

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

In re:

AKORN, INC., *et al.*,¹

Debtors.

)
) Chapter 11
)
) Case No. 20-11177 (KBO)
)
) (Jointly Administered)
)

AD HOC GROUP'S REPLY IN SUPPORT OF THE SALE TRANSACTION

The Ad Hoc Group² and DIP Lenders (collectively, the “Ad Hoc Group”) hereby submit this reply to the 1199SEIU Benefit Funds, DC47 Fund, and SBA Fund’s (collectively, the “MDL Plaintiffs”) objection [Docket No. 553 (the “MDL Objection”)] to the Sale Motion [Docket No. 18], and, in support thereof, state as follows:

PRELIMINARY STATEMENT

1. The MDL Objection should be overruled in its entirety, and the Sale Transaction should be approved. The Sale Transaction is the culmination of over a year’s worth of extensive and good-faith efforts by the Debtors to guaranty their ability to continue as a going concern

¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number, if any, are: Akorn, Inc. (7400); 10 Edison Street LLC (7890); 13 Edison Street LLC; Advanced Vision Research, Inc. (9046); Akorn (New Jersey), Inc. (1474); Akorn Animal Health, Inc. (6645); Akorn Ophthalmics, Inc. (6266); Akorn Sales, Inc. (7866); Clover Pharmaceuticals Corp. (3735); Covenant Pharma, Inc. (0115); Hi-Tech Pharmacal Co., Inc. (8720); Inspire Pharmaceuticals, Inc. (9022); Oak Pharmaceuticals, Inc. (6647); Olta Pharmaceuticals Corp. (3621); VersaPharm Incorporated (6739); VPI Holdings Corp. (6716); and VPI Holdings Sub, LLC. The location of the Debtors’ service address is: 1925 W. Field Court, Suite 300, Lake Forest, Illinois 60045.

² Capitalized terms used herein but not otherwise defined shall have the meanings ascribed to such terms in (a) the Debtors’ Motion Seeking Entry of an Order (A) Authorizing and Approving Bidding Procedures, (B) Scheduling an Auction and a Sale Hearing, (C) Approving the Form and Manner of Notice Thereof, (D) Establishing Notice and Procedures for the Assumption and Assignment of Certain Executory Contracts and Leases, and (E) Granting Related Relief [Docket No. 18 (the “Sale Motion”)] or (b) the Debtors’ Motion Seeking Entry of Interim and Final Orders (I) Authorizing the Debtors to (A) Obtain Postpetition Financing and (B) Utilize Cash Collateral, (II) Granting Liens and Superpriority Administrative Expense Claims, (III) Granting Adequate Protection, (IV) Modifying the Automatic Stay, (V) Scheduling a Final Hearing, and (VI) Granting Related Relief [Docket No. 14 (the “DIP Motion”)].



(preserving thousands of jobs and assuming more than \$150,000,000 of existing liabilities in the process), while also satisfying their obligations under the Prepetition Credit Agreement.³ The Sale Transaction, therefore, represents a value-maximizing and successful outcome for the vast majority of the Debtors' stakeholders that should be encouraged, not attacked.

2. The MDL Plaintiffs, in contrast, would prefer the Debtors liquidate – costing thousands of hard-working employees their livelihoods – in a transparent effort to further their own litigation strategy in the MDL litigation. In support of this value-destructive end, the MDL Plaintiffs have interposed 40 pages of scattershot objections that, without basis, accuse the Prepetition Term Loan Lenders of conspiring in bad faith with the Debtors to “effect a friendly sale that would allow the Debtors to escape all liability.” MDL Objection at 2. The MDL Objection should be overruled.

3. ***First***, the MDL Objection completely misrepresents and distorts the relevant facts giving rise to the Sale Transaction. The Sale Transaction is the result of extensive, good-faith efforts, both prepetition and postpetition, to develop a viable path forward for the Debtors' business. Moreover, the Stalking Horse Bid of \$1.06 billion (the “Purchase Price”) is indisputably the best and highest offer the Debtors received throughout the sale process, but this was not for lack of trying. Indeed, for more than a year, the Debtors engaged in serious, formalized attempts to find a third party to refinance the relevant Terms Loans or to purchase the Debtors as a going concern for an amount that would allow them to satisfy their obligations to the Prepetition Term Loan Lenders.

³ In stating that the Sale Transaction satisfies the Debtors' obligations to the Prepetition Term Loan Lenders under the Prepetition Credit Agreement, the Ad Hoc Group does not suggest that the Prepetition Term Loan Lenders are unimpaired for purposes of voting on the Plan. To the contrary, the Sale Transaction, even if completed, will alter the Prepetition Secured Parties' legal, equitable, and contractual rights under the Prepetition Credit Agreement, resulting in the impairment of the Prepetition Term Loan Lenders' claims against the Debtors.

4. Most recently, the Debtors undertook these efforts pursuant to a Court-approved sale process, during which time, dozens of potential investors were contacted. Despite everyone's best efforts, however, no party came forward with a bid or proposal sufficient to achieve the desired result. Multiple parties had the opportunity to outbid the Purchase Price, and the Prepetition Term Loan Lenders repeatedly accommodated (and encouraged) these efforts.

5. For instance, beginning in early July, a group of new-money investors approached the Debtors with a proposal to either deliver a topping bid in the sales process or to execute a competing plan proposal that would have paid the Prepetition Term Loan Lenders, along with all of the Debtors' other creditors, in full. In an effort to allow these investors time to develop their proposals, the Debtors and the Ad Hoc Group determined to adjourn the Confirmation Hearing from August 20, 2020, to September 1, 2020. In the end, this alternative transaction failed to materialize. It was only after this failure that the Debtors and the Ad Hoc Group, being left with no other actionable options, determined to proceed with the Stalking Horse Bid.

6. ***Second***, the MDL Plaintiffs' kitchen-sink allegations regarding purportedly "unencumbered assets" (in part based on improper and unsubstantiated lien challenges) are also factually misleading and should be rejected. As an initial matter, there are no unencumbered assets of any value in these Cases. As of the Petition Date, the Prepetition Term Loan Lenders had valid, perfected, first-priority liens on substantially all of the Debtors' assets. To the extent any of the Debtors' assets were not captured by these security interests on the Petition Date, they were then granted to the DIP Lenders by this Court in connection with the \$30,000,000 DIP Facility, as well as to the Prepetition Term Loan Lenders on account of adequate protection liens.

7. The MDL Plaintiffs also discuss purportedly valuable Avoidance Actions that are being acquired by the Stalking Horse Purchaser as part of its credit bid in the Sale Transaction,

allegedly for no consideration. To be clear, there is no dispute that the Avoidance Actions are not collateral of either the Prepetition Term Loan Lenders or the DIP Lenders, and therefore, are not part of the Stalking Horse Purchaser's credit bid. Indeed, the DIP Lenders agreed to waive their entitlement to such liens as part of the approval of the DIP Facility.

8. This does not mean that the Stalking Horse Bid fails to provide value sufficient to acquire these claims. The credit bid is only one component of the Purchase Price, which also includes Assumed Liabilities, and the agreement of the Stalking Horse Purchaser to fund the Wind-Down Budget. Indeed, the incremental value provided by the Stalking Horse Purchaser as a result of these Purchase Price components in excess of the credit bid amounts to no less than \$150,000,000, which is easily sufficient to support the acquisition of the Avoidance Actions – because any Avoidance Actions that may exist in these Cases are not valuable.

9. Earlier this week, the Official Committee of Unsecured Creditors (the “Committee”) – the fiduciary tasked with investigating and pursuing such causes of action – filed *The Official Committee of Unsecured Creditors' Statement in Support of Akorn's Plan and Sale Motion* [Docket No. 560 (the “Statement in Support”)], which included the Committee's unequivocal support for the sale process and memorialized its decision not to pursue any Avoidance Actions because the cost, expense, and delay associated with pursuing these types of claims far outweighed the likely recovery. This decision makes the Committee the second fiduciary in these Cases to determine that there was no meaningful value in the Avoidance Actions, as the Debtors also conducted their own investigation and reached the same conclusion. The valueless nature of the Avoidance Actions is precisely why the Stalking Horse Purchaser is justified in acquiring these claims. Allowing third parties – parties that have no go-forward interest in the business – to sue management, vendors, and other parties necessary to the continuation of

the Debtors' business for nuisance value threatens the very purpose of the Sale Transaction, which is to ensure the Debtors' business is able to continue as a going concern.

10. This Court should reject the MDL Plaintiffs' meritless, last-ditch effort to derail the Sale Transaction, especially given that even a short delay has the potential to cause serious harm. The Debtors are already in a precarious liquidity position, with very little runway left, and the DIP Facility that has funded these Cases is about to be exhausted. As recently acknowledged by the Committee in its Statement in Support, "derailing the Sale . . . could be particularly harmful to *all stakeholders* given that there is no current bid for the Debtors' assets other than the credit bid." *Id.* ¶ 3 (emphasis added). The MDL Objection, therefore, should be overruled, and the Sale Transaction should be approved.

BACKGROUND

I. The Unsuccessful Fresenius Merger

11. In 2017, Akorn attempted a merger transaction with Fresenius Kabi AG ("Fresenius"), which valued Akorn at \$34 per share. [Docket No. 15 ("First Day Decl.") ¶ 49]. Fresenius, however, terminated the proposed merger in April 2018. *See id.* ¶ 60. Akorn then sued Fresenius in Delaware Chancery Court. *See id.* ¶ 61. On October 1, 2018, the Chancery Court denied Akorn's requested relief, determining that Fresenius had validly terminated the merger because, among other things, Akorn's business had experienced a "material adverse effect." *See id.* ¶ 63; *see also Akorn, Inc. v. Fresenius Kabi AG*, 2018 WL 4719347 (Del. Ch. Oct. 1, 2018). The Delaware Chancery Court's decision was later affirmed by the Supreme Court of Delaware. *See First Day Decl.* ¶ 65; *see also Akorn, Inc. v. Fresenius Kabi AG*, 198 A.3d 724 (Del. 2018).

12. In November 2018, the Ad Hoc Group reached out to the Debtors to initiate a dialogue regarding various issues, including the fact that the Chancery Court's decision constituted

an Event of Default under the Prepetition Credit Agreement. *See* First Day Decl. ¶ 88.⁴ In December 2018, the Ad Hoc Group sent further correspondence to Debtors explaining that it had the right to accelerate Akorn’s debt obligations under the Prepetition Credit Agreement based on the existent Event of Default. *See id.*

II. The Standstill Agreement

13. After months of negotiations, the relevant parties entered into the May 6, 2019 Standstill Agreement and First Amendment to Loan Agreement (the “Standstill Agreement”). *See id.* ¶ 89. The Standstill Agreement temporarily prevented the Term Loan Lenders from declaring an Event of Default and accelerating Akorn’s debt, providing the Debtors with time to arrange a comprehensive amendment that would refinance or significantly pay down the Prepetition Credit Agreement. *See id.* ¶¶ 89-91. The Standstill Agreement also “provided the Debtors with much-needed time to improve their regulatory status and turn around their business.” *See id.* ¶ 97. In exchange for their forbearance and willingness not to enforce their rights under the Prepetition Credit Agreement, the Ad Hoc Group was paid a one-time in-kind fee and certain other consideration. *See id.* ¶ 93.

III. Refinancing Efforts And Prepetition Marketing Process

14. Beginning in August 2019, the Debtors and their financial advisor launched a financing process through which they solicited debt and equity-linked financings to enable a comprehensive amendment of the Prepetition Credit Agreement. *See id.* ¶¶ 90-91. Several dozen prospective investors were contacted during this process, and a number of them reviewed additional information about Debtors’ business. None of these investors, however, was ultimately

⁴ MDL Plaintiffs’ repeated arguments that Debtors “approached the Secured Lender” and made concessions absent any “threat of a default” by the Term Loan Lenders are simply false. *E.g.*, MDL Objection at 4, 27, 30.

willing to fully refinance the existing Prepetition Credit Agreement. *See id.* ¶ 91. Moreover, while Debtors received several indications of interest from junior capital investors, it became clear that these investors would not be able to provide binding proposals to pay down the existing Prepetition Credit Agreement by a sufficient amount to effectuate a refinancing. *See id.*

15. Because the Debtors and their advisors determined that these financing proposals were not actionable, Debtors and the Ad Hoc Group discussed a potential extension of the Standstill Agreement in Fall 2019. *See id.* ¶ 92. Following negotiations, on December 15, 2019, the relevant parties entered into a first amendment to the Standstill Agreement. *See id.* ¶ 89. This amendment provided further flexibility to the Debtors, extending the standstill period from December 2019 to February 2020. *See id.*

16. In December 2019, the Debtors and their financial advisor also began a prepetition marketing process. *See id.* ¶ 100. The Debtors contacted 72 potentially interested parties (including both strategic purchasers from the pharmaceutical industry and financial purchasers) regarding a potential going-concern transaction of the Debtors' business. *See id.* Thirty-seven of these parties were sufficiently interested in a potential transaction to execute confidentiality agreements that allowed them to receive additional information about the Debtors' business. *See id.* After preliminary indications of interest were submitted in January 2020, Debtors selected the seven most promising bids to participate in a second round of the sale process. *See id.* ¶¶ 101-102.

17. On February 12, 2020, after additional arm's-length negotiations, the parties reached agreement on a second amendment to the Standstill Agreement. *See id.* ¶ 94. This second amendment further extended the standstill period so that the Debtors could continue their prepetition marketing process, with the goal of filing Chapter 11 cases with a "stalking horse" bid in hand. *See id.* The Debtors received updated indications of interest from bidders in March 2020,

and based on the overall quality of the bids, the Debtors selected bidders to advance to a final round. *See id.* ¶¶ 103-104. Nevertheless, the Debtors did not receive any binding bids sufficient to fully pay off the Prepetition Credit Agreement by the March 27, 2020 deadline. *See id.* ¶ 105.

18. Soon after learning that they had not secured any satisfactory bids, the Debtors pivoted to negotiating the terms of a comprehensive restructuring transaction with the Ad Hoc Group. *See id.* Subsequently, the Term Loan Lenders notified the Debtors of their intention to credit bid their loans and act as the “stalking horse” bidder in an in-court sale process. *See id.* ¶ 106. After several rounds of negotiation, the Debtors and the Term Loan Lenders agreed on an asset purchase agreement. *See id.*

IV. Chapter 11 Cases, DIP Financing, And Postpetition Sale

19. On May 20, 2020, the Debtors filed these Chapter 11 Cases. *See id.* ¶ 107. Prior to filing, the Debtors and certain of their Term Loan Lenders entered into a restructuring support agreement (“RSA”) supporting a sale transaction, either to the Term Loan Lenders or to a third party. *See id.* Certain of the RSA parties also agreed to fund the costs of these Chapter 11 Cases and the postpetition sale process via the \$30 million DIP Loan. *See id.*

20. In approving the DIP Loan, this Court found, *inter alia*, that the Debtors had “an immediate need to obtain the DIP Facility,” that they were “unable to obtain financing on more favorable terms” elsewhere, and that the DIP Loan was “negotiated in good faith and at arm’s length.” *See* [Docket No. 179 ¶ F]. The Court thus concluded that the financing was in the best interests of the Debtors’ estates *and their creditors*. *See id.* ¶ G.

21. Subsequently, the Debtors engaged in a comprehensive postpetition sale process pursuant to Court-approved bidding procedures. *See* [Docket No. 181]. As with their prior efforts, the Debtors and their advisors pursued a going-concern sale with many potential third-party purchasers. Once again, these efforts generated strong initial indications of interest; however, as

the parties performed additional diligence and progressed further in the sales process, it became apparent that none of the third-party investors would be willing and able to make an offer superior to that of the stalking horse bidder. As such, by the close of the in-court sales process, the stalking horse bidder was the only remaining bidder and thus became the indisputable winner.

ARGUMENT

I. The Sale Transaction Represents The Culmination Of A Full And Fair Bidding Process.

A. Debtors Undertook Extensive Efforts To Identify An Interested Third Party.

1. Robust Prepetition Marketing Efforts Spanned Many Months.

22. Prior to the Petition Date, and with the support of the Prepetition Term Loan Lenders, the Debtors actively solicited third-party investment over a period of more than a year. Indeed, in August 2019, the Debtors and their investment banker, PJT, launched a formalized search to enable the Debtors to either (a) fully refinance the Prepetition Credit Agreement such that they could end the lending relationship with the Term Loan Lenders or (b) sufficiently pay down the Prepetition Credit Agreement to effectuate a refinancing. *See* [Docket No. 14 Ex. B (“Buschmann Decl.”) ¶ 13]. The Debtors engaged in a robust refinancing process, contacting more than 30 potential investors (more than 20 of whom were sufficiently interested to execute non-disclosure agreements), conducting substantial due diligence, and gathering indications of interest over multiple rounds. *See id.* Despite these robust efforts, none of the potential investors was willing to refinance the capital structure in its entirety, and it became clear that the junior capital investors that had expressed interest “would not be able to provide binding . . . proposals on an out-of-court basis.” *Id.* As a result, in December 2019, the Debtors pivoted towards prepetition efforts to identify third-party purchasers for a judicially supervised sale process. *See id.*

23. The prepetition marketing efforts initiated by Debtors and their advisor in December 2019 were even more extensive, with more than 70 interested parties (including both strategic and financial partners) being contacted. *See id.* ¶ 14. Many of those parties executed confidentiality agreements to obtain non-public information about the Debtors’ business and to proceed further in the multi-round sale process. *See id.* Although initial indications of interest from some of these third parties seemed promising, as the process and the bidders’ diligence efforts progressed, bids started to fall away. *See First Day Decl.* ¶¶ 102-04. Final bids were submitted in late-March 2020. *See id.* ¶ 105. Contrary to the MDL Plaintiffs’ claims that several of the final bids would have provided a “net benefit to the Debtors and their creditors,” MDL Objection at 28, none of these bids was practicable because they were all well under the amount necessary to repay the Prepetition Term Loan Lenders. *See First Day Decl.* ¶ 105.

24. Only at this point—after all other options were exhausted—did the Debtors and the Prepetition Term Loan Lenders transition from a third-party-focused marketing process to negotiations for a comprehensive restructuring built around the Sale Transaction. *See id.* ¶¶ 105-06. The Sale Transaction still allowed for third-party bidders to come forward with a bid after the Debtors were in Chapter 11, but it also provided a backstop to salvage the Debtors’ business as a going concern in case no acceptable competing third-party bids materialized.

2. The Postpetition Sale Process Was Equally Vigorous.

a) The Debtors Followed Court-Approved Bidding Procedures.

25. All postpetition bidding procedures employed by the Debtors were formally approved by the Court. *See* [Docket No. 181]. Indeed, the Court expressly found that “[t]he Bidding Procedures were negotiated by the parties at arms’ length and in good faith,” and that they would extend what was already a “robust and extensive marketing and sale process” designed to “solicit the highest or otherwise best value” for Debtors’ assets. *Id.* ¶¶ E, F. The MDL Plaintiffs’

do not even attempt to contend that the Court-approved bidding process, which “represent[ed] the best method for maximizing . . . value . . . for the benefit of the Debtors’ estates,” *id.* ¶ F, was not followed here.

b) All Parties Were Highly Supportive Of A Third-Party Sale.

26. The in-court sale process provided yet another opportunity for the Debtors to garner interest from potential cash buyers, and the Debtors and their advisors were unwavering in their efforts to attract third-party bids. Dozens of potentially interested parties were contacted and performed due diligence on Debtors’ business as part of the in-court sale process. At the end of the marketing process, however, the Debtors did not receive a single qualified bid, leaving the Stalking Horse Bid as the sole means of ensuring the continuation of Debtors’ business as a going concern.

27. Throughout the in-court marketing process, the Ad Hoc Group (and all of the Prepetition Term Loan Lenders) were highly supportive of a third-party sale or any other alternative transactions, making every effort to ensure that the Debtors received maximum value in connection with these Cases. Indeed, when a group of new-money investors came forward in July 2020 with concrete proposals to make a topping bid and/or design an alternative transaction to acquire the Debtors’ business, the Ad Hoc Group readily agreed to extend the Sale Transaction timeline, including the already-scheduled dates for the Sale and Confirmation Hearings, in order to facilitate this late-breaking development. Although these efforts did not ultimately result in a competing bid or actionable alternative transaction, both the Debtors’ and the Ad Hoc Group’s willingness to accommodate credible parties at all stages of the sale process contradicts the MDL Plaintiffs’ bald assertion of a conspiracy to “ward off other purchasers.” MDL Objection at 31.

B. The Stalking Horse Offer Provides The Highest Attainable Value For Debtors' Assets.

28. It is a well-accepted tenet of bankruptcy sale processes that market behavior is the best indicator of true value. *In re Bos. Generating, LLC*, 440 B.R. 302, 325 (Bankr. S.D.N.Y. 2010) (citing *Bank of Am. Nat. Trust & Sav. Ass'n v. 203 N. La Salle P'ship*, 526 U.S. 434, 457 (1999) (acknowledging that “the best way to determine value is exposure to a market” rather than a determination by a bankruptcy judge)); *see also In re Waterford Wedgwood USA, Inc.*, 500 B.R. 371, 381 (Bankr. S.D.N.Y. 2013) (“Courts give significant deference to marketplace values and to values reached in the context of an arm’s length transaction between a willing buyer and a willing seller” (internal citations and quotation marks omitted)).

29. Here, the market has spoken: after months of intense efforts by the Debtors and their professionals, no qualified bidder has come forward with a bid greater than the Purchase Price. In other words, at the conclusion of the in-court sale process, the Stalking Horse Bid proved to be the highest and otherwise best bid for the Debtors’ assets – one that provides, among other things, no less than \$150,000,000 in value on top of the credit bid, between Assumed Liabilities and the agreement to fund the Wind-Down Budget. More importantly, the Sale Transaction will result in all of the Debtors’ undisputed, non-litigation claims being made whole, all while preserving the Debtors’ business as a going concern, saving the jobs of thousands of the Debtors’ employees and, through the funding of the Wind-Down Budget, keeping these estates administratively solvent.

30. Throughout the nearly two years since the Debtors’ Event of Default first occurred under the Prepetition Credit Agreement, the Ad Hoc Group has been willing to facilitate any refinancing or other transaction that would result in the repayment of the outstanding Term Loans at par plus accrued. Indeed, the many months of standstills to which the Ad Hoc Group and other

Prepetition Term Loan Lenders agreed were aimed at precisely that goal. Despite everyone's best efforts, however, no party came forward – either in the Debtors' initial refinancing efforts or during the prepetition and postpetition sales processes – with bids or proposals sufficient to achieve this result. Only now that this years-long process has run its course do the Prepetition Term Loan Lenders, as the sole remaining bidder, stand to acquire the Debtors' assets and ensure that their businesses continue as a going concern.

31. The MDL Plaintiffs' disappointment that a topping third-party bid has not materialized does not provide a legal basis to block the Sale Transaction. And, in light of the process detailed above, the MDL Plaintiffs' suggestion that a better offer is somehow attainable defies all reason. The MDL Plaintiffs' objections lack basis in law and fact, and should be overruled. Accordingly, the Sale Transaction should be approved.

II. No Avoidance Actions Are Being Purchased Via The Credit Bid.

32. With one exception, there are no unencumbered assets in these Cases of any value, as all of the Debtors' property was either encumbered prior to the Petition Date or in connection with the DIP Facility. The lone exception to this would be any Avoidance Actions, as the DIP Lenders specifically waived their entitlement to liens on the proceeds of the same as part of a settlement with the Committee in connection with the entry of the Final DIP Order. Despite the assertions in the MDL Objection to the contrary, however, the Stalking Horse Purchaser is not credit bidding for the Avoidance Actions. *See, e.g.*, MDL Objection at 12. Instead, the Stalking Horse Purchaser is providing substantial additional value as part of the Purchase Price (no less than \$150 million) in the form of Assumed Liabilities and the agreement to fund the Wind-Down Budget. It is this additional consideration that entitles the Stalking Horse Purchaser to the Avoidance Actions, and it is more than enough to justify the purchase of these assets, given that multiple fiduciaries have now determined that the Avoidance Actions are not worth pursuing from

a value perspective. The MDL Plaintiffs’ arguments about unencumbered assets and zero-consideration purchases, therefore, lack foundation and should be overruled.

A. The Committee Supports The Sale Transaction And Chose Not To Pursue The Avoidance Actions.

33. On August 25, 2020, the Committee announced its support for both the Sale Transaction and the Plan. *See* [Docket No. 560]. Importantly, in reaching this decision, the Committee – unlike the MDL Plaintiffs – “conduct[ed] substantial amounts of discovery into the facts surrounding the Prepetition Credit Agreement and the events giving rise to the Debtors’ chapter 11 cases.” *Id.* ¶ 2. The Committee also “closely monitored the Debtors’ sale process.” *Id.* ¶ 1. Following its thorough fact-gathering and investigation, the Committee – which serves as a fiduciary for the unsecured creditors – is not challenging any security interest or alleging the existence of any “unencumbered assets.” Rather, the Committee “believes the Sale is in the best interest of the Debtors” and should be approved. *Id.* ¶ 1.

B. There Are No Unencumbered Assets Of Any Value.

34. The vast majority of the Debtors’ assets were already pledged as collateral in connection with the Prepetition Credit Agreement, and thus, were encumbered as of the Petition Date. Thereafter, in exchange for providing the DIP Facility, the DIP Lenders were granted a secured, first-priority lien on all of Debtors’ remaining unencumbered assets, with only limited carve-outs – namely the Avoidance Actions. *See* [Docket No. 179 ¶ 7(a)]. The Prepetition Term Loan Lenders, meanwhile, were also granted a security interest in the Debtors’ unencumbered assets in connection with the provision of their Adequate Protection Liens. *See id.* ¶ 8. The Court expressly approved the designation of Debtors’ “Previously Unencumbered Property” as collateral, *id.* ¶¶ 7(a), and the MDL Plaintiffs’ repeated references to “unencumbered assets”

cannot dislodge the incontrovertible fact that these assets were, in fact, pledged as collateral either under the Prepetition Credit Agreement or pursuant to the Final DIP Order.

C. The Purchase Price Includes Substantial Consideration In Excess Of The Credit Bid.

35. As discussed, the only category of unencumbered assets in these Cases are the Avoidance Actions, but the MDL Plaintiffs' contention that the Stalking Horse Purchaser is providing no value in excess of its credit bid to acquire these claims is incorrect. The Purchase Price contains three unique aspects: (a) the credit bid; (b) the assumption of all of the Debtors' uncontested and undisputed non-litigation liabilities; and (c) the agreement to fund the Wind-Down Budget, thereby ensuring that these Cases remain administratively solvent. All in, this non-credit bid consideration in the Purchase Price is valued at no less than \$150,000,000, which is more than sufficient to cover any value that could be attributable to the Avoidance Actions, as both the Committee and the Debtors have determined the Avoidance Actions have insufficient value to pursue. There is no basis, therefore, for the MDL Plaintiffs' repeated assertions that certain asset classes (whether unencumbered or not) are being transferred for "no consideration." MDL Objection at 13-14.⁵

⁵ MDL Plaintiffs' discussions of the various asset classes are themselves peppered with legal and factual errors. For example, the supposed "postpetition interest" payments are actually Court-approved adequate protection payments. *See* [Docket No. 179 ¶ 8(c)]. Nothing was "oversecured," and the Chapter 13 case they cite – *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004) – is entirely irrelevant. With respect to the avoidance actions and the shareholder settlement, the Committee has already declined to seek standing to pursue those causes of action, nor have any other creditors (including MDL Plaintiffs) attempted to do so – and the Committee's independent determination, after discovery and investigation, that the claims were not worth pursuing belies MDL Plaintiffs' related argument that Debtors are "intentionally failing to maximize the value of the estate." MDL Objection at 38. Likewise, MDL Plaintiffs contend that certain of these avoidance actions arise out of "confirmatory grants," *id.* at 14; however, since those grants were executed pursuant to the Prepetition Credit Agreement, the estates necessarily obtained value for them. And MDL Plaintiffs' discussion of tax benefits (both with respect to the CARES Act and sale of an India affiliate, *see* MDL Objection at 14, 37-38) ignores that the prepetition liens extend to *proceeds* arising from prepetition encumbered assets. That those proceeds may have themselves arisen postpetition is irrelevant. *See* 11 U.S.C. § 552(b). The case MDL Plaintiffs cite is inapposite, as it addressed a question of California state law and – contrary to what MDL Plaintiffs' misleading parenthetical would suggest – did not discuss Section 552(b) at all. *See In re TMC Elec.*, 279 B.R. 552, 559 (Bankr. N.D. Cal. 1999).

36. In addition to the fact that the Avoidance Actions have no meaningful value, the Stalking Horse Purchaser specifically negotiated for these causes of action as part of the Purchase Price. This is not because the Stalking Horse Purchaser believes there is any value in the claims – indeed, the Stalking Horse Purchaser specifically agreed not to bring Avoidance Actions against any counterparty to an Assigned Contract or holders of Assumed Liabilities, *see* Bidding Procedures Order ¶ 11 – but because the Stalking Horse Purchaser does not want third parties with no go-forward interest in the business to be able to sue management, contract counterparties, and other holders of Assumed Liabilities for nuisance value. Allowing such business interruption would be entirely inconsistent with the free and clear nature of the Sale Transaction and the intent to preserve the Debtors’ business as a going concern.

III. The Term Loan Lenders And The Debtors Have Acted In Good Faith At All Times.

37. Section 363(m) of the Bankruptcy Code protects an asset purchaser pursuant to a 363 sale from the risk of losing its interest in acquired assets to the extent a sale is reversed on appeal, so long as the purchaser purchased the assets in good faith. 11 U.S.C. § 363(m). “Good faith” is not defined in the Bankruptcy Code, but courts have determined that a purchaser illustrates its good faith through its integrity during the sales process. *See, e.g., In re Abbotts Dairies of Penn., Inc.*, 788 F.2d 143, 147 (3d Cir. 1986) (“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.” (citation omitted)); *In re Andy Frain Servs., Inc.*, 798 F.2d 1113, 1125 (7th Cir. 1986) (same). Here, the Ad Hoc Group and the other Prepetition Term Loan Lenders have been good faith participants in the Sale Transaction, going out of their way on multiple occasions to grant extensions to interested parties, all in pursuit of a value-maximizing outcome that now benefits the

Debtors' estates and the overwhelming majority of their stakeholders by ensuring the continuation of the Debtors' business as a going concern.

38. The MDL Plaintiffs' assertions of bad-faith and collusive conduct by the Debtors and the Prepetition Term Loan Lenders are wholly unsupported.⁶ The contention that the Debtors "manufactured" a default following the Delaware Chancery Court's "material adverse effect" finding in the Fresenius litigation is belied by the findings of that court, as affirmed by the Delaware Supreme Court. MDL Objection at 26, 30. Nor do the MDL Plaintiffs have any support for their claim that the Standstill Agreement and the Debtors' extensive prepetition and postpetition refinancing and sale efforts were all part of some vaguely defined scheme to obtain a "friendly, unbeatable credit bid[] to purchase all Debtor assets." *Id.* at 26. In fact, the Debtors and the Term Loan Lenders have acted in good faith at all times, and the record is replete with examples of "hard-fought, arm's-length negotiations" in their dealings. First Day Decl. ¶ 89. This Court has already found as much and should adhere to that determination. *See, e.g.*, [Docket No. 179 ¶ F] (finding DIP Loan was "negotiated in good faith and at arm's length"); [Docket No. 181 ¶ E] (finding that "[t]he Bidding Procedures were negotiated by the parties at arms' length and in good faith").

39. The MDL Plaintiffs' suggestion that the Debtors "manufactured a default" themselves, and that there was never an actual default under the Prepetition Credit Agreement, is conjured from thin air. The MDL Plaintiffs are in no position to downplay the significance of the Chancery Court's October 2018 finding (subsequently affirmed by the Delaware Supreme Court)

⁶ The MDL Plaintiffs' conflation of the issues and general misunderstanding of the procedural posture of these Cases resulted in them citing the wrong legal standard, opposing the Sale Transaction on the basis that it purportedly violates the "good faith" provisions of Section 1129(a)(3) of the Bankruptcy Code. *See* MDL Objection at 25-26. But Section 1129(a)(3) applies to sales pursuant to a Chapter 11 plan, *not* to sales pursuant to Section 363. In any event, MDL Plaintiffs' allegations of bad faith are meritless under any standard.

that the Debtors had experienced a “material adverse effect” and had failed to operate in the ordinary course of business.⁷ And, in any event, the MDL Plaintiffs concede that the Ad Hoc Group contacted the Debtors, beginning in November 2018, regarding an Event of Default premised on the “material adverse effect” finding. *See* MDL Objection at 26-27; *see also* First Day Decl. ¶ 88. This completely belies any notion that “[t]he Debtors manufactured their current situation,” MDL Objection at 30, that “the Debtors made the first move,” *id.* at 27, or that the Ad Hoc Group’s outreach to the Debtors to assert their rights under the Prepetition Credit Agreement was “a process begun by the Debtors,” *id.* at 26.

40. The MDL Plaintiffs’ arguments regarding the Standstill Agreement are similarly flawed. In exchange for their forbearance and willingness not to declare an Event of Default or accelerate the debt under the Prepetition Credit Agreement, the Prepetition Term Loan Lenders were compensated through certain fees and increased interest rates on the Term Loans. Although the MDL Plaintiffs complain generally about these fees, *id.* at 28-29, they do not provide any evidence that the Standstill Agreement and its amendments were the product of anything other than “hard-fought, arm’s-length negotiations,” First Day Decl. ¶ 89 – much less evidence to corroborate their claims that these amounts were intended to “artificially increas[e] the amount of secured debt,” MDL Objection at 26, or to “shield against an outside purchaser at a chapter 11 sale,” *id.* at 30. These baseless allegations ignore the meaningful benefits that Debtors received from the Standstill Agreement – namely, the Prepetition Term Loan Lenders’ forbearance afforded

⁷ Far from supporting MDL Plaintiffs’ argument, the statement from Debtors’ CFO that MDL Plaintiffs highlight merely *confirms* that the threat of default was real: “we felt that rather than kind of to litigate that and to have a chance of losing, it would be much better to enter into the standstill agreement such that we could have more constructive talks with our creditors and look for a solution and a refinancing solution, so that’s why we made that decision.” MDL Objection Ex. A at 24 (quoted in MDL Objection at 27).

the Debtors time to pursue new financing, improve their business and regulatory compliance, and market themselves for sale as a going concern.

41. The MDL Plaintiffs’ assertions that the Sale Transaction is the result of bad-faith conduct is baseless. On the contrary, the Sale Transaction is the result of nearly two years of hard-fought efforts on both sides to maximize value, pay the vast majority of the Debtors’ creditors in full, preserve the Debtors’ business as a going concern, and ensure the continued employment of thousands of workers. Such conduct is the epitome of “good faith.” The Sale Transaction should therefore be approved, and the Stalking Horse Purchaser should be granted the protections of Section 363(m).

IV. Delaying The Sale Transaction Would Result In Significant Harm.

42. Any delay in the closing of the Sale Transaction could prove fatal to the Debtors as a going concern. The Debtors are on the brink of serious, near-term liquidity constraints, and accordingly, any delay in the approval of the Sale Transaction has the potential to trigger profoundly negative real-world consequences that are likely to substantially diminish the value of the Debtors’ estates and put thousands of jobs at risk. The DIP Facility funding these Cases was simply not designed to fund the Debtors’ operations in Chapter 11 for an indefinite period of time.

43. Moreover, as the Committee acknowledged in its statement in support of the Sale Transaction, “derailing the Sale . . . could be particularly harmful to all stakeholders given that there is no current bid for the Debtors’ assets other than the credit bid,” and “[i]f the sale were derailed, the vast majority of unsecured creditors, which under the sale . . . will be paid in full by the Stalking Horse Purchaser, would get nothing.” [Docket No. 560 ¶ 3].

44. The Debtors’ viability as a going concern is dependent on the expeditious approval of the Sale Transaction so that the Stalking Horse Purchaser can commence in haste all of the necessary regulatory approvals required to consummate the Sale Transaction. It is to the detriment

of all interested parties for these Cases to compound those inevitable regulatory delays. This is just one more reason, among many, why the MDL Objection should be overruled and the Sale Transaction approved at this time.

CONCLUSION

For the foregoing reasons, the Ad Hoc Group respectfully requests that this Court overrule the MDL Objection and approve the Sale Transaction.

[Signature Page Follows]

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August 28, 2020

/s/ Robert F. Poppiti, Jr.

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