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**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEW JERSEY**

In re:

NEW ENGLAND MOTOR FREIGHT, INC.,  
et al.,  
  
Debtors.<sup>1</sup>

Chapter 11

Case No. 19-12809 (JKS)

(Jointly Administered)

**BIDDING PROCEDURES**

By motion dated March 25, 2019 (the “**Motion**”) filed by the above-captioned debtors and debtors in possession (collectively, the “**Debtors**”) in the above-captioned cases (the “**Cases**”) [Docket No. 335],<sup>2</sup> the Debtors sought approval of, among other things, the procedures through which they will determine the highest or otherwise best price for the sale of substantially all the assets owned by Debtors’ Eastern Freight Ways, Inc., (“**Eastern**”) Carrier Industries, Inc.’s (“**Carrier**”) and certain rolling stock owned by New England Motor Freight, Inc. (“**NEMF**”) (collectively, the “**Assets**”) to one or more successful bidders.

On April 8, 2019, the United States Bankruptcy Court for the District of New Jersey (the “**Court**”) entered an order (the “**Bidding Procedures Order**”) which, among other

<sup>1</sup> The Debtors in these chapter 11 cases and the last four digits of each Debtor’s taxpayer identification number are as follows: New England Motor Freight, Inc. (7697); Eastern Freight Ways, Inc. (3461); NEMF World Transport, Inc. (2777); Apex Logistics, Inc. (5347); Jans Leasing Corp. (9009); Carrier Industries, Inc. (9223); Myar, LLC (4357); MyJon, LLC (7305); Hollywood Avenue Solar, LLC (2206); United Express Solar, LLC (1126); and NEMF Logistics, LLC (4666).

<sup>2</sup> Capitalized terms used but not defined herein shall have the meanings ascribed to them in the Motion.

things, (i) authorized the Debtors to determine and select the highest or otherwise best bid for the Assets (the “**Successful Bid**”) through the competitive bidding and auction process set forth below (the “**Bidding Procedures**”); and (ii) scheduled **May 16, 2019 at \_\_\_\_:\_\_\_\_.m. (Prevailing Eastern time)**, as the date and time that a hearing before the Court to consider the Debtors’ request for approval of the Successful Bid will be held (the “**Sale Hearing**”). As set forth below and in the Motion, the Debtors reserve the right to modify the Bidding Procedures in accordance with the Bidding Procedures Order.

The sale will be subject to competitive bidding as set forth herein, and approval of the Court pursuant to sections 105, 363 and 365 of title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.* (the “**Bankruptcy Code**”).

**Additional information regarding the Assets can be obtained by contacting Mark Karbiner, Senior Director, Phoenix Capital Resources, 110 Commons Court, Chadds Ford, PA 19317 (mkarbiner@phoenixcapitalresources.com).**

## **I. Assets to be Sold Free and Clear**

The Assets generally constitute substantially all of the assets owned by Debtors, Eastern and Carrier as well as certain rolling stock owned by NEMF. The Debtors are offering bidders the opportunity to bid on substantially all of the Assets (the “**Sale**”). All of the rights, title and interest of the Debtors in and to the Assets to be acquired will be sold free and clear of all pledges, liens, security interest, encumbrances, claims, charges, options, and interests thereon and there against (collectively, “**Claims and Interests**”) to the extent permitted by sections 363 and 365 of the Bankruptcy Code, and other applicable law, such Claims and Interests to attach to the net proceeds of the Sale of such Assets, with the same validity and priority as existed immediately prior to the Sale.

The Sale of the Assets shall be on an “as is, where is” basis and without representations or warranties of any kind, nature or description by the Debtors, their agents or estates, except to the extent set forth in the purchase agreement between the Debtors and the Successful Bidder.

Each bidder shall be deemed to acknowledge and represent that it has had an opportunity to inspect and examine the Assets prior to making its offer, that it has relied solely upon its own independent review, investigation and/or inspection of any documents in making its bid, and that it 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 information provided in connection with the bidding process, in each case except as expressly stated in the marked purchase agreement.

## **II. Due Diligence**

The Debtors will afford interested parties that deliver an executed confidentiality agreement in form and substance reasonably acceptable to the Debtors and, at the Debtor’s request, financial information that demonstrates such party’s ability to submit a bid that complies with the requirements herein and the Bidding Procedures Order (each, a “**Potential**

**Bidder**”), the opportunity to conduct reasonable due diligence, subject to parameters and restrictions that the Debtors may establish in their discretion. The due diligence period shall extend through and include the Bid Deadline (as defined below).

Neither the Debtors nor its advisors shall be obligated to furnish any information of any kind whatsoever relating to the Assets, assumed liabilities, the Debtors’ contracts, or the Debtors to any person or entity (i) that is not a Potential Bidder or Qualified Bidder (as defined below), (ii) that is not in compliance with the requirements set forth herein and in the Bidding Procedures Order or (iii) after the Bid Deadline (as defined below).<sup>3</sup>

### **III. Bid Deadline**

All Potential Bidders must deliver bids for the Assets (each a **“Bid”**), so as to be received on or before 4:00 p.m. (prevailing Eastern Time), on May 9, 2019 (the **“Bid Deadline”**), unless otherwise extended by the Debtors, to counsel for the Debtors, Gibbons P.C., One Gateway Center, Newark, N.J. 07102 (Attn: Karen Giannelli, Esq. and Lawrence A. Goldman, Esq. ([kgiannelli@gibbonslaw.com](mailto:kgiannelli@gibbonslaw.com), [lgoldman@gibbonslaw.com](mailto:lgoldman@gibbonslaw.com)) and (b) the Debtors, c/o Phoenix Capital Resources, 110 Commons Court, Chadds Ford, PA 19137 (Attn: Mark Karbiner ([mkarbiner@phoenixcapitalresources.com](mailto:mkarbiner@phoenixcapitalresources.com)) (collectively, the **“Notice Parties”**). The Debtors will timely provide counsel to the Official Committee of Unsecured Creditors, copies of all Bids received prior to the Bid Deadline.

### **IV. Qualified Bidder Requirement**

Notwithstanding that it may contain terms and conditions which may be inconsistent with those set forth herein, in the event the Debtors, in the Debtors’ discretion elect to accept a Stalking Horse Bid, for purposes of these Bidding Procedures, any Stalking Horse Bid shall be deemed to constitute a Qualified Bid and any Stalking Horse Bidder shall be deemed to be a Qualified Bidder.

In order to qualify to submit a Qualified Bid (as defined below) and participate in the Auction, each Potential Bidder must: (i) deliver to the Notice Parties financial information evidencing the Potential Bidder’s ability to perform under its proposed transaction to the sole satisfaction of the Debtors’ professionals, including the ability to (a) close the Sale within the time period prescribed in the Bidding Procedures Order and Template Form Purchase Agreement and (b) provide adequate assurance of future performance to counterparties to Executory Contracts and Unexpired Leases to be assumed and assigned to the Potential Bidder. In addition, if the Potential Bidder is an entity formed in whole or part for the purpose of acquiring all or part of the Assets, the Potential Bidder must deliver to the Notice Parties relevant financial information as may be requested by the Debtors, in the Debtors’ Discretion, regarding the major equity holders or financial sponsors of such entity evidencing, to the reasonable satisfaction of the Debtors after consultation with the Committee, the Potential

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<sup>3</sup> To the extent any party executed a confidentiality agreement prior to the entry of an order approving these Bidding Procedures, such party does not need to execute another confidentiality agreement in order to comply with the Bidding Procedures or to become a Qualified Bidder.

Bidder's ability to (x) close the Sale within the time period prescribed in the Bidding Procedures Order and Template Form Purchase Agreement and (y) provide adequate assurance of future performance to counterparties to Executory Contracts and Unexpired Leases to be assumed and assigned to the Potential Bidder.

The Debtors, in their discretion, shall determine whether a Potential Bidder has complied with the foregoing requirements and has qualified to submit a Qualified Bid and participate in the Auction (each such Potential Bidder, a "**Qualified Bidder**"), and the Debtors shall provide prompt written notice of their determination to any such Potential Bidder, with copies to counsel to the Committee.

The Debtors, in their discretion, may request additional information from a Potential Bidder or Qualified Bidder at any time prior to the Auction Date in order to evaluate such bidder's ability to bid at the Auction over and above its initial offer in its Qualified Bid, consummate the Sale, and fulfill its obligations in connection therewith. Each Potential Bidder or Qualified Bidder shall be obligated to provide such additional information within two (2) business days of receiving such requests as a condition to participating further in the Auction and Sale processes; provided, however, that additional information requests made by the Debtors during the Auction in connection with a Qualified Bidder's ability to continue to bid at the Auction over and above its initial offer in its Qualified Bid shall, in the Debtors' discretion, be satisfied prior to such Qualified Bidder submitting any further bids at the Auction.

#### **V. Requirements of a Qualified Bid**

To constitute a Qualified Bid, a bid must, among other things:

- A. Be made in writing;
- B. Be submitted prior to the Bid Deadline;
- C. Be a bid for all or substantially all of the Assets of both Eastern and Carrier;
- D. Designate a list of the executory contracts and unexpired leases with respect to which the Potential Bidder seeks assignment from the Debtors;
- E. Include a binding, definitive and fully executed asset purchase agreement which shall be in form and substance substantially similar to the Form Template Asset Purchase Agreement or Stalking Horse Asset Purchase Agreement, as applicable, and which shall be marked to reflect only those changes required as a condition of such Qualified Bidder's closing the Sale; provided, however, such asset purchase agreement shall not request or entitle such Potential Bidder to any break-up fee, expense reimbursement, or similar type of payment. An asset purchase agreement, together with its schedules and exhibits, submitted in accordance with these Bidding Procedures shall be referred to herein as a "**Qualified Bidder Purchase Agreement**";

- F. Provide that the purchase price shall be paid in full in cash at the closing of the Sale;
- G. Provide a good faith cash deposit (the “**Good Faith Deposit**”) equal to 10% of the Bidder’s proposed purchase price. The Good Faith Deposit shall be paid to such Bidder’s counsel trust account and counsel for such Bidder shall represent in such Bidder’s cover letter or in an email sent to Debtors’ counsel that it is in receipt of the Good Faith Deposit and will hold same in accordance with the Bidding Procedures. The Debtors reserve the right to increase, decrease or waive the Good Faith Deposit for one or more Qualified Bidders in their discretion or to accept an alternative form of consideration in lieu of a Good Faith Deposit. At the conclusion of the Auction, the Good Faith Deposit of the Successful Bidder shall be transferred from counsel’s trust account to a trust account at Gibbons P.C. in accordance with directions to be provided to such Successful Bidder, together with any additional amount such that the final Good Faith Deposit reflects ten (10%) percent of its final bid at Auction. With respect to the Back-Up Bidder, its Good Faith Deposit shall continue to be held by its counsel in a trust account until such time as the Debtors notify the Back-Up Bidder or its counsel that the Good Faith Deposit can be returned to the Back-Up Bidder. To the extent the Successful Bidder fails to close or otherwise breaches its agreement and the Debtors notify the Back-Up Bidder that they intend to proceed with the final Qualified Bid submitted at Auction by the Back-Up Bidder, the Good Faith Deposit of the Back-Up Bidder shall be transferred to a trust account at Gibbons P.C. in accordance with directions to be provided, together with any additional amounts such that the final Good Faith Deposit reflects ten (10) percent of the Back-Up Bidder’s final bid at Auction. All other Qualified Bidders shall be entitled to request the return of their Good Faith Deposits from their counsel at the conclusion of the Auction;
- H. Provide that such bid shall be open and irrevocable until the earlier of: (a) such bid being determined by the Debtors not to be a Qualified Bid; (b) if such bid is not chosen by the Debtors at the Auction to be the Successful Bid or Back-Up Bid (as each such term is defined below), the date of entry by the Bankruptcy Court of an order approving the Sale to another Qualified Bidder; (c) if such bid is chosen by the Debtors to be the Successful Bid, the date which is the earlier to occur of: (i) the closing of the Sale to such Successful Bidder, and (ii) five (5) Business Days following the date the order approving the Sale to the Successful Bidder shall have become a final, non-appealable, order (“**Final Order**”); (d) if such bid is chosen by the Debtors to be the Back-Up Bid, the date which is the earlier to occur of: (i) the date of closing on the Sale to the Successful Bidder, and (ii) twenty-five (25) Business Days following the date the order approving the Sale to the Successful Bidder shall have become a Final Order; provided, that if the Successful Bidder shall fail to close on its purchase of the Purchased Assets during the period set forth above, (x) the Back-Up Bid shall continue to remain open and irrevocable, (y) the Back-Up Bidder, at the Debtors’ discretion, shall be deemed to be the Successful Bidder, and (z) it shall close on the Sale within ten (10) Business Days of becoming the Successful Bidder;

- I. (i) Include an acknowledgement and representation that the Qualified Bidder has had an opportunity to conduct all due diligence regarding the Assets prior to submitting its bid and that it has relied solely upon its own independent review, investigation and/or inspection of any documents and/or assets in making its bid, and (ii) confirms the Qualified Bidder's completion of all due diligence required by such Qualified Bidder in connection with the Sale and does not include any due diligence contingencies;
- J. Does not contain any financing contingencies or any other contingencies not set forth in the Stalking Horse Asset Purchase Agreement or Form Template Purchase Agreement, as applicable;
- K. Provide evidence of authorization and approval from such Qualified Bidder's board of directors (or comparable governing body) evidencing the authority of the Qualified Bidder to make a binding and irrevocable Qualified Bid and to consummate the Sale if such Qualified Bidder is the Successful Bidder or Back-Up Bidder, as such bid may be improved prior to or at the Auction;
- L. Confirm that the Sale will close no later than May 31, 2019;
- M. If the Qualified Bidder was formed in whole or part for the purpose of acquiring all or part of the Assets, provides evidence which is reasonably satisfactory to the Debtors, in their discretion, regarding the major equity holder or sponsor of such Qualified Bidder demonstrating that such Qualified Bidder has, or will have access to, the financial resources needed to consummate the Sale if it becomes the Successful Bidder, and that the use of such resources to consummate the Sale has been authorized and approved by such entity's board of directors (or comparable governing body), provided, that the Debtors reserve the right to limit or waive this requirement for one or more Qualified Bidders in their discretion;
- N. Certifies that the Qualified Bidder has not, and is not, engaged in any collusion with respect to its bid or the Sale; except that the Debtors may facilitate a submission of a Qualified Bid by one or more unrelated Qualified Bidders or one or more entities may elect to jointly submit a Qualified Bid;
- O. Is not conditioned on the receipt of any third-party approvals or consents (excluding required Bankruptcy Court approval and required governmental, licensing or regulatory approval or consent, if any) other than third party approvals or consents that are deemed reasonable, as determined by the Debtors, in their discretion; and
- P. Sets forth the representatives that are authorized to appear and act on behalf of such Qualified Bidder in connection with the proposed transaction and the Auction.

All Qualified Bids, and the determination of same, will be considered by the Debtors (in consultation with the Official Committee of Unsecured Creditors); bids other than Qualified Bids will not be considered, although the Debtors reserve the right to work with non-conforming bids received by the Bid Deadline in order to resolve open issues until the commencement of the Auction. The Debtors may, in their discretion, evaluate bids on numerous grounds, including, but not limited to, any delay, additional risks (including closing risks) and added costs to the Debtors. For the avoidance of doubt, the presence of any governmental, licensing, regulatory or other approvals or consents in a bid or other contingencies, and the anticipated timing or likelihood of obtaining such approvals or consents or resolving such contingencies, may be grounds for the Debtors, in their discretion, to determine that such bid is not higher or otherwise better than any other Qualified Bid.

## **VI. Receipt of Qualified Bids**

If the Debtors receive a bid prior to the Bid Deadline that is not a Qualified Bid, the Debtors (in consultation with the Official Committee of Unsecured Creditors) may, in their discretion, provide a Qualified Bidder with the opportunity to remedy any deficiencies following the Bid Deadline but not later than the commencement of the Auction.

If the Debtors receive only one (1) Bid that is a Qualified Bid, the Debtors, in their discretion, shall (i) notify all Potential Bidders and the Bankruptcy Court in writing that (a) the Auction is cancelled and (b) such Qualified Bid is the Successful Bid, and (ii) the Debtors shall seek authority at the Sale Hearing to consummate the Sale transactions with such Qualified Bidder contemplated by its Qualified Bidder Purchase Agreement.

If the Debtors receive two (2) or more Qualified Bids, the Debtors will conduct an auction (the “**Auction**”). If the Debtors designate a Stalking Horse Bidder, the Debtors shall within two (2) days thereof file a notice of such determination with the Bankruptcy Court, which notice shall (i) identify the Stalking Horse Bidder, (ii) set forth the amount of any Break-Up Fee and/or Expense Reimbursement granted to the Stalking Horse Bidder, (iii) include a copy of the Stalking Horse Bidder’s Qualified Bidder Purchase Agreement, which competing Qualified Bidders must then use as the basis to submit their Qualified Bids, and (iv) shall include modifications to the bidding and auction procedures necessary to account for the Stalking Horse Bidder’s Qualified Bid.

## **VII. Auction Process**

The Auction, if any, will take place at the offices of Gibbons P.C., One Gateway Center, Newark, N.J. 07102, or at such other place and time as the Debtors shall notify all Qualified Bidders and other invitees, on May 14, 2019, commencing at 10:00 a.m. (prevailing Eastern Time).

If the Debtors proceed with the Auction, the following rules and procedures shall apply (subject to Article XII hereof):

- A. Prior to the Auction, the Debtors will select the highest Qualified Bid they have received to serve as the opening bid at the Auction (the “**Baseline Bid**”);

- B. Prior to the commencement of the Auction, the Debtors will provide all Qualified Bidders (including by email or facsimile) with a written notice identifying all of the Qualified Bidders and which Qualified Bid has been chosen as the Baseline Bid;
- C. Only a Qualified Bidder, and its representatives and advisors, who has submitted a Qualified Bid shall be eligible to attend and make any subsequent bids at the Auction. Each Qualified Bidder must appear in person or through a duly authorized representative who has the legal authority to bind the Qualified Bidder at the Auction (and who must provide the Debtors with written evidence of such authority prior to the Auction which is reasonably satisfactory to the Debtors), or they shall not be entitled to attend or participate at the Auction;
- D. All Qualified Bids shall be placed on the record at the Auction, which shall be transcribed, videotaped or audiotaped in the discretion of the Debtors;
- E. Each Qualified Bidder will have the right to make additional modifications or improvements to its Qualified Bidder Purchase Agreement any time, prior to, or during, the Auction which are consistent with these Bidding Procedures and the Bidding Procedures Order;
- F. Bidding shall commence at the Baseline Bid. The first overbid at the Auction (the “**Minimum Initial Overbid**”) shall be the amount of the Baseline Bid plus (i) the amount of any of the Break-Up Fee and Expense Reimbursement which would be due to any Stalking Horse Bidder if it is not the Successful Bidder if one is so designated by the Debtors, plus (ii) \$100,000. Thereafter, a Qualified Bidder may increase its Qualified Bid in any amount as long as each subsequent bid (each, a “**Subsequent Overbid**”) exceeds the previous highest bid by at least \$100,000 of additional cash consideration;
- G. Each bid made by a Qualified Bidder at the Auction must continue to meet, satisfy or comply with the requirements of a Qualified Bid, other than those applicable to the submission of an initial Qualified Bid;
- H. The Auction will continue with each Qualified Bidder submitting additional Subsequent Overbids in each round of bidding, after being advised of the terms of the then highest bid and the identity of the Qualified Bidder who made such bid, in each round of bidding. Each Qualified Bidder must bid in each round or it shall be disqualified from further bidding at the Auction;
- I. The Auction will conclude when the Debtors, in their discretion, determine that they have received the highest or otherwise best offer from a Qualified Bidder (the “**Successful Bid**”). The next highest or otherwise best Qualified Bid submitted at the Auction, as determined by the Debtors, in their discretion, shall be the “**Back-Up Bid**”. The Qualified Bidder submitting the Successful Bid shall be the “**Successful Bidder**” and the Qualified Bidder submitting the Back-Up Bid shall be the “**Back-Up Bidder**”. In making these decisions, the Debtors,

in their discretion, will consider, without limitation, (i) the amount of the purchase price offered, (ii) the form of consideration offered, (iii) the Qualified Bidder's ability to close the Sale at the amount of its last bid made at the Auction and the timing thereof, (iv) evidence of good faith on the part of the Qualified Bidder, (v) the terms and conditions of the Qualified Bidder Purchase Agreement, (vi) the requirements as to the assumption and assignment of executory contracts, (vii) the ability to provide adequate assurance of future performance to the counterparties to executory contracts being assumed and assigned, (viii) the amount of any obligations the Debtors may have to a Stalking Horse Bidder for a Break-Up Fee or Expense Reimbursement and (ix) the net benefit to the Debtors' estates;

- J. Prior to the conclusion of the Auction or as soon as practicable thereafter, the Debtors and the Successful Bidder shall enter into a definitive agreement based upon the Successful Bidder's Qualified Bidder Purchase Agreement previously submitted by the Successful Bidder and will make all related revisions to the proposed order approving the Sale to the Successful Bidder, in each case to reflect the results of the Auction;
- K. All Qualified Bids shall remain open and irrevocable for the time periods set forth in Article V(I) above;
- L. If, after an order is entered by the Bankruptcy Court at the Sale Hearing approving the Successful Bid, the Successful Bidder shall fail to close the Sale because of a breach on the part of the Successful Bidder (after giving effect to any applicable cure periods or waivers), (x) the Back-Up Bidder shall automatically, and without the need for any action by the Debtors or the Bankruptcy Court, be deemed to be the Successful Bidder, (y) the Back-Up Bid shall be deemed to be the Successful Bid, and (z) the Debtors and Back-Up Bidder shall close the Sale within ten (10) Business Days following the date the Back-Up Bidder becomes the Successful Bidder, without the necessity of obtaining any further order of the Bankruptcy Court; and
- M. The Debtors, in their discretion, reserve the right, in their business judgment, to make one or more adjournments to the Auction or these Bidding Procedures to, among other things: (i) facilitate discussions between the Debtors, on the one hand, and one or more Qualified Bidders, on the other hand, (ii) allow the Debtors and/or Qualified Bidders to consider how they wish to proceed, (iii) give Qualified Bidders the opportunity to provide the Debtors with such additional documentation or information as the Debtors in their business judgment may require to determine such Qualified Bidder's ability to close the Sale, or (iv) facilitate higher or better bids.

### **VIII. Sale Hearing**

A hearing to consider approval of the Sale of the Assets to the Successful Bidder will take place on **May 16, 2019, at \_\_:00 \_\_.m. (prevailing Eastern time)**, before the Honorable Jack Sherwood in the United States Bankruptcy Court District of New Jersey. Following the conclusion of the Auction, with the consent of the Successful Bidder, or as otherwise directed by the Bankruptcy Court, the Sale Hearing may be adjourned or rescheduled without notice by an announcement of the adjourned date at the Sale Hearing or by filing a notice on the docket. At the Sale Hearing, the Debtor shall present the Successful Bid to the Bankruptcy Court for approval and seek entry of an order authorizing and approving the Sale (the "**Sale Order**").

### **IX. Certain Additional Matters Concerning Good Faith Deposits**

Subject to Article X, the Good Faith Deposit of the Successful Bidder shall be applied to, and deducted from, the Successful Bidder's obligations under the Successful Bid at the closing of the Sale. The Good Faith Deposit of the Back-Up Bidder shall be returned to the Back-Up Bidder as set forth in Article V(I). If the Back-Up Bidder is subsequently designated by the Debtors as the Successful Bidder as a result of the failure of the Successful Bidder to close on the Sale, the Back-Up Bidder shall be deemed to be the Successful Bidder and it shall comply with the terms of Article VI. The Debtors and the Back-Up Bidder shall close the Sale within ten (10) business days of the Back-Up Bidder becoming the Successful Bidder. Subject to Article X, the Good Faith Deposit of the Back-Up Bidder shall be held by the Debtors until such closing and applied to its obligations at the closing of the Sale. The Debtors reserve all of their rights regarding the return of all Good Faith Deposits, and the failure by the Debtors to timely return any deposit(s) shall not serve as a claim for breach of any bid(s) or create any default in favor of any bidder(s).

### **X. Failure to Close**

If the Successful Bidder fails to consummate the transaction in accordance with the terms of the applicable agreement executed by the Successful Bidder by the closing date contemplated in the purchase agreement agreed to by the parties for any reason, the Successful Bidder shall forfeit its Good Faith Deposit to the Debtors and the Debtors shall maintain the right to pursue all additional available remedies, whether legal or equitable and be free to consummate the proposed transaction with the Back-Up Bidder at the highest price bid by the Back-Up Bidder at the Auction, without the need for an additional hearing or Order of the Bankruptcy Court. To the extent the Back-Up Bidder is deemed the Successful Bidder and fails to consummate the transaction in accordance with the terms of the applicable agreement executed by the Back-Up Bidder by the closing date contemplated in the purchase agreement agreed to by the parties for any reason, the Back-Up Bidder shall forfeit its Good Faith Deposit to the Debtors (and its counsel shall immediately turnover such Good Faith Deposit to the Debtors) and the Debtors shall maintain the right to pursue all additional available remedies, whether legal or equitable.

### **XI. Expenses**

Except to the extent provided for in the Stalking Horse Agreement and the Bidding Procedures Order, any Potential Bidders presenting bids shall bear their own expenses in connection with the proposed Sale, whether or not such Sale is ultimately approved.

## **XII. Reservation of Rights**

Except as otherwise provided in the Bidding Procedures Order or these Bidding Procedures, the Debtors reserve the right as they may reasonably determine to be in the best interests of their estates to: (i) determine which bidders are Qualified Bidders; (ii) determine which bids are Qualified Bids; (iii) determine which Qualified Bid or combination of Qualified Bids is the highest or otherwise best proposal and which is the next highest or otherwise best proposal; (iv) reject any bid that is (a) inadequate or insufficient, (b) not in conformity with the requirements of the Bidding Procedures or the requirements of the Bankruptcy Code, or (c) contrary to the best interests of the Debtors and their estates; (v) remove the Assets from the Sale; (vi) waive terms and conditions set forth herein with respect to all Potential Bidders; (vii) impose additional terms and conditions with respect to all Potential Bidders; (viii) extend the deadlines set forth herein; (ix) on prior notice to the extent practicable under the circumstances, adjourn or cancel the Auction and/or Sale Hearing in open court without further notice; (x) modify the Bidding Procedures, as the Debtors may, in their sole discretion, determine to be in the best interests of their estates; or (xi) withdraw the Motion at any time prior to the Sale Hearing with or without prejudice.