and requirements pursuant to the Bidding Procedures, notwithstanding the requirements that a Potential Bidder must satisfy to be a Qualified Bidder.

A Qualified Bid will be valued by the Debtor based upon any and all factors that the Debtor, in consultation with the Consultation Parties, reasonably deems pertinent in its business judgment, including, among others: (a) the amount of the Qualified Bid; (b) the risks and timing associated with consummating the transaction with the Qualified Bidder; (c) any excluded assets or executory contracts and leases; and (d) any other factors that the Debtor (in consultation with the Consultation Parties) may reasonably deem relevant.

The Debtor, in its business judgment, and in consultation with the Consultation Parties, reserves the right to reject any Bid (other than any Stalking Horse Bid) if such Bid, among other things:

- (a) is on terms that are more burdensome or conditional than the terms of the Stalking Horse Agreement, if applicable;
- (b) requires any indemnification of the Potential Bidder in its Purchase Agreement;
- (c) is not received by the Bid Deadline;

- (d) is subject to any contingencies (including representations, warranties, covenants and timing requirements) of any kind or any other conditions precedent to such party's obligation to acquire the Acquired Assets;
- (e) seeks any bid protections; or
- (f) does not, in the Debtor's determination (after consultation with the Consultation Parties), include a fair and adequate price or the acceptance of which would not be in the best interests of the Debtor's estate or the Auction.

Any Bid rejected pursuant to this paragraph shall not be deemed to be a Qualified Bid. In the event that any Bid is so rejected, the Debtor shall cause the Good Faith Deposit of such Potential Bidder to be refunded to it within five (5) business days after the Bid Deadline.

**X. Auction**

Unless otherwise ordered by the Bankruptcy Court for cause shown, only the Qualified Bidders (including any Stalking Horse Bidder) are eligible to participate at the Auction (as defined below). The Consultation Parties shall be permitted to attend the Auction. At least three (3) days prior to the Auction, each Qualified Bidder, other than any Stalking Horse Bidder, must inform the Debtor in writing whether it intends to participate in the Auction. If the Debtor receives only a Stalking Horse Bid, or one Qualified Bid, (a) the Debtor shall not hold an Auction; (b) the Stalking Horse Bid or Qualified Bid, as applicable, will be deemed the Successful Bid; and (c) the Stalking Horse Bidder or Qualified Bidder, as applicable, will be named the Successful Bidder.

If the Debtor obtains more than one Qualified Bid by the Bid Deadline, the Debtor will conduct an auction (the "**Auction**") and shall determine in its reasonable business judgment, after consultation with the Consultation Parties, which Qualified Bid is the highest or otherwise best Qualified Bid (the "**Starting Bid**"), which determination will be communicated to Qualified Bidders prior to the commencement of the Auction. The Debtor shall hold an open Auction at 10:00 a.m. (prevailing Eastern Time) on July 8, 2020 at the offices of counsel to the Debtor, Young Conaway Stargatt & Taylor, LLP, Rodney Square, 1000 North King Street, Wilmington, Delaware 19801, or such later time or such other place as the Debtor shall designate in a filing with the Court and provide notice of to all Qualified Bidders who have submitted Qualified Bids. For the avoidance of doubt, and upon consultation with the Consultation Parties, the Debtor reserves the right to conduct the Auction telephonically. Professionals and principals for the Debtor, the Stalking Horse Bidder (if any), each Qualified Bidder and the Consultation Parties shall be able to attend and observe the Auction, along with any other creditor, and any other party the Debtor deems appropriate (provided, however, that any party other than the Qualified Bidders and the Consultation Parties shall be required to provide notice to the Debtor at least five (5) days prior to the Auction by sending an email to Troy Bollman, paralegal for counsel to the Debtor, at [tbollman@ycst.com](mailto:tbollman@ycst.com)).

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 *bona fide* offer that it intends to consummate if selected as the Successful Bidder (as defined below).

Bidding at the Auction will begin with the Starting Bid and continue, in one or more rounds of bidding, so long as during each round at least one Subsequent Bid (defined below) is submitted by a Qualified Bidder that (i) improves on such Qualified Bidder's immediately prior Qualified Bid (a "***Subsequent Bid***") and (ii) the Debtor reasonably determines, in consultation with the Consultation Parties, that such Subsequent Bid is (a) for the first round, a higher or otherwise better offer than the Starting Bid, and (b) for subsequent rounds, a higher or otherwise better offer than the Leading Bid (as defined below). Each Subsequent Bid at the Auction shall provide net value to the estate in an amount to be announced at or prior to the Auction ("***Incremental Overbid***") over the Starting Bid or the Leading Bid (as defined below), as the case may be, as determined by the Debtor in the exercise of its reasonable business judgment and in consultation with the Consultation Parties; provided that: (i) if the Leading Bid was made by a Stalking Horse Bidder, such bid shall be deemed to include the Bid Protection Amount (in the event that any Bid Protections were previously approved by the Bankruptcy Court), and (ii) any Subsequent Bid made by any Stalking Horse Bidder shall only be required to equal the sum of the amount of (x) the Starting Bid or the Leading Bid, as applicable, and (y) the Incremental Overbid, less the Bid Protection Amount (if applicable). After the first round of bidding and between each subsequent round of bidding, the Debtor shall announce the bid that it believes to be the highest or otherwise best offer (the "***Leading Bid***"). A round of bidding will conclude after each participating Qualified Bidder has had the opportunity to submit a Subsequent Bid with full knowledge of the Leading Bid, subject to the Debtor's authority to revise the Auction procedures as set forth below.

The Debtor may, in consultation with the Consultation Parties, announce at the Auction additional procedural rules (e.g., the amount of time to make Subsequent Bids, the amount of the Incremental Overbid, or the requirement that parties submit "best and final" bids) for conducting the Auction or otherwise modify these Bidding Procedures; provided that such rules (1) are not materially inconsistent with these Bidding Procedures, the Bankruptcy Code, or any order of the Bankruptcy Court, and (2) are disclosed to each Qualified Bidder during the Auction. The bidding at the Auction shall be transcribed or videotaped and the Debtor shall maintain a transcript of all bids made and announced at the Auction.

Immediately prior to the conclusion of the Auction, the Debtor, in consultation with the Consultation Parties, will: (a) determine, consistent with the Bidding Procedures, which bid constitutes the highest or otherwise best bid (the "***Successful Bid***"); and (b) notify all Qualified Bidders at the Auction, prior to its conclusion, of the name of the maker of the Successful Bid (the "***Successful Bidder***"), and the amount and other material terms of the Successful Bid. The Debtor may, in consultation with the Consultation Parties, designate the Next-Highest Bid (and the corresponding Next-Highest Bidder) to close, in the event that the Successful Bidder does not close the Sale. The terms of each Successful Bid and Next-Highest Bid shall be reasonably acceptable to the DIP Lender. Unless the Bankruptcy Court orders otherwise upon application by the Debtor, the Debtor shall not consider any bids or Subsequent Bids submitted after the conclusion of the Auction and any and all such bids and Subsequent Bids shall be deemed untimely and shall under no circumstances constitute a Qualified Bid.

Within twenty-four (24) hours following conclusion of the Auction, the Debtor shall file a notice on the Bankruptcy Court's docket identifying (with specificity) the Successful Bidder for the Acquired Assets and any applicable Next-Highest Bidder. Notwithstanding the selections of the Successful Bidder and the Next-Highest Bidder, all bids are **binding and irrevocable** until the later of (i) the Closing Date, or (ii) twenty (20) days after the Sale Hearing (unless selected as the Next-Highest Bidder, in which case such offer will remain open until the Closing Date).

**XI. Jurisdictional Consent**

All bidders at the Auction will be deemed to have consented to the core jurisdiction of the Bankruptcy Court and waived any right to jury trial in connection with any disputes relating to the Auction, the Sale, and the construction and enforcement of any Stalking Horse Agreement (if applicable) and all other agreements entered into in connection with any proposed Sale transaction. Such consent and waiver shall apply to the extent that it is later determined that the Bankruptcy Court, absent consent, cannot enter final orders or judgments with regard to the foregoing matters consistent with Article III of the United States Constitution.

**XII. Acceptance of Qualified Bids**

The Debtor may reject at any time, before entry of an order of the Bankruptcy Court approving the Sale, any Bid that, in the Debtor's judgment, upon considering any comments of the Consultation Parties, is (i) inadequate or insufficient, (ii) not in conformity with the requirements of the Bankruptcy Code or the Bidding Procedures, or (iii) contrary to the best interests of the Debtor and its estate.

The Debtor's presentation to the Bankruptcy Court for approval of a selected Qualified Bid as a Successful Bid does not constitute the Debtor's acceptance of such Bid. The Debtor will have accepted a Successful Bid only when such Successful Bid has been approved by the Bankruptcy Court at the Sale Hearing. The Debtor intends to close the Sale on or before July 31, 2020 unless another time or date, or both, are agreed to in writing by the Debtor and the Successful Bidder (the "***Closing Date***").

**XIII. No Fees for Potential Bidders or Qualified Bidders**

Potential Bidders or Qualified Bidders, other than a Stalking Horse Bidder if so approved by the Bankruptcy Court, shall not be allowed any break-up, termination or similar fee. Moreover, all Potential Bidders, Qualified Bidders, and the Stalking Horse Bidder (excluding any Bid Protections approved by the Bankruptcy Court), by participating in the bidding process, will be deemed to have waived any right to seek a claim for substantial contribution pursuant to section 503 of the Bankruptcy Code, or the payment of any broker fees or costs, unless specifically agreed to by the Debtor, upon consultation with the Consultation Parties.

**XIV. Sale Hearing**

Each Successful Bid and any Next-Highest Bid will be subject to approval by the Bankruptcy Court. The hearing to approve a Successful Bid and any Next-Highest Bid will take place on July 13, 2020 at 10:00 a.m. (prevailing Eastern Time) (the "***Sale Hearing***"). The Sale

Hearing may be adjourned by the Debtor from time to time without further notice to creditors or other parties in interest other than by announcement of the adjournment in open court on the date scheduled for the Sale Hearing or by filing a notice, which may be a hearing agenda stating the adjournment, on the docket of the Debtor's chapter 11 case.

At the Sale Hearing, the Debtor will seek entry of an order that, among other things: (i) authorizes and approves the Sale to the Successful Bidder and/or the Next-Highest Bidder; (ii) includes a finding that the Successful Bidder and/or the Next-Highest Bidder is a good faith purchaser pursuant to section 363(m) of the Bankruptcy Code; and (iii) as appropriate, exempts the Sale and conveyance of the Acquired Assets from any transfer tax, stamp tax or similar tax, or deposit under any applicable bulk sales statute.

**XV. Return of Good Faith Deposit and Reservation of Rights**

The Good Faith Deposits of all Potential Bidders shall be held in escrow by the Debtor, but shall not become property of the Debtor's estate absent further order of the Bankruptcy Court. The Good Faith Deposits of all Potential Bidders shall be retained by the Debtor, notwithstanding Bankruptcy Court approval of the Sale, until three (3) business days after the earlier of (a) the Closing Date, or (b) ten (10) days following the Sale Hearing; provided, however, that the Good Faith Deposit of the Next-Highest Bidder shall be retained until three (3) business days after the Closing Date. The Debtor shall retain any Good Faith Deposit submitted by the Successful Bidder. At the closing of a Sale contemplated by a Successful Bid, the applicable Successful Bidder will be entitled to a credit for the amount of its Good Faith Deposit to the extent such a deposit was provided.

If a Successful Bidder (or, if the Sale is to be closed with a Next-Highest Bidder, then the Next-Highest Bidder) fails to consummate the Sale because of a breach or failure to perform on the part of such bidder, then the Debtor and its estate shall be entitled to retain the Good Faith Deposit of such Successful Bidder (or, if the Sale is to be closed with the Next-Highest Bidder, then such Next-Highest Bidder) as part of the damages resulting to the Debtor and its estate for such breach or failure to perform, in addition to any and all other rights, remedies, or causes of action that may be available to the Debtor.

**XVI. Reservation of Rights and Modifications**

Notwithstanding any of the foregoing, the Debtor and its estate, in consultation with the Consultation Parties, and with the consent of the DIP Lender, which consent shall not be unreasonably withheld, reserves the right to modify these Bidding Procedures at or prior to the Auction, including, without limitation, to extend the deadlines set forth herein, modify bidding increments, waive terms and conditions set forth herein with respect to any or all Potential Bidders (including, without limitation, the Bid Requirements), impose additional terms and conditions with respect to any or all potential bidders, adjourn or cancel the Auction at or prior to the Auction, and adjourn the Sale Hearing.

The Debtor shall consult with the Consultation Parties as explicitly provided for in these Bidding Procedures; provided, however, that the Debtor shall not be required to consult with any Consultation Party (or its advisors) that submits a Bid or has a Bid submitted on its behalf, or

that has an affiliate that submits a Bid or has a Bid submitted on its behalf, for so long as such Bid remains open, if the Debtor determines, in its reasonable business judgment, that consulting with such Consultation Party regarding any issue, selection, or determination is (a) likely to have a chilling effect on the potential bidding or (b) otherwise contrary to the goal of maximizing value from the sale process for the Debtor's estate, its creditors, and all other parties in interest.

**XVII. Next-Highest Bidder**

Notwithstanding any of the foregoing, in the event that a Successful Bidder fails to close a Sale prior to such date as specified in the applicable Purchase Agreement (or such date as may be extended by the Debtor), the Debtor, upon written notice to the Next-Highest Bidder, may designate the applicable Next-Highest Bid as the Successful Bid, the Next-Highest Bidder will be deemed to be the Successful Bidder, and the Debtor will be authorized, but not directed, to close the Sale to the Next-Highest Bidder subject to the terms of the Next-Highest Bid without the need for further order of the Bankruptcy Court and without the need for further notice to any interested parties.

**Exhibit 2**

**Notice of Auction and Sale Hearing**



until **July 1, 2020 at 11:59 p.m. (ET)** (the “*Stalking Horse Bid Deadline*”) to obtain a Stalking Horse Bid for the Acquired Assets.

3. Pursuant to the Bidding Procedures, bids for the Acquired Assets, or any subset thereof, must be received on or before **July 6, 2020 at 5:00 p.m. (ET)** (the “*Bid Deadline*”) and **otherwise comply with the Bidding Procedures. FAILURE TO ABIDE BY THE BIDDING PROCEDURES MAY RESULT IN A BID TO BE REJECTED. ANY PARTY INTERESTED IN BIDDING ON THE ACQUIRED ASSETS SHOULD CONTACT [TBD].**

4. Pursuant to the Bidding Procedures, in the event that the Debtor receives more than one Qualified Bid by the Bid Deadline, the Debtor will conduct the Auction which shall take place on **July 8, 2020, beginning at 10:00 a.m. (ET)** at the offices of counsel to the Debtor, Young Conaway Stargatt & Taylor, LLP, Rodney Square, 1000 North King Street, Wilmington, Delaware 19801, or such later time or such other place as the Debtor shall designate and provide notice of to all Qualified Bidders who have submitted Qualified Bids. Only Qualified Bidders (including any Stalking Horse Bidder), shall be entitled to participate at the Auction.

5. Each Successful Bid and any Next-Highest Bid (or if no Qualified Bid other than that of a Stalking Horse Bidder or one Qualified Bidder is received, then the Stalking Horse Bid or the Qualified Bidder, respectively) will be subject to approval by the Bankruptcy Court. The Sale Hearing shall take place on **July 13, 2020, at 10:00 a.m. (ET)**. The Sale Hearing may be adjourned by the Debtor from time to time without further notice to creditors or other parties in interest other than by announcement of the adjournment in open court on the date scheduled for the Sale Hearing or by filing a notice, which may be a hearing agenda, stating the adjournment, on the docket of the Debtor’s chapter 11 case.

6. Any objections to the Sale or the relief requested in connection with the Sale, including objections to entry of the proposed Sale Order (a “*Sale Objection*”), other than a Post-Auction Objection (as defined below) or a Cure Cost/Assignment Objection (which shall be governed by the Assignment Procedures) must: (i) be in writing; (ii) signed by counsel or attested to by the objecting party; (iii) in conformity with the applicable provisions of the Bankruptcy Rules and the Local Rules; (iv) state with particularity the legal and factual basis for the objection and the specific grounds therefor; (v) be filed with the Clerk of the Court, 824 N. Market Street, 3rd Floor, Wilmington, DE 19801, together with proof of service, **on or before 4:00 p.m. (ET) on July 6, 2020** (the “*Sale Objection Deadline*”); and (vi) be served, so as to be actually received on or before the Sale Objection Deadline, upon: (a) counsel to the Debtor, Young Conaway Stargatt & Taylor, LLP, Rodney Square, 1000 North King Street, Wilmington, Delaware 19801, Attn: Matthew Lunn, Esq. (mlunn@ycst.com) and Kenneth J. Enos, Esq. (kenos@ycst.com); (b) counsel to any official committees (if appointed); (c) Office of the United States Trustee, 844 N. King Street, Room 2207, Lockbox 35, Wilmington DE, 19801, Attn: Richard Schepacarter, Esq. (Richard.schepacarter@usdoj.com); and (d) counsel to the DIP Lender, K&L Gates, LLP, 599 Lexington Avenue, New York, NY 10022, Attn: John A. Bicks, Esq. (John.Bicks@klgates.com) and James A. Wright III (James.Wright@klgates.com) (collectively, the “*Notice Parties*”).

7. Any objections solely with respect to conduct at the Auction (a “**Post-Auction Objection**”) must: (i) be in writing; (ii) signed by counsel or attested to by the objecting party; (iii) in conformity with the applicable provisions of the Bankruptcy Rules and the Local Rules; (iv) state with particularity the legal and factual basis for the objection and the specific grounds therefor; (v) be filed with the Clerk of the Court, 824 N. Market Street, 3rd Floor, Wilmington, DE 19801, together with proof of service, **on or before 4:00 p.m. (ET) on July 10, 2020** (the “**Post-Auction Objection Deadline**”); and (vi) be served, so as to be actually received on or before the Post-Auction Objection Deadline, upon the Notice Parties.

8. If a Sale Objection is not filed and served on or before the Sale Objection Deadline or a Post-Auction Objection is not filed and served on or before the Post-Auction Objection Deadline in accordance with the foregoing requirements, the Court may enter the Sale Order without further notice to such party.

9. Copies of the Motion, the Bidding Procedures, the Bidding Procedures Order, and the Assignment Procedures may be obtained by parties in interest free of charge on the dedicated webpage related to the Debtor’s chapter 11 case maintained by the claims and noticing agent in this case, Donlin, Recano & Company, Inc. (<http://www.donlinrecano.com/alpha>). Copies of such documents are also available for inspection during regular business hours at the Clerk of the Bankruptcy Court, 824 N. Market Street, 3rd Floor, Wilmington, DE 19801, and may be viewed for a fee on the internet at the Court’s website (<http://www.deb.uscourts.gov/>) by following the directions for accessing the ECF system on such website.

10. For ease of reference, the following chart has been included to indicate the dates relevant to this Notice:

<b>Date</b>	<b>Event</b>
May 27, 2020	Service of Notice of Assumption and Assignment Notice
July 1, 2020, 11:59 p.m. (ET)	Stalking Horse Bid Deadline
July 6, 2020, 4:00 p.m. (ET)	Sale Objection Deadline Cure Cost/Assignment Objection Deadline
July 6, 2020, 5:00 p.m. (ET)	Bid Deadline
July 8, 2020, 10:00 a.m. (ET)	Auction
July 10, 2020, 4:00 p.m. (ET)	Post-Auction Objection Deadline
July 13, 2020, 10:00 a.m. (ET)	Sale Hearing

Dated: [\_\_\_\_], 2020  
Wilmington, Delaware

YOUNG CONAWAY STARGATT & TAYLOR, LLP

/s/

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Michael R. Nestor (No. 3526) (mnestor@ycst.com)  
Matthew B. Lunn (No. 4119) (mlunn@ycst.com)  
Kenneth J. Enos (No. 4544) (kenos@ycst.com)  
Travis G. Buchanan (No. 5595) (tbuchanan@ycst.com)  
Shane M. Reil (No. 6195) (sreil@ycst.com)  
Matthew P. Milana (No. 6681) (mmilana@ycst.com)  
1000 N. King Street  
Rodney Square  
Wilmington, Delaware 19801  
Telephone: (302) 571-6600  
Facsimile: (302) 571-1253

*Counsel to the Debtor and Debtor in Possession*

**Exhibit 3**

**Notice of Assumption and Assignment**



2. On May \_\_\_\_\_, 2020, the Bankruptcy Court entered the Bid Procedures Order [Docket No. \_\_\_\_].

3. The Sale Hearing shall take place on **July 13, 2020, at 10:00 a.m. (ET)**. The Sale Hearing may be adjourned by the Debtor from time to time without further notice to creditors or other parties in interest other than by announcement of the adjournment in open court on the date scheduled for the Sale Hearing or by filing a notice, which may be a hearing agenda, stating the adjournment, on the docket of the Debtor's chapter 11 case.

4. To facilitate the Sale, the Debtor is potentially seeking to assume and assign the Designated Contracts to any Successful Bidder, in accordance with the Assignment Procedures provided for in the Bid Procedures Order. Each of the Designated Contracts subject to potential assignment through the Sale process is identified on Exhibit 1 attached hereto. **THE INCLUSION OF ANY CONTRACT ON EXHIBIT 1 DOES NOT CONSTITUTE AN ADMISSION THAT A PARTICULAR CONTRACT IS AN EXECUTORY CONTRACT OR UNEXPIRED LEASE OF PROPERTY OR REQUIRE OR GUARANTEE THAT SUCH CONTRACT WILL BE ASSUMED AND ASSIGNED, AND ALL RIGHTS OF THE DEBTOR WITH RESPECT THERETO ARE RESERVED.** The cure amount (each, a "*Cure Cost*"), if any, that the Debtor believes is required to be paid to the applicable counterparty (each, a "*Non-Debtor Counterparty*," and collectively, the "*Non-Debtor Counterparties*") to each of the Designated Contracts under section 365(b)(1)(A) and (B) of the Bankruptcy Code is identified on Exhibit 1 attached hereto.

5. If a Non-Debtor Counterparty objects to the Cure Cost for its Designated Contract and/or to the proposed assumption, assignment and/or transfer of such Designated Contract (including the transfer of any related rights or benefits thereunder), other than objections that relate specifically to the identity of a Successful Bidder, the Non-Debtor Counterparty must file with the Bankruptcy Court and serve on the Notice Parties (as defined below) a written objection (a "*Cure Cost/Assignment Objection*"). Any Cure Cost/Assignment Objection must: (i) be in writing; (ii) signed by counsel or attested to by the objecting party; (iii) in conformity with the applicable provisions of the Bankruptcy Rules and the Local Rules; (iv) state with particularity the legal and factual basis for the objection and the specific grounds therefor; (v) be filed with the Clerk of the Court, 824 N. Market Street, 3rd Floor, Wilmington, DE 19801, together with proof of service, **on or before 4:00 p.m. (ET) on July 6, 2020** (the "*Sale Objection Deadline*"); and (vi) be served, so as to be actually received on or before the Sale Objection Deadline, upon (a) counsel to the Debtor, Young Conaway Stargatt & Taylor, LLP, Rodney Square, 1000 North King Street, Wilmington, Delaware 19801 (Attn: Matthew B. Lunn and Kenneth J. Enos); (b) counsel to any official committee of unsecured creditors; (c) the Office of the United States Trustee for the District of Delaware, 844 N. King Street, Room 2207, Lockbox 35, Wilmington DE, 19801 (Attn: Richard Schepacarter); and (d) counsel to the prepetition and postpetition lender, K&L Gates, LLP, 599 Lexington Avenue, New York, New York 10022 (Attn: John A. Bicks and James A. Wright III) (collectively, the "*Notice Parties*").

6. Objections (a "*Post-Auction Objection*") of any Non-Debtor Counterparty related solely to the identity of, and adequate assurance of future performance provided by, the Successful Bidder must (i) be in writing; (ii) state with specificity the nature of such objection,

and (iii) be filed with the Bankruptcy Court and properly served on the Notice Parties so as to be received **on or before 4:00 p.m. (ET) on July 10, 2020** (the “*Post-Auction Objection Deadline*”).

7. At the Sale Hearing, the Debtor may seek Bankruptcy Court approval of the assumption and assignment to any Successful Bidder of those Designated Contracts that have been selected by the Successful Bidder to be assumed and assigned. The Debtor and its estate reserve any and all rights with respect to any Designated Contracts that are not ultimately assigned to the Successful Bidder.

8. Any Non-Debtor Counterparty to a Contract who fails to timely file and properly serve a Cure Cost/Assignment Objection or Post-Auction Objection as provided herein will (i) be forever barred from objecting to the Cure Cost and from asserting any additional cure or other amounts with respect to such Contract in the event it is assumed and/or assigned by the Debtor and the Debtor shall be entitled to rely solely upon the Cure Cost, and (ii) be deemed to have consented to the assumption, assignment and/or transfer of such Contract (including the transfer of any related rights and benefits thereunder) to the relevant Successful Bidder and shall be forever barred and estopped from asserting or claiming against the Debtor or the Successful Bidder that any additional amounts are due or defaults exist, or conditions to assumption, assignment, and/or transfer must be satisfied under such Contract, or that any related right or benefit under such Contract cannot or will not be available to the relevant Successful Bidder.

9. If a Non-Debtor Counterparty files a Cure Cost/Assignment Objection satisfying the requirements of these Assignment Procedures, the Debtor and the Non-Debtor Counterparty shall meet and confer in good faith to attempt to resolve any such objection without Bankruptcy Court intervention. If the applicable parties determine that the objection cannot be resolved without judicial intervention in a timely manner, the Bankruptcy Court shall make all necessary determinations relating to such Cure Cost/Assignment Objection at a hearing scheduled pursuant to the following Paragraph.

10. Consideration of unresolved Cure Cost/Assignment Objections and Post-Auction Objections relating to all Designated Contracts, if any, will be held at the Sale Hearing; *provided, however*, that (i) any Contract that is the subject of a Cure Cost/Assignment Objection with respect solely to the amount of the Cure Cost may be assumed and assigned prior to resolution of such objection and (ii) the Debtor, in consultation with the Consultation Parties and the parties to any Contract that is subject to a Cure Cost/Assignment objection, may adjourn a Cure Cost/Assignment objection.

11. A timely filed and properly served Cure Cost/Assignment Objection or Post-Auction Objection will reserve the filing Non-Debtor Counterparty’s rights relating to the Contract, but will not be deemed to constitute an objection to the relief generally requested in the Motion with respect to the approval of the Sale.

12. The Debtor’s assumption and/or assignment of a Contract is subject to approval by the Bankruptcy Court and consummation of the Sale. Absent consummation of the Sale and entry of an order approving the assumption and/or assignment of the Designated Contracts, the

Designated Contracts shall be deemed neither assumed nor assigned, and shall in all respects be subject to subsequent assumption or rejection by the Debtor.

13. Copies of the Motion, the Bid Procedures, the Bid Procedures Order, and the Assignment Procedures may be obtained by parties in interest free of charge on the dedicated webpage related to this chapter 11 case maintained by the claims and noticing agent in this case, Donlin, Recano & Company, Inc. (<http://www.donlinrecano.com/alpha>). Copies of such documents are also available for inspection during regular business hours at the Clerk of the Bankruptcy Court, 824 N. Market Street, 3rd Floor, Wilmington, DE 19801, and may be viewed for a fee at the Bankruptcy Court's website (<http://www.deb.uscourts.gov/>) by following the directions for accessing the ECF system on such website.

14. Any Non-Debtor Counterparty to a Contract may notify the Debtor, via an electronic mail request to the Debtor's counsel, Young Conaway Stargatt & Taylor, LLP, Rodney Square, 1000 North King Street, Wilmington, Delaware 19801 (Attn: Matthew B. Lunn, Esq. ([mlunn@ycst.com](mailto:mlunn@ycst.com)), Kenneth J. Enos, Esq. ([kenos@ycst.com](mailto:kenos@ycst.com)) and Shane M. Reil, Esq. ([sreil@ycst.com](mailto:sreil@ycst.com)), of its desire for information about (a) the identity of any Stalking Horse Bidder, as applicable; (b) adequate assurance information from the Stalking Horse Bidder (if its Contract is implicated by the Stalking Horse Bid), as applicable; (c) the identity of the Successful Bidder and any backup bidder; and (d) adequate assurance information from the Successful Bidder and any backup bidder (if its Contract is implicated by the Successful Bid or backup bid). Any such request shall include an email address whereby the requestor can receive such information, and Debtor shall provide, or shall cause their counsel and/or the claims and noticing agent to provide, such information to any requestor (a) with respect to a Stalking Horse Bidder, within the later of (i) twenty-four (24) hours after entry into any agreement with a Stalking Horse Bidder and (ii) twenty-four (24) hours after receipt by counsel to the Debtor of such a request; and (b) with respect to a successful Bidder or backup bidder, within the later of (i) twelve (12) hours after the conclusion of the Auction and (ii) twelve (12) hours after receipt by counsel to the Debtor of such a request.

*[Remainder of page intentionally left blank]*

Dated: [\_\_\_\_], 2020  
Wilmington, Delaware

YOUNG CONAWAY STARGATT & TAYLOR, LLP

/s/

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*Proposed Counsel to the Debtor and Debtor in Possession*

**EXHIBIT 1**

**Designated Contracts**

(attached)