

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

In re:

ATHENEX, INC., et al.,

Debtors.¹

Chapter 11

Case No. 23-90295 (DRJ)

(Joint Administration Requested)

**DEBTORS' EMERGENCY MOTION FOR (I) ENTRY OF AN ORDER APPROVING
(A) BID PROCEDURES; (B) THE FORM AND MANNER OF NOTICE; (C) THE
PROCEDURES FOR DETERMINING CURE AMOUNTS FOR EXECUTORY
CONTRACTS AND UNEXPIRED LEASES; AND (II) ENTRY OF AN ORDER
APPROVING (A) THE SALE OF SUBSTANTIALLY ALL OF THE DEBTORS' ASSETS
FREE AND CLEAR OF ALL LIENS, CLAIMS, ENCUMBRANCES AND INTERESTS;
AND (B) THE ASSUMPTION AND ASSIGNMENT OF CERTAIN CONTRACTS AND
UNEXPIRED LEASES**

Emergency relief has been requested. Relief is requested not later than May 22, 2023.

If you object to the relief requested or you believe that emergency consideration is not warranted, you must appear at the hearing if one is set or file a written response prior to the date that relief is requested in the preceding paragraph. Otherwise, the Court may treat the pleading as unopposed and grant the relief requested.

Athenex, Inc. and its debtor affiliates, as debtors and debtors in possession in the above-captioned Chapter 11 Cases (collectively, the "Debtors" or the "Company"), file this *Motion for (i) Entry of an Order Approving (a) Bid Procedures; (b) the Form and Manner of Notice; (c) the Procedures for Determining Cure Amounts for Executory Contracts and Unexpired Leases; and (ii) Entry of an Order Approving (a) the Sale of Substantially All of the Debtors' Assets Free and*

¹ A complete list of each of the Debtors in these Chapter 11 Cases may be obtained on the website of the Debtors' proposed claims and noticing agent at <https://dm.epiq11.com/athenex>. The location of Athenex, Inc.'s principal place of business and the Debtors' service address in these Chapter 11 Cases is 1001 Main Street, Suite 600, Buffalo, NY 14203.

Clear of All Liens, Claims, Encumbrances and Interests; and (b) the Assumption and Assignment of Certain Contracts and Unexpired Leases (the “Bid Procedures and Sale Motion”).²

JURISDICTION

1. The Court has jurisdiction to consider this matter pursuant to 28 U.S.C. § 1334 and the Order of Reference to Bankruptcy Judge from the United States District Court for the Southern District of Texas, dated May 24, 2012. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).

2. Venue is proper before the Court pursuant to 28 U.S.C. §§ 1408 and 1409.

3. The statutory and other bases for the relief requested in the Bid Procedures and Sale Motion are sections 105(a), 363(b), 365, 503(b) and 507(a)(2) of title 11 of the United States Code (the “Bankruptcy Code”), as complemented by Rules 2002, 6004, and 6006 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), and the Bankruptcy Local Rules.

BACKGROUND

4. On May 14, 2023 (the “Petition Date”), each of the Debtors commenced with the Court a voluntary case under chapter 11 of the Bankruptcy Code. The Debtors are authorized to continue to operate their business and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee, examiner, or statutory committee of creditors has been appointed in these Chapter 11 Cases.

5. The Debtors are a global oncology-focused biopharmaceutical company dedicated to the discovery, development and commercialization of novel therapies for the treatment of

² In support of the Bid Procedures and Sale Motion, the Debtors incorporate the *Declaration of Nicholas K. Campbell in Support of Debtors’ Chapter 11 Petitions and First Day Relief* (the “First Day Declaration”). All capitalized terms not expressly defined herein shall have the same meaning as ascribed in the First Day Declaration or the Bid Procedures, as applicable.

cancer, aiming to develop safer and more efficacious cancer medication. The Debtors' mission is to improve the lives of cancer patients by creating more effective, safer and tolerable treatments.

6. The Company derives its consolidated revenue primarily from (i) the sales of generic injectable products by its Commercial Platform; and (ii) licensing and collaboration projects conducted by the Company's Oncology Innovation Platform, which generates revenue in the form of upfront payments, milestone payments, and payments received for providing research and development services for the Company's collaboration projects and for other third parties. Product sales for the year ended December 31, 2022 was \$90.9 million, an increase of \$22.4 million, or 33%, as compared to \$68.5 million for the year ended December 31, 2021. License fees and other revenue decreased to \$11.9 million for the year ended December 31, 2022, from \$26.9 million for the year ended December 31, 2021, a decrease of \$14.9 million, or 56%.

7. The Company's other operating segments include its Cell Therapy segment and Orascovery segment –which businesses and related assets are up for sale pursuant to this Motion. As to the Orascovery segment, Debtor Athenex R&D LLC and its subsidiaries ("Orascovery") develop small molecule oral chemotherapy treatments for neoadjuvant breast cancer and solid tumors, including Oral Paclitaxel as discussed in the First Day Declaration. As to the Company's Cell Therapy segment, Debtor Kuur Therapeutics Inc. and its subsidiaries ("Cell Therapy") develop biologic and cell therapies for the treatment of high risk neuroblastoma, lymphoma and leukemia, advanced HCC, and genetically driven epithelial cancers. The Company has made significant progress on its Cell Therapy platform, which represents a departure from more commonly used methods for cancer treatment.

8. Further information regarding the Debtors' business and capital structure and the circumstances leading to the commencement of these Chapter 11 Cases is set forth in the

Declaration of Nicholas K. Campbell in Support of the Debtors' Chapter 11 Petitions and First Day Relief (the "First Day Declaration"),³ filed contemporaneously herewith and incorporated by reference herein.

PRELIMINARY STATEMENT

9. The Debtors seek to maximize the value of their assets (the "Assets") for the benefit of the Debtors' estates and all parties in interest. To that end, the Debtors have been evaluating, and continue to evaluate, all of their strategic options with the input of their key constituents, including Debtors' senior secured lenders. As set forth in the First Day Declaration, prior to the filing of these cases, the Debtors have been engaged in extensive marketing efforts and dispositions of key assets. The Debtors have run a formal, investment-banker led marketing process for their APD segment for over twenty (20) months since September 2021. The Debtors identified a potential stalking horse bidder for APD prior to the Petition Date and intend to continue negotiations post-petition for the possible entry into a stalking horse agreement for APD. With respect to their Cell Therapy and Orascovery segments, the Debtors engaged Cassel Salpeter & Co. as their investment banker pre-petition and intend to continue a robust post-petition marketing efforts for all of their assets.

10. By this Motion, the Debtors are requesting crucial relief necessary for them to monetize assets and return the highest and maximum value for their stakeholders. Specifically, the Debtors are asking for approval of a 45-day marketing process that would enable them to solicit bids on all Assets (except for any assets of Athenex Pharma Solutions, LLC ("APS"), which are not being marketed for sale at this time due to ongoing discussions involving resolution of the

³ A capitalized term used but not otherwise defined herein shall have the meaning ascribed to it in the First Day Declaration.

Almirall supply agreement as discussed further in the First Day Declaration). The Debtors are willing to entertain all viable proposals for their entire company, certain segments or divisions, or lot bids on assets (including inventory) held by the Debtors (excluding any APS assets).

11. The Debtors are filing this Motion in order to comply with those milestones set forth in the proposed *Interim Order (i) Authorizing the Debtors to Use Cash Collateral; (ii) Granting Adequate Protection; (iii) Modifying the Automatic Stay; (iv) Scheduling a Final Hearing; and (v) Granting Related Relief* (the “Cash Collateral Order”), which require, among other things, that the Debtors (a) file the Bid Procedures and Sale Motion within one day of the Petition Date; (b) obtain entry of an order approving bid and sale procedures for the sale of substantially all of the Debtors’ Assets (the “Bid Procedures”) no later than seven days after the Petition Date; (c) obtain entry of the Sale Order within forty-five (45) days of the Petition Date; and (d) close on any sales by not later than fifty (50) days of the Petition Date.

12. The Debtors will prepare a form asset purchase agreement (the “Form APA”) available in the electronic dataroom established by the Debtors in connection with their sale process.⁴ To streamline the sale process, Qualified Bidders (as defined below) shall be required to mark the Form APA to show the specific changes to the Form APA that the Qualified Bidder requires.

13. To maximize the value of the Assets, all bids are subject to higher or better offers through a competitive auction process, as detailed below (the “Bidding Process”). If the Debtors pursue a sale of the Assets, the Debtors contemplate that the Bidding Process will culminate in the sale of all or substantially all of the Debtors’ Assets to the Prevailing Purchaser (as defined below)

⁴ For the avoidance of doubt, parties may purchase substantially all or any portion or combination of the Assets, and the Debtors intend to provide parties interested in acquiring substantially all of the Assets or any portion or combination thereof with the Form APA.

free and clear of any or all liens, claims and interests (the “Transaction” or the “Sale”) pursuant to a sale under section 363 of the Bankruptcy Code for cash and/or the assumption of certain liabilities (collectively, the “Purchase Price”), with all such liens, claims and interests attaching to the Transaction proceeds.

RELIEF REQUESTED

14. By this Bid Procedures and Sale Motion, the Debtors respectfully request, pursuant to Bankruptcy Code sections 105, 363, 503(b), and 507(a)(2) and Bankruptcy Rules 2002, 6004 and 6006, (a) the entry of an order substantially in the form attached hereto (the “Bid Procedures Order”): (i) approving the Bid Procedures, which are attached as Exhibit A to the Bid Procedures Order; (ii) approving the form and manner of notice of transaction (the “Transaction Notice”), substantially in the form attached as Exhibit B to the Bid Procedures Order, that sets forth the Bid Procedures and the date, time, and place for an auction, as required by the Bid Procedures; (iii) approving the form and notice of assumption (the “Assumption Notice”), substantially in the form attached as Exhibit C to the Bid Procedures Order and, if necessary, assignment, of executory contracts and unexpired leases; (iv) establishing procedures for determining cure amounts in connection with the assumption (and, if necessary, assignment) of executory contracts and unexpired leases; and (v) granting such other relief as is fair and equitable; and, if the Debtors pursue a sale of the Assets, (b) the entry of an order (the “Sale Order”): (i) approving the sale of the Debtors’ Assets free and clear of liens, claims, and interests; and (ii) authorizing the assumption and assignment of certain executory contracts and unexpired leases; and (iii) granting such other relief as is fair and equitable.

A. Approval of the Bid Procedures⁵

15. To maximize the value of the Assets for the benefit of the Debtors' estates and parties in interest, the Debtors seek to implement a competitive bidding process designed to generate maximum net value for the Debtors, their creditors and other stakeholders and the estates. Any person wishing to participate in the Bidding Process (each, a "Potential Bidder") must become a Qualified Bidder. As a prerequisite to becoming a Qualified Bidder, a Potential Bidder must:

- a. Deliver an executed confidentiality agreement in form and substance reasonably acceptable to the Debtors (a "Bidder Confidentiality Agreement"); and
- b. Be able, as determined by the Debtors, and with the consent of the Agent⁶, to consummate a Transaction based upon a Qualifying Bid (as defined below).

16. If at least one Qualifying Bid acceptable to the Debtors and the Agent is received, the Debtors intend to consummate the Transaction with the Qualified Bidder who makes the highest or best offer for the Assets (the "Successful Bid," and the Qualified Bidder making the Successful Bid then becoming the "Prevailing Purchaser"), as determined by the Debtors with the consent of the Agent and in consultation with the Official Committee of Unsecured Creditors, if appointed (the "Committee") after the conclusion of the Bidding Process. As described more fully in the Bid Procedures attached as Exhibit A to the Bid Procedures Order (the "Bid Procedures"), the Debtors propose a process governed by the following procedures:⁷

⁵ All capitalized terms not expressly defined herein shall have the same meaning as ascribed in the Bid Procedures attached as Exhibit A to the Bid Procedures Order.

⁶ As used herein, the term "Agent" shall mean the Prepetition Term Loan Agent as defined in the Cash Collateral Order.

⁷ The following description of the Bid Procedures is only a summary of the terms set forth in the Bid Procedures attached as Exhibit A to the Bid Procedures Order. The following summary is qualified in its entirety by reference to the provisions of the Bid Procedures. In the event of any inconsistencies between the provisions of the Bid Procedures and the terms herein, the terms of the Bid Procedures shall control.

- a. Bid Deadline. A Qualified Bidder that desires to make a bid shall deliver a written or electronic copy of its bid (which shall be a cash bid, or shall be in such other consideration as is acceptable to the Debtors and the Agent) to the Bid Notice Parties identified in the Bid Procedures not later than 5:00 p.m. (prevailing Central Time) on June 12, 2023 (the “Bid Deadline”), unless such date is extended by the Debtors, with the Agent’s consent;
- b. Required Bid Materials. To be deemed a “Qualifying Bid,” a bid must, among other things:
 - (i) Identification of Qualified Bidder. Identify the party submitting the bid (and any equity holders, in the case of a Qualified Bidder which is an entity specially formed for the purpose of effectuating the contemplated transaction) and the representatives thereof who are authorized to appear and act on its behalf for all purposes regarding the contemplated Transaction;
 - (ii) Proposed Acquired Property. Identify the Debtors’ assets that the Qualified Bidder is bidding on (such specified property is the “Proposed Acquired Property”);
 - (iii) Purchase Price Allocation. Specify the portion of the aggregate purchase price that is being allocated to each of the Debtors’ assets;
 - (iv) Irrevocability of Bid. Include a letter stating that the Qualified Bidder’s offer is irrevocable until the closing of the Transaction if such Qualified Bidder is the Prevailing Purchaser or the Back-Up Bidder (as defined below), and that the Qualified Bidder agrees to serve as a Back-up Bidder if such bidder’s Qualifying Bid is selected as the next highest or otherwise next best bid after the Successful Bid (the “Back-Up Bid,” and the Qualified Bidder making the Back-Up Bid, the “Back-Up Bidder”);
 - (v) Consideration. Identify the cash consideration to be paid for the Proposed Acquired Property, or such other consideration as is acceptable to the Debtors and the Agent;
 - (vi) Assumed Liabilities. Identify the Debtors’ liabilities that the Qualified Bidder seeks to assume;
 - (vii) Identification of Executory Contracts and Unexpired Real Property Leases. Identify the Debtors’ executory contracts and unexpired leases with respect to which the Qualified Bidder seeks to receive an assignment.
 - (viii) Adequate Assurance Information. Include sufficient financial or other information (the “Adequate Assurance Information”) to

establish adequate assurance of future performance with respect to any lease or contract to be Assigned to the Qualified Bidder in connection with the proposed transaction. The bid shall also identify a contact person (with relevant contact information) that counterparties to any lease or contract can contact to obtain additional Adequate Assurance Information;

- (ix) Asset Purchase Agreement. Include an executed copy of an asset purchase agreement providing for purchase of the Proposed Acquired Assets. Such asset purchase agreement shall (A) be substantially in the form of the Form APA; and (B) be delivered together with a draft marked against the Form APA to reflect all variations from the Form APA (the “Qualified Bidder Agreement”);
- (x) No Financing or Diligence Contingencies. Include sufficient financial or other information to demonstrate that the bid does not contain any financing contingencies of any kind to closing on the proposed Transaction;
- (xi) Value to the Estate in Excess of Stalking Horse Agreement, if any. To the extent a Stalking Horse Bidder(s) is selected before the Bid Deadline, will result in a value to the Debtors’ estates in the Debtors’ business judgment, in consultation with the Committee and with the Agent’s consent, that is more than the aggregate of the value of the sum of: (A) the cash purchase price of the Stalking Horse Agreement (as defined below); plus (B) the Stalking Horse Bidder(s)’s assumed liabilities in an estimated amount determined by the Debtors with the Agent’s consent; plus (C) the sum of the Bid Protections; plus (D) \$100,000.
- (xii) Evidence of Financial Ability. Include sufficient evidence of the Qualified Bidder’s ability to consummate the Transaction and payment of the purchase price in cash at the date the Transaction is scheduled to close (the “Closing”), including, but not limited to a signed commitment for any debt or equity financing; a bank or other account statement showing the ability of a Qualified Bidder to pay cash for the Proposed Acquired Assets; contact names and numbers for verification of financing sources; and current audited financial statements (or such other form of financial disclosure and credit-quality support or enhancement, acceptable to the Debtors with the Agent’s consent and in consultation with the Committee) of the Qualified Bidder or those entities that will guarantee in full the payment obligations of the Qualified Bidder;
- (xiii) Deposit. Include a cash deposit by wire transfer to an escrow agent selected by the Debtors with the Agent’s consent (the “Deposit Agent”) in an amount equal to 10% of the cash purchase price of the

bid that will constitute liquidated damages of the Debtors if the Qualified Bidder shall default with respect to its offer (the “Good Faith Deposit”). The Qualified Bidder must deliver the Good Faith Deposit on or before the Bid Deadline;

- (xiv) No Break-Up Fee. Except for any Stalking Horse Bidder(s), include sufficient information to indicate that the Qualified Bidder is not entitled to any break-up fee, expense reimbursement, or similar type of payment;
- (xv) Due Diligence. Include a letter acknowledging and representing that the Qualified Bidder has had an opportunity to conduct any and all due diligence regarding the Assets before making a bid; that it has relied solely upon its own independent review, investigation and/or inspection of any documents and the Assets 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 therewith, except as expressly stated in the Bid Procedures;
- (xvi) Corporate Authority. Include sufficient evidence of authorization and approval from the Qualified Bidder’s board of directors (or comparable governing body) with respect to the submission, execution, delivery and closing of the Qualified Bidder Agreement;
- (xvii) Regulatory Approvals and Covenants. Identify each regulatory and third-party approval required for the Qualified Bidder to consummate the Transaction, if any, and the time period within which the Qualified Bidder expects to receive such regulatory and third-party approvals (and in the case that receipt of any such regulatory or third-party approval is expected to take more than thirty (30) days following the execution and delivery of the Qualified Bidder Agreement, those actions the Qualified Bidder will take to ensure receipt of such approvals as promptly as possible); and
- (xviii) Consent to Jurisdiction and Authority to Enter Final Orders. State that the Qualified Bidder consents to the jurisdiction of the Court and to the entry of a final judgment or order with respect to the Qualified Bidder’s offer, as well as with respect to any aspect of this Bid Procedures and Sale Motion, including the Bid Procedures, and all orders of the Court entered with respect to the Transaction, if it is determined that the Court would lack Article III jurisdiction to enter such final order or judgment absent consent of the parties.

- c. Additionally, each bid must satisfy the other requirements set forth under “Bid Requirements” in the Bid Procedures.
- d. The Debtors, in consultation with the Committee and with the Agent’s consent, shall determine whether a competing bid that meets the above requirements and the other requirements set forth in the Bid Procedures constitutes a Qualifying Bid, and such bidder submitting the Qualifying Bid shall constitute a “Qualified Bidder.” The Debtors shall notify bidders whether their bids have been determined to be Qualified Bids by no later than 5:00 p.m. (prevailing Central time) on June 14, 2023.
- e. Credit Bid Right. The Bid Procedures provide that the Agent may at any time prior to the conclusion of the Auction, credit bid any portion up to the entire amount of their respective claims, at any time, on any Assets constituting their respective collateral. The Agent shall each be deemed to be a Qualified Bidder without being required to submit a Good Faith Deposit, Qualified Bidder Agreement, or any other deliverable or documentation to the Debtors, the Bid Notice Parties, or their representatives or agents. Notwithstanding anything to the contrary in the Bid Procedures, in the event the Agent, or any individual member of the Committee becomes a Potential Bidder or Qualified Bidder, such party shall forego all consent and consultation rights otherwise provided in the Bid Procedures until such time as such party is no longer a Potential Bidder or Qualified Bidder.
- f. Auction. If multiple Qualifying Bids are received by the Debtors, the Debtors may conduct an auction (the “Auction”) with respect to all or some of the Assets. The Auction, if conducted, shall commence at 10:00 a.m., prevailing Central time, on June 15, 2023. The Auction, if any, will take place at such location to be set forth in the Transaction Notice or at such later time or other place as agreed by the Agent and the Debtors as approved by order of this Court, and of which the Debtors will notify the Auction participants.

B. Stalking Horse Bidder(s), Related Bid Protections and Stalking Horse Agreement(s)

17. The Bid Procedures also provide that the Debtors may enter into an agreement (a “Stalking Horse Agreement”) in form and substance acceptable to the Agent and in consultation with the Committee, no later June 2, 2023, or such other later date as may be acceptable to the Agent, subject to approval by the Court and higher or otherwise better offers at the Auction, with one or more stalking horse bidders (each, a “Stalking Horse Bidder”) to establish a minimum bid at the Auction with respect to all or any portion of the Assets. In the event that one or more Stalking

Horse Bidders are selected, the Debtors shall seek court approval of the Stalking Horse Bidder pursuant to the Bid Procedures, and as described in more detail below.

18. The Stalking Horse Agreement, subject to the Agent's consent, may contain (a) an expense reimbursement for the reasonable, documented out-of-pocket expenses incurred by the Stalking Horse Bidder(s) in connection with the Stalking Horse Agreement in an aggregate amount not to exceed the lesser of (i) one percent (1%) of the cash portion of the purchase price under the Stalking Horse Agreement, and (ii) \$250,000; and (b) a break-up fee for the Stalking Horse Bidder in an amount not to exceed three percent (3%) of the cash portion of the purchase price under the Stalking Horse Agreement ((a) and (b) of this sentence, collectively, the "Bid Protections"), payable only from the proceeds of a Sale with a Qualified Bidder other than the Stalking Horse or otherwise if an alternative transaction is accomplished through a chapter 11 plan following the termination of the Stalking Horse Agreement on account of pursuing the alternative Sale or transaction. The Bid Protections, once approved by the Court, shall be an allowed administrative expense.

19. The Bid Procedures provide that in the event that the Debtors, subject to the consent of the Agent, and in consultation with the Committee, select one or more parties to serve as the Stalking Horse Bidder(s), upon such selection, the Debtors shall, by June 2, 2023, file with the Court the Stalking Horse Agreement(s) and provide the following parties (collectively, the "Transaction Notice Parties") notice of and an opportunity to object (by June 9, 2023) to the designation of such Stalking Horse Bidder(s) and the Bid Protections set forth in the Stalking Horse Agreement: (a) the United States Trustee for the Southern District of Texas; (b) counsel for any statutory committee appointed in these cases; and (c) persons who have filed a request for notice pursuant to Bankruptcy Rule 2002.

20. After such notice and absent objection, the Debtors may submit an order to the Court under certification of counsel approving the selection of such Stalking Horse Bidder(s) and the Bid Protections (the “Stalking Horse Order”). To the extent necessary, the Debtors shall be entitled to set an expedited hearing on any objection to the designation of the Stalking Horse Bid promptly following the expiration of any Stalking Horse Objection Deadline, subject to the availability of the Court.

C. Approval of the Notice Procedures

21. The Debtors wish to proceed to the Auction and the hearing approving the Transaction (the “Sale Hearing”) as expeditiously as possible, considering (a) the Debtors’ liquidity situation; (b) the deadlines set forth in the Cash Collateral Order; and (c) the deadlines set forth in the Bid Procedures, while providing the requisite notice of the proposed sale as required by Bankruptcy Rules, including Bankruptcy Rule 2002.

22. Bankruptcy Rule 2002(a) provides, in relevant part, that all creditors must be given at least twenty-one (21) days’ notice by mail of a proposed use, sale, or lease of property of the estate other than in the ordinary course of business. Further, Bankruptcy Rule 2002(c) sets forth that the content of such notices must include the time and place of any sale, the terms and conditions of such sale, and time fixed for filing objections.

D. Approval of the Transaction Notice

23. In accordance with Bankruptcy Rule 2002, the Debtors are required to notify their creditors and other interested parties of the proposed Transaction, including a disclosure of the time and place of the Auction, the terms and conditions of the Transaction, and the deadline for filing any objections to the Transaction, all of which are in the “Transaction Notice” attached as Exhibit B to the Bid Procedures Order.

24. The Transaction Notice (a) contains the type of information required under Bankruptcy Rule 2002 that is currently known to the Debtors; (b) includes information concerning the Bid Procedures; and (c) is reasonably calculated to provide due, adequate and timely notice to all interested parties of (i) the Auction, (ii) the Bid Procedures; (iii) the Sale Hearing; and (iv) the deadline to object to the Transaction.

25. Not later than five (5) days after entry of the Bid Procedures Order (the “Mailing Deadline”), the Debtors (or their agents): (a) will serve a copy of the Transaction Notice, as well as a copy of the Bid Procedures and Sale Motion and the Bid Procedures Order, by first- class mail, postage prepaid, or, for those parties who have consented to receive notice by the ECF system, by ECF, upon the Transaction Notice Parties; and (b) will serve a copy of the Transaction Notice upon all known creditors of the Debtors.

E. Approval of the Assumption Notice

26. In accordance with Bankruptcy Rule 2002, the Debtors must provide notice of: (a) the potential assumption (and, as applicable, assignment) of all of the Debtors’ executory contracts and unexpired leases (the “Executory Contracts”); (b) the amount reflected in the Debtors’ records necessary to cure monetary defaults (the “Cure Amounts”) under each Executory Contract that the Debtors believe they might seek to assume and/or assign in connection with a Transaction (the “Designated Contracts”); and (c) the deadline to file objections to such assumption (and, if applicable, assignment), Cure Amounts, and the existence of any defaults and/or adequate assurance of future performance (collectively, the “Contract Notice Items”). The Debtors propose

to serve the Assumption Notice attached as Exhibit C to the Bid Procedures Order, which will contain a list of the Cure Amount related to each Executory Contract.⁸

27. The Assumption Notice (a) contains the type of information required by Bankruptcy Rule 2002 that is currently known to the Debtors; and (b) is reasonably calculated to provide due, adequate and timely notice to all parties of the Contract Notice Items.

28. By May 26, 2023, the Debtors (or their agents) shall serve the Assumption Notice by first class United States mail, postage prepaid on: (a) parties identified on the proposed Master Service List at the addresses set forth therein; and (b) all non-debtor counterparties to Executory Contracts (the "Counterparties"). Such Assumption Notice is proper, due, timely, good, and sufficient notice of, among other things, the proposed assumption (and if applicable, assignment) of the Executory Contracts, the Cure Amounts, and the procedures for objecting thereto.

29. Except as may otherwise be agreed by the parties to a Designated Contract that is ultimately Assigned (an "Assigned Contract") (with the reasonable consent of the Prevailing Purchaser and the consent of the Agent), or ordered by the Court, the Debtors propose to: (a) satisfy all valid and undisputed Cure Amounts as provided in the Assumption Notice on the effective date of any sale or chapter 11 plan in which the contract is to be assumed and assigned; and (b) with respect to Designated Contracts for which the Cure Amounts are disputed, if any, pay such Cure Amount as determined by the Court at a hearing to resolve the disputed Cure Amounts (including the Sale Hearing).

30. At the Sale Hearing, the Debtors will seek Court approval of the assumption and assignment to the Prevailing Purchaser of only those Designated Contracts that have been selected

⁸ The listing of a contract or lease on the Assumption Notice or the Supplemental Assumption Notice (as defined herein) is not (a) a request to assume such agreement; or (b) an acknowledgment or admission that such contract or lease is executory pursuant to section 365 of the Bankruptcy Code.

by such Prevailing Purchaser to be assumed and assigned. The inclusion of a Designated Contract on an Assumption Notice will not (a) obligate the Debtors to assume any Designated Contract listed thereon nor the Prevailing Purchaser to take assignment of such Designated Contract or (b) constitute any admission or agreement of the Debtors that such Designated Contract is an executory contract. The Debtors and their estates reserve any and all rights with respect to any Designated Contract that are not ultimately designated as Assigned Contracts.

F. Approval of the Supplemental Assumption Notice

31. The Debtors may amend or supplement the Assumption Notice from time to time (the “Supplemental Assumption Notice”). If the Debtors file a Supplemental Assumption Notice, the Debtors will promptly serve a copy of such Supplemental Assumption Notice on the Counterparties to Executory Contracts that are affected by such amendment, supplementation, or modification by first class mail, and in no event will the Debtors serve a Supplemental Assumption Notice such that counterparties to Executory Contracts are served with less than seven (7) days’ notice of the proposed Cure Amounts prior to the Sale Hearing.

G. Approval of the Objection and Cure Procedures

32. The Debtors propose to implement the following procedures (the “Objection and Cure Procedures”) with respect to the notices discussed herein and relief related thereto:

- a. Objections, if any, to the consummation of the Transaction and/or the proposed assumption (and, if applicable, assignment) of the Designated Contracts, including, but not limited to, objections relating to any Cure Amounts and/or adequate assurance of future performance (a “Contract Objection”), must (i) be in writing; (ii) state with specificity the nature of such objection; (iii) if concerning a Cure Amount, set forth a specific default in the Designated Contract and claim a specific monetary amount that differs from the Cure Amount (if any) specified in the Assumption Notice (with appropriate documentation in support thereof); and (iv) comply with the Bankruptcy Rules.

- b. Unless otherwise provided herein, objections, if any, must be filed with the Court and served so as to be received by the following parties (the “Objection Notice Parties”) no later than **June 9, 2023 at 4:00 p.m. (prevailing Central Time)** (the “Objection Deadline”): (i) counsel to the Debtors, Pachulski Stang Ziehl & Jones LLP, at 440 Louisiana Ave., Suite 900, Houston, Texas, 77002, Attn: Michael D. Warner (mwarner@pszjlaw.com) and at 10100 Santa Monica Blvd., Suite 1300, Los Angeles, California 90067, Attn: Richard M. Pachulski (rpachulski@pszjlaw.com), Debra I. Grassgreen (dgrassgreen@pszjlaw.com), and Shirley S. Cho (scho@pszjlaw.com); (ii) counsel to the Agent, Sullivan & Cromwell LLP, Attn: Ari B. Blaut (blauta@sullcrom.com), Daniel R. Loeser (loeserd@sullcrom.com), Benjamin S. Beller (bellerb@sullcrom.com), Mark E. Dendinger (mark.dendinger@bracewell.com), Jonathan Lozano (jonathan.lozano@bracewell.com); (iii) counsel to the Prevailing Purchaser, if one has been determined; (iv) counsel to any appointed committee; (v) counsel to the Stalking Horse Bidder(s), if any; and (vi) the United States Trustee at the Office of the United States Trustee, 515 Rusk St, #3516, Houston, Texas, 77002 Jana Smith Whitworth (Jana.Whitworth@usdoj.gov) and Ha Nguyen (ha.nguyen@usdoj.gov).
- c. The Debtors may amend or supplement the Assumption Notice from time to time by filing a Supplemental Assumption Notice. If the Debtors file a Supplemental Assumption Notice, the Debtors shall promptly serve a copy of such Supplemental Assumption Notice on the counterparties to Executory Contracts that are affected by such amendment, supplementation, or modification by first class mail, and in no event shall the Debtors serve a Supplemental Assumption Notice such that counterparties to Executory Contracts are served with less than seven (7) days’ notice of the proposed Cure Amounts prior to the Sale Hearing. Objections, if any, by counterparties identified in any Supplemental Assumption Notice, must be filed and served upon the Objection Notice Parties seven (7) days after the date of service of the Supplemental Assumption Notice; *provided, however*, that no objections may be made after the Sale Hearing.
- d. If no timely objection to the assumption and assignment of a particular executory contract or unexpired lease is received, then the Cure Amount set forth in the Assumption Notice and/or Supplemental Assumption Notice will be binding on the non-debtor party or parties to the Assigned Contract for all purposes in these cases and otherwise. All such counterparties to the Assigned Contracts will (i) be forever barred from objecting to the Cure Amounts and from asserting any additional cure or other amounts with respect to the Assigned Contracts; (ii) be deemed to have consented to the assumption and assignment, and (iii) be forever barred and estopped from asserting or claiming against the Debtors or the Prevailing Purchaser that any additional amounts are due or other defaults

exist, that conditions to assumption and assignment must be satisfied under such Assigned Contracts, that adequate assurance is not being provided or that there is any other objection or defense to the assumption and assignment of such Assigned Contracts notwithstanding any anti-alienation provision or other restriction on assumption or assignment in the Designated Contract.

- e. If a Counterparty files an objection to assumption or assignment, whether based on Cure Amount, adequate assurance of future performance, or any other alleged cause or claim, then, to the extent the relevant parties are not able to consensually resolve the dispute before the Sale Hearing, such dispute will be heard and resolved by the Court at a hearing to resolve the disputed Cure Amounts; *provided, however*, that if an objection relates solely to the Cure Amount (any such objection, a “Cure Dispute”), the Designated Contract may be assumed by the Debtors and assigned to the Prevailing Purchaser provided that the cure amount the Counterparty asserts is required to be paid under Bankruptcy Code Section 365(b)(1)(A) and (B) (or such lower amount as agreed to by the Counterparty) is deposited in a segregated account by the Debtors pending the Court’s adjudication of the Cure Dispute or the parties’ consensual resolution of the Cure Dispute.

H. **Approval of the Proposed Timeline for Sale of Assets**

33. Pursuant to the milestones set forth in the Cash Collateral Order, the Debtors must (a) file the Bid Procedures and Sale Motion within two days of the Petition Date; obtain entry of an order, with terms and substance acceptable to the Agent, approving the Bid Procedures no later than seven days after the Petition Date; (c) obtain a Bid Deadline of June 12, 2023; and (d) obtain entry of the Sale Order by June 23, 2023. Consistent with these requirements, the Debtors propose the following timeline (the “Timeline”) for the sale process:

Event	Deadline
Bidding Procedures Order Approved	Not later than 7 days after the Petition Date
Cure Notices Served	May 26, 2023
Deadline to Designate Stalking Horse Bidders(s)	June 2, 2023
Sale/ Cure Objection Deadline	June 9, 2023
Deadline to Object to Stalking Horse Bidder(s)	June 9, 2023
Bids Due	June 12, 2023
Auction	June 15, 2023
Notice of Winning Bids Filed	June 16, 2023

Event	Deadline
Objection to Winning Bidder	June 19, 2023 at 12:00 pm
Sale Approval Hearing	June 21, 2023
Sale Order Entered	June 23, 2023
Sale(s) Closed	June 30, 2023

34. The Debtors believe that the proposed timeline is more than sufficient to complete a fair and open sale process and maximize the value received for the Debtors' Assets. The Timeline will provide the Debtors and their advisors sufficient time to solicit (and/or re-solicit) prospective purchasers in advance of the Proposed Bid Deadline set forth in the Timeline, while respecting the necessity to consummate a sale as quickly as possible to maximize the net value obtained for the Debtors' Assets for the benefit of the estates and all constituencies.

BASIS FOR RELIEF

A. The Sale of the Assets May Become Necessary

35. The Debtors, in consultation with their advisors, are pursuing a variety of options to successfully navigate these Chapter 11 Cases and no final decision to seek a sale of substantially all of the Assets has been made. To the extent that the Debtors receive one or more Qualified Bids and determine that a sale of the Assets is necessary, such a decision will be based upon the Debtors' sound business judgment, analyzing factors such as their leveraged financial position, any Qualified Bids received and the valuation of the Debtors' business and Assets.

36. In the event that a going concern sale of the Assets is pursued, the Debtors submit that the proposed Timeline will adequately address the Debtors' liquidity issues by transferring ownership of the Assets to a financially stable buyer with the ability to satisfy the capital requirements of the business so that the business can continue on a going concern basis, while maximizing the value of the Debtors' estates for the benefit of all constituencies. In the absence of a sale or other transaction conducted in accordance with the Timeline, the Debtors will likely face

deterioration in the value of the business and a diminished runway to continue their operations. The Debtors submit that the Successful Bid(s) resulting from the Bid Procedures will constitute the highest and best offer for the Assets. Therefore, to the extent the Debtors pursue the Sale, it will be because such sale will provide a greater recovery for the Debtors' estates than would be provided by any other available alternative. As such, any sale of the Assets as provided for in the Bid Procedures is a valid and sound exercise of the Debtors' business judgment.

B. The Form and Manner of the Transaction Notice Should Be Approved

37. Pursuant to Bankruptcy Rule 2002(a), the Debtors are required to provide their creditors with 21 days' notice of the Sale Hearing. Pursuant to Bankruptcy Rule 2002(c)(1), such notice must include the time and place of the Auction and the Sale Hearing and the deadline for filing any objections to the relief requested herein.

38. The Debtors submit that notice of this Bid Procedures and Sale Motion and the related hearing to consider entry of the Bid Procedures Order, together with service of the Transaction Notice as provided herein, constitutes good and adequate notice of the Auction, the Sale Hearing and the proceedings with respect thereto in compliance with, and in satisfaction of, the applicable requirements of Bankruptcy Rules 2002, 6004, and 6006.

C. The Bid Procedures are Fair and Reasonable and are Designed to Maximize the Value Received for the Assets

39. Pursuant to Bankruptcy Rule 6004(f)(1), sales of property outside the ordinary course of business may be by private sale or auction. Courts have recognized that procedures intended to enhance competitive bidding in a chapter 11 sale process are consistent with the paramount goal of maximizing the value received by the debtor's estate and, are therefore appropriate. *See, e.g., Gluckstadt Holdings, L.L.C. v. VCR I, L.L.C. (In re VCR I, L.L.C.)*, 922 F.3d 323, 327 (5th Cir. 2019) ("A trustee has a duty to maximize the value of the estate," and he

“must demonstrate that the proposed sale price is the highest and best offer”); *ASARCO, L.L.C. v. Elliott Mgmt. (In re ASARCO, L.L.C.)*, 650 F.3d 593, 603 (5th Cir. 2011) (affirming the Court’s finding that certain expense reimbursement procedures were allowable because they help maximize the estate’s assets); *Four B. Corp. v. Food Barn Stores, Inc. (In re Food Barn Stores, Inc.)*, 107 F.3d 558, 564–65 (8th Cir. 1997) (“[A] primary objective of the Code [is] to enhance the value of the estate at hand.”); *Official Comm. of Subordinated Bondholders v. Integrated Res., Inc. (In re Integrated Res., Inc.)*, 147 B.R. 650, 659 (S.D.N.Y. 1992) (“It is a well-established principle of bankruptcy law that the . . . debtor’s duty . . . is to obtain the highest price or greatest overall benefit possible for the estate.”) (quoting *Cello Bag Co. v. Champion Int’l Corp. (In re Atlanta Packaging Prods., Inc.)*, 99 B.R. 124, 131 (Bankr. N.D. Ga. 1988)); *In re Summit Global Logistics, Inc.*, No. 08-11566, 2008 WL 819934, at *14 (Bankr. D.N.J. Mar. 26, 2008) (describing a proposed transaction as one that “maximize[d] value and return to interested parties”). Courts have made clear that a debtor’s business judgment is entitled to substantial deference with respect to the procedures to be used in selling assets from the estate. See *In re ASARCO, L.L.C.*, 650 F.3d at 603 (“The business judgment standard in section 363 is flexible and encourages discretion.”); *In re TM Vill., Ltd.*, No. 18-32770, 2019 Bankr. LEXIS 651, at *20 (Bankr. N.D. Tex. Feb. 28, 2019) (“As long as the sale appears to enhance a debtor’s estate, court approval of a debtor-in-possession’s decision to sell should only be withheld if the debtor’s judgment is clearly erroneous, too speculative, or contrary to the provisions of the Bankruptcy Code.”) (quoting *Richmond Leasing Co. v. Capital Bank, N.A.*, 762 F.2d 1303, 1309 (5th Cir. 1985)); *Official Comm. of Subordinated Bondholders v. Integrated Res., Inc. (In re Integrated Res., Inc.)*, 147 B.R. 650, 656-57 (S.D.N.Y. 1992) (noting that overbid procedures and break-up fee arrangements that have been negotiated by a debtor are to be reviewed according to the deferential “business judgment”

standard, under which such procedures and arrangements are “presumptively valid”). *See also In re Trans World Airlines Inc.*, No. 01-0056, 2001 WL 1820326, at *10 (Bankr. D. Del. Apr. 2, 2001) (“It is not the function of a bankruptcy court to independently exercise a business judgment as to which proposal among competing proposals should be adopted by the debtor.”).

40. Here, the Debtors have sound business justifications for seeking approval of the Bid Procedures at this time. The Debtors are commencing a bidding process immediately, as the Debtors have limited funding and believe the process is in the best interests of the estates and creditors. The Debtors seek approval of the Bid Procedures in an effort to obtain a bid(s) for the Debtors’ Assets which maximizes their value.

41. The Bid Procedures are the result of good-faith, arm’s length negotiations between the Debtors and their key constituents, including the Agent. The Bid Procedures provide an appropriate framework for soliciting offers and will enable the Debtors to analyze and compare all bids received to determine which bid is in the best interest of the Debtors’ estates and creditors.

42. The Bid Procedures provide Potential Bidders with sufficient notice and opportunity for interested parties to acquire the information necessary to submit a timely and informed bid. The Debtors’ deteriorating financial position precludes a more extended process, and the Debtors believe that the period between the date of entrance of the Bid Procedures Order and the Bid Deadline provides a reasonable means for maximizing the return from the sale of the Assets. Additionally, to help facilitate and expedite a Potential Bidder’s evaluation of the Assets, the Debtors have established an electronic dataroom, which contains the information necessary for a Potential Bidder to perform the due diligence before submitting a bid.

43. Further, the Bid Procedures provide the Debtors with sufficient opportunity to consider all competing offers and to select the highest or best offer for the completion of a

Transaction. To the extent that the Debtors enter into a Stalking Horse Agreement, such entry ensures fair value by setting a minimum purchase price that is acceptable to the Debtors and the Agent while exposing bids to the marketplace. Accordingly, the Debtors and all parties in interest can be assured that the ultimate consideration paid for the Assets if a Sale is pursued will be fair, reasonable, and in the best interest of the Debtors' estates and creditors, and sound business reasons exist to approve the Bid Procedures.

44. Further, section 105(a) of the Bankruptcy Code provides that the Court "may issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). As detailed above, approval of the Bid Procedures will greatly assist the Debtors in maximizing the value that they may obtain for the Assets and, therefore, granting the requested relief is "appropriate" under the circumstances.

45. The Debtors request the Court's approval of the Bid Procedures, including the dates established thereby for an Auction and a Sale Hearing. Accordingly, the Debtors and all parties in interest can be assured that any consideration received by the Debtors for the Assets pursuant to the Bid Procedures will be fair and reasonable, and sound business reasons exist to approve the Bid Procedures.

D. Approval of Bid Protections for Stalking Horse Bidders Is Appropriate

46. To induce the Stalking Horse Bidder(s) to enter into Stalking Horse Agreements, setting floor prices for the Assets that may be tested in the marketplace, the Debtors may be required to provide Bid Protections. The terms of any Bid Protections shall be subject to Court approval pursuant to a Stalking Horse Order after seven (7) days' notice (*i.e.*, objection deadline of June 9, 2023) to all relevant parties as set forth in the Bid Procedures.

47. The proposed Bid Protections are fair and reasonable under the circumstances. Any break-up fee and/or any expense reimbursement will be negotiated at arms' length and in good

faith and will be necessary to secure the Stalking Horse Bidder(s)' participation in the proposed sale Transaction. Courts have long recognized that break-up fees and other termination fees are a reasonable, normal and, in many cases, necessary component of significant chapter 11 sales. *See, e.g., In re Acis Capital Mgmt., L.P.*, 604 B.R. 484, 517 (N.D. Tex. 2019) (“Without the Break-Up Fee, the Trustee would have had no ready, willing, and able partner for the proposed Plan. . . .”); *In re Lincolnshire Campus, LLC*, 2010 WL 5269706 at *2 (Bankr. N.D. Tex. July 23, 2010) (“The Break-Up Fee . . . induced the Buyer to submit a bid that will serve as a minimum or floor bid on which the Debtors . . . and other bidders can rely. Accordingly, the Break-Up Fee . . . [is] reasonable and appropriate and represent[s] the best method for maximizing the value for the benefit of the Debtors’ estates.”); *Reliant Energy Channelview LP v. Kelson Channelview LLC (In re Reliant Energy Channelview LP)*, 594 F.3d 200, 206-07 (3d Cir. 2010); *see also Official Comm. of Subordinated Bondholders v. Integrated Res., Inc. (In re Integrated Res., Inc.)*, 147 B.R. 650, 659-660 (S.D.N.Y. 1992) (“Breakup fees are important tools to encourage bidding and to maximize the value of the debtor’s assets In fact, because the . . . corporation ha[s] a duty to encourage bidding, break-up fees can be necessary to discharge [such] duties to maximize values.”); *In re ASARCO, L.L.C. v. Elliott Mgmt. (In re ASARCO, L.L.C.)*, 650 F.3d 593, 603 (5th Cir. 2011) (affirming a break-up fee that the bankruptcy court found helped to maximize the debtor’s estate). Break-up fees are appropriate where they “provide some benefit to the debtor’s estate,” including (a) promoting more competitive bidding, such as by inducing a bid that otherwise would not have been made and without which bidding would have been limited, and (b) inducing a bidder to research the value of the debtor and convert the value to a dollar figure on which other bidders can rely. *Reliant Energy Channelview LP v. Kelson Channelview LLC (In re Reliant Energy Channelview LP)*, 594 F.3d 200, 206-07 (3d Cir. 2010); *Calpine Corp. v. O’Brien Envtl. Energy*,

Inc. (In re O'Brien Env'tl. Energy, Inc.), 181 F.3d 527, 537 (3d Cir. 1999); *In re Acis Capital Mgmt., L.P.*, 604 B.R. 484, 517 (N.D. Tex. 2019).

48. Here, any Bid Protections to be paid under the circumstances described herein will be: (a) actual and necessary costs and expenses of preserving the Debtors' estates within the meaning of Bankruptcy Code sections 503(b) and 507(a)(2); (b) commensurate to the real and substantial benefit conferred upon the Debtors' estates by the Stalking Horse Bidder(s); reasonable and appropriate, in light of the size and nature of the proposed sale transaction and comparable transactions, to the commitments that have been made and the efforts that have been and will be expended by the Stalking Horse Bidder(s); (d) necessary to induce the Stalking Horse Bidder(s) to continue to pursue the sale Transaction and to continue to be bound by any Stalking Horse Agreement; and (e) subject to all parties in interests' rights to object and be heard with respect to approval of such Bid Protections. Indeed, the Bid Protections will enable the Debtors to secure an adequate floor price for their Assets, thereby ensuring that competing bids would be materially higher or otherwise better than the bids reflected in any Stalking Horse Agreement(s) – a clear benefit to the Debtors' estates. Moreover, it is not likely that any Stalking Horse Bidder would agree to act as a stalking horse without the Bid Protections. Without the Bid Protections, the Debtors may lose the opportunity to obtain the highest or best offer for the Assets and would certainly lose the downside protection that will be afforded by the existence of the Stalking Horse Bidder(s) and Stalking Horse Agreement.

49. Moreover, the Stalking Horse Bidder(s) will have expended, and will continue to expend, considerable time, money and energy in connection with the Transaction and will engage in extended and lengthy good faith negotiations. In particular, any Stalking Horse Agreement will be the culmination of a marketing effort and part of a process undertaken by the Debtors, and the

Debtors' professionals to identify and negotiate a transaction that the Debtors believe to be the highest and best proposal for an acquisition of the Debtors' Assets. Therefore, the Debtors believe that granting any Bid Protections requested by the Debtors pursuant to any Stalking Horse Order(s) will provide a postpetition benefit to the Debtors' estates and maximize the value realized for the benefit of the Debtors' estates, their creditors, and other parties in interest.

50. Finally, payment of the Bid Protections in the context of a sale to another purchaser that outbids a Stalking Horse Bidder will not diminish the Debtors' estates to the extent they become payable, as the Bid Procedures require that any competing bid must exceed a Stalking Horse Bid by an amount in excess of the break-up fee and expense reimbursement. For the foregoing reasons, any Bid Protections reflect a sound business purpose, are fair and appropriate under the circumstances, and should be approved.

51. "A break-up fee should constitute a fair and reasonable percentage of the proposed purchase price, and should be reasonably related to the risk, effort, and expenses of the prospective purchaser. When reasonable in relation to the bidder's efforts and to the magnitude of the transaction, break-up fees are generally permissible." *Official Comm. of Subordinated Bondholders v. Integrated Res., Inc. (In re Integrated Res., Inc.)*, 147 B.R. 650, 662 (S.D.N.Y. 1992). *See, e.g., In re Rupari Holding Corp.*, Case No. 17-10793, 2017 Bankr. LEXIS 4042, at *119 (Bankr. D. Del. June 7, 2019) (authorizing a breakup fee of 4%); *In re Edge Petroleum Corp., et al.*, Case No. 09-20644 (Bankr. S.D. Tex.) [Dkt. No. 57] (finding a breakup fee of 3.14% plus expenses was reasonable); *In re Erickson Retirement Cmtys., LLC*, Case No. 09-37010-SGJ (Bankr. N.D. Tex.) [Dkt. No. 272] (finding break-up fee and expenses equal to 3.5% of purchase price reasonable.). Here, any breakup fee requested by the Debtors will be a fair, reasonable

percentage of the purchase price and therefore appropriate in light of the size and nature of the transaction.

52. As additional support, section 105(a) of the Bankruptcy Code provides that the Court “may issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title.” 11 U.S.C. § 105(a). As described above, approval of any Bid Protections will greatly assist the Debtors in maximizing the value that that can obtained for all or portions of the Assets. Consequently, granting the requested relief is “appropriate” under the circumstances.

E. Approval of the Sale is Warranted Under Bankruptcy Code 363(b)

53. If a sale of substantially all of the Debtors’ Assets is pursued, at the conclusion of the Sale Hearing, the Debtors will request that the Court enter the Sale Order, approving the sale of the Assets to the Stalking Horse Bidder(s) or such other Qualified Bidder who submits the Successful Bid (with any liens, claims, interests and encumbrances attaching to the net proceeds of the sale with the same force, validity, effect, priority and enforceability as such interest had in the Assets before such sale).⁹ The Debtors submit that they will not make such a request unless it is in the best interest of the Debtors’ estates and creditors.

54. Section 363(b)(1) of the Bankruptcy Code provides that a debtor, “after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.” 11 U.S.C. § 363(b)(1). To approve the use, sale, or lease of the property outside the ordinary course of business, the Court need only determine that the Debtors’ decision is supported by “some articulated business justification” as established by the Second Circuit in *Committee of Equity Security Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1070 (2d. Cir. 1983),

⁹ To be clear, if the Debtors pursue a Sale, this portion of the relief is requested to be entered after the Sale Hearing in the form of a Sale Order. The Debtors hereby reserve the right to file supplemental pleadings in support of their request for entry of the Sale Order.

which decision has been adopted in this Circuit. *Inst. Creditors of Continental Airlines, Inc. v. Continental Airlines, Inc. (In re Continental Airlines, Inc.)*, 780 F.2d 1223, 1226 (5th Cir. 1986); *Cadle Company v. Mims (In re Moore)*, 608 F.3d 253, 263 (5th Cir. 2010); see also *Myers v. Martin (In re Martin)*, 91 F.3d 389, 395 (3d Cir. 1996); *Fulton State Bank v Schipper (In re Schipper)*, 933 F.2d 513 (7th Cir. 1991); *In re Condere Corp.*, 228 B.R. 615, 628-29 (Bankr. S.D. Miss. 1998); *In re San Jacinto Glass Industries, Inc.*, 93 B.R. 934, 944 (Bankr. S.D. Tex. 1988). Once a debtor articulates a valid business justification, “[t]he business judgment rule ‘is a presumption that in making the business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action was in the best interests of the company.’” *In re S.N.A. Nut Co.*, 186 B.R. 98 (Bankr. N.D. Ill. 1995); see *In re Integrated Res., Inc.*, 147 B.R. at 656 (Bankr. S.D.N.Y. 1992); *Comm. Of Asbestos-Related Litigants v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 60 B.R. 612, 615–16 (Bankr. S.D.N.Y. 1986) (“a presumption of reasonableness attaches to a debtor’s management decisions.”). See also *In re ASARCO, L.L.C. v. Elliott Mgmt. (In re ASARCO, L.L.C.)*, 650 F.3d 593, 601 (5th Cir. 2011) (“The business judgment standard in section 363 is flexible and encourages discretion.”). In evaluating such a sale, a court must balance the need for flexibility with the concern of affected creditors. *In re ASARCO, L.L.C.*, 650 F.3d at 601; *In re Terrace Gardens Park P’ship*, 96 B.R. at 715.

55. Thus, if a debtor’s actions satisfy the business judgment rule, then the transaction in question should be approved under Bankruptcy Code section 363(b)(1). When applying the business judgment standard, courts show great deference to a debtor’s business decisions. *In the Matter of ASARCO, L.L.C. v. Elliott Mgmt. (In re ASARCO, L.L.C.)*, 650 F.3d at 601; *In re Terrace Gardens Park P’ship*, 96 B.R. 707, 715 (Bankr. W.D. Tex. 1989).

56. The Debtors' request for entry of the Sale Order, if any, will be based on their sound business justification for selling the Assets. Based on a careful review of the Debtors' financial position and the Debtors' ongoing and future business prospects, the Debtors and their advisors have concluded that an expedited sale of the Assets in accordance with the procedures set forth in the Bid Procedures may be the best method to maximize recoveries to the estates. Asset value maximization is a sound business purpose warranting authorization of any proposed sale. For the reasons discussed herein, the Debtors believe that a sale of the Assets may be the best way to maximize value for the benefit of creditors and stem any further deterioration of the going concern value of the company.

57. The Debtors have proposed a fair and open process for achieving the goal of obtaining the highest or best offer in a sale of the Assets for the benefit of the Debtors' estates and creditors. The sale of the Assets will be subject to competing bids, enhancing the Debtors' ability to receive the highest or otherwise best value for the Assets. Consequently, the fairness and reasonableness of the consideration to be received by the Debtors if a Sale is conducted will ultimately be demonstrated by a "market check" through the auction process, which is the best means for establishing whether a fair and reasonable price is being paid.

58. For the reasons outlined above, the Debtors assert that any sale of their Assets pursuant to the Bid Procedures will be a sound exercise of their business judgment and supported by the facts and circumstances of these cases.

59. Moreover, all creditors and parties in interest will receive adequate notice of the Bid Procedures and the Sale Hearing, as set forth herein. Such notice is reasonably calculated to provide timely and adequate notice to the Debtors' major creditor constituencies, those parties most interested in these cases, those parties potentially interested in bidding on the Assets and

others whose interests are potentially implicated by a proposed sale. Accordingly, moving forward with a sale process as soon as possible is in the best interests of the Debtors' creditors and parties in interest.

F. The Proposed Sale Satisfies the Requirements of Section 363(f) for a Sale Free and Clear of Interests

60. Section 363(f) of the Bankruptcy Code permits a debtor to sell its assets free and clear of all liens, claims, interests, charges and encumbrances (with any such liens, claims, interests, charges, and encumbrances attaching to the net proceeds of the sale with the same rights and priorities therein as in the sold assets). 11 U.S.C. § 363(f). Because section 363(f) of the Bankruptcy Code is drafted in the disjunctive, satisfaction of any of its five requirements will suffice to permit the sale of the Assets free and clear of the interest. *In re Motors Liquidation Co.*, 829 F.3d 135, 154 (2d Cir. 2016) (“A sale pursuant to § 363(b) may be made ‘free and clear of any interest in such property’ if any condition on a list of conditions is met.”); *Michigan Employment Sec. Comm. (In re Wolverine Radio Co.)*, 930 F.2d 1132, 1147 n.24 (6th Cir. 1991) (stating that “Bankruptcy Code §363(f) is written in the disjunctive” and holding that the court may approve the sale free and clear provided that at least one of the subsections of § 363(f) is met.); *In re Ditech Holding Corp.*, 606 B.R. 544, 580 (Bankr. S.D.N.Y. 2019) (“A sale pursuant to section 363(b) may be made ‘free and clear of any interest in such property’ if the trustee or debtor satisfies any of the conditions set forth in section 363(f).”). If a Sale is pursued, the Debtors believe they will be able to demonstrate at the Sale Hearing that one or more of the conditions in section 363(f) of the Bankruptcy Code have been satisfied.

61. The Debtors believe that one or more of the tests of section 363(f) are satisfied with respect to the transfer of the Assets as agreed to with a Prevailing Purchaser. First, the Agent may consent to the sale free and clear under section 363(f)(2). In the event it does not, a sale free and

clear may proceed pursuant to section 363(f)(5) of the Bankruptcy Code because the Agent will be paid from the proceeds of the sale and the Debtors will establish at the Sale Hearing that the Agent can be compelled to accept a monetary satisfaction of its claims.

62. The Debtors propose that all liens, claims, encumbrances, or interests attach to the sale proceeds with the same force, validity, effect, priority and enforceability as such interests had in the Assets before such sale.

G. The Bid Procedures Were Designed to Prevent Collusion Among Parties in Interest

63. The Bid Procedures require each Qualified Bidder participating in the Auction to confirm that it has not engaged in any collusion with respect to the bidding. Thus, section 363(n) of the Bankruptcy Code governing collusive sales is inapplicable to any sale of the Debtors' Assets pursuant to the Bid Procedures. 11 U.S.C. § 363(n).

H. The Prevailing Purchaser Should be Entitled to the Protections of Section 363(m)

64. Pursuant to section 363(m) of the Bankruptcy Code, a good faith purchaser is one who purchases assets for value, in good faith, and without notice of adverse claims. *See O'Dwyer v. O'Dwyer (In re O'Dwyer)*, 611 Fed. App'x 195, 200 (5th Cir. 2015); *Mark Bell Furn. Warehouse, Inc. v. D.M. Reid Assoc., Ltd. (In re Mark Bell Furniture Warehouse, Inc.)*, 992 F.2d 7, 9 (1st Cir. 1993); *In re Abbotts Dairies of Pa.*, 788 F.2d 143, 147 (3d Cir. 1986); *Willemain v. Kivitz (In re Willemain)*, 764 F.2d 1019, 1023 (4th Cir. 1985); *Factory Mut. Ins. V. Panda Energy Int'l (In re Hereford Biofuels, LP)*, 466 B.R. 841, 860 (Bankr. N.D. Tex. 2012). To the extent the Debtors seek Court approval of a Sale, the Debtors will adduce facts at the Sale Hearing demonstrating that any bidder who is deemed the Prevailing Purchaser for the Assets had negotiated at arm's length, with all parties represented by their own counsel.

65. Accordingly, any sale order entered will include a provision that the Prevailing Purchaser for the Assets is a "good faith" purchaser within the meaning of section 363(m) of the

Bankruptcy Code. The Debtors believe that providing the Prevailing Purchaser with such protection will ensure that the Debtors will receive the maximum price for the Assets and that any Sale will close promptly.

I. The Debtors Have Exercised Sound Business Judgment and Will Provide Adequate Notice and an Opportunity to Object to the Assumption and Assignment of Executory Contracts and Unexpired Leases

66. In connection with the potential assumption and assignment of the Designated Contracts, establishing a process is necessary by which (a) the Debtors and the non-debtor counterparties can reconcile cure obligations, if any, in accordance with Bankruptcy Code section 365, and (b) such counterparties can object to the assumption and assignment of executory contracts and unexpired leases and any applicable Cure Costs.

67. Section 365(a) of the Bankruptcy Code provides, in pertinent part, that a debtor in possession “subject to the court’s approval, may assume or reject any executory contract or [unexpired] lease of the debtor.” 11 U.S.C. § 365(a). The standard governing bankruptcy court approval of a debtor’s decision to assume or reject an executory contract or unexpired lease is whether the debtor’s reasonable business judgment supports assumption or rejection. *See, e.g., In re Senior Care Ctrs., LLC*, No. 18-33967, 2019 Bankr. LEXIS 3185, at *7 (Bankr. D. N.D. Tex. Oct. 4, 2019) (citing *Richmond Leasing Co. v. Capital Bank, N.A.*, 762 F.2d 1303, 1309 (5th Cir. 1985)); *In re Republic Airways Holdings Inc.*, 2016 Bankr. LEXIS 1927, at *10-11 (Bankr. S.D.N.Y. May 3, 2016) (citing *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 523 (1984) (stating that Section 365 is traditionally subject to the “business judgment” standard); *In re Gucci*, 193 B.R. 411 (S.D.N.Y. 1996). If the debtor’s business judgment has been reasonably exercised, a court should approve the assumption or rejection of an unexpired lease or executory contract. *See Mission Prod. Holdings v. Tempnology, LLC*, 139 S. Ct. 1652, 1658 (2019) (“The bankruptcy court will generally approve [the debtor’s] choice, under the deferential ‘business judgment’ rule.”)

(citing *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 523 (1984)); see also *Group of Institutional Investors v. Chicago M. St. P. & P.R.R. Co.*, 318 U.S. 523 (1943); *Sharon Steel Corp. v. Nat'l Fuel Gas Distrib. Corp.*, 872 F.2d 36, 39–40 (3d. Cir. 1989). Under the business judgment test, a court should approve a debtor's proposed assumption if such assumption will benefit the estate. *In re Tayfur*, 599 Fed. App'x. 44, 46 (3rd Cir. 2015); *In re Republic Airways Holdings Inc.*, Case No. 16-10429, 2016 Bankr. LEXIS 1927, at *10-11 (Bankr. S.D.N.Y. May 3, 2016) (“Courts generally will not second-guess a debtor's business judgment concerning whether an assumption or rejection benefits the debtor's estate.”); *In re Gunner Hotel Assoc.*, 96 B.R. 696, 698, (Bankr. W.D. Tex. 1988); *In re Food City, Inc.*, 94 B.R. 91, 93-94 (Bankr. W.D. Tex. 1988); *Wheeling-Pittsburgh Steel Corp. v. West Penn Power Co. (In re Wheeling-Pittsburgh Steel Corp.)*, 72 B.R. 845, 846 (Bankr. W.D. Pa. 1987) (quoting *In re Stable Mews Assoc.*, 41 B.R. 594, 596 (Bankr. S.D.N.Y. 1984) (“The business judgment test “requires only that the trustee (or debtor-in-possession) demonstrate that rejection of the executory contract will benefit the estate.”). Any more exacting scrutiny would slow the administration of a debtor's estate and increase costs, interfere with the Bankruptcy Code's provision for private control of administration of the estate, and threaten the Court's ability to control a case impartially. See *Richmond Leasing Co. v. Capital Bank, NA.*, 762 F.2d 1303, 1311 (5th Cir. 1985). Moreover, pursuant to section 365(b)(1) of the Bankruptcy Code, for a debtor to assume an executory contract, it must “cure, or provide adequate assurance that the debtor will promptly cure,” any default, including compensation for any “actual pecuniary loss” relating to such default. 11 U.S.C. § 365(b)(1).

68. Section 365(f) of the Bankruptcy Code provides that once an executory contract is assumed, the debtor may elect to assign such contract if “adequate assurance of future performance is provided.” 11 U.S.C. § 365(f)(2). See also *L.R.S.C. Co. v. Rickel Home Centers, Inc. (In re*

Rickel Home Center, Inc.), 209 F.3d 291, 299 (3d Cir. 2000) (“The Code generally favors free assignability as a means to maximize the value of the debtor’s estate.”); *see also RPD Holdings, L.L.C. v. Tech Pharm. Servs. (In re Provider Meds, L.L.C.)*, 907 F.3d 845, 851 (5th Cir. 2018) (“Once a trustee assumes an executory contract, a trustee may generally also assign the contract even where legal or contractual provisions would otherwise prohibit assignment.”); *Leonard v. General Motors Corp. (In re Headquarters Dodge, Inc.)*, 13 F.3d 674, 682 (3d Cir. 1994) (noting purpose of section 365(f) is to assist trustee in realizing the full value of the debtor’s assets). The meaning of “adequate assurance of future performance” depends on the facts and circumstances of each case, but should be given “practical, pragmatic construction.” *Carlisle Homes, Inc. v. Arrari (In re Carlisle Homes, Inc.)*, 103 B. R. 524, 538 (Bankr. D.N.J. 1989). *See also Absinthe Bar, L.L.C. v. Bourbon Saloon, Inc. (In re Bourbon Saloon, Inc.)*, 647 Fed. App’x. 342, 346 (5th Cir. 2016) (“A bankruptcy court’s determination of adequate assurance of future performance and the ability to cure under § 365 is a fact-specific question.”) (citing *Tex. Health Enters. Inc. v. Lytle Nursing Home (In re Tex. Health Enters. Inc.)*, 72 F. App’x. 122, 126 (5th Cir. 2003)); *Winters Nursery LLC v. Color Spot Holdings, Inc. (In re Color Spot Holdings, Inc.)*, 2018 WL 3996938, at *2 (D. Del. 2018); *In re Texas Health Enterprises, Inc.*, 246 B.R. 832, 834 (Bankr. E.D. Tex Jan. 27, 2000); *In re Natco Indus., Inc.*, 54 B.R. 436, 440 (Bankr. S.D.N.Y. 1985) (stating that adequate assurance of future performance does not mean absolute assurance that debtor will thrive). Among other things, adequate assurance may be given by demonstrating the assignee’s financial health and experience in managing the type of enterprise or property assigned. *In re Bygaph, Inc.*, 56 B.R. 596, 605–06 (Bankr. S.D.N.Y. 1986) (adequate assurance of future performance is present when a prospective assignee of a lease from debtors has financial resources and has expressed willingness to devote sufficient funding to business in order to give it strong likelihood of

succeeding); *In re Old South Coors, Inc.*, 27 B.R. 923, 926 (Bankr. N.D. Miss. 1983) (finding that successful business experience and financial strength of assignees met “all reasonable standards of adequate assurance . . .”).

69. Here, adequate assurance of future performance with respect to the Prevailing Purchaser shall be presented at any Sale Hearing. Upon any closing, the Prevailing Purchaser will have financial resources sufficient to perform under any executory contracts or unexpired leases it seeks to have assumed by the Debtors. To the extent that any defaults exist under any executory contracts and unexpired leases that are to be Assigned in connection with the Transaction, the Prevailing Purchaser will cure any such default contemporaneously with or as soon as practicable after consummation of an assumption and assignment of such executory contract or unexpired lease. Moreover, if necessary, the Debtors will adduce facts at the Sale Hearing on any objection demonstrating the financial wherewithal of the Prevailing Purchaser and its willingness and ability to perform under the executory contracts and unexpired leases to be assigned to it. If the Debtors seek approval of a Sale, the Sale Hearing will provide the Court and other interested parties ample opportunity to evaluate and, if necessary, challenge the ability of the Prevailing Purchaser to provide adequate assurance of future performance under the executory contracts and unexpired leases that it seeks to assume.

70. Additionally, the proposed Objection and Cure Procedures for the identification and payment of Cure Amounts are appropriately and reasonably tailored to provide non-debtor counterparties of the Designated Contracts with adequate notice of the proposed assumption and assignment of their applicable contract, as well as the proposed Cure Amounts related thereto, if any. Such non-debtor parties to the Designated Contract are given an opportunity to object to the proposed assumption and assignment and, in the event an objection is not resolved and the Debtors,

nonetheless, seek to assume the contract of such objecting counterparty, the Court will adjudicate the dispute, including issues pertaining to adequate assurance of future performance.

71. If the Debtors pursue a Sale, on the closing date of the Transaction, or as soon thereafter as practicable, the Prevailing Purchaser will (a) pay each of the counterparties to the Designated Contracts assumed and assigned as part of the Transaction for which there is not a dispute as to Cure Amounts, or such other party as is necessary to cure defaults, the Cure Amounts related to the Designated Contracts; and (b) with respect to the Designated Contracts for which the Cure Amounts are disputed, if any, pay such Cure Amount as determined by the Court at the Sale Hearing or otherwise. The payment of any Cure Amounts, as directed by the Court, will be in full and final satisfaction of all obligations to cure defaults and will compensate the respective counterparties to the Designated Contracts for any pecuniary losses under such contracts or leases pursuant to Bankruptcy Code section 365(b)(1).

72. As set forth in the Objection and Cure Procedures, the Debtors are also requesting that any Counterparty that fails to object to the proposed assumption and assignment of any Designated Contract be deemed to consent to the assumption and assignment of the applicable Designated Contract pursuant to Bankruptcy Code section 365 and on the terms set forth in the Sale Order, notwithstanding any anti-alienation provision or other restriction on assignment contained in the applicable contract or lease. *See, e.g., In re Alta Mesa Resources, Inc.*, Case No. 19-35133 (Bankr. S.D. Tex., Sept. 11, 2019) [Dkt. 317] (*citing Hargrave v. Township of Pemberton (In re Tabone, Inc.)*, 175 B.R. 855, 858 (Bankr. D.N.J. 1994) (finding that by not objecting to sale motion, creditor was deemed to consent)).

73. The Debtors respectfully submit that the procedures proposed herein for executory contracts and unexpired leases being Assigned at any Closing are appropriate and reasonably

tailored to provide adequate notice to the counterparties of any such contract (the “Contract Notice Parties”) in the form of the Assumption Notice of the proposed assumption and/or assignment of their applicable contract, as well as proposed Cure Amounts, if applicable. Thus, the Court should approve the Objection and Cure Procedures and authorize the Debtors to assume and assign executory contracts and unexpired leases as may be set forth in the Prevailing Purchaser’s asset purchase agreement.

J. The Court Should Waive the Stay of Bankruptcy Rules 6004 and 6006

74. Because time is of the essence in regard to the Transaction, the Debtors request that the Court waive the 14-day stay (a) provided in Bankruptcy Rule 6004(h) in all orders requested to be entered herein and (b) provided in Bankruptcy Rule 6006(d) in the Sale Order.

RESERVATION OF RIGHTS

75. Nothing contained herein is intended to be or shall be deemed as (a) an admission as to the validity of any claim against the Debtors; (b) a waiver of the Debtors’ or any appropriate party in interest’s rights to dispute the amount of, basis for, or validity of any claim; (c) a waiver or limitation of the Debtors’ rights under the Bankruptcy Code or any other applicable nonbankruptcy law; (d) an admission as to whether any contract or lease is an executory contract or unexpired lease; (e) an approval, assumption, adoption, or rejection of any agreement, contract, lease, program, or policy under section 365 of the Bankruptcy Code; or (f) a waiver of the rights of parties in interest to contest whether any of the interests described herein constitute property of the Debtors’ estates. The Debtors expressly reserve all of their rights with respect to the foregoing matters. Likewise, if the Court grants the relief sought herein, any payment made pursuant to the Court’s order is not intended to be and should not be construed as an admission to the validity of any claim or a waiver of the Debtors’ or any party in interest’s rights to subsequently dispute and/or contest such claim.

NOTICE

76. Notice of the hearing on the relief requested in this Motion will be provided by the Debtors in accordance and compliance with Bankruptcy Rules and Local Rules. The Debtors will provide notice of this motion to the following: (a) the U.S. Trustee for the Southern District of Texas, (b) the holders of the thirty largest unsecured claims against the Debtors (on a consolidated basis), (c) of the thirty largest unsecured claims against the Debtors (on a consolidated basis), (d) Oaktree Fund Administration, LLC and its counsel (Sullivan & Cromwell LLP, as primary counsel, and Bracewell LLP, as local counsel), (e) the United States Attorney's Office for the Southern District of Texas, (f) the Internal Revenue Service, (g) the United States Securities and Exchange Commission, (h) the state attorneys general for states in which the Debtors conduct business, (i) governmental agencies having a regulatory or statutory interest in these cases, (j) any party that has requested notice pursuant to Bankruptcy Rule 2002 and Bankruptcy Local Rule 9013-1(d). No other or further notice is needed in light of the nature of the relief requested.

[Remainder of page intentionally left blank]

CONCLUSION

WHEREFORE, the Debtors respectfully request that the Court enter an order, substantially in the form attached hereto, granting the relief requested in this motion and granting such other relief and further relief as appropriate under the circumstances.

Dated: May 14, 2023

PACHULSKI STANG ZIEHL & JONES LLP

/s/ Michael D. Warner

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Proposed Counsel to the Debtors and Debtors in Possession

Certificate of Service

I certify that on May 14, 2023, I caused a copy of the foregoing document to be served via the Electronic Case Filing System for the United States Bankruptcy Court for the Southern District of Texas.

/s/ Michael D. Warner

Michael D. Warner

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

In re:

ATHENEX, INC., et al.,

Debtors.¹

Chapter 11

Case No. 23-90295 (DRJ)

(Joint Administration Requested)

**ORDER APPROVING (A) BID PROCEDURES; (B) THE FORM
AND MANNER OF NOTICE; (C) THE PROCEDURES FOR
DETERMINING CURE AMOUNTS FOR EXECUTORY CONTRACTS
AND UNEXPIRED LEASES; AND (D) GRANTING RELATED RELIEF**

Having considered the *Debtors' Emergency Motion for (i) Entry of an Order Approving (a) Bid Procedures; (b) the Form and Manner of Notice; (c) the Procedures for Determining Cure Amounts for Executory Contracts and Unexpired Leases; and (ii) Entry of an Order Approving (a) the Sale of Substantially All of the Debtors' Assets Free and Clear of All Liens, Claims, Encumbrances and Interests; and (b) the Assumption and Assignment of Certain Contracts and Unexpired Leases* [Dkt. No. ____] (the "Bid Procedures and Sale Motion")² of Athenex, Inc. and its debtor affiliates, as debtors and debtors in possession in the above-captioned Chapter 11 Cases (collectively, the "Debtors"), pursuant to sections 105(a), 363(b), 365, 503(b) and 507(a)(2) of title 11 of the United States Code (the "Bankruptcy Code"), Rules 2002, 6004, and 6006 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), and the Bankruptcy Local Rules, and

¹ A complete list of each of the Debtors in these Chapter 11 Cases may be obtained on the website of the Debtors' claims and noticing agent at <https://dm.epiq11.com/athenex>. The location of Athenex, Inc.'s principal place of business and the Debtors' service address in these Chapter 11 Cases is 1001 Main Street, Suite 600, Buffalo, NY 14203.

² All capitalized terms not expressly defined herein shall have the same meaning as ascribed in the Bid Procedures and Sale Motion or the Bid Procedures, as applicable. The Assets to be sold or otherwise transferred pursuant to this Bid Procedures Order are some or all of the assets, rights, and properties pertaining to or used in connection with the operation of the Debtors' business, but excluding any assets of Debtor Athenex Pharma Solutions, LLC.

the Court having determined that the relief provided herein is in the best interest of the Debtors, their creditors and other parties-in-interest; and due and adequate notice of the Bid Procedures and Sale Motion having been given under the circumstances; and upon the record of the bid procedures hearing, and the full record of these Cases; and due deliberation thereon; and good and sufficient cause appearing therefor; it is hereby:

FOUND AND DETERMINED THAT:³

A. The Court has jurisdiction over the Bid Procedures and Sale Motion and the Transaction pursuant to 28 U.S.C. § 1334.

B. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (M) and (O).

C. Venue in this district is proper under 28 U.S.C. §§ 1408 and 1409.

D. Good and sufficient notice of the Bid Procedures and Sale Motion and the relief sought therein has been given under the circumstances, and no other or further notice is required except as set forth herein.

E. A reasonable opportunity to object or to be heard regarding the relief provided herein has been afforded to all parties-in-interest.

F. The Debtors' proposed notice is appropriate and reasonably calculated to provide all interested parties with timely and proper notice of the relief sought in the Bid Procedures and Sale Motion.

G. The Debtors have articulated good and sufficient business reasons for this Court to: (a) approve the Bid Procedures, including the procedures for selecting one or more Stalking Horse Bidders; (b) schedule a Bid Deadline, Auction and Sale Hearing with respect to a potential sale of

³ Findings of fact shall be construed as conclusions of law, and conclusions of law shall be construed as findings of fact.

the Assets; (c) approve payment of any Bid Protections under the terms and conditions set forth in any Stalking Horse APA, subject to further order of the Court; (d) establish the procedures to fix the Cure Amounts to be paid pursuant to section 365 of the Bankruptcy Code in connection with the assumption and assignment of the Designated Contracts;

H. The Bid Procedures, substantially in the form attached as **Exhibit A**, are fair, reasonable and appropriate and represent the best method for maximizing the value to be obtained for the Assets in the event of a Sale.

I. The Transaction Notice, substantially in the form attached as **Exhibit B**, is appropriate and reasonably calculated to provide all interested parties with timely and proper notice of the sale of Assets (including the sale of Assets free and clear of all liens, claims and encumbrances with all such liens, claims, and encumbrances attaching to the Transaction proceeds with the same force, validity, effect, priority and enforceability as such interests had in the Assets before such sale), the Transaction, the Bid Procedures, the Auction and the Sale Hearing, and no other or further notice is required.

J. The Assumption Notice, substantially in the form attached as **Exhibit C**, is appropriate and reasonably calculated to provide all interested parties with timely and proper notice of the potential assumption and assignment of the Assigned Contracts in connection with the sale of the Assets and the related Cure Costs, and no other or further notice is required.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. The request for entry of the Bid Procedures Order is **GRANTED** as set forth herein.

2. All objections to the request for entry of the Bid Procedures Order or the relief provided herein, including those that have not been withdrawn, waived or settled, and all reservations of rights included therein, are hereby overruled and denied on the merits.

Approval of Process Timeline

3. The Debtors are authorized to take any and all actions reasonably necessary or appropriate to implement the Bid Procedures in accordance with the following timeline:

Event	Deadline
Cure Notices Served	May 26, 2023
Deadline to Designate Stalking Horse Bidders(s)	June 2, 2023
Sale/ Cure Objection Deadline	June 9, 2023
Deadline to Object to Stalking Horse Bidder(s)	June 10, 2023
Bids Due	June 12, 2023
Auction	June 15, 2023
Notice of Winning Bids Filed	June 16, 2023
Objection to Winning Bidder	June 19, 2023 at 12:00 p.m. cst
Sale Approval Hearing	June [21], 2023 @ ___ a.m/p.m. cst
Sale Order Entered	June 23, 2023
Sale(s) Closed	June 30, 2023

4. The failure to timely file any objection described above in accordance with this Bid Procedures Order and by the applicable deadline shall forever bar the assertion of any objection to, as applicable, the Bid Procedures and Sale Motion, entry of any Stalking Horse Order or Sale Order, and/or consummation of the Transaction, including the assumption and assignment of Designated Contracts to the Prevailing Purchaser, and shall be deemed to constitute any such party's consent to entry of the applicable order and consummation of the Transaction and all other transactions related thereto.

5. The Debtors reserve the right, and are authorized to, subject to the consent of the Agent and in consultation with any Official Committee of Unsecured Creditors appointed in these Chapter 11 Cases (the "Committee"), modify the above timeline and the Bid Procedures in

accordance with the Bid Procedures.

Approval of the Bid Procedures

6. The Bid Procedures, in substantially the form attached as **Exhibit A**, are incorporated herein, and are hereby **APPROVED** in their entirety and shall apply with respect to the sale of the Assets. The Debtors are authorized to take all actions incidental, necessary and appropriate to implement the Bid Procedures. The failure to specifically include or reference a particular provision of the Bid Procedures in this Bid Procedures Order shall not diminish or impair the effectiveness of such provision.

7. The process and requirements associated with submitting a Qualified Bid are approved as fair, reasonable, appropriate and designed to maximize recoveries for the benefit of the Debtors' estates, creditors, and other parties in interest. No bid shall be deemed to be a Qualifying Bid or otherwise considered for any purposes unless such bid meets the requirements set forth in the Bid Procedures and is designated as a "Qualifying Bid" by the Debtors, with the Agent's consent, which shall not be unreasonably withheld and in consultation with the Committee.

8. As further described in the Bid Procedures, the Debtors request that the deadline for submitting bids for the Assets (the "Bid Deadline") be **June 12, 2023 at 5:00 p.m. (prevailing Central Time)**. Any disputes or objections, if any, to the selection of Qualified Bid(s), Successful Bid(s), or Backup Bid(s) shall be resolved by this Court at the Sale Hearing. The Debtors shall deliver a copy of each bid received to the Agent and the Committee promptly upon receipt.

9. The Debtors are authorized to conduct the Auction in accordance with the Bid Procedures. In the event that (a) the Debtors timely receive one or more Qualifying Bids, or (b) in the event that a Stalking Horse Bidder is selected, the Debtors receive a Qualifying Bid that the

Debtors, in their business judgment (with the Agent's consent and in consultation with the Committee), determine to be the Initial Highest Bid, the Debtors shall conduct the Auction, which shall take place at **10:00 a.m. (prevailing Central Time), on June 15, 2023** either virtually or physically at Pachulski Stang Ziehl & Jones, LLP, 10100 Santa Monica Blvd., 13th Floor, Los Angeles, CA, 90067 or at such later time or other place as agreed by the Debtors and the Agent, or as approved by order of the Court.

10. Before the Auction, the Debtors shall determine, in their reasonable judgment after consultation with the Debtors' financial and legal advisors and the Committee, and with the Agent's consent, which consent shall not be unreasonably withheld, which of the Qualifying Bids is likely to result in the highest and best value to the Debtors' estates (the "Initial Highest Bid"). Not later than June 14, 2023 at 5:00 pm (prevailing Central Time), the Debtors shall provide to the Auction Participants a copy of the Initial Highest Bid. To allow the Auction Participants to evaluate the Initial Highest Bid, the Debtors shall use commercially reasonable efforts to disclose the value that, in their business judgment and with the Agent's consent, they place on the Initial Highest Bid. The Debtors shall use commercially reasonable efforts to disclose to each Auction Participant the value that, in their business judgment, they place on such Auction Participant's Qualifying Bid.

11. At the commencement of the Auction, the Debtors shall formally announce the Initial Highest Bid. For each round, all Qualifying Bids at the Auction will be based on the Initial Highest Bid and increased therefrom, and thereafter made in minimum increments of at least \$100,000 more than the previous Qualifying Bid or in such other increments as the Debtors may determine, in consultation with the Committee and with the Agent's consent.

12. Each Qualified Bidder participating at the Auction will be required to confirm that

it has not engaged in any collusion with respect to the bidding or the Transaction. All bidding activity at the Auction shall be transcribed, videotaped, or both. The Auction will be conducted openly subject to and as set forth in the Bid Procedures.

13. Upon conclusion of the Auction, the Debtors will, in consultation with the Committee and with the Agent's consent, identify the highest or otherwise best bid (the "Successful Bid"). In making this determination, the Debtors may consider, among other things, the amount of cash and other consideration to be paid and the liabilities to be assumed or otherwise satisfied.

Approval of Right to Credit Bid

14. In conjunction with any Transaction and except as otherwise provided herein, the Agent may credit bid any portion and up to the entire amount of the Prepetition Term Loan Secured Indebtedness (as defined in the Cash Collateral Order), as applicable, on any or all Assets (the "Credit Bid Right"). The Agent shall be deemed to be a Qualified Bidder in all respects and the Agent may credit bid at any time prior to the conclusion of the Auction regardless of whether the Agent participated in prior rounds at the Auction. The Agent shall not be required to submit a Good Faith Deposit, Qualified Bidder Agreement, or any other deliverable or documentation to the Debtors, the Debtors' Counsel, or their representatives or agents. Upon exercise of the Credit Bid Right, the Agent shall not be required to take title to or ownership of, or have any obligation in connection with (in each case, legal, equitable, or otherwise), or be deemed to have taken title to or ownership of, or have any obligation in connection with (in each case, legal, equitable, or otherwise), any Assets, and the Agent shall have the right to designate any person or entity that shall take title to the Assets that are subject to the Credit Bid Right. No other person may credit bid on the Prepetition Collateral unless the entire amount of the Prepetition Term Loan Secured

Indebtedness will be paid in full in cash on the Closing of the proposed Transaction. Notwithstanding anything to the contrary in the Bid Procedures, in the event the Agent or any individual member of the Committee becomes a Potential Bidder or Qualified Bidder, such party shall forego all consent and consultation rights otherwise provided in the Bid Procedures until such time as such party is no longer a Potential Bidder or Qualified Bidder.

Adjournment or Cancellation of Auction

15. The Debtors may, at any time, determine to cancel or adjourn the Auction prior to the commencement of the Auction or during the Auction prior to the conclusion of the Auction by notice filed on the docket and emailed to all Qualified Bidders upon consent of the Agent, which consent shall not be unreasonably withheld.

Approval of Procedures for Selection of Stalking Horse Bidder and Bid Protections

16. The Debtors are authorized to enter into a Stalking Horse Agreement in form and substance acceptable to the Agent and in consultation with the Committee, which may provide for payment of the Bid Protections, as set forth in the Bid Procedures, subject to notice and entry of an order approving the selection of the Stalking Horse Bidder as set forth herein.

17. In the event that the Debtors select one or more parties to serve as a Stalking Horse Bidder, upon such selection, the Debtors shall, by June 2, 2023, file with the Court and provide the following parties notice of and an opportunity to object to the designation of such Stalking Horse Bidder(s) and any Bid Protections set forth in the Stalking Horse Agreement, with any such objection required to be filed with the Court and served by June 10, 2023: (a) the United States Trustee for the Southern District of Texas; (b) counsel for any statutory committee appointed in these cases; and (c) persons who have filed a request for notice pursuant to Bankruptcy Rule 2002.

18. After such notice and absent objection, the Debtors may submit an order to the Court under certification of counsel approving the selection of such Stalking Horse Bidder(s) and the Bid Protections. To the extent necessary, the Debtors shall be entitled to set an expedited hearing on any objection to the designation of the Stalking Horse Bid promptly following the expiration of any Stalking Horse Objection Deadline, subject to the availability of the Court.

Approval of Notice Procedures

19. The Transaction Notice, substantially in the form attached as **Exhibit B**, is hereby **APPROVED**.

20. Within five (5) days after entry of this Bid Procedures Order, the Debtors (or their agents): (a) will serve a copy of the Transaction Notice, as well as a copy of the Bid Procedures and Sale Motion and the Bid Procedures Order, by first-class mail, postage prepaid, or, for those parties who have consented to receive notice by the ECF system, by ECF, upon the following (collectively, the "Transaction Notice Parties"): (i) the United States Trustee for the Southern District of Texas; (ii) the holders of the 30 largest unsecured claims against the Debtors on a consolidated basis; (iii) the Office of the United States Attorney for the Southern District of Texas; (iv) the Internal Revenue Service; (v) all applicable state and federal taxing authorities having jurisdiction over the Assets to the extent reasonably known to the Debtors; (vi) the Securities and Exchange Commission; (vii) persons listed on the Master Service List; (viii) counsel to the Agent; (ix) all parties asserting a security interest in the Assets to the extent reasonably known to the Debtors; (x) federal, state, county and city tax and regulatory authorities to which the Debtors are subject, to the extent reasonably known to the Debtors; (xi) local and state environmental authorities to which the Debtors are subject, to the extent reasonably known to the Debtors; (xii) local, state and federal authorities and agencies that have issued licenses or permits to the Debtors

with respect to the operation and use of the Assets to which the Debtors are subject, to the extent reasonably known to the Debtors; (xiii) the counterparties to each of the Designated Contracts; (xiv) certain other parties who have expressed an interest in acquiring or investing in the Debtors or any of the Assets; (xv) counsel to the Official Committee of Unsecured Creditors, if any; (xvi) counsel to any Stalking Horse Bidder; and (xvii) persons who have filed a request for notice pursuant to Bankruptcy Rule 2002 and such other government agencies to the extent required by the Bankruptcy Rules and Bankruptcy Local Rules; and (b) will serve a copy of the Transaction Notice on all known creditors of the Debtors.

21. Service of the Transaction Notice as described above shall be good and sufficient notice of the Transaction with respect to all parties.

Approval of Procedures Related to Assumption and Assignment of Executory Contracts and Unexpired Leases

22. The Assumption Notice to be issued in connection with the proposed sale of the Assets, substantially in the form attached as Exhibit C, is hereby **APPROVED**.

23. By May 26, 2023, the Debtors shall serve the Assumption Notice by (a) first class United States mail, postage prepaid on all counterparties to Executory Contracts of the Debtors; and (b) the Court's ECF on those parties receiving electronic notice by such system. Listing an Executory Contract on the Assumption Notice does not mean that the Executory Contract will ultimately be a Designated Contract that is assumed and assigned. The Debtors reserve all rights, claims and causes of action with respect to the Executory Contracts listed in the Assumption Notice or any Supplemental Assumption Notice. The Assumption Notice shall identify the cure amount(s) the Debtors assert, based on the Debtors' records, that must be paid to cure defaults outstanding under each Executory Contract to permit the Debtors to assume such contracts and leases (the "Cure Amounts"), as of such date (the "Cure Date").

24. Service of such Assumption Notice as set forth herein shall be deemed good and sufficient notice of, among other things, the proposed assumption and assignment of the Executory Contracts that become Designated Contracts, the applicable Cure Costs related thereto, and the procedures for objecting thereto, and no other or further notice is necessary.

25. The Debtors may amend or supplement the Assumption Notice from time to time (the "Supplemental Assumption Notice"). If the Debtors file a Supplemental Assumption Notice, the Debtors shall promptly serve a copy of such Supplemental Assumption Notice on the counterparties to Executory Contracts that are affected by such amendment, supplementation, or modification by first class mail, and in no event shall the Debtors serve a Supplemental Assumption Notice such that counterparties to Executory Contracts are served with less than seven (7) days' notice of the proposed Cure Amounts prior to the Sale Hearing.

26. Objections, if any, by Counterparties identified in the Assumption Notice and/or any Supplemental Assumption Notice, must be filed and made so as to be received by the Objection Notice Parties on or before June 9, 2023, or seven (7) days after being served with any Supplemental Assumption Notice; provided, however, that no objections may be made after the Sale Hearing. Any objection challenging a Cure Amount must set forth the prepetition cure amount being claimed by the objecting party (the "Claimed Cure Amount") with appropriate documentation in support thereof.

27. At the Sale Hearing, the Debtors will seek Court approval of the assumption and assignment to the Prevailing Purchaser of only those Designated Contracts that have been selected by such Prevailing Purchaser to be assumed and assigned. The inclusion of an Executory Contract on an Assumption Notice and/or any Supplemental Assumption Notice will not (a) obligate the Debtors to assume any Executory Contract listed thereon nor the Prevailing Purchaser to take

assignment of such Executory Contract; or (b) constitute any admission or agreement of the Debtors, or any other party, that such contract or lease is an executory contract or unexpired lease within the meaning of section 365 of the Bankruptcy Code. The Debtors reserve the right to not assume and assign any Executory Contract until the Closing. The Debtors and their estates reserve any and all rights with respect to any Executory Contracts that are not ultimately designated as Assigned Contracts.

28. With respect to any contract or lease identified in the Assumption Notice and/or any Supplemental Assumption Notice, unless a Counterparty files a timely objection to (a) the Cure Amount relating to such contract or lease, or (b) the proposed assumption and assignment of such contract or lease, such counterparty shall (i) be forever barred from objecting to the Cure Amounts and from asserting any additional cure or other amounts with respect to the Assigned Contracts; (ii) be deemed to have consented to the assumption, assignment and/or transfer of such contract to the Prevailing Purchaser; and (iii) be forever barred and estopped from asserting or claiming against the Debtors, the Prevailing Purchaser or any other assignee of the relevant contract or lease, that any additional amounts are due or other defaults exist, that conditions to assumption and assignment must be satisfied under such Assigned Contracts, that adequate assurance is not being provided or that there is any other objection or defense to the assumption and assignment of such Assigned Contracts notwithstanding any anti-alienation provision or other restriction on assumption or assignment in the Designated Contract.

29. If a Counterparty to a Designated Contract files an objection to assumption or assignment, whether based on Cure Amount, adequate assurance of future performance, or any other alleged cause or claim, then, to the extent the relevant parties are not able to consensually resolve the dispute before the Sale Hearing, such dispute will be heard and resolved by the Court

at a hearing to resolve the disputed Cure Amounts; provided, however, that if an objection relates solely to the Cure Amount (any such objection, a “Cure Dispute”), the Designated Contract may be assumed by the Debtors and assigned to the Prevailing Purchaser provided that the cure amount the Counterparty asserts is required to be paid under Bankruptcy Code Section 365(b)(1)(A) and (or such lower amount as agreed to by the Counterparty) is deposited in a segregated account by the Debtors pending the Court’s adjudication of the Cure Dispute or the parties’ consensual resolution of the Cure Dispute.

Approval of Scheduling of Sale Hearing and Related Procedures

30. Any hearing for the final approval of the Transaction (the “Sale Hearing”) will be held on **June __, 2023 at __: __.m. (prevailing Central Time)** and may be adjourned or rescheduled with the consent of the Agent without further notice. At the Sale Hearing, the Debtors will seek Court approval of, among other things, the Successful Bid(s) and the Back-up Bid(s). Unless the Court orders otherwise, any Sale Hearing shall be an evidentiary hearing on matters relating to the Transaction and there will be no further bidding at such hearing.

31. Following the Sale Hearing, if the Prevailing Purchaser fails to consummate an approved Transaction, the Back-up Bidder will be deemed to be the new Prevailing Purchaser, and the Debtors will be authorized to consummate the Transaction with the Back-up Bidder without further order of the Court and such last Qualifying Bid of the Back-up Bidder shall thereupon be deemed the Successful Bid. A defaulting Prevailing Purchaser’s Good Faith Deposit shall be forfeited to the Debtors, and the Debtors specifically reserve the right to seek all additional available damages from the defaulting Prevailing Purchaser, notwithstanding any provision to the contrary in the applicable asset purchase agreement.

32. Except as otherwise provided herein, any and all objections to any Transaction, or the relief requested in the Bid Procedures and Sale Motion, if any, must be filed with the

Bankruptcy Court by **June 9, 2023 at 4:00 p.m. (prevailing Central Time)** (the “Objection Deadline”). Any and all such objections must be served on the Objection Notice Parties by the Objection Deadline.

Other Provisions

33. Except as otherwise provided herein, any objection hereunder must: (a) be in writing; (b) comply with the applicable Bankruptcy Rules and the Bankruptcy Local Rules; (c) state with particularity the legal and factual basis for the objection and the specific grounds therefor; (d) be filed with the Bankruptcy Court by the Objection Deadline of **June 9, 2023 at 4:00 p.m. (prevailing Central Time)**; and (e) be served so as to be received by no later than the Objection Deadline, on (i) counsel to the Debtors, Pachulski Stang Ziehl & Jones LLP, at 440 Louisiana Ave., Suite 900, Houston, Texas, 77002, Attn: Michael D. Warner (mwarner@pszjlaw.com) and at 10100 Santa Monica Blvd., Suite 1300, Los Angeles, California 90067, Attn: Richard M. Pachulski (rpachulski@pszjlaw.com), Debra I. Grassgreen (dgrassgreen@pszjlaw.com), and Shirley S. Cho (scho@pszjlaw.com); (ii) counsel to the Agent, Sullivan & Cromwell LLP, Attn: Ari B. Blaut (blauta@sullcrom.com), Daniel R. Loeser (loeserd@sullcrom.com), Benjamin S. Beller (bellerb@sullcrom.com), Mark E. Dendinger (mark.dendinger@bracewell.com), Jonathan Lozano (jonathan.lozano@bracewell.com); (iii) counsel to the Prevailing Purchaser, if one has been determined; (iv) counsel to any appointed committee; (v) counsel to the Stalking Horse Bidder(s), if any; and (vi) the United States Trustee at the Office of the United States Trustee, 515 Rusk St, #3516, Houston, Texas, 77002, Attn: Jana Smith Whitworth (Jana.Whitworth@usdoj.gov) and Ha Nguyen (ha.nguyen@usdoj.gov) (the

“Objection Notice Parties”). All objections will be heard by the Court at the Sale Hearing, or such other date as determined by the Court.

34. Subject to the Bid Procedures and this Bid Procedures Order, the Debtors reserve their rights, in the exercise of their fiduciary obligations, in consultation with the Committee and subject to the Agent’s consent, to: (a) determine (i) which Qualifying Bid, if any, is the highest or otherwise best offer; and (ii) reject at any time before entry of an order of the Court approving the Successful Bid, any bid that, in the Debtors’ reasonable discretion and with the Agent’s consent, is (1) inadequate or insufficient, (2) not in conformity with the requirements of the Bankruptcy Code or the Bid Procedures, or (3) contrary to the best interests of the Debtors, their estates and creditors; (b) modify the Bid Procedures or impose, at or before the Auction, additional customary terms and conditions on the Transaction involving the Assets, including, without limitation: (i) extending the deadlines set forth in the Auction procedures; (ii) modifying bidding increments; (iii) adjourning the Auction; (iv) adjourning the Sale Hearing in open court without further notice; (v) withdrawing from the Auction the Assets at any time before or during the Auction; or (vi) canceling the Auction.

35. Nothing in this Bid Procedures Order shall preclude the Debtors and their professionals from consulting with or providing information to the Agent and its professionals or other prospective bidders and their professionals that the Debtors, in consultation with their professionals, believe will facilitate the sale process contemplated herein or to which a prospective bidder consents.

36. Notwithstanding anything to the contrary in this Bid Procedures Order or the Bid Procedures and Sale Motion, any payment, obligations, or other relief authorized by this Bid Procedures Order shall be subject to the terms, conditions, and limitations of the Cash Collateral

Order then in effect, including any budget in connection therewith.

37. Any substantial contribution claims by any Qualified Bidder are deemed waived, to the extent based solely on such Qualified Bidder's submission of a bid in accordance with the Bid Procedures.

38. This Bid Procedures Order shall be binding on and inure to the benefit of the Debtors, including any chapter 7 trustee or other fiduciary appointed for the estates of the Debtors.

39. To the extent of the deadlines set forth in this Bid Procedures Order do not comply with the Bankruptcy Local Rules, such Bankruptcy Local Rules are waived and the terms of this Bid Procedures Order shall govern.

40. Notice of the Bid Procedures and Sale Motion as provided therein shall be deemed good and sufficient notice of such Motion and the requirements of Bankruptcy Rule 6004(a) and the Bankruptcy Local Rules are satisfied by such notice.

41. The Debtors are authorized to take all actions necessary to effectuate the relief granted in this Bid Procedures Order in accordance with the Bid Procedures and Sale Motion.

42. Notwithstanding Bankruptcy Rules 6004, 6006 or otherwise, this Bid Procedures Order shall be effective and enforceable immediately upon entry and its provisions shall be self-executing. To the extent applicable, the stay described in Bankruptcy Rules 6004(h) and 6006(d) is hereby waived.

43. The Court shall retain jurisdiction to hear and consider all disputes arising out of the interpretation or implementation of this Bid Procedures Order.

Dated:

UNITED STATES BANKRUPTCY JUDGE

Exhibit A

Bid Procedures

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

In re:	Chapter 11
ATHENEX, INC., et al.,	Case No. 23-90295 (DRJ)
Debtors. ¹	(Joint Administration Requested)

BID PROCEDURES

On May 14, 2023, Athenex, Inc. and its debtor-affiliates (the “Debtors” or the “Company”), as debtors in possession, each filed a voluntary petition for relief (the “Cases”) under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”).

To successfully navigate the chapter 11 process, the Debtors propose to explore a sale of substantially all of their assets² (the “Transaction” or the “Sale”) by implementing a competitive bidding process designed to generate maximum net value to the Debtors, their creditors, and the estates, culminating in an auction (the “Auction”).

The bid procedures set forth herein (the “Bid Procedures”) describe, among other things, the manner in which the bidders and bids become Qualified Bidders and Qualifying Bids (each as defined below), respectively, the receipt and negotiation of bids received, the conduct of the Auction, if any, the ultimate selection of the Prevailing Purchaser(s), (as defined below) if any, and Court approval thereof (collectively, the “Bidding Process”).

On May 14, 2023, the Debtors filed their *Motion for (i) Entry of an Order Approving (a) Bid Procedures; (b) the Form and Manner of Notice; (c) the Procedures for Determining Cure Amounts for Executory Contracts and Unexpired Leases; and (ii) Entry of an Order Approving the Sale of Substantially All of the Debtors’ Assets Free and Clear of All Liens, Claims, Encumbrances and Interests; and (b) the Assumption and Assignment of Certain Contracts and*

¹ A complete list of each of the Debtors in these Chapter 11 Cases may be obtained on the website of the Debtors’ claims and noticing agent at <https://dm.epiq11.com/athenex>. The location of Athenex, Inc.’s principal place of business and the Debtors’ service address in these Chapter 11 Cases is 1001 Main Street, Suite 600, Buffalo, NY 14203.

² The Assets to be sold or otherwise transferred are any and all of the assets, rights, and properties pertaining to or used in connection with the operation of the Debtors’ business, but excluding any assets of Debtor Athenex Pharma Solutions, LLC.

Unexpired Leases [Dkt. No. ____] (the “Bid Procedures and Sale Motion”),³ seeking, among other things, approval of the Bid Procedures outlined herein. These Bid Procedures were approved and authorized pursuant to the *Order Approving (a) Bid Procedures; (b) the Form and Manner of Notice; (c) the Procedures for Determining Cure Amounts for Executory Contracts and Unexpired Leases; and (d) Granting Related Relief* (the “Bid Procedures Order”) entered by the United States Bankruptcy Court for the Southern District of Texas, Houston Division.

1. Property to be Sold

The Debtors intend to pursue a sale of substantially all of their assets, rights, and properties pertaining to or used in connection with the operation of the Debtors’ business, excluding any assets of Athenex Pharma Solutions, LLC (collectively, the “Assets”) and to identify the person or entity making the highest or otherwise best bid at the Auction (the “Prevailing Purchaser”). The Assets include the Debtors’ major business segments, including the Oncology Innovation Platform (Cell Therapy and Orascovery) and their Commercial Platform as described in the First Day Declaration,⁴ including inventory held by the Debtors. However, any assets held by Athenex Pharma Solutions, LLC (“APS”) are excluded and are not Assets.

2. Selection of a Stalking Horse Bidder.

No later than June 2, 2023, the Debtors may enter into an agreement (a “Stalking Horse Agreement”) in form and substance acceptable to the Agent and in consultation with the Official Committee of Unsecured Creditors (the “Committee”), and subject to approval by the Court and higher or otherwise better offers at the Auction, with one or more stalking horse bidders (each, a “Stalking Horse Bidder”) to establish a minimum bid at the Auction with respect to all or any portion of the Assets. In the event that one or more Stalking Horse Bidders are selected, the Debtors shall seek Court approval of each Stalking Horse Bidder pursuant to the Bid Procedures Order.

The Stalking Horse Agreement, subject to the consent of the Agent and consultation with the Committee, may contain an expense reimbursement for the reasonable, documented out-of-pocket expenses of the Stalking Horse Bidder incurred in connection with the Stalking Horse Agreement in an aggregate amount not to exceed the lesser of (i) one percent (1%) of the cash portion of the purchase price under the Stalking Horse Agreement, and (ii) \$250,000, and (b) a break-up fee for the Stalking Horse Bidder in an amount not to exceed three percent (3%) of the cash portion of the purchase price under the Stalking Horse Agreement ((a) and (b) of this sentence, collectively, the “Bid Protections”), payable only from the proceeds of a Sale with a Qualified Bidder other than the Stalking Horse. The Bid Protections shall be an allowed administrative expense.

3. Participation Requirements

Any person wishing to participate in the Bidding Process (each, a “Potential Bidder”) must become a “Qualified Bidder.” As a prerequisite to becoming a Qualified Bidder, a Potential Bidder must:

³ All capitalized terms not expressly defined herein shall have the same meaning as ascribed in the Bid Procedures and Sale Motion or the Bid Procedures, as applicable

⁴ See Declaration of Nicholas K. Campbell, in Support of the Debtors’ Chapter 11 Petitions and First Day Relief (the “First Day Declaration”).

- a. deliver an executed confidentiality agreement in form and substance reasonably acceptable to the Debtors (a “Bidder Confidentiality Agreement”); and
- b. be able, as determined by the Debtors and with the Agent’s consent, to consummate a Transaction based on a Qualifying Bid (as defined below).

The Debtors, in consultation with the Committee and with the Agent’s consent, shall determine whether a Potential Bidder who satisfies the foregoing prerequisites shall be deemed a “Qualified Bidder.”

The Stalking Horse Bidder(s), if any, are deemed to be Qualified Bidder(s) and the Stalking Horse Agreement(s) constitute Qualifying Bid(s) for all purposes.

The Debtors reserve the right, with the Agent’s consent, (a) at any time to require any Potential Bidder previously determined to be a Qualified Bidder (other than the Stalking Horse Bidder, if any) to provide additional evidence of its ability to consummate a Transaction based on a Qualifying Bid in order to remain a Qualified Bidder, and (b) to exclude any such Potential Bidder (other than the Stalking Horse Bidder, if any) from participating further in the Auction as a result of its inability to satisfy such further requirements to remain a Qualified Bidder.

4. Due Diligence

To the extent permitted by these Bid Procedures, the Debtors shall afford any Qualified Bidder the time and opportunity to conduct reasonable due diligence. This will include an opportunity for Qualified Bidder(s) to receive access to a comprehensive data room containing information about the Debtors and the Assets, to request additional information from the Debtors, and to discuss due diligence issues with representatives of the Debtors. To obtain information in addition to the information contained in the electronic data room, a Qualified Bidder must first advise the Debtors in writing of the nature and extent of such additional due diligence such Qualified Bidder may wish to conduct. The due diligence period shall extend to the Bid Deadline (as defined below). The Debtors, with the Agent’s consent, will be permitted to place reasonable restrictions on a Qualified Bidder’s due diligence visits and requests for additional information. The Debtors shall afford the Agent the same time and opportunity to conduct reasonable due diligence that it will provide to any other Qualified Bidder, including, without limitation, the rights and opportunities detailed in this Paragraph 4 of the Bid Procedures. The Debtors have designated their investment banker, Cassel Salpeter & Co., LLC, to coordinate the response to all reasonable requests for additional information and due diligence from Qualified Bidders. Interested bidders should contact Philip Cassel, Managing Director, at pcassel@cs-ib.com and James S. Cassel, Chairman, at jcassel@cs-ib.com.

The Debtors and their representatives shall not be obligated to furnish any due diligence information after the Bid Deadline. Neither the Debtors nor any of their respective representatives are obligated to furnish any information relating to the Assets to any person other than a Qualified Bidder. Due diligence shall be completed on or before the Bid Deadline.

Each Qualified Bidder shall be deemed to acknowledge and represent that it has had an opportunity to conduct any and all due diligence regarding the Assets prior to making a bid; that it has relied solely upon its own independent review, investigation and/or inspection of any documents and

the Assets 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 therewith, except as expressly stated in these Bid Procedures.

5. Bid Requirements/Determination of Qualifying Bid Status

To be deemed a “Qualifying Bid,” a bid must be received from a Qualified Bidder by a date no later than the Bid Deadline that is in cash and:

- a. Identification of Qualified Bidder. Identifies the party submitting the bid (and any equity holders, in the case of a Qualified Bidder which is an entity specially formed for the purpose of effectuating the contemplated transaction) and the representatives thereof who are authorized to appear and act on its behalf for all purposes regarding the contemplated Transaction;
- b. Proposed Acquired Property. Identifies the Debtors’ assets that the Qualified Bidder is bidding on (such specified property is the “Proposed Acquired Property”);
- c. Purchase Price Allocation. Specifies the portion of the aggregate purchase price that is being allocated to each of the Debtors’ assets;
- d. Irrevocability of Bid. Includes a letter stating that the Qualified Bidder’s offer is irrevocable⁵ until the closing of the Transaction if such Qualified Bidder is the Prevailing Purchaser, and that the Qualified Bidder agrees to serve as a Back-up Bidder if such bidder’s Qualifying Bid is selected as the next highest or otherwise next best bid after the Successful Bid (as defined below) (the “Back-Up Bid,” and the Qualified Bidder making the Back-Up Bid, the “Back-Up Bidder”);
- e. Consideration. Identifies the cash consideration to be paid for the Proposed Acquired Property, or such other consideration as is acceptable to the Debtors and the Agent;
- f. Assumed Liabilities. Identifies the Debtors’ liabilities that the Qualified Bidder seeks to assume;
- g. Identification of Executory Contracts and Unexpired Real Property Leases. Identifies with particularity the Debtors’ executory contracts and unexpired leases with respect to which the Qualified Bidder seeks to receive an assignment;

⁵ The Back-up Bidder shall be required to keep its bid open and irrevocable until 5:00 p.m. (prevailing Central time) on the date which is the earlier of (a) thirty (30) days after entry of the order approving the Transaction with the Prevailing Purchaser (the “Outside Back-up Date”) and (b) the closing of the Transaction with the Prevailing Purchaser.

- h. Adequate Assurance Information. Includes sufficient financial or other information (the “Adequate Assurance Information”) to establish adequate assurance of future performance with respect to any lease or contract to be Assigned to the Qualified Bidder in connection with the proposed transaction. The bid shall also identify a contact person (with relevant contact information) that counterparties to any lease or contract can contact to obtain additional Adequate Assurance Information;
- i. Asset Purchase Agreement. Includes a duly authorized and executed asset purchase agreement providing for the purchase of the Proposed Acquired Assets (the “Qualified Bidder Agreement”), together with a copy of such agreement marked to show the specific changes to the Form APA⁶ that the Qualified Bidder requires (a “Marked Agreement”). The Qualified Bidder Agreement shall:
 - i. be on terms and conditions no less favorable to the Debtors’ estates than the terms and conditions contained in the Stalking Horse Agreement, if any (as determined by the Debtors in their reasonable business judgment with the Agent’s consent and in consultation with the Committee);
 - ii. include a complete set of all disclosure schedules and exhibits thereto marked to show the specific changes to the disclosure schedules and exhibits to the Stalking Horse Agreement, if applicable;
 - iii. (1) not contain any financing contingencies of any kind to closing on the proposed Transaction; and (2) provide for expiration of any due diligence contingency on or before the Bid Deadline; and
 - iv. not contain any condition to closing of the proposed Transaction on the receipt of any third party approvals (excluding that required by the Court, governmental, and/or regulatory approval).
- j. No Financing or Diligence Contingencies. Include sufficient financial or other information to demonstrate that the bid does not contain any financing contingencies of any kind to closing on the proposed Transaction;
- k. Value to the Estate in Excess of Stalking Horse Agreement, if any. To the extent a Stalking Horse Bidder is selected prior to the Bid Deadline, will result in a value to the Debtors’ estates in the Debtors’ business judgment with the Agent’s consent and in consultation with the Committee, that is more than the aggregate of the value of the sum of: (A) the cash purchase price of the Stalking Horse Agreement; plus (B) the Stalking Horse Bidder’s assumed liabilities in an estimated amount determined by the Debtors with the Agent’s consent and in consultation with the Committee; plus (C) the sum of the Bid Protections; plus (D) \$100,000;

⁶ The Form APA shall be in form and substance reasonably acceptable to the Agent.

- l. Evidence of Financial Ability. Includes sufficient evidence of the Qualified Bidder's ability to consummate the Transaction and payment of the purchase price in cash at the date the Transaction is scheduled to close (the "Closing"), including, but not limited to a signed commitment for any debt or equity financing; a bank or other account statement showing the ability of a Qualified Bidder to pay cash for the Proposed Acquired Assets; contact names and numbers for verification of financing sources; and current audited financial statements (or such other form of financial disclosure and credit-quality support or enhancement, acceptable to the Debtors with the Agent's consent and in consultation with the Committee of the Qualified Bidder or those entities that will guarantee in full the payment obligations of the Qualified Bidder;
- m. Deposit. Is accompanied by a cash deposit by wire transfer to an escrow agent selected by the Debtors with the Agent's consent (the "Deposit Agent") in an amount equal to 10% of the cash purchase price of the bid that will constitute liquidated damages of the Debtors if the Qualified Bidder shall default with respect to its offer (the "Good Faith Deposit"). The Qualified Bidder must deliver the Good Faith Deposit on or before the Bid Deadline;
- n. No Break-Up Fee. Except for any Stalking Horse Bidder(s), includes sufficient information to indicate that the Qualified Bidder is not entitled to any break-up fee, expense reimbursement, or similar type of payment;
- o. Due Diligence. Includes a letter acknowledging and representing that the Qualified Bidder:
 - i. has had an opportunity to conduct, and has completed, any and all due diligence regarding the Proposed Acquired Assets before making its bid;
 - ii. has relied solely on its own independent review, investigation and/or inspection of any documents and the Proposed Acquired Assets in making its bid; and
 - iii. did not rely on any written or oral statements, representations, promises, warranties or guaranties whatsoever, whether express, implied, by operation of law or otherwise, regarding the Proposed Acquired Assets, or the completeness of any information provided in connection therewith, except as expressly stated in these Bid Procedures and in the representations and warranties contained in the Form APA submitted as part of the Qualifying Bid (as it may be modified before acceptance and execution by the Debtors);
- p. Corporate Authority. Includes sufficient evidence of authorization and approval from the Qualified Bidder's board of directors (or comparable governing body) with respect to the submission, execution, delivery and closing of the Qualified Bidder Agreement;

- q. Regulatory Approvals and Covenants. Identifies each regulatory and third-party approval required for the Qualified Bidder to consummate the Transaction, if any, and the time period within which the Qualified Bidder expects to receive such regulatory and third-party approvals (and in the case that receipt of any such regulatory or third-party approval is expected to take more than thirty (30) days following the execution and delivery of the Qualified Bidder Agreement, those actions the Qualified Bidder will take to ensure receipt of such approvals as promptly as possible);
- r. Consent to Jurisdiction and Authority to Enter Final Orders. States that the Qualified Bidder consents to the jurisdiction of the Court and to the entry of a final judgment or order with respect to the Qualified Bidder's offer, as well as with respect to any aspect of the Bid Procedures and Sale Motion, including the Bid Procedures, and all orders of the Court entered with respect to the Transaction, if it is determined that the Court would lack Article III jurisdiction to enter such final order or judgment absent consent of the parties.

The Debtors, with the Agent's consent and in consultation with the Committee, shall determine whether a competing bid that meets the above requirements constitutes a "Qualifying Bid". The Debtors shall notify bidders whether their bids have been determined to be Qualifying Bids by no later than June 14, 2023.

6. Bid Deadline

- a. A Qualified Bidder that desires to make a bid shall deliver a written or electronic copy of its bid so as to be received no later than 5:00 p.m. (prevailing Central Time) on **June 12, 2023** (the "Bid Deadline"), to (i) proposed counsel to the Debtors, Pachulski Stang Ziehl & Jones LLP, at 440 Louisiana Ave., Suite 900, Houston, Texas, 77002, Attn: Michael D. Warner (mwarner@pszjlaw.com) and at 10100 Santa Monica Blvd., Suite 1300, Los Angeles, California 90067, Attn: Richard M. Pachulski (rpachulski@pszjlaw.com), Debra I. Grassgreen (dgrassgreen@pszjlaw.com), and Shirley S. Cho (scho@pszjlaw.com) ("Debtors' Counsel"); (ii) Cassel Salpeter & Co., LLC, Attn: Philip Cassel (pcassel@cs-ib.com) and James S. Cassel (jcassel@cs-ib.com); and (iii) counsel to the Agent, Sullivan & Cromwell LLP, Attn: Ari B. Blaut (blauta@sullcrom.com), Daniel R. Loeser (loeserd@sullcrom.com), Benjamin S. Beller (bellerb@sullcrom.com). The Debtors shall notify the Stalking Horse Bidder and other Qualified Bidders that have submitted Qualifying Bids if one or more Qualifying Bids are received.
- b. The Debtors, with the Agent's consent, may extend the Bid Deadline at any time on or before the date of the Bid Deadline. If the Debtors, with the Agent's consent, extend the Bid Deadline, the Debtors will promptly notify all Qualified Bidders of such extension.

7. Aggregate Bids

Persons who collectively are referred to as a “Qualified Bidder” need not be affiliates and need not act in concert with one another and the Debtors may, with the Agent’s consent and in consultation with the Committee, aggregate separate bids from unaffiliated persons to create one bid from a Qualified Bidder; provided, however, that all bidders shall remain subject to the provisions of Bankruptcy Code section 363(n) regarding collusive bidding.

8. Evaluation of Qualifying Bids

- a. The Debtors shall determine, in their reasonable judgment after consultation with the Debtors’ financial and legal advisors, and the Committee, and with the Agent’s consent, which of the Qualifying Bids is likely to result in the highest and best value to the Debtors’ estates (the “Initial Highest Bid”).
- b. Not later than June 14, 2023, the Debtors will provide to the Auction Participants (as defined below), the Committee and the Agent a copy of the Initial Highest Bid. To allow the Auction Participants to evaluate the Initial Highest Bid, the Debtors shall use commercially reasonable efforts to disclose the value that, in their business judgment and with the Agent’s consent, they place on the Initial Highest Bid. The Debtors shall also use commercially reasonable efforts to disclose to each Auction Participant the value that, in their business judgment, they place on such Auction Participant’s Qualifying Bid.

9. No Qualifying Bids

Subject to the Agent’s right to exercise its Credit Bid Right, if only one timely Qualifying Bid (including the Stalking Horse Bidder’s bid, if any) is received by the Bid Deadline or if a Stalking Horse Bidder’s Qualifying Bid is determined to be the Initial Highest Bid and there are no other Qualifying Bids, the Debtors shall not hold an Auction. At any time, the Debtors reserve the right to cancel or postpone the Auction with the consent of the Agent.

10. Right to Credit Bid

In conjunction with any Transaction and except as otherwise provided herein, the Agent may credit bid any portion and up to the entire amount of the Prepetition Term Loan Secured Indebtedness (as defined in the Cash Collateral Order)⁷ (the “Credit Bid Right”). The Agent shall be deemed to be a Qualified Bidder in all respects, the Credit Bid Right shall be deemed to be a Qualifying Bid in all respects, and the Agent may credit bid at any time prior to the conclusion of the Auction regardless of whether the Agent participated in prior rounds at the Auction. The Agent shall not be required to submit a Good Faith Deposit, Qualified Bidder Agreement, or any other deliverable or documentation to the Debtors, the Debtors’ Counsel, or their representatives or agents. Upon exercise of the Credit Bid Right, the Agent shall not be required to take title to or ownership of, or have any obligation in connection with (in each case, legal, equitable, or otherwise), or be deemed to have taken title to or

⁷ “Financing Order” shall mean the Cash Collateral Order then in effect.

ownership of, or have any obligation in connection with (in each case, legal, equitable, or otherwise), the Assets, and the Agent shall have the right to designate any person or entity that shall take title to the Assets that are subject to the Credit Bid Right. No other person may credit bid on the Prepetition Collateral or the Collateral unless the entire amount of the Prepetition Term Loan Secured Indebtedness will be paid in full in cash on the Closing of the proposed Transaction. Notwithstanding anything to the contrary in these Bid Procedures, in the event the Agent or any individual member of the Committee becomes a Potential Bidder or Qualified Bidder, such party shall forego all consent and consultation rights otherwise provided in the Bid Procedures until such time as such party is no longer a Potential Bidder or Qualified Bidder.

11. Auction

In the event that (a) the Debtors timely receive one or more Qualifying Bids, or (b) in the event that a Stalking Horse Bidder is selected, the Debtors receive a Qualifying Bid that the Debtors in their business judgment (with the Agent's consent and in consultation with the Committee), determine to be the Initial Highest Bid, the Debtors shall conduct the Auction with respect to such Qualifying Bids in order to determine, in the business judgment of the Debtors with the Agent's consent and in consultation with the Committee, the Successful Bid. The Auction shall be governed by the following procedures:

- a. Only the Stalking Horse Bidder, if any, and the other Qualified Bidders who have made a Qualifying Bid shall be entitled to make any subsequent Qualifying Bids at the Auction (the "Auction Participants"). Prior to the commencement of the Auction, the Debtors shall notify the Agent, the Committee and all Auction Participants the identity of the other Auction Participants (and any equity holders, in the case of an Auction Participant which is an entity specially formed for the purpose of effectuating the contemplated transaction).
- b. The Debtors, the Agent, the Auction Participants, their respective professionals, and any representatives of the Committee, may participate and be heard at the Auction, but only the Auction Participants (including the Stalking Horse Bidder, if any) will be entitled to make any subsequent Qualifying Bids at the Auction. If a Stalking Horse Bidder or any other Qualified Bidder appears through a duly authorized representative, such representative must have been granted a valid and enforceable power of attorney or have other written proof evidencing his or her ability to bind such party, which document(s) shall be delivered to the Debtors at least one business day before the Auction.
- c. The Auction, if required, shall commence at **10:00 a.m.**, prevailing Central time, on **June 15, 2023**. The Auction will take place either virtually or physically at Pachulski Stang Ziehl & Jones, LLP, 10100 Santa Monica Blvd., 13th Floor, Los Angeles, CA, 90067, or at such later time or other place as agreed by the Agent and the Debtors or approved by order of the Court, and of which the Debtors will notify the Auction Participants.

- d. Bidding shall commence at the amount and terms of the Initial Highest Bid, with the next bids to exceed the Initial Highest Bid by the increment set forth below.
- e. Each of the Auction Participants shall be required to confirm that it has not engaged in any collusion with respect to the bidding or the Transaction.
- f. At the commencement of the Auction, the Debtors shall formally announce the Initial Highest Bid. For each round, all Qualifying Bids at the Auction will be based on the Initial Highest Bid and increased therefrom, and thereafter made in minimum increments of at least \$100,000 or higher than the previous Qualifying Bid or in such other increments as the Debtors may determine, with the Agent's consent.
- g. The Stalking Horse Bidder(s) shall be entitled to submit successive Qualifying Bids as overbid at the Auction and, in calculating the amount of a Stalking Horse Bidder's overbid, a Stalking Horse Bidder shall be entitled to a credit in the amount of the Bid Protections. For example, if at the Auction a subsequent Qualifying Bid submitted by a Stalking Horse Bidder is the Successful Bid (over another Qualifying Bid that was submitted), then the purchase price that must be paid by the Stalking Horse Bidder pursuant to such Successful Bid shall be reduced by the amount of the Bid Protections.
- h. The Auction Participants shall have the right to submit successive Qualifying Bids as overbids and make additional modifications to the Stalking Horse Agreement or the Qualified Bidder Agreement at the Auction; provided, however, that any such modifications to the Qualified Bidder Agreement on an aggregate basis and viewed in whole, shall be not less favorable to the Debtors' estates, as determined by the Debtors, in consultation with the Committee and with the Agent's consent, than the terms of the highest and best Qualifying Bid at that time.
- i. The Auction will be conducted openly and the Auction Participants will be informed of the terms of the highest and best previous bid.
- j. Upon conclusion of the Auction, the Debtors will (i) review each Qualifying Bid on the basis of, *inter alia*, financial and contractual terms and other factors relevant to the purchase process, including those factors affecting the speed and certainty of consummating the transaction, and (ii) with the Agent's consent and in consultation with the Committee, identify the highest or otherwise best bid (the "Successful Bid"). In making this determination, the Debtors may, with the Agent's consent, consider, among other things, the amount of cash and other consideration to be paid and the liabilities to be assumed or otherwise satisfied.
- k. The Qualified Bidder that submitted the Successful Bid shall, subject to all other provisions hereof, become the Prevailing Purchaser and shall have such

rights and responsibilities of the purchaser, as set forth in the applicable Stalking Horse Agreement or Qualified Bidder Agreement.

- l. By making a Qualifying Bid at the Auction, an Auction Participant (including the Stalking Horse Bidder, if any) shall be deemed to have agreed to keep its final Qualifying Bid made at the Auction open through the earlier of (i) thirty (30) days after entry of the order approving the Transaction with the Prevailing Purchaser (the “Outside Back-up Date”), and (ii) the closing of the Transaction with the Prevailing Purchaser, if such Qualifying Bid is selected as the Back-up Bid.
- m. To facilitate a deliberate and orderly consideration of competing Qualifying Bids submitted at the Auction, the Debtors, with the Agent’s consent, may adjourn the Auction at any time and from time-to-time and may conduct multiple rounds of bidding. Before conclusion of the Auction, the Debtors may, with the Agent’s consent and in consultation with the Committee, permit one or more Auction Participants to join together as a single Qualified Bidder for the purpose of submitting a joint Qualifying Bid to acquire either some or all of the Proposed Acquired Property.
- n. The Debtors, with the Agent’s consent, shall have the right to adopt such other rules for the Auction (including rules that may depart from those set forth herein) that they determine in their business judgment will promote the goals of the Auction, including promoting the highest or otherwise best value for the Debtors’ estates.

12. Sale Hearing

- a. The Successful Bid will be subject to approval by the Debtors, subject to the consent of the Agent and in consultation with the Committee, and the Court. Unless the Agent is the Prevailing Purchaser at the Auction and chooses to implement its credit bid through the Plan, the evidentiary hearing to consider approval of the Successful Bid (the “Sale Hearing”) will be held at the United States Courthouse, 515 Rusk St., Houston, Texas, 77002 on, **June __, 2023 at __: __.m.** (prevailing Central Time) or such other date as the Court’s docket may accommodate. The Sale Hearing may be adjourned or rescheduled as ordered by the Court, or by the Debtors with the Agent’s consent, but without further notice to creditors and parties in interest other than by announcement by Debtors of the adjourned date at the Sale Hearing.
- b. The Debtors’ presentation to the Court for approval of a Successful Bid does not constitute the Debtors’ acceptance of the Successful Bid. The Debtors shall be deemed to have accepted a Successful Bid only when the Successful Bid has been approved by order of the Court.
- c. At the Sale Hearing, the Debtors will seek the entry of an order of the Court approving and authorizing the Transaction to the Prevailing Purchaser at the

Auction on the terms and conditions of the Successful Bid. The Prevailing Purchaser shall appear at the Sale Hearing and be prepared to testify in support of the Successful Bid and the Prevailing Purchaser's ability to close in a timely manner, including with respect to demonstrating adequate assurance of future performance that may be required in connection with any Designated Contracts.

- d. Should at any time contemplated by these Bid Procedures and the Order, the Agent fails to give the Debtors consent or there is a disagreement between the Agent and the Debtors as to such consent, the Debtors and/or the Agent may seek a determination from the Bankruptcy Court to resolve such dispute on an emergency basis.

13. Return of Good Faith Deposit(s)

- a. Except as provided herein, the Good Faith Deposit of all Qualified Bidders held by the Deposit Agent (other than the Stalking Horse Bidder, if any, and the Prevailing Purchaser) shall be returned, without interest, to each such Qualified Bidder not selected by the Debtors as the Prevailing Purchaser no later than five (5) business days following the Auction, except for the Back-up Bidder, subject to the terms of the escrow agreement pursuant to which such Good Faith Deposit is held.
- b. The Good Faith Deposit of the Stalking Horse Bidder and the Prevailing Purchaser will be distributed pursuant to and in accordance with (i) the Stalking Horse Agreement or the Qualified Bidder Agreement, as applicable; and (ii) the escrow agreement pursuant to which such Good Faith Deposit is held.
- c. The Good Faith Deposit of the Back-up Bidder shall be returned, without interest, no later than three (3) business days after the earlier to occur of (i) the closing of the Transaction with the Prevailing Purchaser; or (ii) the Outside Back-up Date.

14. Failure to Consummate Transaction

- a. If the Auction is conducted, the party (including the Stalking Horse Bidder) with the next highest and best Qualifying Bid to the Successful Bid, as determined by the Debtors in the exercise of their business judgment and with the Agent's consent, at the Auction shall serve as a Back-Up Bidder and such bid shall be open and irrevocable until 5:00 p.m. (prevailing Central Time) on the date which is the earlier of (i) Outside Back-up Date and (ii) the closing of the Transaction with the Prevailing Purchaser.
- b. Following the Sale Hearing, if the Prevailing Purchaser fails to consummate an approved Transaction, the Back-up Bidder, with the Agent's consent, will be deemed to be the new Prevailing Purchaser, and the Debtors, with the Agent's consent, will be authorized to consummate the Transaction with the Back-up

Bidder without further order of the Court and such last Qualifying Bid of the Back-up Bidder shall thereupon be deemed the Successful Bid. A defaulting Prevailing Purchaser's Good Faith Deposit shall be forfeited to the Debtors, and the Debtors specifically reserve the right to seek all additional available damages from the defaulting Prevailing Purchaser.

- c. If any Auction Participant fails to consummate the Transaction because of a breach or failure to perform on the part of such Auction Participant, the process described in this section may continue as determined by the Debtors with the Agent's consent until an Auction Participant consummates the Transaction.

15. Objections

- a. Objections, if any, to the identity of the Prevailing Purchaser (the "Objections") shall be filed with the Court not later than **June 19, 2023 at 4:00 p.m. (prevailing Central Time)** (the "Objection Deadline").
- b. Any Objections not resolved prior to the Sale Hearing shall be argued at the Sale Hearing or such other time as set by the Court.

16. Modifications

Subject to these Bid Procedures and the Order, the Debtors reserve their rights, in the exercise of their fiduciary obligations, and subject to the Agent's consent and in consultation with the Committee (when applicable), to:

- a. Determine (i) which Qualifying Bid, if any, is the highest or otherwise best offer; and (ii) reject at any time before entry of an order of the Court approving the Successful Bid, any bid that, in the Debtors' reasonable discretion and with the Agent's consent and consultation with the Committee, is (1) inadequate or insufficient, (2) not in conformity with the requirements of the Bankruptcy Code or the Bid Procedures, or (3) contrary to the best interests of the Debtors, their estates and creditors.
- b. Modify the Bid Procedures or impose, at or before the Auction, additional customary terms and conditions on the Transaction involving the Assets, including, without limitation: (i) extending the deadlines set forth in the Auction procedures; (ii) modifying bidding increments; (iii) adjourning the Auction; (iv) adjourning the Sale Hearing in open court without further notice; (v) withdrawing from the Auction the Assets at any time before or during the Auction; or (vi) canceling the Auction.

The Debtors, with the Agent's consent, may extend any of the deadlines, or delay any of the applicable dates, in these Bid Procedures.

Exhibit B

Transaction Notice

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

In re:

ATHENEX, INC., et al.,

Debtors.¹

Chapter 11

Case No. 23-90295 (DRJ)

(Joint Administration Requested)

**NOTICE OF (I) THE TERMS AND CONDITIONS OF THE
TRANSACTION; DEADLINE FOR FILING OBJECTIONS TO THE
TRANSACTION; (III) DATE OF SALE HEARING; AND (IV) DATE OF AUCTION**

PLEASE TAKE NOTICE THAT:

1. On May 14, 2023 (the "Petition Date"), Athenex, Inc. and its debtor-affiliates (the "Debtors" or the "Company") each commenced a bankruptcy case in the United States Bankruptcy Court for the Southern District of Texas, Houston Division, by filing voluntary petitions under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code").

2. On May 14, 2023, the Debtors filed their *Motion for (i) Entry of an Order Approving (a) Bid Procedures; (b) the Form and Manner of Notice; (c) the Procedures for Determining Cure Amounts for Executory Contracts and Unexpired Leases; and (ii) Entry of an Order Approving (a) the Sale of Substantially All of the Debtors' Assets Free and Clear of All Liens, Claims,*

¹ A complete list of each of the Debtors in these Chapter 11 Cases may be obtained on the website of the Debtors' proposed claims and noticing agent at <https://dm.epiq11.com/athenex>. The location of Athenex, Inc.'s principal place of business and the Debtors' service address in these Chapter 11 Cases is 1001 Main Street, Suite 600, Buffalo, NY 14203.

Encumbrances and Interests; and (b) the Assumption and Assignment of Certain Contracts and Unexpired Leases [Dkt. No. ____] (the “Bid Procedures and Sale Motion”).²

3. The Debtors are soliciting offers for the Assets, and the Court has entered the *Order Approving (a) Bid Procedures; (b) the Form and Manner of Notice; (c) the Procedures for Determining Cure Amounts for Executory Contracts and Unexpired Leases; and (d) Granting Related Relief* [Dkt. No. ___] (the “Bid Procedures Order”) approving auction and sale procedures (the “Bid Procedures”) for the Assets.³

4. Pursuant to the Bid Procedures and Sale Motion, the Debtors propose to potentially: (a) sell the Assets to the party submitting the highest or otherwise best bid for the Assets (the “Prevailing Purchaser”) at an auction (the “Auction”), free and clear of all liens, claims, or encumbrances thereon, except for certain assumed liabilities and permitted encumbrances as negotiated with the Prevailing Purchaser; and (b) assume and assign certain executory contracts and unexpired leases of the Debtors to the Prevailing Purchaser.

5. The Bid Procedures approved by the Bid Procedures Order describe, *inter alia*, the terms of the Bidding Process, the requirements and deadlines for participation therein, required terms of any bids, and the time, location and conduct of the Auction.

6. The Court has scheduled the Auction of the Assets on **June 15, 2023 at 10:00 a.m. (prevailing Central Time)** at the option of the Debtors to be determined either virtually or physically at Pachulski Stang Ziehl & Jones, LLP, 10100 Santa Monica Blvd., 13th Floor, Los

² All capitalized terms not herein defined shall have the meanings ascribed to them in the Bid Procedures and Sale Motion. The Assets to be sold or otherwise transferred are any and all of the assets, rights, and properties pertaining to or used in connection with the operation of the Debtors’ business, but excluding any assets of Debtor Athenex Pharma Solutions, LLC.

³ Copies of the Bid Procedures and Sale Motion, the Bid Procedures Order, the Bid Procedures, and in the Stalking Horse Agreement, if any, may be obtained free of charge at the website dedicated to the Debtors’ Chapter 11 Cases maintained by their claims and noticing agent and administrative advisor, Epiq Restructuring, LLC, located at <https://dm.epiq11.com/athenex>.

Angeles, CA, 90067. All interested, qualified parties are invited to submit a qualifying bid to purchase the Assets.

7. The Court has scheduled a hearing on **June __, 2023 at __: __.m. (prevailing Central Time)** (the “Sale Hearing”) to potentially approve the sale of the Assets. The Sale Hearing, if any, will be held before the Honorable Judge Jones, United States Bankruptcy Judge, at the United States Bankruptcy Court for the Southern District of Texas, 515 Rusk St., Houston, Texas 77002.

8. Any objection to any of the relief to be requested at the Sale Hearing must be in writing, state the basis of such objection with specificity, and shall be filed with the Court by **June 9, 2023 at 4:00 pm (prevailing Central Time)** (the “Objection Deadline”). At the same time, any objecting party must also serve a copy of the objection, so as to be received by the Objection Deadline on: (a) counsel to the Debtors, Pachulski Stang Ziehl & Jones LLP, at 440 Louisiana Ave., Suite 900, Houston, Texas, 77002, Attn: Michael D. Warner (mwarner@pszjlaw.com) and at 10100 Santa Monica Blvd., Suite 1300, Los Angeles, California 90067, Attn: Richard M. Pachulski (rpachulski@pszjlaw.com) Debra I. Grassgreen (dgrassgreen@pszjlaw.com), and Shirley S. Cho (scho@pszjlaw.com); (ii) counsel to the Agent, Sullivan & Cromwell LLP, Attn: Ari B. Blaut (blauta@sullcrom.com), Daniel R. Loeser (loeserd@sullcrom.com), Benjamin S. Beller (bellerb@sullcrom.com); (iii) counsel to the Prevailing Purchaser, if one has been determined; (iv) counsel to any appointed committee; (v) counsel to the Stalking Horse Bidder(s), if any; and (vi) the United States Trustee at the Office of the United States Trustee, 515 Rusk St, #3516, Houston, Texas, 77002, (Attn: Jana Smith Whitworth (Jana.Whitworth@usdoj.gov) and Ha Nguyen (Ha.Nguyen@usdoj.gov) (collectively, the “Objection Notice Parties”).

9. All requests for information concerning the Assets should be directed toward to the Debtors' investment banker, Cassel Salpeter & Co., LLC, Attn: Philip Cassel, Managing Director, at pcassel@cs-ib.com and James S. Cassel, Chairman, at jcassel@cs-ib.com.

10. The Auction may be adjourned from time to time as agreed by the Agent and the Debtors as approved by order of this Court, and of which the Debtors will notify the Auction participants. The Sale Hearing may be adjourned from time to time without further notice to creditors or other parties in interest other than by announcement of the adjournment in open court or by notice filed on the docket in these Chapter 11 Cases.

11. If you are a counterparty to an Executory Contract, the Debtors will serve you with separate notice of the potential assumption of your executory contract and the objection deadlines in connection with same by first class mail (the "Assumption Notice").⁴ The Debtors will also file the Assumption Notice on the Court's docket.

**IF YOU FAIL TO RESPOND IN ACCORDANCE WITH THIS NOTICE,
THE COURT MAY GRANT THE RELIEF REQUESTED BY THE MOTION
WITHOUT FURTHER NOTICE OR HEARING.**

[Remainder of the page intentionally left blank]

⁴ The listing of a contract or lease on the Assumption Notice, and/or any Supplemental Assumption Notice, is not (a) a request to assume such agreement; or (b) an acknowledgment or admission that such contract or lease is executory pursuant to section 365 of the Bankruptcy Code.

Dated: [●]

PACHULSKI STANG ZIEHL & JONES LLP

/s/ DRAFT

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Maxim B. Litvak (SBT 24002482)
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-and-

Richard M. Pachulski (*pro hac vice* pending)
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Proposed Counsel to the Debtors and Debtors in Possession

Exhibit C

Assumption Notice

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

In re:

ATHENEX, INC., et al.,

Debtors.¹

Chapter 11

Case No. 23-90295 (DRJ)

(Joint Administration Requested)

**NOTICE OF EXECUTORY CONTRACTS AND UNEXPIRED LEASES
WHICH MAY BE ASSUMED AND ASSIGNED, PURSUANT TO SECTION
365 OF THE BANKRUPTCY CODE, IN CONNECTION WITH THE SALE OF
SUBSTANTIALLY ALL OF THE DEBTORS' ASSETS AND THE
PROPOSED CURE AMOUNTS WITH RESPECT THERETO**

PLEASE TAKE NOTICE THAT:

1. On May 14, 2023 (the "Petition Date"), Athenex, Inc. and its debtor-affiliates, (the "Debtors" or the "Company") each commenced a bankruptcy case in the United States Bankruptcy Court for the Southern District of Texas, Houston Division, by filing a voluntary petition under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code").

2. Additionally, on May 14, 2023, the Debtors filed their *Motion for Entry of an Order Approving (a) Bid Procedures; (b) the Form and Manner of Notice; (c) the Procedures for Determining Cure Amounts for Executory Contracts and Unexpired Leases; and Entry of an Order Approving (a) the Sale of Substantially All of the Debtors' Assets Free and Clear of All*

¹ A complete list of each of the Debtors in these Chapter 11 Cases may be obtained on the website of the Debtors' proposed claims and noticing agent at <https://dm.epiq11.com/athenex>. The location of Athenex, Inc.'s principal place of business and the Debtors' service address in these Chapter 11 Cases is 1001 Main Street, Suite 600, Buffalo, NY 14203.

Liens, Claims, Encumbrances and Interests; and (b) the Assumption and Assignment of Certain Contracts and Unexpired Leases [Dkt. No. ___] (the “Bid Procedures and Sale Motion”)² with the United States Bankruptcy Court for the Southern District of Texas.

3. Pursuant to the Bid Procedures and Sale Motion, the Debtors sought (a) entry of an order (the “Bid Procedures Order”) (i) approving the bid procedures (the “Bid Procedures”); (ii) approving the form and manner of notice of transaction (the “Transaction Notice”) that sets forth the Bid Procedures and the date, time, and place for an auction, as required by the Bid Procedures; (iii) approving the form and notice of assumption (the “Assumption Notice”) and, if necessary, assignment, of executory contracts and expired leases (each an “Executory Contract”); (iv) establishing procedures for determining cure amounts in connection with the assumption (and, if necessary, assignment) of Executory Contracts; and (v) granting such other relief as is fair and equitable; and, if the Debtors pursue a sale of the Assets, (b) the entry of an order (the “Sale Order”): (i) approving the sale of the Debtors’ Assets free and clear; and (ii) authorizing the assumption and assignment of certain executory contracts and unexpired leases; and (iii) granting such other relief as is fair and equitable.

4. The Court entered the Bid Procedures Order on May ___, 2023 [Dkt. No. ___].

5. In accordance with the Objection and Cure Procedures, the Debtors are delivering this notice (the “Assumption Notice”) identifying (a) those Executory Contracts, which may be assumed and assigned to the Prevailing Purchaser (the “Designated Contracts”) in connection with the Sale of the Assets, and in accordance with the procedures set forth in the Bid Procedures and Sale Order;

² All capitalized terms not expressly defined herein shall have the same meaning as ascribed in the Bid Procedures and Sale Motion. The Assets to be sold or otherwise transferred are any and all of the assets, rights, and properties pertaining to or used in connection with the operation of the Debtors’ business, but excluding any assets of Debtor Athenex Pharma Solutions, LLC.

and (b) the proposed Cure Amount for each Executory Contract identified on the Assumption Notice.

6. An Executory Contract with respect to which you have been identified as a counterparty, if, any and the corresponding proposed Cure Amount, if any, is set forth on the attached **Exhibit A**. The Debtors' records reflect that all post-petition amounts owing under your Executory Contract have been paid and will continue to be paid until the assumption and assignment or rejection of the Executory Contract, and that other than the Cure Amount, there are no other defaults under the Executory Contract.

Objections

7. Any objection must (a) be in writing; (b) state with specificity the nature of such objection; (c) if concerning a Cure Amount, set forth a specific default in the Designated Contract and claim a specific monetary amount that differs from the Cure Amount (if any) specified in this Assumption Notice (with appropriate documentation in support thereof); and (d) comply with the Bankruptcy Rules. Unless otherwise provided herein, objections, if any, must be filed with the Bankruptcy Court and served so as to be received by the Objection Notice Parties listed below **June 9, 2023 at 4:00 p.m. (prevailing Central Time)** (the "Objection Deadline").

8. Adequate assurance information for the Prevailing Purchaser, whether by virtue of making the Successful Bid at an Auction, or being selected as a Stalking Horse Bidder and making the Highest Initial Bid (the "Prevailing Purchaser Adequate Assurance Information") will be available from the Prevailing Purchaser, subject to appropriate confidentiality protections.

9. The Debtors may amend or supplement the list of Executory Contracts attached as **Exhibit A** from time to time. In such an event, the Debtors will serve a supplemental assumption notice (the "Supplemental Assumption Notice") on counterparties to the affected Executory

Contracts, and objections, if any, to the changes, additions, or deletions reflected in the Supplemental Assumption Notice must be made in writing, filed with the Court and served on the Objection Notice Parties listed below seven (7) days after service of a Supplemental Assumption Notice; provided, however, that no objections may be made after the Sale Hearing.

10. UNLESS YOU FILE AN OBJECTION EITHER (A) TO THE DEBTORS' ASSUMPTION OR ASSIGNMENT OR TO THE PROPOSED CURE AMOUNT SET FORTH ON EXHIBIT A OR ON ANY SUPPLEMENTAL ASSUMPTION NOTICE, OR (B) TO PREVAILING PURCHASER ADEQUATE ASSURANCE INFORMATION, AND SERVE SUCH OBJECTION IN ACCORDANCE WITH THE INSTRUCTIONS AND DEADLINES SET FORTH HEREIN, YOU SHALL BE FOREVER BARRED FROM (A) OBJECTING TO THE DEBTORS' ASSUMPTION, ASSIGNMENT AND/OR THE CURE AMOUNT; (B) ASSERTING OR CLAIMING ANY CURE AMOUNT AGAINST THE DEBTORS, THE PREVAILING PURCHASER OR ANY OTHER ASSIGNEE OF THE RELEVANT EXECUTORY CONTRACT, AND (C) ASSERTING THAT YOU ARE NOT BEING PROVIDED WITH ADEQUATE ASSURANCE OF FUTURE PERFORMANCE WITH RESPECT TO THE PREVAILING PURCHASER OR ANY OTHER ASSIGNEE WITHIN THE MEANING OF SECTION 365 OF THE BANKRUPTCY CODE.

Hearing Regarding Objections

11. If an objection is timely filed and served regarding any Executory Contracts listed on **Exhibit A**, and/or any Supplemental Assumption Notice, a hearing with respect to such objection will be held before the Honorable Judge Jones, United States Bankruptcy Judge, at the United States Bankruptcy Court for the Southern District of Texas, 515 Rusk St., Houston, Texas 77002 at a date and time to be fixed by the Court (including the Sale Hearing); provided, however, that if an objection

relates solely to the Cure Amount, the Designated Contract may be assumed by the Debtors and assigned to the Prevailing Purchaser provided that the cure amount the Counterparty asserts is required to be paid under Bankruptcy Code section 365(b)(1)(A) and (B) (or such lower amount as agreed to by the Counterparty) is deposited in a segregated account by the Debtors pending the Court's adjudication of the Cure Dispute or the parties' consensual resolution of the Cure Dispute.

Sale Hearing Notice

12. The Court has scheduled a hearing on **June __, 2023 at __:__.m.(prevailing Central Time)** (the "Sale Hearing") to potentially approve the Sale of the Assets. The Sale Hearing, if any, will be held before the Honorable Judge _____, United States Bankruptcy Judge, at the United States Bankruptcy Court for the Southern District of Texas, 515 Rusk St., Houston, Texas 77002.

13. Notice of the date and time of the Sale Hearing will be separately filed and served by the Debtors. The Sale Hearing may be continued at the sole discretion of the Debtors. The Transaction Notice and any information regarding continuances or adjournments will also be available on the case website maintained by EPIQ, the Debtors' claims and noticing agent, at <https://dm.epiq11.com/athenex>.

Objection Notice Parties

14. The Objection Notice Parties are as follows: (a) counsel to the Debtors, Pachulski Stang Ziehl & Jones LLP, at 440 Louisiana Ave., Suite 900, Houston, Texas, 77002, Attn: Michael D. Warner (mwarner@pszjlaw.com) and at 10100 Santa Monica Blvd., Suite 1300, Los Angeles, California 90067, Attn: Richard M. Pachulski (rpachulski@pszjlaw.com), Debra I. Grassgreen (dgrassgreen@pszjlaw.com), and Shirley S. Cho (scho@pszjlaw.com); (ii) counsel to the Agent, Sullivan & Cromwell LLP, Attn: Ari B. Blaut (blauta@sullcrom.com), Daniel R. Loeser (loeserd@sullcrom.com), Benjamin S. Beller (bellerb@sullcrom.com), Mark E. Dendinger

(mark.dendinger@bracewell.com), Jonathan Lozano (jonathan.lozano@bracewell.com); (iii) counsel to the Prevailing Purchaser, if one has been determined; (iv) counsel to any appointed committee; (v) counsel to the Stalking Horse Bidder(s), if any; and (vi) the United States Trustee at the Office of the United States Trustee, 515 Rusk St, #3516, Houston, Texas, 77002, (Attn: Jana Smith Whitworth (Jana.Whitworth@usdoj.gov) and Ha Nguyen (Ha.Nguyen@usdoj.gov)).

Reservation of Rights

15. The presence of an Executory Contract on **Exhibit A**, and/or any Supplemental Assumption Notice does not constitute an admission that such any listed Executory Contract is an executory contract or unexpired lease within the meaning of section 365 of the Bankruptcy Code, or that such Executory Contract will be assumed by the Debtors and/or assigned to the Prevailing Purchaser. The Debtors reserve all of their rights to send out additional notices concerning additional or other Executory Contracts, subject to the provisions of any order by the Court.

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Dated: [●]

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/s/ DRAFT

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Proposed Counsel to the Debtors and Debtors in Possession

EXHIBIT A-Cure List

[to be filed]