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Auction Procedures Hearing Date: [November 19], 2008 at 9:30 a.m. (E.T.)
Objection Deadline: [November 18], 2008 at 5:00 p.m. (E.T.)

Sale Hearing Date: [December 15], 2008 at 9:30 a.m. (E.T.)
Objection Deadline: [December 12], 2008 at 5:00 p.m. (E.T.)

Assumption and/or Rejection of Unexpired Leases and Executory Contracts Hearing Date: [December 15], 2008 at 9:30 a.m. (E.T.)
Objection Deadline: [December 12], 2008 at 5:00 p.m. (E.T.)

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	)	Chapter 11
HYDROGEN, L.L.C.,	)	Bankr. Case No.: 08-14139 (AJG)
Debtor.	)	

DEBTOR'S EMERGENCY MOTION FOR ORDERS (A)(i) APPROVING AUCTION PROCEDURES AND BIDDING PROTECTIONS TO BE EMPLOYED IN CONNECTION WITH THE PROPOSED SALE OF THE DEBTOR'S ASSETS, (ii) SCHEDULING AN AUCTION AND HEARING TO CONSIDER APPROVAL OF THE SALE(S) OF SUCH ASSETS, AND (iii) APPROVING THE DEBTOR'S FORM OF PROPOSED ASSET PURCHASE AGREEMENT; (B) APPROVING NOTICE OF RESPECTIVE DATES, TIMES, AND PLACES FOR AUCTION AND FOR HEARING ON APPROVAL OF (i) SALE(S) OF ASSETS AND (ii) ASSUMPTION AND ASSIGNMENT OF CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES; (C) AUTHORIZING THE SALE(S) OF THE ASSETS, FREE AND CLEAR OF ALL LIENS, CLAIMS, ENCUMBRANCES, AND OTHER INTERESTS; (D) AUTHORIZING THE ASSUMPTION AND ASSIGNMENT OF CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES AND THE REJECTION OF OTHER EXECUTORY CONTRACTS AND UNEXPIRED LEASES; (E) AUTHORIZING THE DEBTOR TO CONSUMMATE ALL TRANSACTIONS RELATED TO THE ABOVE; AND (F) GRANTING OTHER RELIEF

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Debtor and debtor-in-possession HydroGen, L.L.C. (the "Debtor"), by and through its undersigned counsel, hereby submits this motion (the "Motion"), pursuant to Bankruptcy Code sections 105, 363, and 365 and Bankruptcy Rules 2002, 6004, and 6006, and in accordance with Administrative General Order M-331, for orders (A)(i) approving the auction procedures and bidding protections (the "Auction Procedures"), substantially in the form attached hereto as Exhibit A, to be employed in connection with the proposed sale or sales of the Debtor's assets (the "Assets"), as a whole to one bidder or in parts to more than one bidder, pursuant to Bankruptcy Code sections 363 and 365, (ii) scheduling an auction (the "Auction"), (iii) approving the Debtor's form of asset purchase agreement (the "Form Asset Purchase Agreement"), substantially in the form attached hereto as Exhibit B, to be used in connection with any sale or sales of the Assets (the "Sale(s)"), and (iv) scheduling a hearing (the "Sale Hearing") to consider (a) approval of the Sale(s) and (b) assumption and assignment of certain executory contracts and unexpired leases (collectively, the "Assumed Contracts"); (B) approving the notice (the "Auction and Sale Hearing Notice"), substantially in the form attached hereto as Exhibit C, of the respective dates, times, and places for the Auction and the Sale Hearing, respectively (the relief requested in such items (A) and (B) is collectively referred to herein as the "Initial Relief," and the proposed order granting the Initial Relief is referred to herein as the "Scheduling Order," substantially in the form attached hereto as Exhibit D); (C) authorizing the Sale(s) free and clear of all liens, claims, encumbrances, and other interests; (D) authorizing the assumption and assignment of the Assumed Contracts in connection with the Sale(s) and the rejection of other executory contracts and unexpired leases; (E) authorizing the Debtor to consummate all transactions related to the above; and (F) granting such other relief as is fair and equitable (the proposed order granting the relief requested in items (C) through (F) above is

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referred to herein as the "Sale Order," a copy of which is attached hereto as Exhibit E);[1] and in support of the Motion respectfully represents as follows:

SUMMARY OF MOTION

1. With the assistance of two different financial advisors, the Debtor has sought to maximize the value of its assets by simultaneously soliciting investments in its business and seeking to sell the Assets. These efforts began many months before the Debtor's bankruptcy filing and have continued since the filing. Although it has only been in bankruptcy for a few weeks, the Debtor has exhausted virtually all potential exit strategies with respect to this case.

2. Regrettably, although the Debtor and its financial advisor, Triax Capital Advisors, LLC ("Triax"), continue to market the Assets and the business to myriad interested parties, to date they have not obtained a definitive offer from any party to invest in the business or to purchase the Assets.

3. Cash flow concerns have intensified the Debtor's desire to sell the Assets as a going concern as soon as possible, in the hope of avoiding a "fire sale" of the Assets.

4. Accordingly, in the exercise of its business judgment, and in an effort to bring its marketing process to a timely conclusion (thereby encouraging potential purchasers to bid or miss out on the opportunity to do so), the Debtor requests, among other relief, that this Court (1) schedule an auction of the Assets for December 8, 2008 and (2) approve the Sale(s) of the Assets to the winning bidder(s) at such Auction on December 15, 2008.

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[1] The Debtor anticipates that the winning bidder at the Auction may propose its own form of Sale Order, and therefore reserves the right to submit a revised form thereof to the Court following the conclusion of the Auction as part of the Supplement (as such term is defined below).

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JURISDICTION

5. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. Venue of this case and this Motion in this District is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). The statutory predicates for the relief requested herein are Bankruptcy Code sections 105, 363, and 365, Bankruptcy Rules 2002, 6004, and 6006, and Administrative General Order M-331.

INTRODUCTION

6. On October 22, 2008 (the "Petition Date"), HydroGen, L.L.C. (the "Debtor"), filed with this Court a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code.

Overview of the Debtor

7. The Debtor, an Ohio limited liability company, is the wholly-owned subsidiary of HydroGen Corporation, an SEC reporting company. HydroGen Corporation has no operations and is not a debtor.

8. The Debtor is a development stage company that manufactures phosphoric acid fuel cells for use in modules and power plants fueled by hydrogen and hydrocarbon gases for application by industrial and chemical industry end-users.

9. The Debtor's products use air-cooled phosphoric acid fuel cell technology developed and successfully tested by Westinghouse in the 1980s and early 1990s and funded in part by the Department of Energy in connection with its efforts to meet public demand for inexpensive, reliable, ultra-clean power generation.

10. This technology was maintained by Westinghouse as trade secrets and has been transferred to the Debtor on an exclusive basis through intermediary owners. The Debtor

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continues to protect substantially all of its intellectual property as trade secrets.

11. The Debtor's technology has proven sound, and it has taken steps to bring that technology to commercial viability. Among other things, the Debtor has entered into a strategic partnership with Samsung C&T Corporation ("Samsung") pursuant to which it will serve as the exclusive distributor of the Debtor's products in South Korea, Asia, India, the Middle East, Australia, New Zealand, and certain countries in Eastern Europe. In addition, with the recent demonstration of its 500 kW fuel cell power plant at its demonstration facility at ASHTA Chemicals, Inc., in Ashtabula, Ohio, the Debtor reached a crucial milestone in its effort to promote the technological viability of its fuel cells.

12. The Debtor's principal executive offices are in New York City, and it leases space in Versailles, Pennsylvania and Ashtabula, Ohio. It has eight employees.

13. In 2007, the Debtor had $1,445,196 in revenues, primarily from government agency grants, and $16,993,154 in operating losses. For the nine-month period ended September 30, 2008, it had $456,089 in revenues, primarily from government agency grants, and $11,981,079 in operating losses.

14. As of the Petition Date, the Debtor had approximately $390,000 in cash on hand and no other liquid assets. As of the date of this Motion, is had $283,586 in cash on hand.

15. The Debtor believes that it has approximately 300 unsecured creditors with claims totaling approximately $4 million. At the Debtor's request, unsecured creditors formed an informal committee prior to the Petition Date, and the Debtor has had numerous discussions with that committee and its counsel. On November 10, 2008, the United States Trustee appointed an official committee of unsecured creditors (the "Committee") in this case.

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Two of the three members of the Committee were also on the informal, pre-petition committee and, like the pre-petition committee, the Committee is represented by Arent Fox LLP.

16. The Debtor continues to manage its properties and operate its business as a debtor-in-possession pursuant to 11 U.S.C. §§ 1107 and 1108. No trustee or examiner has been appointed in this case.

The Loan Agreement

17. On August 22, 2008, the Debtor entered into a loan and security agreement (as amended on September 22, 2008 and October 17, 2008, the "Loan Agreement") with Samsung and Federated Kaufmann Fund ("Federated" and, together with Samsung, the "Lenders"), as lenders, and Federated as agent for the Lenders (the "Agent"). Federated is affiliated with Federated Investors, Inc., which owns approximately 10% of the common stock of HydroGen Corporation.

18. Pursuant to the Loan Agreement, each Lender agreed to loan the Debtor $1 million in two equal installments at an interest rate of 12% per annum. HydroGen Corporation guaranteed all of the obligations of the Debtor, issued warrants to the Lenders, and pledged to the Agent 100% of its membership interests in the Debtor.

19. In addition, the Debtor granted the Agent a first priority security interest in substantially all of its assets, subject to certain existing liens and with the notable exception of a $225,000 carve-out that does not constitute cash collateral.

20. At the closing on August 22, 2008, each Lender provided $500,000 directly to the Debtor and deposited an additional $500,000 in a segregated account maintained by the Debtor.

21. On October 17, 2008, $450,000 of the $1 million in the segregated

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account was released to the Debtor, with the balance, $550,000, returned to the Lenders on October 21, 2008. Thus, as of the Petition Date, the Lenders' claim under the Loan Agreement totaled approximately $1,450,000.

22. Finally, as set forth in the Loan Agreement, the Agent and the Lenders have consented to the Debtor's use of cash collateral in this case provided that it is used for general business and operating purposes related to the reorganization of the Debtor, sale of the Debtor as a going concern, or orderly liquidation of the Debtor's assets.

The Debtor's Marketing Efforts

23. As a development stage company, the Debtor has experienced significant operating losses and negative cash flow since its inception in 2001.

24. In late 2007 and early 2008, in consultation with its then financial advisor, the Debtor attempted to raise additional funding through the public markets and institutional investors. These efforts were unsuccessful and in July 2008, the Debtor hired Triax, a turnaround and crisis management firm, to assist in the management of its business and the exploration of strategic alternatives.

25. With Triax's assistance, the Debtor continued to aggressively market its business. Specifically, the Debtor and Triax (1) generated a list of approximately 100 possible purchasers/investors and contacted those parties to determine their interest level, (2) negotiated and arranged for the execution of confidentiality agreements with certain parties, (3) provided initial information packages materials to more than 70 potentially interested parties, (4) participated in over 50 management conference calls and presentations to such parties, (5) provided facility tours to parties who expressed an interest therein, and (6) responded to questions and additional due diligence requests. Much of this process was undertaken in close

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collaboration with the Agent and the pre-petition committee of unsecured creditors.

26. As of the date of this Motion, the Debtor has received twelve nonbinding initial indications of interest from different potential purchasers. Although the Debtor was encouraged by those results, to date, none of the potential purchasers have submitted a definitive offer or executed an asset purchase agreement.

The Debtor's Decision to Auction the Assets Immediately

27. Without any additional funding, the Debtor anticipates running out of cash in approximately five weeks, around the third week of December. The Debtor has determined that, in order to maximize the value of the Assets and its estate, it needs to identify a definitive purchaser and to consummate a sale with such purchaser as quickly as possible. The Debtor has determined that the optimal way to bring the sales process to a timely conclusion is to schedule an auction, at which any and all Qualified Bidders (as such term is defined below) will have the opportunity to bid on the Assets. The Debtor is hopeful that the time pressure and proposed deadlines associated with such an Auction will prompt one the Qualified Bidders to make a definitive offer for the Assets.

28. The sale of the Assets as a going concern is expected to maximize the value of the Debtor's estate.

RELIEF REQUESTED AND BASIS FOR RELIEF

29. By this Motion, the Debtor respectfully requests, pursuant to Bankruptcy Code sections 105, 363, and 365 and Bankruptcy Rules 2002, 6004, and 6006, orders (A)(i) scheduling the Auction and the Sale Hearing and (ii) approving of the Auction Procedures, the Form Asset Purchase Agreement, the Auction and Sale Hearing Notice; and (B)(i) approving of the Sale(s) and (ii) authorizing the assumption and assignment of the Assumed Contracts and the rejection of other executory contracts and unexpired leases in connection with the Sale(s).

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The Proposed Sale(s)

30. The Debtor proposes to sell all or substantially all of the Assets to one or more purchasers, as a going concern or in pieces, to the bidder or bidders providing the highest and/or best consideration therefor. Although it believes that any third parties that may be interested in purchasing the Assets have already had sufficient opportunity to perform due diligence, the Debtor will permit all Qualified Bidders to perform, at its option and following the execution of an appropriate confidentiality agreement (if not already executed), reasonable due diligence with respect to the Assets, and will assist them with such efforts in the time and manner set forth in the proposed Auction Procedures, including providing such parties with reasonable access to the Debtor's books, records, facilities, and executives.

The Form Asset Purchase Agreement

31. The Debtor proposes to sell the Assets, in whole or part, pursuant to the terms of one or more asset purchase agreements substantially in the form attached hereto as Exhibit B. However, prior to the Auction, the Debtor reserves the right to amend or otherwise to change the terms of the Form Asset Purchase Agreement in such a manner as the Debtor deems to be in the best interests of its estate and will allow parties bidding on less than substantially all of the Assets to bid using their own forms.[2]

32. The Debtor submits that the Form Asset Purchase Agreement contains terms and conditions commonly used in situations such as this one. Among other things, it provides for the Sale(s) "as is, where is" and free and clear of all liens, claims, encumbrances, and other interests and provides that such Sale(s) is subject to (i) the approval of this Court and

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[2] The Debtor will also entertain term sheets for a proposed equity or debt investment in the Debtor's business and/or plan of reorganization.

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(ii) higher and better offers at the Auction. Thus, the Debtor requests that the Court approve the Form Asset Purchase Agreement for use in connection with the Sale(s).

The Auction Procedures

33. In accordance with Bankruptcy Rule 6004(f)(1), sales of property outside the ordinary course of business may be by private sale or by auction. The Debtor believes that good cause exists to subject the Assets to sale at auction and to approve the procedures proposed therefor. An auction conducted in accordance with the Auction Procedures will enable the Debtor to obtain the highest and/or best offers for the Assets, thereby maximizing the value of its estate.

34. The following is a summary of the proposed Auction Procedures:[3]

(A) No later than one business day following the entry of the Scheduling Order, the Debtor will cause the Auction and Sale Hearing Notice to be sent by email, facsimile, and/or overnight delivery to (a) all parties that have previously expressed any interested in purchasing the Assets (including all parties that have signed confidentiality agreements) in the past two years, as identified by the Debtor using its reasonable best efforts and by its professionals (collectively, the "Potential Purchasers"), (b) the Office of the United States Trustee, (c) counsel to the Committee, (d) each of the Lenders and counsel to the Agent, (e) all parties-in-interest that have requested notice pursuant to Rule 2002, (f) all parties to the Debtor's executory contracts and unexpired leases that may be subject to assumption and assignment or rejection pursuant to the Sale(s), (g) all parties that the Debtor believes could potentially have a lien on the Assets, and (h) all government agencies (including the Internal Revenue Service) required to receive notice of proceedings under the Bankruptcy Rules (collectively, the "Notice Parties"), and by First Class U.S. Mail, postage pre-paid, to all other creditors known to the Debtor as of the Petition Date (collectively, the "Notice Procedures"). Further, the Debtor may publish the Auction and Sale Hearing Notice (or an abbreviated version thereof) prior to the Auction in one or more appropriate newspapers or trade publications if it determines that doing so is in the best interest of its estate. The Debtor shall provide the Agent and the Committee with a list of the Potential Purchasers and shall notify them as requests for information regarding the Assets are received.

(B) The Assets may be sold in a single sale to a single bidder or in parts to different bidders, in each case free and clear of all liens, claims, encumbrances, and other

[3] The following description of the Auction Procedures is intended to serve as a summary thereof. In the event of any inconsistencies between such summary and the Auction Procedures set forth on Exhibit A, the latter shall govern.

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interests. The Debtor will qualify potential bidders ("Qualified Bidders") according to their financial qualifications to consummate the purchase of the Assets. The Debtor shall provide the Agent and the Committee with a list of Qualified Bidders prior to the Auction. Any such Qualified Bidders who have not already done so will be required (i) to provide information and other materials demonstrating, to the Debtor's reasonable satisfaction, that such bidder has the financial wherewithal to consummate the proposed transaction and (ii) to execute a confidentiality agreement acceptable to the Debtor. Such Qualified Bidders will then be allowed to perform reasonable due diligence with respect to the Assets and will be given reasonable access to its books, records, facilities, and executives. Each of the Lenders will be deemed a Qualified Bidder.

(C) Subject to further Court approval and to higher and better offers at the Auction, prior to the Auction the Debtor, in consultation with the Agent and the Committee, may enter into an asset purchase agreement (a "Stalking Horse Agreement") with any entity (a "Stalking Horse" or, if there is more than one entity, collectively, the "Stalking Horses") to establish a minimum bid for some or all of the Assets, which may contain certain customary terms and conditions (including an expense reimbursement and/or a breakup fee). In the event that the Debtor does enter into a Stalking Horse Agreement prior to the Auction and such agreement provides for the payment to the Stalking Horse of a break-up fee and/or expense reimbursement (which would be payable from the proceeds of a higher or better transaction), any minimum initial overbid at the Auction by another Qualified Bidder other than the Stalking Horse must be in an amount at least equal to (a) the proposed purchase price set forth in the Stalking Horse Agreement plus (b) the aggregate amount of any agreed upon break-up fee and/or expense reimbursement provided for in the Stalking Horse Agreement plus (c) $20,000. Any subsequent overbid thereafter will be in additional increments as determined by the Debtor at the Auction, with the Stalking Horse waiving the break-up fee upon re-bidding.

(D) All bids must meet certain terms and conditions set forth in the Form Asset Purchase Agreement (or Stalking Horse Agreement, if applicable), provided that parties bidding on less than substantially all of the Assets may bid using their own forms. Specifically, a bid shall consist of (a) an executed version of the asset purchase agreement with marked alterations, if desired, or another form with respect to bids on less than substantially all of the Assets and (b) an earnest money deposit (the "Earnest Money Down Payment") equal to 20% of the proposed purchase price in the form of a certified check or wire transfer payable to an escrow agent to be determined by the Debtor. Bids must (a) specify the portion of consideration to be paid in cash and the portion to be paid in any other form of value (if any); (b) if any consideration is to be provided in a form other than cash, provide information concerning such consideration to permit the Debtor to accurately assess the value of such consideration; (c) if the bid contemplates a purchase of less than all of the Assets, provide sufficient detail concerning which assets are to be purchased thereby; (d) provide sufficient indicia that such bidder or its representative is legally empowered, by power of attorney or otherwise, and financially capable (i) to bid on behalf of the prospective bidder and (ii) to complete and sign, on behalf of the bidder, a binding and enforceable asset purchase agreement; (f) not contain any contingencies to the validity, effectiveness, and or binding nature of the offer, including, without limitation, contingencies for financing, due diligence, or inspection; and (g) identify with particularity each and every executory contract or unexpired lease the assumption and assignment of which is a

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condition to Closing. The Debtor will also, however, entertain term sheets for a proposed equity or debt investment in the Debtor's business and/or plan of reorganization.

(E) If any bid is conditioned on the assumption and assignment of executory contracts and unexpired leases, then such bidder shall provide information satisfactorily evidencing its ability to provide adequate assurance of future performance of such contracts or leases along with its bid (an "Adequate Assurance Package").

(F) All bids (including, without limitation, such bidder's indicia of financial wherewithal) and Adequate Assurance Packages must be submitted in writing to: HydroGen, L.L.C., 10 East 40th Street, New York, NY 10016, Suite 3405 Attn: Scott M. Schecter and Christopher J. Garofalo, Esq., with a copy to (a) Law Offices of David C. McGrail, Esq. 676A Ninth Ave. #211, New York, NY 10036; (b) Triax Capital Advisors, LLC, 75 Rockefeller Plaza, 16th Floor, New York, NY 10020 Attn: Joseph E. Sarachek, Esq., and Marc B. Ross (c) the Office of the United States Trustee, Brian Masumoto, Esq., 33 Whitehall Street, 21st Floor, New York, New York 10004; (d) counsel to the Official Committee of Unsecured Creditors, Schuyler G. Carroll, Esq., and Adrienne W. Blankley, Esq., Arent Fox LLP, 1675 Broadway, New York, NY 10019; and (e) counsel to Federated, as agent for the Lenders, Michael J. Venditto, Esq., and Jason M. Barr., Esq., Reed Smith LLP, 599 Lexington Avenue, 22nd Floor, New York, New York 10022, so that they are actually received by no later than 5:00 p.m. on December 5, 2008. The bid of any bidder failing to comply with these requirements may or may not be considered by the Debtor, in its sole discretion.

(G) The Auction will be conducted at the offices of Arent Fox LLP, 1675 Broadway, New York, NY 10019, or at another location disclosed by the Debtor to Qualified Bidders, on December 8, 2008 at 10:00 a.m. Qualified Bidders that have complied with the Auction Procedures may improve their bids at the Auction. The Auction will be conducted openly, and each bidder will be informed of the terms of the previous bid. Any subsequent bids submitted at the Auction shall be in any minimum monetary increments set by the Debtor after consultation with the Agent and the Committee. In consultation with the Agent and the Committee, the Debtor will select the winning bid or bids at the conclusion of the Auction, subject to Court approval at the Sale Hearing, and the winning bidder or bidders will be required to enter into definitive agreements before the Auction is adjourned; provided that the Debtor shall request that the Bankruptcy Court hear and resolve any disagreement among the Debtor, the Committee, and the Agent with respect to the identity of the winning bidder or bidders on an expedited basis.

(H) No later than one business day following the entry of the Scheduling Order, the Debtor will file with this Court and serve on all non-debtor parties to its executory contracts and unexpired leases a notice (the "Contract Notice") that will inform such parties of (A) the possibility that the Debtor may seek to assume, assign, and transfer some or all of its executory contracts and unexpired leases to a purchaser(s) of any or all of the Assets in connection with a Sale(s), (B) the amount, if any, that the Debtor believes would be required to be paid to cure any monetary default related to each such designated contract or lease if it were so assumed and assigned, in satisfaction of section 365(b) of the Bankruptcy Code (the "Cure Amount"), and (C) the possibility that the Debtor will seek to reject, at the Sale Hearing, any

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such executory contracts and unexpired leases that are not assumed and assigned to a purchaser(s) of the Assets in connection with the Sale(s).

(I) The Debtor will also file with this Court a supplement (the "Supplement") that will inform the Court of the results of the Auction and the highest and/or best bid or bids for the Assets. The Supplement will identify, among other things, (a) the proposed purchaser or purchasers of the Assets, (b) the consideration to be paid by such purchaser or purchasers for the Assets, (c) the material terms upon which such purchase or purchases are based, (d) any executory contracts and unexpired leases to be assumed and assigned to the purchaser or purchasers in connection with the Sale(s), and (e) the treatment of any liens attached to Assets to be sold. In addition, the Debtor will attach to the Supplement, as exhibits, (a) any revised proposed order or orders approving the Sale(s), as outlined in the Supplement and (b) copies of the asset purchase agreement or agreements entered into by the Debtor and the purchaser or purchasers of the Assets. The Debtor will file and serve the Supplement so that it is received by the Notice Parties no later than December 10, 2008 at 5:00 p.m. The Debtor will also serve the Supplement on any person who submits a written request and either an email address or a location in New York City for hand delivery so that such request is actually received by Debtor's counsel by 5:00 p.m. on December 8, 2008.

(J) Objections to all relief requested in the Motion, other than the Initial Relief, if any, including those that relate to the proposed assumption and assignment of an Assumed Contract (including, but not limited to, any objections relating to the validity of the Cure Amount as determined by the Debtor or otherwise to assert that any amounts, defaults, conditions, or pecuniary losses must be cured or satisfied under any of the assigned executory contracts or unexpired leases as of the Sale Hearing Date (a "Cure Objection")) shall be filed and served so as to be received by the undersigned no later than 5:00 p.m. on December 12, 2008 (the "Objection Deadline").

(K) Unless a Cure Objection is filed and served by a party to an Assumed Contract or a party interested in an Assumed Contract by the Objection Deadline, all interested parties that have received actual or constructive notice hereof shall be deemed to have waived and released any right to assert a Cure Objection and to have otherwise consented to the assignment of the Assumed Contract and shall be forever barred and estopped from asserting or claiming against the Debtor, the winning Qualified Bidder, or any other assignee of the relevant Assumed Contract that any additional amounts are due or defaults exist, or conditions to assignment must be satisfied, under such Assumed Contract for the period prior to the Sale Hearing Date.

(L) A hearing on all of the relief requested in this Motion (other than the Initial Relief) and to consider the results of the Auction will be held before the Honorable Arthur J. Gonzalez, United States Bankruptcy Court Judge, at the United States Bankruptcy Court for the Southern District of New York, One Bowling Green, Room 523, New York, New York 10004, on or about December 15, 2008 at 9:30 a.m. (the "Sale Hearing Date").

(M) All bids submitted for the purchase of the Assets shall remain open, and all deposits held in escrow until the sale of the Assets to the proposed purchaser or purchasers is consummated. In the event that the proposed purchaser or purchasers are unable to consummate

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the Sale(s) the next highest and/or best bidder will then be required to consummate on the Sale(s).

(N) The Debtor reserves the right to (i) impose additional terms and conditions at or prior to the Auction; (ii) extend the deadlines set forth in the Auction Procedures and/or adjourn the Auction at the Auction and/or the Sale Hearing in open court without further notice; (iii) withdraw any or all of the Assets from sale at any time prior to or during the Auction and to make subsequent attempts to market the same; and (iv) reject any or all bids if, in the Debtor's reasonable judgment, in consultation with the Agent and the Committee, no bid is for a fair and adequate price.

35. The Debtor believes that these Auction Procedures provide an appropriate framework for selling the Assets in a uniform fashion and will enable the Debtor to review, analyze, and compare all bids received to determine which bid is, or bids are, in the best interests of the Debtor's estate and creditors. Therefore, the Debtor respectfully requests that this Court approve the Auction Procedures.

Scheduling of the Auction and the Sale Hearing

36. The Debtor believes that it is of the utmost importance that it attempt to sell the Assets as quickly as is practicable in order to preserve and maximize the value of its business in light of cash flow concerns. Indeed, without any additional funding, the Debtor anticipates running out of cash just five weeks from the date of this Motion. Thus, the Debtor requests that the Court schedule the Auction for December 8, 2008 and the Sale Hearing for December 15, 2008. The Debtor believes that this timeframe will enable it to conduct a full and fair auction process on the expedited basis necessary to sell the Assets as a "going concern" and prevent a "fire sale" liquidation of the Assets.

37. Because of the essentially administrative nature of the relief sought in the Scheduling Order, and because the interests of all parties have been and will be adequately represented by the active participation of the Agent and the Committee in the Debtor's process, the Debtor submits that parties-in-interest would not be prejudiced were the Court to schedule

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the Auction and the Sale Hearing on the requested dates. Indeed, such parties would only benefit by such scheduling, as it would likely enable the Debtor to achieve a greater sale price for the Assets. In any event, parties-in-interest would have almost three weeks to file objections to all relief requested in the Motion, other than (i) the Initial Relief and (ii) certain relief as it relates to the assumption and assignment of executory contracts and unexpired leases.

38. The Debtor acknowledges that the proposed timeframes are shorter than those in other sales scenarios. Nonetheless, the Debtor believes that these shortened periods are both necessary and appropriate under the circumstances. Otherwise, the Debtor may be forced to conduct a "fire sale" liquidation, to the detriment of all parties-in-interest.

39. In addition, the Debtor believes that an extended auction period would serve little purpose in this case. As set forth above, the Debtor and its professionals have already extensively marketed the Assets. The parties they have identified as the most likely to make a bid on the Assets have already had ample time and opportunity to conduct their due diligence and otherwise to analyze the Assets in question. Accordingly, such parties should not need substantial additional time at this point to engage in further analysis and should be in a position to make a bid within the time period contemplated by this Motion and to participate in the Auction.

40. Moreover, the Agent and the Committee (or its predecessor), representing substantially all of the Debtor's creditors, have been aware of the Debtor's efforts to sell substantially all of the Assets for months. Thus, like potential bidders, the Agent and the Committee should not need substantial additional time to consider the matters raised in the Motion and related documents.

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41. Finally, following any sale of the Assets, the Debtor will retain, or have reasonable access to, its books and records to enable it to administer its bankruptcy case.

The Auction and Sale Hearing Notice and Notice of Motion

42. Under Bankruptcy Rule 2002(a) and (c), the Debtor is required to notify its creditors of the proposed sale of the Assets, including a disclosure of the time and place of the Auction, the terms and conditions of the sale, and the deadline for filing any objections thereto. The Auction and Sale Hearing Notice, which the Debtor propose to distribute in accordance with the Notice Procedures set forth in Paragraph 34(A) above, contains the type of information required under Bankruptcy Rule 2002(c) and also includes information regarding the Auction Procedures and the procedures for the submission of bids. This information will enable interested parties to participate in the Auction and at the Sale Hearing if they so choose.

43. The Debtor has served a copy of this Motion, including all exhibits hereto, by email, facsimile, and/or overnight delivery on (a) the Office of the United States Trustee, (b) counsel to the Committee, (c) each of the Lenders and counsel to the Agent, (d) all parties-in-interest that have requested notice pursuant to Rule 2002, (e) all parties to the Debtor's executory contracts and unexpired leases that may be subject to assumption and assignment or rejection pursuant to the Sale(s), (f) all parties that the Debtor believes could potentially have a lien on the Assets, and (g) all government agencies (including the Internal Revenue Service) required to receive notice of proceedings under the Bankruptcy Rules (collectively, the "Motion Service List"). Moreover, the Auction and Sale Hearing Notice provides that any party that wishes to obtain a copy of this Motion, including all exhibits hereto, may make such a request in writing to: Law Offices of David C. McGrail, 676A Ninth Ave. #211, New York, NY 10036, Facsimile: (646) 224-8377, Email: dmcgrail@davidmcgraillaw.com.

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44. In addition, the Debtor proposes to file and serve the Supplement on the parties and in the manner described in Paragraph 34(I) above.

45. The Debtor submits that (a) the notice to be provided through the Auction and Sale Hearing Notice, this Motion, and the Supplement and (b) the method of service proposed herein constitute good and adequate notice of the Sale(s) and the proceedings to be had with respect thereto (including, but not limited to, the Auction and the Sale Hearing). Therefore, the Debtor respectfully requests that this Court approve the foregoing notices and notice procedures.

Reservation of Rights to Enter Into Stalking Horse Agreement

46. As set forth above, the Debtor has been aggressively marketing the Assets and will continue to do so. While the Debtor has determined in its reasonable business judgment that an auction and subsequent sale of the Assets at this time, even absent a Stalking Horse Agreement, is warranted and necessary, it will continue to negotiate with potential purchasers and, therefore, reserves the right to enter into a Stalking Horse Agreement, subject to Court approval.

47. If the Debtor does so enter into a Stalking Horse Agreement (or Stalking Horse Agreements), it hereby requests that the Court approve certain bidding protections (collectively, the "Bidding Protections") that are customary in similar circumstances, including, but not limited to, (i) a break up fee (or fees) in the amount of up to three percent (3%) of the consideration offered by each such Stalking Horse, and (ii) an expense reimbursement (or reimbursements), not to exceed the lesser of an amount of up to three percent (3%) of the consideration offered and $50,000, in the aggregate, to any and all of the Stalking Horses for actual and documented out-of-pocket expenses, which documentation shall be provided to the

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Debtor, its counsel, and counsel to the Agent and the Committee, and which shall be subject to review and objection by the same. The break-up fees (or fees) and expense reimbursement (or reimbursements) would only be paid from the proceeds of a higher or better transaction. The Debtor submits that cause exists to approve the Bidding Protections because they are fair and reasonable under the circumstances.

48. Sellers of assets often employ bidding protections in order to encourage bids. Break-up fees, expense reimbursement provisions, overbid requirements and other bidder protection devices are a normal and frequently necessary component of sales outside the ordinary course of business under section 363 of the Bankruptcy Code.

49. Break-up fees, in particular, are "important tools to encourage bidding and to maximize the value of the debtor's assets." The Official Committee of Subordinated Bondholders v. Integrated Resources Inc. (In re Integrated Resources, Inc.), 147 B.R. 650, 659 (S.D.N.Y. 1992). Outside the bankruptcy context, courts commonly approve break-up fees. Such fees are presumptively appropriate under the business judgment rule and non-bankruptcy courts rarely rule on their propriety. See, e.g., Cottle v. Storer Communications, Inc., 849 F.2d 570, 578 (11th Cir. 1988); CRTF Corp. v. Federated Dep't. Stores, 683 F. Supp. 422, 440 (S.D.N.Y. 1988); Samjens Partners I v. Burlington Industries, Inc., 663 F. Supp. 614, 624 (S.D.N.Y. 1987).

50. Similarly, bankruptcy courts generally presume that the debtor's decision to agree to a break-up fee is a valid exercise of its business judgment. In re Integrated

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Resources, Inc., 135 B.R. 746, 753 (Bankr. S.D.N.Y. 1992);[4] In re 995 Fifth Avenue Associates, L.P., 96 B.R. 24, 28 (Bankr. S.D.N.Y. 1989). Bankruptcy courts will generally authorize bidding protections such as expense reimbursement or break-up fees where such bidding protections enhance rather than deter bidding. See id. at 28. One such situation is where the bidder is a "stalking horse" -- an initial interested party that promotes competition and encourages other bidders to come forward by submitting a binding offer and providing a baseline against which higher and better offers can be measured. In re Marrose Corp., Nos. 89 B 12171-12180 (CB), 1992 WL 33848 at 5 (Bankr. S.D.N.Y. 1991); In re Integrated Resources, Inc., 135 B.R. 746, 250 (Bankr. S.D.N.Y. 1992).

51. Specifically, the Bidding Protections proposed herein are "reasonably related to the bidder's efforts and the transaction's magnitude." The Official Committee of Subordinated Bondholders v. Integrated Resources, Inc. (In re Integrated Resources, Inc.), 147 B.R. at 662-63. The amount of the Break-Up Fee will at most be three percent (3%) of the total consideration offered by a Stalking Horse. Thus, these Bidding Protections are lower than, or commensurate to, other bidding protections that have been approved in this and in other jurisdictions. See, e.g., See Integrated Resources, 147 B.R. at 662 (break-up fee representing .3

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[4] As the District Court for the Southern District of New York held in In re Integrated Resources, Inc., 147 B.R. at 657, three issues must be considered by bankruptcy courts in assessing bidding protections such as break-up fees: "(1) is the relationship of the parties who negotiated the break-up fee tainted by self-dealing or manipulation, (2) does the fee hamper, rather than encourage, bidding, [and] (3) is the amount of the fee unreasonable relative to the proposed purchase price?" The court added that a "break-up fee" may serve one of three functions: "(1) to attract or retain a potentially successful bid, (2) to establish a bid standard or minimum for other bidders to follow, or (3) to attract additional bidders." Id. at 662.

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to 3.1 % of transaction amount plus reimbursement of expenses upheld; expert testified that outside of bankruptcy break-up fees average 3.3%); In re Montgomery Ward Holding Corp., Case No. 97-1409 (PJW), (Bankr. D. Del. February 17, 1998) (fee of 4.0% upheld); In re Hechinger Investment Company Inc., Case No. 99-2261 (PJW) (Bankr. D. Del. October 1, 1999) (fee of 3.0% upheld); In re American White Cross, Inc., No. 96-1109 (PJW) (Bankr. D. Del., March 31, 1997) (approving up to 5.8% break-up fee plus up to $450,000 in expense reimbursement); In re HHL Financial Servs. Inc., No. 97-398 (SLR) (D. Del., March 31, 1997) (approving 5.5% to 5.9% break-up fees).

52. Moreover, given the posture of the Auction of the Assets, the Bidding Protections are reasonably calculated to encourage a Stalking Horse to submit a final bid within the upper range of reasonably anticipated values, one that could perhaps lead to further competition and to the establishment of a baseline against which higher and better offers can be measured. The Debtor believes, in its business judgment, that a Stalking Horse's offer will have the effect of stimulating bidding from other prospective bidders who would enjoy the benefits of the Stalking Horse's analysis, due diligence, and negotiated Asset Purchase Agreement Form. The Debtor also believes that, as a result of the threshold bidding level established by the Stalking Horse's offer, any and all future bidding would commence at a higher level than could have been expected without the existence of the Stalking Horse's offer.

53. In sum, the Debtor believes that its ability to offer the Bidding Protections to any party willing to execute an asset purchase agreement and serve as a Stalking Horse would enable its to induce other potential buyers to contractually commit to a sale(s) of the Assets at a price the Debtor believes to be fair while, at the same time, providing them with the potential of even greater benefit to its estate. Thus, the Bidding Protections should be approved.

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The Sale(s) Should Be Approved

54. Although the Bankruptcy Code does not specifically define the term "ordinary course," bankruptcy courts in this district have established a two-part test to determine whether a proposed transaction is in the ordinary course of business:

> In the first part of this test, the 'vertical dimension' test, a court analyzes the transaction 'from the vantage point of a hypothetical creditor and inquires whether the transaction subjects a creditor to economic risks of a nature different from those [it] accepted' when it initially contracted with the debtor. In the second part of the analysis, the 'horizontal dimension' test, the court must determine 'whether the postpetition transaction is of a type that other similar businesses would engage in as ordinary business.' Under this two-part analysis, 'the touchstone of 'ordinariness' is thus the interested parties' reasonable expectations of what transactions the debtor in possession is likely to enter in the course of its business.
>
> In re Coordinated Apparel, Inc., 179 B.R. 40, 43 (Bankr. S.D.N.Y. 1995).

55. In this case, a hypothetical creditor would not expect the sale of all or a portion of the Assets. In addition, the Sales(s) would probably not be considered a usual and customary transaction for similar businesses within the Debtor's industry. Therefore, in all likelihood, the Sale(s) would be considered outside of the ordinary course of business.

56. Under Bankruptcy Code section 363(b)(1), a debtor is required to provide a business justification for a proposed use and sale of property of the estate other than in the ordinary course of business. See, e.g., In re Lionel Corp., 722 F.2d 1063, 1070 (2d Cir. 1983) ("[T]here must be some articulated business justification . . . for using, selling or leasing property out of the ordinary course of business before the bankruptcy judge may order such disposition under section 363(b)"); In re Global Crossing Ltd., 295 B.R 726, 742-44 (S.D.N.Y. 2003) (discussing business judgment rule in the context of 11 U.S.C. § 363(b)).

57. In this case, the Debtor submits that the decision to sell the Assets is based upon its sound business judgment and should be approved.

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58. As described above, the Debtor has already conducted an exhaustive sale/investment marketing campaign. To date, no party has executed an asset purchase agreement to acquire all or substantially all of the Assets or has agreed to invest in the Debtor's business. The Debtor believes that an expedited auction and sale process may be the only circumstances under which a purchaser of the Assets would emerge. The Debtor also believes that such an expedited process is necessary at this juncture of its case, as liquidity concerns threaten to significantly devalue the Assets.

59. For these reasons, among others, in the exercise of its reasonable business judgment, the Debtor has determined that an expeditious sale of the Assets pursuant to the Auction is the best means by which to preserve and maximize value for its creditors. Accordingly, the Debtor submits that the Sale(s) should be approved.

Sale(s) Free and Clear of Liens, Claims, and Encumbrances

60. Pursuant to Bankruptcy Code section 363(f), a debtor-in-possession may sell property free and clear of liens, claims, and encumbrances if one of the following conditions is satisfied:

> applicable nonbankruptcy law permits the sale of such property free and clear of such interest;
>
> the lienholder or claimholder consents;
>
> such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
>
> such interest is in bona fide dispute; or
>
> the lienholder or claimholder could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

11 U.S.C. §§ 363(f).

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61. The Debtor anticipates that the Lenders will consent to the Sale(s) in accordance with the Auction Procedures and as provided for herein, because the Sale(s) provide the most effective, efficient, and time-sensitive approach to realizing proceeds for, among other things, the repayment of amounts due to the Lenders under the Loan Agreement. All liens on the Assets will be satisfied or will attach to the remaining net proceeds of the sale of the Assets with the same force, effect, and priority as such liens currently have on the Assets, subject to the rights and defenses, if any, of the Debtor with respect thereto.

62. Moreover, if a holder of a lien, claim, or encumbrance receives the requisite notice of this Motion and does not object within the prescribed time period, such holder will be deemed to have consented to the proposed Sale(s), and the Assets may then be sold free and clear of such holder's liens, claims, and encumbrances. See, e.g., Veltman v. Whetzel, 93 F.3d 517 (8th Cir. 1996) (failure to object to proposed sale, coupled with agreement to stipulation on authorizing sale free of interest, constituted consent); Hargrave v. Pemberton (In re Tabore, Inc.), 175 B.R. 855 (Bankr. D. N.J. 1994) (failure to object to notice of sale or attend hearing deemed consent to sale for purposes of 363).

63. Accordingly, the Debtor submits that the sale of the Assets free and clear of liens, claims, encumbrances, and other interests satisfies the statutory requirements of Bankruptcy Code section 363(f).

Assumption and Assignment of Executory Contracts and Unexpired Leases

64. To facilitate and effectuate the Sale(s), the Debtor seeks to assume and assign the Assumed Contracts to the purchaser or purchasers of the Assets to the extent required. Bankruptcy Code section 365 authorizes a debtor to assume and/or assign its executory contracts and unexpired leases subject to the approval of the Bankruptcy Court, provided that the defaults

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under such contracts and leases are cured and adequate assurance of future performance is provided.

65. The meaning of "adequate assurance of future performance" depends on the facts and circumstances of each case, but should be given "practical, pragmatic construction." See Carlisle Homes, Inc. v. Arrari (In re Carlisle Homes, Inc.), 103 B.R. 524, 538 (Bankr. D.N.J. 1989); see also In re Natco Indus., Inc., 54 B.R. 436, 440 (Bankr. S.D.N.Y. 1985) (adequate assurance of future performance does not mean absolute assurance that debtor will thrive and pay rent); In re Bon Ton Rest. & Pastry Shop, Inc., 53 B.R. 789, 803 (Bankr. N.D. Ill. 1985) ("Although no single solution will satisfy every case, the required assurance will fall considerably short of an absolute guarantee of performance.").

66. Among other things, adequate assurance may be given by demonstrating the assignee's financial health and experience in managing the type of enterprise or property assigned. In re Bygaph, Inc., 56 B.R. 596, 605-06 (Bankr. S.D.N.Y. 1986) (adequate assurance of future performance is present when prospective assignee of a lease from debtor has financial resources and has expressed a willingness to devote sufficient funding to business in order to give it strong likelihood of succeeding; chief determinant of adequate assurance is whether rent will be paid).

67. The Debtor believes that it can and will demonstrate that all requirements for the assumption and/or assignment of the Assumed Contracts to the purchaser or purchasers of the Assets will be satisfied at the Sale Hearing. The Debtor will provide an opportunity to be heard to all parties to the Assumed Contracts and, as set forth above, will provide notice to such parties of the proposed Cure Amount. The Debtor will also evaluate the financial ability of all potential bidders before qualifying such bidders to bid for any or all of the Assets. Finally, as

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indicated above, the Auction Procedures require all bidders to submit an Adequate Assurance Package, which will evidence a bidder's financial ability to adequately assure future performance under the Assumed Contracts and otherwise to satisfy the requirements of Bankruptcy Code section 365(b)(3).

68. Thus, the Debtor respectfully submits that by the conclusion of the Sale Hearing, assumption and assignment of the Assumed Contracts should be approved.

69. Further, by this Motion, the Debtor requests authority to reject certain executory contracts and unexpired leases that are not sold to the purchaser or purchasers of the Assets. After conducting the Auction and selling the Assets, the unsold executory contracts and unexpired leases may be valueless to the Debtor and may only create an administrative expense burden on the Debtor's estate. Therefore, the Debtor requests authority to reject, as of the Sale Hearing Date, any executory contracts and unexpired leases it believes to have no value as of such date, which contracts and leases will be identified in the Supplement.

The Debtor has Presented the Proposed Sale(s) in Good Faith

70. The Asset Purchase Agreement is subject to a finding of the Court that the successful bidder is a good faith purchaser within the meaning of Bankruptcy Code § 363(m). Section 363(m) provides that:

> The reversal or modification on appeal of an authorization under [section 363(b) or (c)] of a sale or lease of property does not affect the validity of the 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).

71. In this jurisdiction, a bankruptcy court is not required to make an explicit finding of good faith in order to authorize a sale under the Bankruptcy Code. See Harbison-

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Fischer Mfg. Co. v. Zinke (In re Zinke), 97 B.R. 155, 156 (E.D.N.Y. 1989) (finding that a duty to make an explicit finding of good faith before permitting a sale "has not been imposed by the Second Circuit or the United States Supreme Court").

72. Although the Bankruptcy Code does not define the term "good faith purchaser," courts interpreting section 363(m) have held that "to show lack of good faith [a party] must show fraud, collusion . . . or an attempt to take grossly unfair advantage of other bidders." Marin v. Coated Sales, Inc. (In re Coated Sales, Inc.), 1990 WL 212899, at *2 (S.D.N.Y. Dec. 13, 1990); see generally In re Colony Hill Associates, 111 F.3d 269 (2nd Cir. 1997) (stating that determination of "in good faith" is based upon traditional equitable principles, including whether there has been full disclosure to the bankruptcy court); see also In re Sasson Jeans, Inc., 90 B.R. 608, 610 (S.D.N.Y. 1988) (quoting In re Bel Air Assocs., Ltd., 706 F.2d 301, 305 (10th Cir. 1983)). Yet, because there is no bright line test, courts examine the facts of each case by concentrating on the "integrity of [an actor's] conduct during the sale proceedings." In re Pisces Leasing Corp., 66 B.R. 671, 673 (E.D.N.Y. 1986) (quoting In re Rock Indus. Machinery Corp., 572 F.2d 1195, 1198 (7th Cir. 1978)).

73. There is no evidence of fraud, collusion, or other impropriety in connection with the proposed Sale(s) or the Debtor's sale process in general. As indicated, the Debtor's desire to sell the Assets as quickly as possible is driven by exigent circumstances, not by fraud or collusion.

74. Moreover, because the Debtor has already conducted an extensive and transparent sale/investment process to date, the shortened timeframe it has requested should not impair potential purchasers' ability to participate in the auction process. Nor should it impair the Committee's or the Lenders' ability to evaluate the results of such process.

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75. Although the proposed timeframe is tight, the Debtor has sought to provide parties-in-interest with sufficient opportunity to be heard, as is appropriate under the circumstances. In addition, it has attached the Form Asset Purchase Agreement hereto, intends to provide notice with respect to all matters related to the Sale(s) as directed by the Court, and will fully disclose and request the Court's approval of all of the terms and conditions of the proposed Sale(s).

76. Accordingly, the Sale(s) pursuant to the asset purchase agreement or agreements (which will be distributed to various parties-in-interest, as described above, in advance of the Sale Hearing) has been proposed, and is, in good faith.

Request for Relief Under Bankruptcy Rule 6004(g) and 6006(d)

77. Rule 6004(g) of the Bankruptcy Rules provides, in substance, that an order authorizing the sale of a debtor's property is stayed for a period of ten days after entry of the order unless the court orders otherwise. Rule 6006(d) of the Bankruptcy Rules provides, in substance, that an order authorizing the assignment of an executory contract or unexpired lease is also stayed for a period of ten days after the entry of the order unless the court orders otherwise.

78. In this case, in light of the liquidity concerns described above, the Debtor submits that it should be authorized to close and consummate any and all Sale(s) and/or assignments immediately after entry of any order authorizing such sales and/or approving such assumption and assignment.

NO PRIOR APPLICATION

79. No previous motion for the relief sought herein has been made to this or any other Court.

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WHEREFORE the Debtor respectfully requests that the Court enter orders granting the relief requested herein and such other and further relief as may be just.

DATED: November 14, 2008
New York, New York

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