

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

In re:)	Chapter 11
)	
THE KRYSTAL COMPANY, <i>et al.</i> , ³)	Case No. 20-61065 (PWB)
)	
)	
Debtors.)	(Jointly Administered)
_____)	

BIDDING PROCEDURES

Set forth below are the bidding procedures (the “Bidding Procedures”) that will be employed in connection with a sale (the “Sale”) of substantially all of the assets (the “Assets”) of the above-captioned debtors and debtors in possession (the “Debtors”).

On January 19, 2020, the Debtors filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”). The Debtors are operating their businesses and managing their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

On March 3, 2020, the United States Bankruptcy Court for the Northern District of Georgia (the “Court”) entered an order [Docket No. *] (the “Bidding Procedures Order”), which, among other things, authorized the Debtors to solicit bids and approved Bidding Procedures to be employed by the Debtors in connection with the sale of all or substantially all of the Debtors’ assets, free and clear of all liens, claims, encumbrances, and other interests, to a potential stalking horse purchaser (a “Stalking Horse Purchaser”) or, absent a Stalking Horse Purchaser or in the event the Stalking Horse Purchaser is not the Successful Bidder, then to the Successful Bidder (as defined below), pursuant to a purchase agreement with such Successful Bidder.

ANY PARTY INTERESTED IN BIDDING ON THE ASSETS SHOULD CONTACT:

**PIPER SANDLER & CO.
2321 ROSECRANS AVENUE, SUITE 3200
EL SEGUNDO, CA 90245
ATTENTION: TERI STRATTON
E-MAIL: TERISTRATTON@PSC.COM**

³ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number, include: The Krystal Company (4140); Krystal Holdings, Inc. (5381); and K-Square Acquisition Co., LLC (8916). The location of the Debtors’ corporate headquarters and service address is: 1455 Lincoln Parkway, Suite 600, Dunwoody, Georgia 30346.

Summary of Important Dates and Deadlines

<u>Date</u>	<u>Deadline</u>
April 1, 2020	Selection of Stalking Horse Bidder, if applicable
April 7, 2020	Potential Assumption and Assignment Notice Deadline and Deadline to Provide Adequate Assurance Information for Stalking Horse Bidder, if applicable
April 7, 2010	Hearing to approve Stalking Horse Bidder, if applicable
April 27, 2020 at 4:00 p.m. (ET)	Cure Cost/Assignment Objection Deadline
May 5, 2020 at 5:00 p.m. (ET)	Bid Deadline
May 7, 2020 at 10:00 a.m. (ET)	Auction
May 8, 2020	Deadline to Serve Notice of Successful Bidder and Successful Bidder's Adequate Assurance Information
May 12, 2020	Sale Objection Deadline
May 13, 2020	Sale Hearing and Adequate Assurance Objection Deadline
No later than May 29, 2020	Closing Date

1. Assets to be Sold

The Sale shall be on an “as is, where is” basis and without representations or warranties of any kind, nature or description by the Debtors, their agents or estates or any other party, except to the extent set forth in the Purchase Agreement between the Debtors and the Successful Bidder. Except as otherwise provided in the Successful Bidder’s Purchase Agreement (as defined below), all of the Debtors’ right, title and interest in and to the Assets shall be sold free and clear of all liens, claims, interests, and encumbrances (collectively, the “Encumbrances”) pursuant to section 363(f) of the Bankruptcy Code, such Encumbrances to attach to the proceeds of the sale of the Assets, with the same validity and priority as existed immediately prior to such sale.

The available Assets are fully described in the data room maintained by the Debtors’ investment banking advisors, which is accessible on the terms described herein.

2. Participation Requirements

Any person or entity that wishes to participate in the bidding process for the Assets (each, a “Potential Bidder”) must first become a “Qualifying Bidder”. To become a Qualifying Bidder (and thus being able to conduct due diligence and gain access to the Debtors’ confidential electronic data room concerning the Assets (the “Data Room”)), a Potential Bidder must submit to the Debtors and their advisors:

- (a) documentation identifying the interested party, its principals, and the representatives thereof who are authorized to appear and act on their behalf for all purposes regarding the contemplated transaction;
- (b) an executed confidentiality agreement in form and substance reasonably satisfactory to the Debtors, which by its terms will inure to the benefit of the Successful Bidder;
- (c) a statement and other factual support demonstrating to the Debtors’ reasonable satisfaction that the interested party has a bona fide interest in consummating a sale transaction; and
- (d) sufficient information to allow the Debtors to determine that the Potential Bidder (i) has, or can obtain, the financial wherewithal and any required internal corporate, legal or other authorizations to close a sale transaction, including, but not limited to, current audited financial statements of the interested party (or such other form of financial disclosure acceptable to the Debtors) and (ii) can provide adequate assurance of future performance under any executory contracts and unexpired leases to be assumed by the Debtors and assigned to such bidder, pursuant to section 365 of the Bankruptcy Code, in connection with the Sale.

Each Potential Bidder shall comply with all reasonable requests for information by the Debtors, or their advisors regarding the ability of such Potential Bidder, as applicable, to consummate its contemplated transaction. The Debtors shall provide regular updates to the Consultation Parties (as defined below) on the Potential Bidders and shall specifically identify to the Consultation Parties any Potential Bidder who submitted the foregoing items (a) to (d) and was not qualified as a Qualifying Bidder and the Debtors’ basis for such determination.

Notwithstanding anything to the contrary herein, and for the avoidance of doubt, for all purposes under the Bidding Procedures: any designated Stalking Horse Purchaser shall be considered a Qualifying Bidder. In addition, the administrative agent under any postpetition credit facility (the “DIP Agent”) and the Administrative Agent under the Debtors’ pre-petition senior secured credit facility (the “First Lien Prepetition Agent”) shall also be considered Qualifying Bidders.

3. Bankruptcy Court Jurisdiction

Any Potential Bidders and Qualifying Bidders shall: (a) be deemed to have waived any right to a jury trial in connection with, and consented and submitted to the exclusive jurisdiction of the Court over, any actions or proceedings arising from or relating the Bidding Procedures, the Sale, the Auction (as defined below) and the construction and enforcement of the contemplated transaction documents of such parties, (b) bring any such action or proceeding in the Court, and (c) be deemed to have consented to the Court entering a final judgment determining any such action or proceeding and that such final judgment in any such action or proceeding, including all appeals, shall be conclusive and may be enforced in other jurisdictions (including any foreign jurisdictions) by suit on the judgment or in any other manner provided by applicable law.

4. Due Diligence

The Debtors will provide any Qualifying Bidder with reasonable access to the Data Room and any other additional information that the Debtors believe to be reasonable and appropriate under the circumstances. The Debtors will provide, in the Data Room, a form of asset purchase agreement for the Sale of Assets (the "Form APA"). All additional due diligence requests shall be directed to:

**PIPER SANDLER & CO.
2321 ROSECRANS AVENUE, SUITE 3200
EL SEGUNDO, CA 90245
ATTENTION: TERI STRATTON
E-MAIL: TERISTRATTON@PSC.COM**

The due diligence period shall extend through and including the Bid Deadline (as defined below). The Debtors may, but shall not be obligated to, in their sole discretion, furnish any due diligence information after the Bid Deadline.

The Debtors reserve the right, in their reasonable discretion, to withhold or limit access to any due diligence information that the Debtors determine is business-sensitive or otherwise not appropriate for disclosure to a Qualifying Bidder; provided that the Debtors shall notify the Consultation Parties of any decision to withhold such information. Notwithstanding any prepetition limitations, including, without limitation, any non-disclosure, confidentiality or similar provisions relating to any due diligence information, the Debtors and their estates shall be authorized to provide due diligence information to Qualifying Bidders provided that such Qualifying Bidders have delivered an executed confidentiality agreement in form and substance acceptable to the Debtors. The Debtors and their estates are not responsible for, and shall have no liability with respect to, any information obtained by, or provided to, any Qualifying Bidders in connection with the Bidding Procedures and the Sale.

5. Stalking Horse Purchaser

The Debtors shall endeavor to identify a Stalking Horse Purchaser and shall have the ability to select a Stalking Horse Purchaser, after consultation with the Consultation Parties, upon any terms and conditions they deem beneficial to the sale process. The Debtors shall have no obligation to select a Stalking Horse Purchaser if, in their business judgment, it will be detrimental to the sale process.

Pursuant to the Bidding Procedures Order, the Debtors, after consultation with the Consultation Parties, are authorized to enter into a Purchase Agreement with a Stalking Horse Purchaser (a “Stalking Horse Agreement”). In the event that the Debtors enter into a Stalking Horse Agreement, within one (1) day after executing the Stalking Horse Agreement, the Debtors will file with the Court and upload to the Data Room, a notice that includes the following: (a) the identification of the Stalking Horse Purchaser; (b) a copy of the Stalking Horse Agreement; (c) the purchase price provided for in the Stalking Horse Agreement (the “Stalking Horse Purchase Price”); (d) the amount of the deposit paid by the Stalking Horse Purchaser; and (e) the amount of any Break-Up Fee or any Expense Reimbursement (each, as defined in the Bidding Procedures Order) and seek expedited approval of the Stalking Horse Agreement and any Break-Up Fee or Expense Reimbursement provided for therein. Nothing herein or in the Bidding Procedures Order authorizes the Debtors to pay, any Break-Up Fee or Expense Reimbursement, and approval of, and authorization for the Debtors to pay, any such Break-Up Fee and Expense Reimbursement, shall be subject to further order of the Court.

6. Bid Requirements

To be deemed a “Qualifying Bid,” a bid must be received from a Qualifying Bidder on or before the Bid Deadline and satisfy each of the following requirements, as determined by the Debtors in consultation with the Consultation Parties (each, a “Bid Requirement”):

- a. be in writing;
- b. fully disclose the identity of the Qualifying Bidder (and any other party participating in the bid) and provide the contact information of the specific person(s) whom the Debtors or their advisors should contact in the event that the Debtors have any questions or wish to discuss the bid submitted by the Qualifying Bidder;
- c. set forth the purchase price to be paid by such Qualifying Bidder;
- d. not propose payment in any form other than cash (except as otherwise expressly set forth in these Bidding Procedures); provided, however, that the DIP Agent and the First Lien Pre-Petition Agent shall be entitled to credit bid all or a portion of their outstanding secured obligations pursuant to section 363(k) of the Bankruptcy Code with respect to any assets on which they hold liens (a “Credit Bid”); but without prejudice to any right of the Debtors or any party in interest to challenge the claims and liens of the First Lien Pre-Petition Agent

(as such rights, if any, may be limited by challenge provisions in any order or orders of the Court, including but not limited to orders authorizing the Debtors to use cash collateral or obtain post-petition financing.

- e. be accompanied by a clean, executed copy of a purchase agreement (the “Purchase Agreement”) and a redline of the Purchase Agreement marked to reflect any proposed amendments and modifications to the Form APA or Stalking Horse Agreement, to the extent a Stalking Horse Purchaser is designated, and the applicable schedules and exhibits;
- f. state that such Qualifying Bidder’s offer is formal, binding and unconditional and is irrevocable until two (2) business days after the closing of the Sale;
- g. state that such Qualifying Bidder is financially capable of consummating the transactions contemplated by the bid and provide written evidence in support thereof;
- h. contain such financial and other information to allow the Debtors to make a reasonable determination as to the Qualifying Bidder’s financial and other capabilities to close the transactions contemplated by the proposal, including, without limitation, such financial and other information supporting the Qualifying Bidder’s ability to comply with the requirements of adequate assurance of future performance under section 365(f)(2)(B) and, if applicable, section 365(b)(3) of the Bankruptcy Code, including the Qualifying Bidder’s financial wherewithal and willingness to perform under any contracts and leases that are assumed and assigned to the Qualifying Bidder (the “Adequate Assurance Information”). The Adequate Assurance Information shall include (1) the specific name of the entity to whom any real property lease will be assigned, if not the Qualifying Bidder, and the proposed name under which the assignee intends to operate the restaurant if not Krystal; (2) the proposed assignee’s intended use for the space if different from the present restaurant operation; (3) if available, audited financial statements and annual reports of the Qualifying Bidder and any other assignee for the past three years, including all supplements or amendments thereto; (4) if available, cash flow projections for the proposed assignee; (5) evidence of the proposed assignee’s restaurant experience; and (6) a contact person for the proposed assignee whom non-Debtor parties may contact directly in connection with adequate assurance of future performance. Should the Qualifying Bidder be a newly formed entity (a “Newco”), the Adequate Assurance Information should also include when such Newco was formed, how it will be financed together with evidence of firm financial commitments, and identify what (if any) credit enhancements may be available to guarantee the obligations under any real property lease to be assigned; (the Stalking Horse Purchaser, if any, and any Qualifying Bidder (other than with respect to the Credit Bid) shall provide to the Debtors the Adequate Assurance Information on or before the Bid Deadline). The Debtors will provide the Adequate Assurance Information by email delivery (or by overnight mail) to all counterparties for real property leases to be assumed or assumed and assigned and all counterparties for executory contract to be assumed and assigned (provided that, solely with respect to counterparties to executory contracts, such counterparties have requested in writing of the Debtors to receive such information) in the

case of the Stalking Horse Purchaser no later than April 7, 2020 and in the case of the Successful Bidder within one day of the conclusion of the Auction **unless the counterparty has provided its email address to the Debtors at lshermohammed@kslaw.com in which the information will be provided by email at the conclusion of the Auction;**

- i. a commitment to close the transaction contemplated by the proposal by no later than May 29, 2020;
- j. not request or entitle such Qualifying Bidder to any break-up fee, termination fee, expense reimbursement or similar type of fee or payment (unless the Qualifying Bidder is a Stalking Horse Purchaser);
- k. in the event that there is a Stalking Horse Purchaser, the aggregate consideration proposed by the Qualifying Bidder must equal or exceed the sum of the amount of (A) any Stalking Horse Purchase Price, (B) any break-up fee approved by the Court, (C) any Expense Reimbursement approved by the Court, and (D) \$250,000; *provided, further*, that any Credit Bid shall, solely to the extent there is insufficient cash in the Debtors' estates at the time of the Auction to pay any Court approved applicable Break-Up Fee and Expense Reimbursement due under the Stalking Horse Agreement entered into by the Debtors in accordance with the procedures set forth herein, also include a cash component sufficient to pay, and earmarked exclusively for the payment of, any such Court approved applicable Break-Up Fee and Expense Reimbursement;
- l. not contain any contingencies of any kind, including, without limitation, contingencies related to financing, internal approval or due diligence;
- m. contain a written acknowledgement and representation that the Qualifying Bidder (i) has had an opportunity to conduct any and all due diligence regarding the Assets, (ii) has relied solely upon its own independent review, investigation and/or inspection of any documents and other information in making its Qualifying Bid, and (iii) did not rely upon any written or oral statements, representations, promises, warranties or guaranties whatsoever, whether express, implied, by operation of law or otherwise, regarding the Assets, or the completeness of any documents or other information provided in connection with the Bidding Procedures and the Sale;
- n. provides for the Qualifying Bidder to serve as a backup bidder (the "Back-Up Bidder") if the Qualifying Bidder's bid is the next highest or best bid (the "Back-Up Bid") after the Successful Bid;
- o. includes written evidence of authorization and approval from the Qualifying Bidder's board of directors (or comparable governing body) with respect to the submission, execution, and delivery of the subject purchase agreement; and

- p. provides a good faith cash deposit (the “Deposit”) in an amount equal to the greater of \$1,000,000 and ten percent (10%) of the purchase price provided for in the proposal (or such additional amount as may be determined by the Debtors in their reasonable discretion and in consultation with the Consultation Parties) to be deposited, prior to the Bid Deadline, with an escrow agent selected by the Debtors (the “Escrow Agent”) pursuant to the escrow agreement to be provided by the Debtors to the Qualifying Bidders (the “Escrow Agreement”).

The Debtors reserve the right, in consultation with the Consultation Parties, to negotiate with any Qualifying Bidder in advance of the Auction to cure any deficiencies in a bid that is not initially deemed a Qualifying Bid.

Each Qualifying Bidder submitting a bid shall be deemed to: (a) acknowledge and represent that it is bound by all of the terms and conditions of the Bidding Procedures and (b) have waived the right to pursue a substantial contribution claim under section 503 of the Bankruptcy Code related in any way to the submission of its bid, the Bidding Procedures, and the Sale.

7. Bid Deadline

A Qualifying Bidder, other than any Stalking Horse Purchaser, the DIP Agent and the First Lien Prepetition Agent that desires to make a bid shall deliver a written and electronic copy of its bid in both PDF and MS-WORD format to the Notice Parties and Consultation Parties so as to be received on or before May 5, 2020 at 5:00 p.m. (ET) (the “Bid Deadline”); provided that the Debtors, after consulting with the Consultation Parties and with the consent of the DIP Agent (if any) and the First Lien Prepetition Agent, may extend the Bid Deadline without further order of the Court. To the extent that the Bid Deadline is extended for all parties, the Debtors shall file a notice on the docket of these chapter 11 cases indicating the same. If the DIP Agent and/or the First Lien Prepetition Agent intends to credit bid at the Auction, they shall provide the Debtors a “Notice of Intention to Credit Bid” by 5:00 p.m. on the Business Day prior to the commencement of the Auction, which notice shall include a marked copy of the Purchase Agreement or Form APA (provided that such DIP Agent and/or the First Lien Prepetition Agent will have the same rights as any other Qualifying Bidder to amend such terms during the Auction). Other than as set forth herein, **any party that does not submit a bid by the Bid Deadline will not be allowed to (a) submit any offer after the Bid Deadline, or (b) participate in the Auction.**

8. Evaluation of Qualifying Bids

The Debtors will deliver, promptly upon receipt thereof, copies of all bids from Qualifying Bidders to each of the Consultation Parties. The Debtors, in consultation with the Consultation Parties, shall make a determination regarding whether a timely submitted bid from a Qualifying Bidder is a Qualifying Bid, and shall notify all Qualifying Bidders whether their bids have been determined to be a Qualifying Bid by no later than two (2) days prior to the Auction Date. In the event that a bid is determined not to be a Qualifying Bid, the Qualifying Bidder shall be notified by the Debtors and, provided with an opportunity to modify its bid to increase the purchase price

or otherwise improve the terms of its bid for the Debtors so that such bid becomes a Qualifying Bid.

At or prior to the Auction, the Debtors shall determine, in consultation with the Consultation Parties, which of the Qualifying Bids, at such time, is the highest or best bid for purposes of constituting the opening bid of the Auction (the “Baseline Bid” and the Qualifying Bidder submitting the Baseline Bid, the “Baseline Bidder”), and shall promptly notify any Stalking Horse Purchaser and all Qualifying Bidders with Qualifying Bids of the Baseline Bid.

9. No Qualifying Bids

If there is a Stalking Horse Purchaser Qualifying Bid, but no timely Qualifying Bids other than any Stalking Horse Purchaser’s Qualifying Bid and no Notice of Intention to Credit Bid are submitted on or before the Bid Deadline, the Debtors shall not hold an Auction and shall request at the Sale Hearing that the Stalking Horse Purchaser be deemed the “Successful Bidder” and that the Court approve the Stalking Horse Agreement and the transactions contemplated thereunder.

10. Auction

If the Debtors timely receive one or more Qualifying Bids other than any Stalking Horse Purchaser’s Qualifying Bid or a Notice of Intention to Credit Bid, then the Debtors shall conduct an auction (the “Auction”), which shall take place at 10:00 a.m. prevailing Eastern Time on May 7, 2020, at the office of King & Spalding, LLP, 1180 Peachtree Street NE, Atlanta, Georgia 30309, or such other date, time and location as shall be timely communicated to all entities entitled to attend the Auction.

Following the Auction, the Debtors will determine, in consultation with the Consultation Parties, which Qualifying Bid is the highest or best bid for the Assets, which will be determined by considering, among other things, the following non-binding factors: (a) the terms of the Purchase Agreement and any Stalking Horse Agreement requested by each bidder; (b) the extent to which such terms are likely to delay closing of the Sale and the cost to the Debtors and their estates of such modifications or delay; (c) the total consideration to be received by the Debtors and their estates; (d) the transaction structure and execution risk, including conditions to, timing of and certainty of closing, termination provisions, availability of financing and financial wherewithal to meet all commitments, and required governmental or other approval; (e) the net benefit to the Debtors’ estates, taking into account any Break-Up Fee and any Expense Reimbursement provided for in any applicable Stalking Horse Agreement; (f) the impact on employees, trade creditors and landlords; (g) any benefit to the Debtors’ bankruptcy estates from any assumption of liabilities to the Debtors, including any liabilities under any pension plan; (h) the assumption of the sponsorship of all, any, or a portion of any pension plan; and (i) any other factors the Debtors may reasonably deem relevant.

The Auction, which shall be recorded and transcribed, shall run in accordance with the following procedures:

- (a) only the Stalking Horse Purchaser, the other Qualifying Bidders with Qualifying Bids (collectively, the “Auction Bidders”), the Debtors, the Consultation Parties, and the advisors to each of the foregoing shall be permitted to attend the Auction in person;
- (b) only the Auction Bidders will be entitled to make subsequent bids at the Auction;
- (c) the Auction Bidders shall confirm that they have not engaged in any collusion with respect to the Bidding Procedures, the Auction or the Sale;
- (d) the Debtors and their professional advisors shall direct and preside over the Auction;
- (e) bidding shall commence at the amount of the Baseline Bid, and the Auction Bidders may submit successive bids in increments of at least \$250,000, provided that: (i) each such successive bid must be a Qualifying Bid; (ii) any Stalking Horse Purchaser shall receive a credit, when bidding, in the amount of any Break-Up Fee and any Expense Reimbursement; and (iii) the Debtors, in consultation with the Consultation Parties, shall retain the right to modify the bid increment requirements at the Auction;
- (f) the Auction may include individual negotiations with any of the Auction Bidders, but all bids shall be made on the record and in the presence of all of the Auction Bidders;
- (g) all material terms of the bid that is deemed to be the highest or best bid for each round of bidding shall be fully disclosed to the Auction Bidders, and the Debtors shall use reasonable efforts to clarify any and all questions that the Auction Bidders may have regarding the Debtors’ announcement of the then-current highest or best bid;
- (h) the Debtors and their professional advisors, in consultation with the Consultation Parties, may employ and announce at the Auction additional procedural rules that are reasonable under the circumstances (e.g., the amount of time allotted to make subsequent bids) for conducting the Auction, provided that such rules are (i) not inconsistent with the Bankruptcy Code, the Bankruptcy Rules, the Local Rules, or any applicable order of the Court entered in connection with these chapter 11 cases, including, without limitation, the Bidding Procedures Order, and (ii) disclosed to the Auction Bidders;
- (i) each Auction Bidder shall (i) be deemed to have waived any right to a jury trial in connection with, and consented and submitted to the exclusive jurisdiction of the Court over, any actions or proceedings arising from or relating the Bidding

Procedures, the Sale, the Auction and the construction and enforcement of the contemplated transaction documents of the Auction Bidders, (ii) bring any such action or proceeding in the Court, and (iii) be deemed to have consented to the Court entering a final judgment determining any such action or proceeding and that such final judgment in any such action or proceeding, including all appeals, shall be conclusive and may be enforced in other jurisdictions (including any foreign jurisdictions) by suit on the judgment or in any other manner provided by applicable law;

- (j) Auction Bidders shall have the right to make additional modifications to their respective Purchase Agreements or any Stalking Horse Agreement, as applicable, in conjunction with each Qualifying Bid submitted in each round of bidding during the Auction, provided that (i) any such modifications on an aggregate basis and viewed in whole, shall not, in the Debtors' discretion, in consultation with the Consultation Parties, be less favorable to the Debtors and their estates than the terms of the Auction Bidders' respective Purchase Agreements or any Stalking Horse Agreement, as applicable, and (ii) each Qualifying Bid shall constitute an irrevocable offer and shall be binding on the Auction Bidder submitting such bid until such party shall have submitted a subsequent Qualifying Bid at the Auction or the conclusion of the Sale Hearing, whichever occurs sooner, unless such bid is selected as the Successful Bid or the Back-Up Bid, which shall remain binding as provided for herein;
- (k) the Debtors and the Consultation Parties shall have the right to request any additional financial information that will allow the Debtors and the Consultation Parties to make a reasonable determination as to an Auction Bidder's financial and other capabilities to consummate the transactions contemplated by their proposal or any Stalking Horse Agreement, as applicable, as may be amended during the Auction, and any further information that the Debtors may believe is reasonably necessary to clarify and evaluate any bid made by an Auction Bidder during the Auction;
- (l) upon the conclusion of the Auction, the Debtors shall determine, in consultation with the Consultation Parties, and subject to Court approval, the offer or offers for the Assets that is the highest or best from among the Qualifying Bids submitted at the Auction, which may be a Stalking Horse Agreement (the "Successful Bid"). In making this decision, the Debtors shall consider, in consultation with the Consultation Parties, the amount of the purchase price, the likelihood of the bidder's ability to close a transaction and the timing thereof, the nature and impact of any variances from the form Purchase Agreement requested by each bidder, and the net benefit to the Debtors' estates. The bidder submitting such Successful Bid, which may be the Stalking Horse Purchaser, shall become the "Successful Bidder," and shall have such rights and responsibilities of the purchaser as set forth in the subject Purchase Agreement, as applicable. The Debtors may, in consultation with

the Consultation Parties, designate Back-Up Bids (and the corresponding Back-Up Bidders) to purchase the Assets in the event that the Successful Bidder does not close the Sale;

- (m) upon the conclusion of the Auction, the Successful Bidder shall complete and execute all agreements, contracts, instruments and other documents evidencing and containing the terms and conditions upon which the Successful Bid was made.

THE SUCCESSFUL BID AND ANY BACK-UP BIDS SHALL CONSTITUTE AN IRREVOCABLE OFFER AND BE BINDING ON THE SUCCESSFUL BIDDER AND THE BACK-UP BIDDER, RESPECTIVELY, FROM THE TIME THE BID IS SUBMITTED UNTIL TWO (2) BUSINESS DAYS AFTER THE SALE HAS CLOSED. EACH QUALIFYING BID THAT IS NOT THE SUCCESSFUL BID OR BACK-UP BID SHALL BE DEEMED WITHDRAWN AND TERMINATED AT THE CONCLUSION OF THE SALE HEARING.

11. Sale Hearing

The Successful Bid and any Back-Up Bid (or if no Qualifying Bid other than that of any Stalking Horse Purchaser is received, then the Stalking Horse Agreement) will be subject to approval by the Court. The Sale Hearing shall take place, subject to the Court's availability, on May 13, 2020 at 11:00 a.m. (ET). The Sale Hearing may be adjourned by the Debtors from time to time without further notice to creditors or other parties in interest other than by announcement of the adjournment in open court on the date scheduled for the Sale Hearing or by filing a hearing agenda or notice on the docket of the Debtors' chapter 11 cases.

At the Sale Hearing, the Debtors will seek entry of an order that, among other things: (i) authorizes and approves the Sale to the Successful Bidder, pursuant to the terms and conditions set forth in the Stalking Horse Agreement or the Purchase Agreement executed by the Successful Bidder, as applicable; and (ii) finding that the Stalking Horse Purchaser or Successful Bidder, as applicable, is a good faith purchaser pursuant to section 363(m) of the Bankruptcy Code.

12. Back-Up Bidder

Notwithstanding any of the foregoing, in the event that the Successful Bidder fails to close the Sale by May 29, 2020 (or such date as may be extended by the Debtors with the agreement of the Back Up Bidder, DIP Agent (if any) and the First Lien Prepetition Agent), the Back-Up Bid will be deemed to be the Successful Bid, the Back-Up Bidder will be deemed to be the Successful Bidder, and the Debtors will be authorized, but not directed, to close the Sale to the Back-Up Bidder subject to the terms of the Back-Up Bid without the need for further order of the Court and without the need for further notice to any interested parties.

13. Return of Deposits

All Deposits shall be returned to each bidder not selected by the Debtors as the Successful Bidder and the Back-up Bidder, no later than five (5) business days following the closing of the Sale. The deposit of the Successful Bidder or, if the Sale is closed with the Back-Up Bidder, the deposit of the Back-Up Bidder, shall be applied to the purchase price for the Sale. If the Successful Bidder (or, if the Sale is to be closed with the Back-Up Bidder, then the Back-Up Bidder) fails to consummate the Sale because of a breach or failure to perform on the part of such bidder, then, subject to the terms of the Purchase Agreement or any Stalking Horse Agreement, as applicable, the Debtors and their estates shall be entitled to retain the Deposit of the Successful Bidder (or, if the Sale is to be closed with the Back-Up Bidder, then the Back-Up Bidder) as part of the damages resulting to the Debtors and their estates for such breach or failure to perform.

14. Notice and Consultation Parties

- (a) The term “Notice Parties” as used in these Bidding Procedures shall mean: (i) the Debtors (Attn: Jonathan Tibus, Chief Restructuring Officer; jtibus@alvarezandmarsal.com); (ii) lead counsel to the Debtors, King & Spalding LLP (Attn: Sarah R. Borders; sborders@kslaw.com); and (iii) investment banking advisor to the Debtors, Piper Sandler & Co. (Attn: Teri Stratton teri.stratton@psc.com).
- (b) The term “Consultation Parties” as used in these Bidding Procedures shall mean: (i) counsel to the First Lien Prepetition Agent, Morgan, Lewis & Bockius LLP (Attn: Sula R. Fiszman, and Jennifer Feldsher; sula.fiszman@morganlewis.com, jennifer.feldsher@morganlewis.com); (ii) counsel to the Official Committee of Unsecured Creditors, Kelley Drye & Warren, LLP, 101 Park Avenue, New York, New York 10178, Attn: Eric R. Wilson (ewilson@kelleydrye.com), Maeghan J. McLoughlin (mmcloughlin@kelleydrye.com), and Kayci G. Hines (khines@kelleydrye.com) (the “Creditors’ Committee”); and (iii) counsel for the DIP Agent, if any.

For the avoidance of doubt, any consultation rights provided to the Consultation Parties by these Bidding Procedures shall not limit the Debtors’ discretion in any way and shall not include the right to veto any decision made by the Debtors in the exercise of their business judgment.

In the event that any Consultation Party or any member of the Creditors’ Committee or an affiliate of any of the foregoing submits a bid that is a Qualifying Bid, any obligation of the Debtors to consult with the bidding party established under these Bidding Procedures will be waived, discharged and released without further action; provided that the bidding party will have the same rights as any other Qualifying Bidder set forth above. If a member of the Creditors’ Committee submits a Qualifying Bid, the Creditors’ Committee will continue to have consultation rights as set forth in these Bidding Procedures; provided that the Creditors’ Committee shall exclude such member from any discussions or deliberations regarding the sale of the Assets and shall not provide any information regarding the sale of the Assets to such member. If the DIP Agent and First Lien

Prepetition Agent determines at the Auction not to proceed as a bidder and informs the Debtors of such determination in writing, their rights as a Consultation Party shall be immediately reinstated.

15. Reservation of Rights

Notwithstanding any of the foregoing, the Debtors and their estates reserve the right to, after consultation with the Consultation Parties, modify these Bidding Procedures at or prior to the Auction, including, without limitation, to allow for bidding on only a portion of the Assets and not all of them, modify bidding increments, waive terms and conditions set forth herein with respect to any or all potential bidders (including, without limitation, the Bid Requirements), impose additional terms and conditions with respect to any or all Potential Bidders, adjourn or cancel the Auction at or prior to the Auction, and adjourn the Sale Hearing; provided, however, that any changes to the dates and deadlines set forth herein shall (i) comply with any milestones contained in any order for the use of cash collateral or DIP financing entered by the Bankruptcy Court in these cases or (ii) be made with the consent of the DIP Agent and First Lien Prepetition Agent.