

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

In re:

Gorham Paper and Tissue, LLC, *et al.*,

Debtors.<sup>1</sup>

Chapter 11

Case No. 20-12814 (KBO)

(Jointly Administered)

**BID PROCEDURES**

In the exercise of their good faith reasonable business judgment, the above-captioned debtors and debtors in possession (the “Debtors”) have executed an Asset Purchase Agreement (the “Stalking Horse Agreement”) with Gorham Acquisition, LLC or its assignee (the “Stalking Horse Bidder”), pursuant to which (i) the Stalking Horse Bidder proposes to (a) purchase, acquire, and take assignment and delivery of the Assets (as defined in the Stalking Horse Agreement) and (b) assume certain Assumed Liabilities (as defined in the Stalking Horse Agreement), and (ii) the Debtors propose to, upon the termination of the Stalking Horse Agreement, (a) pay the Stalking Horse Bidder an aggregate stalking-horse bidder fee in an amount equal to **\$300,000.00**, in consideration of the Stalking Horse Bidder having expended considerable time and expense in connection with the Stalking Horse Agreement and the negotiation thereof, and the identification and quantification of assets to be included in the Assets (the “Break-Up Fee”) and (b) reimburse the Stalking Horse Bidder in the dollar amount of up to **\$100,000.00**, which amount is limited to legal fees and hard costs incurred after execution of Stalking Horse Agreement (the “Expense Reimbursement”), in each case, in accordance with the terms and conditions of the Stalking Horse Agreement and the Bid Procedures Order (as defined below).

On [\_\_\_\_], 2020, 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 Assets. Subject to the entry of the Sale Order, the Sale may be implemented pursuant to the terms and conditions of the Stalking Horse Agreement, 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 will determine, in consultation with the Committee, the Zohar Funds, and ARK II the highest or otherwise best price for the sale of the Assets.

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<sup>1</sup> The last four digits of Gorham Paper and Tissue, LLC’s federal taxpayer identification number are 6533. See 11 U.S.C. § 342(c)(1). The last four digits of White Mountain Tissue, LLC’s federal taxpayer identification number are 0078. See id. The principal place of business for Gorham Paper and Tissue, LLC and White Mountain Tissue, LLC is 72 Cascade Flats, Gorham, New Hampshire, 03581.

**A. Important Dates**

- **November 20, 2020 at 4:00 p.m.**: Deadline for Debtors to file and serve Cure and Possible Assumption and Assignment Notices to All Contract Counterparties
- **November 23, 2020 at 4:00 p.m.**: Deadlines for the Debtors to file and serve the Sale Notice
- **December 4, 2020 at 4:00 p.m.**: Assumed Contract Objection Deadline as to Cure and Possible Assumption and Assignment Notices to All Contract Counterparties
- **December 9, 2020 at 4:00 p.m.**: Deadline to file and serve written Sale Objections to relief requested at Sale Hearing (except for any objection that arises at the Auction)
- **December 11, 2020 at 4:00 p.m.**: Bid Deadline (deadline to submit Bids)
- **December 12, 2020 at 12:00 p.m.**: Deadline for the Debtors to file and serve the Supplemental Assumption Notice (if any)
- **December 14, 2020 at 4:00 p.m.**: Deadline (i) for Stalking Horse Bidder to file and serve notice of additional Assumed Contracts, and (ii) for any other Qualified Bidder to file and serve notice of adding or removing any Assumed Contract(s) relating to Cure and Possible Assumption and Assignment Notices and Supplemental Assumption Notice
- **December 15, 2020 at 10:00 a.m.**: Auction to be conducted
- **December 16, 2020 at 4:00 p.m.**: Deadline for the Debtors to file notice of Successful Bidder with the Court
- **December 17, 2020 at 4:00 p.m.**: Supplemental Assumed Contract Objection Deadline as to Supplemental Assumption Notice (if any)
- **December 17, 2020 at 4:00 p.m.**: Deadline to file written Auction Objections to events at the Auction, including as to selection of the Successful Bidder and Back-Up Bidder
- **December 18, 2020 at 11:00 a.m.**: Court to conduct Sale Hearing

**B. Marketing Process**

**1. Contact Parties**

The Debtors and their advisors have conducted and will conduct an extensive marketing process. B. Riley has a list of “Contact Parties” who will receive a copy of the “Information Package.” The list of Contact Parties will encompass those parties who (i) have executed NDAs with the Debtors, and (ii) 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 Debtors or B. Riley may distribute to each Contact Party an “Information Package,” which is comprised of:

- (a) a cover letter;
- (b) a copy of these Bid Procedures; and
- (d) a copy of the Stalking Horse Agreement.

## **2. Access to Diligence Materials**

To receive due diligence information, including full access to the Debtors’ electronic data room (the “Data Room”) and to additional non-public information regarding the Debtors (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 (a) counsel for the Debtors, Bernstein Shur Sawyer & Nelson, PA, Attn: Sam Anderson (sanderson@bernsteinshur.com) and Adam Prescott (aprescott@bernsteinshur.com) and Polsinelli PC, 222 Delaware Avenue, Suite 1101, Wilmington, Delaware 19801, Attn: Christopher Ward (cward@polsinelli.com) and Shanti M. Katona (skatona@polsinelli.com), and (b) B. Riley Securities, Attn: Matthew Spain (mspain@brileyfin.com) and Dominic Riley (driley@brileyfin.com) (collectively, the “Bid Recipients”):

(i) an executed and signed “Acceptable Confidentiality Agreement,” which, as defined in the Stalking Horse Agreement, shall mean a confidentiality agreement that contains provisions that are not less favorable in the aggregate to the Debtors than those contained in the confidentiality agreement executed between the Debtors and the Stalking Horse Bidder, to the extent not already executed; and

(ii) evidence by the Potential Bidder of its financial capacity to close a proposed transaction, which shall include financial statements of the Potential Bidder, including current audited and unaudited financial statements or other financial information of the Potential Bidder, or, if the Potential Bidder is an entity formed for the purpose of acquiring the Assets, current audited and unaudited financial statements or other financial information of the Potential Bidder’s equity holder or other financial backer, or such other form of financial disclosure and evidence acceptable to the Debtors and their advisors in their reasonable discretion taking into account the Debtors’ fiduciary duties, demonstrating such Potential Bidder’s ability to close the proposed transaction, to finance going concern operations to the extent contemplated, and to provide adequate assurance of future performance to counterparties to any executory contracts and unexpired leases to be assumed by the Potential Bidder.

The Debtors, in consultation with the Committee, the Zohar Funds, and ARK II will assess the adequacy of the evidence of its financial capacity and notify the Potential Bidder within one (1) business day of receipt of the Preliminary Bid whether such Potential Bidder has submitted acceptable Preliminary Bid Documents so that the Potential Bidder may proceed to conduct due diligence and ultimately submit a Bid and participate in the Auction, as applicable. All due diligence requests must be e-mailed to the Bid Recipients.

The Debtors and B. Riley will coordinate all reasonable requests from Bidders for additional information and due diligence access. The Debtors may decline to provide such information to Bidders who, in the Debtors' business judgment, have not established, or who have raised doubt, that such Bidder intends in good faith or has the capacity to consummate a sale transaction of all or substantially all of the Debtors' Assets (a "Transaction").

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.

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 Preliminary Interest Investor 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 B. Riley 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 Committee, the Zohar Funds, and ARK II to satisfy each of the following conditions:

- (i) Stalking Horse Bidder. Stalking Horse Bidder shall be deemed to be a Qualified Bidder and shall not be required to make any Deposit other than as contemplated in the Stalking Horse Agreement (the "Stalking Horse Bid"), provided, however, that the Stalking Horse Bidder shall be subject to all other requirements applicable to any Qualified Bidder in the Bid Procedures Order and the Bid Procedures.
- (ii) Form and Contents. All Bids shall be in the form of an 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 purchase of the Assets, which letter states and includes:
  - (A) Marked Agreement. Each Bid must state the Bidder offers to purchase some or all of the Assets upon the terms and conditions set forth in an executed and attached complete asset purchase agreement prepared and executed by the Bidder (an electronic version in Word format and blacklined against the Stalking Horse Agreement), together with its exhibits and schedules, including terms relating to price and the time of closing (the "Proposed Agreement");

- (B) Assets. Each Bid must clearly specify the Assets that are included in the bid and state that such Qualified Bidder offers to purchase those Assets included in the Stalking Horse Agreement upon substantially the same terms as, or terms more favorable to the Debtors and their estates than, the terms set forth in the applicable Stalking Horse Agreement (it being understood that Bids for only some of the Assets may be permitted only if the combined consideration exceeds the Purchase Price of the Stalking Horse Agreement).
- (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, for example (the “Purchase Price”);
- (D) Overbid. Each Bid or combination of Bids (a) must propose a purchase price equal to or greater than the sum of (i) the value of the Stalking Horse Agreement, as determined by the Debtors in consultation with the Creditors’ Committee; and (ii) an initial overbid of at least **\$450,000.00** (the “Initial Overbid”), consisting of the sum of the Break-Up Fee, the Expense Reimbursement and **\$50,000.00**, and (b) must obligate the Bidder(s) to pay, to the extent provided in the Agreement, all amounts which the Stalking Horse Bidder under the Agreement has agreed to pay, including any assumed liabilities (as set forth in the Stalking Horse Agreement).
- (E) Committed Financing. To the extent that a Bid is not accompanied by evidence of the Bidder’s capacity to consummate the Transaction set forth in its Bid with cash on hand, each Qualified Bid must include evidence of committed financing that demonstrates that the Bidder has received sufficient debt 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, or the sufficiency of, financing or any internal approval, or on the outcome or review of due diligence, 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;
- (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;
- (J) Substantial Contribution Waiver. Each Bid must contain an express waiver, effective upon submission of the Qualified Bid, of any substantial contribution claims by the Bidder;
- (K) Expenses; Disclaimer to Fees. Each 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, no Potential Bidder (other than the Stalking Horse Bidder) will be permitted to request, nor 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;
- (L) Consummation. Each Bid must include a statement that the Bidder is prepared to consummate the transaction, upon entry of an order of this Court approving the Sale to the Successful Bidder (the "Sale Order");
- (M) Irrevocability. Each Bid (other than the Stalking Horse Bid) must include a statement that, in the event the Bidder becomes 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 sale of the Assets;
- (N) Actual Value. The Bid must state the proposed actual value of such Bidder's bid to the Debtors' estate;
- (O) Assumed Contracts and Leases. Each Bid must identify any and all executory contracts and unexpired leases of the Debtors that the Qualified Bidder wishes to be assumed pursuant to a Sale. A Bid must specify that such Bidder will be responsible for any cure costs associated with such assumption, and include a good faith estimate of such cure costs (which estimate shall be provided by the Debtors);
- (P) Employees. Each Bid must detail the treatment of the employees of the Debtors.

- (Q) Liquidated Damages. Each Bid must provide for liquidated damages in the event of the Qualified Bidder's breach of, or failure to perform under, the Proposed Agreement equal to the amount of the Deposit; and
- (R) Consent to Jurisdiction. Each Bidder must submit to the jurisdiction of the 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.
- (iii) Same or Better Terms. Each Bid shall be based on the Stalking Horse Bid and must exceed the Stalking Horse Bid in relation to the Stalking Horse Assets by the Minimum Overbid (as that term is defined in the Bid Procedures Order). Each Bid must be on terms that are not more burdensome than the terms of the Stalking Horse Bid, as determined by the Debtors, and considering, among other factors, the scope and manner of the proposed Transaction. Each Bid must include duly executed, non-contingent transaction documents necessary to effectuate the Sale and a copy of the Stalking Horse APA clearly marked to show all changes requested by the Potential Bidder, including those related to the respective Purchase Price and Assets to be acquired by such Bidder, as well as all other material documents integral to such Bid.
- (iv) Corporate Authority. Written evidence reasonably acceptable to the Debtors demonstrating appropriate corporate authorization to consummate the proposed transaction; 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.
- (v) Adequate Amounts. All Bids must provide for adequate working capital financing to finance going concern operations to the extent contemplated, and to provide adequate assurance of future performance to counterparties to any executory contracts and unexpired leases to be assumed by the Bidder.
- (vi) Proof of Financial Ability to Perform. All Bidders must provide written evidence the Debtors reasonably conclude demonstrates the Bidder has the necessary financial ability to close the Transaction and provide adequate assurance of future performance under all contracts to be assumed and assigned in such Transaction. Such information should include, inter alia, the following: (a) contact names and numbers for verification of financing sources; (b) written evidence of the Bidder's internal resources and proof of any debt or equity funding commitments that are needed to close the transaction; (c) the Bidder's current financial statements (audited if they exist); (d) a description of the Bidder's pro forma capital structure; and (e) any such other form of financial disclosure or credit-quality support information or enhancement reasonably acceptable to the Debtors demonstrating such Bidder has the ability to close the transaction; provided, however, the Debtors shall determine in their reasonable discretion, in consultation with the Committee, the Zohar Funds, and ARK

II whether the written evidence of such financial wherewithal is reasonably acceptable, and shall not unreasonably withhold acceptance of a Bidder's financial qualifications.

- (vii) As Is, Where Is. The sale of the 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 Proposed Agreement of the Successful Bidder.
- (viii) Free and Clear. Except as otherwise provided in the Proposed Agreement, all of the Debtors' right, title, and interest in and to the Assets to be acquired shall be sold free and clear of all liens, claims, charges, security interests, restrictions, and other encumbrances of any kind or nature thereon and there against (collectively, the "Transferred Liens"), with such Transferred Liens to attach to the proceeds of the sale.
- (ix) Good Faith Deposit. Each Bid must be accompanied by a cash deposit in the amount of **\$1,000,000.00** to be held in an escrow account to be identified and established by the Debtors (the "Deposit").
- (x) 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 Bidding Procedures and to refrain from submitting a Qualified Bid or seeking to reopen the Auction after conclusion of the Auction.
- (xi) 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, in consultation with the Committee, the Zohar Funds, and ARK II but in no event later than December 30, 2020.

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 Committee, the Zohar Funds, and ARK II that such Bid meets the requirements above for a Bid as set forth in these Bid Procedures.

**Bid Deadline**. The Debtors and B. Riley must receive a Bid in writing, on or before **December 11, 2020 at 4:00 p.m. (prevailing Eastern Time)** or such later date as may be agreed to by the Debtors (the "Bid Deadline") in accordance with the Bid Procedures Order and the terms herein. Bids must be emailed to the Bid Recipient by the Bid Deadline to be considered.

The Debtors, after consultation with the Committee, the Zohar Funds, and ARK II shall notify any Potential Bidder whether or not it is a Qualified Bidder within one (1) business day of receipt of the Bid, and if a Potential Bidder is determined not to be a Qualified Bidder, the Debtors shall state the basis for that determination in the notification to the Potential Bidder. In the event that such Bid is determined not to be a Qualifying Bid, the Bidder shall have until the commencement of the Auction to modify its bid to increase the purchase price or otherwise improve or correct the terms of the Bid for the Debtors in order to comply with the requirements of Qualified Bids as set forth herein; provided that any Qualifying Bid may be improved during the Auction only 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 prior to the commencement of the Auction. 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, in consultation with the Committee, the Zohar Funds, and ARK II may discuss, negotiate, or seek clarification of any Qualified Bid from a Qualified Bidder. Without the prior written consent of the Debtors, 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 Bidding Procedures; provided that any Qualified Bid may be improved at the Auction as set forth in the Bidding Procedures. Any improved Qualified Bid must continue to comply with the requirements for Qualified Bids set forth in the Bid Procedures. The Stalking Horse shall be deemed a Qualified Bidder at all times, and the Stalking Horse Agreement shall be a Qualified Bid.

Prior to the Auction, the Debtors and their advisors will evaluate Qualified Bids and identify the Qualified Bid that is, in the Debtors' reasonable business judgment and in consultation with the Creditors' Committee, 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 with Qualifying Bids of the Baseline Bid no later than the opening of the Auction.

#### **4. Credit Bid**

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 Agreement. To the fullest extent permissible under Bankruptcy Code § 363(k), the Stalking Horse Bidder, in its capacity as an affiliate or assignee of the DIP Facility Lender, may credit bid, as a Qualified Bid or subsequent Bid, in its sole and absolute discretion, any portion and up to the entire amount of Obligations owing under the DIP Loan Documents (as defined in the DIP Order) in conjunction with the Sale of the Assets pursuant to the terms of the Stalking Horse Agreement, plus the Break-Up Fee and Expense Reimbursement (the "Credit Bid"). In the event the amount of the Credit Bid exceeds the total amount of the highest bids for the Assets subject to the Credit Bid, such Credit Bid will be deemed the highest and best bid and such Credit Bid may be accepted by the Debtors and be presented for approval to the Court. The Committee reserves the right to object to the submission of a credit bid by any Bidder other than the Stalking Horse Bidder.

#### **C. Auction**

If one or more Qualified Bid is received by the Bid Deadline (other than the Stalking Horse Agreement), the Debtors, in consultation with the Committee, Zohar Funds, and ARK II will conduct the Auction to determine the highest and best Qualified Bid or combination of Qualified Bids. This determination shall 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: (a) the amount and nature of the consideration; (b) the proposed assumption of any liabilities and/or executory contracts or unexpired leases, if any, and the excluded assets and/or executory contracts or

unexpired leases, if any; (c) the ability of the Qualified Bidder to close the proposed Transaction and the conditions related thereto, and the timing thereof; (d) whether the Bid is a bulk bid or a partial bid for only some of the Debtors' assets; (e) the proposed closing date and the likelihood, extent and impact of any potential delays in closing; (f) any purchase price adjustments; (g) the impact of the transaction on any actual or potential litigation; (h) the net after-tax consideration to be received by the Debtors' estates; (i) the tax consequences of such Qualified Bid; and (j) 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 Agreement may be deemed the Successful Bid, and, subject to the termination rights under the Stalking Horse Agreement, the Debtors will pursue entry of an order by the Bankruptcy Court authorizing the Sale to the Stalking Horse Bidder as soon as practicable.

### **Procedures for Auction**

The Auction, if necessary, will take place via Zoom on **December 15, 2020 at 10:00 a.m. (prevailing Eastern Time)** or such later time on such day or other place as the Debtors shall notify all Bidders who have submitted Qualified Bids; provided, however, that the Auction may not be postponed or adjourned beyond December 16, 2020 without the consent of the Stalking Horse Bidder. Only the Stalking Horse Bidder and such other Qualified Bidders will be entitled to make any Bids at the Auction.

In addition to the Debtors, B. Riley, the Stalking Horse Bidder, any Qualified Bidder, and their respective counsel, the following parties and/or their counsel shall be entitled to attend the Auction without the need for any further action or notice to the Debtors: (i) the U.S. Trustee, (ii) the Committee, (iii) Zohar Funds, (iv) ARK II, (v) Bank of New Hampshire, (vi) PPAS, (vii) Ankura, (viii) Zohar III, (ix) the Union, and (x) the State of New Hampshire Department of Environmental Services. Any other parties seeking to attend the Auction shall provide notice of their intent to attend to the Debtors not less than two (2) business days prior to the Auction. The Debtors shall provide to all known attendees instructions for attending the Auction via Zoom not less than 24 hours prior to the Auction.

#### **1. 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 commencement of the Auction, the Debtors, in consultation with the Committee, Zohar Funds, and ARK II shall determine which of the Qualified Bids, at such time, is the highest and best bid for purposes of constituting the opening bid of the Auction, and shall promptly notify the Stalking Horse Purchaser and all Qualified Bidders with Qualified Bids of the Baseline Bid. The Baseline Bid may be comprised of any combination of the Assets, and the Debtors may determine that different Baseline Bids exist for different groupings of the Assets. The Debtors, in consultation with the Committee, Zohar Funds, and ARK II shall have the discretion to determine how to proceed when auctioning the Assets in groupings that do not include all of Debtors' Assets so as to maximize the value of the Assets.

All Bids made after the start of the Auction shall be Overbids (as defined below), and shall be made and received on an open basis, and all material terms of each Overbid shall be fully disclosed to all Bidders who have submitted Qualified Bids. The Debtors shall maintain a transcript of all bids made and announced at the Auction, including the Starting Bid and all Overbids.

## **2. Terms of Overbids**

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

### **(1) Minimum Overbid Increment**

Any Overbid after the Baseline Bid shall be made in increments of at least **\$50,000.00** (the “Minimum Overbid Increment”). Additional consideration in excess of the amount set forth in the Starting Bid may include cash and/or non-cash consideration; provided, however that the value for such non-cash consideration shall be determined by the Debtors in their reasonable business judgment, in consultation with the Committee, Zohar Funds, and ARK II.

### **(2) 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 (other than the Stalking Horse Bidder) shall be required to make a representation at the end of the Auction that it will provide any additional deposit necessary so that its Deposit is equal to the amount of ten percent (10%) of the cash purchase price contained in the Successful Bid. 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 Agreement or a previously submitted Modified Purchase 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 accept a higher Overbid.

To the extent not previously provided (which shall be determined by the Debtors in consultation with the Committee, the Zohar Funds, and ARK II), 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.

### **(3) Announcing Overbids**

The Debtors, after consulting with the Committee, the Zohar Funds, and ARK II shall announce at the Auction the material terms of each Overbid, the basis for calculating the total consideration offered in each such Overbid and the resulting benefit to the Debtors’ estates based on, inter alia, the Bid Assessment Criteria.

**(4) 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 or bidding (including it has no agreement with any other Bidder or Qualified Bidder to control the price) and (ii) its Qualified Bid is the good-faith *bona fide* offer and it intends to consummate the proposed transaction if selected as the Successful Bidder.

**(5) Backup Bidder**

Notwithstanding anything in the Bid Procedures to the contrary, if an Auction is conducted, the party(ies) with the second highest or second best Qualified Bid (or combination of Qualified Bids) at the Auction, as determined by the Debtors, in consultation with the Committee, Zohar Funds, and ARK II in the exercise of their business judgment, shall be required to serve as backup bidder (the “Backup Bidder”). The Backup Bidder shall be required to keep its initial Bid(s) (or if the Backup Bidder submitted one or more Overbids at the Auction, its final Overbid) (the “Backup Bid”) open and irrevocable until two (2) business days after the closing of the sale of the Assets (the “Outside Backup Date”). 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 Backup Bidder to be the new Successful Bidder, and the Debtors will be authorized, but not required, to consummate the transaction with the Backup Bidder without further order of the Bankruptcy Court. In such case, 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 Backup Bidder shall be no later than the later of fourteen (14) days after the date the Debtors provide notice to the Backup Bidder the Successful Bidder failed to consummate a sale and the Debtors desire to consummate the transaction with the Backup Bidder. The deposit, if any, of the Backup 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 Backup Bidder, the Backup Bidder’s deposit shall be held until the closing of the transaction with the Backup Bidder. In the event the Debtors fail to consummate a transaction with the Backup Bidder as described above, the Backup 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 Backup Bidder. Notwithstanding anything to the contrary herein, and for the avoidance of doubt, the Stalking Horse Bidder shall have the right, but not the obligation, to serve as a Backup Bidder in the event that the Stalking Horse Bidder is not selected as the Successful Bidder.

**3. 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 Agreement, the Auction, or the construction and enforcement of any Transaction Documents.

**4. Rights of the Stalking Horse Bidder to Credit Bid**

Pursuant to Bankruptcy Code § 363(k), the Stalking Horse Bidder, in its capacity as the affiliate or assignee of the DIP Facility Lender, shall have the right to submit a Credit Bid as set forth in the Stalking Horse Agreement and at the Auction as set forth herein and in the Bid Procedures Order. All Credit Bids by the Stalking Horse Bidder shall be treated as the equivalent as a cash bid of the same amount and no Credit Bid of the Stalking Horse Bidder shall be considered inferior to a cash bid in any respect as a result of the bid being a Credit Bid.

## **5. Closing the Auction**

The Auction shall continue until there is only one 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 with the Committee, the Zohar Funds, and ARK II is the highest and best Qualified Bid(s) at the Auction (the “Successful Bid” and the Bidder(s) submitting such Successful Bid, the “Successful Bidder”). In making this decision, the Debtors, in consultation with their financial and legal advisors, and with the Committee, the Zohar Funds, and ARK II 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 in consultation with the Committee, the Zohar Funds, and ARK II 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.

The Auction shall close when the Successful Bidder submits fully executed sale and transaction documents memorializing the terms of the Successful Bid.

On or before **December 16, 2020 at 4:00 p.m.**, the Debtors shall file with the Bankruptcy Court notice of the Successful Bid and Successful Bidder.

The Debtors shall not consider any Bids submitted after the conclusion of the Auction.

## **6. Break-Up Fee and Expense Reimbursement**

As set forth in the Bid Procedures Order, the Breakup Fee and the Expense Reimbursement shall be paid at the closing of a Sale Transaction to a Successful Bidder, other than the Stalking Horse Bidder.

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

On or prior to **November 20, 2020**, the Debtors shall serve notice via overnight delivery and e-mail (if an e-mail address is known) on all non-Debtor Assumed Contract Counterparties to any Assumed Contract (the “Cure and Possible Assumption and Assignment Notice Parties”) that may be assumed by the Debtors and assigned to the Stalking Horse Bidder or other Successful Bidder after the results of the Auction, a copy of which is attached to the Bid Procedures Order as **Exhibit 3**. The Cure and Possible Assumption and Assignment Notice shall inform 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 Contract Objection Deadline (as defined below).

Objections, if any, to the cure amount set forth on the Cure and Possible Assumption and Assignment Notice or the possible assignment of its executory contract or unexpired lease, including as to adequate assurance of performance (each, an “Assumed Contract Objection”) **must** (i) be in writing, (ii) comply with the applicable provisions of the Bankruptcy Rules and the Local Rules, (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 the following parties so as to be actually received on or before **December 4, 2020 at 4:00 p.m. (prevailing Eastern Time)** (the “Assumed Contract Objection Deadline”): (a) counsel for the Debtors, Bernstein Shur Sawyer & Nelson, PA, Attn: Sam Anderson (sanderson@bernsteinshur.com) and Adam Prescott (aprescott@bernsteinshur.com) and Polsinelli PC, 222 Delaware Avenue, Suite 1101, Wilmington, Delaware 19801, Attn: Christopher Ward (cward@polsinelli.com) and Shanti M. Katona (skatona@polsinelli.com), (b) counsel for the DIP Facility Lender and Stalking Horse Bidder, (i) Pack Law, P.A., 51 Northeast 24th St. Ste 108, Miami, FL 33137 (Attn: Joseph Pack) or joe@packlaw.com, and (ii) Stevens & Lee, P.C., 919 North Market St., Ste 1300, Wilmington, DE 19801 (Attn: Joseph Huston, Jr. and David Giattino) or jhh@stevenslee.com and dwg@stevenslee.com; (c) counsel to the Zohar Funds, Zohar III, ARK II, PPAS, and Ankura, (i) Gibson Dunn & Crutcher, LLP, 1801 California Street, Denver, CO 80202 (Attn: Monica K. Loseman) or mloseman@gibsondunn.com, and (ii) Young Conaway Stargatt & Taylor, LLP, Rodney Square, 1000 North King Street, Wilmington, DE 19801 (Attn: Michael Nestor, Ryan Bartley and Shane Reil) or mnestor@ycst.com, rbartley@ycst.com and sreil@ycst.com, and (iii) Cole Schotz P.C., 1325 Avenue of the Americas, 19th Floor, New York, NY 10019 (Attn: Daniel F.X. Geoghan) or dgeoghan@coleschotz.com, and (iv) Cole Schotz P.C., 500 Delaware Ave, Ste 1410, Wilmington, DE 19801 (Attn: Norman L. Pernick) or npernick@coleschotz.com; (d) counsel to BONH, (i) Murtha Cullina, LLP, 99 High St., 20th Floor, Boston, MA 02110-2320 (Attn: Daniel C. Cohn and Jonathan M. Horne) or dcohn@murthalaw.com and jhorne@murthalaw.com and (ii) Gellert Scali Busenkell & Brown, 1201 N. Orange St., Suite 300, Wilmington, DE 19801 (Attn: Michael Busenkell) or mbusenkell@gsbblaw.com; (e) counsel for the Creditors’ Committee, (i) Reed Smith LLP, Three Logan Square, 1717 Arch Street, Ste. 3100, Philadelphia, PA 19103 (Attn: Claudia Springer and Derek Baker) or cspringer@reedsmith.com and dbaker@reedsmith.com, and (ii) Reed Smith LLP, 1201 Market St, Ste 1500, Wilmington, DE 19801 (Attn: Mark Eckard) or meckard@reedsmith.com; (f) counsel for the Union, (i) Cohen, Weiss and Simon LLP, 900 Third Ave., 21<sup>st</sup> Fl, New York, NY 10036 (Attn: Richard M. Seltzer and Melissa S. Woods) or rseltzer@cwsny.com or mwoods@cwsny.com, and (ii) Law Office of Susan Kaufman, 919 N. Market St., Ste. 460, Wilmington, DE 19801 (Attn: Susan E. Kaufman) or skaufman@skaufmanlaw.com; and (g) counsel to the State of New Hampshire Department of Environmental Services, Andrew Helman, Murray Plumb & Murray, 75 Pearl Street, P.O. Box 9785, Portland, ME 04104-5085 or Ahelman@mpmlaw.com (collectively, the “Notice Parties”). Service to the Notice Parties via e-mail shall constitute adequate service unless otherwise stated in the Bid Procedures Order or the Bid Procedures.

If, after the Cure and Possible Assumption and Assignment Notice is served, the Stalking Horse Bidder or another Qualified Bidder identifies any other executory contracts and/or unexpired leases that they desire to assume and assign in connection with the Sale that are not on the Cure and Possible Assumption and Assignment Notice, the Debtors shall, if necessary, file and serve via overnight delivery and e-mail (if an e-mail address is known) a supplemental list no later than **December 12, 2020, at 12:00 p.m.**, that (i) identifies previously omitted executory contracts or unexpired leases or (ii) modifies the previously stated cure amount for any Assumed Contract on the Cure and Possible Assumption and Assignment Notice, on each of the effected Assumed Contract Counterparties and their counsel of record, if any (each, a “Supplemental Assumption Notice”). Any objections to the Supplemental Assumption Notice, including as to the cure amounts or adequate assurance of performance by the Stalking Horse Bidder or any Qualified Bidder, **must** (i) be in writing, (ii) comply with the applicable provisions of the Bankruptcy Rules and the Local Rules, (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 the Notice Parties as to be actually received on or before **December 17, 2020 at 4:00 p.m. (prevailing Eastern Time)**.

To the extent of any further alterations to the Cure and Possible Assumption and Assignment Notices and Supplemental Assumption Notice, on or before **December 14, 2020, at 4:00 p.m. (prevailing Eastern Time)**, (i) the Stalking Horse Bidder shall file and serve notice of any additional Assumed Contracts, or (ii) any other Qualified Bidder except for the Stalking Horse Bidder shall file and serve notice of addition or removal of any other Assumed Contract(s), in a form substantially similar to the form attached hereto as **Exhibit 3** (the “Final Assumed Contract Notice”). The foregoing service shall be via overnight delivery and e-mail (if an e-mail address is known). Any objection of an Assumed Contract Counterparty to the Final Assumed Contract Notice **must** (i) be in writing, (ii) comply with the applicable provisions of the Bankruptcy Rules and the Local Rules, (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 the Notice Parties as to be actually received **on or before five (5) business days after service of the Final Assumed Contract Notice**.

Where an Assumed Contract Counterparty to an Assumed Contract files a timely Assumed Contract Objection asserting a higher cure amount than the amount listed in the Cure and Possible Assumption and Assignment Notice, or Supplemental Assumption Notice, or objecting to the possible assignment of that Assumed Contract Counterparty’s executory contract or unexpired lease, and the parties are unable to consensually resolve the dispute, the amount to be paid under Bankruptcy Code § 365 (if any) or, as the case may be, the Debtors’ ability to assign the executory contract or unexpired lease to the Successful Bidder shall be determined at the Sale Hearing.

#### **E. Sale Hearing**

The Sale Hearing shall be conducted on **December 18, 2020 at 11:00 a.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.

Objections, if any, to the relief requested in the Motion relating to the Sale, other than regarding events at the Auction (each, a “Sale Objection”) must: (i) be in writing, (ii) comply with the Bankruptcy Rules and the Local Rules, (iii) be filed with the Court, and (iv) be served so it is actually received no later than **4:00 p.m. (prevailing Eastern Time) on December 9, 2020** by the Notice Parties.

Objections, if any, regarding any events at the Auction, including as to the selection of the Successful Bidder (each, an “Auction Objection”) must: (i) be in writing, (ii) comply with the Bankruptcy Rules and the Local Rules, (iii) be filed with the Court, and (iv) be served so it is actually received no later than **4:00 p.m. (prevailing Eastern Time) on December 17, 2020** by the Notice Parties.

A party’s failure to timely file a Sale Objection or Auction Objection shall forever bar the assertion, at the applicable Sale Hearing or otherwise, of any objection to the relief requested in the Motion, or to the consummation of the Sale and the performance of the related transactions, including the transfer of the Assets to the applicable Successful Bidder(s), free and clear of all liens, claims, interests, and encumbrances pursuant to § 363(f) of the Bankruptcy Code, and shall be deemed to be a “consent” for purposes of § 363(f) of the Bankruptcy Code.

#### **F. Return of Good Faith Deposits**

The Deposits of all Qualified Bidders shall be held in one or more interest-bearing escrow accounts by the Debtors, but shall not become property of the Debtors’ estates absent further order of the Court. The Deposits of any Qualified Bidder that is neither the Successful Bidder nor the Backup Bidder shall be returned to such Qualified Bidder not later than two (2) business days after the Sale Hearing. The Deposit of the Backup Bidder shall be returned to the Backup Bidder two (2) business days after the closing of the Sale with the Successful Bidder. Upon the return of the Deposits, their respective owners shall receive any and all interest that will have accrued thereon. If the Successful Bidder timely closes the winning transaction, its Deposit shall be credited towards its purchase price.

#### **G. Reservation of Rights**

The Debtors, in consultation with the Committee, the Zohar Funds, and ARK II reserve their rights to modify these Bid Procedures in their reasonable business judgment in any manner that will best promote the goals of the bidding process or impose, at or prior to the Auction, subject to the rights of the DIP Lender and Stalking Horse Bidder, all to the extent permitted by the Bankruptcy Code, Bankruptcy Rules, and any other applicable law. Notwithstanding the foregoing and subject in all respects to the Stalking Horse Agreement, the Debtors may not impair or modify the Stalking Horse Bidder’s rights and obligations under the Stalking Horse Agreement or the Stalking Horse Bidder’s right to credit bid at the Auction.