IN THE UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re:	Chapter 11
ALLIED SYSTEMS HOLDINGS, INC., *et al.*,[1]	Case No. 12-11564 (CSS)
	(Jointly Administered)
Debtor.	**Re: Docket Nos. 1174, 1175**

OMNIBUS OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO (1) MOTION (I) AUTHORIZING DEBTORS TO (A) OBTAIN POSTPETITION SECURED REPLACEMENT DIP FINANCING AND (B) USE CASH COLLATERAL; (II) GRANTING SUPERPRIORITY LIENS AND PROVIDING FOR SUPERPRIORITY ADMINISTRATIVE EXPENSE STATUS; (III) GRANTING ADEQUATE PROTECTION TO PREPETITION SECURED LENDERS; AND (IV) MODIFYING AUTOMATIC STAY; AND (2) MOTION OF THE DEBTORS FOR ENTRY OF ORDERS: (A)(I) APPROVING BID PROCEDURES RELATING TO SALE OF THE DEBTORS' ASSETS; (II) APPROVING BID PROTECTIONS; (III) SCHEDULING A HEARING TO CONSIDER THE SALE; (IV) APPROVING THE FORM AND MANNER OF NOTICE OF SALE BY AUCTION; (V) ESTABLISHING PROCEDURES FOR NOTICING AND DETERMINING CURE AMOUNTS; AND (VI) GRANTING RELATED RELIEF; AND (B)(I) APPROVING ASSET PURCHASE AGREEMENT AND AUTHORIZING THE SALE OF CERTAIN ASSETS OF DEBTORS OUTSIDE THE ORDINARY COURSE OF BUSINESS; (II) AUTHORIZING THE SALE OF ASSETS FREE AND CLEAR OF ALL LIENS, CLAIMS, ENCUMBRANCES, AND INTERESTS; (III) AUTHORIZING THE ASSUMPTION, SALE, AND ASSIGNMENT OF CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES; AND (IV) GRANTING RELATED RELIEF

The Official Committee of Unsecured Creditors (the "Committee") appointed in the above-captioned chapter 11 cases (the "Chapter 11 Cases") of Allied Systems Holdings, Inc. ("Allied"), Allied Systems, Ltd. (L.P.) ("Systems") and their U.S. and Canadian subsidiaries

[1] The Debtors in these cases, along with the federal tax identification number (or Canadian business number where applicable) for each of the Debtors, are: Allied Systems Holdings, Inc. (58-0360550); Allied Automotive Group, Inc. (58-2201081); Allied Freight Broker LLC (59-2876864); Allied Systems (Canada) Company (90-0169283); Allied Systems, Ltd. (L.P.) (58-1710028); Axis Areta, LLC (45-5215545); Axis Canada Company (87568828); Axis Group, Inc. (58-2204628); Commercial Carriers, Inc. (38-0436930); CT Services, Inc. (38-2918187); Cordin Transport LLC (38-1985795); F.J. Boutell Driveaway LLC (38-0365100); GACS Incorporated (58-1944786); Logistic Systems, LLC (45-4241751); Logistic Technology, LLC (45-4242057); QAT, Inc. (59-2876863); RMX LLC (31-0961359); Transport Support LLC (38-2349563); and Terminal Services LLC (91-0847582). The location of the Debtors' corporate headquarters and the Debtors' address for service of process is 2302 Parklake Drive, Bldg. 15, Ste. 600, Atlanta, Georgia 30345.

(collectively, the "Debtors"), by and through its undersigned counsel, hereby submits this omnibus objection (the "Objection") to the (i) *Motion Pursuant to 11 U.S.C. §§ 105, 361, 362, 363(c), 364(c)(1), 364(c)(2), 364(c)(3), 364(c)(4), 364(c), 503(b) and 507(a), Fed. R. Bankr. P. 2002, 4001 and 9014 and Del. Bankr. L.R. 4001-2: (I) Authorizing Debtors to (A) Obtain Postpetition Secured Replacement DIP Financing and (B) Use Cash Collateral; (II) Granting Superpriority Liens and Providing for Superpriority Administrative Expense Status; (III) Granting Adequate Protection to Prepetition Secured Lenders; and (IV) Modifying Automatic Stay; and (V) Scheduling a Final Hearing Pursuant to Bankruptcy Rules 4001(b) and (c)* (the "Replacement DIP Motion") (D.I. 1174); and (ii) *Motion of the Debtors for Entry of Orders: (A)(I) Approving Bid Procedures Relating to Sale of the Debtors' Assets; (II) Approving Bid Protections; (III) Scheduling a Hearing to Consider the Sale; (IV) Approving the Form and Manner of Notice of Sale by Auction; (V) Establishing Procedures for Noticing and Determining Cure Amounts; and (VI) Granting Related Relief; and (B)(I) Approving Asset Purchase Agreement and Authorizing the Sale of Certain Assets of Debtors Outside the Ordinary Course of Business; (II) Authorizing the Sale of Assets Free and Clear of all Liens, Claims, Encumbrances, and Interests; (III) Authorizing the Assumption, Sale, and Assignment of Certain Executory Contracts and Unexpired Leases; and (IV) Granting Related Relief* (the "Sale/Bid Procedures Motion," together with the Replacement DIP Motion, the "Motions") (D.I. 1175).[2] In support of the Objection, the Committee respectfully represents as follows:

INTRODUCTION

1. Since before the commencement of these chapter 11 proceedings, the Debtors have been held hostage by the fighting between Yucaipa and the Petitioning Creditors,

[2] Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Bid Procedures/Sale Motion.

with each of these parties trying to gain the upper hand against one another with very little concern for the Debtors' estates. Now that the Petitioning Creditors have seemingly replaced Yucaipa as the "Requisite Lender" (at least for the time being), they have simultaneously proposed the Replacement DIP Facility and Bidding Procedures (with a Stalking Horse Bid) that permit them to wield an inordinate amount of control over the Debtors and the outcome of their chapter 11 cases.

2. Just as the Committee was alarmed about the effect of the original terms of the First DIP Facility in conferring an unfair advantage to its proponent Yucaipa, the Committee is now concerned that the relief requested in the Replacement DIP Motion and the Sale/Bid Procedures Motion would be severely detrimental to the Debtors' estates if approved in their current form. The Committee does not dispute that the Debtors need additional liquidity, although a replacement credit facility is not immediately required – indeed, as of May 29, 2013, the Debtors have available to it $2 million undrawn under Yucaipa's First DIP Facility. Nor does it dispute that an appropriate stalking horse bid might spur bidding. However, through the joint operation of these Motions, the Petitioning Creditors cannot be permitted to improperly exploit the Debtors' situation by extracting exorbitant fees and expenses and imposing onerous conditions and procedures, in an effort to gain an unfair advantage in the Debtors' bankruptcy cases at the estates' expense, including taking control as a bidder over the Debtors' sale process and chilling third parties from bidding on the Debtors' assets.

3. While the Committee's objections to the Replacement DIP Motion and the Sale/Bid Procedures Motion each stand on their own merits, the Motions are closely intertwined and designed to effect an outcome where the Petitioning Creditors are able to dictate the course of the Debtors' chapter 11 cases and sale process and reap substantial financial and other benefits

along the way, to the considerable detriment of unsecured creditors. Under the Replacement DIP Facility, the Petitioning Creditors control the substance of the Bidding Procedures Order and the U.S. Sale Order by conditioning their obligation to fund the Debtors on the Petitioning Creditors' approval of sale procedures and a final sale order. Such an attempt to use post-petition financing to dictate the course of these cases and the Replacement DIP Lenders' status in the sale process is patently improper and should be rejected by this Court.

4. The Petitioning Creditors seek to bestow substantial and inappropriate benefits on themselves for providing the Replacement DIP Facility. First, their seven month $33.5 million facility – realistically a 4 to 5 month facility of $11.5 million in new money – is extraordinarily expensive, with a 12% interest rate, 3.5% of the total commitment in fees and a 1.5% Unused Line Fee, and is much more expensive than Yucaipa's one year $20 million First DIP Facility in this case, which has a 10% interest rate and in which Yucaipa received 2.875% of the total commitment in fees and a 0.75% unused line fee. Second, the Petitioning Creditors – representing only their own interests – improperly seek to take control of the Committee Adversary Proceeding, despite the fact that it was brought by the Committee ***on behalf of the estates***. Thus, they cannot be permitted to obtain a veto right over settlement of the Committee Adversary Proceeding because that would be contrary to prior orders of this Court and the best interests of the Debtors and their estates. Moreover, the Petitioning Creditors should not be permitted to inappropriately cap the Committee's litigation fees and set the litigation budget to the detriment of the estates' interest in the Committee Adversary Proceeding. Third, the Petitioning Creditors improperly seek to impose new liens and superpriority/priority claims over avoidance actions and their proceeds.

5. Finally, the Sale/Bid Procedures Motion attempts to impose numerous conditions and provisions that are so burdensome and preferential that they would prevent the estates from maximizing value and would discourage third parties from participating in the sale process. First, *coupled with the provisions of the Replacement DIP Facility*, the Stalking Horse Purchaser seek to skew the sale process in its favor by dictating the terms of the Bidding Procedures Order and the U.S. Sale Order, all the while blocking the Debtors from seeking alternative bids until a Bidding Procedures Order acceptable to the Stalking Horse Purchaser is entered.

6. Second, the stalking horse bid (the "Stalking Horse Bid") proposed by the Stalking Horse Bidder has numerous components that have not been disclosed or finalized, which, together with the other provisions whose approval is sought in this Motion, would chill bidding and prevent third parties from making fully informed bids. Regarding the scope of the Purchased Assets and Assumed Liabilities, the Stalking Horse Purchaser can alter that scope at any time and the Committee still does not have the schedules to the Sale Agreement. Concerning the Stalking Horse Purchaser's consideration, the Committee is not aware of a firm Wind Down Budget or firm amount of the Additional Cash Consideration, and the Stalking Horse Purchaser has not provided a clear allocation of the consideration to the Debtors' assets. Indeed, even though the Stalking Horse Bid is so incomplete that it would not be considered a Qualified Bid under the Bidding Procedures, the proposed Bidding Procedures Order deems the Stalking Horse Bid to be a Qualified Bid.

7. Third, the Bidding Procedures contain unreasonable and inflexible terms and conditions that must be modified or deleted. Specifically, the initial overbid increment of $5 million plus the requirement that all overbids be entirely in cash is unreasonable, and will

discourage potential bidders – particularly where the Stalking Horse Bid itself is largely non-cash and even most of the cash component will be paid to the Petitioning Creditors. More generally, the Bidding Procedures must be modified so that the parties can take into account valuable non-cash consideration offered by potential bidders, such as the assumption of collective bargaining agreements, pension plans or other contracts/liabilities, and also to permit bidders interested in specific portions of the Debtors' estates to bid on those particular segments or enter in combined bids for the Debtors' assets.

8. Lastly, numerous other provisions confer unwarranted benefits on to the Stalking Horse Purchaser and further serve to chill bidding: (i) a $3 million Purchaser's Expense Reimbursement is excessive under these circumstances, as, among other things, it may be required to be paid regardless of why the Sale Agreement transactions were not consummated by October 14, 2013, including if the Stalking Horse Purchaser walks away on the basis of its broad due diligence contingency, (ii) the Stalking Horse Purchaser cannot include Unencumbered Assets in its credit bid of the First Lien Debt because those assets are not subject to liens granted pursuant to First Lien Debt, (iii) by having the access to "any written expression of interest, inquiry, offer or bid received" by the Debtors, the Stalking Horse Purchaser has an unfair advantage over other potential buyers, and (iv) the Stalking Horse Purchaser has the unilateral right to terminate the Sale Agreement under a broad due diligence contingency (contrary to its own requirements for Qualified Bids) and thus the Stalking Horse Purchaser is barely bound by the Sale Agreement.

9. Accordingly, the Motions give the Replacement DIP Lenders and the Stalking Horse Purchaser, *i.e.*, the Petitioning Creditors, substantial and inappropriate leverage over these chapter 11 cases and the critical sale process and will limit marketing and chill

bidding to the detriment of the unsecured creditors of these estates. Any relief provided under the Replacement DIP Motion or the Sale/Bid Procedures Motion must be modified to ensure the value of the Debtors' assets is maximized in a competitive, fair and open process for the benefit of all creditors – not just the Petitioning Creditors.

BACKGROUND

I. The Debtors' Prepetition Loan Agreements

10. As described in the Motions, the Debtors have a first lien facility (the "First Lien Facility") and a second lien facility (the "Second Lien Facility," together with the First Lien Facility, the "Prepetition Credit Facilities"). According to the Debtors, as of the Petition Date or Consent Date, the Debtors owed approximately $244,021,526 in principal amount of debt (the "First Lien Debt") to lenders under the First Lien Facility (the "First Lien Lenders") and $30,000,000 in principal amount of debt (the "Second Lien Debt") to lenders under the Second Lien Facility (the "Second Lien Lenders"). Each of the Debtors and the collateral agents for the two credit facilities entered into an Intercreditor Agreement dated as of May 15, 2007 (the "Intercreditor Agreement") to set forth, among other things, the relative rights and priorities as between these two credit facilities.

11. The First Lien Facility is evidenced by the Amended and Restated First Lien Senior Secured Super-Priority Debtor in Possession and Exit Credit and Guaranty Agreement, dated as of May 15, 2007, as amended by an amendment no. 1 dated as of May 29, 2007, an amendment no. 2 dated as of June 12, 2007 and an amendment no. 3 dated as of April 17, 2008, (as amended, the "First Lien Credit Agreement"), and as purportedly amended by an amendment no. 4 dated as of August 21, 2009 (the "Fourth Amendment"). The Fourth Amendment was held invalid and unenforceable in the New York State Decision (as defined below), and that decision, while not stayed, is currently being appealed by Yucaipa. On April

19, 2012, The CIT Group/Business Credit, Inc. ("CIT") resigned from its position as administrative agent and collateral agent (the "First Lien Agent") under the First Lien Credit Agreement. The Petitioning Creditors, together with AMMC VIII, Limited, (collectively, the "BD/Spectrum Lenders"), notified the relevant parties under the First Lien Credit Agreement that it was appointing affiliates of the Petitioning Creditors as First Lien Agents under the First Lien Credit Agreement.

12. The Second Lien Facility is evidenced by the Second Lien Secured Super-Priority Debtor in Possession and Exit Credit and Guaranty Agreement, dated as of May 15, 2007, as amended by an amendment no. 1 dated as of May 29, 2007, an amendment no. 2 dated as of June 12, 2007 and an amendment no. 3 dated as of April 17, 2008, (as amended, the "Second Lien Credit Agreement").

13. According to the Debtors, the BD/Spectrum Lenders collectively hold $56,486,964.50 in principal amount of obligations under the First Lien Facility, which represents 23.15% of the outstanding First Lien Debt. The Debtors state that Yucaipa purports to hold $134,835,688.70 in principal amount of obligations under the First Lien Facility, which represents 55.25% of the outstanding First Lien Debt. However, on March 29, 2013, Justice Ramos of the Supreme Court of New York held in an opinion and order (the "New York State Decision") that the Fourth Amendment was invalid and that Yucaipa is not the Requisite Lender (as defined in the First Lien Credit Agreement).

14. Assuming this means that all of Yucaipa's First Lien Debt is excluded for the purpose of determining the Requisite Lenders under the First Lien Credit Agreement, the BD/Spectrum Lenders would be the Requisite Lenders thereunder. Under this assumption, the BD/Spectrum Lenders, as the Requisite Lenders, would have the right to direct the First Lien

Agent to submit a credit bid on behalf of the First Lien Lenders. On April 23, 2013, Yucaipa filed in the Supreme Court of the State of New York, Appellate Division, an appeal from, and a motion to stay, the New York State Decision.

15. The Prepetition Credit Facilities are secured by liens in a substantial portion of the assets of the Debtors pursuant to the two Amended and Restated Pledge and Security Agreements, both dated as of May 15, 2007 (the "Prepetition Security Agreements"). The credit and security documents for the First Lien Loan Documents and the Second Lien Loan documents (as such terms are defined in the First Lien Credit Agreement) are referred to herein as the "Prepetition Loan Documents," and the collateral described therein is referred to herein as the "Prepetition Collateral." According to the Debtors, the Prepetition Lenders are not perfected in certain excluded assets and deposit accounts, certain pledged assets in which the First Lien Agent does not have a control agreement, or in certain real estate, which is not encumbered by a mortgage; and those assets, along other exclusions set forth in the Prepetition Security Agreements (including 35% of the outstanding capital stock of foreign subsidiaries), are not included in the Prepetition Collateral (collectively, the "Unencumbered Assets").

II. The Debtors' Postpetition Financing

16. On July 12, 2012, the Court entered the final order (as amended from time to time, the "First DIP Order") authorizing the Debtors to obtain a $20 million delayed draw term loan facility (the "First DIP Facility") provided by affiliates of Yucaipa American Alliance Fund II, LLC (collectively, and together with each applicable affiliate of Yucaipa American Alliance Fund II, LLC, "Yucaipa") pursuant to that certain Senior Secured Super-Priority Debtor in Possession Credit and Guaranty Agreement, dated as of June 12, 2012 (as amended from time to time, the "First DIP Credit Agreement"). The First DIP Facility currently provides post-petition financing for the Debtors in an amount of up to $22 million. As of May 29, 2013, the

Debtors have drawn $20 million from the First DIP Facility, leaving $2 million available for the Debtors to draw.

17. The Debtors filed the Replacement DIP Motion on May 17, 2013. The Replacement DIP Motion seeks entry of the final order (the "Replacement DIP Order"), and approval to enter into a new $33.5 million credit facility (the "Replacement DIP Facility") provided by affiliates of the Petitioning Creditors (collectively, the "Replacement DIP Lenders") pursuant to the Senior Secured Super-Priority Debtor in Possession Credit and Guaranty Agreement (the "Replacement DIP Agreement"). According to the Debtors, the Replacement DIP Facility is intended to refinance the First DIP Facility and provide financing to enable the Debtors to sell their assets pursuant to the Sale/Bid Procedures Motion and to ultimately wind down the Chapter 11 Cases.

III. The Committee Adversary Proceeding

18. On February 1, 2013, the Committee filed its Complaint in the adversary proceeding captioned The Official Committee of Unsecured Creditors v. Yucaipa American Alliance Fund, I, LP et al., Adv. Pro. No. 13-50530 (CSS) (the "Committee Adversary Proceeding"), bringing claims against Yucaipa and certain directors of Allied seeking to, among other things, invalidate, subordinate, and/or recharacterize Yucaipa's First Lien Debt and find Yucaipa and certain directors of Allied liable for breaches of fiduciary duties. As such, the outcome of the Committee Adversary Proceeding will affect the validity and treatment of Yucaipa's First Lien Debt, and, as with the New York State Decision, may affect which First Lien Lenders can comprise the "Requisite Lenders" under the First Lien Credit Agreement.

19. On March 21, 2013, the Court granted the Committee's motion for standing to prosecute the estate causes of action as set forth in the Committee Adversary Proceeding. While the Petitioning Creditors were granted intervenor status, the Court ordered

that the Committee has "the right to seek relief from the Court to modify the scope of the Petitioning Creditors' intervention in the Committee Adversary Proceeding in the event the Committee determines, in good faith, that the Petitioning Creditors' conduct as intervening plaintiffs is not in the best interests of the Debtors' estates and their creditors." D.I. 1015 ¶ 11. Moreover, the Court ordered that "[t]he Committee, the Petitioning Creditors and the Debtors are each hereby vested with the authority to settle Claims." Id. ¶ 12.

20. On April 23, 2013 the court approved an order assigning this case to mediation before Judge Robert D. Drain. The parties appeared for mediation on May 7, 2013 (the "Mediation"). Discovery in the Committee Adversary Proceeding is ongoing. Depositions have been scheduled to take place in Atlanta, Los Angeles, New York, and additional depositions are being scheduled to occur in other locations, including Florida, Phoenix and potentially other locations. All told, it is expected that between 50 to 70 depositions will be taken throughout the months of June and July. Trial in this matter is scheduled for August 22 through August 30, 2013 before this Court.

IV. The Sale/Bid Procedures Motion

21. By the Sale/Bid Procedures Motion, the Debtors seek entry of the bid procedures order (the "Bidding Procedures Order") attached thereto, and the bid procedures (the "Bidding Procedures") set forth therein, including the bid protections set forth in the asset purchase agreement (the "Sale Agreement") between the Debtors, as sellers, and New Allied Acquisition Co. LLC (the "Stalking Horse Purchaser"), an acquisition entity formed by affiliates of the Petitioning Creditors at the direction of the BD/Spectrum Lenders with respect to the proposed sale (the "Sale") of substantially all of the Debtors' assets, scheduling a hearing on the Sale (the "Sale Hearing") and setting objection and bidding deadlines with respect thereto, approving the form and manner of notice of an auction (the "Auction") for the Debtors' assets,

and establishing procedures to determine cure amounts and deadlines for objections for certain contracts and leases to be assumed and assigned by the Debtors (the "Assumed and Assigned Agreements"). The Debtors will also be seeking the entry of an order (the "Sale Order") authorizing and approving the Sale Agreement free and clear of liens, claims, encumbrances and interests,[3] and granting related relief.

OMNIBUS OBJECTION

I. The Replacement DIP Facility Is Too Expensive and Conveys Unjustifiable Benefits to Certain Secured Lenders

A. The Replacement DIP Motion Grants the Replacement DIP Lenders Excessive Control Over the Chapter 11 Cases and Predetermines the Outcome of the Chapter 11 Cases

22. Bankruptcy courts have substantial discretion in approving debtor in possession financing under section 364 of the Bankruptcy Code. In determining whether to grant the Replacement DIP Order and approve the Replacement DIP Facility in its current form, the Court must balance the interests of the Replacement DIP Lenders with those of general unsecured creditors and other creditor constituencies. Striking this balance requires that a debtor seeking postpetition financing on a superpriority basis demonstrate that the proposed financing comports with basic notions of fairness and equity and that it would ultimately inure to the benefit of the Debtors' estates. See Aqua Assocs., 123 B.R. 192, 196 (Bankr. E.D. Pa. 1991); In re Ames Dep't Stores, Inc., 115 B.R. 34, 37-40 (Bankr. S.D.N.Y. 1990). The Debtors, for the sake of obtaining postpetition financing promptly, cannot abrogate their fiduciary duties to their estates and creditors. Ames, 115 B.R. at 38.

23. Courts have consistently refused to approve post-petition financing when the terms of such financing predetermine the outcome of bankruptcy cases – the precise goal of

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[3] Or, presumably, any other agreement that sets forth the highest or otherwise best offer for the Debtors' assets.

the Replacement DIP Facility here. For example, in In re Tenney Village, Co., Inc., 104 B.R. 562 (Bankr. D.N.H. 1989), the proposed financing contained termination events including (i) confirmation of a plan of reorganization over the bank's objections; (ii) the grant of relief from the automatic stay to a third party without the bank's consent; and (iii) the taking of any action against the bank by any creditor or party-in-interest. The court rejected the DIP structure, stating that,

> Under the guise of financing a reorganization, the Bank would disarm the Debtor of all weapons useable against [the bank] for the bankruptcy estate's benefit, place the Debtor in bondage working for the Bank, seize control of the reins of reorganization, and steal a march on other creditors in numerous ways.

Id. at 568. Accordingly, the court refused to approve the agreement because it "would pervert the reorganization process from one designed to accommodate all classes of creditors . . . to one specially crafted for the benefit" of one creditor. Id.

24. Similarly, the court in Ames, 115 B.R. 34, 38, while reaffirming the discretion of the debtor to exercise reasonable business judgment in arranging post-petition financing, cautioned that the financing agreement could not contain terms that leverage the bankruptcy process and powers. Id. at 40 ("a proposed financing will not be approved where it is apparent that the purpose of the financing is to benefit a creditor rather than the estate"); In re Cuisinarts, Inc., 115 B.R. 744 (Bankr. D. Conn. 1990) (rejecting post-petition financing provisions that restricted the estate from using monies derived from bank funding to investigate validity of bank's claims); In re Tamarack Resort, LLC, 2010 Bankr. LEXIS 3680, at *49-53 (Bankr. D. Idaho Oct. 19, 2010) (denying request for postpetition financing when default was likely due to short milestones, time sensitive obligations to file a sale procedure motion, plan and disclosure statement all subject to approval of the lender).

25. Entering the Replacement DIP Order would convert "the bankruptcy process from one designed to benefit all creditors to one designed for the unwarranted benefit of the postpetition lender." In re Mid-State Raceway, Inc., 323 B.R. 40, 59 (Bankr. N.D.N.Y. 2005), citing In re Defender Drug Stores, Inc., 145 B.R. 312, 317 (B.A.P. 9th Cir. 1992). Specifically, the proposed Replacement DIP Order and Replacement DIP Agreement would grant the Petitioning Creditors control of the Debtors' chapter 11 cases and sale process, and would significantly curb the Debtors' ability to act independently of the Petitioning Creditors. Indeed, the proposed Replacement DIP Facility enables the Replacement DIP Lenders to shut down the Debtors' ability to access funding thereunder if sale-related orders are unacceptable to the Replacement DIP Lenders, guaranteeing them a virtual stranglehold over the sale process, as described below:

- As a condition precedent to the obligations of the Replacement DIP Lenders to lend, "the order, in form and substance reasonably acceptable to the [Replacement DIP Agents], granting the relief requested in the Sale/Bid Procedures Motion (the "**Sale/Bid Procedures Order**" shall have been entered by the Bankruptcy Court and shall be in full force and effect." Replacement DIP Agreement § 3.1(q); see also Replacement DIP Order ¶ 2(a).

- In addition, an Event of Default will already be triggered if the Sale/Bid Procedures Order is not entered by the date of the Final Hearing, *i.e.* May 31, 2013. See Replacement DIP Order ¶ 36(b).

- Any amendment or modification of the Sale/Bid Procedures Order not accepted by the Replacement DIP Lenders also triggers an Event of Default under the Replacement DIP Facility. See Replacement DIP Agreement § 8.1(bb).

- An Event of Default is triggered if the order of this Court authorizing the sale of all or substantially all of the Debtors' assets is not entered on or before August 16, 2013, or such order is not "in form and substance reasonably acceptable to each Replacement DIP Agent." Replacement DIP Order ¶ 36(d); see also Replacement DIP Agreement § 8.1(aa).

26. These restrictions prevent the Debtors from exercising their fiduciary duties to adequately market their assets in order to maximize value for their estates and creditors.

See Official Comm. of Unsecured Creditors of Cybergeneics v. Chinery, 330 F.3d 548, 573 (3d Cir. 2003). Thus, under the Replacement DIP Facility, the Replacement DIP Lenders effectively hold veto rights over the course of the sale process – even if their Stalking Horse Bid does not prevail at the Auction – that they can exercise for their own benefit, interfering with the Debtors and other stakeholders' ability to negotiate appropriate sale procedures for the benefit of the estates as a whole. In addition, the Petitioning Creditors will receive a broad release if the Replacement DIP Order is entered (see Replacement DIP Order ¶ 12), thus securing significant allowed liens and superpriority claims that are currency for the Auction.

27. With the Replacement DIP Lenders in control of the Debtors' sale process, third-party bidding for the benefit of the estate will be thwarted. Consequently, these provisions chill bidding, improperly put the Petitioning Creditors in the driver's seat, impermissibly link the Replacement DIP Facility to the sale process, and raise serious and substantial issues regarding the Debtors' ability to discharge their fiduciary obligation to maximize value for creditors and other stakeholders. It is likely that no third-party bidder would invest time and resources in developing and pursuing an offer beneficial to the estate as a whole under these conditions. These conditions to financing, coupled with the substantial benefits accorded to the Stalking Horse Purchaser jeopardize the Debtors' ability to act for the benefit of all of their stakeholders, and must be eliminated.

B. The Replacement DIP Motion Proposes to Pay an Excessive Amount of Interest, Fees and Expenses to the Replacement DIP Lenders and Replacement DIP Agent

28. The Replacement DIP Facility is exorbitantly priced, even when viewed as a seven (7) month $33.5 million facility, and even accepting the Replacement DIP Facility's Budget (as defined in the Replacement DIP Motion) as an adequate forecast. The Replacement DIP Motion requires the Debtors to pay an interest rate of 12% per annum, see Replacement DIP

Agreement § 2.5, as well as (i) the original issue discount of 2.0% of the Commitments ($670,000); (ii) an exit fee of 1.5% of the Commitments ($502,500); (iii) 1.5% per annum (the "Unused Line Fee") on the excess, if any, of the Commitments over the sum of the average principal amount of the Replacement DIP Loans outstanding, payable monthly in arrears commencing May 31, 2013; (iv) certain other fees set forth in the Fee Letter as described in section 2.8 of the Replacement DIP Agreement; and (v) reasonable fees and expenses of the Replacement DIP Agents in connection with the Replacement DIP Facility, *and*, following an Event of Default, the expenses of the Replacement DIP Lenders in connection with enforcement of any obligations under the Replacement DIP Facility, collection of any payments due and the sale or realization of the DIP Collateral.[4] See Replacement DIP Motion ¶ 5(s). This Court previously approved fees payable to Yucaipa under its one (1) year $22 million (originally $20 million) facility at an interest rate of 10% per annum equal to (i) 2.875% of the total original commitment ($575,000), (ii) a commitment fee of 0.75% per annum on the average undrawn portion of the First DIP Facility, payable monthly, and (iii) reasonable fees and expenses like those sought in the Replacement DIP Motion. See D.I. 230, 231. For comparison:

Facility	Replacement DIP Facility	First DIP Facility
Commitment	$33.5 million	$20 million (later increased to $22 million)
Interest Rate	At least 12%	At least 10%
Approximate Term	Seven (7) months	One (1) year
Total Fixed Fees	3.5% ($1,172,500)	2.875% ($575,000)
Monthly Unused Line Fee	1.5% per annum	0.75% per annum
Work Fees and Expenses in connection with Facility?	Yes	Yes

[4] Although these fees and expenses appear to be subject to review mechanisms under ¶ 4(a) of the Replacement DIP Order to ensure their reasonableness, the provision is effectively neutered by operation of ¶ 4(b) of the Replacement DIP Order.

Other Fees	Described in Fee Letter	None

29. Thus, even taking the Replacement DIP Facility at its face, the Replacement DIP Lenders are seeking the approval of inappropriately sized fees at the expense of unsecured creditors and well in excess of the fees paid to Yucaipa for the First DIP Facility, all in exchange for lending money to the Debtors intended solely to protect and advance their own interests. In fact, the terms of the Replacement DIP Facility are even more egregious when the substance of the two postpetition facilities are compared. The Replacement DIP Facility is at best a seven (7) month facility that is effectively a four (4) and a half month facility because the Replacement DIP Facility requires a sale of the Debtors' assets to be consummated by October 14, 2013. The Replacement DIP Facility provides not more than $11.5 million in new money beyond Yucaipa's one (1) year $22 million First DIP Facility. See Replacement DIP Order ¶ 36(e) (an Event of Default under the Replacement DIP Facility occurs if such a sale is not consummated by October 14, 2013); Replacement DIP Agreement § 8.1(aa) (same). Therefore, the interest, fees and expenses sought in the Replacement DIP Facility are patently unreasonable, and must be reduced accordingly.

C. The Petitioning Creditors Improperly Seeks to Gain Control Over the Committee Adversary Proceeding

i. The Committee Does Not Consent to Giving the Petitioning Creditors a Veto Right over Any Proposed Settlement of the Committee Adversary Proceeding

30. In paragraph 11(d) of the proposed Replacement DIP Order, the Replacement DIP Lenders request that the Court approve a statement that "the Committee has agreed (and shall provide a separate written confirmation) that it shall not accept, support or otherwise settle or resolve any portion of the [Committee Adversary Proceeding] without the prior written consent of the Replacement DIP Agents and Replacement DIP Lenders." This

statement is false. The Committee has not agreed, and will not agree, to give the Petitioning Creditors a veto right over any proposed settlement of any of its claims in the Committee Adversary Proceeding.[5] Further, the Replacement DIP Lenders' suggestion that the Committee so agree is inconsistent with the prior orders of this Court. The Committee was granted standing to prosecute the causes of action set forth in the Committee Adversary Proceeding "on ***behalf of the Debtors' estates.***" D.I. 1015 ¶ 1. Although the Petitioning Creditors were granted intervenor status, it was clear that only the Committee would be acting as plaintiff on behalf of the estates and the Petitioning Creditors would only act on its own behalf. Hr'g Tr. Feb. 27, 2013 at 13:17-19, 16:6-19. Intervention for the Petitioning Creditors is not a back door for the Petitioning Creditors to exercise undue influence or control over the Committee Adversary Proceeding. Indeed, to make this clear, the parties specifically negotiated language in the relevant order that the Committee "shall have ultimate decision making authority to prosecute the claims and causes of action contained in the Committee Adversary Proceeding," D.I. 1015 ¶ 10, and would be "vested with the authority to settle Claims." Id. ¶ 12 (along with the Petitioning Creditors and the Debtors). Moreover, the parties built in a safeguard in the standing order approved by the Court that the Committee has "the right to seek relief from the Court to modify the scope of the Petitioning Creditors' intervention in the Committee Adversary Proceeding in the event the Committee determines, in good faith, that the Petitioning Creditors' conduct as intervening plaintiffs is not in the best interests of the Debtors' estates and their creditors." Id. ¶ 11.

31. The Petitioning Creditors appear to now be attempting to circumvent the negotiated terms of this Court's standing order, and wrest from the Committee the valuable right to settle, on behalf of the estates, the causes of action set forth in the Committee Adversary

[5] Similarly, nothing prevents the Petitioning Creditors from settling any of their claims, subject to Bankruptcy Rule 9019, and the Committee seriously doubts that the Petitioning Creditors would agree to give the Committee veto power of their ability to settle their claims.

Proceeding – a right essential to the Committee's "ultimate decision making authority" in the matter. See, e.g., Hr'g Tr., Feb. 27, 2013 at 16:20-17:2 (counsel for the Petitioning Creditors stating that "neither party is going to have either a veto or a consent right over any proposed settlement."); id. at 19:18-22 (this Court stating that the Committee will have "decision making authority"). As a representative of the Debtors' estates in the Committee Adversary Proceeding, the Committee cannot give the Petitioning Creditors – secured creditors acting only to protect their individual interests in these bankruptcy cases and in the Committee Adversary Proceeding – a veto right over the Committee's ability to settle the Committee Adversary Proceeding. Indeed, as evidence of the Petitioning Creditors' self-interested motives, this Objection outlines the numerous protections and benefits sought by the Petitioning Creditors through the Motions that would severely impair the ability of the Debtors to exercise their fiduciary duty to maximize value for their estates and creditors and the ability of the Committee to exercise that fiduciary in relation to the Committee Adversary Proceeding. Accordingly, relevant language concerning the Committee's "agreement" in paragraph 11(d) of the proposed Replacement DIP Order must be deleted.

ii. The Petitioning Creditors Seek to Wrest Control Over the Committee Adversary Proceeding By Imposing an Artificial Litigation Budget and Cap on the Committee's Fees in that Matter

32. The Petitioning Creditors further seek to improperly hinder the Committee's ability to prosecute the Committee Adversary Proceeding by imposing artificial financial limitations that effectively allow the Petitioning Creditors to dictate the course of the litigation, contrary to this Court's directives and best interests of the Debtors' estates and their creditors' generally. Specifically, the Petitioning Creditors arbitrarily seek to cap the Committee's fees and expenses at $1.5 million in prosecuting the Committee Adversary Proceeding, and make such fees and expenses subject to a litigation budget "which shall be in

form and substance acceptable to the Replacement DIP Agents in ***their sole discretion***." Replacement DIP Order ¶ 11(d) (emphasis added). This Court should not tolerate the bald attempt to force the Committee – by controlling the financing for the litigation – to act in accordance with the whims of the Petitioning Creditors, rather than fulfilling its obligation to prosecute the litigation on behalf of the Debtors' estates.

33. Indeed, there is no other rationale for imposing these limitations. To the extent there is concern about the reasonableness of such fees, and unlike the fees and expenses sought under the Replacement DIP Motion, the Committee's professional fees and expenses, including in connection with the Committee Adversary Proceeding, are subject to rigorous reasonableness review under section 330 of the Bankruptcy Code, Rule 2016-2 of the Local Rules of the United States Bankruptcy Court for the District of Delaware (the "Local Rules"), and the United States Trustee Guidelines for Reviewing Applications for Compensation and Reimbursement of Expenses Filed Under 11 U.S.C. § 330 (the "Guidelines"). See, e.g., D.I. 893 (explaining that the fee examiner reviewed the fees and expenses of co-counsel for the Committee under section 330, the Local Rules and the Guidelines). In consideration of the foregoing, the cap on fees relating to the Committee Adversary Proceeding and Petitioning Creditors' "litigation budget" are entirely unreasonable and must be deleted.

D. The Granting of Replacement DIP Superpriority Claims, Replacement DIP Postpetition Liens, Supplemental Adequate Protection Liens and Supplemental Adequate Protection Priority Claims on the Proceeds of Avoidance Actions Is Improper

34. The Committee also objects to the Replacement DIP Facility and any proposed order to the extent they would permit the imposition of new liens on, or the payment of the new superpriority/priority claims from, Avoidance Actions (as defined in the Replacement

DIP Order) and their proceeds of the Debtors. These proposed protections are inappropriate, and plainly contrary to the interests of the Debtors and the unsecured creditors.

35. Avoidance actions are a creation of bankruptcy law designed to facilitate the equality of distribution among a debtor's general unsecured creditors. See In re Cybergenics Corp., 330 F.3d 548, 567 (3d Cir. 2000) (noting that the underlying intent of the avoidance powers is the recovery of valuable assets for the benefit of a debtor's estate). Because of the unique nature of avoidance power actions, courts have recognized that, at least with respect to proceeds recovered pursuant to section 544(b) of the Bankruptcy Code, "empowering the trustee or debtor in possession to avoid a transaction by pursuing an individual creditor's cause of action is a method of forcing that creditor to share its valuable right with other unsecured creditors." Cybergenics, 226 F.3d at 244; see also Buncher Co. v. Official Comm. of Unsecured Creditors of GenFarm Ltd. P'ship IV, 229 F.3d 245, 250 (3d Cir. 2000) ("When recovery is sought under § 544(b) of the Bankruptcy Code, any recovery is for the benefit of all unsecured creditors, including those who individually had no right to avoid the transfer."); Bear Stearns Sec. Corp. v. Gredd, 275 B.R. 190, 194 (S.D.N.Y. 2002) ("[T]he purpose of § 547 is to ensure fair distribution between creditors, while the purpose of § 548 is to protect the estate itself for the benefit of all creditors."); In re Sweetwater, 884 F.2d 1323, 1328 (10th Cir. 1989) ("[P]ost-petition avoidance actions should be pursued in a manner that will satisfy the basic bankruptcy purpose of treating all similarly situated creditors alike.").[6]

36. Because chapter 5 causes of action are not property of the Debtors' estates, there is no legal basis for the Court to grant the Replacement DIP Lenders and the Prepetition Secured Parties (as defined in the Replacement DIP Order) any interest in the

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[6] Section 551 of the Bankruptcy Code preserves avoided transfers for the benefit of the estate with respect to property of the estate.

proceeds of avoidance actions. Accordingly, the proceeds of the Avoidance Actions should not be subject to any of the liens, superpriority claims and priority claims sought to be granted in the Replacement DIP Order, including the Replacement DIP Superpriority Claims, Replacement DIP Postpetition Liens, Supplemental Adequate Protection Liens and Supplemental Adequate Protection Priority Claims (as such terms are defined in the Replacement DIP Order). Further, these liens and superpriority/priority claims should not be senior to any prepetition lien that is determined to be avoidable (see Replacement DIP Order ¶ 10) and the DIP Collateral (as defined in the Replacement DIP Order) should expressly exclude the proceeds of the Avoidance Actions from its definition. See Replacement DIP Order ¶ 8. Indeed, this Court approved Yucaipa's First DIP Order on those precise terms. See D.I. 230 ¶¶ 8, 10(b).

37. If and to the extent this Court finds that such liens and superpriority/priority claims are permissible, the secured parties' ability to seek recourse to the proceeds of avoidance actions and other collateral/assets not encumbered by prepetition collateral should be circumscribed so that the secured parties can only seek such recourse after they have exhausted recovery from their prepetition collateral. As described above, the valuable rights that the creditors have in the avoidance actions should be given effect, and thus the prepetition lenders and the Replacement DIP Lenders should not be able to dissipate these critical assets without first recovering from the rest of the collateral packages.[7]

[7] The proposed Replacement DIP Order provides that the Replacement DIP Lenders and the Prepetition Secured Parties not be subject to the equitable doctrine of "marshaling" or any similar doctrine with respect to the DIP Collateral or the Prepetition Collateral. This waiver should be subject to the parties first seeking a recovery from the relevant collateral as described above before seeking a recovery from Avoidance Actions.

II. The Restrictive Bidding Procedures and Stalking Horse Bid Will Prevent the Estates from Maximizing Value and Discourages Third Party Bidders from Participating

38. The sale of substantially all of a debtor's assets pursuant to section 363 of the Bankruptcy Code outside of a plan of reorganization "requires a bankruptcy court's careful review." In re Exaeris Inc., 380 B.R. 741, 744 (Bankr. D. Del. 2008). It is axiomatic that the Debtors may sell assets under section 363 of the Bankruptcy Code only if the sale is based upon sound business judgment. See In re Montgomery Ward Holding Corp., 242 B.R. 147, 153 (D. Del. 1999); In re Delaware & Hudson Ry. Co., 124 B.R. 169, 176 (D. Del. 1991). Factors considered include: the proportionate value of the asset to the estate as a whole; the amount of elapsed time since the filing; the likelihood that a plan of reorganization will be proposed and confirmed in the near future; the effect of the proposed disposition on the future plan of reorganization; the amount of proceeds to be obtained from the sale versus appraised values of the property; and whether the asset is decreasing or increasing in value. Delaware & Hudson, 124 B.R. at 176.

39. These standards must be observed notwithstanding the need for an expedited sale process. In re Lionel Corp., 722 F.2d 1063, 1071 (2d Cir. 1983) (noting that "[t]he need for expedition, however, is not a justification for abandoning proper standards."). Indeed, the Second Circuit in Lionel held:

> There must be some articulated justification, other than appeasement of major creditors, for using, selling, or leasing property out of the ordinary course of business before the bankruptcy judge may order disposition under §363(b).

Id. at 1070; see also In re Encore Healthcare Assocs., 312 B.R. 52 (Bankr. W.D. Pa. 2004) (applying Lionel standard and finding no business justification as the sole purpose of the section 363 sale was to liquidate assets for benefit of secured creditors).

40. Bidding procedures should only be approved by a bankruptcy court where the proposed procedures would allow the debtor to conduct an auction in a "controlled, fair, and open fashion" that will maximize the sale price of the assets being sold. See, e.g., In re Dura Automotive Sys., Inc., 2007 Bankr. LEXIS 2764, at *253-54 (Bankr. D. Del. Aug. 15, 2009). The procedures proposed by the Debtors have serious flaws that will discourage third-party bidders from participating, and thus cannot be approved in their current state. See, e.g., In re John Joseph Edwards, 228 B.R. 552, 560 (Bankr. E.D. Pa. 1998) (providing that "[t]he purpose of procedural bidding orders is to facilitate an open and fair public sale designed to maximize value for the estate."); In re Food Barn Stores, Inc., 107 F.3d 558, 564-65 (8th Cir. 1997) (finality and regularity of proceedings are significant factors whenever the courts are involved in a sale of property, for devotion to those principles encourages fervent bidding and ensures that interested parties will sincerely extend their best and highest offers at the auction itself); In re Mama's Original Foods, Inc., 234 B.R. 500, 505 (Bankr. C.D. Cal. 1999) (a fair bidding process is required so that each potential bidder is given an adequate opportunity to bid).

A. The Stalking Horse Purchaser Has Control Over the Sale Process

41. As described above, the proposed Replacement DIP Facility gives the Replacement DIP Lenders a virtual stranglehold over the sale process by allowing them to cut off financing for the Debtors if either the sale procedures order or the sale order is not reasonably acceptable to them. The Bidding Procedures and the Sale Agreement expand on the control bestowed upon the Petitioning Creditors (in their capacity as Replacement DIP Lenders) over the sale process.

42. Specifically, the Stalking Horse Purchaser – *i.e.*, the Petitioning Creditors – has no obligation to consummate the Stalking Horse Bid if there are any changes to the Bidding Procedures Order and the Sale Order that adversely impact the Stalking Horse Purchaser

because a condition precedent to the Stalking Horse Purchaser's obligations is that the Bidding Procedures Order and the Sale Order be entered "with any changes thereto that adversely impact the Purchaser satisfactory to the Purchaser ***in its sole discretion***." Sale Agreement § 9.2(b) (emphasis added). Thus, the Petitioning Creditors can choose not to consummate the Stalking Horse Bid in their "sole discretion" if the approved Bidding Procedures Order is not in their favor, and can stop funding the Debtors if either the Bidding Procedures Order or the U.S. Sale Order approving the sale to any winning bidder is not acceptable to the Petitioning Creditors. With this level of control over the sale process, there is no hope of a competitive bidding process, and the Debtors are thoroughly prevented from fulfilling their fiduciary duty to maximize value for their estates and creditors.

43. In addition, the Sale Agreement also grants an unjustifiable exclusive period to the Petitioning Creditors in connection with the sale of the Debtors' assets from the execution date of the Sale Agreement to the entry of the Bidding Procedures Order. See Sale Agreement § 7.1(f). This exclusive period is yet another way in which the Petitioning Creditors controls the sale process to the detriment of the Debtors' estates.[8] Since the Petitioning Creditors do not have to close the Stalking Horse Bid or provide funding to the Debtors if the Bidding Procedures Order is not acceptable to the Petitioning Creditors, the Debtors would be pressured to acquiesce to whatever Bidding Procedures Order the Petitioning Creditors want in order to receive funding and open up the bidding process to third parties. Putting the Debtors in this dilemma inappropriately subjects the Debtors to the will of the Petitioning Creditors, hinders

[8] Moreover, while in some cases limited exclusivity may be acceptable, there is no basis to grant exclusivity ***after*** the Sale Agreement has been executed, as any benefit or inducement to the Stalking Horse Purchaser has already been obtained and thus can only hinder the Debtors' ability to seek bids from other prospective buyers in order to obtain the highest and best value for the assets.

efforts to market the Debtors' assets and solicit bids in an open and fair process, and is contrary to the fundamental tenets of bankruptcy law.

44. In order to ensure a controlled, fair and open sales process, the Sale Agreement cannot contain provisions such as the ones described above, as they would allow the Petitioning Creditors to hinder the Debtors' ability to run a competitive auction based on fair bidding procedures and close on the highest or otherwise best offer.

B. The Terms of the Stalking Horse Bid Are Uncertain, Vague and Subject to Revision

45. The Committee, and indeed, any potential buyer, cannot properly assess and evaluate the terms of the Stalking Horse Bid because that bid lacks sufficient clarity concerning the precise scope of what the Stalking Horse Purchaser is actually seeking to purchase and the precise terms of the Stalking Horse Purchaser's consideration. Accordingly, the Debtors' proposed bidding procedures fail to provide for a fair and commercially reasonable sale process, and cannot be approved in its current form.

46. Although the Sale Agreement appears to set forth a detailed list of Purchased Assets, Excluded Assets, Assumed Liabilities and Excluded Liabilities, the facts and circumstances reveal that this detail is largely illusory, and little about what assets are being purchased and what liabilities are being assumed is known or certain. See Sale Agreement §§ 1.1-1.4.

47. First, the Stalking Horse Purchaser has the ability to alter the Purchased Assets, Excluded Assets, Assumed Liabilities and Excluded Liabilities at any time. See Sale Agreement § 1.5(a). The terms of the Stalking Horse Bid are thus not fixed and can change at any time, without notice to anyone other than the Debtors.

48. Second, the Debtors have not filed the appropriate schedules, or provided them to the Committee (or upon information and belief, any other prospective buyer) that were required to be delivered to the Stalking Horse Purchaser by May 20, 2013 – last week – under section 8.15 of the Sale Agreement. This information contained in the schedules is important to determining what is covered under the Stalking Horse Bid. For example,

- Purchased Assets include, among other things:
    - "all Owned Real Property set forth on Section 4.12(a) of the Seller Disclosure Schedule (other than the Excluded Owned Real Property) and all leases and subleases for the Leased Real Property set forth on Section 1.1(j) of the Seller Disclosure Schedule," Sale Agreement § 1.1(j);
    - "the Seller Plans listed on Section 1.1(y) of the Seller Disclosure Schedule," Sale Agreement § 1.1(y); and
    - "any Contract, asset, property or right set forth on Schedule 1.1(aa)," Sale Agreement § 1.1(aa).
- Assumed Liabilities include "any Liabilities set forth on Schedule 1.3(f)," Sale Agreement § 1.3(f), and are affected by the assets being purchased as noted above, Sale Agreement §§ 1.3(a) (liabilities relating to each Assigned Contracts), 1.3(c) (liabilities relating to the Assumed Plans).

49. Without this information, and the fact that the Stalking Horse Purchaser has the ability to revise the Purchased Assets and Assumed Liabilities in the Sale Agreement, it is not possible for bidders, creditors, or the Court to fully determine which assets the Petitioning Creditors are bidding on, and whether the proposed Stalking Horse Bid is acceptable. Thus, it may not even be feasible for potential bidders to determine whether or how to place a competitive bid.

50. On the flip side, the Sale Agreement does not disclose the precise nature of the consideration offered in exchange for the Purchased Assets and Assumed Liabilities. All that is known is that the Purchase Price – consisting of the DIP Payment, the Wind Down Budget, the Additional Cash Consideration and the Claim Contribution – is $70 million. See

Sale Agreement §§ 2.1, 10.1 ("Claim Contribution Amount"). The breakdown between the cash components (the Wind Down Budget, the Additional Cash Consideration, and possibly the DIP Payment) and the credit bid component (the Claim Contribution) is unknown. First, the Committee is not aware of any agreed-upon Wind Down Budget, despite the fact that it must be agreed upon by the May 31, 2013 hearing on the Bidding Procedures Order. See Sale Agreement §§ 2.1(a)(ii), 8.13. Second, the Additional Cash Consideration is to be determined by the Stalking Horse Purchaser "in its sole discretion" up to $10 million – thus it appears that it could be set at any time, and could range from $0 to $10 million. See Sale Agreement §§ 2.1(a)(iii), 10.1 ("Additional Cash Consideration"). Similarly, as described above, the assumption and discharge of the Assumed Liabilities is not entirely clear. See Sale Agreement § 2.1(b).

51. Moreover, the Committee is not aware of any allocation of the Purchase Price to particular asset classes, other than what is set forth in section 2.1 of the Sale Agreement. It appears that only the Claim Contribution is allocated to the actual purchase of the Debtors' assets because the DIP Payment repays the Replacement DIP Facility, the Wind Down Budget covers the wind down of the Debtors' estates and the Additional Cash Consideration pays down the First Lien Debt. Without such an allocation, there is little meaningful way for prospective bidders to formulate competing bids, or for the Committee, the Court or the Debtors, in weighing the bids, to determine whether a third-party purchaser's bid for less than all of the assets would be more beneficial to the estates than the Petitioning Creditors' bid with respect to the same assets. See, e.g., Mission Iowa Wind Co. v. Enron Corp., 291 B.R. 39 (S.D.N.Y. 2003) (requiring an allocation hearing prior to closing of sale). The Stalking Horse Purchaser is simply

free to wait and see what, if any, bids come in and artificially allocate the Claim Contribution so as to outbid any competing bid for specific assets.

52. The lack of information regarding the precise terms of the Stalking Horse Bid is best considered within the Debtors' own Bidding Procedures. There, the Stalking Horse Bid does not even come close to satisfying the applicable requirements for a Qualified Bid, some of which are described below:

- No Good Faith Deposit (cash equivalent equal to 10% of the aggregate value of the bid). See Bidding Procedures ¶ 12(ii). While the Sale Agreement does provide a limited remedy for the Debtors in certain circumstances to "retain the first $5 million of value otherwise distributable to the First Lien Lenders" (Sale/Bid Procedures Motion ¶ 18(i)), this does not mirror the general requirement of actually posting a 10%, cash-equivalent deposit, and the estates have less of a remedy against the Stalking Horse Purchaser than it would against other bidders. Moreover, unlike other bidders, the Stalking Horse Bidder has no obligation to provide a Successful Bidder Deposit if it has the winning bid. See Bidding Procedures ¶ 20(ix).

- Fails to include "all exhibits and schedules contemplated by the purchase agreement, and, to the extent required by the terms and conditions of such bid, any ancillary agreements as described in the purchase agreement with all exhibits and schedules thereto." Id. ¶ 12(iii).

- Not "accompanied by a list of any executory contracts or unexpired leases that are to be assumed and/or assigned." Id. ¶ 12(iv).

- Does not provide information sufficient to demonstrate that the Stalking Horse Bidder (and its equity holders) is financially capable of consummating the transactions contemplated by the Sale Agreement, does not provide evidence of a firm, irrevocable commitment for financing or other evidence of ability to consummate the Sale, and does not include evidence of the Stalking Horse Purchaser's ability to provide adequate assurance of its ability to perform in the future the contracts and leases proposed in its bid to be assumed and assigned. See id. ¶¶ 12(vii), (viii), (x).

- Expressly contains a broad due diligence contingency under section 9.2(k) of the Sale Agreement. See id. ¶ 12(xiv).

53. Unlike a bid that would eligible as a Qualified Bid, the Stalking Horse Bid is replete with contingencies and uncertainty. Any potential bidder would be discouraged from bidding in this process as it is apparent there is nothing firm or certain about the Stalking Horse

Bid – the Stalking Horse Purchaser has a broad unilateral right to terminate the Sale Agreement under a due diligence contingency, the precise nature of the consideration to the estates is unsettled, and exactly what assets and liabilities are included or excluded from the bid is not apparent, which will continue to be subject to the Stalking Horse Purchaser's whims and revisions throughout the sale process.

C. The Bidding Procedures Are Unreasonable and Inflexible

54. The Bidding Procedures as a whole are extremely restrictive, and fail to provide much-needed flexibility necessary to attract a wide range of parties and to maximize the value of the Debtors' assets. In all respects, the Debtors must have the ability to evaluate all different kinds of offers for their assets, and numerous provisions in the Bidding Procedures hinder this, including an unreasonable overbid procedure requiring a high minimum overbid and permitting only rigid all-cash overbids and no mechanism to handle partial or combined bids for the Debtors.

i. The Overbid Procedure Contains an Unreasonably High Initial Overbid and Is Inflexible

55. Further chilling competitive bidding is the unreasonable overbid procedure contained in the proposed Bidding Procedures, which sets an unreasonably high minimum overbid of $5 million over the Purchase Price of $70 million (7.14%) and requires all overbids to be ***all-cash*** bids. See Bidding Procedures ¶ 12(i). Accordingly, to even qualify to participate in the process, a prospective buyer must offer at least $75 million ***in cash***, in stark contrast to the Stalking Horse Bid, where a substantial portion of the Purchase Price is ***not*** cash and most of the cash consideration component will go straight back to the Petitioning Creditors.[9]

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[9] The "DIP Payment," if paid in cash, will repay the Replacement DIP Lenders (*i.e.*, the Petitioning Creditors) and the "Additional Cash Consideration" is to be paid to the First Lien Lenders, which includes the Petitioning Creditors. See Sale Agreement § 10.1 ("Additional Cash Consideration").

56. Excessive overbid requirements should be discouraged as they chill the bidding process. See In re Mama's Original Foods, Inc., 234 B.R. 500, 505 (C.D. Cal. 1999) (reducing overbid requirement from 11.3% of the initial bid to 2.2% of the initial bid to avoid chilling the process). At a minimum, the initial overbid increment (the "Initial Increment") should not exceed the greater of $1 million, or a reasonable cap on Purchaser's Expense Reimbursement that this Court finds will not chill a competitive bidding process.

57. Additionally, the requirement that overbids be all cash should be modified to provide that overbids must include a total value greater than or equal to the value provided by the Stalking Horse Purchaser plus the Initial Increment, where the overbid includes consideration substantially similar to section 2.1(a)(i) of the Sale Agreement, plus an amount in cash at least equal to the Wind Down Budget, plus an amount of cash at least equal to the Additional Cash Consideration, plus an amount of cash at least equal to the Initial Increment.

58. This way, the bidding process will be more flexible and can bring out the largest number of interested buyers, creating a better opportunity to maximize value for the estates at a competitive auction. Without this change, the overbid procedure would not be able to take into account valuable non-cash consideration that potential buyers may offer, such as assuming the Debtors' collective bargaining agreements (or at least not requiring wholesale negotiation of new collective bargaining agreements as set forth in section 9.1(m) of the Sale Agreement), or assuming more of the Debtors' contracts and pension plans than whatever contracts and pension plans the Stalking Horse Purchaser is purchasing and assuming under the Sale Agreement.

ii. The Bidding Procedures Do Not Provide a Mechanism to Handle Partial or Combined Bids for the Debtors' Assets

59. Although the sale process purports to be open to all bidders seeking to purchase all or part of the Debtors' assets, the Debtors have not required that the Petitioning Creditors allocate its purchase price to particular assets, nor have the Debtors provided a mechanism for parties to bid on specific assets. As noted above, the overbid procedure specifically requires a bid that beats the Stalking Horse Bid, which clearly would preclude any partial bidding. Thus, bidders interested in certain assets or business lines will likely be discouraged to bid for those assets to the detriment of the Debtors' estates.

60. In order to generate as much interest as possible in the Debtors' assets and involve as many parties as possible to create a competitive auction dynamic, the Committee believes that the Bidding Procedures should be modified so that the Stalking Horse Purchaser allocates its Purchase Price to appropriate classes of assets, and allows for potential buyers to bid on particular asset classes.

D. The Bidding Procedures and the Sale Agreement Grants Unjustifiable Benefits to the Stalking Horse Purchaser

i. The Bid Protections Are Excessive

61. Protection to an initial bidder, break-up fees, expense reimbursement and topping fees are designed to initiate the bidding process. See In re Integrated Res., Inc., 147 B.R. 650, 659 (S.D.N.Y. 1992). If the break-up fee, expense reimbursement and topping fee chill the bidding process or discourages certain bidders, then the fees should not be approved. Calpine Corp. v. O'Brien Environmental Energy, Inc., 181 F.3d 527, 538 (3d Cir. 1999); Integrated Res., 147 B.R. at 659. In Reliant Energy, the Third Circuit held that there is "no compelling justification for treating an application for a break-up fee and expenses under § 503(b) differently from other applications for administrative expenses under the same provision." In re Reliant

Energy Channel View LP, 594 F.3d 200, 206 (3d Cir. 2010) (approving the O'Brien approach and rejecting application of the business judgment rule to break-up fees). Indeed, that court held that "it was permissible to offer a break-up fee and reimbursement for expenses to induce an initial bid, ***provided the allowance of the fee does not give an advantage to a favored purchaser over other bidders by increasing the cost of acquisition***." Reliant Energy, 594 F.3d at 206 (emphasis added). The Third Circuit also emphasized that the break-up fee and expense reimbursement must serve as a catalyst to higher bids. See O'Brien, 181 F.3d at 537.

62. Under these facts, the Committee believes that the Debtors or the Stalking Horse Purchaser cannot satisfy their burden of showing that the Purchaser's Expense Reimbursement (which is capped at $3 million and is approximately 4.3% of the total purported Purchase Price of $70 million) is an actual and necessary cost of preserving the estate. See Sale Agreement §§ 2.1(a), 10.1 ("Claim Contribution Amount"), 7.1(a). On the contrary, this bid protection is excessive and harms the estates because it will deter others from bidding. Coupled with the restrictive nature of the Bidding Procedures (as described herein), the Debtors and the Stalking Horse Purchaser cannot demonstrate to this Court that this low initial bid serves as a catalyst for higher bids. Moreover, the Debtors offer nothing other than conclusory statements in claiming that the Purchaser's Expense Reimbursement induced the Petitioning Creditors, through the Stalking Horse Purchaser, to make the Stalking Horse Bid. To the contrary, the evidence suggests that the Petitioning Creditors have strong financial incentive to submit a bid, given the fact that they only hold 23% of the First Lien Debt, yet claim the ability to credit bid the ***entire*** First Lien Facility (as provided to the Requisite Lenders under that facility) because of their victory over Yucaipa in the New York State Action.

63. In addition, the Sale Agreement appears to require the payment of the Purchaser's Expense Reimbursement, simply if the Sale Agreement is not consummated by October 14, 2013, see Sale Agreement §7.1(a) (requiring payment of the Purchaser's Expense Reimbursement if the Sale Agreement is terminated pursuant to section 3.4(b), which permits termination if the Stalking Horse Bid is not consummated on or prior to October 14, 2013). This provision is inappropriately broad – even if the Petitioning Creditors simply back out, for example, because of the broad due diligence contingency contained in section 9.2(k) of the Sale Agreement, it appears they would be entitled to the Purchaser's Expense Reimbursement. No additional estate resources should be wasted on approving an agreement that is not technically binding on the buyer. For each of these reasons, the Purchaser's Expense Reimbursement must be denied.

64. If the Court determines that an expense reimbursement generally is appropriate under the circumstances, the Committee objects to the potential payment of $3 million to the Stalking Horse Purchaser. When compared against the purchase price, a $3 million expense reimbursement would constitute approximately 4.3% of the Purchase Price (and a substantially higher percentage of the actual cash consideration). This amount is plainly excessive, and to the extent the Court permits expense reimbursement, the Committee requests that the cap on such a fee be significantly reduced. Moreover, while the Purchaser's Expense Reimbursement is to cover "reasonable and documented" expenses as set forth in section 7.1(a) of the Sale Agreement, there is no mechanism for any party to review and assess any amounts requested thereunder. See Sale Agreement § 7.1(a). To the extent the Court approves any expense reimbursement, the Committee further believes that procedures substantially similar to those set forth in paragraph 4(a) of the Replacement DIP Order are acceptable in this context.

ii. The Stalking Horse Purchaser Cannot Credit Bid the First Lien Debt On the Unencumbered Assets

65. The Stalking Horse Purchaser cannot credit bid the First Lien Debt on the Unencumbered Assets under the Prepetition Loan Documents, because these assets are not subject to the Petitioning Creditors' prepetition lien under the Prepetition Loan Documents, and thus the credit bid does not comply with section 363(k) with respect to the Unencumbered Assets. See 11 U.S.C. § 363(k) ("At a sale under [section 363(b)] of ***property that is subject to a lien that secures an allowed claim***, unless the court for cause orders otherwise the holder of such claim may bid at such sale, and, if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property.") (emphasis added). Accordingly, to the extent the Stalking Horse Purchaser seeks to purchase Unencumbered Assets (including 35% of each Debtor's interests in the equity of its foreign subsidiaries), these assets must be carved out from the credit bid, and separately bid on, if so desired.

iii. The Stalking Horse Purchaser Cannot Have an Unfair Informational Advantage Over Other Potential Buyers

66. Under the Sale Agreement, the Stalking Horse Purchaser must be given "any written expression of interest, inquiry, offer or bid received by Sellers from any other prospective buyer for the sale of the Purchased Assets." Sale Agreement § 8.12. Under this provision, the Stalking Horse Purchaser has a significant informational edge over other bidders, and can effectively dictate the course of the bidding and auction process. Potential buyers would be discouraged from participating in the sale process, knowing that the Stalking Horse Purchaser is able to predetermine the course of the sale process based on an analysis of all the inquiries, offers and bids made available to it and no other potential buyer.

iv. The Stalking Horse Purchaser's Unilateral Right to Terminate the Sale Agreement Must Be Modified or Deleted

67. The Sale Agreement provides that the obligations of the Stalking Horse Purchaser to consummate the Sale are subject to the fulfillment of the Stalking Horse Purchaser's broad "business, financial, legal and other due diligence investigation and review of Sellers" to the Stalking Horse Purchaser's "satisfaction in its sole discretion; *provided* that this condition shall expire on June 14, 2013." Sale Agreement § 9.2(k). With such a broad contingency, the Sale Agreement barely even binds the Stalking Horse Purchaser. Thus, potential bidders will likely view the Stalking Horse Bid and the sale process with skepticism and concern, and may be discouraged from placing competitive bids.

RESERVATION OF RIGHTS

68. The Committee and its members reserve all of their respective rights, claims, defenses, and remedies, including, without limitation, the right to amend, modify, or supplement this Objection, to seek discovery, to raise additional objections to the Replacement DIP Motion, Replacement DIP Agreement, the Sale/Bid Procedures Motion, Sale Agreement, Bidding Procedures Order and related documents prior to, or during, the Final Hearing, and to negotiate and document alternative debtor-in-possession financing terms.

CONCLUSION

WHEREFORE, the Committee respectfully requests that the Court (i) sustain this Objection, (ii) deny the Replacement DIP Motion, absent the modifications to the Replacement DIP Facility and Replacement DIP Order as discussed herein, (iii) deny the Bidding Procedures Order, absent the modifications discussed herein, and (iv) grant such other further relief as is just and proper.

Dated: Wilmington, Delaware
May 29, 2013

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CERTIFICATE OF SERVICE

I, William A. Hazeltine, do hereby certify I am not less than 18 years of age and that on this 29th day of May, 2013, I caused copies of the foregoing document to be served upon the parties listed below in the manner indicated:

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