

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

In re:	X	
	:	Chapter 11
	:	
FIRST MODE HOLDINGS, INC., <i>et al.</i> , ¹	:	Case No. 24-12794 (____)
	:	
Debtors.	:	(Joint Administration Requested)
	:	
	:	Hearing Date: To Be Scheduled
	:	Obj. Deadline: January 2, 2025

MOTION OF DEBTORS FOR ENTRY OF (I) AN ORDER (A) APPROVING BID PROCEDURES IN CONNECTION WITH THE SALE OF SUBSTANTIALLY ALL OF THE DEBTORS' ASSETS, (B) SCHEDULING AN AUCTION AND A SALE HEARING, (C) APPROVING THE FORM AND MANNER OF NOTICE THEREOF, (D) AUTHORIZING THE DEBTORS TO ENTER INTO THE STALKING HORSE APA AND RELATED BID PROTECTIONS, (E) APPROVING PROCEDURES FOR THE ASSUMPTION AND ASSIGNMENT OF CONTRACTS AND LEASES, AND (F) GRANTING RELATED RELIEF; AND (II) AN ORDER (A) APPROVING THE SALE OF SUBSTANTIALLY ALL OF THE DEBTORS' ASSETS FREE AND CLEAR OF ALL LIENS, CLAIMS, ENCUMBRANCES, AND INTERESTS, (B) AUTHORIZING THE ASSUMPTION AND ASSIGNMENT OF CONTRACTS AND LEASES, AND (C) GRANTING RELATED RELIEF

The debtors and debtors in possession (collectively, the “**Debtors**”) in the above-captioned cases (the “**Chapter 11 Cases**”) hereby file this motion (this “**Motion**”) and respectfully state as follows:

RELIEF REQUESTED

1. By this Motion, first the Debtors seek entry of an order, substantially in the form attached hereto as **Exhibit B** (the “**Bid Procedures Order**”):

- (a) authorizing and approving procedures in connection with the sale of substantially all of the Debtors’ assets substantially in the form attached to the Bid Procedures Order as **Exhibit 1** (the “**Bid Procedures**”) in

¹ The Debtors in these cases, along with the last four digits of each Debtor’s federal tax identification number, are: First Mode Holdings, Inc. (7177), and Synchronous LLC (1829). The Debtors’ mailing address is 3417 1st Ave S, Seattle, WA, 98134.

connection with the sale (the “**Sale**”) of substantially all of the Debtors’ assets (the “**Assets**”);

- (b) scheduling an auction (the “**Auction**”) and sale hearing (the “**Sale Hearing**”) with respect to the Sale of the Assets;
- (c) approving the form and manner of notice of the Auction and the Sale Hearing, a copy of which is attached to the Bid Procedures Order as Exhibit 2 (the “**Sale Notice**”);
- (d) authorizing the Debtors to enter into, and perform under, that certain Asset Purchase Agreement with Cummins Inc. (“**Cummins**” or the “**Stalking Horse Bidder**”), dated December 15, 2024 (including all schedules and exhibits attached thereto, as it may be amended from time to time in accordance with its terms), a copy of which is attached hereto as Exhibit A (the “**Stalking Horse APA**”), pursuant to which the Stalking Horse Bidder agrees to purchase the Purchased Assets (as defined in the Stalking Horse APA) from the Debtors and certain of its non-Debtor affiliates on the terms and conditions set forth therein (the “**Stalking Horse Bid**”);
- (e) approving the Bid Protections (as defined below) granted to the Stalking Horse Bidder;
- (f) approving procedures for the assumption and assignment (as set forth in the Bid Procedures Order, the “**Assumption Procedures**”) of certain executory contracts and unexpired leases in connection with the Sale (collectively, the “**Assigned Contracts**”) and approving the form and manner of notice thereof, a copy of which is attached to the Bid Procedures as Exhibit 3 (the “**Assumption Notice**”); and
- (g) granting related relief.²

2. Following entry of, and compliance with, the Bid Procedures Order, the Debtors intend to seek entry of an order, substantially in the form attached hereto as Exhibit C (the “**Sale Order**”) at the conclusion of the Sale Hearing:

- (a) if an Auction is conducted, authorizing and approving the sale of the Assets to the Qualified Bidder (as defined in the Bid Procedures) that the Debtors determine has made the highest or otherwise best Qualified Bid (as defined in the Bid Procedures) for the Assets (the “**Successful Bidder**”) (or, if the Successful Bidder fails to consummate the Sale, to the Qualified Bidder with the next-highest or second-best Qualified Bid at the Auction for the Assets (the “**Back-Up Bidder**”)), free and clear of all liens, claims,

² Unless otherwise defined herein, capitalized terms shall have the meanings ascribed to such terms in the Declarations, the Stalking Horse APA, or the Bid Procedures, as applicable.

encumbrances, and other interests other than Permitted Liens and Assumed Liabilities (as such terms are defined in the Stalking Horse APA);

- (b) if an Auction is not conducted, authorizing and approving the Sale of the Assets to the Stalking Horse Bidder free and clear of all liens, claims, encumbrances, and other interests other than Permitted Liens and Assumed Liabilities;
- (c) authorizing the assumption and assignment of the Assigned Contracts; and
- (d) granting any related relief.

3. In support of the Motion, the Debtors rely on (i) the *Declaration of Colin Mark Freed in Support of Chapter 11 Petitions and First Day Pleadings* (the “**First Day Declaration**”) and (ii) the *Declaration of Matthew Parr in Support of Motion of Debtors for Entry of (I) an Order (A) Approving Bid Procedures in Connection with the Sale of Substantially All of the Debtors’ Assets, (B) Scheduling an Auction and Sale Hearing, (C) Approving the Form and Manner of Notice Thereof, (D) Authorizing the Debtors to Enter Into the Stalking Horse APA and Related Bid Protections, (E) Approving Procedures for the Assumption and Assignment of Contracts and Leases, and (F) Granting Related Relief; and (II) an Order (A) Approving the Sale of Substantially All of the Debtors’ Assets Free and Clear of All Liens, Claims, Encumbrances, and Interests, (B) Authorizing the Assumption and Assignment of Contracts and Leases, and (C) Granting Related Relief* (the “**Parr Declaration**,” and together with the First Day Declaration, the “**Declarations**”), each of which are fully incorporated herein by reference.

4. The Debtors reserve the right to file and serve any supplemental pleading or declaration that the Debtors deem appropriate or necessary in their reasonable business judgment, including any pleading summarizing the competitive bidding and sale process and the results thereof, in support of their request for entry of the Sale Order before the Sale Hearing.

JURISDICTION AND VENUE

5. This Court has jurisdiction to consider this Motion under 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 February 29, 2012. This is a core proceeding under 28 U.S.C. § 157(b). Venue of these cases and this Motion in this district is proper under 28 U.S.C. §§ 1408 and 1409.

6. The statutory predicates for the relief requested herein are sections 105(a), 363, 365, 503 and 507 of Title 11 of the United States Code, 11 U.S.C. §§ 101–1532 (the “**Bankruptcy Code**”), Rules 2002, 6004, 6006, 9007, and 9014 of the Federal Rules of Bankruptcy Procedure (the “**Bankruptcy Rules**”), and Rules 2002-1, 6004-1, and 9013-1(m) of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the “**Local Rules**”).

7. Pursuant to Local Rule 9013-1(f), the Debtors consent to the entry of a final judgment or order with respect to this Motion if it is determined that this Court would lack Article III jurisdiction to enter such final judgment or order absent consent of the parties.

BACKGROUND

8. On the date hereof (the “**Petition Date**”), the Debtors filed voluntary petitions in this Court for relief under chapter 11 of the Bankruptcy Code. The Debtors continue to manage and operate their business as debtors in possession pursuant to sections 1107 and 1108 of the Bankruptcy Code. No trustee or examiner has been requested and no committee has been appointed in the Chapter 11 Cases.

9. The factual background regarding the Debtors, including their business operations, their capital and debt structures, and the events leading to the filing of the Chapter 11 Cases, is set forth in detail in the First Day Declaration.

10. Simultaneously with the filing of this Motion, the Debtors have filed a motion with this Court pursuant to Bankruptcy Rule 1015(b) seeking joint administration and consolidation of the Chapter 11 Cases for procedural purposes only.

PREPETITION MARKETING AND SALE PROCESS

11. As described in further detail in the Declarations, the Debtors have determined, in consultation with their advisors and certain of their constituents, including the Prepetition Facility Lender and the Consenting Parent, that pursuing a sale of the Assets (as defined below) pursuant to Section 363 of the Bankruptcy Code is the best available method for maximizing the value of those Assets for the benefit of all stakeholders. The Debtors undertook several actions prior to commencing these Chapter 11 Cases to ensure that the sale process yields a value-maximizing transaction. Specifically, the Debtors have conducted an extensive prepetition marketing process that culminated in entry into the Stalking Horse APA, subject to the Debtors' receipt of higher or better offers at the Auction. The Stalking Horse APA offers the Debtors and their stakeholders certainty by establishing a minimum purchase price for the Purchased Assets (as defined below) and signaling to other potential bidders the prevailing market value of the Purchased Assets, while also affording the Debtors an opportunity to seek higher or otherwise better offers.

12. In August 2024, the Debtors engaged M3 Advisory Partners, LP ("**M3**") to serve as their financial advisor and Latham & Watkins LLP ("**Latham**") to serve as their counsel. In September 2024, the Debtors engaged PJT Partners LP ("**PJT**") to serve as their investment banker. The Debtors engaged M3, Latham, and PJT in connection with developing, and advising the Debtors with respect to, various strategic alternatives, including a potential sale and chapter 11 sale process. Shortly thereafter, PJT, alongside the Debtors' management and other professionals,

began a process to market the Assets under the supervision and direction of the Restructuring Committee.

13. Throughout the prepetition marketing process, PJT worked closely with the Debtors' management and other restructuring professionals and has become familiar with the Debtors' capital structure, which is more fully set forth in the First Day Declaration, liquidity needs, and business operations. The goal of the prepetition marketing process was to effectuate an out-of-court sale transaction that would permit the Debtors to continue operating as a going concern, preserve jobs, and maximize recoveries for all parties in interest.

14. As described in further detail in the Parr Declaration, the Debtors' marketing efforts included targeted outreach to potential strategic entities that the Debtors and their advisors believed might be interested in purchasing the Assets. During this process, PJT contacted nineteen (19) strategic buyers. The Debtors invited these potential buyers to execute non-disclosure agreements. In response to the initial outreach, the Debtors executed non-disclosure agreements (collectively, the "**NDAs**") with nine (9) prospective buyers of the Assets, each of which received the same package of marketing materials.

15. The Debtors, in consultation with their advisors, invited the nine (9) potential buyers that executed NDAs to participate in the diligence process and to submit indications of interest by September 30, 2024 (the "**Indication of Interest Deadline**"). As noted above, discussions were initially focused on consummating an out-of-court sale transaction that would provide value to all the Debtors' stakeholders and permit ongoing operations of the Debtors' business as a going concern.

16. Prior to the Indication of Interest Deadline, only one (1) potential buyer—Cummins—submitted an indication of interest. Another potential buyer indicated it would submit

an offer subject to substantial additional due diligence by October 15, 2024, and ultimately submitted an indication of interest following an extension from the Debtors. After additional discussions with this potential buyer, the Debtors, in consultation with their advisors, determined the indication of interest was not actionable at that time. In November 2024, the Debtors narrowed their focus to negotiating an in-court process whereby Cummins would serve as a stalking horse bidder and the Debtors could pursue a plan of liquidation following consummation of the sale.

17. The culmination of the prepetition marketing process was the execution of the Stalking Horse APA, which the Debtors and their advisors believe represents the highest or otherwise best offer the Debtors have received to date. The terms of the Stalking Horse APA, including the Bid Protections, was the product of arms' length, good faith negotiations between the Debtors (in consultation with the Prepetition Facility Lender and Consenting Parent) and the Stalking Horse Bidder, and their respective advisors. On December 13, 2024, following the Restructuring Committee's recommendation, the Debtors' board of directors adopted resolutions authorizing the Debtors to enter into the Stalking Horse APA.

18. The Stalking Horse APA provides that the Stalking Horse Bidder will purchase the Purchased Assets along with various assets of certain non-Debtor affiliates for a purchase price of \$15 million, plus the assumption of certain Assumed Liabilities (as defined in the Stalking Horse APA).³ Importantly, the Stalking Horse APA also contemplates that a significant number of the Debtors' employees will transition to the Stalking Horse Bidder following consummation of the sale.

³ In connection with the Debtors' entry into the Stalking Horse APA, the Debtors and the Stalking Horse Bidder entered into a side letter (the "**Side Letter**") by which the Stalking Horse Bidder agreed that certain Assumed Liabilities would equal an amount of at least \$3,430,119, subject to the Stalking Horse Bidder's ability to negotiate lower Cure Costs (as defined in the Stalking Horse APA) with the applicable counterparties. In connection with determining the highest or otherwise best bid at the Auction, in consultation with the Consultation Parties, the Debtors will take into account the Side Letter.

19. To induce the Stalking Horse Bidder to expend the time, energy and resources necessary to negotiate and ultimately execute the Stalking Horse APA and to keep the Stalking Horse Bid memorialized therein open and irrevocable through the Debtors' sale process, the Debtors have agreed to provide the Stalking Horse Bidder with, and seek this Court's approval of, certain protections pursuant to the terms of the Stalking Horse Bid. The Stalking Horse Bid includes: (i) a break-up fee of three (3) percent of the Purchase Price (the "**Break-up Fee**") and (ii) an expense reimbursement for the Stalking Horse Bidder's reasonable and documented expenses in conjunction with the Stalking Horse Bid up to a maximum amount of \$550,000 (the "**Expense Reimbursement**") and together with the Break-Up Fee, the "**Bid Protections**"). To date, the Debtors have determined, with the assistance of their advisors, that the terms of the Stalking Horse Bid, including the Bid Protections, as the only actionable bid, constitutes the highest or otherwise best offer for the Purchased Assets reasonably available to the Debtors under the circumstances, recognizing that such bid will be subjected to an open and transparent auction process.

20. Notwithstanding the lengthy and thorough prepetition process noted above, there may be additional parties interested in participating in the Auction with respect to the Assets. The Debtors, with the assistance of PJT, have continued, and will continue, to market the Assets to potential buyers. Upon entry of the Bid Procedures Order, the Debtors, with the assistance of PJT, will continue discussions with any party that complies with the requirements of the Bid Procedures Order and the Bid Procedures, with the goal of having such parties participate in the Auction and foster a competitive process that maximizes the value achievable for the Assets. The Debtors believe that, given the extensive prepetition marketing effort, the number of parties that already have executed NDAs, and the fact that the Debtors already have marketed the Assets to the most

likely bidders for Assets of the type the Debtors are selling, the prepetition and postpetition marketing process leading up to the Auction will achieve the greatest possible level of interest and consideration for the Assets in the Chapter 11 Cases and will confirm whether the bid submitted by the Stalking Horse represents the highest and otherwise best offer for the Assets.

21. It is imperative that the Debtors execute a Sale to maximize value for the Debtors' estates as that is the only viable path currently available to the Debtors. Establishing a process for the swift and orderly transition of the Debtors' business to the Successful Bidder will (i) signal to the Debtors' stakeholders that the situation in which the Debtors find themselves is merely temporary and the Debtors will emerge from the chapter 11 process with new owners and a clean slate and (ii) comply with the milestones set forth in the Restructuring Support Agreement (as attached to the First Day Declaration) (the "**RSA**," and such milestones, the "**RSA Milestones**") and the milestones set forth in the DIP Motion⁴ (the "**DIP Milestones**" and together with the RSA Milestones, the "**Milestones**"). It is therefore imperative that the Debtors consummate a value-maximizing Sale as expeditiously as possible.

STALKING HORSE APA

22. The key terms of the proposed transaction can be found in the Stalking Horse APA attached hereto as Exhibit A. The material terms of the Stalking Horse APA, including those provisions required to be highlighted pursuant to Local Rule 6004-1(b)(iv), are as follows:⁵

⁴ The "**DIP Motion**" means the *Motion of Debtors for Entry of Interim and Final Orders (I) Authorizing the Debtors to (A) Obtain Postpetition Financing and (B) Use Cash Collateral, (II) Granting Liens and Providing Claims with Superpriority Administrative Expense Status, (III) Granting Adequate Protection to the Prepetition Facility Lender, (IV) Modifying the Automatic Stay, (V) Scheduling a Final Hearing, and (VI) Granting Related Relief*, filed contemporaneously herewith.

⁵ This summary of the Stalking Horse APA is qualified in its entirety by the Stalking Horse APA. All capitalized terms that are used in this summary, but not otherwise defined herein, shall have the meanings set forth in the Stalking Horse APA. To the extent there are any conflicts between this summary and the Stalking Horse APA, the terms of the Stalking Horse APA shall govern.

Provision	Summary
Parties	<u>Sellers:</u> First Mode Holdings, Inc., Synchronous LLC, First Mode IPP, Ltd., First Mode Pty. Ltd., First Mode SA Pty, First Mode SA Holdings. <u>Buyer:</u> Cummins Inc.
Purchase Price / Consideration	The Stalking Horse APA provides for the following consideration in exchange for the Assets: At the Closing, upon the terms and subject to the conditions set forth herein in full consideration for the sale, transfer, conveyance, assignment and delivery of the Purchased Assets to Buyer, Buyer shall pay to the Company (on behalf of Sellers) an aggregate purchase price equal to (a) fifteen million dollars (\$15,000,000.00) in cash (the “Purchase Price”), <i>plus</i> (b) the Approved Expenditure Amount (if any), <i>minus</i> (c) the Deposit, <i>plus</i> (d) the Accrued Compensation Obligations, <i>minus</i> (e) the Chile Employee Obligations Amount, by irrevocable wire transfer of immediately available funds in accordance with payment instructions delivered by the Company (on behalf of Sellers) to Buyer at least three (3) Business Days prior to the Closing. For the avoidance of doubt, Buyer shall promptly pay, or cause to be paid, to the applicable counterparty any Cure Costs, including such Cure Costs that arise after the Closing. The parties agree to allocate the Purchase Price for tax purposes as provided in <u>Section 3.2</u>. See Stalking Horse APA § 3.1.
Assets	Subject to the terms and conditions set forth herein, at the Closing, Sellers shall sell, transfer, assign, convey and deliver to Buyer, and Buyer shall purchase, acquire and accept from Sellers, free and clear of all Liens (other than Permitted Liens), all right, title and interest of Sellers in, to and under all the assets, rights and properties owned, licensed or used by Sellers, in each case, except as otherwise specified in Article II, to the extent primarily used in, primarily held for use in or primarily related to the Business (collectively, the “Purchased Assets”); <i>provided, however</i>, that the Purchased Assets shall not include any Excluded Assets, but, without limiting the foregoing, shall include: (i) the Assigned Contracts, subject to the Assigned Contract identification process set forth in <u>Section 6.3</u>; (ii) all Transferred Intellectual Property; (iii) all supplies and other inventories, including all raw materials, works-in-process, finished goods, packaging, supplies and parts used in the Business or produced in or by the Business, whether held at any location or facility of Sellers or owned by Sellers but in transit (the “Inventory”); (iv) all equipment, machinery, vehicles and other tangible personal property, including office furniture and fixtures, computers, networking equipment, industrial equipment and supplies primarily used in the Business,

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	whether owned or leased, and all Seller IT Assets that are listed on Schedule 1.1(f); (v) all physical or electronic copies of all personnel records (including those as required by applicable Law and those pertaining to, as applicable, performance, training history, job experience and compensation history, and for the three-year period immediately preceding the Closing) for the Transferred Employees, except where (A) the transfer or disclosure of such records is prohibited by applicable Law or (B) consent of the relevant employee is required by applicable Law but not given (the “<u>Transferred Employee Records</u>”); (vi) all books and records, customer lists, customer credit information, supplier lists, product specifications, documents, copies of all accounting books and records (including any information relating to any Taxes imposed), any data and information (in whatever form maintained), in each case, that relates to the Business and the Purchased Assets or are required to fulfill any obligation under any Assigned Contracts (collectively, the “<u>Business Records</u>”); (vii) equity interests in First Mode Chile SpA, company organized under the laws of Chile (“<u>FM Chile</u>”); (viii) to the extent transferable, the Permits of Sellers (including any applications that are in process) (i) used in the Business or (ii) required to conduct the Business or perform the Assigned Contracts; (ix) all claims, rights or causes of action against third parties related to any of the Purchased Assets or the Assumed Liabilities (including all guaranties, warranties, indemnities and similar rights in favor of Sellers), including any rights, claims or causes of action arising under the Bankruptcy Code, in each case, whether arising by way of counterclaim or otherwise, and whether arising out of transactions occurring prior to, on or after the Closing Date; and (x) the assets listed on Schedule 2.1(a)(x). At Closing, Buyer (i) at Buyer’s sole cost, shall have the right to reasonably direct the manner of delivery of the Purchased Assets from Sellers and (ii) shall have the right to direct that Sellers sell, transfer, assign, convey and deliver the Purchased Assets, or any portion thereof, directly to any Affiliate of Buyer. See Stalking Horse APA § 2.1.
Assumed Liabilities	Subject to the conditions specified in this Agreement, from and after the Closing Date, Buyer will not assume or in any way be responsible for any Liabilities of Sellers or any other Liabilities whatsoever related to the ownership, operation or condition of the Business or the Purchased Assets at any time prior to the Closing Date, except as specifically provided below. From and after the Closing, Buyer will assume and agree to pay, defend, discharge

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	and perform, as and when due, only the following specific Liabilities to the extent relating to the Purchased Assets (“Assumed Liabilities”): (i) all Liabilities relating to the Purchased Assets to the extent such Liabilities arise from and after Closing or relate to events, facts and circumstances arising after the Closing; provided, that Buyer shall assume Liabilities relating to the Assigned Contracts and the purchase orders listed on Schedule 2.3(e) whether arising before or after the Closing, but only to the extent such Assigned Contracts are actually assigned to (or the benefits passed through pursuant to <u>Section 2.5</u> and <u>Section 6.3</u>); provided, further, that with respect to any Assigned Contract subsequently designated as an Excluded Contract following the Closing pursuant to <u>Section 6.3</u>, Buyer shall be solely responsible for payment of obligations and liabilities incurred between the Closing and the designation of such Assigned Contract as an Excluded Contract; (ii) any Transfer Taxes apportioned to Buyer pursuant to <u>Section 8.2</u>; (iii) subject to <u>Section 6.3</u>, all Cure Costs; (iv) all Liabilities (if any) specifically assumed by Buyer pursuant to <u>Section 7.3</u> (including Liabilities arising out of, relating to or in connection with Buyer’s, or one of its Subsidiaries’ failure to offer employment to any Offer Employee on terms consistent with <u>Section 7.3(b)</u>), and all Liabilities (if any) that transfer to Buyer or its Affiliates under applicable Law with respect to FM Chile or with respect to Transferred Employees residing in Australia; and (v) without limiting the foregoing, all other Liabilities that are listed on <u>Schedule 2.3(e)</u>. See Stalking Horse APA § 2.3.
Agreements with Management (Local Rule 6004-1(b)(iv)(B))	Not applicable.
Releases (Local Rule 6004-1(b)(iv)(C))	<u>Seller Release:</u> Effective as of the Closing, each Seller, for itself and each of its controlled Affiliates and any former, current or future estates, heirs, executors, administrators, trustees, successors and assigns of any of the foregoing (each, a “Company Releasor”), irrevocably, knowingly and voluntarily releases, discharges and forever waives and relinquishes all claims, demands, obligations, liabilities, defenses, affirmative defenses, setoffs, counterclaims, Actions and causes of action of whatever kind or nature, whether known or unknown, which any Company Releasor has, may have, or might have or may assert now or in the future, against Buyer, its Affiliates or any of its or their

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	respective former, current or future directors, officers, employees, general or limited partners, managers, members, direct or indirect equityholders, controlling persons, Affiliates, attorneys, assignees, agents, advisors, or representatives, or representatives or Affiliates of any of the foregoing, or any former, current or future estates, heirs, executors, administrators, trustees, successors or assigns of any of the foregoing (each, a “Company Releasee”) arising out of, based upon or resulting from any Contract, transaction, event, circumstance, action, failure to act or occurrence of any sort or type, whether known or unknown, and which occurred, existed or was taken or permitted at or before the Closing to the extent relating to the Business or the Purchased Assets; provided, that nothing contained in this <u>Section 11.16(a)</u> shall release, waive, discharge, relinquish or otherwise affect the rights or obligations of any Person under this Agreement, any other Transaction Document or any other agreement delivered or required to be delivered pursuant hereto or any claims of Fraud. Each Seller shall, and shall cause its controlled Affiliates to, refrain from, directly or indirectly, asserting any claim or demand, or commencing, instituting or causing to be commenced any legal proceeding of any kind against a Company Releasee based upon any matter released pursuant to this <u>Section 11.16(a)</u>. Each Company Releasee to whom this <u>Section 11.16(a)</u> applies shall be a third-party beneficiary of this <u>Section 11.16(a)</u>. See Stalking Horse APA § 11.17(a). <u>Buyer Release:</u> Effective as of the Closing, Buyer, for itself and each of its controlled Affiliates and any former, current or future estates, heirs, executors, administrators, trustees, successors and assigns of any of the foregoing (each, a “Buyer Releasor”), irrevocably, knowingly and voluntarily releases, discharges and forever waives and relinquishes all claims, demands, obligations, liabilities, defenses, affirmative defenses, setoffs, counterclaims, Actions and causes of action of whatever kind or nature, whether known or unknown, which any Buyer Releasor has, may have, or might have or may assert now or in the future, against any Seller or its Affiliates or any of its former, current or future directors, officers, employees, general or limited partners, managers, members, direct or indirect equityholders, controlling persons, Affiliates, attorneys, assignees, agents, advisors, or representatives, or representatives or Affiliates of any of the foregoing, or any former, current or future estates, heirs, executors, administrators, trustees, successors or assigns of any of the foregoing (each, a “Buyer Releasee”) arising out of, based upon or resulting from any Contract, transaction, event, circumstance, action, failure to act or occurrence of any sort or type, whether known or unknown, and which occurred, existed or was taken or permitted at or before the Closing to the extent relating to the Business or Purchased Assets; provided, that nothing contained in this <u>Section 11.16(b)</u> shall release, waive, discharge, relinquish or otherwise affect the rights or obligations of any Person under this Agreement, any Transaction Document or any other agreement delivered or required to be delivered pursuant hereto or any claims of Fraud. Buyer shall, and shall cause its Subsidiaries to, refrain from, directly or indirectly, asserting any claim or

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	demand, or commencing, instituting or causing to be commenced any legal proceeding of any kind against a Buyer Releasee based upon any matter released pursuant to this <u>Section 11.16(b)</u>. Each Buyer Releasee to whom this <u>Section 11.16(b)</u> applies shall be a third-party beneficiary of this <u>Section 11.16(b)</u>. See Stalking Horse APA § 11.17(b).
Private Sale/No Competitive Bidding (Local Rule 6004-1(b)(iv)(D))	Not applicable.
Closing and Other Deadlines (Local Rule 6004-1(b)(iv)(E))	The Stalking Horse APA sets forth the conditions and terms for the Closing of the sale: Subject to the terms and conditions of this Agreement and the applicable provisions of the DGCL, the closing of the purchase and sale of the Purchased Assets (the “Closing”) shall take place remotely by electronic exchange of signature pages as promptly as practicable, and in no event later than two (2) Business Days, after the date on which all of the conditions set forth in Article VII (excluding conditions that, by their terms, are to be satisfied at the Closing, but subject to the satisfaction or, to the extent permitted by applicable Law, waiver of all such conditions at or prior to the Closing), have been satisfied or, to the extent permitted by applicable Law, waived in writing by the party entitled to the benefit of the same, unless another time or date is agreed to in writing by the parties. The day that the Closing takes place is referred to herein as the “Closing Date”. See Stalking Horse APA § 2.6.
Good Faith Deposit (Local Rule 6004-1(b)(iv)(F))	The Stalking Horse Bidder has provided the Debtors with a Deposit of 10% of the Purchase Price. See Stalking Horse APA § 3.4.
Interim Arrangements with Proposed Buyer (Local Rule 6004-1(b)(iv)(G))	The Stalking Horse APA sets forth customary provisions regarding the Debtors’ conduct of their businesses pending the Closing Date. See Stalking Horse APA § 7.1.
Use of Proceeds (Local Rule 6004-1(b)(iv)(H))	The Stalking Horse APA sets forth provisions regarding the Allocation of Purchase Price. See Stalking Horse APA § 3.2.

Provision	Summary
Tax Exemption (Local Rule 6004-1(b)(iv)(I))	Applicable law shall apply.
Record Retention (Local Rule 6004-1(b)(iv)(J))	For a period of seven (7) years from the Closing Date, Buyer shall, and shall cause its Subsidiaries to (a) retain all books, ledgers, files, reports, plans, records and any other documents of the Company and its Subsidiaries in the possession of Buyer and its Subsidiaries relating to the Business and the Purchased Assets at the Closing and (b) use commercially reasonable efforts to (i) give Sellers and their representatives reasonable access to such materials and certain other Seller IT Assets such as computers, servers and other information technology equipment to the extent relating to the Business and the Purchased Assets (ii) furnish to Sellers and their representatives such financial and operating data and other information relating to the Business and the Purchased Assets on or before the Closing Date and (iii) to cause the employees of Buyer and its Affiliates to cooperate with Sellers and their representatives, in each case, to the extent reasonably requested by Sellers in connection with the sale, transfer, conveyance, assignment, delivery, winding-up, disposal or abandonment of any of the Excluded Assets, the winding-up of the Sellers or any of their Affiliates, or relating to the Bankruptcy Cases or in connection with accounting, Tax or other similar needs relating to the operation of the Business by Sellers and their Affiliates prior to the Closing. Any such access or cooperation shall be (a) granted in a manner as not to interfere unreasonably with the conduct of the business of Buyer or its Affiliates and (b) conducted during normal business hours upon reasonable advance notice to Buyer and (z) in the event Sellers or their representatives physically access any properties of Buyer or its Subsidiaries pursuant to this <u>Section 8.1</u>, conducted under the supervision of Buyer's personnel, and Sellers shall be responsible for any out of pocket expenses incurred in connection with any such access or cooperation requested by Sellers pursuant to this <u>Section 8.1</u>. Notwithstanding the foregoing, Buyer may withhold such access, if it determines (in its reasonable judgment) such access could (I) result in the disclosure of trade secrets or competitively sensitive or classified information to third parties, (II) violate any Contract or any Law, (III) be adverse to the interests of Buyer or any of its Affiliates in any pending or threatened Action or (IV) result in the waiver of or otherwise jeopardize the protection of any legal privilege or work-product privilege; <u>provided</u> that, to the extent practicable and in accordance with such Contract or Law, and in a manner that does not result in the waiver of any such privilege, Buyer shall use commercially reasonable efforts to make reasonable and appropriate substitute disclosure arrangements under circumstances in which these restrictions apply; <u>provided, further</u>, that nothing in this <u>Section 8.1</u> shall limit in any respect any rights any party may have with respect to discovery or the production of documents or other information in connection with any litigation. Access provided pursuant to this <u>Section 8.1</u> shall be subject to the terms of the Post-Closing Confidentiality Agreement. See Stalking Horse APA § 8.1.

Provision	Summary
Sale of Avoidance Actions (Local Rule 6004-1(b)(iv)(K))	Not Applicable.
Requested Findings as to Successor Liability (Local Rule 6004-1(b)(iv)(L))	The parties hereto agree that the Sale Order shall provide that to the fullest extent permitted under Section 363(f) of the Bankruptcy Code and any other applicable Law, (a) neither Buyer nor any of its Affiliates shall be liable for any Liability or Lien (other than Assumed Liabilities and Permitted Liens) against Sellers or any of their predecessors; and (b) neither Buyer nor any of its Affiliates shall have any successor or vicarious liability of any kind or character whether known or unknown as of the Closing Date, whether now existing or hereafter arising, or whether fixed or contingent, with respect to the Business, the Purchased Assets or any Liabilities of Sellers who are a debtor in the Bankruptcy Cases arising on or prior to the Closing Date. <i>See Stalking Horse APA § 6.4.</i>
Sale Free and Clear of Unexpired Leases (Local Rule 6004-1(b)(iv)(M))	The Debtors are seeking to sell the Assets free and clear of all Claims, encumbrances, and other interests pursuant to Section 363(f) of the Bankruptcy Code, except as to the Permitted Liens and Assumed Liabilities.
Bid Protections	The Stalking Horse Bidder will be entitled to the Bid Protections (the Break-Up Fee and Expense Reimbursement) upon the occurrence of a Qualifying Termination. <i>See Stalking Horse APA § 10.2.</i>
Credit Bid (Local Rule 6004-1(b)(iv)(N))	The Stalking Horse APA does not seek to permit a credit pursuant to section 363(k) of the Bankruptcy Code. As described herein, the Bid Procedures generally permit credit bidding subject to certain conditions.
Relief from Bankruptcy Rule 6004(h) (Local Rule 6004-1(b)(iv)(O))	As noted in this Motion, the Debtors are requesting relief from the 14-day stay imposed by Bankruptcy Rules 6004(h) and 6006(d).

THE PROPOSED SALE

23. The Debtors believe that a prompt sale of the Assets through a competitive sale process represents the best option available to maximize value for all stakeholders in these Chapter 11 Cases.

24. As described in further detail in the First Day Declaration, a number of factors have destabilized the Debtors' business and threatened to further deteriorate the value of the Assets. In light of these challenges, the Debtors are critically focused on consummating a sale and providing certainty regarding the path forward for the business by consummating a value maximizing sale transaction. Prepetition, the Debtors took important first steps towards achieving that goal by commencing the prepetition marketing process and negotiating and executing the Stalking Horse APA. It is critical that the Debtors seize on that momentum by cementing a post-petition process for the swift and orderly transition of the Debtors' business to the Successful Bidder. This is of the utmost importance and will best position the Debtors to maximize the value of their estates. In other words, time is of the essence.

25. While there is a manifest need for expediency here under the Milestones, the Debtors recognize that conducting a postpetition market check on the Stalking Horse Bid is appropriate and necessary to ensure that the value of the Assets is maximized. To that end, the timeline contemplated by the Bid Procedures appropriately balances the need for expediency with the interest in providing interested parties with a sufficient opportunity to participate in a competitive postpetition sale process and auction. Specifically, by this Motion, the Debtors respectfully request that this Court approve the following sale timeline:⁶

⁶ In the event of any inconsistencies between the Motion and the Bid Procedures, the Bid Procedures shall govern in all respects.

- (a) ***Sale Objection Deadline:*** Objections to the Sale or the Sale Order shall be filed and served no later than **January 2, 2025 at 4:00 p.m. (prevailing Eastern Time)** (collectively, the “**Sale Objection Deadline**”).
- (b) ***Bid Deadline:*** Bids for the Assets, including a marked-up form of the Stalking Horse APA, as well as the deposit and the other requirements for a bid to be considered a Qualified Bid (as defined in the Bid Procedures) must be received by no later than **January 20, 2025 at 4:00 p.m. (prevailing Eastern Time)** or such later date as may be agreed to by the Debtors (the “**Bid Deadline**”).
- (c) ***Assumed Contract Objection Deadline:*** Objections to (i) the potential assumption and assignment of any Assigned Contract to the Stalking Horse Bidder, including the ability of the Stalking Horse Bidder to provide adequate assurance of future performance and (ii) the proposed cure amount to be paid in connection with the assumption and assignment of any Assigned Contract shall be filed and served no later than **January 22, 2025 at 4:00 p.m. (prevailing Eastern Time)** (collectively, the “**Assumed Contract Objection Deadline**”); *provided* that, to the extent any Assumed Contract Counterparty is added to the Assumption Notice after the initial notice is served, such new Assumed Contract Counterparty shall have fourteen (14) days from the date of service of the Supplemental Contract Notice to object to the proposed cure amount and assignment to the Successful Bidder.⁷
- (d) ***Designation of Qualified Bid Deadline:*** The Debtors shall notify each Qualified Bidder whether such party is a Qualified Bidder and shall provide each Qualified Bidder, including the Stalking Horse Bidder, with a copy of each Qualified Bid no later than **4:00 p.m. (prevailing Eastern Time) on January 23, 2025** before the Auction (the “**Designation of Qualified Bid Deadline**”).
- (e) ***Auction:*** The Auction, if necessary, shall be held on **January 27, 2025 at 10:00 a.m. (prevailing Eastern Time)** at the offices of Latham & Watkins LLP, 1271 Avenue of the Americas, New York, New York 10020, telephonically or by video via Zoom, or such other location as identified by the Debtors after notice to all Qualified Bidders.
- (f) ***Post-Auction Notice Deadline:*** As soon as reasonably practicable after closing the Auction, if any, and in any event not more than twenty-four (24) hours after closing the Auction, the Debtors shall file and serve a notice

⁷ The Debtors shall file with the Court, post on the website maintained by the Debtors’ proposed Claims and Noticing Agent, Omni Agent Solutions, Inc., at <https://omniagentsolutions.com/FirstMode>, and serve each Assumed Contract Counterparty to any Assumed Contract an Assumption Notice on or prior to **January 5, 2025** (the “**Assumption Notice Deadline**”).

identifying the Successful Bidder and Back-Up Bidder, if any (the “**Post-Auction Notice**”).

- (g) ***Post-Auction Objection Deadline:*** If the Successful Bidder or Back-Up Bidder that prevails at the Auction is not the Stalking Horse Bidder, the deadline to object solely to (i) the identity of a Successful Bidder or Back-Up Bidder or (ii) the ability of the Successful Bidder or Back-Up Bidder to provide adequate assurance of future performance under any Assigned Contract shall be **January 29, 2025 at 4:00 p.m. (prevailing Eastern Time)** (the “**Post-Auction Objection Deadline**”).
- (h) ***Sale Hearing:*** Subject to the Court’s availability, the Debtors propose to hold the Sale Hearing on **January 30, 2025**.

26. The Debtors believe this timeline maximizes the prospect of receiving the highest or best offer for the Assets while ensuring that the Debtors can close the Sale on the timeline contemplated in the Stalking Horse APA. Further, this timeline will ensure the sale process is conducted and consummated within the timeframe required under the Milestones. Given the Debtors’ extensive prepetition marketing efforts, the proposed timeline is more than adequate to complete a fair, robust and open sale process that will maximize the value received for the Assets. Indeed, the Debtors and their advisors have been actively marketing the Assets to prospective bidders since September 2024 and believe that the most likely potential bidders in an auction have already been contacted and afforded an opportunity to conduct diligence in connection with the prepetition marketing process. To further ensure that the Debtors’ proposed sale process maximizes value for the benefit of the Debtors’ estates, and in accordance with the Stalking Horse APA, the Debtors and their professionals will use the time following the Petition Date to continue to actively market the Assets in an attempt to solicit the highest or otherwise best bids available. The Debtors believe the relief requested by this Motion is in the best interests of their creditors, their other stakeholders, and all other parties in interest, and should be approved.

THE BID PROCEDURES ORDER

A. The Bid Procedures and Auction Process

27. To optimally and expeditiously solicit, receive, and evaluate bids in a fair and accessible manner, the Debtors have developed and proposed the Bid Procedures, attached as Exhibit 1 to the Bid Procedures Order. The Bid Procedures were developed to promote participation and active bidding, and to ensure that the Debtors receive the highest or otherwise best offer for the Assets.

28. The Bid Procedures describe, among other things, the requirements for prospective purchasers to participate in the bidding process, the availability and conduct of due diligence, the deadline for submitting a competing bid, the method and factors for determining qualifying bids, the criteria for selecting a successful bidder and the non-exhaustive procedures for conducting an auction if timely Qualified Bids other than the Stalking Horse Bid are received.

29. The following summary describes the salient points of the Bid Procedures and discloses certain information required pursuant to Local Rule 6004-1:⁸

Provision	Summary
Provisions Governing Bids and Qualifications of Bidders (Local Bankr. R. 6004-1(c)(i)(A), (B))	<u>Bid Deadline</u> : The Debtors must receive a Bid in writing (email being sufficient), on or before January 20, 2025 at 4:00 p.m. (prevailing Eastern Time) (as may be amended in consultation with the Consultation Parties, the “ <u>Bid Deadline</u> ”). Bids must be sent to the Bid Recipients by the Bid Deadline to be considered.

⁸ This summary of the Bid Procedures is qualified in its entirety by the Bid Procedures attached as Exhibit 1 to the Bid Procedures Order. All capitalized terms that are used in this summary, but not otherwise defined herein, shall have the meanings set forth in the Bid Procedures. To the extent there are any conflicts between this summary and the Bid Procedures, the terms of the Bid Procedures shall govern.

Provision	Summary
	<u>Diligence Access Requirements:</u> To receive due diligence information, including full access the Debtors’ electronic data room (the “Data Room”) and additional non-public information regarding the Company (collectively, the “Diligence Materials”), any party interested in submitting a bid, other than the Stalking Horse Bidder (each a “Potential Bidder”) must deliver the following documents (collectively, the “Preliminary Bid Documents”) by email to the Bid Recipients (as defined in the Bid Procedures): • to the extent not already executed, an executed and signed confidentiality agreement on customary terms that are reasonably acceptable to the Debtors (an “Acceptable Confidentiality Agreement”); and • evidence by the Potential Bidder of its financial capacity to close a proposed transaction for the Purchased Assets or other of the Debtors’ assets (a “Transaction”), the adequacy of which will be determined by the Debtors (with the assistance of their advisors) in consultation with the Consultation Parties. <u>Auction Qualification Process:</u> To be eligible to participate in the Auction, each offer, solicitation, or proposal (each, a “Bid”), and each party submitting such a Bid (each, a “Bidder”), must be determined by the Debtors, in consultation with the Consultation Parties, to satisfy each of the following conditions: • <u>Stalking Horse Bidder.</u> The Stalking Horse Bidder shall be deemed to be a Qualified Bidder and the Stalking Horse APA shall be deemed to be a Qualified Bid (the “Stalking Horse Bid”). • <u>Bid Deadline.</u> Bids must be sent in writing (email being sufficient) to the Bid Recipients by the Bid Deadline to be considered. • <u>Consultation Parties.</u> For the avoidance of doubt, if a Consultation Party (or its affiliates, as applicable) is a Potential Bidder, then such party shall no longer be a Consultation Party unless and until the earlier of such Consultation Party’s (i) representation in writing to the Debtors that it is no longer a Potential Bidder and does not intend to pursue a Bid in the future and (ii) failure to be designated as the Successful or Back-Up Bidder (each as defined below) following the completion of the Auction (if any); <i>provided</i> that if such party is a member of the Committee, then the Committee’s counsel and the remaining members of the Committee other than the Potential Bidder shall continue to be Consultation Parties, but shall not provide any information they receive as Consultation Parties to the Potential Bidder. Neither the Debtors nor their representatives shall be obligated to furnish any information of any kind whatsoever relating to the Debtors’ assets to any party that is not a Potential Bidder or a Consultation Party.

Provision	Summary
	• <u>Form and Contents</u>. All Bids shall be in the form of an irrevocable offer letter from a person or persons that the Debtors, in their reasonable discretion taking into account its fiduciary duties, deem financially able to consummate the Transaction, which letter states and includes: ○ <u>Marked Agreement</u>. Each Bid must state that the Bidder irrevocably offers to purchase some or all of the Purchased Assets upon the terms and conditions set forth in a duly executed non-contingent and attached complete asset purchase agreement, which shall be in substantially the same form as the Stalking Horse APA, prepared and executed by the Bidder (an electronic version in Word format and blacklined against the Stalking Horse APA), together with its exhibits and schedules, including terms relating to Purchase Price (as defined below) and the time of closing (the “Proposed Agreement”); ○ <u>Assets</u>. Each Bid must clearly specify the Debtors’ assets that are included in the Bid (it being understood that while Bids for a portion or subset of the Purchased Assets may be permitted, in determining whether the Bid is a Qualified Bid, the Debtors may consider whether the combined consideration for the Debtors’ assets (taking into account such Bid and other Bids) exceeds the Purchase Price of the Stalking Horse APA and/or other aspects of the Bid); ○ <u>Purchase Price</u>. Each Bid must clearly set forth the terms of any proposed Transaction, including and identifying separately any cash and non-cash components of the proposed Transaction consideration, such as certain liabilities to be assumed by the Bidder as part of the Transaction (the “Purchase Price”); ○ <u>Overbid</u>. Each Bid (a) must propose a Purchase Price equal to or greater than the sum of (i) the value of the Stalking Horse Bid, as determined by the Debtors in consultation with the Consultation Parties (including the Break-Up Fee and the Expense Reimbursement (each as defined below)) and (ii) an initial overbid of at least \$250,000; (b) must be on terms that are not materially more burdensome than the terms of the Stalking Horse Bid; and (c) must obligate the Bidder to pay, to the extent provided in the Agreement, all liabilities and expenses that the Stalking Horse Bidder under the Agreement has agreed to pay, including any Assumed Liabilities (as defined in the Stalking Horse APA);

Provision	Summary
	○ <u>Capacity to Consummate Transaction; Committed Financing.</u> Each Bid shall be accompanied by evidence of (i) the Bidder's capacity to consummate the Transaction set forth in its Bid with cash on hand or (ii) sufficient, non-contingent financing and/or equity funding commitments to satisfy the Bidder's Purchase Price and other obligations under its Bid. Such funding commitments or other financing acceptable to the Debtors must be unconditional and must not be subject to any internal approvals, syndication requirements, diligence, or credit committee approvals, and shall have covenants and conditions acceptable to the Debtors; ○ <u>Contingencies; No Financing or Diligence Outs.</u> A Bid shall not be conditioned on a Bidder obtaining financing or any internal approval, or on the outcome or review of due diligence, which must be completed before the Bid Deadline, but may be subject to the accuracy at the closing of specified representations and warranties or the satisfaction at the closing of specified conditions; ○ <u>Identity.</u> Each Bid must fully disclose the identity of each entity that will be bidding or otherwise participating in connection with such Bid (including each equity holder or other financial backer of the Bidder if such Bidder is an entity formed for the purpose of consummating the proposed Transaction contemplated by such Bid), and the complete terms of any such participation. Under no circumstances shall any undisclosed principals, equity holders, or financial backers be associated with any Bid. Each Bid must also include contact information for the specific person(s) and counsel the Debtors' advisors should contact regarding such Bid; ○ <u>Authorization.</u> Each Bid must contain evidence that the Bidder has obtained authorization or approval from its board of directors, or a comparable governing body, acceptable to the Debtors with respect to the submission of its Bid and the consummation of the Transactions contemplated in such Bid; <i>provided</i>, however, if the Bidder is an entity specially formed for the purpose of effectuating the transaction, then the Bidder must furnish written evidence reasonably acceptable to the Debtors of the approval of the transaction by the equity holder(s) of such Bidder; ○ <u>Regulatory or Third-Party Approval.</u> Each Bid must set forth any regulatory or third-party approval required for the Bidder to consummate the Sale, and the time period within which the Bidder expects to receive such regulatory and third-party approvals, if any;

Provision	Summary
	○ <u>Expenses; Disclaimer to Fees.</u> Each Bid (other than the Stalking Horse Bid) must disclaim any right to receive a break-up fee, expense reimbursement, termination fee, or any other similar form of compensation. For the avoidance of doubt, except as may be exclusively applicable to the Stalking Horse Bidder, no Potential Bidder will be permitted to request, or be granted by the Debtors, at any time, whether as part of the Auction or otherwise, a break-up fee, expense reimbursement, termination fee, substantial contribution, or any other similar form of compensation, and by submitting a Bid any Potential Bidder is waiving any assertion or request for reimbursement on any basis, including under Section 503(b) of the Bankruptcy Code; ○ <u>Consummation.</u> Each Bid must include a statement or evidence reflecting (i) that the Bidder is prepared to consummate the transaction upon entry of an order of the Bankruptcy Court approving the Sale to the Successful Bidder (the “Sale Order”) and consummation shall not be contingent on obtaining requisite government, regulatory, or other third-party approvals, (ii) that the Bidder has made or will make as soon as reasonably practicable all necessary filings, if any, with respect to any regulatory, antitrust and other laws and pay the fees associated therewith; and (iii) the Bidder’s plan and ability to obtain all requisite governmental, regulatory, or other third-party approvals, and the proposed timing for the Bidder to undertake the actions required to obtain such approvals, if any; ○ <u>Irrevocability.</u> Each Bid must include a statement that, in the event the Debtors select the Bidder to serve as the Successful Bidder or the Back-Up Bidder (as defined below), such Qualified Bidder’s offer is irrevocable until two (2) business days after the closing of the Transaction; ○ <u>Assumed Contracts and Leases.</u> Each Bid must identify any and all executory contracts and unexpired leases of the Debtors and non-Debtor affiliates that the Qualified Bidder wishes to be assumed and assigned to it pursuant to a Sale. A Bid must specify that such Bidder will be responsible for any cure costs associated with such assumption on the same or better terms as the Stalking Horse Bid, and include a good faith estimate of such cure costs (which estimate shall be provided by the Debtors). Further, a Bid must provide evidence of adequate assurance of future performance under such executory contracts and unexpired leases to be assumed and assigned in such a Sale; ○ <u>Employees.</u> Each Bid must detail the treatment of the employees of the Debtors;

Provision	Summary
	○ <u>Damages</u>. Each Bid must provide that the Debtors have the right to pursue all available damages in the event of the Bidder's breach of, or failure to perform under, the Proposed Agreement; ○ <u>Consent to Jurisdiction</u>. Each Bidder must submit to the exclusive jurisdiction of the Bankruptcy Court and waive any right to a jury trial in connection with any disputes relating to Debtors' qualification of Bids, the Auction, the construction and enforcement of these Bid Procedures, the Sale documents, and the closing of the sale, as applicable; and ○ <u>Other Information</u>. Each Bid must contain such other information as may be reasonably requested by the Debtors. • <u>Combination of Bids</u>. Each Bid shall be based on the Stalking Horse Bid and must exceed, either on its own terms or, in the case of a Bid for a portion or subset of the Debtors' assets, in combination with another Qualified Bid(s) (which combination shall be done by the Debtors, in consultation with the Consultation Parties), the Stalking Horse Bid in relation to the Purchased Assets. For the avoidance of doubt, joint Bids submitted by multiple Bidders will not be considered. • <u>Back-Up Bidder</u>. Each Bidder must acknowledge that by submitting a Bid, the Bidder agrees to be a Back-Up Bidder in accordance with the terms of these Bid Procedures, should the Bid be so selected. • <u>As Is, Where Is</u>. The sale of the Debtors' assets shall be on an "as is, where is" and "with all defects" basis and without representations or warranties of any kind, nature, or description by the Debtors, their agents or estates, except to the extent set forth in the Stalking Horse APA. • <u>Good Faith Deposit</u>. Each Qualified Bid must be accompanied by a cash deposit in the amount of 10% of the total Purchase Price to be held in an escrow account to be identified and established by the Debtors (the "Deposit"). • <u>Binding Effect</u>. By submitting its Bid, each Bidder is agreeing, and shall be deemed to have agreed, to abide by and honor the terms of the Bid Procedures and to refrain from submitting a Qualified Bid or seeking to reopen the Auction after conclusion of the Auction. • <u>Time Frame for Closing</u>. A Bid by a Bidder must be reasonably likely to be consummated, if selected as the Successful Bid, within a time frame acceptable to the Debtors but in no event later than sixty (60) days following the Petition Date.

Provision	Summary
	A Bid received before the Bid Deadline will be considered a “<u>Qualified Bid</u>” and each Bidder that submits a Qualified Bid will be considered a “<u>Qualified Bidder</u>” if the Debtors determine in consultation with the Consultation Parties that such Bid meets the requirements above for a Bid as set forth in these Bid Procedures. The Debtors may also waive or modify any of the above requirements in the exercise of their reasonable business judgment after consultation with the Consultation Parties. The Debtors will notify each Qualified Bidder whether such party is a Qualified Bidder on January 23, 2025 (the “<u>Designation of Qualified Bid Deadline</u>”) and shall provide each Qualified Bidder, including the Stalking Horse Bidder, with a copy of the Baseline Bid no later than 4:00 p.m. (prevailing Eastern Time) on the day before the Auction commences. Upon determination that any Bid is not a Qualified Bid, the Debtors shall notify such Bidder of such determination forthwith, but in any event not later than the Designation of Qualified Bid Deadline, and shall provide such bidder with the basis for such determination. In the event that such Bid is determined not to be a Qualified Bid, the Debtors may allow the Bidder until the commencement of the Auction to modify its Bid to increase the Purchase Price or otherwise improve the terms of the Bid in order to comply with the requirements for Qualified Bids as set forth herein. To the extent there is any dispute regarding whether a Bidder is a Qualified Bidder, such dispute may be raised with the Bankruptcy Court on an expedited basis. If any Bid is determined not to be a Qualified Bid, the Debtors will refund such Bidder’s Deposit promptly after the Bid Deadline. Between the date that the Debtors notify a Bidder that it is a Qualified Bidder and the Auction date, the Debtors may discuss, negotiate, or seek clarification of any Qualified Bid from a Qualified Bidder. Without the prior written consent of the Debtors, in consultation with the Consultation Parties, a Qualified Bidder may not modify, amend, or withdraw its Qualified Bid, except for proposed amendments to increase its Purchase Price, or otherwise improve the terms of the Qualified Bid, during the period that such Qualified Bid remains binding as specified in these Bid Procedures. The Stalking Horse Bidder shall be deemed a Qualified Bidder at all times, and the Stalking Horse APA shall be a Qualified Bid. Prior to 4:00 p.m. (prevailing Eastern Time) on the day before the Auction (the “<u>Baseline Bid Deadline</u>”), the Debtors and their advisors will evaluate Qualified Bids and identify the Qualified Bid that is, in the Debtors’ reasonable business judgment, the highest or otherwise best bid (the “<u>Baseline Bid</u>” and the Bidder making such Baseline Bid, the “<u>Baseline Bidder</u>”), and shall notify the Stalking Horse Bidder and all Qualifying Bidders of the Baseline Bid no later than the Baseline Bid Deadline.

Provision	Summary
Good Faith Deposit (Local Rule 6004-1(b)(iv)(F))	Each Qualified Bid must be accompanied by a cash deposit in the amount of 10% of the total Purchase Price to be held in an escrow account to be identified and established by the Debtors (the “Deposit”). See Bid Procedures § B.3(viii).
Other Highlighted Terms Under Del. Bankr. L.R. 6004-1(b)(iv)	<u>Private Sale/No Competitive Bidding:</u> The Sale is being conducted pursuant to the competitive bidding process detailed in the Motion. <u>Credit Bid:</u> Any Qualified Bidder who has a valid, undisputed, and perfected lien on any of the Debtors’ assets (a “Secured Creditor”) shall have the right to credit bid all or a portion of such Secured Creditor’s allowed secured claims pursuant to section 363(k) of the Bankruptcy Code; <i>provided that</i> a credit bid shall not constitute a Qualified Bid if the bid does not include a cash component sufficient to pay in full, in cash, all Bid Protections (as defined below) and all claims for which there are valid, perfected, and unavoidable liens on any of the Debtors’ assets included in such bid that are senior in priority to those of the party seeking to credit bid (unless such senior lien holder consents to alternative treatment). All rights to credit bid shall be subject to the terms of the Interim DIP Order. For the avoidance of doubt, a Secured Creditor shall be required to provide cash consideration in respect of any assets to be acquired but that do not constitute collateral securing such Secured Creditor’s claim(s), if any. Notwithstanding anything to the contrary herein, any Bid submitted by the Prepetition Facility Lender or the DIP Lender (or their respective designee), as applicable, shall be deemed a Qualified Bid notwithstanding the requirements set forth in Section B.3 of the Bid Procedures (including, for the avoidance of doubt, the Deposit, which shall not be applicable to any credit bid by the Prepetition Facility Lender or the DIP Lender). See Bid Procedures § B.4. Relief from Bankruptcy Rule 6004(h): As noted in this Motion, the Debtors are requesting relief from the 14-day stay imposed by Bankruptcy Rules 6004(h) and 6006(d).

Provision	Summary
Stalking Horse Bid Protections (Local Rule 6004-1(c)(i)(C))	To provide the Stalking Horse Bidder with an incentive to participate in a competitive process and to compensate the Stalking Horse Bidder for (i) performing substantial due diligence and incurring the expenses related thereto and (ii) entering into the Stalking Horse APA with the knowledge and risk that arises from participating in the sale and subsequent bidding process, in the event of a Qualifying Termination (as defined in the Stalking APA), the Debtors will pay the Stalking Horse Bidder (at the time required under the Stalking Horse APA) a break-up fee in the amount equal to three (3) percent of the Purchase Price (the “<u>Break-Up Fee</u>”) and reimburse the Stalking Horse Bidder for its reasonable and documented expenses in conjunction with the Stalking Horse Bid up to a maximum amount of \$550,000 (the “<u>Expense Reimbursement</u>,” and together with the Break-Up Fee, the “<u>Bid Protections</u>”). See Bid Procedures § B.5.
Bidding Increments (Local Rule 6004-1(c)(i)(C)(3))	<u>Overbid.</u> Each Bid (i) must propose a Purchase Price equal to or greater than the sum of (a) the value of the Stalking Horse Bid, as determined by the Debtors in consultation with the Consultation Parties (including the Break-Up Fee and the Expense Reimbursement (each as defined below)) and (b) an initial overbid of at least \$250,000; (ii) must be on terms that are not materially more burdensome than the terms of the Stalking Horse Bid; and (iii) must obligate the Bidder to pay, to the extent provided in the Agreement, all liabilities and expenses that the Stalking Horse Bidder under the Agreement has agreed to pay, including any Assumed Liabilities (as defined in the Stalking Horse APA). See Bid Procedures § B.3(iv)(D) <u>Minimum Overbid Increment:</u> Any Overbid after the Baseline Bid shall be made in increments of at least <u>\$250,000</u> in cash, cash equivalents, or such other consideration that the Debtors, in consultation with the Consultation Parties, deem equivalent (the “<u>Minimum Overbid Increment</u>”). For the avoidance of doubt, in calculating the amount of any Overbid made by the Stalking Horse Bidder, the Stalking Horse Bidder shall be entitled to a credit in the amount of the Bid Protections. See Bid Procedures § C.3.
Modifications of Bidding and Auction Procedures (Local Rule 6004-1(c)(i)(D))	The Debtors reserve their rights to modify these Bid Procedures in their reasonable business judgment and in consultation with the Consultation Parties in any manner that will best promote the goals of the bidding process, at or prior to the Auction, subject to the rights of the Stalking Horse Bidder. See Bid Procedures § H.

Provision	Summary
Closing with Alternative Backup Bidders (Local Rule 6004-1(c)(i)(E))	Notwithstanding anything in the Bid Procedures to the contrary, if an Auction is conducted, the party(ies) with the second highest or otherwise second best Qualified Bid (or combination of Qualified Bids) at the Auction, as determined by the Debtors, in the exercise of their business judgment and in consultation with the Consultation Parties and with the consent of the Prepetition Facility Lender, shall be designated by the Debtors as backup bidder (the “<u>Back-Up Bidder</u>”). The Back-Up Bidder shall be required to keep its initial Qualified Bid (or if the Back-Up Bidder submitted one or more Overbids at the Auction, its final Overbid) (the “<u>Back-Up Bid</u>”) open and irrevocable until two (2) business days after the closing of the sale of the Purchased Assets (the “<u>Outside Back-Up Date</u>”); <i>provided</i>, that if the Stalking Horse Bid is selected as the Back-Up Bid, it must remain irrevocable only for so long as is required under the Stalking Horse APA. See Bid Procedures § C.3(e).
Provisions Governing the Auction (Local Rule 6004-1(c)(ii))	The Auction, if necessary, will commence on January 27, 2025 at 10:00 a.m. (prevailing Eastern Time) at the offices of Latham & Watkins LLP, 1271 Avenue of the Americas, New York, New York 10020, telephonically, or by video via Zoom, or such later time or other place as the Debtors shall notify all Qualified Bidders. Only the Stalking Horse Bidder and other Qualified Bidders will be entitled to make any Bids at the Auction. The Stalking Horse Bidder and other Qualified Bidders participating at the Auction shall appear themselves or through a duly authorized representative. Only the Debtors, the Stalking Horse Bidder, any participating Qualified Bidders, the Consultation Parties, and any creditor of the Debtors, together with the professional advisors to each of the foregoing parties, may attend the Auction; <i>provided</i> that any of the Debtors’ creditors must provide two (2) days’ written notice to counsel to the Debtors of their intent to attend the Auction. See Bid Procedures § C.1.

30. Importantly, the Bid Procedures recognize the Debtors’ fiduciary obligations to maximize the value of their Assets and, as such, do not impair the Debtors’ ability to consider all Qualified Bids. Additionally, as noted above, the Bid Procedures preserve the Debtors’ rights to modify the Bid Procedures as necessary or appropriate to maximize the value of the Assets for the benefit of the Debtors’ estates.

Form and Manner of Sale Notice

31. On or within two (2) business days after the entry of the Bid Procedures Order, the Debtors (or their agent) shall serve the Sale Notice by first-class mail upon: (i) the Office of the

United States Trustee for the District of Delaware (the “**U.S. Trustee**”), 844 King Street, Suite 2207, Lockbox 35, Wilmington, DE 19801, Attn: Jane Leamy (Jane.M.Leamy@usdoj.gov); (ii) the holders of the thirty (30) largest, non-insider unsecured claims against the Debtors, if no official committee of unsecured creditors has been appointed; (iii) counsel to the official committee of unsecured creditors, if one has been appointed; (iv) counsel to the Stalking Horse Bidder; (v) counsel to the DIP Lender, the Prepetition Facility Lender, and the Consenting Parent; (vi) all parties known by the Debtors to assert a lien on any of the Assets; (vii) all entities reasonably known to have expressed an interest in a transaction with respect to any of the Assets during the past three (3) months; (viii) the United States Attorney’s Office for the District of Delaware; (ix) the Internal Revenue Service; (x) all state and local taxing authorities with an interest in the Assets; (xi) the offices of the attorneys general for the states in which the Debtors operate; (xii) all other governmental agencies with an interest in the Sale and transactions proposed thereunder; (xiii) the office of the secretary of state in each state in which the Debtors operate or are organized; (xiv) all environmental authorities having jurisdiction over any of the Assets; (xv) all other parties known or reasonably believed to have asserted an interest in the Assets; (xvi) the counterparties to the Assigned Contract (the “**Assumed Contract Counterparties**”); (xvii) the Debtors’ insurance carriers; (xviii) all known creditors of the Debtors; (xix) all known holders of equity interests in the Debtors; (xx) any party that has requested notice pursuant to Bankruptcy Rule 2002; and (xxi) to the extent not included above, all parties in interest listed on the Debtors’ creditor matrix

32. In addition, the Debtors propose to publish the notice attached hereto as **Exhibit D** (the “**Publication Notice**”) once in each of the *USA Today* or similar nationally circulated news publication and the *Financial Times* or similar publication circulated in the United Kingdom as

soon as practicable after entry of the Bid Procedures Order. Finally, the Debtors will post a copy of the Sale Notice at the website maintained by the Debtors' proposed Claims and Noticing Agent, Omni Agent Solutions, Inc., at <https://omniagentsolutions.com/FirstMode>.

Summary of the Assumption Procedures

33. The Debtors are also seeking approval of certain procedures to facilitate the fair and orderly assumption and assignment of the Assigned Contracts in connection with the Sale. Pursuant to the Bid Procedures Order, notice of the proposed assumption and assignment of the Assigned Contracts to the Successful Bidder, the proposed cure amounts related thereto, and the rights, procedures, and deadlines for objecting thereto, shall be provided in the Assumption Notice to be sent to the applicable Assumed Contract Counterparties prior to the Assumption Notice Deadline. Because the Bid Procedures Order sets forth the Assumption Procedures in detail, they are not restated herein. Generally, however, the Assumption Procedures: (i) outline the process by which the Debtors shall serve notice to all Assumed Contract Counterparties regarding the proposed assumption and assignment and related cure amounts, if any, informing such parties of their right, and the procedures, to object thereto, and (ii) establish objection and other relevant deadlines and the manner for resolving disputes relating to the assumption and assignment of the Assigned Contracts to the extent necessary.

BASIS FOR RELIEF

A. The Relief Sought in the Bid Procedures Order Is in the Best Interests of the Debtors' Estates and Should Be Approved

34. The Debtors filed these Chapter 11 Cases to pursue a value-maximizing sale for the benefit of the Debtors' stakeholders. The Stalking Horse APA is the product of a three-plus month prepetition marketing process, during which the Debtors and PJT contacted nineteen (19) potential buyers, executed nine (9) NDAs, and received one actionable initial indication of interest from

Cummins. The Debtors believe that the most likely bidders for the Assets have already been contacted as part of the prepetition marketing process and had ample opportunity to engage in the process and conduct appropriate diligence. In light of the extensive prepetition marketing process, the Debtors believe that the Bid Procedures, and in particular the timeline contemplated therein, will ensure a value-maximizing sale while, at the same time, providing an achievable path towards an orderly resolution of these Chapter 11 Cases and complying with the milestones set forth in the RSA.

1. The Proposed Notice of the Bid Procedures and the Sale Process Is Appropriate

35. The Debtors seek authority to sell the Assets through an Auction and related sale process, subject to the Debtors' right to seek an alternative course of action to maximize the value of their estates. The Debtors and their advisors have conducted and will continue to conduct an extensive marketing process. PJT has a list of "**Contact Parties**" who will receive a copy of the "**Information Package**" (both as defined in the Bid Procedures). The list of Contact Parties shall encompass those parties whom the Debtors believe may be interested in pursuing a Sale, or whom the Debtors reasonably believe may have the financial resources to consummate such a transaction. The Bid Procedures are designed to elicit bids from one or more parties and to encourage a robust auction of the Assets, thus maximizing the value of the Debtors' estates for the benefit of their creditors and other stakeholders.

36. The Debtors respectfully submit that the Sale Notice is reasonably calculated to provide parties with timely and proper notice of the proposed Sale as required by Bankruptcy Rule 2002(a) and (c), including: (i) the date, time, and place of the Auction (if one is held); (ii) the Bid Procedures and certain dates and deadlines related thereto; (iii) the deadline for filing objections to the Sale of the Assets to the Stalking Horse Bidder and entry of the Sale Order, and the date,

time, and place of the Sale Hearing; (iv) instructions for promptly obtaining a copy of the Stalking Horse APA. No other or further notice of the Sale shall be required.

37. The Sale Notice, coupled with the notice of this Motion and the related hearing to consider entry of the Bid Procedures Order, the Assumption Notice, and publication of the Publication Notice, as provided for herein, constitutes good and adequate notice of the Sale and the proceedings with respect thereto in compliance with, and satisfaction of, the applicable requirements of Bankruptcy Rule 2002. The Debtors further submit the proposed notice procedures are designed to maximize the chance of obtaining the broadest possible participation in the Debtors' marketing process, while minimizing costs to the estates. Accordingly, the Debtors respectfully request the Court find the proposed notice procedures set forth in this Motion are sufficient, and no other or further notice of the Bid Procedures, Auction, Sale, or Sale Hearing is required.

2. The Bid Procedures Are Appropriate and Will Maximize Value

38. Bid procedures should be approved when they provide a benefit to the debtor's estate by maximizing the value of the debtor's assets. *See In re Edwards*, 228 B.R. 552, 361 (Bankr. E.D. Pa. 1998) ("The purpose of procedural bidding orders is to facilitate an open and fair public sale designed to maximize value for the estate."). Courts have made clear that a debtor's business judgment is entitled to substantial deference with respect to the procedures to be used in selling an estate's assets. *See, e.g., In re Schipper*, 933 F.2d 513, 515 (7th Cir. 1991) ("Under Section 363, the debtor in possession can sell property of the estate . . . if he has an 'articulated business justification'") (internal citations omitted); *In re Martin*, 91 F.3d 389, 395 (3d Cir. 1996) (quoting *Schipper*); *In re Montgomery Ward Holding Corp.*, 242 B.R. 147, 153 (D. Del. 1999) (same); *see also In re Integrated Resources, Inc.*, 147 B.R. 650, 656-57 (S.D.N.Y. 1992) (noting that bid procedures that have been negotiated by a trustee are to be reviewed in accordance with

the deferential “business judgment” standard, under which such procedures and arrangements are “presumptively valid”).

39. The paramount goal in any proposed sale of property of the estate is to maximize the proceeds received by the estate. *See Mushroom Transp. Co., Inc.*, 382 F.3d 325, 339 (3d Cir. 2004); *Official Comm. of Unsecured Creditors of Cybergenics, Corp. v. Chinery*, 330 F.3d 548, 573 (3d Cir. 2003); *see also In re Food Barn Stores, Inc.*, 101 F.3d 558, 564-65 (8th Cir. 1997) (in bankruptcy sales, “a primary objective of the Code [is] to enhance the value of the estate at hand”); *Integrated Resources*, 147 B.R. at 659 (“[I]t is a well-established principle of bankruptcy law that the objective of the bankruptcy rules and the trustee’s duty with respect to such sales is to obtain the highest price or greatest overall benefit possible for the estate.”) (internal citations omitted); *Edwards*, 228 B.R. at 561.

40. To that end, courts uniformly recognize that procedures intended to enhance competitive bidding are consistent with the goal of maximizing the value received by the estate and therefore appropriate in the context of bankruptcy transactions. *See, e.g., In re O’Brien Envtl. Energy, Inc.*, 181 F.3d 527, 537 (3d Cir. 1999); *Integrated Resources*, 147 B.R. at 659 (bid procedures “are important tools to encourage bidding and to maximize the value of the debtor’s assets”); *In re Fin. News Network, Inc.*, 126 B.R. 152, 156 (Bankr. S.D.N.Y.1991) (“court-imposed rules for the disposition of assets . . . [should] provide an adequate basis for comparison of offers, and [should] provide for a fair and efficient resolution of bankrupt estates”).

41. The Debtors believe the proposed Bid Procedures will establish the parameters under which the value of the Sale may be tested at the Auction. The Bid Procedures will increase the likelihood the Debtors will receive the greatest possible consideration because they will ensure a competitive and fair bidding process.

42. The Debtors believe that the proposed Bid Procedures will promote active bidding from seriously interested parties and will elicit the highest or otherwise best offers available for the Assets. The proposed Bid Procedures will enable the Debtors to conduct the Sale both in accordance with the Milestones and in a controlled, fair, and open fashion that will encourage participation by financially capable bidders who will offer the best package for the Assets and who can demonstrate the ability to close the transaction. Further, even though the sale process in the Bid Procedures is expeditious, the proposed timeline is consistent with timelines in bid procedures previously approved by this Court and others.⁹

43. Specifically, the proposed Bid Procedures contemplate an open auction process with minimum barriers to entry and provide potential bidding parties with sufficient time to perform due diligence and acquire the information necessary to submit a timely and well-informed bid.

⁹ See e.g., *In re iMedia Brands*, Case No. 23-10852 (KBO) (Bankr. D. Del. Aug. 3, 2023) [Docket No. 345] (approving bid procedures containing a bid deadline 37 days after the petition date, an auction 38 days after the petition date, and a sale hearing 42 days after the petition date); *In re Tritex Int'l Inc.*, Case No. 23-10520 (TMH) (Bankr. D. Del. May 19, 2023) [Docket No. 114] (approving bid procedures containing a bid deadline 27 days after the petition date, an auction 28 days after the petition date, and a sale hearing 35 days after the petition date); *In re Virgin Orbit Holds., Inc.*, Case No. 23-10405 (KBO) (Bankr. D. Del. May 1, 2023) [Docket No. 201] (approving bid procedures containing a bid deadline 38 days after the petition date, an auction 41 days after the petition date, and a sale hearing 47 days after the petition date); *In re Tricida, Inc.*, Case No. 23-10024 (JTD) (Bankr. D. Del. Jan. 26, 2023) [Docket No. 100] (approving bid procedures containing a bid deadline 30 days after the petition date, an auction 35 days after the petition date, and a sale hearing 41 days after the petition date); *In re Bed Bath & Beyond, Inc.*, Case No. 23-13359 (VFP) (Bankr. D.N.J. Apr. 25, 2023) [Docket No. 92] (approving bid procedures containing a bid deadline 35 days after the petition date, an auction 40 days after the petition date, and a sale hearing 45 days after the petition date); *In re Impel Pharmaceuticals Inc.*, Case No. 23-80016 (SGJ) (Bankr. N.D. Tex. Jan. 11, 2024) [Docket No. 127] (approving bid procedures containing a bid deadline 34 days after the petition date, an auction 40 days after the petition date, and a sale hearing 43 days after the petition date); *In re Orbital Infrastructure Grp., Inc.*, Case No. 23-90763 (DRJ) (Bankr. S.D. Tex. Sept. 20, 2023) [Docket No. 131] (approving bid procedures containing a bid deadline 40 days after the petition date, an auction 41 days after the petition date, and a sale hearing 42 days after the petition date); *In re AppHarvest Prods., LLC*, Case No. 23-90745 (DRJ) (Bankr. S.D. Tex. Aug. 25, 2023) [Docket No. 298] (approving bid procedures containing a bid deadline 33 days after the petition date, an auction 35 days after the petition date, and a sale hearing 42 days after the petition date); *In re Vice Grp. Hold. Inc.*, Case No. 23-10738 (JPM) (Bankr. S.D.N.Y. May 30, 2023) [Docket No. 80] (approving bid procedures containing a bid deadline 36 days after the petition date, an auction 38 days after the petition date, and a sale hearing 39 days after the petition date).

44. At the same time, the proposed Bid Procedures provide the Debtors with a robust opportunity to consider competing bids and select the highest or otherwise best offer for the completion of the Sale. Additionally, entering into the Stalking Horse APA with the Stalking Horse Bidder ensures that the Debtors obtain fair market value by setting a minimum purchase price for the Purchased Assets that will be tested in the marketplace. As such, creditors of the Debtors' estates can be assured the consideration obtained will be fair and reasonable and at or above the market.

45. Thus, the Bid Procedures are reasonable, appropriate, and within the Debtors' sound business judgment under the circumstances because the Bid Procedures are designed to maximize the value to be received by the Debtors' estates.

3. The Bid Protections are Appropriate

46. As set forth more fully in the Parr Declaration, the Debtors believe that the Bid Protections are fair and reasonable under the circumstances. The Bid Protections provided for in the Stalking Horse Bid were negotiated at arms' length and in good faith and were a necessary inducement to the Stalking Horse Bidder's participation in the proposed sale transaction and willingness to subject its bid to a competitive auction process. As discussed below, the Stalking Horse Bid sets a "floor" value for the Purchased Assets that maximizes the likelihood that the Debtors will receive the highest or otherwise best offer for the Assets to the benefit of the Debtors' estates.

47. Approval of the Bid Protections is governed by standards for determining the appropriateness of bid protections in the bankruptcy context. Courts have identified at least two (2) instances in which bid protections may benefit the estate. First, a break-up fee or expense reimbursement may be necessary to preserve the value of a debtor's 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.” *In re O’Brien Envtl. Energy, Inc.*, 181 F.3d 527, 533 (3d Cir. 1999). Second, if the availability of break-up fees and expense reimbursements were to induce 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 id.*; *see also In re Reliant Energy Channel View LP*, 594 F.3d 200, 206-08 (3d Cir. 2010) (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).

48. In *O’Brien*, the Third Circuit reviewed the following nine (9) factors set forth by the lower court as relevant in deciding whether to award a termination fee:

- (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 “sale configuration mode” to attract other bidders to the auction;
- (e) the ability of the request for a break-up fee to serve 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 maximum value of the debtor’s estate;
- (g) the support of the principal secured creditors and creditors’ committees of the 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 In re O’Brien Envtl. Energy, Inc., 181 F.3d at 536.

49. While none of the factors is dispositive, an application of the facts to several of such factors supports the approval of the Bid Protections. In particular, the Bid Protections are

necessary to preserve the value of the Debtors' estates because they will enable the Debtors to establish an adequate floor value for the Purchased Assets and to therefore require that competing bids be materially higher or otherwise better than the Stalking Horse Bid—a clear benefit to the Debtors' estates. The Debtors believe that the Stalking Horse Bidder would not agree to act as a stalking horse without the Bid Protections given the substantial time and expense it has incurred in connection with negotiating definitive documentation and the risk that it will be outbid at the Auction. Without the Bid Protections, the Debtors might lose the opportunity to obtain the highest or otherwise best offer for the Purchased Assets and would certainly lose the downside protection that will be afforded by the existence of the Stalking Horse Bidder. The bid of the Stalking Horse Bidder sends a message to all potential bidders that the Purchased Assets are at least worth the Purchase Price and puts pressure on potential competing bidders to “put their best foot forward” in formulating their bids. Therefore, without the benefit of the bid of the Stalking Horse Bidder, the bids received at auction for the Purchased Assets could be substantially lower than the bid offered by the Stalking Horse Bidder.

50. In addition, as set forth in the Parr Declaration, the Bid Protections were the product of hard-fought negotiations between the Debtors and the Stalking Horse Bidder, and their respective advisors, in which the Debtors sought to both minimize the magnitude of Bid Protections payable and limit the circumstances under which they are payable. The resulting Bid Protections – consisting of a Break-Up Fee worth three (3) percent of the Purchase Price and Expense Reimbursement for reasonable and documented expenses in conjunction with the Stalking Horse Bid up to a maximum amount of \$550,000 – fall within the range of stalking horse bid protections approved in this District and others. *See, e.g., In re iSun, Inc.*, Case No. 24-11144 (TMH) (Bankr. D. Del. July 10, 2024) [Docket No. 183] (approving break-up fee equal to

approximately 5%); *In re Clovis Oncology, Inc.*, Case No. 22-11292 (JKS) (Bankr. D. Del. Jan. 24, 2022) [Docket No. 100] (approving a break-up fee equal to \$6 million and \$2 million in expense reimbursement); *In re Teligent, Inc.*, Case No. 21-11332 (BLS) (Bankr. D. Del. Dec. 15, 2021) (approving bid protections totaling 5.2% of stalking horse bid); *In re ActiveCare, Inc.*, Case No. 18-11659 (LSS) (Bankr. D. Del. Aug. 17, 2018) (approving bid protections totaling 7.5% of stalking horse bid); *In re Orexigen Therapeutics, Inc.*, Case No. 18-10518 (KG) (Bankr. D. Del. Apr. 23, 2018) (approving bid protections totaling 7.33% of stalking horse bid); *In re Verengo, Inc.*, Case No. 16-12098 (BLS) (Bankr. D. Del. Oct. 17, 2016) (approving 4% breakup fee with 1.5% expense reimbursement for total of 5.5% of stalking horse bid); *In re Nirvanix, Inc.*, Case No. 13-12595 (BLS) (Bankr. D. Del. Oct. 23, 2013) (approving bid protections totaling 11% of stalking horse bid); *In re First Place Fin. Corp.*, Case No. 12-12961 (BLS) (Bankr. D. Del. Nov. 26, 2012) (approving bid protections totaling 6.6% of transaction value); *In re Hub Holding Corp.*, Case No. 09-11770 (PJW) (Bankr. D. Del. June 30, 2009) (approving bid protections totaling 6.43% of stalking horse bid); *In re AppHarvest Prods., LLC*, Case No. 23-90745 (DRJ) (Bankr. S.D. Tex. Aug. 25, 2023) [Docket No. 298] (approving a 3% percent break-up fee and an expense reimbursement of \$500,000); *In re Instant Brands Acquisition Holds., Inc.*, Case No. 23-90716 (DRJ) (Bankr. S.D. Tex. July 12, 2023) [Docket No. 253] (approving a 3% percent break-up fee and an expense reimbursement of \$500,000).

51. Finally, payment of the Bid Protections in the context of a sale to another purchaser will not diminish the Debtors' estates to the extent they become payable, as the Bid Procedures require that any competing bid must exceed the Stalking Horse Bid by an amount in excess of the Break-Up Fee and Expense Reimbursement. Accordingly, based on the foregoing, the Debtors

submit that the Bid Protections reflect a sound business purpose, are fair and appropriate under the circumstances, and should be approved.

4. The Minimum Overbid Increment Is Appropriate

52. One important component of the proposed Bid Procedures is the “Overbid” provision. Once the Debtors, in consultation with the Consultation Parties, determine the Baseline Bid (which shall equal or exceed the value of the Stalking Horse APA, including the Bid Protections, plus \$250,000) and hold the Auction, bidding on the Assets must be in Minimum Overbid Increments of at least **\$250,000** in cash, cash equivalents, or such other consideration that the Debtors, in consultation with the Consultation Parties, deem equivalent (the “**Minimum Overbid Increment**”). For the avoidance of doubt, in calculating the amount of any Overbid made by the Stalking Horse Bidder, the value of the Bid Protections and all Assumed Liabilities shall be included.

53. The Debtors believe that such Minimum Overbid Increment is reasonable under the circumstances and will enable the Debtors to maximize the value received for the Assets while limiting any potential chilling effect in the marketing process.

5. The Proposed Notice Procedures for the Assigned Contracts and the Identification of Related Cure Amounts Are Appropriate

54. As set forth above, the Sale contemplates the potential assumption and assignment of the Assigned Contracts to the Successful Bidder. In connection with this process, the Debtors believe it is necessary to establish a process by which: (i) the Debtors and the Assumed Contract Counterparties can reconcile cure obligations, if any, in accordance with Sections 105(a) and 365 of the Bankruptcy Code, and (ii) such counterparties can object to the potential assumption and assignment of the Assigned Contracts and/or related cure amounts.

55. The Bid Procedures specify the process by which the Debtors will serve Assumption Notices and set forth the procedures and deadline for Assumed Contract Counterparties to Assigned Contracts to file and serve Assumed Contract Objections and Post-Auction Objections.

56. Except as may otherwise be agreed to in the Successful Bid or by the parties to an Assigned Contract, at the closing of the Sale, the Successful Bidder shall cure those defaults under the Assigned Contracts that need to be cured in accordance with Section 365(b) of the Bankruptcy Code, by (i) payment of the undisputed cure amount (the “**Cure Amount**”) and/or (ii) reserving amounts with respect to any disputed cure amounts.

57. As set forth in the Bid Procedures Order, the Debtors also request, to the fullest extent permitted by law, that any party that fails to object to the proposed assumption and assignment of any Assigned Contract be deemed to consent to the assumption and assignment of the applicable Assigned Contract pursuant to Section 365 of the Bankruptcy Code on the terms set forth in the Sale Order, along with the Cure Amounts identified in the Assumption Notice. See, e.g., *In re Tabone, Inc.*, 175 B.R. 855, 858 (Bankr. D.N.J. 1994) (by not objecting to the Motion, a creditor is deemed to consent); *Pelican Homestead v. Wooten (In re Gabel)*, 61 B.R. 661, 667 (Bankr. W.D. La. 1985) (same).

58. The Debtors believe the Assumption Procedures are fair and reasonable, provide sufficient notice to the Assumed Contract Counterparties of the potential assumption and assignment of their Assigned Contracts, and provide certainty to all parties in interest regarding their obligations and rights with respect thereof. Accordingly, the Debtors request this Court approve the Assumption Procedures set forth in the Bid Procedures Order.

B. Approval of the Proposed Sale Is Appropriate and in the Best Interests of the Estates

1. The Sale of the Assets Should Be Authorized Pursuant to Bankruptcy Code Section 363 as a Sound Exercise of the Debtors' Business Judgment.

59. Section 363(b)(1) of the Bankruptcy Code provides that a debtor, “after notice and a hearing, may use, sell or lease, other than in the ordinary course of business, property of the estate.” 11 U.S.C. § 363(b)(1). A sale of the debtor’s assets should be authorized pursuant to Section 363 if a sound business purpose exists for the proposed transaction. *See, e.g., Meyers v. Martin (In re Martin)*, 91 F.3d 389, 395 (3d Cir. 1996); *In re ICL Holding Co.*, 802 F.3d 547, 551 (3d Cir. 2015) (finding that bankruptcy courts use the “sound business purpose” test to decide approval of sales under section 363) (citing *In re Montgomery Ward Holding Corp.*, 242 B.R. 147, 153-54 (Bankr. D. Del. 1999)); *Chamberlain v. Stanziale (In re Chamberlain)*, 545 B.R. 827, 844 (D. Del. 2016) (“Transactions under Section 363 must be based upon the sound business judgment of the trustee.”); *In re Del. & Hudson Ry. Co.*, 124 B.R. 169, 174 (Bankr. D. Del. 1991); *see also In re Schipper*, 933 F.2d 513, 515 (7th Cir. 1991) (“Under Section 363, the debtor in possession can sell property of the estate outside the ordinary course of business if: he has an ‘articulated business justification’”); *Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1070 (2d Cir. 1983); *In re Telesphere Commc’ns, Inc.*, 179 B.R. 544, 552 (Bankr. N.D. Ill. 1999).

60. Courts typically consider the following factors in determining whether a proposed sale satisfies this standard: (i) whether a sound business justification exists for the sale, (ii) whether adequate and reasonable notice of the sale was given to interested parties, (iii) whether the sale will produce a fair and reasonable price for the property, and (iv) whether the parties have acted in good faith. *See Del. & Hudson*, 124 B.R. at 176; *In re Phoenix Steel Corp.*, 82 B.R. 334, 33536 (Bankr. D. Del. 1987).

61. A sound business purpose for the sale of a debtor's assets outside the ordinary course of business may be found where such a sale is necessary to preserve the value of assets for the estates, creditors, or interest holders. *See, e.g., In re Abbotts Dairies of Pa, Inc.*, 788 F.2d 143 (3d Cir. 1986); *In re Lionel Corp.*, 722 F.2d 1063 (2d Cir. 1983).

62. “Where the debtor articulates a reasonable basis for its business decisions (as distinct from a decision made arbitrarily or capriciously), courts will generally not entertain objections to the debtor's conduct.” *Comm. of Asbestos-Related Litigants and/or Creditors v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 60 B.R. 612, 616 (Bankr. S.D.N.Y. 1986); *see also In re Chamberlain*, 545 B.R. at 844 (same) (citing *In re Filene's Basement, LLC*, 2014 Bankr. LEXIS 2000, *39-40 (Bankr. D. Del. April 29, 2014)). There is a presumption that “in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action was in the best interests of the company.” *In re Integrated Res.*, 147 B.R. at 656 (quoting *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985)); *see also In re S.N.A. Nut Co.*, 186 B.R. 98, 102 (Bankr. N.D. Ill. 1995) (“The business judgment rule is a presumption that in making the business decision the directors of a corporation acted on an informed basis, in good faith, and in the honest belief that the action was in the best interests of the company.”) (citations omitted); *In re Filene's Basement, LLC*, No. 11-13511 (KJC), 2014 WL 1713416, at *12 (Bankr. D. Del. Apr. 29, 2014) (“If a valid business justification exists, then a strong presumption follows that the agreement at issue was negotiated in good faith and is in the best interests of the estate.”) (citations omitted). Thus, if a debtor's actions satisfy the business judgment rule, then the transaction in question should be approved under Section 363(b)(1) of the Bankruptcy Code. Indeed, when applying the business judgment standard, courts show great deference to a debtor's business decisions. *See Pitt v. First Wellington Canyon Assocs. (In re First*

Wellington Canyon Assocs.), 1989 WL 106838, at *3 (N.D. Ill. 1989) (“Under this test, the debtor’s business judgment . . . must be accorded deference unless shown that the bankrupt’s decision was taken in bad faith or in gross abuse of the bankrupt’s retained discretion.”).

63. The Debtors have a sound business justification for selling the Assets. As described in further detail in the First Day Declaration, the Debtors operate in a highly competitive and capital-intensive industry. The Debtors encountered operational headwinds that have been difficult to overcome given the Debtors’ current status as a growth-stage company. These challenges have been amplified by the Debtors’ difficulties in attracting new customers to strengthen revenue streams. In light of these challenges and the Debtors’ inability to secure new financing, the Debtors determined, in consultation with their advisors, that pursuing a sale of the Assets under section 363 of the Bankruptcy Code is the best available means to maximize the value of the Assets for the benefit of all stakeholders. The Debtors also believe the sale of substantially all of the Debtors’ Assets will preserve substantial value that would otherwise be lost if the Assets were sold on a stand-alone or liquidation basis.

64. The sale of the Assets will also be subject to competing bids, enhancing the Debtors’ ability to receive the highest or otherwise best value for the Assets. The value of the Assets, which has already been market-tested through an extensive prepetition sale process, will be further tested through the Auction conducted pursuant to and according to the Bid Procedures. Ultimately, the Successful Bid (as defined in the Bid Procedures), after being subject to a postpetition “market check” in the form of the Auction and accepted by the Debtors in the exercise of their reasonable business judgment, will constitute the highest or otherwise best offer for the Assets and at this time the Debtors believe will provide a greater recovery for their estates than any known or practically available alternative. *See, e.g., In re Trans World Airlines, Inc.*, No. 01-

00056, 2001 WL 1820326, at *4 (Bankr. D. Del. 2001) (while a “section 363(b) sale transaction does not require an auction procedure . . . the auction procedure has developed over the years as an effective means for producing an arm’s-length fair value transaction”). Consequently, the fairness and reasonableness of the consideration to be paid by the Successful Bidder ultimately will be demonstrated by adequate “market exposure” and an open and fair auction process—the best means for establishing whether a fair and reasonable price is being paid.

65. Thus, absent a change in circumstances that causes the Debtors to abandon the sale process, the Debtors submit the Successful Bidder’s purchase agreement will constitute the highest or otherwise best offer for the Assets and will provide greater value to the Debtors’ estates as compared to any other available alternative.¹⁰ As such, the Debtors’ determination to explore selling the Assets through an auction process and subsequently to enter into the asset purchase agreement with the Successful Bidder (to the extent the Successful Bidder is someone other than the Stalking Horse Bidder) will be a valid and sound exercise of the Debtors’ business judgment. The Debtors will submit evidence at the Sale Hearing to support these conclusions. Therefore, the Debtors request the Court make a finding the proposed Sale of the Assets is a proper exercise of the Debtors’ business judgment and is rightly authorized.

2. Adequate and Reasonable Notice of the Sale Will Be Provided

66. As described above, the Sale Notice will: (i) be served in a manner that provides sufficient notice of the date, time, and location of the Sale Hearing, (ii) inform parties in interest of the deadlines for objecting to the Sale or the assumption and assignment of the Assigned Contract, and (iii) otherwise include all information relevant to parties interested in or affected by

¹⁰ The Debtors reserve all rights to implement the sale in a manner that in their determination will maximize value for the estates.

the Sale. Significantly, the form and manner of the Sale Notice will have been approved by this Court pursuant to the Bid Procedures Order, after notice and a hearing, before it is served on parties in interest.¹¹

3. The Sale and Purchase Price Will Reflect a Fair-Value Transaction

67. It is well settled that, where there is a court-approved auction process, a full and fair price is presumed to have been obtained for the assets sold, as the best way to determine value is exposure to the market. *See Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 457 (1999). The Debtors will continue to market the Assets and solicit offers consistent with the Bid Procedures and Stalking Horse APA, including, without limitation, by providing potential Bidders with executed NDAs with access to the Data Room and requested information. In this way, the number of Bidders eligible to participate in the competitive auction process will be maximized. On the other hand, if no Auction is held because the Debtors do not receive any Qualified Bids, the Stalking Horse APA's Purchase Price conclusively will have been demonstrated to be fair value.

4. The Sale of the Assets Should Be Free and Clear of Interests Pursuant to Section 363(f) of the Bankruptcy Code

68. The Debtors further submit it is appropriate to sell the Assets free and clear of all liens, claims, encumbrances, and other interests (collectively, the "Interests") other than Permitted Liens and Assumed Liabilities (as such terms are defined in the Stalking Horse APA) pursuant to Section 363(f) of the Bankruptcy Code, with any such Interests attaching to the net sale proceeds of the Assets, as and to the extent applicable.

¹¹ Despite the condensed nature, the Debtors believe that the process set forth in the Bid Procedures is designed to provide interested parties with proper notice of the Sale. The Debtors believe that the filing of this Motion, coupled with the months-long prepetition marketing process, provides potential bidders appropriate notice of the Sale. *See In re Lucky Brand Dungarees, LLC*, Case No. 20-11768 (Bankr. D. Del. July 30, 2020) [Docket No. 251] (concluding that bid procedures with a similar sale process timeline provided proper notice of the sale).

69. Section 363(f) of the Bankruptcy Code permits a debtor to sell property free and clear of another party's interest in the property if (i) applicable nonbankruptcy law permits such a free and clear sale, (ii) the holder of the interest consents, (iii) the interest is a lien and the sale price of the property exceeds the value of all liens on the property, (iv) the interest is the subject of a bona fide dispute, or (v) the holder of the interest could be compelled in a legal or equitable proceeding to accept a monetary satisfaction of its interest. *See* 11 U.S.C. § 363(f).

70. Section 363(f) is drafted in the disjunctive. Thus, satisfaction of any of the requirements enumerated therein will suffice to permit the Debtors' Sale of the Assets free and clear of all Interests (*i.e.*, all liens, claims, rights, interests, charges, or encumbrances), except with respect to any interests that may be assumed liabilities under the applicable purchase agreement. *See In re Kellstrom Indus., Inc.*, 282 B.R. 787, 793 (Bankr. D. Del. 2002) (“[I]f any of five conditions are met, the debtor has the authority to conduct the sale free and clear of all liens.”); *see also In re Dundee Equity Corp.*, 1992 Bankr. LEXIS 436, at *12 (Bankr. S.D.N.Y. March 6, 1992) (“Section 363(f) is in the disjunctive, such that the sale free of the interest concerned may occur if any one of the conditions of § 363(f) have been met.”); *Citicorp Homeowners Servs., Inc. v. Eliot (In re Eliot)*, 94 B.R. 343, 345 (E.D. Pa. 1988) (same); *Michigan Employment Sec. Comm’n v. Wolverine Radio Co. (In re Wolverine Radio Co.)*, 930 F.2d 1132, 1147 n.24 (6th Cir. 1991) (stating § 363(f) of the Bankruptcy Code is written in the disjunctive; holding the court may approve the sale “free and clear” provided at least one of the subsections of Bankruptcy Code Section 363(f) has been satisfied).

71. The Debtors submit that, excluding Assigned Contracts, if any, the Assets may be sold free and clear of all Interests—all in accordance with at least one of the five conditions of Section 363(f). Consistent with Section 363(f)(2), subject to the terms of the Stalking Horse APA,

each of the parties holding liens on the Assets, if any, will consent, or absent any objection to this Motion, will be deemed to have consented to, the Sale and transfer of the Assets. Furthermore, any party holding a valid lien against the Assets will be adequately protected by having its liens, if any, attach to the sale proceeds received by the Debtors from the Sale of the Assets to the Successful Bidder, in the same order of priority, with the same validity, force, and effect such creditor had prior to such sale, subject to any order by this Court, and claims and defenses the Debtors and their estates may possess with respect thereto. Accordingly, Section 363(f) of the Bankruptcy Code authorizes the sale and transfer of the Assets free and clear of any such Interests.

5. The Assets and the Assigned Contracts Should Be Sold Free and Clear of Successor Liability

72. The proposed Sale Order provides the Purchaser shall not have any successor liability related to Seller or the Assets to the maximum extent permitted by law. Extensive case law establishes that claims against a winning bidder may be directed to the proceeds of a free and clear sale of property and may not subsequently be asserted against that buyer.

73. Although Section 363(f) of the Bankruptcy Code provides for the sale of assets “free and clear of any interests,” the term “any interest” is not defined anywhere in the Bankruptcy Code. *Folger Adam Security v. DeMatteis/MacGregor JV*, 209 F.3d 252, 257 (3d Cir. 2000). In the case of *In re Trans World Airlines, Inc.*, 322 F.3d 283, 288-89 (3d Cir. 2003), the Third Circuit specifically addressed the scope of the term “any interest.” The Third Circuit observed that while some courts have “narrowly interpreted that phrase to mean only in rem interests in property,” the trend in modern cases is towards “a more expansive reading of ‘interests in property’ which ‘encompasses other obligations that may flow from ownership of the property.’” *Id.* at 289 (citing 3 Collier on Bankruptcy 363.06[1]). As determined by the Fourth Circuit in *In re Leckie Smokeless Coal Co.*, 99 F.3d 573, 581-82 (4th Cir. 1996), a case cited approvingly and extensively by the

Third Circuit in *Folger*, the scope of Section 363(f) is not limited to *in rem* interests. Thus, the Third Circuit in *Folger* cited *Leckie* for the proposition that the debtors “could sell their assets under § 363(f) free and clear of successor liability that otherwise would have arisen under federal statute.” *Folger*, 209 F.3d at 258.

74. Courts have consistently held a buyer of a debtor’s assets pursuant to a Section 363 sale takes free from successor liability resulting from pre-existing claims. See *In re Trans World Airlines, Inc.*, 322 F.3d 283, 290 (3d Cir. 2002) (agreeing with *Collier’s* that “Section 363(f) permits the bankruptcy court to authorize a sale free of ‘any interest’ that an entity has in property of the estate.”); *In re NE Opco, Inc.*, 513 B.R. 871, 876 (Bankr. D. Del. 2014) (finding that “TWA establishes that successor liability claims may be barred by section 363(f) findings.”); *The Ninth Avenue Remedial Group v. Allis-Chalmers Corp.*, 195 B.R. 716, 732 (Bankr. N.D. Ind. 1996) (stating a bankruptcy court has the power to sell assets free and clear of any interest that could be brought against the bankruptcy estate during the bankruptcy); *MacArthur Co. v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 837 F.2d 89, 93-94 (2d Cir. 1988) (channeling of claims to proceeds consistent with intent of sale free and clear under Bankruptcy Code § 363(f)); *In re New England Fish Co.*, 19 B.R. 323, 329 (Bankr. W.D. Wash. 1982) (transfer of property in free and clear sale was free and clear of Title VII employment discrimination and civil rights claims of debtor’s employees); *In re Hoffman*, 53 B.R. 874, 876 (Bankr. D.R.I. 1985) (transfer of liquor license free and clear of any interest permissible even though the estate had unpaid taxes); *American Living Systems v. Bonapfel (In re All Am. of Ashburn, Inc.)*, 56 B.R. 186, 190 (Bankr. N.D. Ga. 1986) (product liability claims precluded from being asserted against his successor in a sale of assets free and clear); *WBQ P’ship v. Virginia Dept. of Medical Assistance Services (In re*

WBQ P'ship), 189 B.R. 97, 104-05 (Bankr E D. Va. 1995) (Commonwealth of Virginia's right to recapture depreciation is an "interest" as used in § 363(f)).

75. The purpose and value of an order authorizing the transfer of the Assets would be frustrated if claimants thereafter could still assert claims against the purchaser or the Assets. Under Section 363(f) of the Bankruptcy Code, the purchaser is entitled to know the Assets are not tainted by latent claims that could be asserted against the purchaser after the proposed transaction is completed. Absent that ruling, the value of the Assets could be severely compromised.

76. Accordingly, consistent with the above-cited case law and provisions of the Bankruptcy Code, the Debtors submit that the proposed Sale Order should provide that the Purchaser is not liable as a successor under any theory of successor liability for Interests that encumber or relate to the Assets.

6. The Sale Has Been Proposed in Good Faith and Without Collusion, and the Successful Bidder Will Be a "Good-Faith Purchaser" Entitled to the Full Protection of Bankruptcy Code Section 363(m); and the Sale of the Assets Does Not Violate Bankruptcy Code Section 363(n)

77. The Debtors request that the Court find the Successful Bidder is entitled to the benefits and protections provided by Section 363(m) of the Bankruptcy Code in connection with the sale of the Assets.

78. Section 363(m) provides, in pertinent part:

[t]he reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

11 U.S.C. § 363(m).

79. Section 363(m) thus protects the purchaser of assets sold pursuant to Section 363 from the risk it will lose its interest in the purchased assets if the order allowing the sale is reversed on appeal, as long as such purchaser purchased or leased the assets in “good faith.” Although the Bankruptcy Code does not define “good faith,” courts have held a purchaser shows its good faith through the integrity of its conduct during the course of the sale proceedings, finding that, where there is a lack of such integrity, a good-faith finding may not be made. *See, e.g., Abbotts Dairies of Pa.*, 788 F.2d at 147 (“Typically, the misconduct that would destroy a [buyer’s] good faith status at a judicial sale involves fraud, collusion between the [proposed buyer] and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders.”); *In the Matter of Andy Frain Servs., Inc.*, 798 F.2d 1113 (7th Cir. 1986) (same); *In re Sasson Jeans, Inc.*, 90 B.R. 608, 610 (S.D.N.Y. 1988) (same).

80. The Debtors submit that the Stalking Horse Bidder, or any other Successful Bidder arising from the Auction, would be a “good faith purchaser” within the meaning of Section 363(m) of the Bankruptcy Code, and the resulting purchase agreement would be a good-faith agreement on arm’s length terms entitled to the protections of Section 363(m).¹² First, as set forth in more detail above, the consideration to be received by the Debtors pursuant to the Sale will be subject to a market process by virtue of the Debtors’ marketing efforts and the Auction and will be substantial, fair, and reasonable. Second, the asset purchase agreement entered into by the Debtors and the Successful Bidder (to the extent the Successful Bidder is someone other than the Stalking Horse Bidder) will be the result of arm’s-length negotiations, during which all parties will have

¹² The Debtors believe a finding of good faith within the meaning of Section 363(m) will be appropriate for the Successful Bidder arising from the Auction and the Bid Procedures. Pursuant to the Bid Procedures, any Successful Bidder will have had to present a proposal in accordance with the Bid Procedures. In addition, the Debtors will not choose as the Successful Bidder or the Back-Up Bidder any entity whose good faith under Section 363(m) can reasonably be doubted, and will be prepared to present the Court with sufficient evidence to allow the Court to find that the “good faith” standard of Section 363(m) has been satisfied.

the opportunity to be, and the Debtors will be, represented by competent counsel, and any purchase agreement with a Successful Bidder will be the culmination of the Debtors' competitive market process during which all negotiations will be conducted on an arm's length, good-faith basis. Third, where there is no indication of any "fraud or collusion between the purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders" or similar conduct, there is no cause that would permit the Sale to be avoided pursuant to Section 363(n). Moreover, with respect to potential bidders, the Bid Procedures are designed to ensure no party is able to exert undue influence over the process. Finally, the Successful Bidder's offer will be evaluated and approved by the Debtors in consultation with their advisors. Accordingly, the Debtors believe the Successful Bidder and the resulting purchase agreement should be entitled to the full protections of Section 363(m).

81. Moreover, because there will be absolutely no fraud or improper insider dealing of any kind, the Sale does not constitute an avoidable transaction pursuant to Section 363(n) of the Bankruptcy Code, and, as a result, the Successful Bidder should receive the protections afforded good faith purchasers by Section 363(m). Accordingly, the Debtors request that the Court make a finding at the Sale Hearing that the agreement reached with the Successful Bidder was at arm's length and is entitled to the full protections of Section 363(m) of the Bankruptcy Code. The Debtors will submit evidence at the Sale Hearing to support these conclusions.

7. Credit Bidding Should Be Authorized Pursuant to Section 363(k) of the Bankruptcy Code

82. A secured creditor is allowed to "credit bid" the amount of its claims in a sale of assets in which it has a security interest. Section 363(k) of the Bankruptcy Code provides, in relevant part, that unless the court for cause orders otherwise, the holder of a claim secured by property that is the subject of the sale "may bid at such sale, and, if the holder of such claim

purchases such property, such holder may offset such claim against the purchase price of such property.” 11 U.S.C. § 363(k). Even if a secured creditor is undersecured as determined in accordance with Section 506(a) of the Bankruptcy Code § 506(a), Section 363(k) of the Bankruptcy Code allows such secured creditor to bid the total face value of its claim and does not limit the credit bid to the creditor’s economic value. *See In re Submicron Sys. Corp.*, 432 F.3d 448, 459-60 (3d Cir. 2006) (explaining “[i]t is well settled . . . that creditors can bid the full face value of their secured claims under section 363(k)”).

83. Thus, pursuant to Section 363(k) of the Bankruptcy Code and subject to the Bid Procedures, any Qualified Bidder who has a valid, undisputed, and perfected lien on any of the Debtors’ assets, should be allowed to submit a Credit Bid at an Auction, as long as such credit bid complies with the Bid Procedures. *See* Bid Procedures, § B.4.

C. The Assumption and Assignment of the Assigned Contracts Should Be Approved

1. The Assumption and Assignment of the Assigned Contracts Reflects the Debtors’ Reasonable Business Judgment

84. To facilitate and effectuate the sale of the Assets, the Debtors are seeking authority to assign the Assigned Contracts to the Successful Bidder to the extent required by such Successful Bidder.

85. Section 365 of the Bankruptcy Code authorizes a debtor to assume and/or assign its executory contracts and unexpired leases, subject to the approval of the court, provided the defaults under such contracts and leases are cured and adequate assurance of future performance is provided. *See* 11 U.S.C. § 365(b)(1).

86. The standard applied by the Third Circuit in determining whether an executory contract or unexpired lease should be assumed is the “business judgment” test, which requires a debtor to determine that the requested assumption or rejection would be beneficial to its estate.

See Sharon Steel Corp. v. Nat'l Fuel Gas Distrib. Corp., 872 F.2d 36, 40 (3d Cir. 1989); *see also NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 523 (1984) (describing business judgment test as “traditional”) (superseded in part by 11 U.S.C. § 1113).

87. Courts generally will not second-guess a debtor’s business judgment concerning the assumption of an executory contract. *See In re Decora Indus., Inc.*, 2002 WL 32332749, at *8 (D. Del. 2002); *Official Comm. for Unsecured Creditors v. Aust (In re Network Access Solutions, Corp)*, 330 B.R. 67, 75 (Bankr. D. Del. 2005) (“The standard for approving the assumption of an executory contract is the business judgment rule”); *In re Exide Techs.*, 340 B.R. 222, 239 (Bankr. D. Del. 2006) (“The propriety of a decision to reject an executory contract is governed by the business judgment standard”); *see also Phar Mor, Inc. v. Strouss Bldg. Assocs.*, 204 B.R. 948, 952 (N.D. Ohio 1997) (“Courts should generally defer to a debtor’s decision whether to reject an executory contract.”) (citation omitted). A debtor’s decision to assume or reject an executory contract or expired lease will not be subject to review unless such decision is clearly an unreasonable exercise of such judgment. *See, e.g., Group of Institutional Investors v. Chicago, Milwaukee, St. Paul & Pac. Ry. Co.*, 318 U.S. 523 (1943) (applying Bankruptcy Act section 77(b), predecessor to Bankruptcy Code § 365, and rejecting a test of whether an executory contract was burdensome in favor of determining whether rejection is within the debtor’s business judgment); *see also Sharon Steel*, 872 F.2d at 40 (describing deference to a debtor’s business judgment as “breathing space afforded [to] the debtor to consider whether to reject or assume executory contracts under the Code”); *Network Access Solutions*, 330 B.R. at 75; *Exide Techs.*, 340 B.R. at 239.

88. Here, the Court should approve the decision to assume and assign the Assigned Contracts in connection with the Sale as a sound exercise of the Debtors’ business judgment. First,

the Assigned Contracts provide valuable consideration to the Successful Bidder. Second, the Assigned Contracts are necessary to operate the Assets and, as such, they are essential to inducing the best offer for the Assets. Third, it is unlikely any purchaser would want to acquire the Assets unless a number of the contracts and leases needed to manage the day-to-day operations of the Debtors' business and which represent important sources of revenue were included in the transaction. Fourth, the Assigned Contracts will be assumed and assigned as part of a process approved by the Court pursuant to the Bid Procedures Order and, thus, will be reviewed by key constituents in these Chapter 11 Cases. Accordingly, the Debtors submit the assumption and assignment of the Assigned Contracts, if required by the Successful Bidder, should be approved as a sound exercise of the Debtors' business judgment.

89. A debtor in possession may assign an executory contract or an unexpired lease of the debtor if it assumes the agreement in accordance with Section 365(a), and provides adequate assurance of future performance by the assignee, whether or not there has been a default under the agreement. *See* 11 U.S.C. § 365(f)(2). Significantly, among other things, adequate assurance may be provided by demonstrating the assignee's financial health and experience in managing the type of enterprise or property assigned. *See, e.g., In re Bygaph, Inc.*, 56 B.R. 596, 605-06 (Bankr. S.D.N.Y. 1986) (stating adequate assurance of future performance is present when the prospective assignee of a lease from the debtor has financial resources and has expressed willingness to devote sufficient funding to the business in order to give it a strong likelihood of succeeding). The meaning of "adequate assurance of future performance" depends on the facts and circumstances of each case, but should be given "practical, pragmatic construction." *EBG Midtown South Corp. v. McLaren/Hart Env'tl. Eng'g Corp. (In re Sanshoe Worldwide Corp.)*, 139 B.R. 585, 592

(S.D.N.Y. 1992) (citations omitted), *aff'd*, 993 F.2d 300 (2d Cir. 1993); *Carlisle Homes, Inc. v. Azzari* (*In re Carlisle Homes, Inc.*), 103 B.R. 524, 538 (Bankr. D.N.J. 1988).

90. Counterparties to Assigned Contracts will have the opportunity to object to adequate assurance of future performance by the Successful Bidder by the Assumed Contract Objection Deadline or the Post-Auction Objection Deadline as applicable. Accordingly, the Debtors submit the assumption and assignment of the Assigned Contracts as set forth herein should be approved.

91. To assist in the assumption, assignment, and sale of the Assigned Contracts, the Debtors also request, to the fullest extent permitted by law, that the Sale Order approving the Sale of the Assets provide that anti-assignment provisions in the Assigned Contracts shall not restrict, limit, or prohibit the assumption, assignment, and sale of the Assigned Contracts and are deemed and found to be unenforceable anti-assignment provisions within the meaning of Section 365(f) of the Bankruptcy Code.

92. Section 365(f)(1) of the Bankruptcy Code permits a debtor to assign unexpired leases and contracts free from such anti-assignment restrictions, providing, in pertinent part, that:

[N]otwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law, that prohibits, restricts, or conditions the assignment of such contract or lease, the trustee may assign such contract or lease under paragraph (2) of this subsection

. . . .

11 U.S.C. § 365(f)(1).

93. Section 365(f)(1), by operation of law, invalidates provisions that prohibit, restrict, or condition assignment of an executory contract or unexpired lease. *See, e.g., Coleman Oil Co., Inc. v. The Circle K Corp. (In re The Circle K Corp.)*, 127 F. 3d 904, 910-11 (9th Cir. 1997) (“no principle of bankruptcy or contract law precludes us from permitting the Debtors here to extend their leases in a manner contrary to the leases’ terms, when to do so will effectuate the purposes

of section 365”), *cert. denied*, 522 U.S. 1148 (1998). Section 365(f)(3) goes beyond the scope of Section 365(f)(1) by prohibiting enforcement of any clause creating a right to modify or terminate the contract or lease upon a proposed assumption or assignment thereof. *See, e.g., In re Jamesway Corp.*, 201 B.R. 73 (Bankr. S.D.N.Y. 1996) (section 365(f)(3) prohibits enforcement of any lease clause creating right to terminate lease because it is being assumed or assigned, thereby indirectly barring assignment by debtor; all lease provisions, not merely those entitled anti-assignment clauses, are subject to court’s scrutiny regarding anti-assignment effect).

94. Other courts have recognized provisions that have the effect of restricting assignments cannot be enforced. *See In re Rickel Home Ctrs., Inc.*, 240 B.R. 826, 831 (D. Del. 1998) (“In interpreting Section 365(f) [*sic*], courts and commentators alike have construed the terms to not only render unenforceable lease provisions which prohibit assignment outright, but also lease provisions that are so restrictive that they constitute de facto anti-assignment provisions.”). Similarly, in *In re Mr. Grocer., Inc.*, the court noted that:

[the] case law interpreting § 365(f)(1) of the Bankruptcy Code establishes that the court does retain some discretion in determining that lease provisions, which are not themselves ipso facto anti-assignment clauses, may still be refused enforcement in a bankruptcy context in which there is no substantial economic detriment to the landlord shown, and in which enforcement would preclude the bankruptcy estate from realizing the intrinsic value of its assets.

77 B.R. 349, 354 (Bankr. D.N.H. 1987). Thus, the Debtors request that any anti-assignment provisions be deemed not to restrict, limit, or prohibit the assumption, assignment, and sale of the Assigned Contracts, and be deemed and found to be unenforceable anti-assignment provisions within the meaning of Section 365(f).

**RELIEF PURSUANT TO BANKRUPTCY RULES 6004(H) AND 6006(D) IS
APPROPRIATE**

95. 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 the entry of the order, unless the court orders otherwise.” Additionally, Bankruptcy Rule 6006(d) provides an “order authorizing the trustee to assign an executory contract or unexpired lease . . . is stayed until the expiration of 14 days after the entry of the order, unless the court orders otherwise.” The Debtors request the Sale Order be effective immediately upon its entry by providing the 14-day stay under Bankruptcy Rules 6004(h) and 6006(d) be waived.

96. The purpose of Bankruptcy Rules 6004(h) and 6006(d) is to provide sufficient time for an objecting party to appeal before an order can be implemented. *See* Advisory Committee Notes to Fed. R. Bankr. P. 6004(h) and 6006(d). Although Bankruptcy Rules 6004(h) and 6006(d) and the Advisory Committee Notes are silent as to when a court should “order otherwise” and eliminate or reduce the 14-day stay periods, the leading treatise on bankruptcy suggests the 14-day stay periods should be eliminated to allow a sale or other transaction to close immediately “where there has been no objection to procedure.” 10 *Collier on Bankruptcy* ¶ 6004.10 (15th rev. ed. 2006). Furthermore, if an objection is filed and overruled, and the objecting party informs the court of its intent to appeal, the stay may be reduced to the amount of time actually necessary to file such appeal. *Id.*

97. To maximize the value received from the Assets, and to ensure they are in compliance with their obligations under the Stalking Horse APA, the Debtors seek to close the Sale as soon as possible after the Sale Hearing. Accordingly, the Debtors hereby request that the Court waive the 14-day stay periods under Bankruptcy Rules 6004(h) and 6006(d).

NOTICE

98. Notice of this Motion will be given to: (i) the Office of the United States Trustee for the District of Delaware; (ii) the United States Attorney's Office for the District of Delaware; (iii) the United States Department of Justice; (iv) the attorneys general for the states in which the Debtors conduct business; (v) the Internal Revenue Service; (vi) the creditors listed on the Debtors' consolidated list of thirty (30) creditors holding the largest unsecured claims; (vii) counsel to the DIP Lender, the Prepetition Facility Lender, and the Consenting Parent; (viii) the Stalking Horse Bidder; (ix) all entities reasonably known to have expressed an interest in a transaction with respect to any of the Assets during the past three (3) months; (x) all parties known by the Debtors to assert a lien on any of the Assets; and (xi) any party that has requested notice pursuant to Bankruptcy Rule 2002. The Debtors believe that no further notice is required.

99. A copy of this Motion is available on (i) this Court's website, at www.deb.uscourts.gov, and (ii) the website maintained by the Debtors' proposed Claims and Noticing Agent, Omni Agent Solutions, Inc., at <https://omniagentsolutions.com/FirstMode>.

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WHEREFORE, the Debtors respectfully request this Court: (i) enter the Bid Procedures Order, the form of which is attached as Exhibit B hereto, (ii) enter the Sale Order, and (iii) grant such other and further relief as is just and proper.

Dated: December 16, 2024
Wilmington, Delaware

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Respectfully Submitted,

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Proposed Counsel for Debtors and Debtors in Possession

Exhibit A

Stalking Horse APA

ASSET PURCHASE AGREEMENT

dated as of

December 15, 2024

by and among

CUMMINS INC.,

FIRST MODE HOLDINGS, INC.,

SYNCHRONOUS LLC,

FIRST MODE IPP LTD.,

FIRST MODE PTY LTD.,

FIRST MODE SA PTY,

and

FIRST MODE SA HOLDINGS

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Exhibits

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ASSET PURCHASE AGREEMENT

This Asset Purchase Agreement (this “Agreement”), dated as of December 14, 2024, is entered into by and among (i) Cummins Inc., an Indiana corporation (“Buyer”) and (ii) First Mode Holdings, Inc., a Delaware corporation (the “Company”), Synchronous LLC, a Washington limited liability company, First Mode IPP Ltd., a private limited company organized under the laws of England and Wales, First Mode Pty Ltd., a proprietary company organized under the laws of Australia, First Mode SA Pty, private company organized under the laws of South Africa and First Mode SA Holdings, a private company organized under the laws of South Africa (each of the foregoing described in this clause (ii), a “Seller” and collectively, the “Sellers”).

RECITALS

WHEREAS, the Company owns, directly or indirectly, all of the outstanding equity interests of the other Sellers;

WHEREAS, Sellers are engaged in the Business and collectively own all of the Purchased Assets;

WHEREAS, Buyer and Sellers desire to effect the sale of the Business through Buyer’s acquisition of the Purchased Assets and assumption of the Assumed Liabilities, all on the terms and subject to the conditions set forth herein;

WHEREAS, First Mode Holdings, Inc. and Synchronous LLC (each a “Debtor”) will commence voluntary cases under Chapter 11 of the Bankruptcy Code (the “Bankruptcy Cases”) by filing petitions for relief in the United States Bankruptcy Court for the District of Delaware (the “Bankruptcy Court”, and the date of the filing of such petitions, the “Petition Date”);

WHEREAS, Sellers will seek entry by the Bankruptcy Court of the Bid Procedures Order approving the Bid Procedures;

WHEREAS, Buyer and Sellers intend, among other things, that following the execution of this Agreement, Buyer will act as a “stalking horse bidder” pursuant to the Bid Procedures for the Purchased Assets;

WHEREAS, in the absence of Sellers’ acceptance of a higher or better bid made in accordance with the Bid Procedures Order or any other order of the Bankruptcy Court, Buyer will purchase, and Sellers will sell, Sellers’ right, title and interest in and to the Purchased Assets and Buyer will assume the Assumed Liabilities, in each case on the terms and subject to the conditions set forth in this Agreement, pursuant to, among other provisions thereof, Section 363 of the Bankruptcy Code and in accordance with the Bid Procedures and subject to entry of the Sale Order by the Bankruptcy Court; and

WHEREAS, concurrently with the execution and delivery of this Agreement, Buyer, the Company, and Escrow Agent shall have entered into the Escrow Agreement.

NOW, THEREFORE, in consideration of the foregoing and the respective representations, warranties, covenants and agreements set forth in this Agreement, and for other

good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and intending to be legally bound by this Agreement, Buyer and Sellers agree as follows:

ARTICLE I. CERTAIN DEFINITIONS

1.1 Definitions.

As used herein, the following terms shall have the following meanings:

“Accrued Compensation Obligations” means, with respect to each Transferred Employee, such employee’s (i) accrued but unpaid base salary or wages and (ii) accrued but unpaid vacation, holiday, sick time and other paid time off that is required to be paid out under applicable Law or Company policy, in each case, as of the Closing.

“Action” means any claim, action, charge, complaint, grievance, suit, audit, assessment, arbitration, inquiry, demand, litigation, citation, summons, subpoena, proceeding or investigation, in each case, by or before any Governmental Authority, of any nature, whether civil, criminal, administrative, regulatory or otherwise and whether at law or in equity.

“Affiliate” means, with respect to any specified Person, any Person that, directly or indirectly, controls, is controlled by, or is under common control with, such specified Person, through one or more intermediaries or otherwise.

“Agreement” has the meaning specified in the Preamble.

“Alternate Transaction” has the meaning specified in Section 10.1(b).

“Anglo Facility” means that certain Facility Agreement, dated as of December 21, 2023, by and among the Company, the Subsidiaries of the Company and Anglo American International Holdings Limited, as amended, supplemented or otherwise modified before the date hereof.

“Approved Expenditure Amount” has the meaning specified in Section 7.1(c).

“Assigned Contracts” has the meaning specified in Section 6.3(c).

“Assigned Contracts Schedule” has the meaning specified in Section 6.3(c).

“Assumed Liabilities” has the meaning specified in Section 2.3.

“Assumption Notice” has the meaning specified in Section 6.3(b).

“Auction” has the meaning specified in the Bid Procedures Order.

“Available Contract” has the meaning specified in Section 6.3(a).

“Back-Up Bidder” has the meaning specified in the Bid Procedures Order.

“Back-Up Termination Date” means the first to occur of (a) 30 days after entry of the Sale Order or an order of the Bankruptcy Court approving consummation of an Alternate Transaction, (b) consummation of an Alternate Transaction with the successful bidder, or (c) Buyer’s receipt of notice from the Sellers of the release of Buyer’s obligations as Back-Up Bidder under any order of the Bankruptcy Court approving bidding procedures in connection with the Transactions or an Alternate Transaction.

“Bankruptcy Cases” has the meaning specified in the Recitals.

“Bankruptcy Code” means title 11 of the United States Code, 11 U.S.C. § 101 et seq.

“Bankruptcy Court” has the meaning specified in the Recitals.

“Bid Procedures” means those certain bidding procedures to be filed and approved by the Bankruptcy Court attached as Exhibit 1 to the Bid Procedures Order.

“Bid Procedures Order” means a Governmental Order by the Bankruptcy Court approving (A) the Bid Procedures and (B) the Bid Protections (including as an administrative expense in the Bankruptcy Cases pursuant to sections 503 and 507 of the Bankruptcy Code), in form and substance reasonably acceptable to Buyer.

“Bid Protections” has the meaning set forth in Section 10.2(c).

“Bill of Sale and Assignment” has the meaning specified in Section 2.7(a)(i).

“Break-Up Fee” has the meaning specified in Section 10.2(b).

“Business” means the design, manufacture or distribution of hydrogen refueling equipment and zero emission, hybrid electric and battery electric drive trains for trucks in the manner conducted by the Company and its Subsidiaries as of the date hereof.

“Business Day” means any day that is not a Saturday, a Sunday or other day on which banks in New York or London are closed.

“Business Employee” means any employee of the Company or one of its Subsidiaries who primarily renders services to the Business but excluding any such employee primarily located in the United Kingdom.

“Business Records” has the meaning specified in the Section 2.1(a)(vi).

“Buyer” has the meaning specified in the Preamble.

“Buyer 401(k) Plan” has the meaning specified in Section 7.3(d).

“Buyer Fundamental Representations” means Section 5.1 (Corporate Organization), Section 5.2 (Due Authorization) and Section 5.7 (Brokers’ Fees).

“Buyer Releasee” has the meaning specified in Section 11.16(b).

“Buyer Releasor” has the meaning specified in Section 11.16(b).

“Cap” has the meaning specified in Section 7.1(c).

“Cash” means, as of any date and time, the marketable securities, cash and cash equivalents of the Company and its Subsidiaries.

“Chile Employee Obligations Amount” means seventy seven thousand dollars (\$77,000).

“Closing” has the meaning specified in Section 2.6.

“Closing Date” has the meaning specified in Section 2.6.

“COBRA” means Part 6 of Subtitle B of Title I of ERISA, Section 4980B of the Code, or similar state or local Law.

“Code” means the Internal Revenue Code of 1986, as amended.

“Company” has the meaning specified in the Preamble.

“Company Benefit Plan” has the meaning specified in Section 4.11(a).

“Company Releasee” has the meaning specified in Section 11.16(a).

“Company Releasor” has the meaning specified in Section 11.16(a).

“Company Transaction Expenses” means the sum (without duplication) of (a) all fees, expenses, liabilities and other unpaid costs of the Company and its Subsidiaries in connection with or in anticipation of the negotiation, execution and delivery of this Agreement or the consummation of the transactions contemplated by this Agreement, including the fees and expenses of professionals (including investment bankers, attorneys, accountants and other consultants and advisors), in each case, to the extent incurred prior to the Closing and that remain unpaid as of the Closing, (b) any transaction, stay bonus, retention, sale or change of control payments or benefits or any incentive compensation, commission payments or other similar compensation arising as a result of, or in connection with, (whether alone or as the result of the passage of time) the Transactions, in each case payable by the Company or its Subsidiaries to current or former employees, directors, officers, consultants or other individual service providers, (c) any and all accrued or earned but unpaid annual or special bonuses, commissions or profit-sharing payments attributable to pre-Closing periods (whether or not accrued) and payments owing under any appreciation right, phantom or profit-sharing plan and any deferred compensation, retention, separation or severance obligations arising with respect to (i) any termination of a director or employment of any employee, independent contractor, consultant or officer of the Company or any Subsidiary (other than an Offer Employee to the extent such termination occurs following Buyer’s, or one of its Subsidiaries’ failure to offer employment to such Offer Employee on terms consistent with Section 7.3(b)) prior to Closing or (ii) any resignation (or for which notice is provided) of an employee, independent contractor, consultant or officer of the Company or any Subsidiary (other than an Offer Employee to the extent such resignation (or notice) occurs

following Buyer's, or one of its Subsidiaries' failure to offer employment to such Offer Employee on terms consistent with Section 7.3(b)) prior to Closing, (d) amounts that remain outstanding under the Company's retention plan to the extent that they remain unpaid as of Closing, (e) the employer portion of any employment and payroll Taxes payable by the Company or its Subsidiaries, with respect thereto or in connection with such payment in clauses (b), (c) and (d) above; provided that, "Company Transaction Expenses" shall exclude Transfer Taxes and liabilities for Taxes relating to the ownership of the Purchased Assets and the operation of the Business attributable to any Post-Closing Tax Period (determined in accordance with Section 8.2).

"Competing Bid" has the meaning set forth in Section 6.1.

"Confidentiality Agreement" means that certain Confidentiality Agreement, dated as of September 11, 2024, by and between the Company and Buyer.

"Contracts" means any legally binding contracts, agreements, subcontracts, leases, subleases, licenses, sublicenses, instruments, notes, bonds, mortgages, indentures, deeds of trust, warranties, and sales or purchase orders.

"Cure Costs" means the monetary amounts that are required to be paid under Sections 365(b)(1)(A) and (B) of the Bankruptcy Code in connection with the assumption and/or assignment of any Assigned Contracts to which a Debtor is a party, as agreed upon by the parties hereto, or determined by the Bankruptcy Court pursuant to the procedures in the Bid Procedures Order.

"Cure Objection" has the meaning specified in Section 6.3(d).

"Debt" means, the aggregate indebtedness of the Company and its Subsidiaries, including, without duplication, as of any date and time (a) all indebtedness for borrowed money, including the amounts outstanding under the Anglo Facility and any inter-company debt between or among the Company or one or more of its Subsidiaries, such obligations evidenced by notes, bonds (including surety bonds), debentures or similar instruments as well as any obligation or liability under any loan, grant or assistance provided by any Governmental Authority, whether or not such grant or assistance is eligible for forgiveness, (b) all capitalized finance lease obligations of the Company and its Subsidiaries determined in accordance with GAAP, (c) all reimbursement obligations of the Company and its Subsidiaries under letters of credit and surety bonds solely to the extent such letters of credit have been drawn or claims have been made under such surety bonds, (d) any off-balance sheet financing, including synthetic leases and project financing, (e) any obligations with respect to forward currency exchanges, interest rate swaps, collars, caps and similar hedging obligations (including any applicable breakage costs), (f) any unfunded or underfunded pension or pension-like liabilities or obligations and any unfunded or underfunded post-retirement and post-employment benefits, liabilities or obligations and any obligations and liabilities in respect of any unfunded or underfunded nonqualified deferred compensation plan, programs, agreements or arrangements (including the employer portion of any payroll Taxes associated therewith), (g) all obligations secured by any Liens (other than Permitted Liens and Assumed Liabilities) existing on property or assets owned by such Person, whether or not indebtedness secured thereby has been assumed, and (h) all obligations in respect of interest, premiums, penalties, make-whole payments, reimbursements, indemnities and other expenses,

fees or charges of the obligations in respect of any of the foregoing on prepayment (regardless if any of such are actually paid), as a result of or in connection with the consummation of the Transactions; provided that, “Debt” shall exclude Transfer Taxes and liabilities for Taxes relating to the ownership of the Purchased Assets and the operation of the Business attributable to any Post-Closing Tax Period (determined in accordance with Section 8.2).

“Debtor” has the meaning specified in the Recitals.

“Deposit” has the meaning specified in Section 3.4(a).

“Designated Person” has the meaning specified in Section 11.17(a).

“DGCL” means the Delaware General Corporation Law.

“Environmental Laws” means any and all Laws relating to pollution or the protection of the environment or natural resources, health and safety or relating to the use, generation, management, manufacture, processing, treatment, storage, transportation, remediation, cleanup, handling, disposal or Release or threatened Release of, or exposure to, Hazardous Materials.

“Environmental Liabilities” means all Liabilities, obligations, responsibilities, remedial actions, losses, damages, punitive damages, consequential damages, treble damages, costs and expenses (including all reasonable fees, disbursements and expenses of counsel, experts and consultants and costs of investigation and feasibility studies), fines, penalties, sanctions, supplemental environmental projects in lieu of any fines, penalties or sanctions, and interest incurred as a result of any claim or demand by any other Person or in response to any violation of or Liability under Environmental Law, whether known or unknown, accrued or contingent, whether based in contract, tort, implied or express warranty, strict liability, criminal or civil statute, to the extent based upon, related to, or arising under or pursuant to any Environmental Law, Permit, order or agreement with any Governmental Authority or other Person, which relates to any environmental, health or safety condition, violation of Environmental Law or a Release or threatened Release of, or exposure to, Hazardous Materials.

“ERISA” has the meaning specified in Section 4.11(a).

“ERISA Affiliate” means any trade or business (whether or not incorporated) which together with the Company would be treated as a single employer under Section 414 of the Code or Section 4001 of ERISA.

“Escrow Agent” means JPMorgan Chase Bank, N.A.

“Escrow Agreement” means that certain Escrow Agreement, dated as of the date hereof, by and among the Company, Buyer and the Escrow Agent attached as Exhibit A.

“Excluded Assets” has the meaning specified in Section 2.2.

“Excluded Books and Records” means the following originals and copies of those books and records, documents, data and information (in whatever form maintained) of Sellers and

the Business: (i) all corporate minute books (and other similar corporate records) and stock records and the Organizational Documents of Sellers, (ii) any books and records relating to the Excluded Assets, Excluded Liabilities or Taxes paid or payable by Sellers (excluding such books and records related solely to the Purchased Assets), (iii) all Tax Returns of Sellers (excluding such Tax Returns related solely to the Purchased Assets), (iv) any records, documents or other information solely to the extent related to any current or former employee of Sellers and the Business who is not a Transferred Employee, or (v) any books, records or other materials that Sellers (x) are required by Law to retain (copies of which, to the extent permitted by Law, will be made available to Buyer upon Buyer's reasonable request) or (y) reasonably believe are necessary to enable them to prepare or file Tax Returns.

"Excluded Contracts" means all Contracts of Sellers other than the Assigned Contracts.

"Excluded Intellectual Property" means all Intellectual Property and goodwill of Company or its Subsidiaries set forth on Schedule 1.1(b).

"Excluded Liabilities" has the meaning specified in Section 2.4.

"Existing Representation" has the meaning specified in Section 11.17(a).

"Expense Reimbursement Amount" means the aggregate amount of all reasonable and documented out of pocket costs, expenses and fees incurred by Buyer in connection with evaluating, negotiating, documenting and performing the Transactions, including fees, costs and expenses of any professionals (including financial advisors, outside legal counsel, accountants, experts and consultants) retained by or on behalf of Buyer in connection with or related to the authorization, preparation, investigation, negotiation, execution and performance of this Agreement and the Transactions, including the Bankruptcy Cases and other judicial and regulatory proceedings related to such transactions, in an aggregate amount not to exceed five hundred fifty thousand dollars (\$550,000).

"Final Allocation Schedule" has the meaning specified in Section 3.2(b).

"Final Order" means a Governmental Order (a) as to which no appeal, leave to appeal, notice of appeal, motion to amend or make additional findings of fact, motion to alter or amend judgment, motion for rehearing, or motion for new trial has been timely filed (in cases in which there is a date by which such filing is required to occur or, if any of the foregoing has been timely filed, it has been disposed of in a manner that upholds and affirms the subject order in all respects without the possibility for further appeal thereon), (b) in respect of which the time period for instituting or filing an appeal, leave to appeal, motion for rehearing or motion for a new trial shall have expired (in cases in which such time period is capable of expiring), and (c) as to which no stay is in effect.

"Financial Statements" means (a) the audited consolidated balance sheets, and the and the related consolidated statements of operations and comprehensive (loss) income, of stockholders' equity and of cash flows, of the Company and its Subsidiaries as of and for the twelve-month period ended December 31, 2022, the period from January 1 to January 5, 2023, and the period from January 6 to December 31, 2023, together with the auditor's reports thereon and

(b) the Interim Financial Statements.

“FM Chile” has the meaning specified in Section 2.1(a)(vii).

“FM Chile Benefit Plan” has the meaning specified in Section 4.11(a).

“Fraud” means, with respect to any Person, an actual and intentional fraud by such Person with respect to the making of representations and warranties contained in this Agreement (after giving effect to the disclosures set forth in the Schedules) or certification delivered in connection herewith by such Person and not with respect to any other matters and shall only be deemed to exist if (a) such Person had knowledge that the representations and warranties made by such Person were inaccurate when made, (b) that such representations or warranties were made with the intent to induce the other Person to rely thereon and that such other Person would take action or inaction to such other Person’s detriment, (c) such reliance and subsequent action or inaction by such other Person was justifiable and (d) such action or inaction resulted in actual Liabilities to such other Person.

“GAAP” means United States generally accepted accounting principles, as in effect as of the date of this Agreement (or in reference to any financial statements of the Company as of an earlier date, as of such date).

“Governmental Authority” means any federal, state, provincial, municipal, local or foreign government, governmental authority, regulatory or administrative agency, governmental commission, department, board, bureau, agency, instrumentality, court or tribunal, in each case including (a) any self-regulatory organization or (b) any other body exercising judicial, regulatory, administrative, taxing or other governmental authority, including any arbitral body or tribunal.

“Governmental Order” means any award, ruling, order, judgment, injunction, decree, writ, stipulation, determination or award, in each case, issued, promulgated, approved or entered by or with any Governmental Authority.

“Hazardous Materials” means (a) any substance, material, or waste that is listed, classified or regulated as hazardous or toxic or as a pollutant or contaminant pursuant to any Environmental Law, or that is otherwise regulated by, or for which Liability or standards of care may be imposed under, Environmental Laws; and (b) any petroleum, petroleum distillate or petroleum-derived products, radon, radioactive materials or wastes, per- and polyfluoroalkyl substances, silica, asbestos or asbestos-containing materials, lead or lead-containing materials, urea formaldehyde foam insulation, and polychlorinated biphenyls.

“Improvements” has the meaning specified in Section 4.16.

“Intellectual Property” means any of the following: (a) patents and patent applications, including all reissues, reexaminations, divisionals, extensions, provisionals, continuations, continuations-in-part and foreign counterparts thereof; (b) registered and unregistered trademarks, service marks, trade names, service names, trade dress, logos, brands, and other source identifiers, including all registrations, extensions, and renewals of any of the foregoing, and all of the goodwill associated therewith, as well as pending trademark and service mark registration applications, and intent-to-use registrations or similar reservations of marks

(“Trademarks”); (c) copyrights and rights in works of authorship, moral rights, database rights, and design rights, in each case whether or not registered, and all registrations, applications for registration, renewals, extensions, and reversions thereof; (d) internet domain names; (e) Trade Secrets; and (f) rights in Software.

“Intellectual Property Assignment” has the meaning specified in Section 2.7(a)(ii).

“Interim Financial Statements” means the unaudited consolidated balance sheet and statements of income and comprehensive income of the Company and its Subsidiaries as of and for the nine-month period ended September 30, 2024.

“International Plan” has the meaning specified in Section 4.11(h).

“Inventory” has the meaning specified in Section 2.1(a)(iii).

“IRS” means the Internal Revenue Service.

“knowledge of Buyer” or any other similar knowledge qualification in this agreement means to the actual knowledge, after reasonable inquiry, of the Persons set forth in Schedule 1.1(c).

“knowledge of the Company” or any other similar knowledge qualification in this agreement means to the actual knowledge, after reasonable inquiry, of the Persons set forth in Schedule 1.1(d).

“Law” means any federal, state, county, local, municipal, foreign, supranational or other law (including common law), statute, constitution, treaty, directive, resolution, ordinance, code, license, permit, decision, order, edict, writ, decree, rule, regulation, judgment, ruling, injunction, guidance, or requirement issued, enacted, adopted, promulgated, implemented or otherwise put into effect by or under the authority of any Governmental Authority.

“Leased Real Property” means the leased premises located at (a) 3417 1st Ave S. Seattle, WA 98134, and (b) 913 Big Hanaford Road, Centralia, WA 98531.

“Liability” means any liability, fine, penalty, loss, interest, charge, damage, duty, demand, obligation, commitment, claim, cost, expense or debt of any kind, character or description, and whether known or unknown, choate or inchoate, liquidated or unliquidated, accrued, absolute, contingent or otherwise, and regardless of when asserted or by whom.

“Lien” means any pledge, lien, charge, encumbrance or, security interest, deed of trust, deed to secure debt, license, covenant, hypothecation, declaration, right-of-way, easement, lease, mortgages, encroachment, title defect, option, levy, right of first refusal or first offer or other third party (or governmental) right or similar encumbrance of any kind or any other restriction that adversely affects the right, title or interest in or to any particular property or asset (including any restriction on the voting of any security or restriction on the transfer, use or ownership of any security or other asset other than those created under applicable securities laws) of any kind or nature, including liens issued pursuant to Section 361, 363 or 364 of the Bankruptcy Code.

“Material Adverse Effect” means any event, occurrence, fact, circumstance, condition or change that has had, or would reasonably be expected to have, individually or in the aggregate, a material adverse effect on the Business or the Purchased Assets, taken as a whole; provided, however, that in no event would any of the following, alone or in combination, be deemed to constitute, nor shall any of the following (including the effect of any of the following) be taken into account in determining whether there has been or will be, a “Material Adverse Effect”: (a) any change in applicable Law or GAAP or any interpretation thereof; (b) general economic, political or business conditions or changes therein (including commencement, continuation or escalation of war, armed hostilities or national or international calamity); (c) financial and capital markets conditions, including interest rates and currency exchange rates, or changes therein; (d) any change generally affecting the industries in which the Business operates; (e) the entry into or announcement of this Agreement, the consummation of the Transactions or the performance of this Agreement or any other Transaction Document, including any adverse change in customer, supplier, governmental, landlord, employee or similar relationships resulting therefrom or with respect thereto; (f) weather conditions, global health conditions (including any epidemic, pandemic or disease outbreak) or other force majeure events, any act of God or natural disaster, including any material worsening of such conditions threatened or existing as of the date hereof or any commercially reasonable responses thereto; (g) the taking of any action (or the omission of any action) specifically required by this Agreement or any other Transaction Document or taken (or omitted to be taken) with the written consent of Buyer; (h) any acts of terrorism or changes in geopolitical conditions, (i) any failure of the Business to meet any projections, business plans or forecasts (provided that, this clause (i) shall not prevent a determination that any change or effect underlying such failure to meet projections, business plans or forecasts has resulted in a Material Adverse Effect (to the extent such change or effect is not otherwise excluded from this definition of Material Adverse Effect)), (j) actions taken in preparation for the commencement of, or the commencement of, the Bankruptcy Cases or the filing for relief in the Bankruptcy Court (including any action or inaction by the customers, suppliers, landlords, employees or consultants of Seller or their Affiliates as a result thereof), (k) any objections in the Bankruptcy Court related to the Transactions and (l) the termination of that certain HEV Purchase Order, dated December 21, 2023, as amended by Amendment No. 1 to the HEV Purchase Order, dated April 12, 2024, by and between the Company and Anglo American Services (UK) Ltd. and the events precipitating therefrom; provided, further, that in the case of the foregoing clauses (a), (b), (c), (d), (f) and (h), except to the extent that such matters materially and disproportionately impact the Company and its Subsidiaries (taken as a whole) relative to other Persons in the industries in which the Company or its Subsidiaries operate.

“Multiemployer Plan” has the meaning specified in Section 4.11(a).

“Non-Debtor Contract Costs” has the meaning specified in Section 6.3(a).

“Non-Transferred Asset” has the meaning specified in Section 2.5.

“Off-the-Shelf Software” means any commercially available, “off the shelf” or “shrink wrapped” Software that is generally, commercially available to the public and is non-exclusively licensed to the Company or one of its Subsidiaries and that has an annual license, subscription or other fees of \$100,000 or less in the aggregate.

“Offer Conditions” has the meaning specified in Section 7.3(b).

“Offer Employees” means any Business Employee set forth on Schedule 1.1(a), other than those employed by FM Chile.

“Open Source Software” means any Software that is distributed (a) as “free software” (as defined by the Free Software Foundation), (b) as “open source software” or pursuant to any license identified as an “open source license” by the Open Source Initiative (www.opensource.org/licenses) or any other license that substantially conforms to the Open Source Definition (www.opensource.org/osd), or (c) under a license that (i) requires any other Software that is a derivative work of, or based on, such Software to be made available in source code form and/or licensed for purposes of creating derivative works of such other Software or (ii) prohibits the receipt of consideration in connection with sublicensing or distributing such Software.

“Organizational Documents” means any charter, certificate of incorporation, certificate of formation, articles of incorporation, articles of association, memorandum of association, bylaws, operating agreement, partnership agreement or similar formation or governing documents and instruments and, with the respect to the Company, that certain Relationship Agreement, dated as of January 5, 2023, by and among the Company and certain other parties thereto.

“Outside Date” has the meaning specified in Section 10.1(g).

“Permits” has the meaning specified in Section 4.14.

“Permitted Liens” means (a) immaterial mechanics, materialmen’s and similar statutory Liens arising or incurred in the ordinary course of business with respect to any amounts not yet delinquent or which are being contested in good faith through appropriate proceedings and for which adequate reserves have been maintained in accordance with GAAP, (b) Liens for Taxes not yet due and payable or which are being contested in good faith through appropriate proceedings and for which adequate reserves have been established in the financial statements in accordance with GAAP, (c) Liens securing rental payments under capital lease agreements, (d) Liens on Leased Real Property (including easements, covenants, rights of way and other restrictions of record) that (i) encumber the fee estate of Leased Real Property, (ii) are matters of record that do not materially interfere with the current use of such Leased Real Property or, (iii) would be disclosed by a current, accurate survey or physical inspection of such Leased Real Property that do not materially interfere with the current use of such Leased Real Property or (e) statutory landlord’s, sublandlord’s, or similar liens or encumbrances, (f) in the case of Intellectual Property, non-exclusive licenses or other similar non-exclusive grants granted by a Seller in the ordinary course of business of the Sellers described on Schedule 1.1(e) and (g) Liens described on Schedule 1.1(e).

“Person” means any individual, firm, corporation, partnership, limited liability company, incorporated or unincorporated association, joint venture, joint stock company, governmental agency or instrumentality or other entity of any kind.

“Petition Date” has the meaning specified in the Recitals.

“Post-Closing Confidentiality Agreement” means that certain Confidentiality Agreement, dated as of the date hereof, by and between the Company and Buyer.

“Post-Closing Matters” has the meaning specified in Section 11.17(a).

“Post-Closing Representations” has the meaning specified in Section 11.17(a).

“Post-Closing Tax Period” means any taxable period beginning after the Closing Date and the portion of any Straddle Period beginning after the Closing Date.

“Pre-Closing Designated Persons” has the meaning set forth in Section 11.17(b).

“Pre-Closing Privileges” has the meaning set forth in Section 11.17(b).

“Pre-Closing Tax Period” means any taxable period ending on or before the Closing Date and that portion of any Straddle Period ending on (and including) the Closing Date.

“Preliminary Allocation Schedule” has the meaning specified in Section 3.2(a).

“Previously Omitted Contract” has the meaning specified in Section 6.3(g).

“Previously Omitted Contract Notice” has the meaning specified in Section 6.3(g).

“Prior Company Counsel” has the meaning specified in Section 11.17(a).

“Purchase Price” has the meaning specified in Section 3.1(a).

“Purchased Assets” has the meaning specified in Section 2.1(a).

“Qualifying Termination” has the meaning specified in Section 10.2(b).

“Real Property Leases” has the meaning specified in Section 4.10(a)(iv).

“Related Party” has the meaning specified in Section 4.19.

“Release” means any release, spill, emission, leaking, pumping, pouring, emptying, escape, injection, deposit, disposal, discharge, dispersal, dumping, leaching or migration of Hazardous Materials into or through the indoor or outdoor environment or into or out of any property, including the movement of Hazardous Materials through or in the air, soil, sediment, surface water or groundwater.

“Remedies Exception” has the meaning specified in Section 4.3.

“Reverse Break-Up Fee” has the meaning specified in Section 10.2(b).

“Sale Motion” means the motion, pleading or other filing of the Sellers, in form and substance acceptable to the Buyer, seeking entry of the Bid Procedures Order and the Sale Order.

“Sale Order” means a Governmental Order of the Bankruptcy Court approving and

authorizing this Agreement and all of the terms and conditions hereof (including approving and authorizing the Company's assumption and assignment pursuant to Section 365 of the Bankruptcy Code of the Assigned Contracts, and approving and authorizing the Company to consummate the Transactions contemplated hereby free and clear of Liens to the full extent permitted pursuant to Section 363(f) of the Bankruptcy Code and containing a finding that Buyer has acted in "good faith" within the meaning of Section 363(m) of the Bankruptcy Code), in form and substance reasonably acceptable to Buyer. A form of acceptable Sale Order shall be appended to this Agreement as Exhibit B prior to the Closing Date.

"Schedules" has the meaning specified in the first sentence of ARTICLE IV.

"Seattle Headquarters" means the seat of Sellers' corporate operations in the United States located at 542 First Avenue South, Suites 200-500, Seattle, Washington 98104.

"Section 280G Approval" has the meaning specified in Section 7.4.

"Section 280G Payments" has the meaning specified in Section 7.4.

"Section 338(g) Election" has the meaning specified in Section 8.2(d).

"Seller" has the meaning specified in the Preamble.

"Seller Fundamental Representations" means Section 4.1 (Corporate Organization of the Company), Section 4.2 (other Sellers), Section 4.3 (Due Authorization) and Section 4.20 (Brokers' Fees).

"Seller IT Assets" means all computers, servers, workstations, routers, hubs, switches, data communications lines and all other information technology equipment, including all third party Software, and all documentation related to the foregoing, owned by, or licensed or leased to Sellers or any of their Subsidiaries that are listed on Schedule 1.1(f).

"Software" means (a) computer programs (whether in source code, object code, human readable form or other form), code (including software implementations of algorithms, models, and methodologies) applications, application programming interfaces, firmware, software development kits, library functions, operating systems and virtualization environments, and (b) documentation, including user manuals and training materials, related to any of the foregoing.

"Straddle Period" has the meaning specified in Section 8.2(b).

"Subsidiary" means, with respect to a Person, a corporation or other entity of which more than 50% of the voting power of the equity securities or equity interests is owned, directly or indirectly, by such Person.

"Successful Bidder" has the meaning set forth in the Bid Procedures.

"Superannuation Fund" means a superannuation fund as regulated under the *Superannuation Guarantee (Administration) Act 1992* (Cth) and the *Superannuation Guarantee Charge Act 1992* (Cth) and as contributed to by a Seller on behalf of a Transferred Employee.

“Tax Returns” means any return, declaration, report, statement, information statement or other document filed or required to be filed with respect to Taxes, including any claims for refunds of Taxes and any amendments or supplements of any of the foregoing.

“Taxes” means all federal, state, local, foreign or other tax, including all income, gross receipts, license, escheat, unclaimed property, payroll, employment, excise, severance, stamp, occupation, premium, windfall profits, environmental, customs duties, capital stock, ad valorem, value added, inventory, franchise, profits, withholding, social security (or similar), unemployment, disability, real property, personal property, sales, use, transfer, registration, alternative or add-on minimum, or estimated tax, and including any interest, penalty or addition thereto.

“Trade Secrets” means confidential and proprietary information, including rights relating to know-how and trade secrets, including ideas, concepts, methods, techniques, inventions (whether patentable or unpatentable), research in progress, algorithms, data, designs, processes, drawings, schematics, blueprints, flow charts, models, strategies, customer lists, supplier lists, mailing lists, business plans and techniques that derive independent economic value, actual or potential, from not being generally known or readily ascertainable by others.

“Transaction Documents” means this Agreement, the Escrow Agreement, the Bill of Sale and Assignment, the Intellectual Property Assignment, the Bid Procedures Order, the Sale Order and any other agreements, instruments and certificates contemplated hereby or thereby or agreements arrangement as the parties and their respective legal counsels deem reasonably necessary to effect the Transactions.

“Transactions” means the transactions contemplated by this Agreement.

“Transfer Regulations” means the Transfer of Undertakings (Protection of Employment) Regulations 2006 (as amended from time to time) or any local similar or equivalent applicable Law.

“Transfer Taxes” means any and all direct and indirect transfer, documentary, sales, use, court, gross receipts, stamp, registration, goods and services, reporting, filing, value added, recording, escrow and other similar Taxes and fees imposed in connection with the Transactions.

“Transferred Employee” means the Business Employees of FM Chile and each Offer Employee who, as of the Closing, becomes an employee of Buyer or one of its Subsidiaries by acceptance of Buyer’s or one of its Subsidiary’s offer of employment pursuant to Section 7.3(b).

“Transferred Employee Records” has the meaning specified in Section 2.1(a)(v).

“Transferred Intellectual Property” means all Intellectual Property other than Excluded Intellectual Property that is owned or purported to be owned by the Company or any of its Subsidiaries and is related to, or necessary for furtherance of, the Business of the Company or any of its Subsidiaries (including, without limiting the foregoing, all Intellectual Property set forth on Schedule 4.17(a)). For the avoidance of doubt, “Transferred Intellectual Property” includes all Transferred Registered Intellectual Property and Transferred Software.

“Transferred Registered Intellectual Property” has the meaning set forth in Section 4.17(a).

“Transferred Software” means all proprietary Software included in the Transferred Intellectual Property.

“Waived Payments” has the meaning specified in Section 7.4.

“Wrong Pocket Assets” has the meaning specified in Section 8.3(a).

1.2 Construction.

(a) Unless the context of this Agreement otherwise requires, (i) words of any gender include each other gender; (ii) words using the singular or plural number also include the plural or singular number, respectively; (iii) the terms “hereof,” “herein,” “hereby,” “hereto” and derivative or similar words refer to this entire Agreement; (iv) the terms “Article”, “Section”, “Schedule” or “Annex” refer to the specified Article or Section of, or Schedule or Annex to, this Agreement; (v) the word “including” shall mean “including, without limitation,” and (vi) the word “or” shall be disjunctive but not exclusive.

(b) Unless the context of this Agreement otherwise requires, references to agreements and other documents shall be deemed to include all subsequent amendments and other modifications thereto.

(c) Unless the context of this Agreement otherwise requires, references to statutes shall include all subsequent amendments and other modifications thereto, and all rules and regulations promulgated thereunder.

(d) Whenever this Agreement refers to a number of days, such number shall refer to calendar days unless Business Days are specified and any such period shall exclude the date specified as the beginning of the period and shall conclude at 5:00 pm (Eastern Time) on the final day of such period.

(e) The phrase “to the extent” shall mean the degree to which a subject or other thing extends, and such phrase shall not mean simply “if”.

(f) The phrases “provided to Buyer” or “made available to Buyer” or words of similar import, mean providing the referenced materials to Buyer or any of its representatives in the online data room titled “Gemstone VDR” hosted by Datasite in connection with the Transactions no later than two (2) Business Days prior to the date hereof.

(g) All accounting terms used herein and not expressly defined herein shall have the meanings given to them under GAAP.

(h) All amounts payable pursuant to this Agreement shall be paid in U.S. dollars, and all references to “\$” or “dollars” shall mean the lawful currency of the United States of America.

(i) The parties have participated jointly in the negotiation and drafting of this Agreement and, in the event an ambiguity or question of intent or interpretation arises, this Agreement shall be construed as jointly drafted by the parties to express their mutual intent and no presumption or burden of proof shall arise favoring or disfavoring any party by virtue of the authorship of any provision of this Agreement, nor shall any rule of strict construction be applied against any party.

ARTICLE II. PURCHASE AND SALE; CLOSING

2.1 Purchase of Assets.

(a) Subject to the terms and conditions set forth herein, at the Closing, Sellers shall sell, transfer, assign, convey and deliver to Buyer, and Buyer shall purchase, acquire and accept from Sellers, free and clear of all Liens (other than Permitted Liens), all right, title and interest of Sellers in, to and under all the assets, rights and properties owned, licensed or used by Sellers, in each case, except as otherwise specified in this ARTICLE II, to the extent primarily used in, primarily held for use in or primarily related to the Business (collectively, the “Purchased Assets”); provided, however, that the Purchased Assets shall not include any Excluded Assets, but, without limiting the foregoing, shall include:

(i) the Assigned Contracts, subject to the Assigned Contract identification process set forth in Section 6.3;

(ii) all Transferred Intellectual Property;

(iii) all supplies and other inventories, including all raw materials, works-in-process, finished goods, packaging, supplies and parts used in the Business or produced in or by the Business, whether held at any location or facility of Sellers or owned by Sellers but in transit (the “Inventory”);

(iv) all equipment, machinery, vehicles and other tangible personal property, including office furniture and fixtures, computers, networking equipment, industrial equipment and supplies primarily used in the Business, whether owned or leased, and all Seller IT Assets that are listed on Schedule 1.1(f);

(v) all physical or electronic copies of all personnel records (including those as required by applicable Law and those pertaining to, as applicable, performance, training history, job experience and compensation history, and for the three-year period immediately preceding the Closing) for the Transferred Employees, except where (A) the transfer or disclosure of such records is prohibited by applicable Law or (B) consent of the relevant employee is required by applicable Law but not given (the “Transferred Employee Records”);

(vi) all books and records, customer lists, customer credit information, supplier lists, product specifications, documents, copies of all accounting books and records (including any information relating to any Taxes imposed), any data and information (in whatever form maintained), in each case, that relates to the Business and the Purchased Assets or are required to fulfill any obligation under any Assigned Contracts (collectively, the “Business Records”);

(vii) equity interests in First Mode Chile SpA, company organized under the laws of Chile (“FM Chile”);

(viii) to the extent transferable, the Permits of Sellers (including any applications that are in process) (i) used in the Business or (ii) required to conduct the Business or perform the Assigned Contracts;

(ix) all claims, rights or causes of action against third parties related to any of the Purchased Assets or the Assumed Liabilities (including all guaranties, warranties, indemnities and similar rights in favor of Sellers), including any rights, claims or causes of action arising under the Bankruptcy Code, in each case, whether arising by way of counterclaim or otherwise, and whether arising out of transactions occurring prior to, on or after the Closing Date; and

(x) the assets listed on Schedule 2.1(a)(x).

(b) At Closing, Buyer (i) at Buyer’s sole cost, shall have the right to reasonably direct the manner of delivery of the Purchased Assets from Sellers and (ii) shall have the right to direct that Sellers sell, transfer, assign, convey and deliver the Purchased Assets, or any portion thereof, directly to any Affiliate of Buyer.

2.2 Excluded Assets.

Notwithstanding the provisions of Section 2.1 or anything to the contrary herein, any and all assets, title, rights and interest in, to and under the following assets and interests of Sellers (collectively, the “Excluded Assets”) shall be retained by Sellers, and Buyer and its designees shall acquire no right, title or interest in the Excluded Assets in connection with the Transactions:

(a) all Cash (including any cash collateralizing obligations), investment securities and other short- and medium-term investments and all accounts with any banks or other financial institutions;

(b) any interest or consideration received by Sellers or their Affiliates pursuant to, and all rights of Sellers and their Affiliates under, this Agreement and the Transaction Documents, including the right to receive the Purchase Price and to enforce Sellers’ rights and remedies thereunder, subject to the terms hereof and thereof;

(c) all Tax refunds, overpayments, credits or other attributes with respect to Taxes that are Excluded Liabilities;

- (d) all Excluded Contracts;
- (e) the Excluded Books and Records;
- (f) any and all proceeds relating to any and all bonds, letters of credit, guarantees or other security provided by Sellers;
- (g) any shares or other equity interests in Sellers or any other Person or any securities of Sellers or any other Person, except for the equity interests of FM Chile;
- (h) all Excluded Intellectual Property;
- (i) all of Sellers' and their Subsidiaries' rights, claims or causes of action against third parties relating to the assets, properties, business or operations of Sellers (including all guaranties, warranties, indemnities and similar rights in favor of Sellers or any of their Affiliates), including the rights to insurance proceeds, in each case, to the extent relating to the Excluded Assets or Excluded Liabilities, in each case, whether arising out of transactions occurring prior to, on or after the Closing Date;
- (j) all rights under the Company Benefit Plans and any trusts, funding vehicles and other assets related thereto;
- (k) all claims, rights or causes of action by or in the rights of a Seller or any of its Subsidiaries, on the one hand, against any current or former director, officer, employee, partner, member, representative or agent of a Seller or any of its Subsidiaries (other than Transferred Employees), on the other hand, whether arising by counterclaim or otherwise;
- (l) all property located at the Seattle Headquarters;
- (m) any Seller IT Assets that are not listed on Schedule 1.1(f); and
- (n) the assets listed on Schedule 2.2(n).

2.3 Assumed Liabilities.

Subject to the conditions specified in this Agreement, from and after the Closing Date, Buyer will not assume or in any way be responsible for any Liabilities of Sellers or any other Liabilities whatsoever related to the ownership, operation or condition of the Business or the Purchased Assets at any time prior to the Closing Date, except as specifically provided below. From and after the Closing, Buyer will assume and agree to pay, defend, discharge and perform, as and when due, only the following specific Liabilities to the extent relating to the Purchased Assets ("Assumed Liabilities"):

- (a) all Liabilities relating to the Purchased Assets to the extent such Liabilities arise from and after Closing or relate to events, facts and circumstances arising after the Closing; provided, that Buyer shall assume Liabilities relating to the Assigned Contracts and the purchase orders listed on Schedule 2.3(e) whether arising before or after the

Closing, but only to the extent such Assigned Contracts are actually assigned to (or the benefits passed through pursuant to Section 2.5 and Section 6.3); provided, further, that with respect to any Assigned Contract subsequently designated as an Excluded Contract following the Closing pursuant to Section 6.3, Buyer shall be solely responsible for payment of obligations and liabilities incurred between the Closing and the designation of such Assigned Contract as an Excluded Contract;

- (b) any Transfer Taxes apportioned to Buyer pursuant to Section 8.2;
- (c) subject to Section 6.3, all Cure Costs;
- (d) all Liabilities (if any) specifically assumed by Buyer pursuant to Section 7.3 (including Liabilities arising out of, relating to or in connection with Buyer's, or one of its Subsidiaries' failure to offer employment to any Offer Employee on terms consistent with Section 7.3(b)), and all Liabilities (if any) that transfer to Buyer or its Affiliates under applicable Law with respect to FM Chile or with respect to Transferred Employees residing in Australia; and
- (e) without limiting the foregoing, all other Liabilities that are listed on Schedule 2.3(e).

2.4 Excluded Liabilities.

Buyer shall not assume or be obligated to pay, perform or otherwise discharge any Liabilities of any Seller or any of Seller's Affiliates, direct or indirect, known or unknown, absolute or contingent, not expressly assumed by Buyer pursuant to Section 2.3 and Transaction Documents (all such Liabilities not being assumed, the "Excluded Liabilities") and, notwithstanding anything in Section 2.3 to the contrary, each of the following shall be Excluded Liabilities for purposes of this Agreement:

- (a) any Liabilities in respect of (i) current or former employees of any Seller who are not Business Employees or (ii) any individual service providers, contractors or consultants of the Sellers or their Subsidiaries (other than of FM Chile), in each case, including any benefits or compensation therefor, arising at any time;
- (b) all Liabilities in respect or arising out of, relating to or resulting from the employment or engagement by Sellers and their Subsidiaries of any Business Employees, or the termination by Sellers and their Subsidiaries of such employment or engagement (excluding Liabilities arising out of, relating to or in connection with Buyer's, or one of its Subsidiaries' failure to offer employment to any Offer Employee on terms consistent with Section 7.3(b)), including any benefits or compensation therefor, in each case arising prior to Closing, other than all Liabilities (if any) (i) specifically assumed by Buyer pursuant to Section 7.3 or (ii) that transfer to Buyer or its Affiliates under applicable Law with respect to FM Chile or with respect to Transferred Employees residing in Australia;
- (c) any Liabilities in respect of any Company Benefit Plan (including terminated Company Benefit Plans and any retention or incentive program that is approved by the

Bankruptcy Court as contemplated by Section 7.1(b)(vii)), other than any FM Chile Benefit Plan;

(d) any Liabilities arising from a breach of the Transfer Regulations (excluding Liabilities arising out of, relating to or in connection with any act or omission of Buyer or one of its Subsidiaries);

(e) Any Liabilities for (i) Taxes of Sellers, and (ii) Taxes relating to the ownership of the Purchased Assets and the operation of the Business attributable to any Pre-Closing Tax Period (determined in accordance with Section 8.2(b)), in each case excluding Transfer Taxes;

(f) any Liabilities relating to the failure or alleged failure by any Seller to comply with Law or perform its obligations under or otherwise comply with the terms of any Contract;

(g) any Debt or Company Transaction Expenses;

(h) any Liabilities relating to errors or omissions or alleged errors or omissions by any Seller or any employees of any Seller in performing services prior to the Closing;

(i) all Environmental Liabilities arising out of or relating to the ownership or operation of Sellers or Purchased Asset on or prior to the Closing Date;

(j) except with respect to Cure Costs, any Liabilities in respect of Actions to which any Seller is a party or its assets or properties are otherwise subject;

(k) All Liabilities in respect of any trade accounts payable of Sellers to third parties in connection with the Business except for such trade accounts payable of Sellers set forth on Schedule 2.3(e); and

(l) any Liabilities arising out of or related to Excluded Assets.

2.5 Nontransferable Assets and Liabilities.

Notwithstanding anything herein to the contrary, this Agreement shall not constitute an agreement to sell, convey, assign, sublease or transfer any Purchased Asset if any attempted sale, conveyance, assignment, sublease or transfer of such Purchased Asset, without the consent of a third party (including a Governmental Authority) (after giving effect to the Sale Order or any other applicable Governmental Order of the Bankruptcy Court that effects such transfer without any required consents) to such transfer, would constitute a breach by any Seller or Buyer with respect to such Purchased Asset (each, a “Non-Transferred Asset”). Non-Transferred Assets shall be considered Excluded Assets hereunder unless and until the applicable consent is obtained. If such consent has not been obtained or such other action has not been taken prior to the Closing, then, at Buyer’s election, Sellers and Buyer shall use their commercially reasonable efforts to obtain any consent necessary to sell, convey, assign, sublease or assign each such Non-Transferred Asset to Buyer as soon as possible after the Closing Date. Once a consent described in this Section 2.5 is obtained from, or such other action described in this Section 2.5 is taken by, such third party

or Governmental Authority, the applicable assets shall be deemed Purchased Assets and shall be deemed to have been automatically transferred to Buyer on the terms set forth in this Agreement as of immediately prior to the Closing for no consideration. Notwithstanding the foregoing, at Buyer's election, (i) subject to the requirement for Buyer to pay to the Company (on behalf of Sellers) any Non-Debtor Contract Costs in accordance with Section 6.3(c), any Non-Transferred Asset shall be an Excluded Asset and Buyer shall have no obligation with respect to any such any Non-Transferred Asset or any liability with respect thereto, and (ii) to the extent elected by Buyer, Sellers shall use their commercially reasonable efforts to obtain for Buyer substantially all of the practical benefits and assume the associated obligations and burdens of such property or rights of the any Non-Transferred Asset (in which case Buyer shall (x) reasonably assist Sellers in the performance of such any Non-Transferred Asset and (y) pay or satisfy any liabilities associated with such any Non-Transferred Asset to the extent Buyer would have been responsible for such liabilities if consent under the any Non-Transferred Asset had been obtained), including by (1) entering into appropriate and reasonable alternative arrangements on terms mutually agreeable to Buyer and Sellers and (2) subject to the consent and control of Buyer, enforcing any and all rights of Sellers against the third party thereto arising out of the breach or cancellation thereof by such other party or otherwise. For the avoidance of doubt, nothing in this Section 2.5 shall require Sellers or Buyer to expend money, incur any Liability, commence any litigation or offer or grant any accommodation (financial or otherwise) to any third party (including any Governmental Authority) in order to obtain the applicable consent.

2.6 Closing.

Subject to the terms and conditions of this Agreement and the applicable provisions of the DGCL, the closing of the purchase and sale of the Purchased Assets (the "Closing") shall take place remotely by electronic exchange of signature pages as promptly as practicable, and in no event later than two (2) Business Days, after the date on which all of the conditions set forth in ARTICLE VII (excluding conditions that, by their terms, are to be satisfied at the Closing, but subject to the satisfaction or, to the extent permitted by applicable Law, waiver of all such conditions at or prior to the Closing), have been satisfied or, to the extent permitted by applicable Law, waived in writing by the party entitled to the benefit of the same, unless another time or date is agreed to in writing by the parties. The day that the Closing takes place is referred to herein as the "Closing Date".

2.7 Closing Deliverables.

(a) Sellers, as applicable, shall deliver, or cause to be delivered, to Buyer at the Closing:

- (i) the bill of sale and assignment and assumption agreement substantially in the form of Exhibit C ("Bill of Sale and Assignment"), executed by the applicable Sellers;
- (ii) the assignment of the Transferred Intellectual Property substantially in the form of Exhibit D (the "Intellectual Property Assignment"), executed by the applicable Sellers;

- (iii) an IRS Form W-9 or the appropriate IRS Form W-8, if applicable, properly completed and duly executed for each Seller (or, if applicable, its regarded owner for U.S. federal income tax purposes);
 - (iv) a certificate delivered pursuant to Section 9.2(a)(iii), executed by Sellers;
 - (v) a copy of the Sale Order as entered by the Bankruptcy Court, vesting the Purchased Assets of Sellers in Buyer free and clear of all Liens;
 - (vi) a certificate evidencing the equity interests of FM Chile duly endorsed by the Company in blank or accompanied by stock powers or other appropriate instruments necessary to transfer such equity interests to the Buyer;
 - (vii) such other instruments of assumption and other instruments or documents, in each case, in form and substance reasonably acceptable to Buyer, reasonably necessary for the effective assignment of any Purchased Assets to Buyer, the recordation of the assignments, the release of Liens or otherwise consummate the Transactions, in accordance with the requirements of applicable Law and this Agreement, in each case duly executed by Sellers.
- (b) Buyer, as applicable, shall deliver, or cause to be delivered, to Sellers at the Closing:
- (i) the Bill of Sale and Assignment, executed by Buyer;
 - (ii) the Intellectual Property Assignment, executed by Buyer;
 - (iii) evidence of payment by Buyer of the Cure Costs, including the funding to Sellers of amounts necessary for the establishment of customary reserves for payment to the extent any Cure Costs have not been determined as of the date of Closing;
 - (iv) a certificate delivered pursuant to Section 9.3(a)(iii), executed by Buyer; and
 - (v) such other instruments of assumption and other instruments or documents, in each case, in form and substance reasonably acceptable to Sellers, reasonably necessary for the effective assignment of any Purchased Assets to Buyer and the assumption of Assumed Liabilities by Buyer, the recordation of the assignments, the release of Liens or otherwise consummate the Transactions, in accordance with the requirements of applicable Law and this Agreement, in each case duly executed by Buyer.

ARTICLE III.
PURCHASE PRICE; ALLOCATION; WITHHOLDING

3.1 Purchase Price.

(a) At the Closing, upon the terms and subject to the conditions set forth herein in full consideration for the sale, transfer, conveyance, assignment and delivery of the Purchased Assets to Buyer, Buyer shall pay to the Company (on behalf of Sellers) an aggregate purchase price equal to (a) fifteen million dollars (\$15,000,000.00) in cash (the “Purchase Price”), plus (b) the Approved Expenditure Amount (if any), minus (c) the Deposit, plus (d) the Accrued Compensation Obligations, minus (e) the Chile Employee Obligations Amount, by irrevocable wire transfer of immediately available funds in accordance with payment instructions delivered by the Company (on behalf of Sellers) to Buyer at least three (3) Business Days prior to the Closing. For the avoidance of doubt, Buyer shall promptly pay, or cause to be paid, to the applicable counterparty any Cure Costs, including such Cure Costs that arise after the Closing. The parties agree to allocate the Purchase Price for tax purposes as provided in Section 3.2.

(b) At the Closing, Buyer and the Company shall instruct the Escrow Agent to pay the Deposit to the Company, by wire transfer of immediately available funds, in accordance with the terms of the Escrow Agreement.

3.2 Allocation of Purchase Price.

(a) Within thirty (30) days after the date hereof, Buyer shall deliver to the Company (which shall act on behalf of all Sellers with respect to this Section 3.2) a schedule allocating for applicable Tax and financial accounting purposes the Purchase Price (and any liabilities considered assumed by Buyer treated as purchase consideration for Tax purposes) among the Purchased Assets in a manner consistent with the residual method principles of Section 1060 of the Code and the Treasury Regulations promulgated thereunder (the “Preliminary Allocation Schedule”). If, within thirty (30) days following delivery of the Preliminary Allocation Schedule, the Company (on behalf of Sellers) does not notify Buyer in writing of its disagreement with the Preliminary Allocation Schedule (including in such communication a detailed description of the basis of its disagreement), the Preliminary Allocation Schedule shall be final and binding. If within such thirty (30) day period the Company (on behalf of Sellers) so notifies Buyer, Buyer shall revise the Preliminary Allocation Schedule incorporating Sellers’ reasonable comments; provided, that if the Company (on behalf of Sellers) and Buyer are unable to resolve any dispute with respect to the Preliminary Allocation Schedule within fifteen (15) days after the Company so notifies Buyer of its disagreement with the Preliminary Allocation Schedule, such dispute shall be resolved by an impartial nationally-recognized firm of independent certified public accountants mutually appointed by Buyer and the Company (provided that the fees and expenses of such accounting firm shall be borne equally by Buyer and the Company). Following such revision, if any, the Preliminary Allocation Schedule shall be final and binding.

(b) The Preliminary Allocation Schedule, upon becoming final and binding in accordance with this Section 3.2, shall constitute the “Final Allocation Schedule.” The parties shall file their respective Tax Returns (including IRS Form 8594) in all respects and for all purposes consistent with the Final Allocation Schedule, and no party shall take any position (whether in audits, Tax Returns or otherwise) that is inconsistent with the Final Allocation Schedule, unless otherwise required by a final determination within the

meaning of Section 1313 of the Code or any corresponding provision of state, local or non-U.S. Law, or as the Buyer or the Company (as applicable) determines is necessary to settle a dispute with a Governmental Authority after making a good faith effort to defend the Final Allocation Schedule.

(c) Notwithstanding the foregoing, the parties hereto recognize that certain allocations may be necessary prior to the times set forth in Section 3.2(b), such as in the case of any Transfer Tax filings, and agree to reasonably cooperate in determining the appropriate allocations as necessary in such circumstances in a timely manner.

(d) Each Seller agrees that following the Closing the Company shall have no obligation to segregate or maintain the funds received on account of the Purchase Price and the Company may use such funds in its sole discretion (including to fund the costs of the Bankruptcy Cases and to repay any financing obtained in connection with the Bankruptcy Cases).

3.3 Withholding.

Buyer shall be entitled to deduct and withhold from the consideration otherwise payable or deliverable to any Person in connection with the Transactions such amounts that the Buyer is required to deduct and withhold with respect to any such deliveries and payments under the Code or any provision of state, local, provincial or foreign Law. Other than any deduction or withholding with respect to any employment compensation payment, before making any such deduction or withholding, Buyer shall use commercially reasonable efforts to (i) provide the Person on behalf of which such deduction or withholding is proposed advance written notice of the intention to make such deduction or withholding and (ii) cooperate with such Person to obtain reduction of or relief from such deduction or withholding to the extent permitted by Law. To the extent that amounts are so withheld in compliance with this Section 3.3, and duly and timely deposited with or otherwise paid to the appropriate Governmental Authority, by Buyer, such withheld amounts shall be treated for all purposes of this Agreement as having been paid to the Person in respect of which such deduction and withholding was made.

3.4 Deposit.

(a) No later than one (1) Business Day after the date hereof, Buyer will make an earnest money deposit (the “Deposit”) into escrow with the Escrow Agent in the amount equal to one million five hundred thousand dollars (\$1,500,000) by wire transfer of immediately available funds. The Deposit shall not be subject to any Lien, attachment, trustee process or any other judicial process of any creditor of any of the Sellers or Buyer and shall be applied against payment of the Purchase Price. At the Closing, the Deposit shall be delivered to the Company (on behalf of Sellers) in accordance with Section 3.1(b) and the terms of the Escrow Agreement and credited toward payment of the Purchase Price.

(b) If this Agreement has been validly terminated prior to the Closing by the Company pursuant to Section 10.1(e) then, within three (3) Business Days after the date of such termination, Buyer and the Company (on behalf of Sellers) shall jointly instruct

the Escrow Agent to disburse the Deposit to the Company (on behalf of Sellers).

(c) If this Agreement has been validly terminated prior to the Closing by any party hereto for any reason other than as contemplated by Section 3.4(b) then, within three (3) Business Days after the date of such termination, Buyer and the Company (on behalf of Sellers) shall jointly instruct the Escrow Agent to disburse the Deposit to Buyer.

ARTICLE IV. REPRESENTATIONS AND WARRANTIES OF SELLERS

Except as set forth in the schedules delivered concurrently with to this Agreement (the “Schedules”), the Company (on behalf of Sellers) represents and warrants to Buyer as of the date of this Agreement and as of the Closing as follows:

4.1 Corporate Organization of the Company.

The Company has been duly incorporated and is validly existing as a corporation in good standing under the Laws of the State of Delaware and has the corporate power and authority to own, operate or lease the Purchased Assets currently owned, operated or leased by the Company and to conduct its respective portion of the Business as it is now being conducted in all material respects. The Company is duly licensed or qualified to do business and (where applicable) is in good standing in each jurisdiction in which the ownership, operation or leasing of its property or the character of its activities is such as to require it to be so licensed or qualified or in good standing, as applicable, except where the failure to be so licensed would not, individually or in the aggregate, reasonably be expected to be material to the Purchased Assets or the Business, taken as a whole. The Company has delivered to Buyer true and complete copies of the Organizational Documents, each as amended as of the date hereof, of the Company and its Subsidiaries.

4.2 Other Sellers.

Sellers (other than the Company) and their jurisdiction of incorporation or organization are set forth on Schedule 4.2. Such Sellers have been duly formed or organized and are validly existing under the laws of their respective jurisdictions of incorporation or organization and have the power and authority to own, operate or lease the Purchased Assets and to conduct their respective portions of the Business, in each case, as it is now being conducted in all material respects. Each Seller (other than the Company) is duly licensed or qualified to do business and (where applicable) in good standing as a legal entity in each jurisdiction in which the ownership, operation or leasing of the Purchased Assets or the character of its activities is such as to require it to be so licensed or qualified, except where the failure to be so licensed or qualified or in good standing would not reasonably be expected to have a Material Adverse Effect.

4.3 Due Authorization.

Each Seller has all requisite company power and authority to execute and deliver this Agreement and, as applicable, the other Transaction Documents to which the such Seller is a party and (subject to the consents, approvals, authorizations and other requirements described in Schedule 4.5) to consummate the Transactions. The execution and delivery of this Agreement by each Seller and, as applicable, the other Transaction Documents to which such Seller is party, and

the consummation by such Seller of the Transactions have been duly and validly authorized and approved by the board of directors (or an equivalent governing body) and the requisite equityholders of such Seller, as applicable, and no other corporate proceeding on the part of such Seller is necessary to authorize this Agreement. This Agreement and, as applicable, the other Transaction Documents to which each Seller is a party, have been duly and validly executed and delivered by such Seller and (assuming such agreements constitute the legal, valid and binding obligations of Buyer) constitute the legal, valid and binding obligations of such Seller, enforceable against such Seller in accordance with its terms, subject to applicable bankruptcy, insolvency, fraudulent conveyance, reorganization, moratorium and similar Laws affecting creditors' rights generally and subject, as to enforceability, to general principles of equity (collectively, the "Remedies Exception").

4.4 No Conflict.

Subject to the receipt of the consents, approvals, authorizations and other requirements set forth in Schedule 4.5, and except as may result from any facts or circumstances related solely to Buyer or its Affiliates, the execution and delivery of this Agreement and, as applicable, the other Transaction Documents to which each Seller is a party and the consummation by each Seller of the Transactions do not (a) violate in any material respects any provision of, or result in the breach of, any applicable Law to which the such Seller is subject or by which any Purchased Asset is bound, (b) conflict with the Organizational Documents of such Seller, (c) violate in any material respects any provision of or result in a breach in any material respects of, or require a consent under, any Contract listed on Schedule 4.10(a), or terminate or result in the termination of any such Contract, or result in the creation of any Lien (other than a Permitted Lien) under any such Contract upon any of the Purchased Assets of such Seller, or constitute an event which, after notice or lapse of time or both, would result in any such violation, breach, termination or creation of such a Lien or (d) result in a violation or revocation of any required material license, permit or approval.

4.5 Governmental Consents.

Assuming the truth and completeness of the representations and warranties of Buyer contained in this Agreement and except as may result from any facts or circumstances related solely to Buyer or any of its Affiliates, no consent, approval or authorization of, or designation, declaration or filing with, any Governmental Authority is required on the part of any Seller with respect to such Person's execution or delivery of this Agreement or the consummation by the Company of the Transactions, except (a) for any consents, approvals, authorizations, designations, declarations or filings, the absence of which would not reasonably be expected to be material to the Purchased Assets or the Business, taken as a whole, or (b) as otherwise disclosed on Schedule 4.5.

4.6 Financial Statements; Inventory.

- (a) The Company has provided true, correct and complete copies of the Financial Statements. The Financial Statements (a) have been prepared from, and are in accordance with the books and records of the Business in all material respects (except as may be indicated in the notes thereto), (b) fairly present in all material respects the Purchased

Assets and Assumed Liabilities and combined results of operations of the Business as of the respective dates or for the respective time periods set forth therein and (c) were prepared in accordance with GAAP, subject, in the case of the Interim Financial Statements, to normal recurring year-end adjustments and the absence of notes (none of which would individually or in the aggregate be material to the Business). The Company and its Subsidiaries maintain a system of internal accounting controls that is designed to provide reasonable assurances that (i) the Financial Statements have been prepared and are fairly presented free from material misstatements, (ii) access to the properties and assets of the Company and its Subsidiaries are permitted only in accordance with authorization by management of the Company and its Subsidiaries, and (ii) all transactions are executed with such management's authorization and accurately recorded in the correct period as necessary to permit the preparation of financial statements in accordance with GAAP.

(b) All accounts receivables are reflected properly in the Financial Statements or the accounting records of the Business as of the date of the Interim Financial Statements and represent or will represent valid obligations arising from sales actually made or services actually performed in the ordinary course of business. Such accounts receivable are current and collectible, except to the extent reserved in the Financial Statements. There is no contest, claim, defense or right of setoff, other than returns in the ordinary course of business, relating to the amount or validity of such accounts receivable. No such account receivable is or was subject to any rebate, discount, counterclaim or setoff, and neither the Company nor any Subsidiary has issued any credit or credit memorandum with respect thereto.

(c) All accounts payable and notes payable by the Company and its Subsidiaries to third parties reflected on the Financial Statements have arisen from the purchase of goods and services in the ordinary course of business. The Financial Statements accurately reflect, in all material respects, all amounts owed by the Company and its Subsidiaries with respect to trade accounts due and other payables. The charges, accruals and reserves on the books of the Company and its Subsidiaries in respect of the accounts receivables and accounts payable as of the date thereof were calculated in accordance with GAAP.

(d) The Inventory reflected on the Financial Statements and in the records of the Business since the most recent date of the balance sheet in the Financial Statements is of a quality and a quantity usable in the ordinary course of business in all material respects.

4.7 Undisclosed Liabilities.

Except as set forth in the Schedule 4.7, there is no Liability of the Company or any of its Subsidiaries, except for liabilities and obligations (a) reflected or reserved for on the Financial Statements or disclosed in the notes thereto, (b) that have arisen since the date of the most recent balance sheet included in the Financial Statements in the ordinary course of the operation of business of the Company and its Subsidiaries and which are not, individually or in the aggregate, material in amount or significance or (c) that constitute Excluded Liabilities.

4.8 Litigation and Proceedings.

Except as set forth on Schedule 4.8, there are, and since the date that is three (3) years before the date hereof, there have been, no pending or, to the knowledge of the Company, threatened in writing, Actions against the Company or any of its Subsidiaries, the Business or the Purchased Assets that, in each case, if resolved adversely to the Company or any of its Subsidiaries, would reasonably be expected to be material to the Business or the Purchased Assets, taken as a whole. Except as set forth on Schedule 4.8, neither the Company nor any Subsidiary are subject of any judgment, decree, injunction, or order of any Governmental Authority. To the knowledge of the Company, no officer, director, agent or employee of the Company or any Subsidiary or is subject to any order of any Governmental Authority that prohibits such officer, director, agent or employee from engaging in or continuing any conduct, activity, or practice relating to the Business or the Purchased Assets. Except as set forth on Schedule 4.8, there is not any Action or claim by the Company or any Subsidiary pending, or that the Company or any Subsidiary is named as a plaintiff or intends to initiate, against any other Person. To the knowledge of the Company, there is no investigation by any Governmental Authority of, or affecting, the Business or Purchased Assets.

4.9 Legal Compliance.

Except as set forth on Schedule 4.9, the Company and its Subsidiaries are, and since the date that is three (3) years before the date hereof the Company and its Subsidiaries have been, in compliance in all material respects with all applicable Laws with respect to the conduct of the Business and the ownership and use of the Purchased Assets. None of the Company or any of its Subsidiaries has received at any time since the date that is three (3) years before the date hereof, any written notice regarding any actual, alleged, or potential violation of, or failure to comply with, in any material respect any applicable Law with respect to the conduct of the Business and the ownership and use of the Purchased Assets.

4.10 Contracts; No Defaults.

(a) Schedule 4.10(a) contains a listing of all Contracts described in clauses (i) through (viii) below to which (I) the Company or any of its Subsidiaries is a party (other than Company Benefit Plans) or by which it is bound in connection with the Business or the Purchased Assets or (II) any of the Purchased Assets are bound or affected. True and complete copies of the Contracts listed on Schedule 4.10(a) have been delivered to or made available to Buyer or its representatives.

(i) Each Contract that involves annual payments or consideration furnished by or to the Company or any of its Subsidiaries of more than \$300,000;

(ii) Each note, debenture, other evidence of indebtedness, guarantee, loan, credit, indemnity, surety arrangement or financing agreement or instrument or other Contract (A) for any Debt of the Business, the Company or any of its Subsidiaries, in each case, in excess of \$300,000, (B) imposing a Lien (other than a Permitted Lien) on any of the Purchased Assets or (C) that is a hedging, futures, options or other derivative Contract, other than in the case of (A) and (B), the Anglo Facility;

(iii) Each Contract for the merger, consolidation, reorganization, acquisition,

sale, spin-off or outsourcing or any similar transaction involving any Person, or any business division thereof, or the disposition of any assets of the Company or any of its Subsidiaries, other than dispositions of immaterial amounts of assets in the ordinary course of business;

(iv) Each lease, sublease, license or occupancy agreement governing the Leased Real Property (collectively, the “Real Property Leases”) or other Contract that, in each case, provides for the ownership of, leasing of, title to, use of, or any leasehold or other interest in any real or personal property;

(v) Each joint venture Contract, partnership agreement or limited liability company agreement with a third party (in each case, other than with respect to wholly owned Subsidiaries of the Company);

(vi) Each Contract with a Governmental Authority, or any Contract relating to grants or other forms of assistance received from any Governmental Authority;

(vii) Each Contract (including but not limited to any collective bargaining agreement) with any labor union, employee association, or other labor organization;

(viii) Each Contract containing (A) covenants expressly limiting in any material respect the freedom of the Company or any of its Subsidiaries to compete with any Person in a product line or line of business, to operate in any geographic area, acquire any product or other asset or any services from any other Person, sell any product or other asset to or perform any services for any other Person, or manufacture or create any products, including Contracts that contain, any exclusive rights to provide, license, market, deliver, sell or distribute any product to any Person or otherwise contemplating an exclusive relationship between the Company or a Subsidiary, on one hand, and any other Person, on the other hand and (B) a “most favored nation” clause or similar term pursuant to which the Company or any of its Subsidiaries provides preferential pricing or treatment to any other Persons;

(ix) Each Contract pursuant to which (A) the Company or any of its Subsidiaries is licensed or otherwise permitted by a third party to use (or is granted rights by a third party in) any material Intellectual Property (other than (1) nondisclosure or confidentiality agreements entered into in the ordinary course of business, (2) employee invention assignment agreements or (3) licenses to Off-the-Shelf Software), or (B) any third party is licensed or otherwise permitted to use (or has been granted rights in) any Transferred Intellectual Property (other than non-exclusive licenses or nondisclosure or confidentiality agreements entered into in the ordinary course of business);

(x) Each Contract to which FM Chile is a party or otherwise bound; and

(xi) Each Contract that was entered into outside the ordinary course of business of any the Company or a Subsidiary and that is material to the operation of the Business or the Purchased Assets, taken as a whole.

(b) All of the Contracts set forth on Schedule 4.10(a) and any other Contract set forth on Schedule 6.3(c) on the date hereof are (i) in full force and effect, and enforceable by the Company or a Subsidiary party thereto in accordance with its terms, subject to the Remedies Exception, and (ii) represent the valid and binding obligations of the Company or one of its Subsidiaries party thereto and, to the knowledge of the Company, represent the valid and binding obligations of the other parties thereto. Except as set forth on Schedule 4.10(b), (x) neither the Company, any of its Subsidiaries nor, to the knowledge of the Company, any other party thereto, is in material breach of or material default under any such Contract, (y) neither the Company nor any of its Subsidiaries has received any written claim or notice of a material breach of or material default under any such Contract, and (z) to the knowledge of the Company, no event has occurred which, individually or together with other events, would reasonably be expected to result in a material breach of or a material default under any such Contract or give any Person the right to declare a default or exercise any remedy under, accelerate the maturity or performance of, or cancel, terminate or modify any such Contracts (in each case, with or without notice, lapse of time or both). Neither the Company nor a Subsidiary has waived any of its respective material rights under any such Contracts. No Person has a contractual right pursuant to the terms of any such Contracts to unilaterally renegotiate any amount paid or payable to the Company or a Subsidiary under any such Contracts or any other material term or provision of any such Contracts.

4.11 Company Benefit Plans.

(a) Schedule 4.11(a) sets forth a complete list of each material Company Benefit Plan. “Company Benefit Plan” shall mean (i) any “employee benefit plan” as defined in Section 3(3) of the Employee Retirement Income Security Act of 1974, as amended (“ERISA”), whether or not subject to ERISA and whether written or unwritten, and (ii) any other compensation, stock option, stock purchase, stock appreciation rights, phantom equity or other equity or equity-based awards, individual employment, consulting, severance, tax gross-up, change in control, retention, bonus, incentive, deferred compensation, profit-sharing, retirement, health, cafeteria, medical, dental, vision, disability, flexible spending, tuition reimbursement, scholarship, vacation, paid time off, severance or termination pay, fringe- or other benefit plan, policy, practice, agreement, arrangement or program, whether written or unwritten, which is maintained, sponsored, contributed to, or required to be contributed to, by the Company or any of its Subsidiaries or under which the Company or any of its Subsidiaries has any obligation or Liability, in each case, to provide compensation or benefits to or for the benefit of (i) any Offer Employee or (ii) any current or former director officer, employee or individual independent contractor of FM Chile (a “FM Chile Benefit Plan”), but excluding in each case any plan or program that is sponsored solely by a Governmental Authority or a “multiemployer plan” (as defined in Section 3(37) of ERISA) (a “Multiemployer Plan”). Notwithstanding the foregoing, Schedule 4.11(a) need not identify an offer letter if such offer letter is substantially similar to a form which has been provided to Buyer.

(b) With respect to each Company Benefit Plan, the Company has delivered or made available to Buyer or its representatives copies of, to the extent applicable, (i) the plan document (or, with respect to any unwritten Company Benefit Plan, a summary of the

material terms thereof) and all amendments thereto, (ii) the most recent summary plan description and all summaries of material modification, (iii) all related trust agreements, insurance contracts or other funding agreements, including any amendment thereto, (iv) the most recent determination, opinion or advisory letter, issued by the Internal Revenue Service and (v) annual testing (including nondiscrimination and coverage) results for the most recently completed plan year.

(c) (i) Each Company Benefit Plan has been administered in all material respects in accordance with its terms and all applicable Laws, including, to the extent applicable, ERISA and the Code; and (ii) each Company Benefit Plan which is intended to be qualified within the meaning of Section 401(a) of the Code (A) has received a currently-effective favorable determination opinion letter as to its qualification or (B) has been established under a standardized master and prototype or volume submitter plan for which a current favorable Internal Revenue Service advisory letter or opinion letter has been obtained by the plan sponsor and is valid as to the adopting employer and, in either case, there are no existing circumstances or events that have occurred that could reasonably be expected to cause and the loss of any such qualification status of any such Company Benefit Plan.

(d) No Company Benefit Plan is subject to Title IV of ERISA, Section 302 of ERISA or Section 412 of the Code and neither the Company nor any of its Subsidiaries has sponsored or contributed to or been required to contribute to a Multiemployer Plan at any time or other pension plan subject to Title IV of ERISA, Section 302 of ERISA or Section 412 of the Code at any time within the previous six (6) years and neither the Company nor its Subsidiaries have or could reasonably be expected to have any Liability (including on account of their ERISA Affiliates) with respect to a Multiemployer Plan or Company Benefit Plan subject to Title IV of ERISA, Section 302 of ERISA or Section 412 of the Code. None of the Company or any of its ERISA Affiliates has any Liability as a result of a violation of COBRA.

(e) None of the Company, any of its Subsidiaries, or any Company Benefit Plan provides, or has any obligation to provide, current or former employees of the Company or its Subsidiaries with respect to the Business (or any beneficiaries thereof) welfare benefits (including medical and life insurance benefits) after such person terminates employment with the Company or its Subsidiaries, except for the coverage continuation requirements of COBRA or continued coverage until the end of the month during which termination occurs.

(f) With respect to each Offer Employee, neither the execution of this Agreement nor the consummation of the Transactions (either alone or in combination with another event) will or can be reasonably expected to (i) entitle any Offer Employee to any compensatory payment (including severance pay or similar compensation), any cancellation of indebtedness, or any increase in compensation; (ii) result in the acceleration of payment, funding or vesting under any Company Benefit Plan; or (iii) result in any increase in benefits payable under any Company Benefit Plan. No amount paid or payable (whether in cash, in property, or in the form of benefits) in connection with the Transactions (either alone or in combination with another event) could

reasonably be expected to constitute an “excess parachute payment” within the meaning of Section 280G of the Code. Neither the Company nor any of its Subsidiaries has any obligation to make a “gross-up” or similar payment to an Offer Employee in respect of any Taxes that may become payable under Section 4999 of the Code.

(g) Except as set forth on Schedule 4.11(g), neither the Company nor any Subsidiary is a party to, or is proposing to introduce, a formal or informal severance or redundancy payment scheme or customary arrangement in addition to or that provides entitlements in excess of statutory minimums under applicable Law, in any case, with respect to an Offer Employee.

(h) With respect to each Company Benefit Plan that is subject to Laws of a jurisdiction outside the United States (each an “International Plan”): (i) each International Plan required to be registered with a Governmental Authority has been registered and is in good standing with applicable Governmental Authorities; (ii) if intended to qualify for special Tax treatment, each International Plan is so qualified; and (iii) each International Plan has been administered in all material respects accordance with its terms and all applicable Laws. Except with respect to employees residing in the United States, neither the Company nor any Subsidiary has been a party to, a sponsoring employer of, or otherwise is under any Liability with respect to any defined benefit pension scheme, any final salary scheme or any death, disability or retirement benefit calculated by reference to age, salary or length of service or any other item.

4.12 Labor Relations.

(a) The Company has provided to Buyer a true and correct list of all Offer Employees and all Business Employees of FM Chile containing: (i) their names (or identification number) and status as an employee; (ii) the entity with which they are employed or engaged and their location (country, state, city); (iii) their start dates; (iv) their job titles; (v) their full-time, part-time, or temporary status; (vi) their base salaries or base hourly wage or contract rate; (vii) their target bonus rates or target commission rates; (viii) any other compensation payable to them (including compensation payable pursuant to any other bonus, deferred compensation, commission arrangements or other compensation, and/or severance payments); (ix) their visa status, if applicable, (x) designation of whether they are classified as exempt or non-exempt for purposes of the Fair Labor Standards Act and any similar state law; (xi) with respect to Offer Employees residing in Australia, accrued but unused vacation, holiday and/or paid time off; (xii) leave status and anticipated return to work date, if applicable; and (xiii) any promises or commitments made to them with respect to changes or additions to their compensation or benefits.

(b) Except as set forth in Schedule 4.12(a), there are no currently pending, and have not been during the past three (3) years, any Actions, claims (oral or written), charges, complaints, grievances, arbitrations, investigations or other legal proceedings against the Company or any of its Subsidiaries, or to the knowledge of the Company, threatened to be brought or filed, by or with any Person or any Governmental Authority or arbitrator in connection with the employment or engagement of any Business Employee or any current or former employee, applicant, individual independent contractor, or other

individual service provider of FM Chile, including, without limitation, any claim relating to unfair labor practices, employment discrimination, harassment, retaliation, equal pay, wage or hours violations, unpaid wages, misclassification, unpaid commissions, wrongful termination or any other employment related matter arising under applicable Laws.

(c) Except as set forth in Schedule 4.12(c), during the past three (3) years neither the Company nor its Subsidiaries have implemented or effectuated a “plant closing,” “mass layoff,” partial “plant closing,” “relocation,” or “termination” (each as defined in the Worker Adjustment and Retraining Notification Act or similar state or local Law) affecting any site of employment or one or more facilities or operating units within any site of employment or facility of the Company or any of its Subsidiaries.

(d) Each Person providing services to FM Chile during the past three (3) years that has been characterized as a consultant or independent contractor and not as an employee has been properly characterized pursuant to applicable Law as such and the Company and its Subsidiaries, including but not limited to, FM Chile, do not have any material Liability arising out of the hiring or retention of Persons to provide services to the Company or its Subsidiaries, including but not limited to, FM Chile and treating such Persons as consultants or independent contractors and not as employees of the Company or its Subsidiaries, including but not limited to, FM Chile. All Offer Employees have been correctly classified as exempt or non-exempt for purposes of the Fair Labor Standards Act and any similar Law, and overtime has been properly recorded and paid for all such employees classified as non-exempt.

(e) To the knowledge of the Company, during the past three (3) years, (i) no allegations of harassment, discrimination or misconduct have been made against any (A) officer or director of the Company or its Subsidiaries who is an Offer Employee or any officer or director of FM Chile, or (B) any Offer Employee or any employee of FM Chile who, directly or indirectly, supervises or has managerial authority over other employees or service providers of the Company or its Subsidiaries, and (ii) the Company and its Subsidiaries have not entered into any settlement agreement as a result of any investigation related to allegations of harassment, discrimination or misconduct with respect to an Offer Employee, an employee of FM Chile and/or by an Offer Employee.

(f) To the extent applicable, the Company and its Subsidiaries have properly verified the employment eligibility of all of the Offer Employees in compliance in all material respects with the Immigration Reform and Control Act and has retained an accurately completed and executed Form I-9 for each Offer Employee and any required supporting documentation as required by any Laws.

(g) No transaction contemplated by this Agreement will give rise to a relevant transfer, or result in the automatic transfer of employees to the Buyer or its Subsidiaries, pursuant to the Transfer Regulations.

4.13 Taxes.

- (a) All material Tax Returns required by Law to be filed by or with respect to the Business, the Purchased Assets and FM Chile have been timely filed, and all such Tax Returns are true and complete in all material respects. No extension of time within which to file any such Tax Return is in effect.
- (b) No waiver of any statute of limitations relating to material Taxes with respect to the Business, the Purchased Assets or FM Chile is in effect, and no written request for such a waiver is outstanding.
- (c) All material Taxes which are due and payable with respect to the Business, the Purchased Assets and FM Chile (whether or not shown as due and payable on any Tax Return) have been paid.
- (d) None of the Purchased Assets (excluding the equity interests in FM Chile) is an interest in an entity taxable as a corporation, partnership, trust or real estate mortgage investment conduit for U.S. federal income Tax purposes.
- (e) All material Taxes (i) with respect to the Business or the Purchased Assets required by applicable Law to be withheld or (ii) which FM Chile is required by applicable Law to withhold, have been withheld and paid over to the appropriate Governmental Authority.
- (f) No deficiency for any material Taxes with respect to the Business, the Purchased Assets or FM Chile has been asserted or assessed by any Governmental Authority in writing (or, to the knowledge of the Company, has been threatened or proposed in writing), except for deficiencies which have been satisfied by payment, settled or withdrawn. No Action with respect to any Taxes is in progress, pending, proposed or threatened in writing with respect to the Business, the Purchased Assets or FM Chile.
- (g) None of the Sellers or FM Chile has been a member of a federal, state, local or foreign consolidated, combined, unitary or similar group (other than a group the common parent of which is First Mode Holdings Inc.). There are no Tax indemnification or Tax sharing agreements under which the Buyer would reasonably be expected to be liable after the Closing Date for any Tax liability of any Seller or FM Chile, other than with respect to customary agreements with customers, vendors, lessors, lenders and the like or other similar agreements included in the Purchased Assets or Assumed Liabilities and entered into in the ordinary course of business that do not substantially relate to Taxes. None of the Sellers or FM Chile has any liability for material Taxes of another Person under Treasury Regulations Section 1.1502-6 (or any similar provision of state, local or foreign law) as a transferee or successor.
- (h) None of the Sellers or FM Chile has entered into or participated in a “listed transaction” that has given rise to a disclosure obligation under Section 6011 of the Code and the Treasury Regulations promulgated thereunder and that has not been disclosed in the relevant Tax Return of the relevant Seller.
- (i) There are no Liens for Taxes on the Purchased Assets or the assets of FM Chile other than Permitted Liens.

(j) No claim related to the Business, the Purchased Assets or the Taxes of FM Chile has been made by any Governmental Authority in a jurisdiction where any Seller or FM Chile does not file a particular type of Tax Return claiming that such Seller is or may be required to file such Tax Return or pay a particular type of Tax in such jurisdiction or is or may be subject to taxation by that jurisdiction, in each case, that remains unresolved.

(k) FM Chile is classified as a corporation for U.S. federal income tax purposes.

(l) There are no Tax rulings or requests for rulings relating to Taxes of FM Chile.

(m) FM Chile (i) is not and has never been a “surrogate foreign corporation” within the meaning of Section 7847(a)(2)(B) of the Code or is treated as a U.S. corporation under Section 7874(b) of the Code; or (ii) was not created or organized in the United States such that such entity would be taxable in the United States as a domestic entity pursuant to United States Treasury Regulations Section 301.7701-5(a).

(n) FM Chile will not be required to include any material item of income in, or exclude any material item of deduction or loss from, taxable income for any taxable period (or portion thereof) ending after the Closing Date as a result of any (i) installment sale or open transaction disposition made prior to the Closing, (ii) prepaid amount or deferred revenue received prior to the Closing, (iii) change in method of accounting for a taxable period ending on or prior to the Closing Date, (iv) “closing agreement” as described in Section 7121 of the Code (or any similar provision of state, local or non-U.S. Tax Law) entered into prior to the Closing, (v) use of an improper method of accounting for a taxable period ending on or prior to the Closing Date, or (vi) a gain recognition agreement under Section 367 of the Code (or any similar provision of state, local or non-U.S. Tax Law).

(o) No transaction contemplated by this Agreement is subject to withholding under Section 1445 of the Code (relating to “FIRPTA”) (or similar provision of state, local or foreign law).

4.14 Licenses, Permits and Authorizations.

Sellers hold, and are in compliance with, all of the licenses, approvals, consents, registrations and permits (collectively, “Permits”) necessary under applicable Laws to permit Sellers own, operate, use and maintain their respective Purchased Assets in the manner in which they are now operated, used and maintained and to conduct their respective portions of the Business as currently conducted, except where the absence of, or the failure to be in compliance with, any such Permit would not reasonably be expected to be material to the Purchased Assets or the Business, taken as a whole. There are no pending or, to the knowledge of the Company, threatened in writing, Actions that would reasonably be expected to result in the revocation or termination of any Permit that is material to the conduct of the Business as currently conducted, except for any such revocation or termination that would not reasonably be expected to be material to the Business or the Purchased Assets, taken as a whole.

4.15 Sufficiency of Assets; Machinery, Equipment and Other Tangible Personal Property;

(a) The Company or one of its Subsidiaries owns and has good title to the Purchased Assets, free and clear of all Liens other than Permitted Liens.

(b) The equipment, fixtures and other tangible assets included in the Purchased Assets (i) have been maintained in all material respects in accordance with the ordinary course policies, procedures and standards of the Company or its Subsidiaries, and are not the subject to any material deferred maintenance or deferred capital expenditures, (ii) are in good condition and repair (ordinary wear and tear excepted) and (iii) are suitable for the uses for which intended, and none of such tangible assets are in need of maintenance or repairs except for ordinary, routine maintenance and repairs that are not material in cost or nature. The leased personal property included in the Purchased Assets are in all material respects in the condition required of such property by the terms of the lease applicable thereto.

4.16 Real Property.

None of the Company or any of its Subsidiaries own any real property. Neither the Company nor any of its Subsidiaries is obligated or bound by any options, obligations or rights of first refusal or contractual rights to sell, lease or acquire any real property. Schedule 4.16 lists the street addresses of all Leased Real Property and a description of all Real Property Leases. The Company or one of its Subsidiaries has a valid and enforceable leasehold estate in all Leased Real Property, subject to the Remedies Exception and free and clear of all Liens except any Permitted Liens. Neither the Company nor any of its Subsidiaries has received any written notice from any lessor or similar third party of such Leased Real Property of, nor does the Company or any of its Subsidiaries have knowledge of the existence of, any default, event or circumstance that, with or without notice, lapse of time, or both, would constitute a default under any of the Real Property Leases. The Company or the Subsidiary, as applicable, has the right to use all of the Leased Real Property for the full term of each such Real Property Lease (and any renewal options) relating thereto. Neither the Company nor any of its Subsidiaries has assigned, transferred or pledged any interest in any of the Real Property Leases. Neither the whole nor any part of the Leased Real Property is subject to any pending suit for condemnation or other taking by any public authority, and, to the knowledge of the Company, no such condemnation or other taking is threatened or contemplated. The use and occupancy of the Leased Real Property by the Company or its Subsidiary and the conduct of the Business thereat as presently conducted does not violate in any material respect any applicable Laws (including zoning Laws). There are no leases, subleases, licenses or other agreements granting to any Person other than the Company or its Subsidiaries the right of use or occupancy of any portion of the Leased Real Property (except under the Real Property Leases). All buildings, structures, facilities and improvements located on the Leased Real Property, including buildings, structures, facilities and improvements which are under construction (collectively, “Improvements”) comply in all material respects with valid and current certificates of occupancy or similar permits to the extent required by Laws for the use thereof, and conform in all material respects with all applicable Laws. The Improvements are in all material respects (A) in good operating condition and repair (ordinary wear and tear excepted) and (B) suitable and adequate for continued use in the manner in which they are presently being used. The Leased Real Property constitutes all of the real property used by the Company or any of its Subsidiaries in the conduct of its business.

4.17 Intellectual Property.

(a) Schedule 4.17(a) sets forth a complete, accurate and current list of all the following included in the Transferred Intellectual Property: (A) issued or registered Intellectual Property and pending applications for issuances or registrations of Intellectual Property, including for each such item (to the extent applicable), the record owner, the jurisdiction in which such item has been issued, registered, or filed, and the issuance, registration, or application number and date (the “Transferred Registered Intellectual Property”), (B) material unregistered Trademarks, (C) material Transferred Software, and (D) Trade Secrets. All Transferred Registered Intellectual Property is subsisting, unexpired, valid, and enforceable. The Company and its Subsidiaries are in compliance with all applicable requirements (including payment of filing, examination, and maintenance fees) required to maintain the Transferred Registered Intellectual Property in full force and effect.

(b) Except as set forth on Schedule 4.17(b), all Transferred Intellectual Property is owned by the Company or one of its Subsidiaries free and clear of any Liens (other than Permitted Liens).

(c) The Company or one of its Subsidiaries owns, or has sufficient rights in and to pursuant to a valid and subsisting license, sublicense, agreement or other permission, to use all Intellectual Property in the manner in, and to the extent to, which it is used in the operation of the business of the Company and its Subsidiaries, as conducted as at the date of this Agreement and as at Closing.

(d) The Company and its Subsidiaries use and have used commercially reasonable efforts to maintain and protect the confidentiality of the Trade Secrets of the Company and its Subsidiaries that are material to the business. All Persons who are privy to any such Trade Secrets have executed and delivered to the Company or one of its Subsidiaries, as applicable, a written agreement pursuant to which such Person has agreed to hold such Trade Secrets in confidence. To the knowledge of the Company, no Trade Secrets, know-how or other proprietary information of the Company or any of its Subsidiaries are owned by any current or former employee, founder, contractor, consultant, or any other individual or entity other than the Company or any of its Subsidiaries. There has been and is no misuse of Trade Secrets by the Company or any of its Subsidiaries and the Company, its Subsidiaries and the Sellers have not made any disclosure of know-how to any person, other than to the Buyer or in the ordinary and usual course of business and on the basis that such disclosure is to be treated as being of a confidential character.

(e) All Persons who have independently or jointly contributed to the creation, development, conception, or reduction to practice of any Transferred Intellectual Property, including any Transferred Intellectual Property that was created prior to the formation of the Company or any of its Subsidiaries, have executed and delivered to the Company or one of its Subsidiaries, as applicable, a valid and enforceable written agreement pursuant to which such Person irrevocably and unconditionally assigns all rights, title, and interest in and to such Intellectual Property to the Company or one of its

Subsidiaries, as applicable. No such Person has retained any rights in or to such Transferred Intellectual Property.

(f) Except as set forth on Schedule 4.17(f), neither the Company nor any of its Subsidiaries has delivered, licensed or made available to any escrow agent or other Person any material source code included in the Transferred Software, except for disclosures to employees and independent contractors for the Company or any of its Subsidiaries that are subject to written confidentiality obligations to maintain the confidentiality of such software code and who have had such access only during the term of their employment with, or provision of services to, the Company or any of its Subsidiaries, as applicable, and no Software that is licensed, distributed or otherwise made available to others by the Company or any of its Subsidiaries incorporates any Open Source Software or similar license that requires any source code included in the Transferred Software to be disclosed, distributed, or licensed to any other Person.

(g) Except as set forth on Schedule 4.17(g) no third party is infringing upon, misappropriating or otherwise violating any Transferred Intellectual Property. Neither the Company nor any of its Subsidiaries has given any notice, charge, complaint, claim or other assertion asserting or threatening to assert any Action against any Person involving or relating to any Transferred Intellectual Property or other Intellectual Property which is material to the conduct of the business as it is conducted at the date of this Agreement and at Closing.

(h) Neither the Company nor any of its Subsidiaries is a member of, participant in or contributor to any standards-setting organization or patent pool that requires the Company or any of its Subsidiaries to license, release, covenant not to asset or make available any Transferred Intellectual Property to any other Person. Neither the Company nor any of its Subsidiaries has used any funding, facilities, personnel or other resources of any Governmental Authority, academic or research institution to invent, develop or create any Transferred Intellectual Property.

4.18 Absence of Changes.

(a) From the date of the most recent balance sheet included in the Financial Statements to the date of this Agreement, there has not been any Material Adverse Effect.

(b) Except as expressly contemplated by this Agreement, from the date of the most recent balance sheet included in the Financial Statements through the date of this Agreement, the Company and its Subsidiaries have, in all material respects, conducted the Business and operated the Purchased Assets in the ordinary course of business.

(c) Except as set forth in Schedule 4.18(c), since the date of most recent balance sheet included in the Financial Statements, neither the Company nor any of its Subsidiaries has taken any action that would require the Buyer's consent pursuant subsections (ii), (v) or (vii) to Section 7.1(b).

4.19 Affiliate Matters.

None of the Contracts set forth on Schedule 6.3(c) on the date hereof are between (x) any Seller or FM Chile, on the one hand, and (y) any Affiliate of any Seller or FM Chile or any officer, director, equityholder or employee of any Seller or FM Chile, on the other hand (each, a “Related Party”). Except as set forth on Schedule 4.19, no Related Party (a) owns any of the Purchased Assets, (b) owes any money to, or is owed any money by, any Seller or FM Chile (excluding advances for business expenses in the ordinary course of business) or (c) provides material services to FM Chile or the Business or with respect to any Purchased Asset.

4.20 Brokers’ Fees

Except as set forth on Schedule 4.20, no broker, finder, investment banker or other Person is entitled to any brokerage fee, finders’ fee or other similar commission, for which Buyer, the Company or any of its Subsidiaries would be liable in connection with the Transactions based upon arrangements made by the Company, any of its Subsidiaries or any of their Affiliates.

4.21 No Additional Representations or Warranties.

Except as provided in this ARTICLE IV, the Schedules or, as applicable, any other Transaction Document to which any Seller is a party, neither Sellers nor any of their Affiliates, nor any of their respective managers, directors, officers, employees, stockholders, partners, members, agents or representatives has made, or is making, any representation or warranty whatsoever, express or implied, at law or in equity, to Buyer or its Affiliates, directors, officers, employees, stockholders, partners, members or representatives.

ARTICLE V. REPRESENTATIONS AND WARRANTIES OF BUYER

Except as set forth in the Schedules, Buyer represent and warrant to the Company as of the date of this Agreement and as of the Closing as follows:

5.1 Corporate Organization.

Buyer has been duly incorporated and is validly existing as a corporation in good standing under the Laws of the State of Delaware and has the corporate power and authority to own, operate or lease its properties and to conduct its business as it is now being conducted. Buyer is duly licensed or qualified and (where applicable) is in good standing in each jurisdiction in which the ownership, operation or leasing of its property or the character of its activities is such as to require it to be so licensed or qualified except as would not, individually or in the aggregate, reasonably be expected to interfere with, prevent or delay the ability of Buyer to enter in to and perform its obligations under the Transaction Documents to which it is a party or to consummate the transactions contemplated thereby.

5.2 Due Authorization.

Buyer has all requisite corporate power and authority to execute and deliver this Agreement and the other Transaction Documents to which Buyer is a party and (subject to the

consents, approvals, authorizations and other requirements described in Section 5.5) to perform all obligations to be performed by it hereunder. The execution and delivery of this Agreement and the other Transaction Documents to which Buyer is a party and the consummation by Buyer of the Transactions have been duly and validly authorized and approved by the board of directors of Buyer, and no other corporate proceeding on the part of Buyer is necessary to authorize this Agreement. This Agreement and the other Transaction Documents to which Buyer is a party have been duly and validly executed and delivered by Buyer and (assuming such agreements constitute the legal, valid and binding obligations of the applicable Sellers) constitute the legal, valid and binding obligations of Buyer, enforceable against Buyer in accordance with its terms, subject to the Remedies Exception.

5.3 No Conflict.

Except as may result from any facts or circumstances related solely to Sellers or their Affiliates, the execution and delivery of this Agreement by Buyer and the other Transaction Documents to which Buyer is a party and the consummation by Buyer of the Transactions do not (a) conflict with, violate any provision of, or result in the breach of any applicable Law to which Buyer is subject or by which any property or asset of Buyer is bound, (b) conflict with the Organizational Documents of Buyer or any Subsidiary of Buyer, or (c) conflict with, violate any provision of, result in a breach of, constitute a default (or an event which, with or without notice, lapse of time or both, would become a default) under, require a consent under, give to any person any right of acceleration, termination, modification or cancellation under, result in the creation of any Lien (other than Permitted Liens) under, or terminate or result in the termination of, any material Contract to which Buyer or any Subsidiary of Buyer is a party or by which Buyer or any Subsidiary of Buyer may be bound, or terminate or result in the termination of any such Contract, or result in the creation of any such Lien under any such Contract upon any of the properties or assets of Buyer or any Subsidiary of Buyer constitute an event which, after notice or lapse of time or both, would result in any such violation, breach, termination or creation of such Lien, except to the extent that the occurrence of the foregoing items set forth in clauses (a) or (c) would not, individually or in the aggregate, interfere with, prevent or delay in any material respect the ability of Buyer, as applicable, to enter into and perform its obligations under the Transaction Documents to which it is a party or consummate the transactions contemplated thereby.

5.4 Litigation and Proceedings.

There are no Actions pending or, to the knowledge of Buyer, threatened, against Buyer or any of their respective Affiliates or their respective representatives which, in each case, if resolved adversely to Buyer or any of their respective Affiliates or representatives, would reasonably be expected to interfere with, prevent or delay in any material respect the ability of Buyer, as applicable, to enter into and perform its obligations under the Transaction Documents to which it is a party or consummate the transactions contemplated thereby.

5.5 Governmental Consents.

Assuming the truth and completeness of the representations and warranties of the Company contained in this Agreement, no consent, approval or authorization of, or designation, declaration or filing with, any Governmental Authority is required on the part of Buyer with respect

to Buyer's execution or delivery of this Agreement or the consummation of the Transactions.

5.6 Financial Ability.

Buyer has cash on hand or undrawn amounts immediately available under existing credit facilities necessary to consummate the Transactions, and to satisfy all of the obligations of Buyer under this Agreement.

5.7 Brokers' Fees.

Except as set forth on Schedule 5.7, no broker, finder, investment banker or other Person is entitled to any brokerage fee, finders' fee or other similar commission in connection with the Transactions based upon arrangements made by Buyer or any of its Affiliates.

5.8 No Outside Reliance.

Notwithstanding anything contained in this ARTICLE V or any other provision hereof, Buyer acknowledges and agrees that neither the Company nor any of its Affiliates, nor any of its or their respective directors, officers, employees, stockholders, partners, members, agents or representatives, has made, or is making, any representation or warranty whatsoever, oral or written, express or implied, beyond those expressly given in ARTICLE IV or any other Transaction Document, including any implied warranty or representation as to condition, merchantability, suitability or fitness for a particular purpose or trade as to any Purchased Asset or the Business. Without limiting the generality of the foregoing, it is understood that any cost estimates, financial or other projections or other predictions that may be contained or referred to in the Schedules or elsewhere, as well as any information, documents or other materials (including any such materials contained in any "data room" or reviewed by Buyer or any of its Affiliates, nor any of their respective directors, officers, employees, stockholders, partners, members, agents or representatives agents or representatives pursuant to the Confidentiality Agreement) or management presentations or due diligence discussions that have been or shall hereafter be provided to or engaged in with Buyer or any of its Affiliates or any of their respective directors, officers, employees, stockholders, partners, members, agents or representatives are not and will not be deemed to be representations or warranties of the Company or any of its Affiliates or any of their respective directors, officers, employees, stockholders, partners, members agents or representatives, and no representation or warranty is made as to the accuracy or completeness of any of the foregoing, except as may be expressly set forth in ARTICLE IV or any other Transaction Document. Buyer understands and agrees that any Inventory that is a Purchased Asset is furnished "as is", and "where is" and, subject only to the representations and warranties contained in ARTICLE IV, with all faults and without any other representation or warranty of any nature whatsoever. Notwithstanding anything to the contrary in the foregoing, nothing contained in this Section 5.8 shall limit the applicability of any claim for Fraud.

5.9 No Additional Representations or Warranties.

Except as provided in this ARTICLE V or any other Transaction Document to which it is a party, neither Buyer nor any of their Affiliates, nor any of their respective managers, directors, officers, employees, stockholders, partners, members, agents or representatives has made, or is making, any representation or warranty whatsoever, express or implied, at law or in

equity, to Sellers or their respective Affiliates, directors, officers, employees, stockholders, partners, members or representatives.

ARTICLE VI. BANKRUPTCY COURT MATTERS

6.1 Competing Transaction.

This Agreement is subject to approval by the Bankruptcy Court and the consideration by Sellers of higher or better competing bids in respect of all or any part of the Purchased Assets, as determined in accordance with the provisions of the Bid Procedures Order (each, a “Competing Bid”).

6.2 Bankruptcy Court Filings.

(a) Subject to Section 6.1, Sellers shall use commercially reasonable efforts to take all actions as may be necessary to cause the Sale Order to be issued and entered by the Bankruptcy Court and become a Final Order, including furnishing affidavits, declarations or other documents or information for filing with the Bankruptcy Court, which Sale Order shall provide for the transfer of the Purchased Assets and the Assumed Liabilities to Buyer free and clear of any Liens and free from all successor or transferee Liability to the fullest extent permitted by Section 363 of the Bankruptcy Code. Sellers shall comply (or obtain an Order from the Bankruptcy Court waiving compliance) with all requirements under the applicable provisions of the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, and the Local Bankruptcy Rules for the Bankruptcy Court in obtaining the entry of the Sale Order. Buyer agrees that it will promptly take such actions as are reasonably requested by Sellers to assist in obtaining entry of the Sale Order, including a finding of adequate assurance of future performance by Buyer, including by furnishing affidavits or other documents or information for filing with the Bankruptcy Court for the purposes, among others, of providing necessary assurances of performance by Buyer under this Agreement and demonstrating that Buyer is a “good faith” Buyer under Section 363(m) of the Bankruptcy Code. If the Sale Order, or any other orders of the Bankruptcy Court relating to this Agreement or the Transactions are appealed by any Person (or if any petition for certiorari or motion for reconsideration, amendment, clarification, modification, vacation, stay, rehearing or reargument shall be filed with respect to the Bid Procedures Order and the Sale Order, or such other Order), subject to rights otherwise arising from this Agreement, Sellers shall take all actions as may be necessary to prosecute and defend such appeal, petition or motion and obtain an expedited resolution thereof.

(b) Sellers shall use its commercially reasonable efforts to (i) hold the Auction, unless an Auction is not required to be held pursuant to the terms of the Bid Procedures, on or before the date that is 40 days following the Petition Date, and (ii) have the Sale Order entered on or before the date that is 50 days following the Petition Date.

(c) The parties shall consult with each other regarding pleadings that any of them intends to file with the Bankruptcy Court in connection with, or which might reasonably

affect the Bankruptcy Court's approval of, the Sale Order, including, (i) sharing in advance of filing the Sale Motion, any proposed Bid Procedures Order, any proposed Sale Order, together with any motions, declarations, or replies submitted by the Sellers in support of entry of Bid Procedures Order or the Sale Order, and (ii) to the extent reasonably practicable, sharing in advance of filing any drafts of any other documents in connection with the Sale Order. Sellers shall not seek any modification to the Sale Order by the Bankruptcy Court or any other Governmental Authority of competent jurisdiction to which a decision relating to the Bankruptcy Cases has been appealed, in each case, without the prior written consent of Buyer, not to be unreasonably withheld.

6.3 Assumption of Assigned Contracts.

(a) Schedule 6.3(a) sets forth a complete list of all executory Contracts and unexpired leases, including Real Property Leases, and non-executory Contracts (collectively, the "Available Contracts") to which any Seller is a party and that are used or held for use in the operation of, or relating to, the Business or Purchased Assets, including (x) with respect to each such executory Contract to which a Debtor is a party, a good faith estimate of the Cure Costs in respect of each such executory Contract and (y) with respect to each such Contract to which a Debtor is not a party, the monetary amounts that the Sellers believe are required to be paid in connection with the assumption and/or assignment of each such Contract (such monetary amounts as set forth on Schedule 6.3(a), the "Non-Debtor Contract Costs"). The Sellers have, to their knowledge, made available to Buyer prior to the execution of this Agreement true and complete copies of all such Available Contracts.

(b) With respect to any Available Contracts to which a Debtor is a party, on or before the date that is two Business Days following the date on which the Bid Procedures Order is entered by the Bankruptcy Court, Sellers shall file (or cause to be filed) a customary notice of assumption (the "Assumption Notice") with the Bankruptcy Court and serve such notice on each counterparty to an Available Contract listed thereon. The Assumption Notice shall identify all Available Contracts to which a Debtor is a party that Sellers and Buyer believe may be assumed and assigned in connection with the sale of the Purchased Assets and set forth a good faith estimate of the amount of Cure Costs applicable to each such Available Contract (and if no Cure Cost is estimated to be applicable with respect to any particular Available Contract, the amount of such Cure Cost designated for such Available Contract shall be "\$0.00"). In accordance with the Bid Procedures Order, the parties hereto reserve the right to supplement and/or modify such list of Available Contracts and have Sellers provide additional notice thereof, as applicable, and to remove (subject to Section 6.3(c)) an Available Contract from, or add a Contract to, such list of Available Contracts, up to two (2) days prior to the Closing Date. Solely to the extent consistent with the Bid Procedures Order, the Assumption Notice and any notice of supplementation or modification with respect thereto shall provide that any failure by a non-Debtor counterparty to timely object to the Cure Costs set forth in the applicable Assumption Notice shall make binding the Cure Costs set forth in the applicable Assumption Notice or notice of supplementation or modification with respect thereto.

(c) Schedule 6.3(c) sets forth a list of Available Contracts that Buyer intends to include on the Assigned Contract Schedule as of the date hereof. Not less than two (2) Business Days before the Auction or cancellation thereof, Buyer shall provide to Sellers an updated list of the Available Contracts that the Buyer intends to include on the Assigned Contract Schedule (as defined below, and such Contracts that Buyer intends to have Sellers assume and assign to Buyer at the Closing, the “Assigned Contracts”). Buyer shall be entitled, in its sole discretion, to (i) remove any Available Contract from the Assigned Contracts or (ii) add any Available Contract to the Assigned Contracts at any time up to two (2) days prior to the Closing Date by providing Sellers written notice of such removal or addition, as applicable, without any downward adjustment to the Purchase Price. In the event that Buyer removes any such Available Contract from the list of Assigned Contracts (as finalized at two (2) days prior to the Closing Date, the “Assigned Contracts Schedule”), such Available Contract will constitute an Excluded Contract and, to the extent a Debtor is a party to such Available Contract, Sellers will provide the relevant counterparty notice that the applicable Available Contract is no longer identified as an Assigned Contract. Subject to Section 6.3(d), for the avoidance of doubt, only those Available Contracts that remain identified as Assigned Contracts on the Assigned Contracts Schedule as of the Closing Date will be assumed by Sellers and assigned to Buyer (x) with respect to such Assigned Contracts to which a Debtor is a party, pursuant to the Sale Order or (y) with respect to such Assigned Contracts to which a Debtor is not a party, pursuant to the terms hereof (subject to Section 2.5) and, in each case, included as Purchased Assets. With respect to the Assigned Contracts to which a Debtor is a party, Sellers shall file such motions or pleadings as may be appropriate or necessary to assume and assign such Assigned Contracts and to determine the amount of the Cure Costs with respect thereto. With respect to the Assigned Contracts to which a Debtor is not a party, Sellers and Buyer shall, and shall cause their respective subsidiaries to, use commercially reasonable efforts prior to the Closing to obtain the consents, waivers, approvals, orders and authorizations necessary to transfer, assign or permit a change in control with respect to any such Assigned Contracts; provided, that, for the avoidance of doubt, any such Assigned Contracts for which the requisite consent, waiver, approval, order or authorization is not obtained prior to the Closing shall be deemed a Non-Transferred Asset in accordance with Section 2.5. Notwithstanding the foregoing, nothing herein shall preclude Sellers from filing one or more motions to reject any Available Contracts to which a Debtor is a party that are not Assigned Contracts; provided, that Sellers shall confirm with Buyer before filing any motion to reject any such Available Contracts that Buyer does not intend to assume any such Available Contract. At the Closing, Sellers shall assume and assign to Buyer (x) the Assigned Contracts to which a Debtor is a party, in each case, pursuant to Section 365 of the Bankruptcy Code and the Sale Order, subject to provision by Buyer of adequate assurance and payment of future performance to the extent required under Section 365 of the Bankruptcy Code and the terms of the Sale Order and (y) the Assigned Contracts to which a Debtor is not a party pursuant to the terms and subject to the conditions hereof.

(d) For the avoidance of doubt and notwithstanding anything to the contrary herein, Buyer shall be liable for all Cure Costs (including, for the avoidance of doubt, any such Cure Costs that arise after Closing). If an objection from a duly noticed counterparty is timely filed in the Bankruptcy Court (each, a “Cure Objection”) with respect to an

Assigned Contract to which a Debtor is a party and such Cure Objection is not consensually resolved or finally determined by the Bankruptcy Court, in each case prior to Closing and to Buyer's satisfaction, then at Buyer's election (i) such Assigned Contract will be removed from the list of Assigned Contracts and shall be deemed an Excluded Contract for purposes of this Agreement, (ii) such Assigned Contract shall be assumed by the Seller and assigned to Buyer on the Closing with a Cure Cost equal to that asserted by the Contract counterparty or (iii) such Assigned Contract shall be deemed assumed by the applicable Seller and assigned to the Buyer on the Closing, subject to the preservation of the non-Seller counterparty's Cure Objection, and with respect to the foregoing clauses (ii) and (iii), Buyer shall be required to pay or cause to be paid such Cure Costs. For the avoidance of doubt, at any time during the pendency of a dispute with respect to a Cure Objection and, in any event, within five (5) Business Days after the date on which the Bankruptcy Court has entered an order fixing a Cure Cost that is higher than the amount listed in the Assumption Notice and/or the Assigned Contracts Schedule, Buyer may designate such Assigned Contract as an Excluded Contract in accordance with this Section 6.3 and such contract shall be deemed an Excluded Contract for purposes of this Agreement, with no payment of any Cure Costs; provided, that with respect to any Assigned Contract subsequently designated as an Excluded Contract following the Closing, Buyer shall be solely responsible for payment of obligations and liabilities incurred between the Closing and the designation of such Assigned Contract as an Excluded Contract; provided, further, that the applicable Seller shall not reject such Assigned Contract until Buyer's designation (if any).

(e) If Sellers receive a Cure Objection and such Cure Objection is consensually resolved or finally determined by the Bankruptcy Court, in each case, prior to Closing and to Buyer's satisfaction, then any remaining Cure Costs owing to such non-Seller counterparty with respect to the subject Assigned Contract shall promptly be paid by Buyer.

(f) From the date of the filing of the Assumption Notice, Sellers shall (i) not (x) increase the Cure Costs or Non-Debtor Contract Costs set forth on Schedule 6.3(a) with respect to any Available Contract, (y) reject any Available Contract, or (z) resolve any Cure Objection, in each case without Buyer's prior written consent (not to be unreasonably withheld), and (ii) consult with Buyer with respect to any Cure Objections or the resolution thereof.

(g) If, prior to Closing, it is discovered that a Contract should have been listed on Schedule 6.3(a) but was not so listed (any such Contract, a "Previously Omitted Contract"), then Sellers shall, as soon as reasonably possible following the discovery thereof, notify Buyer in writing of such Previously Omitted Contract (the "Previously Omitted Contract Notice") and provide Buyer with a copy of such Previously Omitted Contract and the Cure Cost (if any) in respect thereof. Buyer shall thereafter deliver notice to Sellers no later than two (2) days prior to Closing noting whether Buyer elects to so include such Previously Omitted Contract on the Assigned Contracts Schedule and make it an Assigned Contract. Any Previously Omitted Contract not added to the Assigned Contracts Schedule shall be deemed an Excluded Contract for purposes of this Agreement. If Buyer includes a Previously Omitted Contract on the Assigned Contracts

Schedule in accordance with Section 6.3(g), and a Debtor is a party to such Previously Omitted Contract, Sellers shall file and serve a customary notice on the counterparty to such Previously Omitted Contract notifying such counterparty of the Sellers' intention for the Seller to assume and assign such contract, including in such notice the proposed Cure Cost (if any).

(h) Prior to Closing, Sellers and Buyer shall take action to provide adequate assurance and payment of Cure Costs as may be required under Section 365 of the Bankruptcy Code and the terms of the Sale Order. At the Closing (or, if applicable, in accordance with clause (iii) of Section 6.3(d)), the Cure Costs with respect to any Assigned Contract (including Previously Omitted Contracts that become Assigned Contracts pursuant to Section 6.3(g)) that is consensually resolved or finally determined by the Bankruptcy Court shall be paid in accordance with Section 6.3(d).

(i) Sellers shall use reasonable best efforts to facilitate introductions to the counterparties to any Contract of Sellers or its Subsidiaries pertaining to the Business or the Purchased Assets, and Buyer may (during the period between the date hereof and Closing) discuss with each such counterparty the terms on which Buyer is willing to assume such Contract. Upon an agreement between Sellers, Buyer and the applicable counterparty to any Assigned Contract to which a Debtor is a party on the Cure Costs that shall be payable in connection with assignment and assumption of such Assigned Contract, subject to Buyer's consent, which agreement is binding on the counterparty pursuant to an order of the Bankruptcy Court, such amount shall be deemed to be the Cure Cost applicable to such Assigned Contract for all purposes hereunder.

(j) Notwithstanding any provision in this Agreement to the contrary, from and after the date hereof through the Closing Date, Sellers will not reject or take any action (or fail to take any action that would result in rejection by operation of Law) to reject, withdraw, repudiate or disclaim any Contract materially or primarily related to the Business unless Buyer has provided its prior written consent (email being sufficient).

6.4 No Successor Liability

The parties hereto agree that the Sale Order shall provide that to the fullest extent permitted under Section 363(f) of the Bankruptcy Code and any other applicable Law, (a) neither Buyer nor any of its Affiliates shall be liable for any Liability or Lien (other than Assumed Liabilities and Permitted Liens) against Sellers or any of their predecessors; and (b) neither Buyer nor any of its Affiliates shall have any successor or vicarious liability of any kind or character whether known or unknown as of the Closing Date, whether now existing or hereafter arising, or whether fixed or contingent, with respect to the Business, the Purchased Assets or any Liabilities of Sellers who are a debtor in the Bankruptcy Cases arising on or prior to the Closing Date.

ARTICLE VII. CERTAIN PRE-CLOSING ACTIONS

7.1 Conduct of the Business.

(a) Except (i) as set forth on Schedule 7.1(b), (ii) as may be approved in advance in

writing by Buyer, including pursuant to Section 7.1(c) and (iii) as is otherwise required by a Governmental Order of the Bankruptcy Court, from the date hereof through the Closing, Sellers shall use their reasonable best efforts to (A) enter or cause FM Chile to enter the Contracts set forth on Schedule 7.1(c) and purchase Inventory or other assets or services in accordance with Section 7.1(c); provided, that, for the avoidance of doubt, Sellers' failure to enter or cause FM Chile to enter such Contracts or purchase such Inventory or other assets or services shall not constitute a breach of this Section 7.1(a) for purposes Section 9.2(a)(i) and (B) use their reasonable best efforts keep and maintain the tangible Purchased Assets in good operating condition and repair.

(b) Without limiting the generality of Section 7.1, except as expressly contemplated by this Agreement or as set forth in Schedule 7.1(b), Sellers shall not, without the express prior written approval of Buyer (including pursuant to Section 7.1(c)):

(i) sell, lease (as lessor), transfer or otherwise dispose of (including any transfers to any equityholders of the Company or any affiliates of such equityholders), or mortgage or pledge, or impose or suffer to be imposed any Lien on, any of the Purchased Assets, except for minor amounts of personal property sold or otherwise disposed of for fair value in the ordinary course of the business of the Company or its Subsidiaries consistent with past practice;

(ii) acquire by merging or consolidating with, or by purchasing a substantial portion of the assets of any business or any corporation, partnership or other business organization or otherwise acquire any assets (except assets purchased for minor amounts in the ordinary course of the business of the Company or its Subsidiaries consistent with past practice), that as of the Closing would constitute Purchased Assets;

(iii) cancel any debts owed to or claims held by the Company or its Subsidiaries (including the settlement of any claims or litigation) in connection with the Business or the Purchased Assets other than in the ordinary course of the business of the Company or its Subsidiaries consistent with past practice;

(iv) create, incur or assume, or agree to create, incur or assume, any indebtedness for borrowed money or enter into, as lessee, any capitalized lease obligations in connection with the Business or the Purchased Assets (other than for reasonably necessary repairs and ordinary course maintenance), except to the extent the foregoing would constitute Excluded Liabilities;

(v) delay or accelerate payment of any account payable or other liability beyond or in advance of its due date or the date when such liability would have been paid in the ordinary course of the business of the Company or its Subsidiaries consistent with past practice in connection with the Business or the Purchased Assets, except to the extent the foregoing would constitute Excluded Liabilities;

(vi) (A) prepare or file any material Tax Return inconsistent with past practice or, on any such Tax Return, take any position, make any election, or adopt any

method that is inconsistent with positions taken, elections made or methods used in preparing or filing similar Tax Returns in prior periods, in each case, in respect of material Taxes, (B) file any material amended Tax Return, (C) settle or compromise any claim related to material Taxes, (D) enter into any closing agreement or similar agreement relating to material Taxes, (E) otherwise settle any dispute relating to material Taxes, (F) surrender any right to claim a material Tax refund, material offset or other material reduction in Tax liability, or (G) request any ruling or similar guidance with respect to material Taxes, in each case (A) through (G), with respect to FM Chile or the Purchased Assets;

(vii) except as required by Law, the terms of any Company Benefit Plan as in effect on the date hereof or as provided in any incentive or retention program or similar arrangement approved by the Bankruptcy Court (the liabilities for which shall be treated as an Excluded Liability), institute any increase in any compensation payable to any Offer Employees or any Business Employees of FM Chile or in any profit-sharing, bonus, incentive, deferred compensation, insurance, pension, retirement, medical, hospital, disability, welfare or other payments or benefits made available to any such employees;

(viii) enter into, materially amend or modify or terminate any Contract that is listed on Schedule 4.10(a) or Schedule 6.3(c);

(ix) terminate the employment of any Offer Employee or Business Employee of FM Chile other than for cause;

(x) fail to take all necessary action to maintain and protect the Transferred Intellectual Property or otherwise cause loss of rights in the Transferred Intellectual Property;

(xi) enter into any agreement or commitment with any Affiliate of the Company or any of its Subsidiaries that would be a Purchased Asset; or

(xii) enter into or become committed to enter into any material transaction except in the ordinary course of business of the Company or its Subsidiaries in connection with the Business or the Purchased Assets.

(c) Following the date hereof and prior to the Closing, Buyer and Sellers anticipate that Sellers and/or FM Chile will (i) enter into Contracts with certain Persons identified on Schedule 7.1(c) and (ii) incur expenditures for the purchase of Inventory or procurement of other assets or services as described on Schedule 7.1(c) in connection with such Contracts; provided, that the aggregate amount of expenditures incurred pursuant to this Section 7.1(c) shall not exceed \$2,175,000 (the “Cap”). Sellers shall provide Buyer with copies of such Contracts and reasonable supporting documentation with respect to such expenditures and obtain the prior written consent of Buyer prior to entering into any such Contract or making any such expenditures (the aggregate of such approved and incurred expenditures, the “Approved Expenditure Amount”), and, for the avoidance of doubt, the Approved Expenditure Amount shall not exceed the Cap. The

Purchase Price shall be increased by the Approved Expenditure Amount in accordance with Section 3.1.

(d) During the period prior to the Closing Date, the Company will notify Buyer of (i) any Action that is threatened, brought, asserted or commenced against any Seller that would have been listed in Schedule 4.8 if such lawsuit, claim, proceeding or investigation had arisen prior to the date hereof, (ii) any notice or other communication from any third Person alleging that the consent of such third Person is or may be required in connection with the Transactions or (iii) any default by a Seller under any material Contract listed on Schedule 4.10(a) or Schedule 6.3(c); provided, that failure to deliver any such notice pursuant to the foregoing clause (iii) by the Company shall not constitute a failure of the conditions to Closing set forth in Section 9.1 or Section 9.2 to be satisfied.

7.2 Investigation by Buyer.

Sellers shall afford the officers, employees and authorized representatives of Buyer (including independent public accountants and attorneys) reasonable access during normal business hours to the offices, properties, employees and business and financial records (including computer files, retrieval programs and similar documentation) and such access and information to the extent Buyer shall deem necessary or desirable in each case, to the extent related to the Business or the Purchased Assets. Sellers shall furnish to Buyer or its authorized representatives such additional information concerning the Purchased Assets and the Business as shall be reasonably requested, including all such information as shall be necessary to enable Buyer or its Representatives to: (a) verify the accuracy of the representations and warranties contained in this Agreement; (b) verify that the covenants of Sellers contained in this Agreement have been complied with; (c) determine whether the conditions set forth in Section 9.1 have been satisfied; and (d) permit Buyer to facilitate the transition of the Business and Purchased Assets to Buyer at the Closing. Buyer agrees that such investigation shall be conducted in such a manner as not to interfere unreasonably with the operations of Sellers. Further, Sellers shall afford Buyer's human resources personnel reasonable access during normal business hours to the Business's offices, employees and applicable records for the purpose of facilitating the transition of the Transferred Employees from Sellers to Buyer as contemplated by Section 7.3.

7.3 Employment Matters.

(a) To the extent permitted by applicable Law, no later than fifteen (15) days after the date of this Agreement, the Company shall provide Buyer with an updated Schedule 1.1(a) of Offer Employees, containing the information required by Section 4.12(a), and Sellers shall update such information periodically (and no less frequently than every thirty (30) days) prior to the Closing Date to reflect leaves of absence and anticipated return to work dates, employment terminations, and any other material changes thereto, and provide copies of such updated lists and information to Buyer. For the avoidance of doubt, no Business Employees may be added to the list of Offer Employees by the Company or its Subsidiaries without the consent of Buyer.

(b) At least ten (10) Business Days prior to the Closing, the Buyer shall, or shall cause one of its Subsidiaries to, make an offer of employment to each Offer Employee in

accordance with the terms set out in this Section 7.3(b) and having the terms set forth on Section 7.3(b), with such employment to be effective immediately upon the Closing (which offer of employment and employment shall be subject to (i) such Offer Employee being employed by the Company or one of its Subsidiaries as of the Closing Date, (ii) such Offer Employee's satisfaction of Buyer's standard hiring requirements and on-boarding process, including but not limited to background checks and immigration control, and (iii) obtainment of all necessary licenses or other clearances if required by U.S. export controls or sanctions regulations and (iv) such Offer Employee not becoming subject to formal or final written disciplinary or corrective action related to misconduct in violation of any of Sellers' policies (collectively, the "Offer Conditions")). Unless prohibited by applicable Law, any Offer Employee residing in the United States who accepts Buyer's offer of employment and is on a leave of absence as of the Closing Date shall become a Transferred Employee effective immediately on the date such Offer Employee returns to active employment, subject to (x) such Offer Employee's satisfaction of the Offer Conditions and (y) such Offer Employee returning to active employment within six (6) months following the Closing Date (or such later date as may be required by applicable Law), and references to "Closing Date" or "Closing" in this Section 7.3(b) and with respect to the definition of Transferred Employee shall refer to the date on which such Offer Employee returns to active employment. Where Buyer or one of its Subsidiaries makes an offer of employment to an Offer Employee in accordance with this Section 7.3(b) and such Offer Employee fails to accept such offer no later than five Business Days prior to the Closing Date, fails to present for work (including remotely) on the Closing Date (or the first Business Day following the Closing Date on which such Business Employee is scheduled, expected or permitted to return to work (taking into account time off or leave)) or such Offer Employee fails to satisfy any of the Offer Conditions, the Company or the applicable Seller shall be responsible for any liability for the continued employment or termination of employment of such Offer Employee and Sellers agree that any liability arising in respect of such employment or termination shall be treated as an Excluded Liability. Buyer shall be solely responsible for any Liabilities arising out of, relating to or in connection with Buyer's, or one of its Subsidiary's, failure to offer employment to any Offer Employee on terms consistent with this Section 7.3(b) (including any termination, severance or redundancy Liabilities arising in connection therewith), or continue the employment of any Transferred Employee after the Closing Date (and such Liabilities shall be treated as Assumed Liabilities).

(c) For a period of six (6) months following the Closing Date, Buyer shall, or shall cause one of its Subsidiaries to, provide for each Transferred Employee (i) at least the same base salary or wage rate, as applicable, as those provided to the Transferred Employee immediately before the Closing and (ii) other employee benefits (including incentive opportunities and severance but excluding equity-based compensation and defined benefit plan benefits) that are substantially similar to those provided to similarly situated employees of Buyer or one of its Affiliates.

(d) Effective not later than the Closing Date, Buyer shall, or shall cause one of its Subsidiaries to, have in effect one or more defined contribution plans that include a qualified cash or deferred arrangement within the meaning of Section 401(k) of the Code

(and a related trust exempt from tax under Section 501(a) of the Code) (as applicable, the “Buyer 401(k) Plan”). Each Transferred Employee shall be eligible to become a participant in the Buyer 401(k) Plan as of or following the Closing Date in accordance with the terms and conditions thereof. Buyer or one of its Subsidiaries shall take the necessary action, including any necessary plan amendments, to cause the Buyer 401(k) Plan to permit each Transferred Employee to make rollover contributions of “eligible rollover distributions” (within the meaning of Section 402(f)(2)(A) of the Code), exclusive of loans, in the form of cash in an amount equal to the full amount of the eligible rollover distribution distributable to such Transferred Employee from a Benefit Plan that is a defined contribution plan that includes a qualified cash or deferred arrangement within the meaning of Section 401(k) of the Code Plan immediately prior to the Closing to Buyer 401(k) Plan.

(e) The Company or its applicable Subsidiary shall be responsible for paying out, or causing to be paid out all Accrued Compensation Obligations in connection with the Closing. As of the Closing, the Transferred Employees shall cease participation in, and shall cease accruing benefits under, any Company Benefit Plans. For the avoidance of doubt, the Transferred Employees will continue to participate in and accrue benefits under any Superannuation Fund, as applicable.

(f) The Company, the Buyer and their Subsidiaries, as applicable, shall be responsible for complying with the requirements of Section 4980B of the Code with respect to any “M&A qualified beneficiary” in accordance with the requirements of Treasury Regulation Section 54.4980B-9. The Company shall deliver written notice to Buyer of its intention to terminate any group health plan maintained by the Company or any of its United States Subsidiaries as soon as administratively practicable following such decision but in no event less than thirty (30) Business Days prior to such termination and shall (i) simultaneously with the delivery of such notice, provide Buyer with a list of individuals receiving COBRA continuation coverage under any such group health plan and (ii) following delivery of such notice, provide Buyer with any updates or other information in respect of such individuals that Buyer reasonably requests.

(g) Prior to the Closing, the Company shall provide complete copies of the Transferred Employee Records to Buyer and any other personnel records required to be provided to or retained by Buyer and its Subsidiaries under applicable Law or otherwise as necessary for Buyer to establish payroll systems or employee benefit plans as of the Closing Date.

(h) The Company and its Subsidiaries shall be responsible for all liabilities or obligations under the WARN Act arising out of actions or omissions occurring prior to, on, or following the Closing Date with respect to or involving all employees of the Company and its Subsidiaries, including but not limited to the Business Employees, except that Buyer or one of its Subsidiaries shall be responsible for all liabilities or obligations under the WARN Act resulting from (i) any “employment loss” (as defined in the WARN Act) occurring after the Closing solely with respect to or involving the Transferred Employees or (ii) Buyer’s, or one of its Subsidiary’s, failure to offer employment to any Offer Employee on terms consistent with this Section 7.3 and in

accordance with applicable Law or continue the employment of any Transferred Employee after the Closing Date.

(i) In the event that any Offer Employee declines an offer of employment made by Buyer or its Subsidiary to such Offer Employee, (i) provided that such offer is made in accordance with the terms set out in Section 7.3(b), Buyer or its Subsidiary may extend an offer of employment to a former Business Employee whose employment terminated prior to the Closing to replace such Offer Employee; and (ii) for six (6) months after the Closing, Buyer and its Subsidiaries will refrain from making an offer to, or hiring, such Offer Employee; provided however, that an Offer Employee shall not be deemed to have declined an offer of employment if such Offer Employee is negotiating the terms of the offer with Buyer or its Subsidiary.

(j) Nothing in this Section 7.3 shall (i) be construed as an amendment or other modification of any Company Benefit Plan or other employee benefit plan, (ii) create any third-party beneficiary or other right (A) in any other Person, including any current or former director, officer, employee, independent contractor or other individual service provider of the Company or any of its Subsidiaries or any participant in any Company Benefit Plan or other employee benefit plan, agreement or other arrangement (or any dependent or beneficiary thereof) or (B) to continued employment with Buyer or any of its Affiliates, (iii) shall restrict Buyer or any of its Affiliates from terminating the employment of any employee following the Closing or (iv) limit the right of Buyer or any of its Affiliates to terminate or amend any employee benefit plan.

7.4 Section 280G.

To the extent that the execution of this Agreement or the consummation of the Transactions (either alone or together with any other event) may reasonably be expected to entitle any “disqualified individual” to any payments or benefits that, separately or in the aggregate, may constitute “parachute payments” (as each such term is defined in Section 280G of the Code and the applicable rulings and final regulations thereunder (“Section 280G Payments”)), then, if requested by Buyer and prior to the Closing, the Sellers will (i) use commercially reasonable efforts to obtain a waiver from each such disqualified individual of his or her right to receive or retain any payment or benefit that could reasonably be expected to constitute a Section 280G Payment (collectively, the “Waived Payments”), (ii) submit the Waived Payments for approval in a manner intended to meet the requirements of Section 280G(b)(5)(B) of the Code and the applicable rulings and final regulations thereunder (the “Section 280G Approval”), and (iii) provide all required disclosure to all Persons entitled to vote under Section 280G(b)(5)(B)(ii) of the Code, such that, if such waiver(s) and Section 280G Approval are obtained, the deduction of the Waived Payments will not be limited by the application of Section 280G of the Code and the applicable rulings and final regulations thereunder. At least five (5) Business Days prior to the submission to the Persons entitled to approve the Waived Payments, the Sellers will forward to Buyer and provide Buyer with a reasonable opportunity to review and comment on copies of the disclosure statement and waiver prepared by the in connection with this Section 7.4, as well as the parachute payment calculations prepared by the Sellers and/or their advisors.

ARTICLE VIII. COVENANTS

8.1 Retention of Books and Records.

For a period of seven (7) years from the Closing Date, Buyer shall, and shall cause its Subsidiaries to (a) retain all books, ledgers, files, reports, plans, records and any other documents of the Company and its Subsidiaries in the possession of Buyer and its Subsidiaries relating to the Business and the Purchased Assets at the Closing and (b) use commercially reasonable efforts to (i) give Sellers and their representatives reasonable access to such materials and certain other Seller IT Assets such as computers, servers and other information technology equipment to the extent relating to the Business and the Purchased Assets (ii) furnish to Sellers and their representatives such financial and operating data and other information relating to the Business and the Purchased Assets on or before the Closing Date and (iii) to cause the employees of Buyer and its Affiliates to cooperate with Sellers and their representatives, in each case, to the extent reasonably requested by Sellers in connection with the sale, transfer, conveyance, assignment, delivery, winding-up, disposal or abandonment of any of the Excluded Assets, the winding-up of the Sellers or any of their Affiliates, or relating to the Bankruptcy Cases or in connection with accounting, Tax or other similar needs relating to the operation of the Business by Sellers and their Affiliates prior to the Closing. Any such access or cooperation shall be (a) granted in a manner as not to interfere unreasonably with the conduct of the business of Buyer or its Affiliates and (b) conducted during normal business hours upon reasonable advance notice to Buyer and (z) in the event Sellers or their representatives physically access any properties of Buyer or its Subsidiaries pursuant to this Section 8.1, conducted under the supervision of Buyer's personnel, and Sellers shall be responsible for any out of pocket expenses incurred in connection with any such access or cooperation requested by Sellers pursuant to this Section 8.1. Notwithstanding the foregoing, Buyer may withhold such access, if it determines (in its reasonable judgment) such access could (I) result in the disclosure of trade secrets or competitively sensitive or classified information to third parties, (II) violate any Contract or any Law, (III) be adverse to the interests of Buyer or any of its Affiliates in any pending or threatened Action or (IV) result in the waiver of or otherwise jeopardize the protection of any legal privilege or work-product privilege; provided that, to the extent practicable and in accordance with such Contract or Law, and in a manner that does not result in the waiver of any such privilege, Buyer shall use commercially reasonable efforts to make reasonable and appropriate substitute disclosure arrangements under circumstances in which these restrictions apply; provided, further, that nothing in this Section 8.1 shall limit in any respect any rights any party may have with respect to discovery or the production of documents or other information in connection with any litigation. Access provided pursuant to this Section 8.1 shall be subject to the terms of the Post-Closing Confidentiality Agreement.

8.2 Tax Matters.

(a) Buyer and Sellers shall cooperate fully, and shall cause their respective Affiliates to cooperate fully, as and to the extent reasonably requested by the other party, in connection with the filing of Tax Returns regarding Taxes of, or with respect to, the Business or the Purchased Assets. Such cooperation shall include the retention of and (upon the other party's request) the provision of records and information reasonably

relevant to any such Action and making employees available on a mutually convenient basis to provide additional information and explanation of any material provided hereunder.

(b) The parties agree for purposes of this Agreement, the amount of Taxes relating to the operation of the Business or the ownership of the Purchased Assets for any taxable period beginning on or before and ending after the Closing Date (a “Straddle Period”) shall be allocated to the portion of such period ending on the end of the Closing Date as follows: (i) with respect to property or similar periodic or ad valorem Taxes, the amount allocable to the portion of the period ending on the Closing Date shall equal (A) the amount of such Taxes for such entire Straddle Period, multiplied by (B) a fraction, the numerator of which is the number of days during the Straddle Period that are in the portion of such Straddle Period ending on the end of the Closing Date, and the denominator of which is the number of days in the entire Straddle Period, and (ii) with respect to all other Taxes, the amount allocable to the portion of the period ending on the end of the Closing Date shall be determined based on a closing of the books as of the end of the Closing Date.

(c) All Transfer Taxes shall be borne and paid by Buyer. The parties shall cooperate to prepare and timely file any Tax Returns or other filings relating to Transfer Taxes as may be required by Law. The parties shall reasonably cooperate in executing any appropriate tax exemption certificates in connection with the transactions contemplated in this Agreement to reduce or eliminate any such Transfer Taxes.

(d) Buyer shall be entitled to make, in its sole discretion, an election under Section 338(g) of the Code (and any comparable election under state or local Tax Law) (a “Section 338(g) Election”) with respect to FM Chile. The Company shall use commercially reasonable efforts to provide Buyer with assistance reasonably requested by Buyer in connection with any Section 338(g) Election pursuant to this Section 8.2.

(e) In the event that Buyer declines to make a Section 338(g) Election with respect to FM Chile, Sellers and Buyer shall, and shall cause their respective Affiliates to, reasonably cooperate (i) in making an election to close the taxable year of FM Chile for which such election is available as of the end of the day on the Closing Date, in accordance with the procedures set forth in Treasury Regulations Section 1.245A-5(e)(3)(i) and (ii) otherwise to elect to close the taxable years of FM Chile for income Tax purposes as of the end of the day on the Closing Date, in the case of this clause (ii), to the extent permitted under applicable Law.

8.3 Wrong Pocket Assets; Intercompany Accounts; Further Assurances.

(a) If, at any time after Closing, it is determined that either Sellers or their Affiliates, on one hand, or Buyer and its Subsidiaries, on the other hand, possess any interest in, to or under any Contracts, rights, Intellectual Property or other interests or assets that should have been transferred or assigned (directly or indirectly) to Buyer as part of the Purchased Assets or that should have been retained by Sellers as part of the Excluded Assets (in each case, collectively, the “Wrong Pocket Assets”), then (i) either party shall promptly

notify the other party of such Wrong Pocket Asset and shall promptly transfer or assign or cause its Subsidiaries or Affiliates to transfer or assign, as applicable, such Wrong Pocket Assets (and any related Liabilities) and (ii) such Wrong Pocket Assets shall be transferred or assigned at the expense of the party seeking such transfer or assignment, as applicable, for no additional consideration.

(b) Prior to the Closing, the Company shall cause FM Chile to take such actions as are necessary to settle, effective as of prior to the Closing, all intercompany accounts between or among FM Chile, on the one hand, and any Affiliate of FM Chile, on the other hand, so that, as of Closing, there are no intercompany obligations, fees, payables or receivables between or among FM Chile, on the one hand, and any Affiliate of FM Chile, on the other hand.

(c) Subject to the terms of this Agreement, whether before or after the Closing Date, each party shall, and shall cause its Subsidiaries to, use commercially reasonable efforts to obtain the consents, waivers, approvals, orders and authorizations and execute and deliver such additional documents, instruments, conveyances and assurances and take such further actions as may be reasonably requested by the other party in order to evidence or consummate the Transactions and comply with the terms of this Agreement and the Transaction Documents.

ARTICLE IX. CONDITIONS PRECEDENT

9.1 Conditions to Each Party's Obligation.

The respective obligations of the parties to effect the Transactions are subject to the satisfaction (or, to the extent permitted by applicable Law, waiver by the Company (on behalf of Sellers) and Buyer), at or prior to the Closing, of each of the following conditions:

(a) No Injunctions or Restraints. No Governmental Order or Law restraining, enjoining or preventing the consummation of the Transactions shall be in effect.

(b) Sale Order. The Bankruptcy Court shall have entered the Bid Procedures Order and the Sale Order, each of which shall be a Final Order, in full force and effect and not subject to a stay, vacation or reversal.

9.2 Conditions Precedent of Buyer.

The obligations of Buyer under this Agreement shall be subject to the satisfaction (or, to the extent permitted by applicable Law, waiver by Buyer) at or prior to the Closing, of each of the following conditions:

(a) No Misrepresentation or Breach of Covenants and Warranties.

(i) Sellers shall have complied in all material respects in the performance of any of its or their respective covenants and agreements herein required to be performed or satisfied at or prior to the Closing;

(ii) (I) each of the Seller Fundamental Representations shall be true and correct in all material respects as of the date of this Agreement and as of the Closing Date as though made at and as of such time (except for those representations and warranties which address matters only as of a specific date in which case such representation or warranty shall have been true and correct in all material respects as of such date) and (II) each of the other representations and warranties of Sellers set forth in ARTICLE IV shall be true and correct in all respects (without giving effect to any qualifications or limitations as to materiality (including the word “material”), “Material Adverse Effect” or words of similar import set forth therein) as of the date hereof and as of the Closing as though made at and as of such time (other than such representations and warranties that relate to an earlier date, which shall be so true and correct as of such date), except where the failure of such representations and warranties to be so true and correct would not have, individually or in the aggregate, a Material Adverse Effect; and

(iii) there shall have been delivered to Buyer a certificate from Sellers, dated as of the Closing Date and signed on behalf of Sellers by an authorized officer of the Company, to the effect that the conditions set forth in Sections 9.2(a)(i) and 9.2(a)(ii) have been satisfied.

(b) Absence of Certain Changes. Between the date hereof and the Closing Date, there shall have been no Material Adverse Effect.

(c) Closing Deliveries. Sellers shall have made or caused to have been made all other deliveries set forth in Section 2.7(a) (except for those that by their nature can only be made at the Closing).

9.3 Conditions Precedent of Sellers. The obligations of Sellers under this Agreement shall be subject to the satisfaction (or, to the extent permitted by applicable Law, waiver by Sellers), at or prior to Closing, of each of the following conditions:

(a) No Misrepresentation or Breach of Covenants and Warranties.

(i) Buyer shall have complied in all material respects in the performance of any of its covenants and agreements herein required to be performed at or prior to the Closing;

(ii) (I) each of the Buyer Fundamental Representations shall be true and correct in all material respects as of the date of this Agreement and as of the Closing Date as though made at and as of such time (except for those representations and warranties which address matters only as of a specific date in which case such representation or warranty shall have been true and correct in all material respects as of such date) and (II) each of the other representations and warranties of Buyer set forth in ARTICLE V shall be true and correct in all respects (without giving effect to any qualifications or limitations as to materiality (including the word “material”), “Material Adverse Effect” or words of similar import set forth therein) as of the date hereof and as of the Closing as though made at and as of such time

(other than such representations and warranties that relate to an earlier date, which shall be so true and correct as of such date), except, where the failure of such representations and warranties to be so true and correct would not have, individually or in the aggregate, a Material Adverse Effect.

(iii) and there shall have been delivered to Sellers a certificate from Buyer, dated the Closing Date and signed on behalf of Buyer by an authorized officer of Buyer, to the effect that the conditions set forth in Sections 9.3(a)(i) and 9.3(a)(ii) have been satisfied.

(b) Closing Deliveries. Buyer shall have made all of the deliveries set forth in Section 2.7(b) (except for those that by their nature can only be made at the Closing).

9.4 Frustration of Conditions.

Neither Buyer nor Sellers may rely on the failure of any condition set forth in Section 9.2 or Section 9.3 to be satisfied if such failure was caused by the failure of Buyer, on the one hand, or Sellers, on the other hand, respectively, to (a) use commercially reasonable efforts to consummate the Transactions and (b) otherwise comply in all material respects with their obligations under this Agreement.

ARTICLE X. TERMINATION

10.1 Events of Termination

Notwithstanding anything to the contrary, this Agreement may be terminated, and the Transactions may be abandoned, at any time prior to the Closing as follows:

- (a) by mutual written consent of Buyer and the Company;
- (b) by Buyer or the Company, by written notice to the other party, if the Sellers consummate any sale or other disposition of all or substantially all of the Purchased Assets to a Person other than Buyer (each, an “Alternate Transaction”);
- (c) by Buyer, if (i) the Company or any other Seller withdraw the Sale Motion, (ii) the Company or any other Seller moves to voluntarily dismiss the Bankruptcy Cases or the Bankruptcy Court otherwise orders, (iii) the Company or any other Seller moves for conversion of the Bankruptcy Cases to Chapter 7 of the Bankruptcy Code or the Bankruptcy Court otherwise orders, (iv) the Company or any other Seller moves for appointment of an examiner with expanded powers pursuant to Section 1104 of the Bankruptcy Code or a trustee in the Bankruptcy Cases or the Bankruptcy Court otherwise orders, (v) Buyer is not selected as the Successful Bidder or Back-Up Bidder at the conclusion of the Auction, (vi) Buyer has been selected as Back-Up Bidder and the Back-Up Termination Date has occurred, or (vii) there is in effect a Final Order of a Governmental Authority of competent jurisdiction restraining, enjoining, or otherwise prohibiting the consummation of the Transactions;

(d) by Buyer, by written notice from Buyer to the Company, if there has been a breach or inaccuracy of a covenant, representation or warranty made by Sellers in this Agreement, and such breach or inaccuracy would result in a failure of any of the conditions in Section 9.2(a) to be satisfied and which breach is incapable of being cured or, if capable of being cured, has not been cured by Sellers prior to the earlier of (i) fifteen (15) Business Days after receipt of written notice from Buyer requesting such breach or inaccuracy be cured or (ii) the Outside Date; provided, that the right to terminate this Agreement pursuant to this Section 10.1(d) shall not be available to Buyer if the failure of Buyer to fulfill any of its obligations under this Agreement has been the primary cause of, or resulted in, such breach or inaccuracy, or if the conditions in Section 9.3 are not capable of being satisfied because there is then a breach or inaccuracy of a covenant, representation or warranty made by Buyer in this Agreement;

(e) by the Company, by written notice from the Company to Buyer, if there has been a breach or inaccuracy of a covenant, representation or warranty made by Buyer in this Agreement, and such breach or inaccuracy would result in a failure of any of the conditions in Section 9.3(a) to be satisfied and which breach is incapable of being cured or, if capable of being cured, has not been cured by Buyer prior to the earlier of (i) fifteen (15) Business Days after receipt of written notice from the Company requesting such breach or inaccuracy be cured or (ii) the Outside Date; provided, that the right to terminate this Agreement pursuant to this Section 10.1(e) shall not be available to the Company if the failure of Sellers to fulfill any of its obligations under this Agreement has been the primary cause of, or resulted in, such breach or inaccuracy, or if the conditions in Section 9.2 are not capable of being satisfied because there is then a breach or inaccuracy of a covenant, representation or warranty made by Sellers in this Agreement;

(f) by Buyer or the Company, by written notice to the other party, if any Governmental Authority of competent jurisdiction shall have issued a Governmental Order, enacted any Law or taken any other action restraining, enjoining or otherwise prohibiting the consummation of the Transactions and, in the case of Governmental Orders and other actions, such Governmental Orders or other action shall have become Final Orders; provided, the right to terminate this Agreement pursuant to this Section 10.1(f) shall not be available to the party seeking to terminate if any action of such party or any failure of such party to act has contributed to such Governmental Order or other action and such action or failure constitutes a breach of this Agreement that would result in a failure of any of the conditions in Section 9.2(a), in the case of any action or failure on the part of Sellers, or a failure of any conditions in Section 9.3(a), in the case of any action or failure on the part of Buyer;

(g) by Buyer or the Company, by written notice from Buyer or the Company to the other, if the Closing has not occurred on or prior to March 31, 2025 (the “Outside Date”); provided, that the right to terminate this Agreement pursuant to this Section 10.1(g) shall not be available to any party whose breach of any provisions of this Agreement results in the failure of any of the conditions in Sections 9.2(a)(i), 9.2(a)(ii), 9.3(a)(i) or 9.3(a)(ii), as applicable, not to be satisfied.

10.2 Effect of Termination.

(a) If this Agreement is terminated pursuant to Section 10.1, all rights and obligations of the parties hereunder shall terminate without any liability of any party hereto or other Person; provided, that (a) the provisions of, and the parties rights and obligations under, the Confidentiality Agreement, Section 1.2 (Matters of Construction; Definitions), Section 3.4 (Deposit), this Section 10.2 (Effect of Termination) and ARTICLE XI (Miscellaneous) will survive termination of this Agreement and (b) subject to Section 10.2(b), nothing herein will relieve any party from liability for Fraud or any willful breach of this Agreement occurring prior to termination.

(b) In consideration of Buyer's and its Affiliates having expended considerable time and expense in connection with this Agreement and the negotiation thereof, and the identification and quantification of assets to be included in the Purchased Assets, and to compensate Buyer as a stalking-horse bidder in connection with the Auction, (i) if this Agreement is terminated (x) by Buyer or the Company pursuant to Section 10.1(b), (y) by Buyer pursuant to provisions (i) through (vi) of Section 10.1(c) or Section 10.1(d) or (z) otherwise the Bankruptcy Court issues a Governmental Order approving the termination of this Agreement by Sellers in order to allow the respective boards of directors of Sellers to fulfill their respective fiduciary duties under applicable Law in a circumstance that relates to an Alternate Transaction or (ii) if, at any time, the Bankruptcy Court issues a Governmental Order approving the termination of this Agreement by Sellers in order to allow the respective boards of directors of Sellers to fulfill their respective fiduciary duties under applicable Law in a circumstance that is unrelated to an Alternate Transaction (the foregoing clauses (i) and (ii), each, a "Qualifying Termination"), then in each such event, the Company (on behalf of Sellers) shall pay to Buyer (1) an amount equal to 3% of the Purchase Price (the "Break-Up Fee") and (2) the Expense Reimbursement Amount by wire transfer at, or within two (2) Business Days after (A) in the event of a termination pursuant to Section 10.1(d) or the foregoing clause (ii), the date of such termination or (B) for any other Qualifying Termination the earlier of (I) the consummation of such Alternate Transaction or (II) one hundred twenty (120) days following such termination; provided, that, in the event of a termination described in the foregoing clause (i)(x), clause (i)(z) or pursuant to provisions (v) or (vi) of Section 10.1(c), the Break-Up Fee and the Expense Reimbursement Amount shall be paid solely from the proceeds of such Alternate Transaction; provided, further, that, for the avoidance of doubt, under any circumstance, including in the event that the proceeds of such Alternate Transaction are insufficient for such payment, the Break-Up Fee and the Expense Reimbursement Amount shall be payable in accordance with applicable Law. If this Agreement is terminated for any reason other than (I) a Qualifying Termination or (II) a termination pursuant to Section 10.1(a), then Buyer shall pay to the Company (on behalf of Sellers) an amount equal to the Approved Expenditure Amount as of the date of such termination (the "Reverse Break-Up Fee"); provided, that if Buyer is required to pay Sellers the Reverse Break-Up Fee as a result of the termination of this Agreement pursuant to Section 10.1(g), Sellers shall promptly (and no more than thirty (30) days following payment of the Reverse Break-Up Fee) assign, convey and deliver (or cause to be assigned, conveyed or delivered) to Buyer (such delivery to be in a manner reasonably directed by Buyer and at Buyer's cost) all (i) un-used Inventory funded by the Approved

Expenditure Amount pursuant to Section 7.1(c) and (ii) the amount of cash (if any) actually received by the Company and its Subsidiaries solely on account of such Inventory as an advanced payment from the applicable customer under a Contract related to an Approved Expenditure Amount, net of any refunds paid or payable or other obligations owing or arising out of Approved Expenditure Amounts or Contracts in respect thereof (whether to such customer or other customers), including to terminate or otherwise winddown such Approved Expenditure Amounts or Contracts following termination of this Agreement, that are not otherwise satisfied in full by the Reverse Break-Up Fee. Absent Fraud, the payment of (x) the Break-Up Fee and the Expense Reimbursement Amount to Buyer or (y) the Reverse Break-Up Fee (and, in the case of a termination pursuant to Section 10.1(e), the Deposit) to the Company (on behalf of Sellers), in each case, pursuant to this Section 10.2(b), shall be Buyer's and Sellers' and their respective Affiliates sole and exclusive remedy against the other party or any of such party's Affiliates, stockholders, members, directors, officers or agents for any losses suffered as a result of the failure of the Closing to occur, any breach of this Agreement or the failure of the Transactions to be consummated.

(c) For avoidance of doubt, (i) any Break-Up Fee and Expense Reimbursement Amount (collectively, the "Bid Protections") that are payable to Buyer pursuant to Section 10.1(b) shall be payable whether the Alternate Transaction is consummated pursuant to Section 363 of the Bankruptcy Code or pursuant to a plan and (ii) the Bid Protections shall not be due and payable more than once under any circumstance.

ARTICLE XI. MISCELLANEOUS

11.1 Survival of Representations, Warranties and Covenants

None of the representations, warranties, covenants or agreements of any party contained in this Agreement shall survive the Closing, other than each covenant and agreement set forth in this Agreement that by its terms is to be performed following the Closing, which shall survive the Closing until fully performed in accordance with its terms. No party or any of its respective Affiliates shall have any Liability with respect to any representation, warranty, covenant or agreement from and after the time that such representation, warranty, covenant or agreement ceases to survive hereunder; provided, that the foregoing shall not limit any claim for Fraud.

11.2 Waiver.

Any party to this Agreement may by action taken by its board of directors, or officers thereunto duly authorized, waive any of the terms or conditions of this Agreement by an agreement in writing executed in the same manner (but not necessarily by the same Persons) as this Agreement. No waiver by any of the parties of any default, misrepresentation or breach of representation, warranty, covenant or other agreement hereunder, whether intentional or not, shall be deemed to extend to any prior or subsequent default, misrepresentation or breach hereunder or affect in any way any rights arising by virtue of any prior or subsequent such occurrence. No waiver by any of the parties of any of the provisions hereof shall be effective unless explicitly set forth in writing and executed by the party sought to be charged with such waiver.

11.3 Notices.

All notices and other communications among the parties shall be in writing and shall be deemed to have been duly given (i) when delivered in person, (ii) when delivered by FedEx or other nationally recognized overnight delivery service, or (iii) when delivered by email (in the case of this clause (iii), solely if receipt is confirmed), addressed as follows:

(a) If to Buyer:

Cummins Inc.
301 East Market Street
Indianapolis, IN 46204
Attention: Malene Prince – Assistant General Counsel
E-mail: malene.prince@cummins.com

with a copy (which shall not constitute notice) to:

Sidley Austin LLP
One South Dearborn Street
Chicago, IL 60603
Attention: Pran Jha, Dennis M. Twomey
E-mail: pjha@sidley.com, dtwomey@sidley.com

(b) If to the Company (on behalf of Sellers), to:

First Mode Holdings, Inc.
300 Lenora Street #1445
Seattle, Washington 98121
Attention: First Mode Legal
Email: legal@firstmode.com

with copies (which shall not constitute notice) to:

Latham & Watkins LLP
330 North Wabash Ave, Suite 2800
Attention: Bradley C. Faris; Caroline Reckler
Email: bradley.faris@lw.com; caroline.reckler@lw.com

or to such other address or addresses as the parties may from time to time designate in a written notice delivered in accordance with this Section.

11.4 Assignment.

No party shall assign this Agreement or any part hereof without the prior written consent of the other parties; provided, however, Buyer may assign this Agreement or any such rights to an Affiliate that is, for U.S. federal income tax purposes, a United States person or whose regarded owner is a United States person without the prior written consent of any party; provided, further, that no such assignment shall relieve Buyer of its obligations hereunder. Subject to the

foregoing, this Agreement shall be binding upon and inure to the benefit of the parties and their respective successors and permitted assigns.

11.5 Rights of Third Parties.

Nothing expressed or implied in this Agreement is intended or shall be construed to confer upon or give any Person, other than the parties, any right or remedies under or by reason of this Agreement; provided, however, that, notwithstanding the foregoing the Company Releasees and Buyer Releasees are intended third-party beneficiaries of, and may enforce, Section 11.16(a) and Section 11.16(b) respectively and Prior Company Counsel and the Designated Persons shall be intended third-party beneficiaries of, and may enforce, Section 11.17.

11.6 Expenses.

Subject to Section 3.2(a) or as otherwise specifically provided herein, each party shall bear its own expenses incurred in connection with this Agreement and the Transactions whether or not such transactions shall be consummated, including all fees of its legal counsel, financial advisers and accountants.

11.7 Governing Law.

This Agreement, and all claims or causes of action based upon, arising out of, or related to this Agreement or the Transactions, shall be governed by, and construed in accordance with, the Laws of the State of Delaware, without giving effect to principles or rules of conflict of laws to the extent such principles or rules would require or permit the application of Laws of another jurisdiction.

11.8 Captions; Counterparts.

The captions in this Agreement are for convenience only and shall not be considered a part of or affect the construction or interpretation of any provision of this Agreement. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

11.9 Schedules and Annexes.

The Schedules and Annexes referenced herein are a part of this Agreement as if fully set forth herein. All references herein to Schedules and Annexes shall be deemed references to such parts of this Agreement, unless the context shall otherwise require. Any disclosure made by a party in the Schedules with reference to any section or schedule of this Agreement shall be deemed to be a disclosure with respect to all other sections or schedules to which the relevance of such disclosure is reasonably apparent on the face of such disclosure. Certain information set forth in the Schedules is included solely for informational purposes and may not be required to be disclosed pursuant to this Agreement. The disclosure of any information shall not be deemed to constitute an acknowledgment that such information is required to be disclosed in connection with the representations and warranties made in this Agreement, nor shall such information be deemed to establish a standard of materiality.

11.10 Entire Agreement.

This Agreement (together with the Schedules and Annexes to this Agreement) and the other Transaction Documents constitute the entire agreement among the parties relating to the Transactions and supersede any other agreements, whether written or oral, that may have been made or entered into by or among any of the parties or any of their respective Subsidiaries relating to the Transactions. No representations, warranties, covenants, understandings or agreements, oral or otherwise, relating to the Transactions exist among any of the parties, except as expressly set forth in the Transaction Documents.

11.11 Amendments.

This Agreement may be amended or modified in whole or in part by Buyer and the Company.

11.12 Severability.

If any provision of this Agreement is held invalid or unenforceable by any court of competent jurisdiction, the other provisions of this Agreement shall remain in full force and effect. The parties further agree that if any provision contained herein is, to any extent, held invalid or unenforceable in any respect under the Laws governing this Agreement, they shall take any actions necessary to render the remaining provisions of this Agreement valid and enforceable to the fullest extent permitted by Law and, to the extent necessary, shall amend or otherwise modify this Agreement to replace any provision contained herein that is held invalid or unenforceable with a valid and enforceable provision giving effect to the intent of the parties.

11.13 Jurisdiction; Waiver of Jury Trial.

(a) For so long as Sellers are subject to the jurisdiction of the Bankruptcy Court, the parties hereto irrevocably elect as the sole judicial forum for the adjudication of any matters arising under or in connection with the Agreement, and consent to the exclusive jurisdiction of, the Bankruptcy Court. After Sellers are no longer subject to the jurisdiction of the Bankruptcy Court, the parties hereto irrevocably elect as the sole judicial forum for the adjudication of any matters arising under or in connection with this Agreement, and consent to the jurisdiction of, the State of Delaware's Court of Chancery (or, if the Delaware Chancery Court shall be unavailable, any other court of the State of Delaware or, in the case of claims to which the federal courts have exclusive subject matter jurisdiction, any federal court of the United States of America sitting in the State of Delaware), and, in each case, appellate courts therefrom, and each of the parties irrevocably submits to the exclusive jurisdiction of each such court in any such Action, waives any objection it may now or hereafter have to personal jurisdiction, venue or to convenience of forum, agrees that all claims in respect of such Action shall be heard and determined only in any such court, and agrees not to bring any Action arising out of or relating to this Agreement or the Transactions in any other court. Nothing herein contained shall be deemed to affect the right of any party to serve process in any manner permitted by Law or to commence legal proceedings or otherwise proceed against any

other party in any other jurisdiction, in each case, to enforce judgments obtained in any Action brought pursuant to this Section 11.13(a).

(b) Each party waives, to the fullest extent permitted by applicable Law, any right it may have to a trial by jury in respect of any Action arising out of this Agreement the other Transaction Documents or the Transactions. Each party (i) certifies that no representative, agent or attorney of any other party has represented, expressly or otherwise, that such party would not, in the event of any Action, seek to enforce the foregoing waiver and (ii) acknowledges that it and the other parties have been induced to enter into this Agreement by, among other things, the mutual waiver and certifications in this Section 11.13(b).

11.14 Enforcement.

The parties agree that irreparable damage would occur, and that the parties would not have any adequate remedy at law, if any of the provisions of this Agreement were not performed in accordance with their specific terms or were otherwise breached. It is accordingly agreed that the parties shall be entitled to an injunction or injunctions to prevent breaches of this Agreement and to specifically enforce the terms and provisions of this Agreement, without proof of actual damages or otherwise, in addition to any other remedy to which any party is entitled at law or in equity. Each party agrees to waive any requirement for the securing or posting of any bond in connection with such remedy. The parties further agree not to assert that a remedy of specific enforcement is unenforceable, invalid, contrary to law or inequitable for any reason, nor to assert that a remedy of monetary damages would provide an adequate remedy. The remedies available to the Company pursuant to this Section 11.14 shall be in addition to any other remedy to which it is entitled at law or in equity.

11.15 Non-Recourse.

Except to the extent otherwise set forth in the other Transaction Documents, this Agreement may only be enforced against, and any claim or cause of action based upon, arising out of, or related to in any manner this Agreement, or the negotiation, execution or performance of this Agreement, or the Transactions (including any representation or warranty made in, in connection with, or as an inducement to this Agreement) may only be brought against, the entities that are named as parties (and, for the avoidance of doubt, shall not be brought against any past, present or future, Affiliate, director, officer, employee, incorporator, member, partner, stockholder, agent, attorney, advisor, or representative or Affiliate of any of the foregoing, in each case, of the entities that are named as parties) and then only with respect to the specific obligations set forth herein with respect to such party.

11.16 Waivers and Releases.

(a) Effective as of the Closing, each Seller, for itself and each of its controlled Affiliates and any former, current or future estates, heirs, executors, administrators, trustees, successors and assigns of any of the foregoing (each, a “Company Releasor”), irrevocably, knowingly and voluntarily releases, discharges and forever waives and relinquishes all claims, demands, obligations, liabilities, defenses, affirmative defenses,

setoffs, counterclaims, Actions and causes of action of whatever kind or nature, whether known or unknown, which any Company Releasor has, may have, or might have or may assert now or in the future, against Buyer, its Affiliates or any of its or their respective former, current or future directors, officers, employees, general or limited partners, managers, members, direct or indirect equityholders, controlling persons, Affiliates, attorneys, assignees, agents, advisors, or representatives, or representatives or Affiliates of any of the foregoing, or any former, current or future estates, heirs, executors, administrators, trustees, successors or assigns of any of the foregoing (each, a “Company Releasee”) arising out of, based upon or resulting from any Contract, transaction, event, circumstance, action, failure to act or occurrence of any sort or type, whether known or unknown, and which occurred, existed or was taken or permitted at or before the Closing to the extent relating to the Business or the Purchased Assets; provided, that nothing contained in this Section 11.16(a) shall release, waive, discharge, relinquish or otherwise affect the rights or obligations of any Person under this Agreement, any other Transaction Document or any other agreement delivered or required to be delivered pursuant hereto or any claims of Fraud. Each Seller shall, and shall cause its controlled Affiliates to, refrain from, directly or indirectly, asserting any claim or demand, or commencing, instituting or causing to be commenced any legal proceeding of any kind against a Company Releasee based upon any matter released pursuant to this Section 11.16(a). Each Company Releasee to whom this Section 11.16(a) applies shall be a third-party beneficiary of this Section 11.16(a).

(b) Effective as of the Closing, Buyer, for itself and each of its controlled Affiliates and any former, current or future estates, heirs, executors, administrators, trustees, successors and assigns of any of the foregoing (each, a “Buyer Releasor”), irrevocably, knowingly and voluntarily releases, discharges and forever waives and relinquishes all claims, demands, obligations, liabilities, defenses, affirmative defenses, setoffs, counterclaims, Actions and causes of action of whatever kind or nature, whether known or unknown, which any Buyer Releasor has, may have, or might have or may assert now or in the future, against any Seller or its Affiliates or any of its former, current or future directors, officers, employees, general or limited partners, managers, members, direct or indirect equityholders, controlling persons, Affiliates, attorneys, assignees, agents, advisors, or representatives, or representatives or Affiliates of any of the foregoing, or any former, current or future estates, heirs, executors, administrators, trustees, successors or assigns of any of the foregoing (each, a “Buyer Releasee”) arising out of, based upon or resulting from any Contract, transaction, event, circumstance, action, failure to act or occurrence of any sort or type, whether known or unknown, and which occurred, existed or was taken or permitted at or before the Closing to the extent relating to the Business or Purchased Assets; provided, that nothing contained in this Section 11.16(b) shall release, waive, discharge, relinquish or otherwise affect the rights or obligations of any Person under this Agreement, any Transaction Document or any other agreement delivered or required to be delivered pursuant hereto or any claims of Fraud. Buyer shall, and shall cause its Subsidiaries to, refrain from, directly or indirectly, asserting any claim or demand, or commencing, instituting or causing to be commenced any legal proceeding of any kind against a Buyer Releasee based upon any matter released pursuant to this Section 11.16(b). Each Buyer Releasee to whom this Section 11.16(b) applies shall be a third-party beneficiary of this Section 11.16(b).

11.17 Waiver of Conflicts Regarding Representations; Non-Assertion of Attorney-Client Privilege.

(a) Conflicts of Interest. Buyer acknowledges that Latham & Watkins LLP (“Prior Company Counsel”) have, on or before the Closing Date, represented one or more of the equityholders of the Company, the Company, and its Subsidiaries and other controlled Affiliates, and their respective officers, employees and directors (each such Person, other than FM Chile, a “Designated Person”) in one or more matters relating to this Agreement or any other agreements or Transactions (including any matter that may be related a litigation, claim or dispute arising under or related to this Agreement or such other agreements or in connection with such transactions) (each, an “Existing Representation”), and that, in the event of any post-Closing matters in which Buyer or any of its controlled Affiliates, on the one hand, and one or more Designated Persons, on the other hand, are or may be adverse to each other (each, a “Post-Closing Matters”), the Designated Persons reasonably anticipate that Prior Company Counsel will represent them in connection with such matters. Accordingly, Buyer (i) waives and shall not assert, and agrees after the Closing to cause its controlled Affiliates to waive and to not assert, any conflict of interest arising out of or relating to the representation by Prior Company Counsel of one or more Designated Persons in connection with one or more Post-Closing Matters (the “Post-Closing Representations”), and (ii) agrees that, if a Post-Closing Matter arises, Prior Company Counsel may represent one or more Designated Persons in such Post-Closing Matter even though the interests of such Person(s) may be directly adverse to Buyer or any of its controlled Affiliates, and even though Prior Company Counsel may have represented the Company or its Subsidiaries in a matter substantially related to such dispute. Without limiting the foregoing, Buyer (on behalf of itself and its controlled Affiliates) consents to the disclosure by Prior Company Counsel to the Designated Persons of any information learned by Prior Company Counsel in the course of one or more Existing Representations, whether or not such information is subject to the attorney-client privilege of the Company or any of its Subsidiaries and/or Prior Company Counsel’s duty of confidentiality as to the Company or any of its Subsidiaries and whether or not such disclosure is made before or after the Closing.

(b) Attorney-Client Privilege. Buyer (on behalf of itself and its controlled Affiliates) waives and shall not assert, and agrees after the Closing to cause its controlled Affiliates to waive and to not assert, any attorney-client privilege, attorney work-product protection or expectation of client confidence with respect to any communication between Prior Company Counsel, on the one hand, and any Designated Person or the Company or any of its Subsidiaries (collectively, the “Pre-Closing Designated Persons”), on the other hand, or any advice given to any Pre-Closing Designated Person by any Prior Company Counsel, occurring during one or more Existing Representations (collectively, “Pre-Closing Privileges”) in connection with any Post-Closing Representations, including in connection with a dispute between any Designated Person and one or more of Buyer and its controlled Affiliates, it being the intention of the parties that all rights to such Pre-Closing Privileges, and all rights to waiver or otherwise control such Pre-Closing Privilege, shall be retained by the Company, and shall not pass to or be claimed or used by Buyer, except as provided in the last sentence of this Section 11.17(b). Furthermore, Buyer (on behalf of itself and its controlled Affiliates) acknowledges and agrees that any

advice given to or communication with any of the Designated Persons subject to a Pre-Closing Privilege shall not be subject to any joint privilege (whether or not the Company or one more of its Subsidiaries also received such advice or communication) and shall be owned solely by such Designated Persons. For the avoidance of doubt, if a dispute arises between one or more of Buyer and its controlled Affiliates, on the one hand, and any of the Designated Persons, on the other hand, then Buyer shall make available to the Company, acting on behalf of the applicable Designated Persons, all books and records of the Buyer subject to Pre-Closing Privileges, and Buyer shall (and shall cause its controlled Affiliates to) waive any Pre-Closing Privileges of Buyer or its controlled Affiliates applicable to such books and records. Notwithstanding the foregoing, if a dispute arises between Buyer or any of its Subsidiaries, on the one hand, and a third party other than a Designated Person, on the other hand, Buyer shall (and shall cause its controlled Affiliates to) assert the Pre-Closing Privileges on behalf of the Designated Persons to prevent disclosure of privileged materials to such third party; provided, however, that such privilege may be waived only with the prior written consent of the Company, acting on behalf of the applicable Designated Person.

(c) Miscellaneous. Buyer acknowledges that it has had the opportunity (including on behalf of its Affiliates) to discuss and obtain adequate information concerning the significance and material risks of, and reasonable available alternatives to, the waivers, permissions and other provisions of this Agreement, including the opportunity to consult with counsel other than Prior Company Counsel. This Section 11.17 shall be irrevocable, and no term of this Section 11.17 may be amended, waived or modified, without the prior written consent of the Company, acting on behalf of the applicable Designated Persons and their respective controlled Affiliates and Prior Company Counsel affected thereby.

11.18 Public Announcements.

The initial press release relating to this Agreement shall be a joint press release, the text of which shall be agreed to in writing by the Buyer, on the one hand, and the Company, on the other hand. Thereafter, unless otherwise required by or reasonably necessary to comply with applicable Law (including (x) the Bankruptcy Code, Bankruptcy rules, and applicable local rules of the Bankruptcy Court to the extent reasonably necessary to obtain entry of the Bid Procedures Order or, if the Buyer is selected as the winning bidder, the Sale Order and (y) in any filing made by the Company or its Affiliates with the Bankruptcy Court and as may be necessary or appropriate in the good faith determination of Company or its representatives to obtain Court approval of the Transactions or in connection with conducting the Auction), Governmental Orders of the Bankruptcy Court or the rules or regulations of any applicable securities exchange, and except for disclosure of matters that become a matter of public record as a result of the Bankruptcy Cases and any filings or notices related thereto, the Buyer, on the one hand, and the Company, on the other hand, shall consult with each other before either such party or their respective Affiliates or representatives issue any other press release or otherwise makes any public statement with respect to this Agreement, the Transactions or the activities and operations of the other parties hereto with respect to this Agreement and the Transactions and shall not, and shall cause their respective Affiliates and representatives not to, issue any such release or make any such statement without the prior written consent of the Company or the Buyer, respectively (such consent not to be unreasonably withheld, conditioned or delayed), except that no such consent shall be necessary to

the extent disclosure is made on the record at a hearing in connection with this Agreement or the Bankruptcy Cases; provided, that nothing in this Agreement shall restrict or prohibit (a) the Company, Buyer or their respective Affiliates from making any announcement to their respective employees, customers and other business relations to the extent that such announcement consists solely of, or is otherwise consistent in all material respects with previous press releases, public disclosures or public statements made by any party hereto in accordance with this Agreement, including in investor conference calls, securities Law filings, Q&As or other publicly disclosed statements or documents, in each case under this clause (ii), to the extent such disclosure is still accurate in all material respects (and not misleading) or (b) Buyer or its Affiliates from making any announcement to their employees or existing or prospective limited partners or other investors, in each case, subject to the terms of the Confidentiality Agreement.

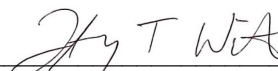
11.19 Fiduciary Obligations.

Without limiting the rights of Buyer under this Agreement or any Transaction Document and rights to receive the Bid Protections pursuant to Section 10.2(b), nothing in this Agreement or the other Transaction Document will require Sellers or any of their respective boards of directors to take any action, or to refrain from taking any action, to the extent any such board of directors determines, in good faith, upon the advice of counsel, that taking or failing to take such action is required in order for such board of directors to comply with its fiduciary obligations under applicable Law. Without limiting the rights of Buyer in this Agreement or the other Transaction Documents and rights to receive the Bid Protections pursuant to Section 10.2(b), for the avoidance of doubt, Sellers retain the right to pursue any transaction or restructuring strategy, including an Alternate Transaction, that, in the good faith and business judgment of the board of directors of any Seller, upon the advice of counsel, is required in order for such board of directors to comply with its fiduciary duties under applicable Law to maximize the value of their businesses and estates; provided that Sellers must use their reasonable best efforts to respond promptly to information requests from Buyer relating to any Alternate Transaction.

[The remainder of this page is intentionally left blank.]

IN WITNESS WHEREOF the parties have hereunto caused this Agreement to be duly executed as of the date first above written.

CUMMINS INC.

By: 
Name: Jeffrey Wiltrot
Title: Vice President – Corporate Development

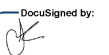
FIRST MODE HOLDINGS, INC.

By: _____
Name: Julian Soles
Title: Chief Executive Officer

SNYCHRONOUS LLC

By: _____
Name: Julian Soles
Title: Authorized Signatory

FIRST MODE IPP LTD

By: _____
Name: Julian Soles
Title: Authorized Signatory

FIRST MODE PTY LTD

By: _____
Name: Julian Soles
Title: Authorized Signatory

FIRST MODE SA PTY

By: _____
Name: Julian Soles
Title: Authorized Signatory

FIRST MODE SA HOLDINGS

By:  _____
Name: Julian Soles
Title: Authorized Signatory

Schedules

[INTENTIONALLY OMMITTED]

Exhibit B

Proposed Bid Procedures Order

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

	X	
In re:	:	Chapter 11
	:	
FIRST MODE HOLDINGS, INC., <i>et al.</i> , ¹	:	Case No. 24-12794 (____)
	:	
Debtors.	:	(Jointly Administered)
	:	
	X	

**ORDER (I) APPROVING BID
PROCEDURES IN CONNECTION WITH THE SALE
OF SUBSTANTIALLY ALL OF THE DEBTORS' ASSETS;
(II) SCHEDULING AN AUCTION AND A SALE HEARING;
(III) APPROVING THE FORM AND MANNER OF NOTICE THEREOF;
(IV) AUTHORIZING THE DEBTORS TO ENTER INTO THE STALKING
HORSE APA AND RELATED BID PROTECTIONS; (V) APPROVING PROCEDURES
FOR THE ASSUMPTION AND ASSIGNMENT OF CONTRACTS AND LEASES; AND
(VI) GRANTING RELATED RELIEF**

Upon the motion (the “**Motion**”)² of the above-captioned debtors and debtors in possession (the “**Debtors**”) for entry of an order (this “**Order**”) (i) authorizing and approving the Bid Procedures attached hereto as Exhibit 1 (the “**Bid Procedures**”) in connection with the sale (the “**Sale**”) of substantially all of the Debtors’ assets (the “**Assets**”); (ii) scheduling an auction (the “**Auction**”) and sale hearing (the “**Sale Hearing**”) with respect to the Sale of the Assets; (iii) the form and manner of notice of the Auction and the Sale Hearing (the “**Sale Notice**”), as attached hereto as Exhibit 2; (iv) authorizing the Debtors to enter into the Stalking Horse APA (as defined herein), pursuant to which the Stalking Horse Bidder agrees to purchase the Purchased Assets (as defined in the Stalking Horse APA) from the Debtors and certain of its non-Debtor affiliates on

¹ The Debtors in these cases, along with the last four digits of each Debtor’s federal tax identification number, are: First Mode Holdings, Inc. (7177), and Synchronous LLC (1829). The Debtors’ mailing address is 3417 1st Ave S, Seattle, WA, 98134.

² Capitalized terms used as defined terms herein but not otherwise defined shall have the meanings ascribed to them in the Motion or the Bid Procedures, as applicable.

the terms and conditions set forth therein; (v) approving the Bid Protections (as defined herein) granted to the Stalking Horse Bidder; (vi) approving procedures for the assumption and assignment of executory contracts and unexpired leases in connection with the Sale (collectively, the “**Assigned Contracts**”) and the notice thereof (the “**Assumption Notice**”), attached hereto as Exhibit 3; and (vii) granting related relief; and this Court having reviewed the Motion and having heard the statements in support of the relief requested therein at a hearing before this Court (the “**Hearing**”), the First Day Declaration and the Parr Declaration, and this Court having jurisdiction to consider the Motion and the relief requested therein in accordance with 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 February 29, 2012; and this Court having found that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2) and that this Court may enter a final order consistent with Article III of the United States Constitution; and this Court having found that venue of this proceeding and the Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and it appearing that proper and adequate notice of the Motion has been given and that no other or further notice is necessary; and upon the record herein; and after due deliberation thereon; and this Court having determined that there is good and sufficient cause for the relief granted in this Order, it is hereby

ORDERED, ADJUDGED AND DECREED THAT:

A. The findings and conclusions set forth herein constitute the Court’s findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052, made applicable to this proceeding pursuant to Bankruptcy Rule 9014. To the extent any of the following findings of fact constitute conclusions of law, they are adopted as such. To the extent any of the following conclusions of law constitute findings of fact, they are adopted as such.

B. This 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 February 29, 2012.

C. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2). The Debtors have confirmed their consent, pursuant to Local Rule 9013-1(f), to the entry of a final order by this Court in connection with the Motion, to the extent it is later determined this Court, absent the consent of the parties, cannot enter final orders or judgments consistent with Article III of the United States Constitution.

D. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

E. The bases for the relief requested in the Motion are Sections 105, 363, 365, 503, and 507 of the Bankruptcy Code, Bankruptcy Rules 2002, 6004, 6006, 9007, and 9014, and Local Rules 2002-1, 6004-1, and 9013-1(m).

F. Notice of the Motion has been given to (i) the Office of the United States Trustee for the District of Delaware; (ii) the United States Attorney for the District of Delaware; (iii) the United States Department of Justice; (iv) the attorneys general for the states in which the Debtors conduct business; (v) the Internal Revenue Service; (vi) those creditors listed on the Debtors' consolidated list of thirty (30) creditors holding the largest unsecured claims; (vii) counsel to the DIP Lender, the Prepetition Facility Lender, and the Consenting Parent; (viii) the Stalking Horse Bidder; (ix) all entities reasonably known to have expressed an interest in a transaction with respect to any of the Assets during the past three (3) months; (x) all parties known by the Debtors to assert a lien on any of the Assets; and (xi) any party that has requested notice pursuant to Bankruptcy Rule 2002-1.

G. Notice of the Motion, including the relief sought therein, and the Hearing was good and sufficient under the circumstances, and such notice complied with all applicable requirements under the Bankruptcy Code, the Bankruptcy Rules, and the Local Rules, and no other or further notice need be provided. A reasonable opportunity to object or be heard regarding the relief provided in this Order has been afforded to all parties in interest.

H. The Debtors have articulated good and sufficient reasons for this Court to grant the relief requested in the Motion, including (i) approving the Bid Procedures; (ii) scheduling the Auction and the Sale Hearing; (iii) approving the Sale Notice; (iv) authorizing the Debtors to enter into the Stalking Horse APA and approving the related Bid Protections, in the exercise of the Debtors' reasonable business judgment; and (v) approving procedures for the assumption and assignment of the Assigned Contracts, including the Assumption Notice. The entry of this Order is in the best interests of the Debtors, their estates, creditors, and other parties in interest.

I. The Bid Procedures attached hereto as Exhibit 1 are reasonable, appropriate and represent the best method for maximizing value for the benefit of the Debtors, their estates, and their creditors. The Bid Procedures were negotiated at arm's length, in good faith, and without collusion. The Bid Procedures are reasonably designed to attract value-maximizing proposals beneficial to the Debtors, their estates, their creditors, and other parties in interest. The Bid Procedures comply with the requirements of Local Rule 6004-1(c).

J. The Debtors have demonstrated compelling and sound business justifications for approval of, and authorization to perform under, that certain Asset Purchase Agreement, a copy of which is attached as Exhibit A to the Motion (the "**Stalking Horse APA**") by and among the Debtors and the Stalking Horse Bidder. The Stalking Horse APA, including the Break-up Fee and Expense Reimbursement (the "**Bid Protections**"), represents the highest or otherwise best offer

the Debtors have received to date as a result of their efforts to market the Purchased Assets for sale. The approval of the relief requested is a necessary constructive step toward completion of the sale process. The Stalking Horse APA and the Bid Protections allow the Debtors to solicit the highest or otherwise best bid for their assets through the Bid Procedures.

K. The Stalking Horse Bidder is not an “insider” or “affiliate” of any of the Debtors, as those terms are defined in section 101 of the Bankruptcy Code, and no common identity of incorporators, directors, or controlling stockholders exists between the Stalking Horse Bidder and the Debtors. The Stalking Horse Bidder and its counsel and advisors have acted in “good faith” within the meaning of section 363(m) of the Bankruptcy Code in connection with the Stalking Horse Bidder’s negotiation of the Stalking Horse APA, subject to (i) compliance with the Bid Procedures and (ii) entry of the Sale Order.

L. The Bid Protections, as set forth in the Stalking Horse APA, are: (i) an actual and necessary cost of preserving the Debtors’ estates within the meaning of sections 503(b)(1)(A) and 507(a)(2) of the Bankruptcy Code; (ii) fair, reasonable and appropriate and designed to maximize the value for the benefit of the Debtors’ estate; (iii) commensurate to the real and substantial benefits conferred upon the Debtors’ estates by the Stalking Horse Bidder; (iv) reasonable and appropriate in light of the size and nature of the proposed sale contemplated by the Stalking Horse APA, the commitments that have been made by the Stalking Horse Bidder, and the efforts that have been and will be expended by the Stalking Horse Bidder; and (v) necessary to induce the Stalking Horse Bidder to continue to pursue such sale and continue to be bound by the Stalking Horse APA and a condition of the Stalking Horse Bidder’s execution of the Stalking Horse APA.

M. The Bid Protections, to the extent payable under the Stalking Horse APA, pursuant to sections 105(a), 365(c)(1), 503(b), and 507(a)(2) of the Bankruptcy Code, are a superpriority administrative expense claim in each of the Debtors' estates.

N. The Sale Notice, substantially in the form attached hereto as Exhibit 2, regarding the Sale of the Assets by Auction and Sale Hearing, is reasonably calculated to provide interested parties with timely and proper notice of the proposed Sale, including, without limitation: (i) the date, time, and place of the Auction (if one is held); (ii) the Bid Procedures and certain dates and deadlines related thereto; (iii) the deadline for filing objections to the Sale of the Assets to the Stalking Horse Bidder and entry of the Sale Order, and the date, time, and place of the Sale Hearing; and (iv) instructions for promptly obtaining a copy of the Stalking Horse APA. No other or further notice of the Sale shall be required.

O. The Assumption Notice, substantially in the form attached hereto as Exhibit 3, regarding the assumption and assignment of Assigned Contracts was reasonably calculated and provided each Assumed Contract Counterparty with proper notice of the potential assumption and assignment of such contracts and leases by the Successful Bidder or Back-Up Bidder or any of their known proposed assignees (if different from the Successful Bidder or Back-Up Bidder, respectively), the proposed Cure Amounts for such contract, and the requirement that each such Assumed Contract Counterparty assert any objection to the proposed Cure Amount or otherwise be barred from asserting claims arising out of or related to the contract or lease following the assumption and assignment thereof.

P. Neither the filing of the Motion, entry of this Order, the solicitation of bids or the conducting of the Auction in accordance with the Bid Procedures nor any other actions taken by

the Debtors in accordance therewith shall constitute a Sale of the Assets, which Sale will only take place, if at all, following the Sale Hearing.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT:

1. The Motion is GRANTED as set forth herein.

2. All objections, statements, and reservations of rights with respect to the relief requested in the Motion with respect to the Bid Procedures that have not been withdrawn, waived, or settled, as announced to the Court at the Hearing on the Motion or by stipulation filed with the Court, are overruled and denied on the merits with prejudice.

A. The Bid Procedures

3. The Bid Procedures, attached hereto as Exhibit 1, are hereby approved in their entirety and fully incorporated into this Order. The Bid Procedures shall govern the submission, receipt, and analysis of all bids relating to the proposed Sale and any party desiring to submit a higher or better offer for the Assets must comply with the terms of the Bid Procedures and this Order. The Bid Procedures shall also govern the terms on which the Debtors will proceed with the Auction and/or Sale pursuant to the Stalking Horse APA. The failure to specifically include a reference to any particular provision of the Bidding Procedures in this Order shall not diminish or impair the effectiveness of such provision.

4. The Stalking Horse Bidder shall be deemed a Qualified Bidder and the Stalking Horse APA shall be deemed a Qualified Bid pursuant to the Bid Procedures for all purposes. The Stalking Horse Bidder's status as a Qualified Bidder cannot be abrogated by subsequent amendment or modification of the Bid Procedures.

5. Solely in accordance with the Stalking Horse APA, the Break-Up Fee shall be set at three (3) percent of the Purchase Price (as defined in the Stalking Horse APA). The Stalking Horse Bidder shall also be entitled to reimbursement of the reasonable and documented out-of-

pocket costs and expenses of the Stalking Horse Bidder incurred, up to an amount equal to \$550,000, solely in accordance with the Stalking Horse APA.

6. Subject to paragraph 5, the proposed Bid Protections are hereby approved in their entirety and shall be payable by the Debtors in accordance with, and subject to, the terms of the Stalking Horse APA. The Debtors are authorized to pay the Bid Protections in accordance with, and subject to the terms of, the Stalking Horse APA and this Order without further order of the Court.

7. The Bid Protections, to the extent payable under the Stalking Horse APA, pursuant to sections 105(a), 365(c)(1), 503(b), and 507(a)(2) of the Bankruptcy Code, shall constitute a superpriority administrative expense claim in each of the Debtors' estates. Any overbid alternative transaction (including, for the avoidance of doubt, any credit-bid transaction) shall be required to include a cash component satisfactory to pay the Bid Protections in full.

8. Bid Deadline. The deadline to submit a bid to the Debtors, in writing (email being sufficient) and in accordance with the Bid Procedures, is **January 20, 2025 at 4:00 p.m. (prevailing Eastern Time)** (as may be amended by the Debtors in consultation with the Consultation Parties, the "**Bid Deadline**").

9. Bid Designations. The Debtors will notify each Bidder whether such party is a Qualified Bidder on **January 23, 2025** and shall provide each Qualified Bidder, including the Stalking Horse Bidder, with a copy of the Baseline Bid no later than 4:00 p.m. (prevailing Eastern Time) on the day before the Auction commences.

10. Auction. As further described in the Bid Procedures, if a Qualified Bid, other than the Stalking Horse APA, is received by the Bid Deadline, the Debtors will conduct the Auction at **10:00 a.m. (prevailing Eastern Time) on January 27, 2025** at the offices of Latham & Watkins

LLP, 1271 Avenue of the Americas, New York, New York 10020, telephonically, or by video via Zoom, or such later time on such day or other place as the Debtors shall notify all Qualified Bidders who have submitted Qualified Bids, if a Qualified Bid is timely received. The Debtors are authorized, subject to the terms of this Order and the Bid Procedures, to take actions reasonably necessary to conduct and implement the Auction.

11. Post-Auction Notice Deadline. As soon as reasonably practicable after closing the Auction, if any, and in any event not more than twenty-four (24) hours after closing the Auction, the Debtors shall file and serve a notice identifying the Successful Bidder and Back-Up Bidder (the “**Post-Auction Notice**”).

12. Sale Hearing. The Sale Hearing shall be conducted on **January 30, 2025 at [●] [a./p.]m. (prevailing Eastern Time)**. The Debtors will seek entry of an order of the Court at the Sale Hearing approving and authorizing the Sale of the Assets to the Successful Bidder. Upon entry of this Order, the Debtors are authorized to perform any obligation intended to be performed prior to the Sale Hearing or entry of the Sale Order with respect thereto. In accordance with the Bid Procedures, the Sale Hearing may be adjourned from time to time without further notice other than such announcement being made in open court or a notice of adjournment filed on the Court’s docket.

B. Entry into Stalking Horse APA and Approval of Bid Protections

13. Subject to final approval at the Sale Hearing, the Debtors are authorized, pursuant to sections 105(a) and 363(b) of the Bankruptcy Code, to enter into and perform the Stalking Horse APA, subject to the solicitation of higher or otherwise better bids at the Auction.

14. The Stalking Horse APA shall be binding and enforceable on the parties thereto in accordance with its terms. The failure to describe specifically or include any provision of the Stalking Horse APA or related documents in the Motion or herein shall not diminish or impair the

effectiveness of such provision. The Stalking Horse APA and any related agreements, documents or other instruments may be modified, amended or supplemented by the parties thereto, solely in accordance with the terms thereof, without further order of the Court; *provided, however*, the parties may not amend the Purchase Price, Bid Protections, or make any other changes to the Stalking Horse APA which are materially adverse to the Debtors without further order of this Court.

15. The Bid Protections, as set forth in the Stalking Horse APA, are approved in their entirety. The obligation of the Debtors to pay the Bid Protections shall be payable only pursuant to the terms set forth in the Stalking Horse APA.

16. For the avoidance of doubt and notwithstanding anything to the contrary contained in this Order, this Order does not approve the Sale of the Purchased Assets under the Stalking Horse APA or authorize the consummation of the Sale, such approval and authorization (if any) to be considered only at the Sale Hearing and all rights of all parties in interest to object to such approval and authorization are reserved.

17. No person or entity, other than the Stalking Horse Bidder, shall be entitled to any expense reimbursement, break-up fee, topping or termination fee, or other similar fee or payment, and, by submitting a Bid, such person or entity is deemed to have waived its right to request or file with this Court any request for expense reimbursement or any other fee of any nature in connection with the Auction and the Sale, whether by virtue of Bankruptcy Code § 503(b) or otherwise.

C. Assumption and Assignment Notices & Procedures

18. The procedures set forth below regarding the assumption and assignment of the executory contracts and unexpired leases proposed to be assumed by the Debtors pursuant to Section 365(b) of the Bankruptcy Code and assigned to the Stalking Horse Bidder (or other Successful Bidder, if any) pursuant to Section 365(f) of the Bankruptcy Code in connection with

the Sale (the “**Assumption Procedures**”) are hereby approved to the extent set forth herein. These Assumption Procedures shall govern the assumption and assignment of all of the Assigned Contracts to be assumed and assigned in connection with the Sale, subject to the payments necessary to cure any defaults arising under any such Assigned Contracts.

19. As of **January 5, 2025** (the “**Assumption Notice Deadline**”), the Debtors have filed with the Court, posted on the website maintained by the Debtors’ proposed Claims and Noticing Agent, Omni Agent Solutions, Inc., at <https://omniagentsolutions.com/FirstMode>, and served on the counterparties to the Assigned Contracts (each, an “**Assumed Contract Counterparty**”) that may be assumed by the Debtors and assigned to the Stalking Horse Bidder or other Successful Bidder after the results of the Auction, with notice substantially in the form attached hereto as Exhibit 3 (an “**Assumption Notice**”). The Assumption Notice informed each recipient of the timing and procedures relating to such assumption and assignment, and, to the extent applicable, (i) the title of the executory contract or unexpired lease, as applicable, (ii) the name of the counterparty to the executory contract or unexpired lease, as applicable, (iii) the Debtors’ good faith estimate of the cure amount (if any) required in connection with the executory contract or unexpired lease, as applicable, (iv) the identity of the Stalking Horse Bidder (as assignee, if applicable), and (v) the Assumed Contract Objection Deadline and Post-Auction Objection Deadline. The presence of an Assigned Contract on the Assumption Notice does not constitute an admission that such Assigned Contract is an executory contract or unexpired lease, and the presence of an Assigned Contract on any notice shall not prevent the Debtors from subsequently withdrawing such request for assumption or rejecting such Assigned Contract any time before such Assigned Contract is actually assumed and assigned pursuant to the Sale Order.

20. At any time after service of the Assumption Notice and before the closing of a Sale, the Debtors may (i) supplement the list of Assigned Contracts with previously omitted executory contracts or unexpired leases, (ii) remove Assigned Contracts from the list of executory contracts and unexpired leases ultimately selected as Assigned Contracts that a Successful Bidder proposes to be assumed and assigned to it in connection with a Sale, and/or (iii) modify the previously stated cure amount associated with any Assigned Contract. In the event the Debtors exercise any of these reserved rights, the Debtors will promptly serve a supplemental notice of contract assumption (a “**Supplemental Assumption Notice**”) on each of the Assumed Contract Counterparties to such Assigned Contracts and their counsel of record, if any; *provided, however*, the Debtors may not add an executory contract to the list of Assigned Contracts that has been previously rejected by the Debtors by order of the Court. Each Supplemental Assumption Notice will include the same information with respect to listed Assigned Contracts as was included in the Assumption Notice.

21. To the extent any Assumed Contract Counterparty is added to the Assumption Notice after the initial Assumption Notice is served, or the cure amount for any contract on a prior Assumption Notice is modified, such new Assumed Contract Counterparty shall receive notice of the addition and/or the Debtors’ proposed cure amount through service of a Supplemental Assumption Notice, and that party shall have fourteen (14) days from the date of such notice to object to the proposed cure amount and assignment to the Successful Bidder (except as provided in this Order with respect to objections based on the ability of a Successful Bidder other than the Stalking Horse Bidder to provide adequate assurance of future performance).

22. Objections, if any, to (i) the potential assumption and assignment of any Assigned Contract to the Stalking Horse Bidder including the ability of the Stalking Horse Bidder to provide adequate assurance of future performance and (ii) the proposed cure amount to be paid in

connection with the assumption and assignment of any Assigned Contract (each, an “**Assumed Contract Objection**”) **must** (i) be in writing, (ii) comply with the applicable provisions of the Bankruptcy Rules and the Local Rules, and (iii) state with specificity the nature of the objection and, if the objection pertains to the proposed cure amount, the correct cure amount alleged by the objecting counterparty, together with any applicable and appropriate documentation in support thereof, and (iv) be filed with the Bankruptcy Court and served on: (i) proposed counsel to the Debtors: (a) Latham & Watkins LLP (x) 330 North Wabash Avenue, Suite 2800, Chicago, IL 60611, Attn: Caroline Reckler, Esq. (email: caroline.reckler@lw.com); (y) 1271 Avenue of the Americas, New York, NY 10020, Attn: Annemarie V. Reilly, Esq. and Brian S. Rosen, Esq. (emails: annemarie.reilly@lw.com and brian.rosen@lw.com); and (z) 355 South Grand Avenue, Suite 100, Los Angeles, CA 90071, Attn: Jeffrey T. Mispagel, Esq. (email: jeffrey.mispagel@lw.com) and (b) Young Conaway Stargatt & Taylor, LLP, Rodney Square, 1000 North King Street, Wilmington, DE 19801, Attn: Michael R. Nestor, Esq., Kara Hammond Coyle, Esq., and Joseph M. Mulvihill, Esq. (emails: MNestor@ycst.com, KCoyle@ycst.com, and JMulvihill@ycst.com); (ii) counsel for the DIP Lender, the Prepetition Facility Lender, and the Consenting Parent: (a) Davis Polk & Wardwell LLP, 450 Lexington Ave, New York, NY 10017, Attn: Darren S. Klein, Esq. and Aryeh Ethan Falk, Esq. (emails: darren.klein@davispolk.com and aryeh.falk@davispolk.com) and (b) Morris, Nichols, Arsht & Tunnell LLP, 1201 N Market St # 1600, Wilmington, DE 19801, Attn: Robert J. Dehney, Sr., Esq. (email: rdehney@morrisnichols.com); (iii) counsel to any statutory committee appointed in these cases; and (iv) the United States Trustee for the District of Delaware, 844 King Street, Suite 2207, Wilmington, DE 19801, Attn: Jane Leamy (email: Jane.M.Leamy@usdoj.gov) (the “**Objection Notice Parties**”) and counsel to the Stalking Horse Bidder, Sidley Austin LLP, (i) 1 S. Dearborn

St, Chicago, IL 60603, Attn: Dennis M. Twomey, Esq. (email: dtwomey@sidley.com) and (ii) 787 7th Ave, New York, NY 10019; Attn: Margaret R. Alden, Esq. (email: malden@sidley.com) so as to be actually received no later than **January 22, 2025 at 4:00 p.m. (prevailing Eastern Time)** (collectively, the “**Assumed Contract Objection Deadline**”).

23. If the Successful Bidder or Back-Up Bidder that prevails at the Auction is not the Stalking Horse Bidder, the deadline to object (a “**Post-Auction Objection**”) solely to (i) the identity of a Successful Bidder or Backup Bidder or (ii) the ability of the Successful Bidder or Back-Up Bidder to provide adequate assurance of future performance under any Assigned Contract shall be **January 29, 2025 at 4:00 p.m. (prevailing Eastern Time)** (the “**Post-Auction Objection Deadline**”). Any Post-Auction Objection **must** (i) be in writing, (ii) comply with the applicable provisions of the Bankruptcy Rules and the Local Rules, and (iii) state with specificity the nature of the objection, and (iv) be filed with the Bankruptcy Court and served on the Objection Notice Parties before the Post-Auction Objection Deadline.

24. If an Assumed Contract Counterparty does not timely file and serve an Assumed Contract Objection by the applicable Assumed Contract Objection Deadline or a Post-Auction Objection by the Post-Auction Objection Deadline, then that party shall be forever barred from objecting to (i) the Debtors’ proposed cure amount and (ii) the assumption and assignment of that party’s executory contract or unexpired lease (including the adequate assurance of future performance), and (iii) the related relief requested in the Motion. Such party shall be forever barred and estopped from objecting to the cure amount, the assumption and assignment of that party’s executory contract or unexpired lease (including the adequate assurance of future performance), the relief requested in the Motion, whether applicable law excuses such counterparty from accepting performance by, or rendering performance to, the Stalking Horse

Bidder or the Successful Bidder, as applicable, for purposes of Section 365(c)(1) of the Bankruptcy Code and from asserting any additional cure or other amounts against the Debtors and the Stalking Horse Bidder or Successful Bidder, as applicable, with respect to such party's executory contract or unexpired lease.

25. If an Assumed Contract Counterparty timely files and serves an Assumed Contract Objection by the applicable Assumed Contract Objection Deadline or a Post-Auction Objection by the Post-Auction Objection Deadline, the Court will hear and determine such objection at the Sale Hearing or such other date that the Debtors, in consultation with the Successful Bidder and the Consultation Parties, shall determine in their discretion (subject to the Court's calendar).

26. The payment of the applicable cure amount by the Debtors or Stalking Horse Bidder (or other Successful Bidder), as applicable, shall (i) effect a cure of all defaults existing thereunder and (ii) compensate for any actual pecuniary loss to such counterparty resulting from such default, and such counterparty shall be forever barred from asserting any other claims related to such Assigned Contract against the Debtors and their estates or the Stalking Horse Bidder (or other Successful Bidder), or the property of any of the foregoing, that existed prior to the entry of any order resolving the applicable cure amount and the Sale Order.

D. Notice of the Sale Process

27. The Sale Notice, and the Assumption Notice, in substantially the forms as annexed to this Order as Exhibit 2 and Exhibit 3, respectively, and the Publication Notice, in substantially the forms as annexed to the Motion as Exhibit D, respectively, are hereby approved.

28. Within two (2) business days after the entry of this Order, the Debtors (or their agent) shall serve the Sale Notice by first-class mail upon: (i) the Office of the United States Trustee for the District of Delaware (the "**U.S. Trustee**"), 844 King Street, Suite 2207, Lockbox 35, Wilmington, DE 19801, Attn: Jane Leamy (Jane.M.Leamy@usdoj.gov); (ii) the holders of the

thirty (30) largest, non-insider unsecured claims against the Debtors, if no official committee of unsecured creditors has been appointed; (iii) counsel to the official committee of unsecured creditors, if one has been appointed; (iv) counsel to the Stalking Horse Bidder; (v) counsel to DIP Lender, the Prepetition Facility Lender, and the Consenting Parent; (vi) all parties known by the Debtors to assert a lien on any of the Assets; (vii) all entities reasonably known to have expressed an interest in a transaction with respect to any of the Assets during the past three (3) months; (viii) the United States Attorney's Office for the District of Delaware; (ix) the Internal Revenue Service; (x) all state and local taxing authorities with an interest in the Assets; (xi) the offices of the attorneys general for the states in which the Debtors operate; (xii) all other governmental agencies with an interest in the Sale and transactions proposed thereunder; (xiii) the office of the secretary of state in each state in which the Debtors operate or are organized; (xiv) all environmental authorities having jurisdiction over any of the Assets; (xv) all other parties known or reasonably believed to have asserted an interest in the Assets; (xvi) the Assumed Contract Counterparties; (xvii) the Debtors' insurance carriers; (xviii) all known creditors of the Debtors; (xix) all known holders of equity interests in the Debtors; (xx) any party that has requested notice pursuant to Bankruptcy Rule 2002; and (xxi) to the extent not included above, all parties in interest listed on Debtors' creditor matrix

29. As soon as practicable after the entry of this Order, the Debtors shall publish the Publication Notice once in each of the *USA Today* or similar nationally circulated news publication and the *Financial Times* or similar publication circulated in the United Kingdom. In addition, as soon as reasonably practicable, as soon as practicable after entry of the Order, the Debtors will also post the Sale Notice and this Order on the website maintained by the Debtors' proposed Claims and Noticing Agent, Omni Agent Solutions, Inc., at

<https://omniagentsolutions.com/FirstMode>. Such publication notice as set forth in the preceding two sentences shall be deemed sufficient and proper notice of the Sale to any other interested parties whose identifies are unknown to the Debtors.

E. Other Relief Granted

30. Nothing in this Order, the Stalking Horse APA, or the Motion shall be deemed to or constitute the assumption or assignment of an executory contract or unexpired lease.

31. All rights of the Debtors, as they may reasonably determine to be in the best interest of their estates, in consultation with the Consultation Parties, to modify, subject to the terms of the Restructuring Support Agreement, the Bid Procedures in good faith, to further the goal of attaining the highest or otherwise best offer for the Assets, or impose, at or prior to selection of the Successful Bidder(s), additional customary terms and conditions on the Sale of the Assets, are reserved to the extent set forth in the Bid Procedures; *provided*, that any changes to the dates and deadlines set forth herein shall comply with the Milestones. The Debtors shall provide reasonable notice of any such modification to any Qualified Bidder, including the Stalking Horse Bidder.

32. The requirements of Bankruptcy Rules 6004(h) and 6006(d) are waived.

33. The Debtors are hereby authorized to conduct the Sale without the necessity of complying with any state or local bulk transfer laws or requirements.

34. The Debtors are authorized to take all actions necessary to effectuate the relief granted pursuant to this Order in accordance with the Motion.

35. The terms and conditions of this Order shall be immediately effective and enforceable upon its entry, notwithstanding any provision in the Bankruptcy Rules or the Local Rules to the contrary, and the Debtors may, in their discretion and without further delay, take any action and perform any act authorized under this Order.

36. In the event of any inconsistencies between the Bid Procedures Order and the Bid Procedures, the Bid Procedures shall govern in all respects.

37. This Court shall retain exclusive jurisdiction with respect to all matters arising from or related to the implementation, interpretation or enforcement of this Order.

Exhibit 1

Bid Procedures

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

	X	
In re:	:	Chapter 11
	:	
FIRST MODE HOLDINGS, INC., <i>et al.</i> , ¹	:	Case No. 24-12794 (____)
	:	
Debtors.	:	(Jointly Administered)
	:	

BID PROCEDURES

In the exercise of their good faith reasonable business judgment, the above-captioned debtors and debtors in possession (the “**Debtors**”) and certain of their non-Debtor affiliates (together with the Debtors, the “**Company**”) have executed an Asset Purchase Agreement (including all exhibits, schedules, and addenda thereto, the “**Stalking Horse APA**”) with Cummins Inc. (the “**Stalking Horse Bidder**”), pursuant to which the Stalking Horse Bidder proposes to (i) purchase, acquire, and take assignment and delivery of the Purchased Assets (as defined in the Stalking Horse APA) and (ii) assume certain Assumed Liabilities (as defined in the Stalking Horse APA), each as specifically enumerated in the Stalking Horse APA and subject to the terms and conditions set forth therein.

On [●], 2025, the United States Bankruptcy Court for the District of Delaware (the “**Bankruptcy Court**”) entered an order [Docket No. [●]] (the “**Bid Procedures Order**”) approving, among other things, these bid procedures (the “**Bid Procedures**”).

These Bid Procedures set forth the process by which the Debtors are authorized to conduct the auction (the “**Auction**”) for the sale (the “**Sale**”) of the Purchased Assets. Subject to the entry of the Sale Order, the Sale may be implemented pursuant to the terms and conditions of the Stalking Horse APA, as the same may be amended pursuant to the terms thereof, subject to the receipt of higher or otherwise better Bids (as defined below) in accordance with these Bid Procedures. Pursuant to the Bid Procedures, the Debtors, in consultation with the Consultation Parties, will determine the highest or otherwise best offer for the sale of the Purchased Assets and, if applicable, other of the Debtors’ assets.

¹ The Debtors in these cases, along with the last four digits of each Debtor’s federal tax identification number, are: First Mode Holdings, Inc. (7177), and Synchronous LLC (1829). The Debtors’ mailing address is 3417 1st Ave S, Seattle, WA, 98134.

A. Important Dates²

Event	Date
Sale Objection Deadline	Objections to the Sale or Sale Order shall be filed and served no later than January 2, 2025 at 4:00 p.m. (prevailing Eastern Time) (collectively, the “ <u>Sale Objection Deadline</u> ”).
Bid Deadline	January 20, 2025 at 4:00 p.m. (prevailing Eastern Time).
Assumed Contract Objection Deadline	Objections to (i) the potential assumption and assignment of any Assigned Contract to the Stalking Horse Bidder including the ability of the Stalking Horse Bidder to provide adequate assurance of future performance and (ii) the proposed cure amount to be paid in connection with the assumption and assignment of any Assigned Contract shall be filed and served no later than January 22, 2025 at 4:00 p.m. (prevailing Eastern Time) (collectively, the “ <u>Assumed Contract Objection Deadline</u> ”); <i>provided</i> that, to the extent any Assumed Contract Counterparty is added to the Assumption Notice after the initial notice is served, such new Assumed Contract Counterparty shall have fourteen (14) days from the date of service of the Supplemental Contract Notice to object to the proposed cure amount and assignment to the Successful Bidder.
Deadline for Debtors to designate Qualified Bids	January 23, 2025 at 4:00 p.m. (prevailing Eastern Time).
Deadline to identify the Baseline Bid (if necessary)	Prior to 4:00 p.m. (prevailing Eastern Time) on the day before the Auction, the Debtors will provide copies of the Baseline Bid (as defined herein) to the Stalking Horse Bidder and all other Qualified Bidders.
Auction (if necessary)	January 27, 2025 at 10:00 a.m. (prevailing Eastern Time).
Post-Auction Notice Deadline	As soon as reasonably practicable after closing the Auction, if any, and in any event not more than twenty-four (24) hours after closing the Auction, the Debtors shall file and serve a notice identifying the Successful Bidder and Back-Up Bidder, if any.
Post-Auction Objection Deadline	If the Successful Bidder or Backup Bidder that prevails at the Auction is not the Stalking Horse Bidder, the deadline to object solely to (i) the identity of a Successful Bidder or Backup Bidder or (ii) the ability of the Successful Bidder or Backup Bidder to provide adequate assurance of future performance under any Assigned

² Capitalized terms used but not defined herein shall have the meanings given to them in the Motion or the Stalking Horse APA, as applicable.

	Contract shall be January 29, 2025 at 4:00 p.m. (prevailing Eastern Time).
Sale Hearing	The Sale Hearing shall be on January 30, 2025 at [●] [a./p.]m.

B. Marketing Process

1. Contact Parties

The Debtors and their advisors have conducted and will continue to conduct an extensive marketing process. Through the marketing process, the Debtors' proposed investment banker, PJT Partners LP ("**PJT**"), has developed a list of "Contact Parties" who will receive a copy of an "**Information Package**," which is comprised of: (i) marketing materials; (ii) a copy of these proposed Bid Procedures (and once entered by the Court, the Bid Procedures Order); and (iii) a copy of the Stalking Horse APA. The list of Contact Parties encompasses parties whom the Debtors believe may be interested in pursuing a Sale and whom the Debtors reasonably believe may have the financial resources to consummate such a transaction.

2. Access to Diligence Materials

To receive due diligence information, including full access to the Debtors' electronic data room (the "**Data Room**") and additional non-public information regarding the Company (collectively, the "**Diligence Materials**"), any party interested in submitting a bid, other than the Stalking Horse Bidder (each a "**Potential Bidder**"), must deliver the following documents (collectively, the "**Preliminary Bid Documents**") by email to (i) proposed counsel to the Debtors: (a) Latham & Watkins LLP (x) 330 North Wabash Avenue, Suite 2800, Chicago, IL 60611, Attn: Caroline Reckler, Esq. (email: caroline.reckler@lw.com); (y) 1271 Avenue of the Americas, New York, NY 10020, Attn: Annemarie V. Reilly, Esq. and Brian S. Rosen, Esq. (emails: annemarie.reilly@lw.com and brian.rosen@lw.com); and (z) 355 South Grand Avenue, Suite 100, Los Angeles, CA 90071, Attn: Jeffrey T. Mispagel, Esq. (email: jeffrey.mispagel@lw.com) and (b) Young Conaway Stargatt & Taylor, LLP, Rodney Square, 1000 North King Street, Wilmington, DE 19801, Attn: Michael R. Nestor, Esq., Kara Hammond Coyle, Esq., and Joseph M. Mulvihill, Esq. (emails: MNestor@ycst.com, KCoyle@ycst.com, and JMulvihill@ycst.com); (ii) PJT Partners LP, Attn: Matt Parr, William Evarts, and Brandon Pinn (emails: parr@pjtpartners.com, evarts@pjtpartners.com, and pinn@pjtpartners.com); and (iii) counsel for Anglo American International Holdings Limited (the "**DIP Lender**" or the "**Prepetition Facility Lender**") and Anglo American Technical & Sustainability Limited (the "**Consenting Parent**"): (a) Davis Polk & Wardwell LLP, 450 Lexington Ave, New York, NY 10017, Attn: Darren S. Klein, Esq. and Aryeh Ethan Falk, Esq. (emails: darren.klein@davispolk.com and aryeh.falk@davispolk.com) and (b) Morris, Nichols, Arsht & Tunnell LLP, 1201 N Market St #1600, Wilmington, DE 19801, Attn: Robert J. Dehney, Sr., Esq. (email: rdehney@morrisnichols.com); and (iv) counsel to any official committee of unsecured creditors, if any [●] (the "**Committee**," and together with the DIP Lender, the Prepetition Facility Lender, and the Consenting Parent, the "**Consultation Parties**") (collectively, the "**Bid Recipients**");

- (i) to the extent not already executed, an executed and signed confidentiality agreement on customary terms that are reasonably acceptable to the Debtors (an **“Acceptable Confidentiality Agreement”**); and
- (ii) evidence by the Potential Bidder of its financial capacity to close a proposed transaction for the Purchased Assets or other of the Debtors’ assets (a **“Transaction”**), the adequacy of which will be determined by the Debtors (with the assistance of their advisors) in consultation with the Consultation Parties.

The Debtors may decline to provide any Diligence Materials to Potential Bidders who, in the Debtors’ business judgment, have not established, or who have raised doubt, that such Potential Bidder intends in good faith or has the capacity to consummate a sale transaction for the Purchased Assets or any of the Debtors’ assets.

For any Potential Bidder who is a competitor of the Debtors or is affiliated with any competitor of the Debtors, the Debtors reserve the right to withhold any Diligence Materials that the Debtors determine are business-sensitive or otherwise not appropriate for disclosure to such Potential Bidder at such time.

For the avoidance of doubt, the Prepetition Facility Lender and the DIP Lender (as such terms are defined in the *Interim Order (I) Authorizing Debtors to (A) Obtain Postpetition Financing and (B) Use Cash Collateral, (II) Granting Liens and Providing Claims with Superpriority Administrative Expense Status, (III) Granting Adequate Protection to the Prepetition Facility Lender, (IV) Modifying the Automatic Stay, (V) Scheduling a Final Hearing and (VI) Granting Related Relief* [Docket No. [●]] (the **“Interim DIP Order”**) are hereby deemed Potential Bidders, with no further action necessary on their part.

No due diligence will continue after the Bid Deadline (defined below). The Debtors shall provide the Stalking Horse Bidder with access to all material due diligence materials, management presentations, on-site inspections, and other information provided to any Potential Bidder or Qualified Bidder that were not previously made available to the Stalking Horse Bidder concurrently with the provision of such information or materials to such Potential Bidder or Qualified Bidder, as applicable.

Each Potential Bidder shall comply with all reasonable requests for additional information and due diligence access by the Debtors or their advisors regarding such Potential Bidder and its contemplated Transaction.

3. Auction Qualification Process

To be eligible to participate in the Auction, each offer, solicitation, or proposal (each, a **“Bid”**), and each party submitting such a Bid (each, a **“Bidder”**), must be determined by the Debtors, in consultation with the Consultation Parties, to satisfy each of the following conditions:

- (i) Stalking Horse Bidder. The Stalking Horse Bidder shall be deemed to be a Qualified Bidder and the Stalking Horse APA shall be deemed to be a Qualified Bid (the **“Stalking Horse Bid”**).

- (ii) Bid Deadline. Except as set forth herein, the Debtors must receive a Bid in writing (email being sufficient), on or before **January 20, 2025 at 4:00 p.m. (prevailing Eastern Time)** (as may be amended in consultation with the Consultation Parties, the “**Bid Deadline**”). Bids must be sent to the Bid Recipients by the Bid Deadline to be considered.
- (iii) Consultation Parties. For the avoidance of doubt, if a Consultation Party (or its affiliates, as applicable) is a Potential Bidder, then such party shall no longer be a Consultation Party unless and until the earlier of such Consultation Party’s (i) representation in writing to the Debtors that it is no longer a Potential Bidder and does not intend to pursue a Bid in the future and (ii) failure to be designated as the Successful or Back-Up Bidder (each as defined below) following the completion of the Auction (if any); *provided* that if such party is a member of the Committee, then the Committee’s counsel and the remaining members of the Committee other than the Potential Bidder shall continue to be Consultation Parties, but shall not provide any information they receive as Consultation Parties to the Potential Bidder. Neither the Debtors nor their representatives shall be obligated to furnish any information of any kind whatsoever relating to the Debtors’ assets to any party that is not a Potential Bidder or a Consultation Party.
- (iv) Form and Contents. All Bids shall be in the form of an irrevocable offer letter from a person or persons that the Debtors, in their reasonable discretion taking into account its fiduciary duties, deem financially able to consummate the Transaction, which letter states and includes:
 - (A) Marked Agreement. Each Bid must state that the Bidder irrevocably offers to purchase some or all of the Purchased Assets upon the terms and conditions set forth in a duly executed non-contingent and attached complete asset purchase agreement, which shall be in substantially the same form as the Stalking Horse APA, prepared and executed by the Bidder (an electronic version in Word format and blacklined against the Stalking Horse APA), together with its exhibits and schedules, including terms relating to Purchase Price (as defined below) and the time of closing (the “**Proposed Agreement**”);
 - (B) Assets. Each Bid must clearly specify the Debtors’ assets that are included in the Bid (it being understood that while Bids for a portion or subset of the Purchased Assets may be permitted, in determining whether the Bid is a Qualified Bid, the Debtors may consider whether the combined consideration for the Debtors’ assets (taking into account such Bid and other Bids) exceeds the Purchase Price of the Stalking Horse APA and/or other aspects of the Bid);
 - (C) Purchase Price. Each Bid must clearly set forth the terms of any proposed Transaction, including and identifying separately any cash and non-cash components of the proposed Transaction consideration, such as certain

liabilities to be assumed by the Bidder as part of the Transaction (the **“Purchase Price”**);

- (D) **Overbid.** Each Bid (i) must propose a Purchase Price equal to or greater than the sum of (a) the value of the Stalking Horse Bid, as determined by the Debtors in consultation with the Consultation Parties (including the Break-Up Fee and the Expense Reimbursement (each as defined below)) and (b) an initial overbid of at least \$250,000; (ii) must be on terms that are not materially more burdensome than the terms of the Stalking Horse Bid; and (iii) must obligate the Bidder to pay, to the extent provided in the Agreement, all liabilities and expenses that the Stalking Horse Bidder under the Agreement has agreed to pay, including any Assumed Liabilities (as defined in the Stalking Horse APA);
- (E) **Capacity to Consummate Transaction; Committed Financing.** Each Bid shall be accompanied by evidence of (i) the Bidder’s capacity to consummate the Transaction set forth in its Bid with cash on hand or (ii) sufficient, non-contingent financing and/or equity funding commitments to satisfy the Bidder’s Purchase Price and other obligations under its Bid. Such funding commitments or other financing acceptable to the Debtors must be unconditional and must not be subject to any internal approvals, syndication requirements, diligence, or credit committee approvals, and shall have covenants and conditions acceptable to the Debtors;
- (F) **Contingencies; No Financing or Diligence Outs.** A Bid shall not be conditioned on a Bidder obtaining financing or any internal approval, or on the outcome or review of due diligence, which must be completed before the Bid Deadline, but may be subject to the accuracy at the closing of specified representations and warranties or the satisfaction at the closing of specified conditions;
- (G) **Identity.** Each Bid must fully disclose the identity of each entity that will be bidding or otherwise participating in connection with such Bid (including each equity holder or other financial backer of the Bidder if such Bidder is an entity formed for the purpose of consummating the proposed Transaction contemplated by such Bid), and the complete terms of any such participation. Under no circumstances shall any undisclosed principals, equity holders, or financial backers be associated with any Bid. Each Bid must also include contact information for the specific person(s) and counsel the Debtors’ advisors should contact regarding such Bid;
- (H) **Authorization.** Each Bid must contain evidence that the Bidder has obtained authorization or approval from its board of directors, or a comparable governing body, acceptable to the Debtors with respect to the submission of its Bid and the consummation of the Transactions contemplated in such Bid; *provided*, however, if the Bidder is an entity specially formed for the

purpose of effectuating the transaction, then the Bidder must furnish written evidence reasonably acceptable to the Debtors of the approval of the transaction by the equity holder(s) of such Bidder;

- (I) Regulatory or Third-Party Approval. Each Bid must set forth any regulatory or third-party approval required for the Bidder to consummate the Sale, and the time period within which the Bidder expects to receive such regulatory and third-party approvals, if any;
- (J) Expenses; Disclaimer to Fees. Each Bid (other than the Stalking Horse Bid) must disclaim any right to receive a break-up fee, expense reimbursement, termination fee, or any other similar form of compensation. For the avoidance of doubt, except as may be exclusively applicable to the Stalking Horse Bidder, no Potential Bidder will be permitted to request, or be granted by the Debtors, at any time, whether as part of the Auction or otherwise, a break-up fee, expense reimbursement, termination fee, substantial contribution, or any other similar form of compensation, and by submitting a Bid any Potential Bidder is waiving any assertion or request for reimbursement on any basis, including under Section 503(b) of the Bankruptcy Code;
- (K) Consummation. Each Bid must include a statement or evidence reflecting (i) that the Bidder is prepared to consummate the transaction upon entry of an order of the Bankruptcy Court approving the Sale to the Successful Bidder (the “**Sale Order**”) and consummation shall not be contingent on obtaining requisite government, regulatory, or other third-party approvals, (ii) that the Bidder has made or will make as soon as reasonably practicable all necessary filings, if any, with respect to any regulatory, antitrust and other laws and pay the fees associated therewith; and (iii) the Bidder’s plan and ability to obtain all requisite governmental, regulatory, or other third-party approvals, and the proposed timing for the Bidder to undertake the actions required to obtain such approvals, if any;
- (L) Irrevocability. Each Bid must include a statement that, in the event the Debtors select the Bidder to serve as the Successful Bidder or the Back-Up Bidder (as defined below), such Qualified Bidder’s offer is irrevocable until two (2) business days after the closing of the Transaction;
- (M) Assumed Contracts and Leases. Each Bid must identify any and all executory contracts and unexpired leases of the Debtors and non-Debtor affiliates that the Qualified Bidder wishes to be assumed and assigned to it pursuant to a Sale. A Bid must specify that such Bidder will be responsible for any cure costs associated with such assumption on the same or better terms as the Stalking Horse Bid, and include a good faith estimate of such cure costs (which estimate shall be provided by the Debtors). Further, a Bid must provide evidence of adequate assurance of future performance under

such executory contracts and unexpired leases to be assumed and assigned in such a Sale;

- (N) Employees. Each Bid must detail the treatment of the employees of the Debtors;
 - (O) Damages. Each Bid must provide that the Debtors have the right to pursue all available damages in the event of the Bidder's breach of, or failure to perform under, the Proposed Agreement;
 - (P) Consent to Jurisdiction. Each Bidder must submit to the exclusive jurisdiction of the Bankruptcy Court and waive any right to a jury trial in connection with any disputes relating to Debtors' qualification of Bids, the Auction, the construction and enforcement of these Bid Procedures, the Sale documents, and the closing of the sale, as applicable; and
 - (Q) Other Information. Each Bid must contain such other information as may be reasonably requested by the Debtors.
- (v) Combination of Bids. Each Bid shall be based on the Stalking Horse Bid and must exceed, either on its own terms or, in the case of a Bid for a portion or subset of the Debtors' assets, in combination with another Qualified Bid(s) (which combination shall be done by the Debtors, in consultation with the Consultation Parties), the Stalking Horse Bid in relation to the Purchased Assets. For the avoidance of doubt, joint Bids submitted by multiple Bidders will not be considered.
 - (vi) Back-Up Bidder. Each Bidder must acknowledge that by submitting a Bid, the Bidder agrees to be a Back-Up Bidder in accordance with the terms of these Bid Procedures, should the Bid be so selected.
 - (vii) As Is, Where Is. The sale of the Debtors' assets shall be on an "as is, where is" and "with all defects" basis and without representations or warranties of any kind, nature, or description by the Debtors, their agents or estates, except to the extent set forth in the Stalking Horse APA.
 - (viii) Good Faith Deposit. Each Qualified Bid must be accompanied by a cash deposit in the amount of 10% of the total Purchase Price to be held in an escrow account to be identified and established by the Debtors (the "**Deposit**").
 - (ix) Binding Effect. By submitting its Bid, each Bidder is agreeing, and shall be deemed to have agreed, to abide by and honor the terms of the Bid Procedures and to refrain from submitting a Qualified Bid or seeking to reopen the Auction after conclusion of the Auction.
 - (x) Time Frame for Closing. A Bid by a Bidder must be reasonably likely to be consummated, if selected as the Successful Bid, within a time frame acceptable to the Debtors but in no event later than sixty (60) days following the Petition Date.

A Bid received before the Bid Deadline will be considered a “**Qualified Bid**” and each Bidder that submits a Qualified Bid will be considered a “**Qualified Bidder**” if the Debtors determine in consultation with the Consultation Parties that such Bid meets the requirements above for a Bid as set forth in these Bid Procedures. The Debtors may also waive or modify any of the above requirements in the exercise of their reasonable business judgment after consultation with the Consultation Parties.

The Debtors will notify each Qualified Bidder whether such party is a Qualified Bidder on **January 23, 2025** (the “**Designation of Qualified Bid Deadline**”) and shall provide each Qualified Bidder, including the Stalking Horse Bidder, with a copy of the Baseline Bid no later than 4:00 p.m. (prevailing Eastern Time) on the day before the Auction commences.

Upon determination that any Bid is not a Qualified Bid, the Debtors shall notify such Bidder of such determination forthwith, but in any event not later than the Designation of Qualified Bid Deadline, and shall provide such bidder with the basis for such determination. In the event that such Bid is determined not to be a Qualified Bid, the Debtors may allow the Bidder until the commencement of the Auction to modify its Bid to increase the Purchase Price or otherwise improve the terms of the Bid in order to comply with the requirements for Qualified Bids as set forth herein.

To the extent there is any dispute regarding whether a Bidder is a Qualified Bidder, such dispute may be raised with the Bankruptcy Court on an expedited basis. If any Bid is determined not to be a Qualified Bid, the Debtors will refund such Bidder’s Deposit promptly after the Bid Deadline.

Between the date that the Debtors notify a Bidder that it is a Qualified Bidder and the Auction date, the Debtors may discuss, negotiate, or seek clarification of any Qualified Bid from a Qualified Bidder. Without the prior written consent of the Debtors, in consultation with the Consultation Parties, a Qualified Bidder may not modify, amend, or withdraw its Qualified Bid, except for proposed amendments to increase its Purchase Price, or otherwise improve the terms of the Qualified Bid, during the period that such Qualified Bid remains binding as specified in these Bid Procedures. The Stalking Horse Bidder shall be deemed a Qualified Bidder at all times, and the Stalking Horse APA shall be a Qualified Bid.

Prior to 4:00 p.m. (prevailing Eastern Time) on the day before the Auction (the “**Baseline Bid Deadline**”), the Debtors and their advisors will evaluate Qualified Bids and identify the Qualified Bid that is, in the Debtors’ reasonable business judgment, the highest or otherwise best bid (the “**Baseline Bid**” and the Bidder making such Baseline Bid, the “**Baseline Bidder**”), and shall notify the Stalking Horse Bidder and all Qualifying Bidders of the Baseline Bid no later than the Baseline Bid Deadline.

4. Credit Bid

Any Qualified Bidder who has a valid, undisputed, and perfected lien on any of the Debtors’ assets (a “**Secured Creditor**”) shall have the right to credit bid all or a portion of such Secured Creditor’s allowed secured claims pursuant to section 363(k) of the Bankruptcy Code; *provided that* a credit bid shall not constitute a Qualified Bid if the bid does not include a cash

component sufficient to pay in full, in cash, all Bid Protections (as defined below) and all claims for which there are valid, perfected, and unavoidable liens on any of the Debtors' assets included in such bid that are senior in priority to those of the party seeking to credit bid (unless such senior lien holder consents to alternative treatment). All rights to credit bid shall be subject to the terms of the Interim DIP Order. For the avoidance of doubt, a Secured Creditor shall be required to provide cash consideration in respect of any assets to be acquired but that do not constitute collateral securing such Secured Creditor's claim(s), if any.

Notwithstanding anything to the contrary herein, any Bid submitted by the Prepetition Facility Lender or the DIP Lender (or their respective designee), as applicable, shall be deemed a Qualified Bid notwithstanding the requirements set forth in Section B.3 of the Bid Procedures (including, for the avoidance of doubt, the Deposit, which shall not be applicable to any credit bid by the Prepetition Facility Lender or the DIP Lender).

5. Stalking Horse Bid

Subject to Bankruptcy Court approval, pursuant to the Stalking Horse APA, the Stalking Horse Bidder has committed to pay a Purchase Price worth a total aggregate consideration as set forth in the Stalking Horse APA, free and clear of all claims or encumbrances (other than Assumed Liabilities and Permitted Liens, as defined in the Stalking Horse APA). To provide the Stalking Horse Bidder with an incentive to participate in a competitive process and to compensate the Stalking Horse Bidder for (i) performing substantial due diligence and incurring the expenses related thereto and (ii) entering into the Stalking Horse APA with the knowledge and risk that arises from participating in the sale and subsequent bidding process, in the event of a Qualifying Termination (as defined in the Stalking APA), the Debtors will pay the Stalking Horse Bidder (at the time required under the Stalking Horse APA) a break-up fee in the amount equal to three (3) percent of the Purchase Price (the "**Break-Up Fee**") and reimburse the Stalking Horse Bidder for its reasonable and documented expenses in conjunction with the Stalking Horse Bid up to a maximum amount of \$550,000 (the "**Expense Reimbursement**," and together with the Break-Up Fee, the "**Bid Protections**"). To the extent an Overbid is deemed the Successful Bid, such Overbid must provide cash satisfactory to pay the Bid Protections in full to the Stalking Horse Bidder; *provided that*, upon consummation of such Overbid (or a material portion of them), the Bid Protections, to the extent not previously paid in accordance with, and solely to the extent payable under and subject to the terms of the Stalking Horse Agreement, shall be paid from the proceeds of any such sale prior to any payment or other recoveries being made in respect of the DIP Facility or the Prepetition Facility Loans (each as defined in the Interim DIP Order) from such proceeds. For the avoidance of doubt, the foregoing applies whether such Overbid transaction is consummated pursuant to section 363 of the Bankruptcy Code, pursuant to a plan of reorganization, or other transaction.

The Stalking Horse Bidder shall be deemed to be a Qualified Bidder and is not required to make any Deposit other than as contemplated in the Stalking Horse APA.

Any party that objects to the Sale or the Sale Order must file an objection (a "**Sale Objection**") on or before **4:00 p.m. prevailing Eastern Time on January 2, 2025**, which Sale Objection must be served on: (i) proposed counsel to the Debtors: (a) Latham & Watkins LLP (x) 330 North Wabash Avenue, Suite 2800, Chicago, IL 60611, Attn: Caroline Reckler, Esq.

(email: caroline.reckler@lw.com); (y) 1271 Avenue of the Americas, New York, NY 10020, Attn: Annemarie V. Reilly, Esq. and Brian S. Rosen, Esq. (emails: annemarie.reilly@lw.com and brian.rosen@lw.com); and (z) 355 South Grand Avenue, Suite 100, Los Angeles, CA 90071, Attn: Jeffrey T. Mispagel, Esq. (email: jeffrey.mispagel@lw.com) and (b) Young Conaway Stargatt & Taylor, LLP, Rodney Square, 1000 North King Street, Wilmington, DE 19801, Attn: Michael R. Nestor, Esq., Kara Hammond Coyle, Esq., and Joseph M. Mulvihill, Esq. (emails: MNestor@ycst.com, KCoyle@ycst.com, and JMulvihill@ycst.com); (ii) counsel for the DIP Lender, the Prepetition Facility Lender, and the Consenting Parent: (a) Davis Polk & Wardwell LLP, 450 Lexington Ave, New York, NY 10017, Attn: Darren S. Klein, Esq. and Aryeh Ethan Falk, Esq. (emails: darren.klein@davispolk.com and aryeh.falk@davispolk.com) and (b) Morris, Nichols, Arsht & Tunnell LLP, 1201 N Market St # 1600, Wilmington, DE 19801, Attn: Robert J. Dehney, Sr., Esq. (email: rdehney@morrisnichols.com); (iii) counsel to any statutory committee appointed in these cases [●]; and (iv) the United States Trustee for the District of Delaware, 844 King Street, Suite 2207, Wilmington, DE 19801, Attn: Jane Leamy (email: Jane.M.Leamy@usdoj.gov) (the “**Objection Notice Parties**”) and counsel to the Stalking Horse Bidder, Sidley Austin LLP, (i) 1 S. Dearborn St, Chicago, IL 60603, Attn: Dennis M. Twomey, Esq. (email: dtwomey@sidley.com) and (ii) 787 7th Ave, New York, NY 10019; Attn: Margaret R. Alden, Esq. (email: malden@sidley.com) (the “**Stalking Horse Notice Party**”), and filed with the Clerk of the Bankruptcy Court for the District of Delaware, 824 North Market Street, 3rd Floor, Wilmington, DE 19801. If a party does not timely file and serve a Sale Objection, that party will be forever barred from objecting to the identity of the Stalking Horse Bidder.

C. Auction

If one or more Qualified Bids are received by the Bid Deadline (other than the Stalking Horse Bid), the Debtors will conduct the Auction to determine the highest or otherwise best Qualified Bid or combination of Qualified Bids. In determining which Qualified Bid constitutes the highest or otherwise best Qualified Bid or combination of Qualified Bids, the Debtors’ determination may take into account any factors the Debtors reasonably deem relevant to the value of the Qualified Bid to the estates, including, *inter alia*, the following non-exhaustive factors: (i) the amount and nature of the consideration; (ii) the proposed assumption of any liabilities, if any, and the excluded assets and/or executory contracts or unexpired leases, if any; (iii) the ability of the Qualified Bidder to close the proposed Transaction and the conditions to closing, and the timing thereof; (iv) whether the Bid is a bulk bid or a partial bid for only some of the Debtors’ assets; (v) the proposed closing date and the likelihood, extent and impact of any potential delays in closing; (vi) any purchase price adjustments; (vii) the impact of the proposed Transaction on any actual or potential litigation or on claims asserted against the Debtors’ estates; (viii) the net after-tax consideration to be received by the Debtors’ estates; (ix) the tax consequences of such Qualified Bid; (x) the regulatory approvals required to consummate the proposed Transaction; and (xi) the consent of the parties in interest and/or the cost and expense to the Debtors of resolving sale issues before Closing (collectively, the “**Bid Assessment Criteria**”).

If no Qualified Bids other than the Stalking Horse Bid are received prior to the Bid Deadline, then the Auction will not occur, the Stalking Horse Bid may be deemed the Successful Bid (as defined below), and, subject to the termination rights under the Stalking Horse APA, the Debtors will pursue entry of an order by the Bankruptcy Court authorizing the Sale to the Stalking Horse Bidder as soon as practicable.

1. Procedures for Auction

The Auction, if necessary, will commence on **January 27, 2025 at 10:00 a.m. (prevailing Eastern Time)** at the offices of Latham & Watkins LLP, 1271 Avenue of the Americas, New York, New York 10020, telephonically, or by video via Zoom, or such later time or other place as the Debtors shall notify all Qualified Bidders. Only the Stalking Horse Bidder and other Qualified Bidders will be entitled to make any Bids at the Auction. The Stalking Horse Bidder and other Qualified Bidders participating at the Auction shall appear themselves or through a duly authorized representative. Only the Debtors, the Stalking Horse Bidder, any participating Qualified Bidders, the Consultation Parties, and any creditor of the Debtors, together with the professional advisors to each of the foregoing parties, may attend the Auction; *provided* that any of the Debtors' creditors must provide two (2) days' written notice to counsel to the Debtors of their intent to attend the Auction.

2. The Debtors Shall Conduct the Auction

The Debtors and their professionals shall direct and preside over the Auction and the Auction shall be transcribed or videotaped. Prior to the Baseline Bid Deadline, the Debtors, in consultation with the Consultation Parties, shall determine, in accordance with the requirements herein, the Baseline Bid, and shall promptly notify the Stalking Horse Purchaser and all Qualified Bidders with Qualified Bids of such Baseline Bid. The Debtors, in consultation with the Consultation Parties, shall have the discretion to determine how to proceed when auctioning the Debtors' assets, including by doing so in groupings that do not include all of the Debtors' assets so as to maximize the value of the Debtors' assets.

Round-skipping, as described herein, is explicitly prohibited. To remain eligible to participate in the Auction, in each round of bidding, (i) each Qualified Bidder must submit a Bid before the end of such round of bidding that is a higher or otherwise better offer than the immediately preceding Bid submitted by a Qualified Bidder in such round of bidding and (ii) to the extent a Qualified Bidder fails to bid in such round of bidding or to submit a Bid in such round of bidding that is a higher or otherwise better offer than the immediately preceding Bid submitted by a Qualified Bidder in such round of bidding, as determined by the Debtors in their reasonable business judgment, such Qualified Bidder shall be disqualified from continuing to participate in the Auction without the consent of the Debtors. For the avoidance of doubt, the Debtors, in consultation with the Consultation Parties, may conduct a round where Qualified Bidders are required to submit best and final Bids, including under seal to the Debtors directly.

All Bids made during the Auction shall be made and received on the record; *provided*, that, the Debtors may keep confidential any sealed Bids in the interest of maximizing the value of the sale. To the extent that final bids are sealed when shared with the Debtors, the Debtors shall read them into the record at the Auction at the time the Debtors determine appropriate. Further, all Bids must (i) be Overbids (as defined below), and (ii) include all material terms. The Debtors shall maintain a transcript of all bids made and announced at the Auction, including the Baseline Bid and all Overbids.

3. Terms of Overbids

An “**Overbid**” is any Bid made at the Auction subsequent to the Debtors’ announcement of the Baseline Bid. To submit an Overbid for purposes of this Auction, a Bidder must comply with the following conditions:

a. Minimum Overbid Increment

Any Overbid after the Baseline Bid shall be made in increments of at least \$250,000 in cash, cash equivalents, or such other consideration that the Debtors, in consultation with the Consultation Parties, deem equivalent (the “**Minimum Overbid Increment**”). For the avoidance of doubt, in calculating the amount of any Overbid made by the Stalking Horse Bidder, the Stalking Horse Bidder shall be entitled to a credit in the amount of the Bid Protections.

b. Overbid Procedures

Bidding at the auction will begin with the Baseline Bid, and each participating Qualified Bidder will have the opportunity to submit an Overbid in each round of bidding (each, an “**Overbid Round Deadline**”).

After each Overbid Round Deadline, the Debtors shall determine whether an Overbid is higher or otherwise better than the Baseline Bid (as defined in the Bid Procedures) in the initial Overbid round or, in subsequent rounds, the Overbid previously designated by the Debtors as the prevailing highest or otherwise best Bid (the “**Prevailing Highest Bid**”). The Debtors shall announce and describe to all Qualified Bidders present at the Auction the material terms of any new Overbid designated by the Debtors as the Prevailing Highest Bid, as well as the value attributable by the Debtors to such Prevailing Highest Bid.

c. Remaining Terms Are the Same as for Qualified Bids

Except as modified herein, an Overbid must comply with the conditions for a Qualified Bid set forth above; *provided, however*, the Bid Deadline shall not apply and no additional Deposit shall be required beyond the Deposit previously submitted by a Qualified Bidder; *provided that* the Successful Bidder and Back-Up Bidder (each other than the Stalking Horse Bidder) shall be required to make a representation at the end of the Auction that they will provide any additional deposit necessary so that their Deposits are equal to the amount of ten percent (10%) of the cash purchase price contained in the Successful Bid and Back-Up Bid (each, as defined below), as applicable, no later than two (2) business days following the Auction. Any Overbid must include, in addition to the amount and form of consideration of the Overbid, a description of all changes (if any) requested by the Qualified Bidder to the Stalking Horse APA or a previously submitted Proposed Agreement, in connection therewith (including any changes to the designated assigned contracts and leases and assumed liabilities). Any Overbid must remain open and binding on the Bidder until and unless the Debtors name a Successful Bid and Back-Up Bid.

To the extent not previously provided (which shall be determined by the Debtors in consultation with the Consultation Parties) a Bidder submitting an Overbid must submit, as part of its Overbid, written evidence (in the form of financial disclosure or credit-quality support information or enhancement reasonably acceptable to the Debtors) demonstrating such Bidder’s

ability to close the transaction proposed by such Overbid; *provided, however*, this shall not apply to an Overbid by the Stalking Horse Bidder.

d. No Collusion; Good-Faith *Bona Fide* Offer

Each Qualified Bidder participating at the Auction will be required to confirm on the record at the Auction (i) it has not engaged in any collusion with respect to the Sale, bidding (including it has no agreement with any other Bidder or Qualified Bidder to control the price or other terms of any Bid) or any other Transaction and (ii) its Qualified Bid is a good-faith *bona fide* offer and it intends to consummate the proposed transaction if selected as the Successful Bidder or Back-Up Bidder (if the Successful Bidder fails to consummate the proposed transaction).

e. Back-Up Bidder

Notwithstanding anything in the Bid Procedures to the contrary, if an Auction is conducted, the party(ies) with the second highest or otherwise second best Qualified Bid (or combination of Qualified Bids) at the Auction, as determined by the Debtors, in the exercise of their business judgment and in consultation with the Consultation Parties and with the consent of the Prepetition Facility Lender, shall be designated by the Debtors as backup bidder (the “**Back-Up Bidder**”). The Back-Up Bidder shall be required to keep its initial Qualified Bid (or if the Back-Up Bidder submitted one or more Overbids at the Auction, its final Overbid) (the “**Back-Up Bid**”) open and irrevocable until two (2) business days after the closing of the sale of the Purchased Assets (the “**Outside Back-Up Date**”); *provided*, that if the Stalking Horse Bid is selected as the Back-Up Bid, it must remain irrevocable only for so long as is required under the Stalking Horse APA. Following entry of the Sale Order, if the Successful Bidder fails to consummate an approved transaction because of a breach or failure to perform on the part of such Successful Bidder, the Debtors may designate the Back-Up Bidder to be the new Successful Bidder, and the Debtors will be authorized, but not required, to consummate the transaction with the Back-Up Bidder without further order of the Bankruptcy Court. In such case, except, solely for the Stalking Horse Bidder, to the extent otherwise provided in the Stalking Horse APA, the defaulting Successful Bidder’s Deposit, if any, shall be forfeited to the Debtors’ estates, and the Debtors specifically reserve the right to seek all available damages from the defaulting Successful Bidder. The closing date to consummate the transaction with the Back-Up Bidder shall be no later than ten (10) days after the date the Debtors provide notice to the Back-Up Bidder that the Successful Bidder has failed to consummate a sale and the Debtors desire to consummate the transaction with the Back-Up Bidder. Solely for the Stalking Horse Bidder, except to the extent otherwise provided in the Stalking Horse APA, the Deposit, if any, of the Back-Up Bidder shall be held by the Debtors until two (2) business days after the closing of the Sale with the Successful Bidder; *provided, however*, in the event the Successful Bidder does not consummate the transaction as described above and the Debtors provide notice to the Back-Up Bidder, the Back-Up Bidder’s Deposit shall be held until the closing of the transaction with the Back-Up Bidder. In the event the Debtors fail to consummate a transaction with the Back-Up Bidder as described above, the Back-Up Bidder’s Deposit shall be forfeited to the Debtors’ estates, and the Debtors specifically reserve the right to seek all available damages from the defaulting Back-Up Bidder. Notwithstanding anything to the contrary herein, for the avoidance of doubt, the Deposit submitted by the Stalking Horse Bidder pursuant to the Stalking Horse APA shall be treated, returned to the Stalking Horse Bidder, or forfeited to the Debtors’ estates solely in accordance with the terms of the Stalking Horse APA.

4. Consent to Jurisdiction as Condition to Bidding

All Qualified Bidders, and all Bidders at the Auction, shall be deemed to have consented to the core jurisdiction of the Bankruptcy Court and waived any right to a jury trial in connection with any disputes relating to the Stalking Horse APA, the Auction, or the construction and enforcement of any Transaction Documents.

5. Adjournment of the Auction

The Debtors reserve the right, in their reasonable business judgment, to adjourn the Auction one (1) or more times to, among other things, (i) facilitate discussions between the Debtors and Qualified Bidders, (ii) allow Qualified Bidders to consider how they wish to proceed, and (iii) provide Qualified Bidders the opportunity to provide the Debtors with such additional evidence as the Debtors, in their reasonable business judgment, may require, demonstrating that the Qualified Bidder has sufficient internal resources or has received sufficient non-contingent debt or equity funding commitments to consummate the proposed Sale at the prevailing bid amount.

6. Closing the Auction

The Auction shall continue until there is only one (1) Qualified Bid or combination of Qualified Bids that the Debtors determine in their reasonable business judgment, after consultation with their financial and legal advisors and the Consultation Parties and with the consent of the Prepetition Facility Lender, is the highest or otherwise best Qualified Bid at the Auction (the “**Successful Bid**” and the Bidder submitting such Successful Bid, the “**Successful Bidder**”). In making this decision, the Debtors, in consultation with their financial and legal advisors and the Consultation Parties, shall consider the Bid Assessment Criteria. The Auction shall not close unless and until all Bidders who have submitted Qualified Bids have been given a reasonable opportunity, in the Debtors’ discretion, to submit an Overbid at the Auction to the then-existing Overbid and the Successful Bidder has submitted fully executed Transaction Documents memorializing the terms of the Successful Bid.

Promptly following the Debtors’ selection of the Successful Bid and the conclusion of the Auction, the Debtors shall announce the Successful Bid and Successful Bidder. The Debtors will file a notice identifying the Successful Bidder and Back-Up Bidder (the “**Post-Auction Notice**”) as soon as reasonably practicable after closing the Auction, if any, and in any event not more than twenty-four (24) hours following the close of the Auction.

D. Procedures for Determining Cure Amounts and Adequate Assurance for Assumed Contract Counterparties to Assigned Contracts

On or before **4:00 p.m. (prevailing Eastern Time) on January 5, 2025** (the “**Assumption Notice Deadline**”), the Debtors shall send a notice to each counterparty to an executory contract or unexpired lease (each an “**Assumed Contract Counterparty**”) setting forth the Debtors’ calculation of the cure amount, if any, that would be owing to such Assumed Contract Counterparty if the Debtors decided to assume or assume and assign such executory contract or unexpired lease, and alerting such Assumed Contract Counterparty that their contract may be

assumed and assigned to the Successful Bidder (the “**Assumption Notice**”), a copy of which is attached to the Bid Procedures Order as Exhibit 3. Any Assumed Contract Counterparty that objects to (i) the potential assumption and assignment of any Assigned Contract to the Stalking Horse Bidder including the ability of the Stalking Horse Bidder to provide adequate assurance of future performance and (ii) the proposed cure amount to be paid in connection with the assumption and assignment of any Assigned Contract, must file an objection (an “**Assumed Contract Objection**”) on or before **4:00 p.m. prevailing Eastern Time on January 22, 2025**, which Assumed Contract Objection must be served on the Objection Notice Parties and the Stalking Horse Notice Party, and filed with the Clerk of the Bankruptcy Court for the District of Delaware, 824 North Market Street, 3rd Floor, Wilmington, DE 19801. If an Assumed Contract Counterparty does not timely file and serve an Assumed Contract Objection, that party will be forever barred from objecting to (i) the Debtors’ proposed cure amount or (ii) the assignment of that party’s executory contract or unexpired lease to the Stalking Horse Bidder.

If the Successful Bidder that prevails at the Auction is not the Stalking Horse Bidder, the deadline to object solely to (i) the identity of a Successful Bidder or (ii) the ability of the Successful Bidder to provide adequate assurance of future performance under any Assigned Contract (each, a “**Post-Auction Objection**”) shall be **4:00 p.m. prevailing Eastern Time on January 29, 2025** (the “**Post-Auction Objection Deadline**”). Each Post-Auction Objection must be served on the Objection Notice Parties and filed with the Clerk of the Bankruptcy Court for the District of Delaware, 824 North Market Street, 3rd Floor, Wilmington, DE 19801, so it is actually received no later than the Post-Auction Objection Deadline. If a Post-Auction Objection is not filed, parties will be forever barred from objecting to the identity of the Successful Bidder or to the assignment of that party’s executory contract or unexpired lease to the Successful Bidder.

Where an Assumed Contract Counterparty to an Assigned Contract files a timely Assumed Contract Objection asserting a higher cure amount than the amount listed in the Assumption Notice, or timely files an Assumed Contract Objection or Post-Auction Objection, as applicable, to the possible assignment of that Assumed Contract Counterparty’s executory contract or unexpired lease, including the Successful Bidder’s ability to provide adequate assurance of future performance, and the parties are unable to consensually resolve the dispute, the amount to be paid (if any) under Section 365 of the Bankruptcy Code or, as the case may be, the Debtors’ ability to assign the executory contract or unexpired lease to the Successful Bidder will be determined at the Sale Hearing or at a later date as fixed by the Bankruptcy Court.

E. Sale Hearing

A hearing (the “**Sale Hearing**”) shall be held on **January 30, 2025, at [●] [a./p.]m. (prevailing Eastern Time)**, at which hearing the Debtors may, in their discretion, seek approval of the Sale with the Successful Bidder.

F. Return of Good Faith Deposits

The Deposit of the Successful Bidder, if applicable, shall be applied to the Purchase Price of such Transaction at closing. The Deposits from each Qualified Bidder shall be held in one or more accounts on terms acceptable to the Debtors in their sole discretion and shall be returned (other than with respect to the Successful Bidder and the Back-Up Bidder) on or before the date

that is two (2) business days after the Auction is completed. The Back-Up Bidder's Deposit shall be held by the Debtors and shall be returned on or before the date that is two (2) business days after the closing of the Transaction with the Successful Bidder. In the event the Successful Bidder fails to close the Transaction and the Debtors opt to close on the Transaction set forth in the Back-Up Bid, the Back-Up Bidder's Deposit shall be applied to the Purchase Price of such Transaction at closing. In the event of a breach or failure to consummate a Transaction by the Successful Bidder or the Back-Up Bidder, as applicable, the defaulting Successful Bidder's Deposit or Back-Up Bidder's Deposit, as applicable, shall be forfeited to the Debtors, and the Debtors specifically reserve the right to seek all available remedies against the defaulting Successful Bidder or Back-Up Bidder, as applicable.

G. Fiduciary Out

Nothing in these Bid Procedures will require any director, manager, or officer of any Debtor to take any action, or to refrain from taking any action, with respect to these Bid Procedures, that would violate his or her fiduciary duties to any Debtor, including, but not limited to, requiring that any Bids submitted after the conclusion of the Auction and prior to the closing of the Transaction not be considered.

H. Reservation of Rights

The Debtors reserve their rights to modify these Bid Procedures in their reasonable business judgment and in consultation with the Consultation Parties in any manner that will best promote the goals of the bidding process, at or prior to the Auction, subject to the rights of the Stalking Horse Bidder. Notwithstanding the foregoing and subject in all respects to the Stalking Horse APA, the Debtors may not impair or modify the Stalking Horse Bidder's rights and obligations under the Stalking Horse APA, including the Stalking Horse Bidder's right to the Bid Protections or the Stalking Horse Bidder's right to credit the Bid Protections as part of any subsequent Qualifying Bids as Overbids; and (ii) subject to the terms of the Stalking Horse APA, in the event the Debtors (a) elect to withdraw the applicable assets from the Auction, (b) cancel the Auction, and/or (c) reject all Qualifying Bids, the Bid Protections shall be payable to the extent payable to the Stalking Horse Bidder in accordance with the terms of the Stalking Horse APA.

Exhibit 2

Sale Notice

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

	X	
In re:	:	Chapter 11
	:	
FIRST MODE HOLDINGS, INC., <i>et al.</i> , ¹	:	Case No. 24-12794 (____)
	:	
Debtors.	:	(Jointly Administered)
	:	

**NOTICE OF BID PROCEDURES,
AUCTION, HEARING AND DEADLINES RELATING TO THE SALE OF
SUBSTANTIALLY ALL OF THE ASSETS OF THE DEBTORS**

PLEASE TAKE NOTICE that on December 16, 2024, the debtors and debtors in possession (the “Debtors”) in the above-captioned cases (the “Chapter 11 Cases”), filed a *Motion of Debtors for Entry of (I) An Order (A) Approving Bid Procedures in Connection with the Sale of Substantially All of the Debtors’ Assets, (B) Scheduling an Auction and Sale Hearing, (C) Approving the Form and Manner of Notice Thereof, (D) Authorizing the Debtors to Enter Into the Stalking Horse APA, (E) Approving Procedures for the Assumption and Assignment of Contracts and Leases, and (F) Granting Related Relief; and (II) An Order (A) Approving the Sale of Substantially All of the Debtors’ Assets Free and Clear of All Liens, Claims, Encumbrances, and Interests, (B) Authorizing the Assumption and Assignment of Contracts and Leases, and (C) Granting Related Relief* [Docket No. [●]] (the “Bid Procedures and Sale Motion”).² The Debtors seek to complete a sale (the “Sale”) of substantially all their assets (the “Assets”) to the Stalking Horse Bidder or a prevailing bidder or bidders (the “Successful Bidder”) at an auction free and clear of all liens, claims, encumbrances and other interests pursuant to Section 363 of the Bankruptcy Code (the “Auction”). A copy of the Stalking Horse APA may be obtained for free by accessing the website of the Debtors’ Claims and Noticing Agent, Omni Agent Solution, Inc., at <https://omniagentsolutions.com/FirstMode>.

PLEASE TAKE FURTHER NOTICE that, on [●], 2025 the Bankruptcy Court entered an order [Docket No. [●]] (the “Bid Procedures Order”) approving the Bid Procedures set forth in the Bid Procedures and Sale Motion (the “Bid Procedures”), which set the key dates and times related to the sale of the Debtors’ Assets. **All interested bidders should carefully read the Bid Procedures.** To the extent there are any inconsistencies between the Bid Procedures and the summary description of their terms and conditions contained in this notice, the terms of the Bid Procedures shall control.

¹ The Debtors in these cases, along with the last four digits of each Debtor’s federal tax identification number, are: First Mode Holdings, Inc. (7177), and Synchronous LLC (1829). The Debtors’ mailing address is 3417 1st Ave S, Seattle, WA, 98134.

² Capitalized terms not otherwise defined herein shall have the meanings set forth in the Bid Procedures and Sale Motion.

PLEASE TAKE FURTHER NOTICE that, pursuant to the Bid Procedures, the Debtors must receive a Qualified Bid from interested bidders in writing on or before **January 20, 2025 at 4:00 p.m. (prevailing Eastern Time)** or such later date as may be agreed to by the Debtors (the “Bid Deadline”). To be considered, Bids must be sent in writing to the following at or before the Bid Deadline: (i) proposed counsel to the Debtors: (a) Latham & Watkins LLP (x) 330 North Wabash Avenue, Suite 2800, Chicago, IL 60611, Attn: Caroline Reckler, Esq. (email: caroline.reckler@lw.com); (y) 1271 Avenue of the Americas, New York, NY 10020, Attn: Annemarie V. Reilly, Esq. and Brian S. Rosen, Esq. (emails: annemarie.reilly@lw.com and brian.rosen@lw.com); and (z) 355 South Grand Avenue, Suite 100, Los Angeles, CA 90071, Attn: Jeffrey T. Mispagel, Esq. (email: jeffrey.mispagel@lw.com) and (b) Young Conaway Stargatt & Taylor, LLP, Rodney Square, 1000 North King Street, Wilmington, DE 19801, Attn: Michael R. Nestor, Esq., Kara Hammond Coyle, Esq., and Joseph M. Mulvihill, Esq. (emails: MNestor@ycst.com, KCoyle@ycst.com, and JMulvihill@ycst.com); (ii) PJT Partners LP, Attn: Matt Parr, William Evarts, and Brandon Pinn (emails: parr@pjtpartners.com, evarts@pjtpartners.com, and pinn@pjtpartners.com); and (iii) counsel for Anglo American International Holdings Limited (the “DIP Lender” or the “Prepetition Facility Lender”) and Anglo American Technical & Sustainability Limited (the “Consenting Parent”): (a) Davis Polk & Wardwell LLP, 450 Lexington Ave, New York, NY 10017, Attn: Darren S. Klein, Esq. and Aryeh Ethan Falk, Esq. (emails: darren.klein@davispolk.com and aryeh.falk@davispolk.com) and (b) Morris, Nichols, Arsht & Tunnell LLP, 1201 N Market St #1600, Wilmington, DE 19801, Attn: Robert J. Dehney, Sr., Esq. (email: rdehney@morrisnichols.com); and (iv) counsel to any official committee of unsecured creditors, if any (the “Committee,” and together with the DIP Lender, the Prepetition Facility Lender, and the Consenting Parent, the “Consultation Parties”) (collectively, the “Bid Recipients”).

PLEASE TAKE FURTHER NOTICE that, pursuant to the terms of the Bid Procedures, if the Debtors receive one or more Qualified Bids (other than the Stalking Horse APA) by the Bid Deadline, the Auction will be conducted at the offices of Latham & Watkins LLP, 1271 Avenue of the Americas, New York, NY 10020 on **January 27, 2025 at 10:00 a.m. (prevailing Eastern Time)**, or at such other place, date and time as may be designated by the Debtors.

PLEASE TAKE FURTHER NOTICE that, pursuant to the terms of the Bid Procedures, any objections to the Sale or the Sale Order must be filed by **4:00 p.m. prevailing Eastern Time on January 2, 2025** (the “Sale Objection Deadline”) on the (i) proposed counsel to the Debtors: (a) Latham & Watkins LLP (x) 330 North Wabash Avenue, Suite 2800, Chicago, IL 60611, Attn: Caroline Reckler, Esq. (email: caroline.reckler@lw.com); (y) 1271 Avenue of the Americas, New York, NY 10020, Attn: Annemarie V. Reilly, Esq. and Brian S. Rosen, Esq. (emails: annemarie.reilly@lw.com and brian.rosen@lw.com); and (z) 355 South Grand Avenue, Suite 100, Los Angeles, CA 90071, Attn: Jeffrey T. Mispagel, Esq. (email: jeffrey.mispagel@lw.com) and (b) Young Conaway Stargatt & Taylor, LLP, Rodney Square, 1000 North King Street, Wilmington, DE 19801, Attn: Michael R. Nestor, Esq., Kara Hammond Coyle, Esq., and Joseph M. Mulvihill, Esq. (emails: MNestor@ycst.com, KCoyle@ycst.com, and JMulvihill@ycst.com); (ii) counsel for the DIP Lender, the Prepetition Facility Lender, and the Consenting Parent: (a) Davis Polk & Wardwell LLP, 450 Lexington Ave, New York, NY 10017, Attn: Darren S. Klein, Esq. and Aryeh Ethan Falk, Esq. (emails: darren.klein@davispolk.com and aryeh.falk@davispolk.com) and (b) Morris, Nichols, Arsht & Tunnell LLP, 1201 N Market St #1600, Wilmington, DE 19801, Attn: Robert J. Dehney, Sr., Esq. (email:

rdehney@morrishnichols.com); (iii) counsel to any statutory committee appointed in these cases; and (vii) the United States Trustee for the District of Delaware, 844 King Street, Suite 2207, Wilmington, DE 19801, Attn: Jane Leamy (email: Jane.M.Leamy@usdoj.gov) (the “Objection Notice Parties”) and counsel to the Stalking Horse Bidder, Sidley Austin LLP, (i) 1 S. Dearborn St, Chicago, IL 60603, Attn: Dennis M. Twomey, Esq. (email: dtwomey@sidley.com) and (ii) 787 7th Ave, New York, NY 10019; Attn: Margaret R. Alden, Esq. (email: malden@sidley.com) (the “Stalking Horse Notice Party”), and filed with the Clerk of the Bankruptcy Court for the District of Delaware, 824 North Market Street, 3rd Floor, Wilmington, DE 19801. Any party that fails to timely file a Sale Objection will be forever barred from objecting to the Sale or the Sale Order.

PLEASE TAKE FURTHER NOTICE that, on or before **4:00 p.m. (prevailing Eastern Time) on January 5, 2025** (the “Assumption Notice Deadline”), the Debtors shall send a notice to each counterparty to an executory contract or unexpired lease (each an “Assumed Contract Counterparty”) setting forth the Debtors’ calculation of the cure amount, if any, that would be owing to such Assumed Contract Counterparty if the Debtors decide to assume, or assume and assign, such executory contract or unexpired lease, and alerting such Assumed Contract Counterparty that their contract may be assumed and assigned to the Successful Bidder (the “Assumption Notice”), a copy of which is attached to the Bid Procedures Order as Exhibit 3. Any Assumed Contract Counterparty that objects to (i) the potential assumption and assignment of any Assigned Contract to the Stalking Horse Bidder, including the ability of the Stalking Horse Bidder to provide adequate assurance of future performance and/or (ii) the proposed cure amount to be paid in connection with the assumption and assignment of any Assigned Contract, must file an objection (an “Assumed Contract Objection”) on or before **4:00 p.m. prevailing Eastern Time on January 22, 2025**, which Assumed Contract Objection must be served on the Objection Notice Parties and the Stalking Horse Notice Party. To the extent any Assumed Contract Counterparty is added to the Assumption Notice after the initial notice is served, such new Assumed Contract Counterparty shall be notified via a Supplemental Contract Notice and such new Assumed Contract Party shall have fourteen (14) days from the date of service of the Supplemental Contract Notice to object to the proposed cure amount and assignment to the Successful Bidder. If an Assumed Contract Counterparty does not timely file and serve an Assumed Contract Objection, that party shall be forever barred from objecting to (i) the assumption and assignment of any Assigned Contract to the Stalking Horse Bidder, including the ability of the Stalking Horse Bidder to provide adequate assurance of future performance and (ii) the cure amount to be paid in connection with the assumption and assignment of any Assigned Contract.

PLEASE TAKE FURTHER NOTICE that if a Successful Bidder that is not the Stalking Horse Bidder prevails at the Auction, then the deadline to object (a “Post-Auction Objection”) solely to (i) the identity of a Successful Bidder or Back-up Bidder or (ii) the ability of the Successful Bidder or Back-up Bidder to provide adequate assurance of future performance under the Assigned Contract shall be **January 29, 2025 at 4:00 p.m. (prevailing Eastern Time)** (the “Post-Auction Objection Deadline”), which Post-Auction Objection must be served on the Objection Notice Parties so it is actually received by the Post-Auction Objection Deadline and filed with the Clerk of the Bankruptcy Court for the District of Delaware, 824 North Market Street, 3rd Floor, Wilmington, DE 19801. Any party that fails to timely file a Post-Auction Objection will be forever barred from objecting to the identity of the Successful Bidder or to the assignment of that party’s executory contract or unexpired lease to the Successful Bidder.

PLEASE TAKE FURTHER NOTICE that where a counterparty to an Assumed Contract timely files and serves an Assumed Contract Objection by the applicable Assumed Contract Objection Deadline or Post-Auction Objection by the Post-Auction Objection Deadline, the Court will hear and determine such objection at the Sale Hearing or such other date that the Debtors, in consultation with the Successful Bidder and the Consultation Parties, shall determine in their discretion (subject to the Court's calendar). To the extent any Assumed Contract Counterparty is added to the Assumption Notice after the initial notice is served, such new Assumed Contract Counterparty shall receive notice of the addition and the Debtors' proposed cure amount through a supplemental Assumption Notice, and that party shall have fourteen (14) days from the date of such notice to object to the propose cure amount and assignment to the Successful Bidder.

PLEASE TAKE FURTHER NOTICE that subject to the Court's availability, a hearing will be held to approve the sale of the Assets to the Successful Bidder (the "Sale Hearing") before the Honorable [●], U.S. Bankruptcy Court for the District of Delaware, 824 North Market Street, Wilmington, Delaware 19801, 6th Floor, Courtroom #3, on January 30, 2025 at [●] [a./p.]m. (prevailing Eastern Time).

PLEASE TAKE FURTHER NOTICE THAT ANY PARTY WHO FAILS TO MAKE A TIMELY SALE OBJECTION OR POST-AUCTION OBJECTION ON OR BEFORE THE SALE OBJECTION DEADLINE OR POST-AUCTION OBJECTION DEADLINE IN ACCORDANCE WITH THE BID PROCEDURES ORDER SHALL BE FOREVER BARRED FROM ASSERTING ANY SALE OBJECTION OR POST-AUCTION OBJECTION, INCLUDING WITH RESPECT TO THE TRANSFER OF THE ASSETS FREE AND CLEAR OF ALL LIENS, CLAIMS, ENCUMBRANCES AND OTHER INTERESTS.

PLEASE TAKE FURTHER NOTICE that the Debtors are seeking to waive the fourteen-day stay period under Bankruptcy Rules 6004(h) and 6006(d) in order for the Sale to close immediately upon entry of the Sale Order by this Court.

PLEASE TAKE FURTHER NOTICE that this notice is subject to the full terms and conditions of the Bid Procedures and Sale Motion, the Bid Procedures Order, and the Bid Procedures, which shall control in the event of any conflict, and the Debtors encourage parties in interest to review such documents in their entirety. A copy of the Bid Procedures and Sale Motion, the Bid Procedures, and the Bid Procedures Order may be obtained for free by accessing the website of the Debtors' proposed Claims and Noticing Agent, Omni Agent Solution, Inc., at <https://omniagentsolutions.com/FirstMode>.

Dated: [•], 2024
Wilmington, Delaware

LATHAM & WATKINS LLP

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Respectfully Submitted,

/s/

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Proposed Counsel for Debtors and Debtors in Possession

Exhibit 3

Assumption Notice

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

----- X
In re: : Chapter 11
: :
FIRST MODE HOLDINGS, INC., *et al.*,¹ : Case No. 24-12794 (____)
: :
Debtors. : (Jointly Administered)
: :
----- X

**NOTICE TO COUNTERPARTIES TO POTENTIALLY ASSUMED
EXECUTORY CONTRACTS AND UNEXPIRED LEASES REGARDING CURE
AMOUNTS AND POSSIBLE ASSIGNMENT TO THE STALKING HORSE BIDDER OR
SUCH OTHER SUCCESSFUL BIDDER AT AUCTION**

**YOU ARE RECEIVING THIS NOTICE BECAUSE YOU OR ONE OF YOUR
AFFILIATES MAY BE COUNTERPARTY TO ONE OR MORE EXECUTORY
CONTRACTS AND/OR UNEXPIRED LEASES WITH THE DEBTORS.²**

**PARTIES RECEIVING THIS NOTICE SHOULD (I) READ THIS NOTICE
CAREFULLY AS YOUR RIGHTS MAY BE AFFECTED BY THE TRANSACTIONS
DESCRIBED HEREIN AND (II) LOCATE THEIR NAME AND CONTRACT
AND/OR LEASE ON APPENDIX I HERETO**

PLEASE TAKE NOTICE that on December 16, 2024, the above-captioned debtors and debtors in possession (the “Debtors”)³ filed a motion (the “Bid Procedures and Sale Motion”) with the United States Bankruptcy Court for the District of Delaware (the “Bankruptcy Court”).

PLEASE TAKE FURTHER NOTICE that on [●], 2025, the Bankruptcy Court entered an order [Docket No. [●] (the “Bid Procedures Order”), which (i) set key dates, times and procedures related to the Sale (the “Sale”) of substantially all of the Debtors’ assets (the “Assets”) pursuant to an auction (the “Auction”) overseen by the Bankruptcy Court, which Auction is scheduled to take place at the offices of Latham & Watkins LLP, 1271 Avenue of the Americas, New York, NY 10020 on **January 27, 2025 at 10 a.m. (prevailing Eastern Time)**, (ii) authorized the Debtors to enter into a stalking horse asset purchase agreement (the “Stalking Horse APA”) with Cummins Inc. or its assignee (the “Stalking Horse Bidder”), (iii) established certain

¹ The Debtors in these cases, along with the last four digits of each Debtor’s federal tax identification number, are: First Mode Holdings, Inc. (7177), and Synchronous LLC (1829). The Debtors’ mailing address is 3417 1st Ave S, Seattle, WA, 98134.

² This Notice is being sent to counterparties to potential executory contracts and unexpired leases. This Notice is not an admission by the Debtors that such contract or lease is executory or unexpired.

³ Capitalized terms used but not defined herein shall have the meanings ascribed to such terms in the Bid Procedures and Sale Motion.

procedures relating to the Debtors' assumption and assignment of executory contracts and unexpired leases in connection with the Sale (collectively, the "Assigned Contracts"), and (iv) granted related relief.⁴ A hearing will be held to approve the sale of the Assets to the Successful Bidder (the "Sale Hearing") before the Honorable [●], U.S. Bankruptcy Court for the District of Delaware, 824 North Market Street, Wilmington, Delaware 19801, 6th Floor, Courtroom #3, on **January 30, 2025 at [●] [a./p.]m. (prevailing Eastern Time).**

PLEASE TAKE FURTHER NOTICE that, in accordance with the Bid Procedures Order, the Debtors may assume and assign the executory contract(s) and/or unexpired lease(s) to which you may be a counterparty to the Stalking Horse Bidder or such other party that is deemed the Successful Bidder at the conclusion of the Auction.

PLEASE TAKE FURTHER NOTICE that the Debtors have conducted a review of their books and records and have determined the cure amount for unpaid monetary obligations with respect to each contract or lease, which amount is set forth in the right-hand column on Appendix I (the "Cure Amount"). If you object to (i) the potential assumption and assignment of any Assigned Contract to the Stalking Horse Bidder, including the ability of the Stalking Horse Bidder to provide adequate assurance of future performance, and/or (ii) the proposed cure amount to be paid in connection with the assumption and assignment of any Assigned Contract, **you must file an objection with the Bankruptcy Court no later than January 22, 2025 at 4:00 p.m. (prevailing Eastern Time)** (the "Assumed Contract Objection Deadline") and serve such objection on the following parties: (i) proposed counsel to the Debtors: (a) Latham & Watkins LLP (x) 330 North Wabash Avenue, Suite 2800, Chicago, IL 60611, Attn: Caroline Reckler, Esq. (email: caroline.reckler@lw.com); (y) 1271 Avenue of the Americas, New York, NY 10020, Attn: Annemarie V. Reilly, Esq. and Brian S. Rosen, Esq. (emails: annemarie.reilly@lw.com and brian.rosen@lw.com); and (z) 355 South Grand Avenue, Suite 100, Los Angeles, CA 90071, Attn: Jeffrey T. Mispagel, Esq. (email: jeffrey.mispagel@lw.com) and (b) Young Conaway Stargatt & Taylor, LLP, Rodney Square, 1000 North King Street, Wilmington, DE 19801, Attn: Michael R. Nestor, Esq., Kara Hammond Coyle, Esq., and Joseph M. Mulvihill, Esq. (emails: MNestor@ycst.com, KCoyle@ycst.com, and JMulvihill@ycst.com); (ii) counsel for the DIP Lender, the Prepetition Facility Lender, and the Consenting Parent: (a) Davis Polk & Wardwell LLP, 450 Lexington Ave, New York, NY 10017, Attn: Darren S. Klein, Esq. and Aryeh Ethan Falk, Esq. (emails: darren.klein@davispolk.com and aryeh.falk@davispolk.com) and (b) Morris, Nichols, Arsht & Tunnell LLP, 1201 N Market St # 1600, Wilmington, DE 19801, Attn: Robert J. Dehney, Sr., Esq. (email: rdehney@morrisnichols.com); (iii) counsel to any statutory committee appointed in these cases; and (iv) the United States Trustee for the District of Delaware, 844 King Street, Suite 2207, Wilmington, DE 19801, Attn: Jane Leamy (email: Jane.M.Leamy@usdoj.gov) (the "Objection Notice Parties") and counsel to the Stalking Horse Bidder, Sidley Austin LLP, (i) 1 S. Dearborn St, Chicago, IL 60603, Attn: Dennis M. Twomey, Esq. (email: dtwomey@sidley.com) and (ii) 787 7th Ave, New York, NY 10019; Attn: Margaret R. Alden, Esq. (email: malden@sidley.com) (the "Stalking Horse Notice Party"). If an Assumed Contract Counterparty does not timely file and serve an Assumed Contract Objection, such counterparty shall be forever barred from objecting to (i) the Debtors' proposed cure amount, or (ii) the assignment of that party's executory contract or unexpired lease to the Stalking Horse Bidder;

⁴ To the extent there are any inconsistencies between the Bid Procedures Order and the summary description of the terms and conditions contained in this Notice, the terms of the Bid Procedures Order shall control.

provided that, to the extent any Assumed Contract Counterparty is added to the Assumption Notice after the initial notice is served, such new Assumed Contract Counterparty shall receive notice of the addition and the Debtors' proposed cure amount through a Supplemental Assumption Notice, and such party shall have fourteen (14) days from the date of such notice to object to the proposed Cure Amount and assignment to the Successful Bidder.

PLEASE TAKE FURTHER NOTICE that if a Successful Bidder that is not the Stalking Horse Bidder prevails at the Auction, then the deadline to object (a "Post-Auction Objection") solely to (i) the identity of a Successful Bidder and/or (ii) the ability of the Successful Bidder to provide adequate assurance of future performance under the Assumed Contract shall be **January 29, 2025 at 4:00 p.m. (prevailing Eastern Time)** (the "Post-Auction Objection Deadline"). Any Post-Auction Objection must be served on the Objection Notice Parties so it is actually received by the Post-Auction Objection Deadline and filed with the Clerk of the Bankruptcy Court for the District of Delaware, 824 North Market Street, 3rd Floor, Wilmington, DE 19801. Any party that fails to timely file a Post-Auction Objection will be forever barred from objecting to the identity of the Successful Bidder or to the assignment of that party's executory contract or unexpired lease to the Successful Bidder.

PLEASE TAKE FURTHER NOTICE that if no objection to the Cure Amount or the assignment of your Executory Contract(s) or Unexpired Lease(s) to the Successful Bidder is filed by the Assumed Contract Objection Deadline or Post-Auction Objection Deadline, as applicable, **you will be (i) forever barred from objecting to the Cure Amount or provision of adequate assurance of future performance and from asserting any additional cure or other amounts with respect to your contract(s) or lease(s), and the Debtors and the Stalking Horse Bidder or the Successful Bidder (as applicable) shall be entitled to rely solely upon the Cure Amount, (ii) deemed to have consented to the assumption or assumption and assignment, and (iii) forever barred and estopped from asserting or claiming defaults exist, that conditions to assignment must be satisfied under such contract(s) and/or lease(s) or that there is any objection or defense to the assumption and assignment of such contract(s) and/or lease(s).**

PLEASE TAKE FURTHER NOTICE that if you agree with the Cure Amount indicated on Appendix I and otherwise do not object to the Debtors' assumption or assumption and assignment of your contract(s) and/or lease(s), you need not take any further action.

PLEASE TAKE FURTHER NOTICE that copies of the Bid Procedures and Sale Motion, the Bid Procedures, and the Bid Procedures Order, as well as all related exhibits, including the proposed Sale Order may be obtained for free by accessing the website of the Debtors' proposed Claims and Noticing Agent, Omni Agent Solution, Inc., at <https://omniagentsolutions.com/FirstMode>.

Dated: [•], 2024
Wilmington, Delaware

LATHAM & WATKINS LLP

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Respectfully Submitted,

/s/

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TAYLOR, LLP**

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Proposed Counsel for Debtors and Debtors in Possession

APPENDIX I

[Counterparty Name]	[Contract/Lease]	[Cure Amount]	[Proposed Assignee (if any)]
---------------------	------------------	---------------	---------------------------------

Exhibit C

Proposed Sale Order

[TO BE FILED]

Exhibit D

Publication Notice

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

	X	
In re:	:	Chapter 11
	:	
FIRST MODE HOLDINGS, INC., <i>et al.</i> , ¹	:	Case No. 24-12794 (____)
	:	
Debtors.	:	(Jointly Administered)
	:	

NOTICE OF BID PROCEDURES²

PLEASE TAKE NOTICE that, on December 16, 2024, the above-captioned debtors and debtors in possession (the “Debtors”) filed a motion (the “Bid Procedures and Sale Motion”) with the United States Bankruptcy Court for the District of Delaware (the “Bankruptcy Court”).

PLEASE TAKE FURTHER NOTICE that, on [●], 2025, the Bankruptcy Court entered an order [Docket No. [●] (the “Bid Procedures Order”) approving Bid Procedures (the “Bid Procedures”), which set key dates, times and procedures related to the sale of substantially of the Debtors’ assets (the “Assets”). **All interested bidders should carefully read the Bid Procedures.** To the extent there are any inconsistencies between the Bid Procedures and the summary description of the terms and conditions contained in this Notice, the terms of the Bid Procedures shall control.

PLEASE TAKE FURTHER NOTICE that, to be eligible to participate in the Auction, each Bid and each Bidder must be determined by the Debtors to comply with the conditions set forth in the Bid Procedures. The deadline to submit a Bid is **January 20, 2025 at 4:00 p.m. (prevailing Eastern Time)** or such later date as may be agreed to by the Debtors (the “Bid Deadline”).

PLEASE TAKE FURTHER NOTICE that, pursuant to the terms of the Bid Procedures Order, an auction (the “Auction”) may be held at the offices of Latham & Watkins LLP, 1271 Avenue of the Americas, New York, NY 10020, on **January 27, 2025 at 10:00 a.m. (prevailing Eastern Time)** or such later time or place as may be timely disclosed by the Debtors to all Qualified Bidders.

PLEASE TAKE FURTHER NOTICE that, pursuant to the terms of the Bid Procedures, any objections to the Sale or the Sale Order must be filed by **4:00 p.m. prevailing Eastern Time on January 2, 2025** (the “Sale Objection Deadline”) on the (i) proposed counsel to the Debtors:

¹ The Debtors in these cases, along with the last four digits of each Debtor’s federal tax identification number, are: First Mode Holdings, Inc. (7177), and Synchronous LLC (1829). The Debtors’ mailing address is 3417 1st Ave S, Seattle, WA, 98134.

² Capitalized terms used but not otherwise defined herein shall have the meanings set forth in the Bid Procedures or the Bid Procedures Order, as applicable.

(a) Latham & Watkins LLP (x) 330 North Wabash Avenue, Suite 2800, Chicago, IL 60611, Attn: Caroline Reckler, Esq. (email: caroline.reckler@lw.com); (y) 1271 Avenue of the Americas, New York, NY 10020, Attn: Annemarie V. Reilly, Esq. and Brian S. Rosen, Esq. (emails: annemarie.reilly@lw.com and brian.rosen@lw.com); and (z) 355 South Grand Avenue, Suite 100, Los Angeles, CA 90071, Attn: Jeffrey T. Mispagel, Esq. (email: jeffrey.mispagel@lw.com) and (b) Young Conaway Stargatt & Taylor, LLP, Rodney Square, 1000 North King Street, Wilmington, DE 19801, Attn: Michael R. Nestor, Esq., Kara Hammond Coyle, Esq., and Joseph M. Mulvihill, Esq. (emails: MNestor@ycst.com, KCoyle@ycst.com, and JMulvihill@ycst.com); (ii) counsel for the DIP Lender, the Prepetition Facility Lender, and the Consenting Parent: (a) Davis Polk & Wardwell LLP, 450 Lexington Ave, New York, NY 10017, Attn: Darren S. Klein, Esq. and Aryeh Ethan Falk, Esq. (emails: darren.klein@davispolk.com and aryeh.falk@davispolk.com) and (b) Morris, Nichols, Arsht & Tunnell LLP, 1201 N Market St # 1600, Wilmington, DE 19801, Attn: Robert J. Dehney, Sr., Esq. (email: rdehney@morrisnichols.com); (iii) counsel to any statutory committee appointed in these cases [●]; and (vii) the United States Trustee for the District of Delaware, 844 King Street, Suite 2207, Wilmington, DE 19801, Attn: Jane Leamy (email: Jane.M.Leamy@usdoj.gov) (the “Objection Notice Parties”) and counsel to the Stalking Horse Bidder, Sidley Austin LLP, (i) 1 S. Dearborn St, Chicago, IL 60603, Attn: Dennis M. Twomey, Esq. (email: dtwomey@sidley.com) and (ii) 787 7th Ave, New York, NY 10019; Attn: Margaret R. Alden, Esq. (email: malden@sidley.com) (the “Stalking Horse Notice Party”), and filed with the Clerk of the Bankruptcy Court for the District of Delaware, 824 North Market Street, 3rd Floor, Wilmington, DE 19801. Any party that fails to timely file a Sale Objection will be forever barred from objecting to the Sale or the Sale Order.

PLEASE TAKE FURTHER NOTICE that, on or before **4:00 p.m. (prevailing Eastern Time) on January 5, 2025** (the “Assumption Notice Deadline”), the Debtors shall send a notice to each counterparty to an executory contract or unexpired lease (each an “Assumed Contract Counterparty”) setting forth the Debtors’ calculation of the cure amount, if any, that would be owing to such Assumed Contract Counterparty if the Debtors decided to assume or assume and assign such executory contract or unexpired lease, and alerting such Assumed Contract Counterparty that their contract may be assumed and assigned to the Successful Bidder (the “Assumption Notice”), a copy of which is attached to the Bid Procedures Order as Exhibit 3. Any Assumed Contract Counterparty that objects to (i) the potential assumption and assignment of any Assigned Contract to the Stalking Horse Bidder, including the ability of the Stalking Horse Bidder to provide adequate assurance of future performance, and/or (ii) the proposed cure amount to be paid in connection with the assumption and assignment of any Assigned Contract, must file an objection (an “Assumed Contract Objection”) on or before **4:00 p.m. prevailing Eastern Time on January 22, 2025** (the “Assumed Contract Objection Deadline”), which Assumed Contract Objection must be served on the Objection Notice Parties and the Stalking Horse Notice Party and filed with the Clerk of the Bankruptcy Court for the District of Delaware, 824 North Market Street, 3rd Floor, Wilmington, DE 19801. To the extent any Assumed Contract Counterparty is added to the Assumption Notice after the initial notice is served, such new Assumed Contract Counterparty shall be notified via a Supplemental Contract Notice and such new Assumed Contract Party shall have fourteen (14) days from the date of service of the Supplemental Contract Notice to object to the proposed cure amount and assignment to the Stalking Horse Bidder. If an Assumed Contract Counterparty does not timely file and serve an Assumed Contract Objection, that party shall be forever barred from objecting to (i) the assumption and assignment of any Assigned Contract to the Stalking Horse Bidder, including the ability of the Stalking Horse Bidder to provide adequate

assurance of future performance, and (ii) the cure amount to be paid in connection with the assumption and assignment of any Assigned Contract.

PLEASE TAKE FURTHER NOTICE that if a Successful Bidder that is not the Stalking Horse Bidder prevails at the Auction, then the deadline to object (a “Post-Auction Objection”) solely to (i) the identity of a Successful Bidder or Backup Bidder or (ii) the ability of the Successful Bidder or Backup Bidder to provide adequate assurance of future performance under the Assigned Contract shall be **January 29, 2025 at 4:00 p.m. (prevailing Eastern Time)** (the “Post-Auction Objection Deadline”), which Post-Auction Objection must be served on the Objection Notice Parties so it is actually received by the Post-Auction Objection Deadline and filed with the Bankruptcy Court. Any party that fails to timely file a Post-Auction Objection will be forever barred from objecting to the identity of the Successful Bidder or to the assignment of that party’s executory contract or unexpired lease to the Successful Bidder.

PLEASE TAKE FURTHER NOTICE subject to the Court’s availability, a hearing will be held to approve the sale of the Assets to the Successful Bidder (the “Sale Hearing”) before the Honorable [●], U.S. Bankruptcy Court for the District of Delaware, 824 North Market Street, Wilmington, Delaware 19801, 6th Floor, Courtroom [●], **on January 30 at [●] [a./p.]m. (prevailing Eastern Time)**, or at such time thereafter as counsel may be heard or at such other time as the Bankruptcy Court may determine. The Sale Hearing may be adjourned from time to time without further notice to creditors or parties in interest other than by announcement of the adjournment in open court on the date scheduled for the Sale Hearing or on the agenda for such Sale Hearing.

PLEASE TAKE FURTHER NOTICE THAT ANY PARTY WHO FAILS TO MAKE A TIMELY SALE OBJECTION ON OR BEFORE THE SALE OBJECTION DEADLINE IN ACCORDANCE WITH THE BID PROCEDURES ORDER SHALL BE FOREVER BARRED FROM ASSERTING ANY SALE OBJECTION, INCLUDING WITH RESPECT TO THE TRANSFER OF THE ASSETS FREE AND CLEAR OF ALL LIENS, CLAIMS, ENCUMBRANCES AND OTHER INTERESTS.

PLEASE TAKE FURTHER NOTICE that this Notice is subject to the full terms and conditions of the Bid Procedures and the Bid Procedures Order, which shall control in the event of any conflict with this Notice. The Debtors encourage parties in interest to review such documents in their entirety. A copy of the Bid Procedures and the Bid Procedures Order may be obtained for free by accessing the website of the Debtors’ Claims and Noticing Agent, Omni Agent Solutions, Inc., at <https://omniagentsolutions.com/FirstMode>.

Dated: [•], 2024
Wilmington, Delaware

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/s/

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