

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

In re:

Taylor-Wharton International LLC, *et al.*,¹

Debtors.

Chapter 11

Case No. 15-12075 (BLS)

(Joint Administration Requested)

**DEBTORS' MOTION PURSUANT TO 11 U.S.C. §§ 105(a), 363, 365 AND FED. R.
BANKR. P. 2002, 6004, 6006 FOR**

(A) ORDER (I) ESTABLISHING SALE PROCEDURES RELATING TO THE SALE OF (1) THE DEBTORS' CRYOSCIENCE BUSINESS AND (2) ANY OR ALL OF THE DEBTORS' ASSETS; (II) APPROVING BID PROTECTIONS IN CONNECTION WITH THE SALE OF THE DEBTORS' CRYOSCIENCE BUSINESS; (III) ESTABLISHING PROCEDURES RELATING TO THE ASSUMPTION AND ASSIGNMENT OF CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES, INCLUDING NOTICE OF PROPOSED CURE AMOUNTS; (IV) APPROVING FORM AND MANNER OF NOTICE OF ALL PROCEDURES, PROTECTIONS, SCHEDULES, AND AGREEMENTS; (V) SCHEDULING A HEARING TO CONSIDER THE PROPOSED SALES; AND (VI) GRANTING CERTAIN RELATED RELIEF

AND

(B) AN ORDER (I) AUTHORIZING THE SALE OF THE DEBTORS' ASSETS FREE AND CLEAR OF ALL LIENS, CLAIMS, ENCUMBRANCES, AND INTERESTS; (II) AUTHORIZING THE ASSUMPTION AND ASSIGNMENT OF CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES; AND (III) GRANTING CERTAIN RELATED RELIEF

Taylor-Wharton International LLC ("TWI") and Taylor-Wharton Cryogenics LLC ("Cryogenics") and together with TWI, the "Debtors"), by and through their undersigned counsel, respectfully submit Debtors' Motion Pursuant to 11 U.S.C. §§ 105(a), 363, 365 and Fed. R. Bankr. P. 2002, 6004, 6006 for (A) Order (I) Establishing Sale Procedures Relating to the Sale of (1) the Debtors' CryoScience Business and (2) any or all of the Debtors' Assets; (II) Approving Bid Protections in Connection with the Sale of the Debtors' CryoScience Business;

¹ The Debtors are the following two entities (with the last four digits of their taxpayer ID nos. in parenthesis): Taylor-Wharton International LLC (1577) and Taylor-Wharton Cryogenics LLC (1713). The Debtors' corporate address is: 5600 Rowland Road, Minnetonka, MN 55343.

(III) Establishing Procedures Relating to the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases, Including Notice of Proposed Cure Amounts; (IV) Approving Form and Manner of Notice of All Procedures, Protections, Schedules, and Agreements; (V) Scheduling a Hearing to Consider the Proposed Sales; and (VI) Granting Certain Related Relief; and (B) an Order (I) Authorizing the Sale of the Debtors' Assets Free and Clear of All Liens, Claims, Encumbrances, and Interests; (II) Authorizing the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases; and (III) Granting Certain Related Relief (the "Motion") to this Court for entry of an order (the "Bidding Procedures Order") (I) Establishing Sale Procedures Relating To The Sale Of (A) The Debtors' CryoScience Business And (B) Any Or All Of The Debtors' Assets; (II) Approving Bid Protections In Connection With The Sale Of The Debtors' CryoScience Business; (III) Establishing Procedures Relating To The Assumption And Assignment Of Certain Executory Contracts And Unexpired Leases, Including Notice Of Proposed Cure Amounts; (IV) Approving Form And Manner Of Notice Of All Procedures, Protections, Schedules, And Agreements; (V) Scheduling A Hearing To Consider The Proposed Sales; And (VI) Granting Certain Related Relief. The Debtors further request that at the Sale Hearing, subject to the results of the Auction and the Bidding Procedures (as defined below) set forth herein, this Court enter one or more orders (each a "Sale Order") approving and authorizing the sale of the Debtors' Assets (as defined below) (each a "Sale Transaction" or collectively, the "Sale Transactions"), free and clear of all claims, liabilities, interests, encumbrances, liens, financing statements, mortgages, mechanics' liens, lis pendens, and all other documents or agreements evidencing interests in and/or claims against such Assets (collectively, the "Encumbrances"), except to the extent set forth in a Successful Bidder's APA or APA(s) (as defined below) and authorizing the assumption and assignment of

certain executory contracts and unexpired leases. In support of the Motion, the Debtors, by and through their undersigned counsel, respectfully represent:

I. JURISDICTION AND VENUE

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334, and the Amended Standing Order of Reference from the United States District Court for the District of Delaware, dated as of February 29, 2012 (the "Amended Standing Order"). This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2), and the Court may enter a final order consistent with Article III of the United States Constitution. Pursuant to Local Rule 9013-1(f), the Debtors consent to entry of a final order by the Court in connection with this Motion to the extent that it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments in connection herewith consistent with Article III of the United States Constitution.

2. Venue of these cases and this Motion in this District is proper under 28 U.S.C. §§ 1408 and 1409.

3. The statutory predicates for the relief requested herein are §§ 105, 363 and 365 of title 11 of the United States Code (the "Bankruptcy Code") and Rules 2002, 6004 and 6006 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules").

II. FACTUAL BACKGROUND

4. On October 7, 2015 (the "Petition Date"), the Debtors filed Voluntary Petitions for relief under chapter 11 of the Bankruptcy Code. No request has been made for the appointment of a trustee or examiner in these Cases and the Debtors continue to operate their businesses and manage their properties as debtors-in-possession pursuant to §§ 1107(a) and 1108 of the Bankruptcy Code. As of the date hereof, no official committee of unsecured creditors has been appointed in the above-captioned bankruptcy cases (these "Cases").

5. The Debtors in these cases are TWI, a Delaware limited liability holding company formed in 2007, and its wholly-owned operating subsidiary, Cryogenics.

6. Debtor TWI is a Delaware limited liability holding company and is a wholly-owned subsidiary of non-debtor Taylor-Wharton Intermediate Holdings, Inc. TWI has two wholly owned subsidiaries: Debtor Cryogenics and non-debtor Crossmont Holdings LLC. Crossmont Holdings LLC has no operations and merely holds, through a wholly-owned subsidiary (Fremont Land LLC), a parcel of real estate of *de minimis* value.

7. Cryogenics is a leading designer, engineer and manufacturer of cryogenic equipment designed to transport and store liquefied atmospheric and hydrocarbon gases. Cryogenics has a single United States operation in Theodore, Alabama. Cryogenics is the direct or indirect parent of several foreign non-debtor subsidiaries which have manufacturing operations in China, Malaysia, Slovakia, and warehousing operations in Germany and Australia.

8. Cryogenics and its subsidiaries engage principally in the manufacturing and distribution of cryogenic portable and bulk storage tanks. These tanks are used for storing cryogenic liquids, providing economical solutions for transporting, storing and dispensing liquefied gasses, medical applications, beverage carbonation applications and other related storage and delivery solutions. Customers for these products include liquid gas distribution and production companies, cryoscience equipment distributors, carbonation system retailers and distributors, and others engaged in the cryogenics business.

9. More specifically, Cryogenics serves three different and distinct end markets through three business divisions: CryoIndustrial, CryoLNG, and CryoScience.

10. CryoIndustrial produces cryogenic equipment to store industrial gases, with products ranging from large, on-site storage tanks to mobile cylinders used to deliver gas to customers.

11. CryoLNG was launched in 2012 in response to the expanding use of liquid natural gas and the potential for utilization of cryogenic manufacturing expertise in growing end-markets – its product offerings include liquefied natural gas storage tanks for numerous applications, including bulk storage, fueling stations, marine and vehicle applications.

12. CryoScience (the “CryoScience Business”) produces smaller cryogenic containers used for biological research and laboratory applications (e.g., preservation of stem cells, artificial insemination for animal breeding, etc.). CryoScience tanks are highly engineered and much smaller than the tanks manufactured in Cryogenics’ historical large tank business. CryoScience tanks are manufactured along with Cryogenics’ larger industrial tanks in its Theodore, Alabama plant. The manufacture of the CryoScience tanks utilizes about 20% of the Theodore, Alabama plant. The remainder of the Theodore plant is devoted to Cryogenics’ CryoIndustrial and CryoLNG businesses.

13. The Debtors have previously filed for bankruptcy protection and reorganized under the Bankruptcy Code in this Court at Case No. 09-14089 (BLS). On May 26, 2010, this Court entered an Order confirming the Debtors’ Joint Plan of Reorganization. The Debtors exited from Chapter 11 on June 16, 2010.

14. Upon emerging from chapter 11 in 2010, TWI worked diligently toward achieving profitability but despite efforts to streamline the Debtors’ businesses, the infusion of new capital, and the sale of certain of TWI’s subsidiaries, the Debtors have been unable to achieve profitability.

15. As a result of these challenges facing its businesses, the Debtors have commenced these cases in order to preserve and maximize the value of their business for the benefit of stakeholders.

16. As a result of extensive pre-petition marketing efforts by the Debtors and their advisors, the Debtors have received an offer (the “Stalking Horse Bid”) to purchase the assets of the CryoScience Business for \$24 million in cash and the assumption of certain liabilities from Haier Medical and Laboratory Products USA, Inc. (the “Stalking Horse Buyer”).

17. It is the Debtors’ intention to sell all of their remaining assets and businesses (collectively, the “Assets”), including the assets related to the CryoScience Business, Cryogenics’ Theodore, Alabama plant, and the stock and/or assets of Cryogenics’ foreign subsidiaries. Accordingly, under the Bidding Procedures, if approved by the Court, the Debtors intend to solicit bids for Cryogenics’ U.S. Assets and businesses as well as the assets and businesses of Cryogenics’ foreign subsidiaries.

III. SUMMARY OF THE SALE PROCESS

A. The Debtors’ Marketing and Sales Efforts

18. The Debtors extensively marketed the CryoScience Business beginning in December 2014. In January 2015, the Debtors expanded their marketing efforts to include all their businesses and Assets. As part of this process, the Debtors hired an investment banker who contacted numerous parties who were likely to be interested in the Debtors’ Assets and businesses. This process included distribution of a 58-page marketing package for the CryoScience Business (supplemented by an additional 24 page package for all of the Debtors’ Assets) to approximately 33 parties. Such process resulted in indications of interest by at least 10 parties. The fact that the Debtors’ Assets were for sale was of general knowledge in the Gaserv industry. Upon execution of a confidentiality agreement, each interested party was given

access to a data room established by the Debtors to facilitate due diligence. In addition to the Stalking Horse Buyer, the Debtors believe that several other potential purchasers remain interested in purchasing some or all of the Debtors' businesses and assets. Some of those expressions of interest include the CryoScience Business, other of those expressions of interests exclude the CryoScience Business.

19. The Debtors have reached an agreement with the Stalking Horse Buyer to sell all of the Debtors' Assets related to the CryoScience Business. By this motion, the Debtors seek to establish procedures (the "Bidding Procedures") to allow the Debtors to solicit higher and better offers for the CryoScience Business and for authority to sell its CryoScience Business. In this motion, the Debtors also seek authority to solicit, consider and accept offers to purchase all the Debtors' Assets located in the United States consisting principally of Cryogenics's Theodore, Alabama Operations. Such other bids may or may not include the CryoScience Business.²

20. In addition to considering competing offers for the Assets related to the CryoScience Business, the Bidding Procedures will also permit the Debtors to consider offers for Assets not being acquired by the Stalking Horse Buyer. To the extent that the proposed offer for the Debtors' Assets does not include the CryoScience Business, such purchaser must agree to a short term transition services agreement (not to exceed 9 months) for the CryoScience Business to be operated at the Debtors' Theodore, Alabama plant, substantially in the form attached to the Stalking Horse APA as Exhibit B, with the Stalking Horse Buyer or the Successful Bidder thereon.

21. Cryogenics also conducts operations outside the United States through several non-US subsidiaries. The Debtors intend to solicit, consider and accept offers to purchase all the

² To the extent assets of the CryoScience Business are included in any competing bid for Debtors' Assets, the Bidding Procedures will require such bidder to allocate value between the assets of the CryoScience Business and the "other" Assets to permit the Stalking Horse Buyer to make further competing bids.

interests or assets owned by Cryogenics's subsidiaries located outside the United States. These foreign subsidiaries include Endurium Holding, Ltd., Taylor-Wharton Malaysia Sdn. Bhd., Taylor-Wharton Cryogenics Eq. Co. Ltd., Taylor-Wharton (Australia) Pty. Ltd., Taylor-Wharton Slovakia, s.r.o., and Taylor-Wharton Germany GmbH. The Debtors' subsidiaries are not debtors herein and any sales may not require approval of the Bankruptcy Court. However, to ensure that all interested parties have a full opportunity to propose transactions for the highest and best value for the United States based Assets and for the acquisition of their foreign operations, the Debtors intend to solicit, consider and accept offers on all terms (or combinations of terms) that will maximize the Debtors' overall estates.

22. Because time is of the essence, the Debtors proposed the following timeline for the Sale of the Debtors' Assets:³

- Bidding Procedures Hearing: Not later than **October 20, 2015**
- Submission Deadline for Qualified Bids (defined below): Not later than **November 6, 2015** at 5:00 p.m. (Prevailing eastern time)
- Auction (if an Auction is to be held): Not later than **November 11, 2015**
- Proposed Hearing to approve a Sale or Sales (the "Sale Hearing"): Not later than **November 16, 2015**

B. Summary of the Stalking Horse APA

23. The Stalking Horse Buyer and the Debtors have entered into an Asset Purchase Agreement (the "Stalking Horse APA"), subject to the process set forth in this Motion. A copy of the Stalking Horse APA among the Stalking Horse Buyer and the Debtors is attached hereto

³ The Debtors, in the exercise of their business judgment after consultation with the Consultation Parties and consistent with the DIP Order, reserve their right to change these sale-related dates in order to achieve the maximum value for the Debtors' Assets.

and marked as “**Exhibit A**”. A summary of the principal terms of the Stalking Horse APA is as follows:⁴

- Cash Purchase Price: \$24,000,000, subject to adjustment as set forth in Section 1.6 of the Stalking Horse APA.
- Assignment and Assumption of Certain Liabilities. Subject to the terms and conditions set forth in the Stalking Horse APA, Purchaser shall assume from the Debtors and thereafter be responsible for the payment, performance or discharge of the following Liabilities and obligations of the Debtors:
 - all trade accounts payable and accrued expenses of the Seller that (i) are exclusively or primarily related to CryoScience Business, (ii) were incurred in the Ordinary Course of Business, and (iii) are included as current liabilities in the determination of the Final Closing Net Working Capital; provided that, for the avoidance of doubt, to the extent any such payables or other amounts owed to any vendor, supplier or other third party are partially attributable to the CryoScience Business, on the one hand (the “CryoScience Portion”), and to any other business or division of the Seller or any of its Affiliates, on the other hand, the only portion thereof that shall constitute an Assumed Liability hereunder shall be the CryoScience Portion; and
 - without duplication, all obligations of the Seller that first arise after the Closing under the Assumed Contracts.
- Assets Subject To Stalking Horse APA: All the Debtors’ Assets and all properties, assets and rights used in or held for use by the Debtors in connection with, or related to the Cryoscience Business, or arising out of the CryoScience Business as more fully described in Section 1.1 of the Stalking Horse APA.
- Termination to Pursue Higher or Better Offer. The Debtors may terminate the Stalking Horse APA to consummate an Alternate Transaction entered into in accordance with the Bidding Procedures Order, upon paying the Stalking Horse Buyer a break-up fee of \$875,000 (the “Break-Up Fee”). The Break-Up Fee and the provisions on payment thereof are more fully described in Section 8.2(c) of the Stalking Horse APA.
- Expense Reimbursement. If the Stalking Horse APA is terminated under certain other circumstances, Stalking Horse Buyer may be entitled to the reimbursement of its actual and reasonable expenses, including attorney’s fees, in an amount not to exceed \$350,000 (the “Maximum Expense Reimbursement” and together with

⁴ The following summary is qualified in its entirety by reference to the provisions of the Stalking Horse APA. In the event of any inconsistencies between the provisions of the Stalking Horse APA and the terms herein, the terms of the Stalking Horse APA shall govern. Unless otherwise defined in the summary set forth in the accompanying text, capitalized terms in this section of the Motion shall have the meanings assigned to such terms in the Stalking Horse APA.

the Break-Up Fee, the “Bid Protections”). The Maximum Expense Reimbursement and the provisions on payment thereof are more fully described in Section 8.2(c) of the Stalking Horse APA.

- Excluded Liabilities. The Stalking Horse Buyer shall not assume any liabilities other than the Assumed Liabilities described above. Such excluded liabilities, include, without limitation, those liabilities set forth in Section 1.4 of the Stalking Horse APA.
- Relief from Bankruptcy Rule 6004(h). Pursuant to Bankruptcy Rules 7062, 9014, 6004(h), and 6006(d), the Sale Order shall be effective immediately upon entry and the Debtors and Stalking Horse Buyer are authorized to close the Sale immediately upon entry of the Sale Order.

24. Local Rule 6004-1(b)(iv) states that the a sale motion “must highlight material terms, including but not limited to (a) whether the proposed form of sale order and/or the underlying purchase agreement constitutes a sale or contains [certain highlighted provisions], (b) the location of any such provision substantially in the proposed form of order or purchase agreement, and (c) the justification for the inclusion of any such provision.” In addition, Local Rule 6004-1(c) provides that “[a] debtor may file a Sale Procedures Motion seeking approval of an order . . . approving bidding and auction procedures either as part of the Sale Motion or by a separate motion filed in anticipation of an auction and a proposed sale.” Pursuant to Local Rule 6004-1(c)(i), a motion seeking approval of bidding and auction procedures must highlight certain provisions contained in the proposed order approving such procedures.

25. In accordance with Local Rule 6004-1, the Debtors hereby highlight the relevant provisions of both the Stalking Horse APA and the Bidding Procedures Order below, along with additional material terms thereof for the convenience of all interested parties. The Stalking Horse APA contemplates the Sale of the Transferred Assets, subject to higher and better bids, on the following material terms:⁵

⁵ Capitalized terms not otherwise defined herein shall have the meanings ascribed to such terms in the Stalking Horse APA.

<u>Buyers / Sale to Insiders</u>	Not applicable. The Stalking Horse Buyer is <u>not</u> a statutory insider of the Debtors.
<u>Agreements with Management</u>	Not applicable. The Stalking Horse APA does not contain any agreements or representations with individual members of the Debtors' management team.
<u>Releases</u>	Not applicable. The Stalking Horse APA does not contemplate any releases to be provided to the Stalking Horse Buyer.
<u>Private Sale/No Competitive Bidding</u>	Not applicable. The Debtors intend to execute a public auction process for the sale of the Transferred Assets.
<u>Break-Up Fee and Expense Reimbursement Amount (Bid Protections)</u> Stalking Horse APA Section 8.2	<ul style="list-style-type: none"> • <u>Termination to Pursue Higher or Better Offer</u>. The Debtors may terminate the Stalking Horse APA to consummate an Alternate Transaction entered into in accordance with the Bidding Procedures Order, upon paying the Stalking Horse Buyer a break-up fee of \$875,000 (the "<u>Break-Up Fee</u>"). The Break-Up Fee and the provisions on payment thereof are more fully described in Section 8.2(c) of the Stalking Horse APA. • <u>Expense Reimbursement</u>. If the Stalking Horse APA is terminated under certain other circumstances, Stalking Horse Buyer may be entitled to the reimbursement of its actual and reasonable expenses, including attorney's fees, in an amount not to exceed \$350,000 (the "<u>Maximum Expense Reimbursement</u>" and together with the Break-Up Fee, the "<u>Bid Protections</u>"). The Maximum Expense Reimbursement and the provisions on payment thereof are more fully described in Section 8.2(c) of the Stalking Horse APA.
<u>Closing and Other Deadlines</u> Bidding Procedures; Bidding Procedures Order	The deadlines related to the Closing and other milestones as set forth in the Bidding Procedures Order and the Bidding Procedures are consistent with the deadlines set forth in Debtors' debtor-in-possession financing order [<u>See</u> Docket No. 12.]
<u>Good Faith Deposit</u> Stalking Horse APA Section 2.8	The Stalking Horse Buyer is required to provide a good faith deposit in connection with the Stalking Horse APA in an amount of RMB currency equal in amount to \$1 million (with the obligation to cooperate with commercially reasonable efforts to have such amount transferred to a U.S. Dollar denominated account). Entities seeking to submit a "Qualified Bid" are required to submit a deposit of 10% of the total purchase price of their Bid.

<u>Interim Arrangements with Proposed Buyer</u>	Not applicable. The Stalking Horse APA does not require any pre-closing, interim arrangements with the Stalking Horse Buyer.
<u>Use of Proceeds</u>	Not applicable. The Stalking Horse APA does not impose requirements on the Debtors in connection with the use of proceeds from the Sale.
<u>Tax Exemption Under Bankruptcy Code Section 1146(a)</u>	Not applicable.
<u>Record Retention</u> Stalking Horse APA Section 1.1(g)	The Stalking Horse APA only contemplates a sale of books and records exclusively or primarily related to the CryoScience Business.
<u>Sale of Avoidance Actions</u> Stalking Horse APA Sections 1.2(g)	All Avoidance Actions are Excluded Assets under the Stalking Horse APA, except those exclusively or primarily related to the CryoScience Business or exclusively or primarily affecting the CryoScience Transferred Assets
<u>Requested Findings as to Successor Liability</u> Stalking Horse APA Section 4.4(e)(vi)	The Stalking Horse APA requires that the Sale Order contain a finding that the Stalking Horse Buyer shall have no liability or responsibility for any Liability or other obligation of any Debtor arising under or related to the CryoScience Transferred Assets other than as expressly set forth in the Stalking Horse APA, including successor or vicarious liabilities of any kind or character, including, but not limited to, any theory of antitrust, environmental, successor or transferee liability, labor law, de facto merger or substantial continuity, and, for the avoidance of doubt, the Stalking Horse Buyer shall have no successor liability under any collective bargaining agreement, contract with any union or under any pension plan or other Employee Plan under which any Debtor or any Affiliate thereof is or was an obligor or a party.
<u>Sale Free and Clear</u> Stalking Horse APA Section 4.4(e)(i)	The Stalking Horse APA requires that the Sale Order contain a finding that the CryoScience Transferred Assets shall be sold and transferred to the Stalking Horse Buyer, free and clear of all Liens (except for Permitted Liens), and the Assumed Liabilities shall be assumed by Stalking Horse Buyer, in each case, pursuant to the Stalking Horse APA.

<p><u>Sale Free and Clear of Unexpired Leases</u></p> <p>Stalking Horse APA Sections 1.1(b), 1.2(a) & 4.4(e)(ii), (iii) and (iv)</p>	<p>The Stalking Horse APA allows the Stalking Horse Buyer to select which, if any, unexpired leases to assume and for the Stalking Horse Buyer to take assignment of the same. Any such assumption and assignment will be pursuant to § 365 of the Bankruptcy Code.</p>
<p><u>Credit Bid</u></p> <p>Bidding Procedures</p>	<p>Not applicable. The Stalking Horse APA does not include a credit bid as part of its payment of the Purchase Price.</p> <p>The Bidding Procedures shall permit the Stalking Horse Buyer to credit bid the amount of its Break-Up Fee (if approved) at successive rounds at the Auction.</p>
<p><u>Relief from Bankruptcy Rule 6004(h) and 6006(d)</u></p> <p>Sale Order; Bidding Procedures Order</p>	<p>The Bidding Procedures Order and the Sale Order provide, among other things, that the provisions of Bankruptcy Rule 6004(h) and 6006(d) shall be waived.</p>
<p><u>Employment of the Debtors' Employees</u></p> <p>Stalking Horse APA Section 5.2</p>	<p>The Stalking Horse Buyer may offer employment to certain of the Debtors' employees on the terms provided in the Stalking Horse APA.</p>

IV. RELIEF REQUESTED

26. The Debtors seek entry of the Bidding Procedures Order (A) approving procedures for (i) submitting bids for the Debtors' Assets, (ii) conducting an Auction (the "Auction") in the event that the Debtors receive more than one Bid (each, a "Competing Bid"); (B) approving the Bid Protections; (C) scheduling the Auction and a Sale Hearing with respect to any Bid accepted by the Debtors; (D) establishing Notice and Assumption and Assignment Procedures; and (E) approving form and manner of notice of all procedures, protections, schedules and agreements. A form of Bidding Procedures Order is attached hereto, marked as "Exhibit C".

27. The Debtors also request the Court to schedule the Sale Hearing no later than **October 20, 2015**. At the Sale Hearing, pending the outcome of the Auction and as set forth in the Bidding Procedures, the Debtors intend to seek entry of an order (each a “Sale Order(s)”), approving the Sale of the Debtors’ Assets described therein free and clear of all Encumbrances and authorizing the assumption and assignment of certain executory contracts and unexpired leases. A form of Sale Order for the Debtors’ Assets related to the CryoScience Business is attached hereto, marked as “**Exhibit D**”. A form of Sale Order for the Debtors’ Assets other than the CryoScience Business will prepared and filed depending on the results of the Auction

V. BASIS FOR RELIEF

A. Necessity for Sale

28. The Debtors have been marketing their Assets since before the inception of these Cases. They have engaged in a thorough marketing process and all potential purchasers have had an opportunity to make an offer on the Debtors’ Assets and will have yet another opportunity should they wish to bid at the Auction.

B. The Bidding Procedures⁶

29. Terms of the Bidding Procedures are set forth in full in “**Exhibit B**”, and incorporated herein by reference.

30. Consistent with Local Rule 6004-1(c)(i), the following sets forth a summary of the key provisions of the Bidding Procedures:

⁶ Terms used but not otherwise defined in this section of this Motion shall have the meanings ascribed to them in the Bidding Procedures attached hereto.

<p><u>Provisions Governing Qualification of Bidders</u></p> <p>Bidding Procedures at 9-10</p>	<p>A “Qualified Bidder” is a Bidder that satisfies the Participant Requirements and that the Debtors determine has submitted by the Bid Deadline a Qualified Bid that is determined by the Debtors to be able to consummate the Sale as proposed in the Purchase Agreement (as defined in the Bidding Procedures) if selected as a Successful Bidder or a Back-Up Bidder.</p> <p>The Stalking Horse Buyer is deemed a Qualified Bidder for all purposes.</p> <p>The DIP Agent and Prepetition Agent (or any assignee(s) or designee(s) thereof) are deemed Qualified Bidders to the extent they elect to submit a Bid at the Auction as provided in the section above under the heading “Bid Deadline.”</p>
<p><u>Provisions Governing Qualified Bids</u></p> <p>Bidding Procedures at 6-9</p>	<p>A Qualified Bid must be submitted to the parties designated in the Bidding Procedures on or before the Bid Deadline and must contain all the requirements provided for clauses (a)-(p) in the Bidding Procedures.</p>
<p><u>Stalking Horse Bid Protections</u></p> <p>Bidding Procedures at 9</p>	<p>The Stalking Horse Buyer is entitled to the Break-Up Fee and the Expense Reimbursement Amount under the terms of the Stalking Horse APA.</p> <p>Each Qualified Bid (to the extent that it seeks to purchase any of the CryoScience Transferred Assets) must provide for a proposed purchase price, the value in cash of which is determined by the Debtors to be equal to or greater than the sum of: (a) the Total Consideration provided for in the Stalking Horse APA including cash in the amount of \$24,000,000 plus (b) the Break-Up Fee plus (c) \$150,000.</p>
<p><u>Modifications of Bidding Qualifications or Auction Procedures</u></p> <p>Bidding Procedures at 5, 13</p>	<p>Subject to the Bidding Procedures Order, the Debtors shall have the right to adopt such other rules for the Bidding Procedures (including rules that may depart from those set forth herein), that, in the Debtors’ reasonable discretion, after consultation with the Consultation Parties, will better promote the goals of the Bidding Procedures. With respect to all material decisions that the Debtors have the power to make under these Bidding Procedures, the Debtors will confer with the Consultation Parties</p> <p>The Debtors, in their reasonable discretion, and after consultation with the Consultation Parties, may adopt rules for the Auction at or prior to the Auction that will better promote the goals of the Auction and that are not inconsistent with any of the provisions of the Bidding</p>

	Procedures, the Bidding Procedures Order or the Bankruptcy Code.
<p><u>Closing with Alternative Backup-Bidders</u></p> <p>Bidding Procedures at 13, 15</p>	<p>If an Auction is held, upon conclusion of the bidding, the Auction shall be closed and no additional Bids may be considered following the closing of the Auction. The Debtors shall immediately review the final Overbid of each Qualified Bidder on the basis of financial and contractual terms and the factors relevant to the Sale, including those factors affecting the speed and certainty of consummating the proposed sale, and identify the highest or otherwise best offer for the CryoScience Transferred Assets (the “Successful Bid” and the entity submitting such Successful Bid, the “Successful Bidder”) and the next highest or otherwise best offer after the Successful Bid (the “Back-Up Bid” and the entity submitting such Back-Up Bid, the “Back-Up Bidder”).</p> <p>Following the approval of the Sale of any of the Debtors’ Assets set forth in the applicable Purchase Agreement to the Successful Bidder at the Sale Hearing, if such Successful Bidder fails to consummate an approved Sale within sixty (60) days after the entry of the Sale Order (except where the sole cause of any delay of the Closing Date is the result of a default by the Debtors), the Debtors shall be authorized, but not required, to deem the Back-Up Bid with respect to such Assets, as disclosed at the Sale Hearing, the Successful Bid and the Debtors shall be authorized, but not required, to consummate the sale with the Back-Up Bidder without further notice or orders of the Court.</p>

31. In order to maximize the value of the Debtors’ Assets for the benefit of the Debtors’ estates and their respective creditors, the Debtors seek to implement a competitive bidding process that is designed to generate maximum recovery. As described more fully in the Bidding Procedures, the Debtors seek authority to sell the Debtors’ Assets to any bidder that makes the highest or otherwise best offer for the Debtors’ Assets or any subset or combination thereof.

32. By way of further explanation, the Bidding Procedures are meant to ensure that all parties have the ability to submit competing offers for the Assets related to the CryoScience Business and to submit offers for all the Debtors’ Assets (whether or not including Assets related to the CryoScience Business). The Debtors believe the Bidding Procedures will secure the

highest and best offer for the Assets related to the CryoScience Business (either through the Stalking Horse APA or such other Alternative Transaction) and allow the Debtors to engage potential interested parties on their interest in all the Debtors' Assets (including Assets other than those related to the CryoScience Business).

33. A summary of the Bidding Procedures for which the Debtors herein seek approval is set forth below.⁷

a. **The Bidding Process.** The Debtors and their advisors shall, in consultation with the Consultation Parties (i) determine whether any bid for any of the Debtors' Assets is a Qualified Bid, (ii) coordinate the efforts of Qualified Bidders in conducting their due diligence investigations, (iii) solicit and receive offers from Qualified Bidders, and (iv) negotiate in good faith any offers made to purchase the Debtors' Assets (collectively, the "**Bidding Process**"). The Debtors shall have the right to adopt such additional rules for the Bidding Process that will better promote the goals of the Bidding Process and that are not inconsistent with any of the other provisions of the Bidding Procedures or of any Bankruptcy Court order.

b. **"As Is, Where Is"**. Any sale of the Debtors' Assets shall be on an "as is, where is" basis and without representations or warranties of any kind, nature, or description by the Debtors, their agents or their estate except to the extent set forth in the Stalking Horse APA or the operative purchase agreement of another Successful Bidder. By submitting a bid, each Qualified Bidder shall be deemed to acknowledge and represent that it has had an opportunity to conduct any and all due diligence regarding the Debtors' Assets prior to making its offer, that it has relied solely upon its own independent review, investigation and/or inspection of any documents and/or the Debtors' Assets in making its bid, and that it did not rely upon any written

⁷ The following description of the Bidding Procedures is a summary of the terms set forth in Exhibit B attached hereto. To the extent that this summary differs in any way from terms set forth in the Bidding Procedures, the terms of the Bidding Procedures shall control.

or oral statements, representations, promises, warranties or guaranties whatsoever, whether express, implied, by operation of law or otherwise, regarding the Debtors' Assets to which their Qualified Bid applies, or the completeness of any information provided in connection therewith or the Auction, except as expressly stated in the Bidding Procedures, as expressly stated in the terms of the sale of the Debtors' Assets as set forth in the applicable agreement and ancillary documents.

c. **Free Of Any And All Encumbrances.** Except as otherwise provided in the applicable agreement and subject to the DIP Order, all of the Debtors' right, title and interest in and to any of the Debtors' Assets proposed to be sold pursuant to a Sale Transaction, shall be sold free and clear of Encumbrances to the maximum extent permitted by §363 of the Bankruptcy Code, with such Encumbrances to attach to the net proceeds of the sale of the Debtors' Assets subject to the Sale Transaction with the same validity and priority as such Encumbrances applied against such Assets. Nothing herein shall prevent any party in interest from objecting to the Bankruptcy Court's approval of any sale of the Debtors' Assets pursuant to any agreement, except with respect to the Bid Protections which are being approved in connection with approval of the Bidding Procedures.

d. **Auction.** If a Qualified Bid other than that submitted by the Stalking Horse Buyer has been received by the Debtors prior to the Bid Deadline, the Debtors shall conduct the Auction to consider and determine the highest and best offer for the Debtors' Assets. The time and date of the Auction shall be as set forth in the Bidding Procedures Order as approved by the Court. The Debtors shall notify the Qualified Bidders that have submitted Qualified Bids of the time and place of the Auction. Only Qualified Bidder (other than the DIP Agent and the Prepetition Agent) that has submitted a Qualified Bid is eligible to participate at

the Auction. During the Auction, bidding shall begin initially with the highest Qualified Bid as determined by the Debtors and subsequently continue in minimum increments of at least \$250,000 in cash. Except as otherwise set forth herein, the Debtors may conduct the Auction in the manner they determine will result in the highest, best or otherwise financially superior offer(s) for the Debtors' Assets.

e. **Successful Bid.** Prior to closing the Auction, the Debtors shall (i) immediately review each Qualified Bid on the basis of financial and contractual terms and the factors relevant to the sale process, including those factors affecting the speed and certainty of consummating the proposed sale, and (ii) after consultation with the Consultation Parties, identify the highest, best or otherwise financially superior offer(s) for the Debtors' Assets (the "**Successful Bid(s)**") and the entity or entities submitting such Successful Bid, the "**Successful Bidder(s)**"), which highest, best or otherwise financially superior offer(s) will provide the greatest amount of net value to the Debtors, and advise the Qualified Bidders of such determination.

f. **Acceptance of Successful Bids.** Subject to the limitations set forth above, the Debtors shall seek authority from the Bankruptcy Court at the Sale Hearing to sell their Assets to the Successful Bid(s). To the Debtors' presentation of a particular Successful Bid to the Bankruptcy Court for approval does not constitute the Debtors' acceptance of the bid; the Debtors will be deemed to have finally accepted a bid only when the bid has been approved by the Bankruptcy Court at the Sale Hearing. All interested parties reserve their right to object to the Debtors' selection of the Successful Bidder(s).

g. **The Bidding Protections.** Pursuant to §§105, 363, 503 and 507 of the Bankruptcy Code, the Debtors are authorized to pay the Break-Up Fee to the Stalking Horse

Buyer pursuant to the terms and conditions set forth in the Stalking Horse APA. Specifically, the Break-Up Fee shall be paid to the Stalking Horse Bidder upon the closing of an Alternative Transactions if and to the extent required pursuant to section 8.2(c) of the Stalking Horse APA. In addition the Debtors may reimburse the Stalking Horse Buyer for out of pocket expenses incurred (up to the Maximum Reimbursement Amount) if and to the extent required pursuant to section 8.2(c) of the Stalking Horse APA. Upon entry of this Order, the Break-Up Fee or an amount of up to the Maximum Reimbursement Amount (each, if earned pursuant to the Stalking Horse APA) shall, until paid in full as set forth in the Stalking Horse APA, be entitled to administrative expense status pursuant to § 503(b)(1) and 507(a)(2) of the Bankruptcy Code junior in all respects to the Debtors' debtor-in-possession credit facilities.

C. The Sale Hearing, Closing and Return of Deposits

34. The Debtors seek approval for the Sale Hearing to be conducted by the Bankruptcy Court no later than **November 16, 2015** or on such date and time as may be established by the Bankruptcy Court. The Debtors seek approval of the Notice of the Sale Hearing, attached hereto and marked as "**Exhibit E.**"

35. The Bidding Procedures describe, among other things, the Assets available for sale, the manner in which Bidders and Bids become "qualified," the coordination of diligence efforts among Qualified Bidders and the Debtors, the receipt and negotiation of Bids received, the conduct of any Auction, and the selection and approval of the Successful Bidder and the selection of the Back-Up Bid.

36. Upon conclusion of the Auction, the Debtors shall identify the highest or otherwise best offer for the CryoScience Transferred Assets (the "**Successful Bid**" and the entity

submitting such Successful Bid, the “Successful Bidder”⁸ and the next highest or otherwise best offer after the Successful Bid (the “Back-Up Bid” and the entity submitting such Back-Up Bid, the “Back-Up Bidder”).

D. The Cure Procedures

37. The Debtors seek approval of the following procedures with respect to cure obligations:

a. No later than **October 25, 2015** the Debtors shall prepare and distribute to non-Debtor parties (the “Notice Parties”) to any executory contracts and unexpired non-residential real property leases anticipated to be assumed in connection with a Sale (the “Anticipated Assumed Contracts”) a notice (a “Notice of Assignment”), substantially in the form annexed to this Motion as “**Exhibit F,**” listing (i) the Anticipated Assumed Contracts, and (ii) the Cure Amounts, if any.

b. If additional executory contracts and/or unexpired non-residential real property leases other than the Anticipated Assumed Contracts are to be assumed in connection with a Sale, no later than two (2) business days after the Auction, the Debtors shall send a subsequent Notice of Assignment, by overnight mail or facsimile, to all non-Debtor counterparties to such additional executory contracts and unexpired non-residential real property leases to be assigned to the Successful Bidder (the “Additional Assumed Contracts”) that were not Anticipated Assumed Contracts. The Anticipated Assumed Contracts and the Additional Assumed Contracts shall collectively be referred to as the “Assumed Contracts.”

c. The non-Debtor parties to the Anticipated Assumed Contracts shall have until **November 6, 2015** (the “Contract Objection Deadline”), which deadline may be extended

⁸ All references to the Successful Bidder herein shall apply equally to the Back-Up Bidder for purposes of the relief requested hereunder in the event the Debtors must close a transaction with a Back-up Bidder.

in the sole discretion of the Debtors, to object (a “Contract Objection”) to (i) the Cure Amounts listed by the Debtors and to propose alternative cure amounts, and/or (ii) the proposed assumption and assignment of the Anticipated Assumed Contracts in connection with the Sale.

d. Any party asserting Contract Objection, including objecting to the Cure Amounts, whether or not such party previously has filed a proof of claim with respect to amounts due under the applicable agreement, or objecting to the potential assumption and assignment of Assumed Contracts, shall be required to file such Contract Objection with the Bankruptcy Court and serve on, (i) counsel and investment banker for the Debtors, (ii) counsel for the Stalking Horse Buyer, (iii) counsel to the Committee and (iv) counsel to the DIP and Prepetition Agent. The Contract Objection shall be in writing, setting forth with specificity any and all cure obligations that the objecting party asserts must be cured or satisfied in respect of the Assumed Contracts and/or any and all objections to the potential assumption and assignment of such agreements, together with all documentation supporting such cure claim or objection. The Contract Objection must be (i) filed with the Court and (ii) served so as to be actually received no later than 4:00 p.m. (prevailing eastern time) on the Contract Objection Deadline, as applicable. If a Contract Objection is timely filed, the Bankruptcy Court shall hear any such Contract Objection and determine the amount of any disputed cure amount or objection to assumption and assignment not settled by the parties at the Sale Hearing or such later date as the Court may deem appropriate.

e. In the event that no Contract Objection is timely filed, the applicable party shall be deemed to have consented to the Cure Amount proposed by the Debtors and shall be forever enjoined and barred from seeking any additional amount on account of the Debtors’ cure obligations under §365 of the Bankruptcy Code or otherwise from the Debtors, their estates or

the Successful Bidders on account of the assumption and assignment of such executory contract or unexpired non-residential real property lease and deemed to have consented to the proposed assignment and assumption. In addition, if no timely Contract Objection is filed, the Successful Bidder shall enjoy all of the rights and benefits under all Assumed Contracts without the necessity of obtaining any party's written consent to the Debtors' assumption and assignment of such rights and benefits, and each such party shall be deemed to have waived any right to object to, consent to, condition or otherwise restrict any such assumption and assignment.

VI. APPLICABLE AUTHORITY

E. Approval of the Sale is Warranted Under The Bankruptcy Code.

38. Section 363(b)(1) of the Bankruptcy Code provides that “[t]he trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.” 11 U.S.C. §363(b)(1). Debtors have been permitted to conduct pre-confirmation sales of their property provided that a “sound business purpose” exists for the sale. See, e.g., In re Montgomery Ward Holdings Corp., 242 B.R. 147, 153 (D. Del. 1999); In re Delaware & Hudson Ry. Co., 124 B.R. 169, 176 (D. Del. 1991); see also In re Lionel Corp., 722 F. 2d 1063, 1069 (2d Cir. 1983) (“Section 363(b) of the Code seems on its face to confer upon the bankruptcy judge virtually unfettered discretion to authorize the use, sale, or lease, other than in the ordinary course of business, of property of the estate”); In re Frezzo, 217 B.R. 985, 988 (Bankr. E.D. Pa. 1998) (“In determining whether to approve a proposed sale under section 363, courts generally apply standards that, although stated in various ways, represent essentially a business judgment test.”).

39. Once the Debtors articulate a valid business justification for a sale outside of the ordinary course of business, the Debtors' business judgment should be given deference. The business judgment rule “is a presumption that in making a business decision the directors . . .

acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the corporation.” Brehm v. Eisner, 746 A.2d 244, 264, n. 66 (Del. 2000) (quoting Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984)); Grobow v. Perot, 539 A.2d 180, 187 (Del. 1988); In re Tower Air, Inc., 416 F.3d 229, 238 (3d Cir. 2005); Ad Hoc Committee of Equity Holders of Tectonic Network, Inc. v. Wolford, 554 F. Supp. 2d 538, 555 n.111 (D. Del. 2008); Continuing Creditors’ Comm. of Star Telecomms., Inc. v. Edgecomb, 385 F.Supp.2d 449, 462 (D. Del. 2004); see also In re Johns-Manville Corp., 60 B.R. 612, 615-16 (Bankr. S.D.N.Y. 1986) (“a presumption of reasonableness attaches to a Debtor’s management decisions”).

40. The Debtors have a sound business justification for soliciting offers and selling the Debtors’ Assets at this time. Based on the results of their analysis of the Debtors’ ongoing and future business prospects, the Debtors’ management and team of financial advisors have concluded that a Sale of the Debtors’ Assets in accordance with the procedures set forth in the Bidding Procedures will be the best method to maximize recoveries to the estates. Maximization of the value of the Debtors’ Assets is a sound business purpose warranting authorization of any proposed Sale.

41. Any Sale of the Debtors’ Assets will be subject to competing bids, enhancing the Debtors’ ability to receive the highest or otherwise best value for the Debtors’ Assets. Consequently, the fairness and reasonableness of the consideration to be received by the Debtors will ultimately be demonstrated by a “market check” through the auction process, which is the best means for establishing whether a fair and reasonable price is being paid.⁹

42. In addition, all creditors and parties in interest will receive adequate notice, reasonably calculated to provide timely and adequate notice to the Debtors’ major creditor

⁹ The Debtors reserve all rights not to submit any bid that is not acceptable to the Debtors for approval to the Bankruptcy Court.

constituencies, those parties most interested in these Cases, those parties potentially interested in bidding on the Debtors' Assets and others whose interests are potentially implicated by a proposed Sale, of the Bidding Procedures and Sale Hearing as set forth above. Accordingly, consummating the Sale as soon as possible is in the best interests of the Debtors and its creditors and parties in interest.

F. The Bidding Procedures are Fair and Are Designed to Maximize the Value Received for the Debtors' Assets.

43. Section 363(b)(1) of the Bankruptcy Code provides that “[t]he trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.” 11 U.S.C. § 363(b)(1).

44. The paramount goal in any proposed sale of property of the estate is to maximize the proceeds received by the estate. See In re Mushroom Transp. Co., 382 F.3d 325, 339 (3d Cir. 2004) (debtor in possession “had a fiduciary duty to protect and maximize the estate’s assets”); Official Comm. of Unsecured Creditors of Cybergenics, Corp v. Chinery, 330 F.3d 548, 573 (3d Cir. 2003) (same). To that end, courts recognize that procedures to enhance competitive bidding are consistent with the goal of maximizing the value received by the estate and therefore are appropriate in the context of bankruptcy transactions. See In re O’Brien Env’tl. Energy, Inc., 181 F.3d 527, 537 (3d Cir. 1999).

45. Similar bidding procedures have been previously approved by bankruptcy courts in this District. See, e.g., In re Vertis Holdings, Inc., Case No. 12-12821 (CSS) (Bankr. D. Del. Nov. 2, 2012 (D.I. 206)); In re Northstar Aerospace (USA) Inc., Case No. 12-11817 (MFW) (Bankr. D. Del. June 27, 2012) (D.I. 119); In re Traffic Control & Safety Corp., Case No. 12-11287 (KJC) (Bankr. D. Del. May 14, 2012) (D.I. 128); In re Real Mex Rests. Inc., Case No. 11-13122 (BLS) (Bankr. D. Del. Nov. 9, 2011) (D.I. 393); In re Nortel Networks, Inc., Case No. 09-

10138 (KG) (Bankr. D. Del. June 30, 2009) (D.I. 1012); In re Tweeter Home Etm't Group, Inc., Case No. 07-10787 (PJW) (Bankr. D. Del. June 27, 2007) (D.I. 211).

46. The Debtors believe that the Bidding Procedures are appropriate under §§ 105 and 363 of the Bankruptcy Code to ensure that the bidding process is fair and reasonable and will yield the maximum value for their estates and creditors. The Bidding Procedures proposed herein are designed to maximize the value received for the Debtors' Assets by facilitating a competitive bidding process in which all potential bidders are encouraged to participate and submit competing bids. The Bidding Procedures provide potential bidders with sufficient notice and an opportunity to acquire information necessary to submit a timely and informed bid. At the same time, the Bidding Procedures provide the Debtors with the opportunity to consider all competing offers and to select the highest and best offer for the Debtors' Assets as determined by the Debtors.

47. The Debtors request this Court's approval of the Bidding Procedures, including the dates established thereby for the Auction and Sale Hearing. Accordingly, the Debtors and all parties in interest can be assured that the consideration for the Debtors' Assets will be fair and reasonable, and there are sound business reasons to approve the Bidding Procedures.

G. The Bid Protections are Necessary to Preserve the Value of the Debtors' Estates.

48. Pursuant to Bankruptcy Rule 6004(f)(1), a sale of property outside the ordinary course of business may be by private sale or by public auction. The Debtors believe that having the ability to offer the Bid Protections to the Stalking Horse Buyer, and thereby facilitating an Auction, will maximize the realizable value of the Assets for the benefit of the Debtors' estates, creditors and other parties-in-interest.

49. The Third Circuit identified at least two instances in which bidding incentives may benefit the estate. First, a break-up fee may be necessary to preserve the value of the estate if assurance of the fee “promote[s] 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) (hereinafter, “O’Brien”); see also In re Reliant Energy Channelview, LP, 403 B.R. 308, 311 (D. Del. 2009). Second, if the break-up fee induces a bidder to research the value of the debtor and convert that value to a dollar figure on which other bidders can rely, the bidder provided a benefit to the estate by increasing the likelihood that the price at which the debtor is sold will reflect its true worth. Id.

50. In O’Brien, the Third Circuit reviewed nine (9) factors in deciding whether to award a break-up fee. Such factors include:

- (A) the presence of self-dealing or manipulation in negotiating the break-up fee;
- (B) whether the fee harms, rather than encourages, bidding;
- (C) the reasonableness of the break-up fee relative to the purchase price;
- (D) whether the unsuccessful bidder placed the estate property in a “sales configuration mode” to attract other bidders to the auction;
- (E) the ability of the request for a break-up fee “to attract or retain a potentially successful bid, establish a bid standard or minimum for other bidders, or attract additional bidders;
- (F) the correlation of the fee to a maximization of value of the debtor’s estate;
- (G) the support of the principal secured creditors and creditors’ committees of break-up fee;
- (H) the benefits of the safeguards to the debtor’s estate; and

- (I) the substantial adverse impact of the break-up fee on unsecured creditors, where such creditors are in opposition to the break-up fee.

See O'Brien, 181 F.3d at 536.

51. The Debtors extensively negotiated the terms of the Stalking Horse APA, including the Break-Up Fee and the Maximum Expense Reimbursement (together, the “Bid Protections”), at arms’ length with the Stalking Horse Buyer and the Stalking Horse Buyer would not agree to act as a stalking horse bidder without the Bid Protections. Moreover, payment of the Break-Up Fee will not diminish the Debtors’ estate. The Debtors only incur an obligation to pay the Break-Up Fee if the Debtors terminate the Stalking Horse APA to accept a higher and better alternative bid (an “Alternative Transaction”).

52. In the event the Stalking Horse APA is terminated for certain other reasons, the Stalking Horse Buyer may be entitled to reimbursement of certain out of pocket costs (including attorneys’ fees) up to the Maximum Expense Reimbursement.

53. In this case, Stalking Horse Buyer has expended and will continue to expend a substantial amount of time, money and energy pursuing a purchase of the Assets related to the CryoScience Business. As part of the Debtors’ prepetition marketing efforts, the Stalking Horse Buyer engaged as the interested party proposing the highest offer for the Assets related to CryoScience Business. The Stalking Horse Buyer originally requested exclusivity throughout the sale process. The Debtors could not agree to exclusivity throughout the sale process in light of the filing of the Cases. In order to compensate the Stalking Horse Buyer for the substantial investment of time and expenses to conduct due diligence, finalize the Stalking Horse APA and subject the Stalking Horse APA to higher and better offers, the Stalking Horse Buyer and the Debtors agreed to the Bid Protections. In recognition of this expenditure of time, energy and resources, and the benefit to the Debtors’ estates of securing a minimum bid for the Debtors’

Assets, and further because the Debtors could not provide exclusivity to the Stalking Horse Buyer, the Debtors have agreed to provide the Bid Protections to the Stalking Horse Buyer.

54. The Bid Protections correlate with the value the Stalking Horse APA provided to the Debtors' estates. In addition to enabling the Stalking Horse Buyer (without exclusivity) to invest time, resources and energy to enter into a Stalking Horse APA. The Bid Protections create a "floor value" for the Auction of the Debtors' Assets related to CryoScience Business (the "CryoScience Transferred Assets") and encourages competitive bidding. The purchase price being paid by the Stalking Horse Buyer under the Stalking Horse APA demonstrates the existing market interest the assets related to the CryoScience Transferred Assets. With an established floor for assets related to the CryoScience Transferred Assets, the Debtors will be better able to insist that competing bids be materially higher or otherwise better than the Stalking Horse APA, a clear benefit to the Debtors' estates. Without the benefit of the Bid Protections, the bids received at Auction for the CryoScience Transferred Assets would not have any floor and could be substantially lower than that offered by Stalking Horse Buyer.

55. The Debtors ability to continue to shop the Debtors' Assets for a higher or better offer without risk of losing the Stalking Horse Buyer would be eliminated if the Debtors are not authorized to pay the Break-Up Fee. Therefore, absent authorization to pay the Break-Up Fee, the Debtors may lose the opportunity to obtain the highest and best offer for the Debtors' Assets and the downside protection provided by the Stalking Horse APA. If the protections are not approved, the Stalking Horse Buyer may not go forward with the Sale.

56. Because the Debtors would be unable to attract a "stalking horse buyer" bid without the Bid Protections, such inducement is in the best interest of the Debtors' estates. Additionally, the Debtors' request for approval of Bid Protections is an appropriate exercise of

the Debtors' business judgment because it provides a benefit to the Debtors' estates by encouraging competitive bidding and incentivizing the Stalking Horse Buyer to serve as a stalking horse bidder.

57. Furthermore, the Break-Up Fee - three and six-tenths percent (3.6%) of the total consideration paid in the event the Debtors terminate the Stalking Horse APA to pursue an Alternate Transaction - is reasonable in amount and well within the magnitude as break-up fees approved in other cases. See, e.g., In re Vertis Holdings, Inc., Case No. 12- 12821 (CSS) (Bankr. D. Del. Nov. 2, 2012) (court approved break-up fee of 3.0% in connection with a \$258 million sale of assets); In re Solyndra LLC, Case No. 11-12799 (MFW) (Bankr. D. Del. Sept. 28, 2012) (court approved break-up fee of 2.6% in connection with \$90 million sale of assets); In re Northstar Aerospace (USA) Inc., Case No. 12-11817(MFW) (Bankr. D. Del. June 27, 2012) (court approved break-up fee of 3.5% in connection with \$70 million sale of assets); In re Global Motorsport Group, Inc., Case No. 08-10192 (KJC) (Bankr. D. Del. Feb. 14, 2008) (court approved break-up fee of approximately 4% or \$500,000 in connection with sale of assets); In re Radnor Holdings, Case No. 0610894 (Bankr. D. Del. September 22, 2006) (aggregate fee and expense reimbursement of 3% permitted); In re Global Home Products LLC, Case No. 06-10340 (KG) (Bankr. D. Del. July 14, 2006) (order approving a break-up fee of \$650,000 or 3.1% of purchase price of \$21 million); In re Caldor, Inc. - NY, Case No. 95 B-44080 (JLG) (Bankr. S.D.N.Y. Feb. 4, 1999) (order approving break-up fees of \$1,900,000 on purchase price of \$75,735,000 and \$3,550,000 on purchase price of \$142,000,000 or approximately 2.5%).

58. The Stalking Horse Buyer has provided a material benefit to the Debtors and their creditors by increasing the likelihood that the Debtors will receive the best possible price for the Debtors' Assets. Accordingly, the Debtors request that the Court approve the Bid Protections as

necessary to preserve the value of the Debtors' estates and as an appropriate exercise of the Debtors' business judgment.

H. The Proposed Sale(s) Satisfy the Requirements of §363(f) of the Bankruptcy Code for a Sale Free and Clear of Encumbrances.

59. Section 363(f) of the Bankruptcy Code permits the Debtors to sell the Debtors' Assets 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 Debtors' Assets). Specifically, § 363(f) of the Bankruptcy Code provides as follows:

The trustee may sell property under subsection (b) or (e) of this section free and clear of any interest in such property of an entity other than the estate, only if-

- (1) applicable non-bankruptcy law permits sale of such property free and clear of such interest;
- (2) such entity consents;
- (3) 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 the property;
- (4) such interest is in bona fide dispute; or
- (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

11 U.S.C. § 363(f).

60. Section 363(f) of the Bankruptcy Code is stated in the disjunctive; thus, it is only necessary to meet one of the five conditions of §363(f) of the Bankruptcy Code in order to sell the Debtors' Assets free and clear. In re Kellstrom Indus., Inc., 282 B.R. 787, 793 (Bankr. D. Del. 2002); Citicorp Homeowners Servs., Inc. v. Elliot (In re Elliot), 94 B.R. 343, 345 (E.D. Pa. 1988). The Debtors believe that they will be able to demonstrate that at the Sale Hearing that they have satisfied one or more of these conditions.

61. The Debtors propose that any Encumbrances shall attach to the sale proceeds with the same force, validity, effect, priority and enforceability as such Encumbrances had in the Debtors' Assets prior to such Sale.

62. In the event that any secured creditors (other than the DIP and Prepetition Agents) object to the sale of the Debtors' Assets free and clear, the Sale may proceed pursuant to § 363(f)(5) of the Bankruptcy Code because the liens of such secured creditors will attach to the proceeds of the sale and the Debtors will establish at the Sale Hearing that the secured lenders can be compelled to accept a monetary satisfaction of their claims.

I. A Successful Bidder Should be Entitled to the Protections of §363(m) of the Bankruptcy Code

63. Pursuant to § 363(m) of the Bankruptcy Code, "a 'good faith purchaser' is generally one who purchases assets for value, in good faith, and without knowledge of adverse claims." In re Youngstown Steel Tank Co., 27 B.R. 596, 598 (W.D. Pa. 1983); see also In re Mark Bell Furniture Warehouse, Inc., 992 F.2d 7, 8 (1st Cir. 1993); Willemain v. Kivitz, 764 F.2d 1019, 1023 (4th Cir. 1985); In re Congoleum Corp., Case No. 03-51524, 2007 WL 1428477, *2 (Bankr. D. N.J. May 11, 2007). "Good faith" in the context of §363(m) of the Bankruptcy Code requires to Court to focus on the integrity of the purchaser's conduct during the course of the sale proceedings. In re Abbott's Dairies of Pennsylvania, Inc., 788 F.2d 143, 147 (3d Cir. 1986).

64. The Debtors believe that providing any Successful Bidder with such protection will ensure that the maximum price will be received by the Debtors for the Debtors' Assets and closing of the same will occur promptly. The Debtors will adduce facts at the Sale Hearing on any objection demonstrating that any bidder who is deemed a Successful Bidder for all or any

portion of the Debtors' Assets has negotiated at arm's-length, with all parties represented by their own counsel.

65. Accordingly, the Debtors' request that Sale Order include a finding that the Successful Bidder for any of the Debtors' Assets, is a "good faith" purchaser within the meaning of §363(m) of the Bankruptcy Code.

J. The Assumption and Assignment of Executory Contracts and Unexpired Leases

66. Section 365(a) of the Bankruptcy Code provides, in pertinent part, that a debtor in possession "subject to the court's approval, may assume or reject any executory contract or [unexpired] lease of the debtor." 11 U.S.C. § 365(a). The standard governing bankruptcy court approval of a debtor's decision to assume or reject an executory contract or unexpired lease is whether the debtor's reasonable business judgment supports assumption or rejection. See, e.g., Sharon Steel Corp. v. National Fuel Gas Distribution Corp., 872 F.2d 36, 39-40 (3d Cir. 1989) (citing Wheeling-Pittsburgh Steel Corp. v. West Penn Power Co. (In re Wheeling-Pittsburgh Steel Corp.), 72 B.R. 845, 846 (Bankr. W.D.Pa. 1987) (in turn quoting In re Stable Mews Assoc., Inc., 41 B.R. 594, 596 (Bankr. S.D.N.Y. 1984)); In re Network Access Solutions Corp., 330 B.R. 67, 75 (Bankr. D. Del. 2005).

67. If the debtor's business judgment has been reasonably exercised, a court should approve the assumption or rejection of an unexpired lease or executory contract. Sharon Steel Corp. v. Nat'l Fuel Gas Distrib. Corp., 872 F. 2d at 39-40. The business judgment test "requires only that the trustee [or debtor in possession] demonstrate that [assumption or] rejection of the contract will benefit the estate." In re Wheeling-Pittsburgh Steel Corp., 72 B.R. at 846 (quoting In re Stable Mews Assoc., 41 B.R. 594, 596 (Bankr. S.D.N.Y. 1984)); see also In re Central Jersey Airport Servs., LLC, 282 B.R. 176, 183 (Bankr. D.N.J. 2002).

68. Pursuant to § 365(b)(1) of the Bankruptcy Code, for a debtor to assume an executory contract, it must “cure, or provide adequate assurance that the debtor will promptly cure,” any default, including compensation for any “actual pecuniary loss” relating to such default. 11 U.S.C. § 365(b)(1).

69. Once an executory contract is assumed, the trustee or debtor in possession may elect to assign such contract. See In re Rickel Home Center, Inc., 209 F.3d 291, 299 (3d Cir. 2000) (“[t]he Code generally favors free assignability as a means to maximize the value of the debtor’s estate”); see also In re Headquarters Doge, Inc., 13 F.3d 674, 682 (3d Cir. 1993) (noting purpose of section 365(f) is to assist trustee in realizing the full value of the debtor’s assets).

70. Section 365(f) of the Bankruptcy Code provides that the “trustee may assign an executory contract...only if the trustee assumes such contract...and adequate assurance of future performance is provided.” 11 U.S.C. § 365(f)(2). The phrase “adequate assurance of future performance” “is to be given a practical, pragmatic construction based upon the facts and circumstances of each case. Although no single solution will satisfy every case, the required assurance will fall considerably short of an absolute guarantee of performance.” Cinicola v. Scharffenberger, 248 F.3d 110, 120 n.10 (3d Cir. 2001) (quoting Carlisle Homes, Inc. v. Azzari (In re Carlisle Homes, Inc.), 103 B.R. 524, 538 (Bankr. D.N.J. 1988) and discussing legislative history of “Section 365(f) of the Bankruptcy Code); In re DBSI, Inc., 405 B.R. 698, 708 (Bankr. D. Del. 2009). 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. Accord 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 lease from debtors has

financial resources and has expressed willingness to devote sufficient funding to the business in order to give it strong likelihood of succeeding).

71. The Debtors will adduce facts at the Sale Hearing demonstrating the financial wherewithal of any Successful Bidder, and their willingness and ability to perform under the contracts to be assumed and assigned to them. The Sale Hearing therefore will provide the Court and other interested parties ample opportunity to evaluate and, if necessary, challenge the ability of any Successful Bidder to provide adequate assurance of future performance under the Assumed Contracts.

72. The Debtors respectfully submit that the proposed Assumption and Assignment Procedures are appropriate and reasonably tailored to provide Notice Parties with adequate notice in the form of the Notice of Assumption or Cure Notice, as applicable, of the proposed assumption and/or assignment of their applicable contract, as well as proposed Cure Amounts, if applicable. Such Notice Parties will then be given an opportunity to object to such notice. If an objection is filed, such objection will be heard at the Sale Hearing or at a later hearing, as determined by the Debtors.

73. Furthermore, to the extent that any defaults exist under any executory contract or unexpired lease that is to be assumed and assigned in connection with the Sale of any of the Debtors' Assets, the Debtors will cure any such default prior to such assumption and assignment. Moreover, the Debtors will adduce facts at the Sale Hearing demonstrating the financial wherewithal of the Successful Bidder(s), its experience in the industry, and its willingness and ability to perform under the contracts to be assumed and assigned to it.

74. Accordingly, the Debtors submit that implementation of the proposed Assumption and Assignment Procedures is appropriate in these cases. The Court therefore should have a

sufficient basis to authorize the Debtors to reject or assume and assign contracts as will be set forth in a Successful Bidder's Stalking Horse APA.

K. Relief Under Bankruptcy Rules 6004(h) and 6006(d) is Appropriate

75. Bankruptcy Rule 6004(h) provides that an "order authorizing the use, sale, or lease of property . . . is stayed until the expiration of 14 days after entry of the order, unless the court orders otherwise." Additionally, Bankruptcy Rule 6006(d) provides that an "order authorizing the trustee to assign an executory contract or unexpired lease . . . is stayed until the expiration of 10 days after the entry of the order, unless the court orders otherwise." The Debtors request that any Sale Order be effective immediately by providing that the 10-day stays under Bankruptcy Rules 6004(h) and 6006(d) are waived.

VI. NOTICE

76. Notice of this Motion will be given to:
- i) counsel to the Stalking Horse Buyer;
 - ii) counsel to the Debtors' DIP Agent;
 - iii) counsel to the Debtors' Prepetition Agent;
 - iv) any party who, in the past year, expressed in writing to the Debtors an interest in any of the Debtors' Assets;
 - v) non-debtor parties to the Anticipated Assumed Contracts;
 - vi) all parties who are known or reasonably believed to have asserted a lien, encumbrance, claim or other interest in any of the Debtors' Assets;
 - vii) the Internal Revenue Service;
 - viii) the Department of Treasury for each of the states identified on Schedule 5.3 of the Agreement;
 - ix) the Environmental Protection Agency;

- x) the Department of Environmental Protection for the State of Alabama;
- xi) all persons or entities that have requested notice in these Chapter 11 cases under Bankruptcy Rule 2002; and
- xii) the United States Trustee.

The Debtors submit that, under the circumstances, no other or further notice is required.

VII. NO PRIOR REQUEST

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

WHEREFORE, the Debtors respectfully request that this Court enter the Bidding Procedures Order substantially in the form attached hereto as "**Exhibit C,**" (i) approving the Bidding Procedures; (ii) approving the Bid Protections; (iii) scheduling the Auction and Sale Hearing to approve the Sale, and approving the form and manner of notice thereof; and (iv) granting such other and further relief as is just and proper. Additionally, the Debtors request that, at the Sale Hearing, the Court enter a Sale Order subject to the result of the Auction and to the Bidding Procedures (i) approving and authorizing the Sale; and (ii) authorizing the assumption and assignment of certain executory contracts and unexpired leases.

Dated: October 7, 2015
Wilmington, Delaware

Respectfully submitted,

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