IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	:	Chapter 11
A123 SYSTEMS, INC., et al.,	:	Case No. 12-12859 (KJC)
Debtors.[1]	:	Jointly Administered
	:	**Re: Docket Nos. 34, 149, 150, 153, 156 & 178**

DEBTORS' OMNIBUS RESPONSE TO OBJECTIONS TO DEBTORS' MOTION FOR ORDER (I) AUTHORIZING AND APPROVING (A) BIDDING PROCEDURES IN CONNECTION WITH THE SALE OF CERTAIN ASSETS OF THE DEBTORS, (B) STALKING HORSE BID PROTECTIONS, (C) THE FORM AND MANNER OF NOTICE OF THE SALE HEARING AND (D) RELATED RELIEF AND (II) AUTHORIZING (A) THE SALE OF CERTAIN ASSETS OF THE DEBTORS FREE AND CLEAR OF ALL CLAIMS, LIENS, LIABILITIES, RIGHTS, INTERESTS AND ENCUMBRANCES EXCEPT FOR PERMITTED ENCUMBRANCES; (B) THE DEBTORS TO ENTER INTO AND PERFORM THEIR OBLIGATIONS UNDER THE ASSET PURCHASE AGREEMENT; (C) THE DEBTORS TO ASSUME AND ASSIGN CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES; AND (D) RELATED RELIEF

The above-captioned debtors and debtors-in-possession (collectively, the "**Debtors**") file this omnibus response (the "**Response**") to the objections filed in opposition to the Debtors' motion (the "**Motion**")[2] for entry of orders, (i) authorizing and approving (a) bidding procedures in connection with the sale of certain assets of the Debtors, (b) stalking horse bid protections, (c) the form and manner of notice of the sale hearing and (d) related relief, and (ii) authorizing (a) the sale of certain assets of the debtors free and clear of all claims, liens, liabilities, rights, interests and encumbrances (except Permitted Encumbrances (as defined in the APA)), (b) the Debtors to enter into and perform their obligations under the APA (attached to the Motion as

[1] The Debtors in these Chapter 11 Cases, along with the last four digits of each Debtor's federal tax identification number, are: A123 Systems, Inc. (3876); A123 Securities Corporation (5388); and Grid Storage Holdings LLC (N/A). The above-captioned Debtors' mailing address is c/o A123 Systems, Inc., 200 West Street, Waltham, Massachusetts 02451.

[2] Terms used but not otherwise defined herein shall have the meanings ascribed to such terms in the Motion.

Exhibit D), (c) the Debtors to assume and assign certain executory contracts and unexpired leases and (d) related relief. In further support of the Response, the Debtors respectfully state as follows:

Preliminary Statement

1. With the assistance of their advisors, the Debtors have designed and are implementing a fair, inclusive and transparent sale process that will promote competitive bidding to maximize the value of their assets to the benefit of their stakeholders. To date, the Debtors have already received significant interest in not only their automotive business that is the subject of the Stalking Horse Bidder's bid but also in their grid business and other business units. The approval of the relief requested in the Motion, including the approval of the entry into the APA (subject to competitive bidding at the Auction), the Bid Protections and the sale process generally, is appropriate and necessary to the Debtors' continued efforts to maximize the value of their assets.

2. Failure to receive Court approval of either the Bid Protections or the proposed timeline could cause the APA with the Stalking Horse Bidder to terminate to the detriment of the Debtors' estates and stakeholders. The APA with the Stalking Horse Bidder constitutes the best offer received by the Debtors and will enhance the Debtors' sale process. Moreover, the sale timeline proposed by the Debtors fairly balances the liquidity needs and cash burn of the Debtors, on the one hand, with the need for Potential Bidders to complete their diligence and obtain governmental regulatory approvals,[3] if necessary. Accordingly, the Objections (defined below) should be overruled.

[3] As discussed below, Wanxiang America Corporation's ("**Wanxiang**") focus on CFIUS (defined below) approval is likely a red herring because the Debtors can entertain Bids with conditionality, and there is no certainty that Wanxiang can or will receive the approvals that they desire even under the timeline they propose.

The Objections

3. The deadline for filing objections to the Bidding Procedures was October 26, 2012 at 12:00 p.m. (EDT). Such deadline was extended by agreement for certain parties in interest and was extended until November 5, 2012 at 12:00 p.m. (EST) for the official committee of unsecured creditors (the "**Committee**"), which was appointed by the United States Trustee on November 2, 2012, pursuant to Section 1102 of the Bankruptcy Code [Docket No. 204]. Prior to the applicable objection deadlines, five objections were filed (collectively, the "**Objections**"), each of which is described below. For the reasons set forth herein, each of the Objections should be overruled. The Objections consist of:

a. Limited Objection of Massachusetts Clean Energy Technology Center to Debtors' Sale Motion and Request for Relief [Docket No. 149] (the "**MA-CEC Objection**"), filed by the Massachusetts Clean Energy Technology Center ("**MA-CEC**");

b. United States Trustee's Limited Objection to Debtors' Motion for Order Approving Bidding Procedures in Connection with the Sale of Certain Assets, (B) Stalking Horse Bid Protections, and Other Related Relief [Docket No. 150] (the "**U.S. Trustee Objection**"), filed by the United States Trustee for Region 3 (the "**U.S. Trustee**");

c. Limited Objection of Fisker Automotive, Inc. to the Debtors' Motion for Entry of an Order Authorizing and Approving (A) Bidding Procedures in Connection with the Sale of Certain Assets of the Debtors, (B) Stalking Horse Bid Protections, (C) the Form and Manner of Notice of the Sale Hearing, and (D) Related Relief [Docket No. 153] (the "**Fisker Objection**"), filed by Fisker Automotive, Inc. ("**Fisker**");

d. Limited Objection to Motion of Debtors for Order (I) Under 11 U.S.C. §§ 105(a), 363, 365, 503, 507 and 1146(a), Fed. R. Bankr. P. 2002, 6004, 6006, 9007 and 9014 and Del. Bankr. L.R. 2002-1, 6004-1 and 9006-1 Authorizing and Approving (A) Bidding Procedures in Connection with the Sale of Certain Assets of the Debtors, (B) Stalking Horse Bid Protections, (C) the Form and Manner of Notice of the Sale Hearing and (D) Related Relief; and (II) Under 11. U.S.C. §§ 105(a), 363, 365, 503, 507 and 1146(a), Fed. R. Bankr. P. 2002, 6004, 6006, 9007 and 9014 and Del.

Bankr. L.R. 2002-1, 6004-1 and 9006-1 Authorizing (A) the Sale of Certain Assets of the Debtors Free and Clear of All Claims, Liens, Liabilities, Rights, Interests and Encumbrances Except for Permitted Encumbrances; (B) the Debtors to Enter into and Perform Their Obligations Under the Asset Purchase Agreement; (C) the Debtors to Assume and Assign Certain Executory Contracts and Unexpired Leases; and (D) Related Relief [Docket No. 156] (the "**Patent Licensor Objection**"), filed by LiFePO4+C Licensing AG (the "**Patent Licensor**"), Hydro-Quebec ("**HQ**"), Universite de Montreal ("**UDM**") and Centre National de la Recherche Scientifique ("**CNRS**" and together with HQ and UDM, the "**Patent Owners**"); and

e. Limited Objection of Wanxiang America Corporation to Debtors' Motion for an Order Approving Certain Bidding Procedures and Stalking Horse Protections and Granting Related Relief in Connection with the Sale of Certain of the Debtors' Assets [Docket No. 178] (the "**Wanxiang Objection**"), filed by Wanxiang.

4. MA-CEC Objection: MA-CEC argues that "neither the proposed Bidding Procedures nor the proposed [Sale Notice] reasonably identify the Purchased Assets, nor clearly state the treatment of the claims secured by said Purchased Assets." MA-CEC Objection, at 1. Additionally, MA-CEC argues that the Bidding Procedures "do not provide MA-CEC with an adequate opportunity to object to the possible sale of the collateral pledged as security for the repayment of its loan to the Debtor." Id. The MA-CEC objection requests that the Court order the Debtors to "(1) amend the Sale Notice and Bid Procedures Order so that they reasonably identify which assets are being sold and which leases are being assumed with sufficient particularity to allow MA-CEC to ascertain whether its collateral will be among the assets eligible for sale; (2) make the Purchaser Schedule available for review at least one week prior to the Sale Hearing to allow MA-CEC ample time to determine whether its collateral will be sold and to file an objection if appropriate, or seek other relief on the grounds of adequate protection; and (3) account for and segregate any sale proceeds arising from the sale of MA-CEC's

collateral pledged as security for the repayment of its loan to the Debtor, or provide other means of adequate protection satisfactory to MA-CEC." Id. at 2.

5. U.S. Trustee Objection: The U.S. Trustee argues that, "[b]ecause the Debtors have multiple suitors anxious to bid on assets, they cannot characterize the proposed Break-Up Fee in favor of JCI as actually necessary to induce bids or actually necessary to preserve the value of the estate." U.S. Trustee Objection, ¶ 16. Accordingly, the U.S. Trustee asserts that the Break-Up Fee cannot be allowed. Id. The U.S. Trustee goes on to argue that "the aggregate Break-Up Fee for which the Debtors seek prospective approval is excessive." Id. ¶ 19.

6. Fisker Objection: Similar to the U.S. Trustee, Fisker argues that the Bid Protections are "unreasonably high and will divert assets from the Debtors' estates." Fisker Objection, at 2. Additionally, Fisker argues that that the initial overbid requirement "far exceeds amounts customarily approved by courts in this district and elsewhere and creates a substantial hurdle that will deter potential purchasers from submitting competing bids." Id. Lastly, Fisker argues that "the various dates and deadlines that the Debtors are seeking to implement in the Bidding Procedures, including the Bid Deadline and the Auction date, are unreasonably short and will discourage a competitive bidding process." Id.

7. Patent Licensor Objection: The Patent Licensor Objection asserts that, under 11 U.S.C. § 356(c)(1)(A) of the Bankruptcy Code, "the Debtor is prohibited from assuming and assigning [its sublicense with the Patent Licensor] as currently structured in the APA." Patent Licensor Objection, ¶ 7. The reasoning behind this assertion is that "[t]he assets that the Debtor would be selling pursuant to section 2.1 of the APA and that the Debtor would not be selling under section 2.2 of the APA could all require the licenses granted to the Debtor under the Sublicense." Id. ¶ 8. Accordingly, the Patent Licensor and Patent Owners argue, "the Debtors

would be essentially bifurcating its license rights under the Sublicense in violation of the Sublicense, the rights of the Patent Owners and the [Patent] Licensor, and nonbankruptcy and bankruptcy law." Id. Lastly, the Patent Licensor Objection argues that the Licensor is owed royalty payments under the sublicense and that the Purchaser has not provided any adequate assurance that royalty payments will be paid in a timely manner. Id. ¶ 9. Therefore, the Patent Licensor Objection asserts that the sublicense cannot be assumed and assigned to the Purchaser. Id.

8. Wanxiang Objection: Wanxiang asserts that the proposed timeline for the sale process is "unreasonably short" and that it appears to have "been designed to exclude any potential bidders who are not already familiar with the Debtors' assets or who may require regulatory approvals before submitting a binding bid." Wanxiang Objection, ¶ 4. Wanxiang submits that this Court should extend the deadlines for the Debtors' sale process by approximately one month. Additionally, Wanxiang asserts that the Bid Protections are impermissible for the same reasons set forth in the U.S. Trustee Objection and the Fisker Objection. Wanxiang Objection, ¶ 7. Finally, Wanxiang asserts that the Stalking Horse APA should be modified to allow the Debtors to seek specific performance of the Stalking Horse Bidder. Wanxiang Objection, ¶ 8-11.

9. Informal Objections: In addition to the Objections, the Debtors received several informal objections (the "**Informal Objections**") from the following parties prior to the objection deadline: the United States Department of Energy; Welsh Romulus, LLC, one of the Debtors' landlords; Boston Properties Limited Partnership, another one of the Debtors' landlords; and a Potential Bidder. All of the Informal Objections have been resolved prior to the

date hereof, and there is no need for adjudication of these objections. Attached hereto as Exhibit A is a chart setting forth descriptions of all of the Informal Objections.

Argument

10. In response to the Objections, the Debtors make four primary arguments. First, the APA with the Stalking Horse Bidder constitutes the best offer received by the Debtors, the Bid Protections are fair and reasonable under the circumstances and the Debtors believe the APA will maximize the value received for their assets at the Auction. Second, the sale process, including the sale timeline established by the proposed Bidding Procedures Order is reasonable and in the best interests of the Debtors' estates given the circumstances of these Chapter 11 Cases. Third, the Debtors have reasonably identified the Assets to be sold at the Auction by clearly stating in the revised Bidding Procedures that any and all assets of the Debtors, not just their automotive business that the Stalking Horse Bidder contemplates purchasing, are subject to sale at the Auction, and the Debtors also have addressed the treatment of alleged secured claims of MA-CEC by stating in the Motion that any liens, claims, interests, charges, and encumbrances will attach to the net proceeds of the sale with the same rights and priorities therein as in the sold assets. Lastly, the Patent Licensor Objection is premature and need not be resolved at this stage of the proceedings but even if it were adjudicated now it would be without merit.

A. The APA Is the Best Offer Received by the Debtors and the Bid Protections Are Fair and Reasonable and Should Be Approved.

11. The Debtors believe that the Bid Protections are fair and reasonable under the circumstances and that they will maximize the value of the assets sold to the benefit of the Debtors' estates, creditors, and other parties-in-interest.

12. In the spring/summer of 2012, the Debtors and their advisors conducted an exhaustive sale process. Many parties thoroughly examined the Debtors' businesses and

expressed interest in purchasing some or all of the assets as part of that effort. The result was that the Debtors entered into a complex transaction with Wanxiang as described in the Prystash Declaration. When it became clear that the Debtors would not be able to consummate the Wanxiang transaction without running out of liquidity, the Debtors turned their attention to negotiating a transaction with the Stalking Horse Bidder. The transaction negotiated with the Stalking Horse Bidder was designed to be a stalking horse bid subject to higher and better offers under section 363 of the Bankruptcy Code. Pursuant to the APA, the Stalking Horse Bidder has agreed (a) to pay an amount in cash equal to the sum of (i) $116 million in cash, plus (ii) upon the consummation of the Stalking Horse Bidder's acquisition of certain powder coating facilities owned by a Chinese subsidiary of the Debtor, $9 million in cash paid to the Chinese subsidiary, plus/minus (iii) the Adjustment Amount[4]; and (b) to assume the Assumed Liabilities (collectively, the "**Purchase Price**") to acquire the Purchased Assets, subject to the outcome of the Auction, if one is needed, Court approval and certain other customary conditions, as set forth in the APA.

13. The Debtors can demonstrate, as required, sound business judgment for entering into the APA with the Stalking Horse Bidder. See, e.g., Myers v. Martin (In re Martin), 91 F.3d 389, 395 (3d Cir. 1996) (noting that the sale of a debtor's assets is appropriate where there are sound business reasons behind such determination). Notably, the Debtors (a) initiated an extensive sale process in the spring of 2012, (b) aggressively marketed the transaction between April and August, and (c) as a result of such process, had engaged in significant negotiations with the complete universe of likely buyers of the Debtors' assets. The Debtors decided to

[4] The Adjustment Amount is defined in the APA as an amount equal to (a) any Cure Costs set forth in Schedule 2.8(a) with respect to any Assumed Contracts and Assumed Leases that are designated as such by Purchaser after the conclusion of the Auction minus (b) any Cure Costs set forth on Schedule 2.8(a) with respect to any Eliminated Agreement that are designated as such by Purchaser after conclusion of the Auction.

designate JCI as the Stalking Horse Bidder because (i) the Debtors believed the Stalking Horse Bid provided an appropriate floor for the value of the Purchased Assets, (ii) the Stalking Horse Bid is capable of being consummated quickly if selected as the winning bid, and (iii) the Stalking Horse Bid provides a meaningful opportunity to retest the market with respect to both the Purchased Assets as well as remaining assets and thus positions the Debtors to seek to maximize value for the benefit of its stakeholders. Thus, the Debtors' decision to enter into the Stalking Horse Bid was the product of months of analysis among the Debtors' management and professionals regarding how to maximize the value of the Debtors' estates.

14. The Debtors did not receive an offer with better terms than those found in the APA with the Stalking Horse Bidder. Importantly, the offer made by the Stalking Horse Bidder did not condition closing on any significant regulatory approvals and therefore the Debtors were comfortable that the Stalking Horse Bidder would be able to close a sale transaction with respect to the automotive business with the Debtors on the necessary timeline, and thus would serve as an effective Stalking Horse. This factor, among others, was weighed against factors such as the Bid Protections and the limitation on the Debtors' ability to specifically enforce the APA and require the Stalking Horse Bidder to close the sale. The Debtors and the Stalking Horse Bidder negotiated such terms in good faith and at arm's length, and the Debtors firmly believe that the offer made by the Stalking Horse Bidder was and remains the best offer they have received.

15. Regarding the Bid Protections, as discussed in the Motion, the Third Circuit has identified at least two situations in which bid protections are permissible in the bankruptcy context. First, the Third Circuit has held that a break-up fee or expense reimbursement may be necessary to preserve the value of the estate if assurance of the fee "promotes more competitive bidding, such as by inducing a bid that otherwise would not have been made and without which

bidding would have been limited." Calpine Corp. v. O'Brien Envtl. Energy, Inc. (In re O'Brien Envtl. Energy, Inc.), 181 F.3d 527, 537 (3d Cir. 1999); see also In re Reliant Energy Channelview LP, 594 F.3d 200, 206 (3d Cir. 2010) (noting that, under the O'Brien test, "it [is] permissible to offer a break-up fee and reimbursement for expenses to induce an initial bid"). Second, if the availability of break-up fees and expense reimbursements induces a bidder to research the value of the debtor and convert the value to a dollar figure on which other bidders can rely, the bidder may have provided a benefit to the estate by increasing the likelihood that the price at which the debtor is sold will reflect its true worth. See O'Brien, 181 F.3d at 537; see also In re Reliant Energy Channelview LP, 594 F.3d at 206-08 (reasoning that a break-up fee should be approved if it is necessary to entice a party to make the first bid or if it would induce a stalking horse bidder to remain committed to a purchase). In this case, both rationales apply and support approval of the Bid Protections.

16. The Bid Protections were necessary to induce the Stalking Horse Bidder to agree to serve as the stalking horse, as the Stalking Horse Bidder indicated that it would not proceed with the APA without these protections. For this reason, under Third Circuit case law, the Bid Protections promote more competitive bidding. If the Auction were to take place without the Stalking Horse Bidder, it is possible that the bids received (and the ultimate price paid for the Debtors' assets) would be substantially lower than the Purchase Price. Furthermore, in the event that no other parties submit bids for the Purchased Assets, the Debtors have the safeguard of the Stalking Horse Bidder and will be able to sell their assets as agreed upon pursuant to the APA. Lastly, there have not been any allegations of self-dealing or manipulation pertaining to the negotiation of the Bid Protections. The Debtors believe that the Bid Protections will promote

more competitive bidding and will preserve the value of the Debtors' estates. Therefore, the O'Brien test has been satisfied.

17. Furthermore, the Stalking Horse Bidder conducted extensive diligence to value the Purchased Assets prior to submitting the Stalking Horse Bid. This diligence and research will provide significant benefits to the Debtors' estates because, by selecting the Stalking Horse Bidder, the Debtors have established a minimum value for the Purchased Assets and have ensured that any bids submitted at the Auction will appropriately value the Purchased Assets.

18. At this time, the Stalking Horse Bidder is the only party to submit a bid that does not contain materially unsatisfied conditions that must be fulfilled prior to closing. Thus, despite the rumors of alternative stalking horse bids, there remains only one bid that is currently a viable option for the Debtors. If the APA with the Stalking Horse Bidder is terminated, there is no assurance that the Debtors will find another buyer before they exhaust their entire debtor-in-possession financing and cash on hand at the end of this year. It is the business judgment of the Debtors and their advisors that having a stalking horse bid in place at the Auction will maximize the value of their assets. The Bid Protections grant the Stalking Horse Bidder (a) a break-up fee equal to three percent (3%) of the Purchase Price, which equates to $3,750,000 and (b) an expense reimbursement to cover reasonable out-of-pocket costs and expenses incurred in connection with the Sale estimated at $4,000,000. The Bid Protections further ensure that competing bids will be materially higher or otherwise contain more favorable terms than the APA, which also provides a direct benefit to the Debtors' estates and their stakeholders. The Bid Procedures require that any Potential Bid for the Purchased Assets provide a net consideration to

the estates of at least $10,250,000[5] more than the Purchase Price in order for the Potential Bid to be deemed a Qualified Bid.

19. Under the terms of the APA, the Stalking Horse Bidder may terminate the APA prior to closing if "the Bankruptcy Court shall fail to enter the Sale Procedures Order[6] on or prior to the date that is 15 days after the Petition Date." See Asset Purchase Agreement, § 8.1(e).[7] In the section of the APA addressing the "Sale Procedures Motion and Order," the Debtors acknowledged that the Stalking Horse Bidder expended considerable time and expenses in connection with executing the APA, and in consideration of such time and expenses, the Debtors agreed to include in the Sales Procedures Motion a request to approve the Break-Up Fee and Expense Reimbursement. Therefore, the Break-Up Fee and Expense Reimbursement were express consideration provided by the Debtors in exchange for the Stalking Horse Bidder entering into the APA. If the Court denies the Debtors' Sale Procedures Motion, the Stalking Horse Bidder will have the contractual right to terminate the APA, and the Debtors would be left without a stalking horse bidder—and potentially without any bidder at all—at the Auction.

B. The Sale Process Set Forth in the Proposed Bidding Procedures Order is Fair and Reasonable Under the Circumstances.

20. Notably, Wanxiang and Fisker are the only two parties in interest that have argued that the sale process contained in the proposed Bidding Procedures Order should be extended. Wanxiang and Fisker assert that an extension is necessary because the sale timeline does not permit other bidders to conduct sufficient diligence to submit a bid. Notably, Fisker does not

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[5] This consists of the $3.75 million Break-Up Fee (3% of $125 million), $4 million in estimated Expense Reimbursement Amount and a $2.5 million minimum overbid.

[6] The Sale Procedures Order is defined as "a final, non-appealable order of the Bankruptcy Court that has not been stayed, vacated or stayed pending appeal, in the form attached [to the APA] with such changes as JCI may have approved in its sole and absolute discretion to the extent that such changes affect or concern JCI."

[7] At the request of the Debtors and so as to accommodate the formation of an official committee of unsecured creditors, the Stalking Horse Bidder agreed to extend this date through and including November 5, 2012.

assert that it will actually be a bidder but instead is apparently defending the rights and interests of other unnamed bidders. Additionally, Wanxiang argues that the sale timeline does not permit parties who require regulatory approvals to obtain such approvals prior to submitting a bid. Neither point justifies any change to the sale process set forth in the proposed Bidding Procedures Order – which reflects sale milestones negotiated with the Stalking Horse Bidder and which deviation from would potentially result in the Debtors' losing the commitment of the Stalking Horse Bidder in addition to materially decreasing the estates' remaining cash and thus value.

21. First, the argument regarding potential diligence plainly does not apply to Wanxiang itself. Wanxiang and the Debtors' extensive prepetition relationship was described in great detail in the Prystash Declaration. Indeed, Wanxiang has agreed to provide postpetition financing that will replace the financing provided by the Stalking Horse Bidder. Wanxiang has conducted substantially more due diligence with respect to the Debtors than any party involved in these Chapter 11 Cases, including the Stalking Horse Bidder, and cannot credibly argue that it needs more time to become familiar with the Debtors' assets. In fact, as detailed in the Prystash Declaration, Wanxiang conducted sufficient diligence to provide it comfort to commit to invest no less than $390 million for approximately 80% of the equity of A123 Systems, Inc. subject to the satisfaction of certain closing conditions. Claims that at this point Wanxiang would require due diligence in order to commit to a transaction seem specious. Rather, Wanxiang appears to make this argument to protect other bidders who may ultimately compete against Wanxiang. However, none of these bidders have objected and, indeed, the Debtors have resolved the concerns of certain Potential Bidders through the clarifications made to the proposed form of Bidding Procedures Order and the Bidding Procedures.

22. Second, Wanxiang's request for an extension to permit bidders to obtain government regulatory approvals is undermined by Wanxiang's lack of certainty that such an extension will actually result in such approvals being obtained. Notably missing from the Wanxiang Objection is any assurance that it will have governmental regulatory approvals even if the Court were to extend the sale timeline. The lack of such assurance must not be overlooked. In essence, Wanxiang asks the Court to extend the sale timeline despite the fact that Wanxiang may not be able to secure the governmental regulatory approvals it is seeking even under this extended timeline.

23. Indeed, the most significant approval desired[8] by Wanxiang is that of the Committee on Foreign Investment in the United States ("**CFIUS**"). A formal review by CFIUS commences upon the filing of a joint voluntary notice by the parties to a covered transaction. CFIUS then will review for an initial 30 days to determine whether the transaction threatens to impair United States national security. If CFIUS unanimously determines that no such threat is present then CFIUS will clear the transaction. If a threat is present then CFIUS must conduct an additional 45-day investigation, at the end of which the President of the United States can review for an additional 15 days. CFIUS has previously indicated that the investigation period would likely be necessary and had previously initiated a 45-day investigation for the initial joint voluntary notice submitted by Wanxiang and the Debtors on September 5, 2012, which notice had been subsequently withdrawn. Because of this potentially lengthy process, there is no guarantee that Wanxiang would obtain CFIUS approval even if the sale process were adjusted and extended as requested by Wanxiang.

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[8] Filing for CFIUS review is entirely voluntary and CFIUS approval is not strictly required to permit a transaction such as the Sale to go forward. However, failure to file for and receive CFIUS approval could result in a demand by CFIUS that the parties unwind a transaction even after the transaction closes. Wanxiang therefore does not require CFIUS approval to participate in the Auction but rather desires to protect itself from the risk that the Sale could subsequently be unwound.

24. Notably, Wanxiang can still participate in the auction (and the Debtors hope that they do) even if it has not secured the requisite governmental regulatory approvals, although any closing contingencies contained in a bid may impact the value that the Debtors ascribe to such bid. See Bidding Procedures, § 7. The Debtors hope to have and expect to have a robust and competitive Auction and specified in the Bid Procedures themselves that neither Wanxiang nor any other Potential Bidder is required to have obtained governmental regulatory approval prior to participating in the Auction. With the assistance of their advisors, while negotiating a sale timeline with the Stalking Horse Bidder the Debtors were focused on ensuring that the sale process would result in a fair process for all Potential Bidders and that the Auction would be conducted on a level playing field.

25. Moreover, such an extension would cause real harm to the Debtors and their estates in two ways. First, the Debtors consume substantial sums of cash each week to keep their operations running in the ordinary course of business pending the sale. If the sale timeline is extended as requested by Wanxiang and Fisker, the Debtors will spend even more cash operating their business, which will reduce the total value of the Debtors' estates and thereby negatively impact the potential recovery to the Debtors' creditors. Second, and even more critically, the Debtors also risk losing key employees, many of whom the Debtors believe are already seeking other employment due to the uncertainty that the bankruptcy has caused. If these key employees of the Debtor decide to pursue other employment opportunities, then the Debtors' ability to maximize the value recovered at the sale is materially inhibited.[9] For these reasons, an extension of the sale timeline causes significant harm to the Debtors and their creditors without providing any benefit.

[9] Indeed, if substantial numbers of employees leave prior to the consummation of the Sale it could give rise to a termination right by the Stalking Horse Bidder.

C. The Debtors Have Reasonably Identified the Assets to Be Sold and Clearly Stated the Treatment of Claims Secured by Such Assets.

26. MA-CEC argues that the proposed Bidding Procedures do not reasonably identify the assets to be sold and fail to state the treatment of the claims secured by any assets sold by the Debtors. The Debtors disagree with this characterization and believe that the Bidding Procedures appropriately explained that substantially all of the Debtors' assets could be included in the Sale. However, in the revised proposed Bidding Procedures, filed on November 2, 2012 [Docket No. 213], the Debtors have added additional language clearly stating their intention to sell any and all property owned by the Debtors. See Bidding Procedures, § 3 ("The Debtors seek to sell (i) certain of the Debtors' assets, defined as the 'Purchased Assets' . . . together with the Applicable Assets; . . . and/or (ii) all or a portion of the Remaining Assets to the maximum extent permitted by Section 363."). Furthermore, the revised Bidding Procedures Order, filed on November 2, 2012 [Docket No. 213], states that the Debtors "may sell the Purchased Assets and the Remaining Assets if such acquisition is proposed by any Qualified Bid(s)." Bidding Procedures Order, ¶ 5. To the extent that any ambiguity existed at the time of MA-CEC's Objection, and the Debtors do not believe that any did, the revised language in the Bidding Procedures and Bidding Procedures Order reasonably identifies the assets to be sold as any of the Debtors' assets.

27. While the Purchased Assets listed in the APA do not include any property encumbered by MA-CEC's asserted liens, such property may be sold at the Auction. Because both the Sale Notice and Bid Procedures Order already make clear that any of the Debtors' property may be sold, including MA-CEC's collateral, it is unnecessary to require the Debtors to further amend the Sale Notice and Bid Procedures Order.

28. The Debtors have also made clear the treatment that secured claims will receive after previously encumbered property is sold. The Motion, relying on Section 363(f) of the Bankruptcy Code, provides that all assets will be sold "free and clear of all liens, claims, interests, charges and encumbrances (with any such liens, claims, interests, charges, and encumbrances attaching to the net proceeds of the sale with the same rights and priorities therein as in the sold assets)." Motion, at 38 (emphasis added). Therefore, the Debtors have plainly stated how the claims held by MA-CEC will be treated. In the event that any of MA-CEC's purported collateral is sold by the Debtors, MA-CEC's interest in the collateral, if any, will attach to the sale proceeds relating thereto in the same priority as existed prior to the sale.

29. Lastly, the timeline provided in the Bidding Procedures provides MA-CEC with an adequate opportunity to object to the sale of any assets on which MA-CEC asserts that it has a lien. Nonetheless, given MA-CEC's status as an alleged secured creditor, the Debtors will consent to MA-CEC's attending the Auction so that it has the same amount of notice as the Debtors and the Committee as to which assets are actually being sold. The ability to attend the Auction should resolve MA-CEC's concerns regarding notice of its collateral being sold.

30. MA-CEC further requests that the Debtors segregate any sale proceeds arising from the sale of MA-CEC's alleged collateral. This objection raises an issue to be resolved at the Sale Hearing as it relates to the distribution of sale proceeds and not to the Bidding Procedures. Such an objection is not appropriate at this juncture in the proceedings.

D. The Patent Licensor Objection Is Premature; Regardless, the Debtors May Assign the Patent Sublicense Agreement Under the Express Terms of the Agreement.

31. The Patent Licensor Objection raises issues to be resolved at the Sale Hearing, not the hearing on the Bidding Procedures. At this stage of the proceedings, the Debtors do not

know who will ultimately purchase their assets at the Auction or even which assets will ultimately be purchased. Accordingly, it is not possible at this juncture to determine whether an assignment of the Patent Sublicense Agreement between the Patent Licensor and A123 Systems, Inc. (the "**Sublicense Agreement**") is permitted under the terms of the Sublicense Agreement or will mature into a ripe issue.

32. However, to the extent the assignment of the Sublicense Agreement does become ripe in these proceedings, it is clear that such assignment is permitted. Section 13.13 of the Sublicense Agreement explicitly states that "either Party may assign or otherwise transfer [the Sublicense Agreement] to a successor in connection with . . . a sale of all or substantially all of a Party's business related to [the Sublicense Agreement], without the other Party's or any Third Party consent." Sublicense Agreement, § 13.13. A plain reading of the Sublicense Agreement reveals that the parties contemplated the possible assignment and assumption—even to a competitor of the other party—of their respective rights and obligations under the agreement and included provisions expressly intended to address such a transfer.

33. Therefore, the Debtors may assign the Sublicense Agreement to a purchaser so long as the Debtors sell to such purchaser all or substantially all of the Debtors' business related to the Sublicense Agreement. See id. The Debtors' business that is related to the Sublicense Agreement is their business involving the manufacturing of powder. The Debtors have not proposed to sell (and do not expect to sell) such business piecemeal or to more than one party. In fact, the APA entered into with the Stalking Horse Bidder would transfer to the Stalking Horse Bidder the entire powder manufacturing business, thereby fulfilling any and all conditions set forth in Section 13.13 of the Sublicense Agreement.

34. Furthermore, while courts have found nonexclusive patent licenses that are silent as to their assignability to be nonassignable without the patent owner's consent, see, e.g., In re Access Beyond Tech., 237 B.R. 32, 44 (Bankr. D. Del. 1999), the justification for prohibiting such assignment does not exist in this case. In this situation, the Sublicense Agreement expressly grants a right of assignment and multiple provisions of the Agreement contemplate assignability.[10] Such provisions demonstrate that the Patent Licensor and the Debtors contemplated and negotiated for such assignment rights. As further evidence that the assignability restrictions typically applied to nonexclusive sublicenses of intellectual property were not intended to apply in this case, that the Patent Sublicense provides that if the Debtors undergo a change in control and the acquirer is a competitor of the licensor, the license does not terminate; the change of control merely triggers increased royalties. See Sublicense Agreement, §§ 7.4-7.5.

35. Lastly, the Patent Licensor Objection argues that the Debtors must cure any defaults under the Sublicense Agreement prior to assumption and assignment and that the Stalking Horse Bidder has failed to provide adequate assurance of future performance. As set forth in the Motion, the Debtors have proposed a formal cure process to resolve such issues. Motion, ¶¶ 17-18. At the appropriate time and in accordance with such cure process, the Patent Licensor and Patent Owners may dispute the relevant cure amount for the Sublicense Agreement (to the extent they disagree with the amount listed by the Debtors) and whether the purchaser has provided adequate assurance.

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[10] For example, Section 9.2.1 of the Sublicense Agreement provides that "*permitted assignments* of [the] Agreement shall not be considered abandonment of Licensee's business," and Section 13.5 provides that the Sublicense Agreement shall be binding upon "each Party's successors and *permitted assigns*." Sublicense Agreement, §§ 9.2.1, 13.5 (emphasis added).

36. For the above stated reasons, the Patent Licensor Objection is premature. However, if the Court decides to resolve the objection at this stage in the proceedings, the Debtors submit that they may assign their rights under the Sublicense Agreement pursuant to the express terms thereof.

CONCLUSION

37. As set forth above, the APA with the Stalking Horse Bidder, including the Bid Protections set forth therein, constitutes the best offer received by the Debtors and will maximize the value received by the Debtors at the Auction. Further, the Debtors have reasonably identified the Assets to be sold at the Auction and have sufficiently addressed the treatment of secured claims. Lastly, the Patent Licensor Objection is premature and should be resolved after the Auction when it is clear which assets are being sold and to whom. Accordingly, the Debtors respectfully submit that each of the Objections should be overruled and the Bidding Procedures should be approved.

WHEREFORE, the Debtors respectfully request that this Court (a) overrule the Objections, (b) enter the Bidding Procedures Order, and (c) grant such other and further relief as is just and proper.

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