IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: TUPPERWARE BRANDS CORPORATION, *et al.*,[1] Debtors.	Chapter 11 Case No. 24-12156 (BLS) (Jointly Administered) **Ref. Docket No. 15**

OBJECTION OF THE AD HOC GROUP OF SECURED LENDERS TO AN ORDER (I) APPROVING THE BIDDING PROCEDURES, (II) AUTHORIZING THE DEBTORS TO ENTER INTO ONE OR MORE STALKING HORSE AGREEMENTS AND PROVIDE BID PROTECTIONS, (III) APPROVING THE FORM AND MANNER OF SALE NOTICE, (IV) SCHEDULING AN AUCTION AND SALE HEARING, (V) APPROVING THE PROCEDURES FOR THE ASSUMPTION AND ASSIGNMENT OF CONTRACTS, (VI) APPROVING THE SALE OF THE DEBTOR' ASSETS FREE AND CLEAR, AND (VII) GRANTING RELATED RELIEF.

The Ad Hoc Group of Secured Lenders (the "Ad Hoc Group") under the Debtors' prepetition credit agreement dated as of November 23, 2021 (as amended, restated, supplemented, or otherwise modified prior to the date hereof, the "Revolving/Term Loan Credit Agreement," and the lenders thereunder, the "Revolving/Term Loan Secured Lenders") and that certain Bridge Loan Credit Agreement dated as of August 12, 2024 (as amended or otherwise modified from time to time, the "Bridge Loan Credit Agreement," and the lenders thereunder, the "Bridge Secured Lenders," and together with the Revolving/Term Loan Secured Lenders, the "Prepetition Secured

[1] The Debtors in these Chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: Tupperware Brands Corporation (2333); Dart Industries Inc. (5570); Deerfield Land Corporation (0323); Premiere Products Inc. (4064); Tupperware Brands Latin America Holdings, L.L.C. (0264); Tupperware Home Parties LLC (1671); Tupperware International Holdings Corporation (8983); Tupperware Products AG (6765); Tupperware Products, Inc. (8796); and Tupperware U.S., Inc. (2010). The location of the Debtors' service address in these Chapter 11 cases is: 14901 S Orange Blossom Trail, Orlando, FL 32837.

Lenders"),[2] by and through its undersigned counsel, hereby submits this objection (the "Objection") to the *Motion of Debtors for Entry of an Order (I) Approving the Bidding Procedures, (II) Authorizing the Debtors to Enter into One or More Stalking Horse Agreements and Provide Bid Protections, (III) Approving the Form and Manner of Sale Notice, (IV) Scheduling an Auction and Sale Hearing, (V) Approving the Procedures for the Assumption and Assignment of Contracts, (VI) Approving the Sale of the Debtors' Assets Free and Clear, and (VII) Granting Related Relief* [Docket No. 15] (the "Bid Procedures Motion"), and in support thereof, respectfully states as follows: [3]

PRELIMINARY STATEMENT

1. As described in the *Declaration of Brian J. Fox, Chief Restructuring Officer of Tupperware Brands Corporation, in Support of Chapter 11 Petitions and First Day Motions* [Docket No. 2] (the "First Day Declaration"), beginning in April 2023, the Debtors ran an extensive, three-stage marketing process for their assets and businesses. Although that process generated some non-binding bids—the highest providing for materially less than a 20% recovery on the $817 million in principal amount outstanding under the Revolving/Term Loan Credit Agreement—none of those bids resulted in a consummated transaction. Unable to find a buyer for the businesses as a going concern that would satisfy the Prepetition Secured Debt, the Debtors now

[2] The members of the Ad Hoc Group are listed in the *Verified Statement of the Ad Hoc Group of Secured Lenders Pursuant to Bankruptcy Rule 2019* [Docket No. 46]. The members of the Ad Hoc Group hold, in the aggregate, approximately $472.85 million, or 58%, of the approximately $817 million principal amount outstanding under the Revolving/Term Loan Credit Agreement. The debt thereunder is secured by a first lien on substantially all the Debtors' assets, including cash collateral, other than certain specified inventory on which the Revolving/Term Loan Secured Lenders have a second lien. The members of the Ad Hoc Group also hold, in the aggregate, $8 million in principal amount of loans outstanding under the Bridge Loan Credit Agreement, which is secured by a first lien on certain inventory, and the proceeds, products, and offspring thereof.

[3] Capitalized terms used but not defined herein shall have the meanings ascribed to such terms in the *Preliminary Objection of Ad Hoc Group of Secured Lenders to Debtors' Motion for Authority to Use Cash Collateral* [Docket No. 47] (the "Cash Collateral Objection").

propose a "fourth and final market check," a process inappropriately designed to strip the Debtors' secured lenders of their right to credit bid the full value of their liens. Bid Procedures Motion ¶ 5.

2. Aside from the blatant impropriety of it, this proposal is too little, too late: the market has spoken, and the value of the Debtors' assets does not come anywhere close to the total outstanding funded debt under the Revolving/Term Loan Credit Agreement and Bridge Loan Credit Agreement. Moreover, this proposal is the latest in a series of moves by the Debtors to squander estate resources and prevent a more orderly and less costly transaction with their secured creditors that could generate a profitable going concern.

3. But the Court does not need to rely on this basis alone to deny the Bid Procedures Motion—the proposed bidding procedures and sale also clearly violate the Bankruptcy Code. *First*, because "cause" to deny the Prepetition Secured Lenders their right to credit bid does not exist (and tellingly the Debtors have not even attempted to make the requisite showing that it does), as required under section 363(k) of the Bankruptcy Code, the Debtors cannot justify an auction and sale process that eliminates the Prepetition Secured Lenders' right to credit bid the amount of their secured debt. *Second*, conducting yet another marketing process would not only be wasteful but also could not possibly result in a sale that can be approved under section 363(f) of the Bankruptcy Code, because the Prepetition Secured Lenders do not consent to the sale of their Collateral, and the Debtors cannot satisfy (as they must) any of the other requirements under section 363(f) to sell the Collateral free and clear of the Prepetition Secured Lenders' liens.

4. For these reasons, the Ad Hoc Group objects to the Bid Procedures Motion.

BACKGROUND

5. The members of the Ad Hoc Group hold, in the aggregate, approximately $472.85 million or 58% of the approximately $817 million principal amount outstanding under the Revolving/Term Loan Credit Agreement, and thus qualify, collectively, as the Required Lenders

thereunder. As discussed in greater detail in the Cash Collateral Objection, the Prepetition Revolving/Term Loan Secured Debt is secured by the Prepetition Revolving/Term Loan Collateral, comprising a first lien on substantially all of the Debtors' assets, other than certain specified inventory on which the Prepetition Revolving/Term Loan Secured Lenders have a second lien. In the days prior to the Debtors' chapter 11 filing, the members of the Ad Hoc Group provided $8 million in bridge financing under the Bridge Loan Credit Agreement. The Prepetition Bridge Secured Debt, together with the Prepetition Revolving/Term Loan Secured Debt, is secured by a first lien on certain inventory and the proceeds, and products thereof.

6. Prior to filing these chapter 11 cases, the Debtors had been engaged in a years-long attempt to market their assets and businesses. The Debtors hired Moelis & Company ("Moelis") as investment bankers on March 27, 2020, to solicit potential buyers. Despite having "engaged with over 150 different parties to evaluate market interest in one or more potential sales of all, substantially all, or any portion of the Debtors' assets" over the course of more than seventeen months, the Debtors were unable to solicit a successful bid. Steinberg Declaration ¶ 8. The highest non-binding bid received by Moelis would have provided for materially less than 20% of the debt outstanding under the Revolving/Term Loan Credit Agreement.

7. In light of this failed marketing campaign, the Ad Hoc Group sought to reach an agreement with the Debtors to facilitate an out-of-court strict foreclosure. The Debtors declined this proposal from the Ad Hoc Group and filed these chapter 11 cases on September 17, 2024. On September 19, 2024, the Ad Hoc Group filed the Cash Collateral Objection, as well as the *Motion of Ad Hoc Group of Secured Lenders for an Order (I) Dismissing These Chapter 11 Cases or Converting Them to Chapter 7 or (II) For Relief from the Automatic Stay* [Docket No. 48] (the "Motion to Dismiss"). Thereafter, the Ad Hoc Group and the Debtors worked collaboratively to

agree to the limited, consensual use of Cash Collateral terminating no later than October 11, 2024. The Court entered the *Bridge Order (I) Authorizing the Debtors to Use Cash Collateral, (II) Granting Adequate Protection to the Prepetition Secured Parties, (III) Scheduling a Final Hearing, and (IV) Granting Related Relief* [Docket No. 103] on September 27, 2024, authorizing the limited use of the Cash Collateral on a consensual basis.

8. As part of their first day pleadings, the Debtors filed the Bid Procedures Motion through which they seek to solicit bids and consummate a sale transaction as a "fourth and final" marketing check. Bid Procedures Motion ¶ 5-6. The Bid Procedures Motion seeks authorization to employ bidding procedures which impermissibly strip the Prepetition Secured Lenders of their right to credit bid and purport to sell their Collateral free and clear of their secured interests. 11 U.S.C. § 363(f). The Debtors' only justification (which, of course, is really no justification at all) for requiring only cash bids is to prevent an alleged "chilling effect" that a credit bid may have on a "competitive auction process." Bid Procedures Motion ¶ 7. This justification clearly fails as a reason for cause to deny the Prepetition Secured Lenders their statutory credit bid right provided for in section 363(k) of the Bankruptcy Code. The arguments raised by the Official Committee of Unsecured Creditors (the "Committee") in opposition to credit bid, *see* Docket No. 126, fare no better, as we address below.

9. Furthermore, as demonstrated by the protracted, failed sale process, it is irrefutable that the value of the Collateral is a fraction of the Prepetition Secured Debt. Nothing in the Debtors' first day filings or declaration submitted in support of the Bid Procedures Motion substantiates the notion that the value of the Collateral will be maximized by a fourth marketing process that, among other things, unlawfully precludes the Prepetition Secured Lenders from credit bidding. After three failed marketing processes, which included potential sales under section 363

of the Bankruptcy Code, the Debtors are now proposing this *fourth* market test on an expedited basis. The Debtors offer no evidence that the results of this sale process will garner an outcome that is materially different than those three previous marketing attempts—a bid that is significantly below the outstanding value of the Prepetition Secured Debt. Any such bid would fail to produce a sale in compliance with section 363 of the Bankruptcy Code.

OBJECTION

I. THE DEBTORS HAVE FAILED TO JUSTIFY THE EXCLUSION OF CREDIT BIDS UNDER 363(K)

10. Section 363(k) of the Bankruptcy Code grants secured creditors the right to credit bid the value of their collateral. At any 363(b) sale of property "that is subject to a lien that secures an allowed claim, unless the court for cause orders otherwise the holder of such claim may bid at such sale, and, if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property." 11 U.S.C. § 363(k). Unless a court imposes limits for "cause," secured lenders are entitled to credit bid "up to the face amount of [the allowed] claim." *In re Aerogroup Int'l, Inc*., 620 B.R. 517, 523 (D. Del. 2020); *see also In re SubMicron Sys. Corp*., 432 F.3d 448, 459 (3d Cir. 2006) (holding that credit bidding is allowed up to the entire amount of the secured claim, regardless of the actual economic value of the claim). By exercising the right to credit bid, secured creditors can mitigate "the risk that its collateral will be sold at a depressed price." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 644 n.2 (2012).

11. Section 1129(b)(2)(A) of the Bankruptcy Code provides that a debtor seeking to consummate the sale of estate property under a plan "subject to the liens securing such claims, free and clear of such liens" does so "subject to section 363(k)." 11 U.S.C. 1129(b)(2)(A). As such,

the right of a secured lender to credit bid the value of their collateral cannot be denied by debtors seeking to sell their property free and clear of all liens. *RadLAX*, 566 U.S. at 647.

12. The right to credit bid may only be limited by the court for "cause" under section 363(k), and a movant seeking to limit the right to credit bid carries the heavy burden of proof. *In re River Rd. Hotel Partners, LLC*, No. 09-30029 (BWB), 2010 WL 6634603, at *2 (Bankr. N.D. Ill. Oct. 5, 2010), *aff'd sub nom. River Rd. Hotel Partners, LLC v. Amalgamated Bank*, 651 F.3d 642 (7th Cir. 2011), *aff'd sub nom. RadLAX,* 566 U.S. 639. Not only did the Debtors fail to provide any evidence to support their requested relief, their own pleadings and declarations support denial of the relief they seek.

13. "Cause" is to be determined on a case-by-case basis, in light of the actions of the respective parties. *In re DeCurtis Holdings LLC*, No. 23-10548 (JKS), 2023 WL 5274925, at *14 (Bankr. D. Del. Aug. 14, 2023). But, the discretion to determine cause "does not give the bankruptcy court the authority to act arbitrarily or to be freewheeling." *In re RML Dev., Inc.*, 528 B.R. 150, 155 (Bankr. W.D. Tenn. 2014). Therefore, the modification or denial of credit bid rights should be the extraordinary exception and not the norm." *See In re Aeropostale, Inc.*, 555 B.R. 369, 415 (Bankr. S.D.N.Y. 2016) (*quoting In re RML Dev.*, 528 B.R. at 155).

A. The Debtors Have Not Established the "Cause" Necessary to Deny the Prepetition Secured Lenders' Right to Credit Bid

14. The Debtors have failed to offer any valid reason (let alone the requisite evidence to support it) to deny the Prepetition Secured Lenders and the Ad Hoc Group their right to credit bid the full value of their secured claims "for cause." The Debtors do not—and cannot—cite to any inequitable conduct by the Prepetition Secured Lenders and the Ad Hoc Group. Rather, they simply make the unsubstantiated claim that is contradicted by the record in this case, claiming that

denying the Prepetition Secured Lenders the right to credit bid would cultivate a "competitive auction process." Bid Procedures Motion ¶ 7.

15. In *In re DeCurtis Holdings LLC*, this court denied such a request on very similar facts. The *DeCurtis* court held that where a debtor conducted a four-month prepetition marketing process, its secured lenders could not be denied their right to credit bid. 2023 WL 5274925, at *15. In that case the marketing process failed to yield any substantial bids, there was limited opportunity for recovery by general unsecured creditors, and the secured creditors did not support the plan of reorganization. *Id.* The court noted that any "chilling effect" was not the result of credit bidding, but rather, "[was] based upon the Debtors' historical operations, and the various risks attendant to their go-forward business." *Id.*

16. The same is true here. The Debtors face a very similar set of facts, none of which constitute "cause" to limit the statutory right of the Prepetition Secured Lenders to credit bid on their Collateral. The Debtors engaged in a years-long marketing effort with nothing to show for it. The highest non-binding bid provided for materially less than 20% recovery of the amount outstanding under the Revolving/Term Loan Credit Agreement, and no bids or offers resulted in a consummated transaction. There is no reason to believe that a "final market check" would produce a different, better result. Further, like in *DeCurtis*, the only likely cause for a "chilling effect" on bidding is the market's recognition of the risks associated with the Debtors' go-forward business.

17. The Debtors' request to prohibit credit bids also clearly violates the standards set out by the Supreme Court in *RadLAX*. There, the debtors sought to bar secured creditors with a blanket lien on all of the debtors' assets from credit bidding, restricting offers to cash bids. *RadLAX*, 566 U.S. at 641. The Supreme Court held that this restriction on credit bidding violated the Bankruptcy Code, and that for a debtor to sell their property free and clear of liens through its

plan—as required under section 1129(b)(2)(A)—it was statutorily required to allow lienholders the right to credit bid. *Id.* at 647. The Debtors' requirement that all bids be made in cash violates the clear terms of the Supreme Court's mandate in *RadLAX*. Without specific cause to do so (which cause does not exist), and in direct contradiction with Supreme Court precedent, the Debtors' proposed prohibition on credit bidding in these chapter 11 cases must be rejected.

B. The Price the Ad Hoc Group Paid for the Prepetition Secured Debt is Irrelevant

18. At the first day hearing in these chapter 11 cases and in their September 14, 2024 letter to the Ad Hoc Group, the Debtors have alluded to the Ad Hoc Group's purchase of the outstanding debt under the Revolving/Term Loan Credit Agreement at a discount. *See* September 14, 2024 Tupperware Response to the Ad Hoc Group at 1 [Docket No. 2-2]. There is no authority, however, to support the proposition that the trading price of secured loans impacts the credit bid rights of a secured lender under the Bankruptcy Code. This fact is simply of no relevance to the extreme relief sought by the Debtors.

19. Not surprisingly, the Debtors suggest that *Fisker* supports their requested prohibition on credit bidding. In *Fisker*, the court found cause to limit the amount of a secured creditor's claim to the amount they paid to purchase the loan from the Department of Energy. *In re Fisker Auto. Holdings, Inc*., 510 B.R. 55, 60 (Bankr. D. Del. 2014). The court, however, did not hinge its ruling on the fact that the claim was purchased at a discount. Rather, cause existed to cap the credit bid according to the *Fisker* court, because the amount of the allowed claim was uncertain, and the court was concerned that secured creditors would have "frozen out" another interested purchaser by proposing an aggressive timeline. *Id.*

20. In this case, unlike *Fisker*, the amount of the secured claims of the Prepetition Secured Lenders is clearly defined as a valid, perfected lien on substantially all of the Debtors'

assets, as it has been stipulated to by the Debtors. *See* First Day Declaration ¶¶ 63, 70; Cash Collateral Motion ¶¶ 28, 29 36; Proposed Interim Order ¶¶ G, 3. Further, neither the Ad Hoc Group nor the other Secured Lenders have engaged, or alleged to have engaged, in aggressive tactics or proposed unfair timelines with the aim of freezing out other interested parties. To the contrary, the Ad Hoc Group has sought to work collaboratively with the Debtors to find value-optimizing out-of-court solutions to continue the business as a going concern, while the Debtors commenced these cases with a strategy for a 30-day sale process, which is opposed by the Ad Hoc Group and certain other Revolving/Term Loan Secured Lenders.

21. This Court has reiterated in the years since *Fisker* that secured creditors are entitled to credit bid the entire amount of their claim, despite the underlying economic reality of the collateral's value. *In re Aerogroup Int'l, Inc*., 620 B.R. at 552 ("Section 363(k) of the Bankruptcy Code permits a secured creditor to credit bid up to the entire face amount of its claim."); *In re KII Liquidating, Inc*., 607 B.R. 398, 407 (D. Del. 2019) (holding that a credit bid in the amount of a secured claim that was contested constituted a valid and binding credit bid). With no untoward behavior on behalf of the Ad Hoc Group or the other Prepetition Secured Lenders, and the clearly defined terms of their Collateral and the amount of their secured claims, the Debtors have no justification for denying the Prepetition Secured Lenders' right to credit bid the full amount of their claims.

22. Furthermore, any credit bid of debt under the Revolving/Term Loan Credit Agreement led by the Ad Hoc Group would include debt held by other Revolving/Term Loan Secured Lenders. The other Revolving/Term Loan Secured Lenders include three banks that are part of the original lender group and did not purchase their debt at a discount. These other

Revolving/Term Loan Secured Lenders hold, in the aggregate, debt under the Revolving/Term Loan Credit Agreement in a principal amount in excess of $300 million.

23. Notwithstanding all of the above, the Committee, merely a few days into the case, conducting no interviews or real discovery of any kind, asserts a convoluted mix of theories that are not supported by the facts, or the law it cites. *First*, ignoring the fact that this is a case where the Prepetition Secured Lenders oppose the process pursued by the Debtors, many of the cases cited by Committee, including *Fisker*, are where the lenders attempted to impose the process on the debtors. Here, although the Debtors and the Ad Hoc Group are at loggerheads, the Debtors, free of the Ad Hoc Group's demands, failed to raise any argument attacking the Ad Hoc Group's conduct or their liens. *Second*, ignoring the fact that the Ad Hoc Group was seeking to pursue an out-of-court process prescribed by the Uniform Commercial Code, the Committee, citing no authority, casts aspersions at the statutory process preferred by the Ad Hoc Group. *Third*, as noted above, the Prepetition Secured Lenders here include par holders holding approximately $300 million in secured debt, that are not members of the Ad Hoc Group.

24. *Finally*, the cases cited by the Committee do not support any of its theories. *In re Family Christian LLC*, 533 B.R. 600, 631 (Bankr. W.D. Mich 2015), involved a proposed sale to a lender who obtained unfair advantage by receiving information as a consultation party and then attempted to remove itself from that role and joined as a bidder. *In re CS Mining*, *LLC*, 574 B.R. 259, 285 (Bankr. D. Utah 2017), involved an approval of a settlement where certain members of the debtors' board of managers owned economic interests in the lenders and were going to benefit economically from the settlement and a proposed credit bid by an insider. In *In re The Free Lance-Star Publishing Co. of Fredericksburg, VA*, 512 B.R. 798, 806 (Bankr. E.D. Va. 2014), the court refused to allow a secured creditor to bid due to its over-zealous loan-to-own strategy in acquiring

the debt without an intent to be repaid and solely for the purposes of obtaining the assets at an expediated credit bid sale and discouraging competitive bidding. The Committee ignores the inconvenient fact that here the Debtors and their professionals engaged in three marketing processes over seventeen months, all of which failed. Lastly, all this Court held in *In re M&G USA Corp.*, Case No. 17-12307 (BLS), Hr'g. Tr. (Bankr. D. Del. Feb. 13, 2018), was that either an arrangement should be made to preserve a successful challenge, or that the auction must be delayed. Tr. at 19. Here, the Prepetition Secured Lenders are not asking nor expecting a release. The Prepetition Secured Lenders are well known banks and funds who can satisfy any judgement on a successful challenge, if any.

25. *In re Philadelphia Newspapers, LLC*, 599 F.3d 298, 316 (3d Cir. 2010) was effectively overruled by the Supreme Court in *RedLAX*. Tellingly, the bankruptcy court's opinion below rejected the theories advanced here to support denial of credit bid. *In re River Rd.*, 2010 WL 6634603, at *2. The debtors sought to deny the secured lenders' credit bid rights arguing that (i) the secured lenders' actions caused the debtors to fail, (ii) allowing credit bid would chill bidding and (iii) there are millions of dollars in mechanics liens, allegedly senior to the secured lenders, that are still being litigated. *Id.* at *1.

26. The court found that none of this justified denial of credit bid rights. *Id*. As to the alleged conduct that caused the debtors to fail, the court found that the debtors do not assert that the lenders breached their contracts with the debtors or acted with an intent to harm the debtor. All the lenders did was designed to protect their rights. *Id.* at *2. The same is true here. As to the chilling the bidding argument, the court held that such general assertion is insufficient absent evidence supporting the claim. *Id*.; *see also Aeropostale*, 555 B.R. at 417 ("Indeed, the Court is unaware of any cases where the chilling of the bidding alone is sufficient to justify a limit on a

credit bid."). And as to disputes concerning senior liens, the court held that it is insufficient to deny credit bid rights. *In re River Rd.*, 2010 WL 6634603, at *2.

27. In short, none of the concerns that courts in this circuit cite to as "cause" for the purpose of limiting credit bids exist in these cases.

II. THE PROPOSED BIDDING PROCEDURES DO NOT SATISFY THE REQUIREMENTS OF SECTION 363(F) OF THE BANKRUPTCY CODE

28. Under section 363(f) of the Bankruptcy Code, a sale of assets "free and clear of any interest in such property of an entity other than the estate" is possible only where one of the following disjunctive requirements is met:

> (1) "applicable nonbankruptcy law permits sale of such property free and clear of such interest;
>
> (2) such entity consents;
>
> (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
>
> (4) such interest is in bona fide dispute; or
>
> (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest."

11 U.S.C. § 363(f); *In re Trans World Airlines, Inc.*, 322 F.3d 283, 288 (3d Cir. 2003).

29. In order to obtain the requested relief, the Debtors carry the burden of proof and must specify which provision(s) of section 363(f) authorizes the sale of their assets free and clear of another entity's interest in the property. "[Section] 363(f) places the burden squarely [on the movant's] shoulders" to show that at least one of subsections (1) through (5) are satisfied. *See In re Revel AC, Inc*., 802 F.3d 558, 564 (3d Cir. 2015); *In re Summit Glob. Logistics, Inc.,* No. 08-11566 (DHS), 2008 WL 819934, at *9 (Bankr. D.N.J. Mar. 26, 2008) ("The Debtors bear the burden of proving that they have satisfied the requirements of Section 363(f)"); *In re Grand Prix*

Assocs. Inc., No. 09-16545 (DHS), 2009 WL 1850966, at *4 (Bankr. D.N.J. June 26, 2009) (same). The Debtors fail to do so in both the Bid Procedures Motion, the accompanying proposed order, and the *Declaration of Adam Steinberg in Support of the Bid Procedures Motion* [Docket No. 16] (the "Steinberg Declaration").

30. Here, the Debtors have failed to articulate which provision of section 363(f) authorizes the sale of the Prepetition Secured Lenders' Collateral free and clear of their secured interests. To be sure, section 363(f)(1) is not met since the Debtors fail to point to any applicable nonbankruptcy law that allows for the disposition of the Collateral free and clear of the Prepetition Secured Lenders' liens. The Debtors do not have consent from the Prepetition Secured Lenders as required by section 363(f)(2). The Debtors cannot rely upon subsection (3) because the Debtors have failed their burden of proof to show that any sale under the proposed bidding procedures would exceed the face value of the Prepetition Secured Lenders' claim *and* provide value to other stakeholders. Section 363(f)(4) is inapplicable because the Prepetition Secured Lenders' interest in the Collateral is not in dispute, as the Debtors have already conceded that the Prepetition Secured Lenders have a first lien on substantially all of the Debtors' assets. Section 363(f)(5) similarly does not apply because the Debtors have pointed to no legal or equitable proceeding under which the Prepetition Secured Lenders could be compelled to accept money in satisfaction of their liens.

A. The Debtors Cannot Satisfy Section 363(f)(1) Because Applicable State Law Does Not Permit the Sale of Collateral Free and Clear of Liens

31. The term "any interest" under section 363(f) "is intended to refer to obligations that are connected to, or arise from, the property being sold." *In re CCX, Inc.*, 654 B.R. 680, 696 (D. Del. 2023) (citing *In re Trans World Airlines, Inc.*, 322 F.3d at 289). The Third Circuit's expansive interpretation of "interests" encompasses many types of obligations that may flow from ownership

of property. *In re Trans World Airlines*, 322 F.3d at 289. And interest includes a lien. *Clear Channel Outdoor, Inc. v. Knupfer (In re PW, LLC)*, 391 B.R. 25, 42 (B.A.P. 9th Cir. 2008).[4]

32. The Third Circuit has explained that a "lien" is "a charge or encumbrance upon property to secure the payment or performance of a debt, duty, or other obligation. It is distinct from the obligation which it secures." *In re Kellstrom Indus., Inc.*, 282 B.R. 787, 793 (Bankr. D. Del. 2002) (citing *Folger Adam Security, Inc. v. Dematteis/MacGregor JV*, 209 F.3d 252, 259-60 (3d Cir. 2000)). Courts have held that 363(f)(1) is to be read "narrowly" to only apply to nonbankruptcy laws "where the owner of the asset may . . . sell an asset free and clear of an interest in such asset." *Dishi & Sons v. Bay Condos LLC*, 510 B.R. 696, 710 (S.D.N.Y. 2014); *In re Jaussi*, 488 B.R. 456, 458 (Bankr. D. Colo. 2013) (holding that foreclosure actions do not fall within the provision's ambit).

33. The Debtors have not pointed to any applicable non-bankruptcy law that permits a sale of the Collateral free and clear of the Prepetition Secured Lenders' secured interests, and the Ad Hoc Group is not aware of any such law. Thus, the Debtors fail to satisfy section 363(f)(1).

B. The Debtors Do Not Have Consent to Execute a Sale Under Section 363(f)(2)

34. Section 363(f)(2) states a trustee may sell property free and clear of any interest in such property of an entity other than the estate only if such entity consents to the sale. 11 U.S.C. 363(f)(2); *see also In re TE Holdcorp LLC*, No. 22-1807 (AJF), 2023 WL 418059, at *3 (3d Cir. Jan. 26, 2023) (finding consent where an interest holder had notice and the opportunity to object and failed to do so as required by section 363(f)(2) of the Bankruptcy Code).

[4] Of course, if "interest" does not include a lien, section 363(f)(1) cannot be used to approve a sale free and clear of liens. *PW, LLC*, 391 B.R. at 41.

35. The Ad Hoc Group (which constitutes the Required Lenders under the Revolving/Term Loan Credit Agreement) filed the Motion to Dismiss and objected to the Debtors' requests for the use of Cash Collateral in these cases, and the administrative agents under the Revolving/Term Loan Credit Agreement and Bridge Loan Credit Agreement, each with an interest in the Collateral, joined in the Cash Collateral Objection.[5] The Debtors cannot satisfy section 363(f)(2) because the Ad Hoc Group does not consent to the Bid Procedures Motion or the sale of its Collateral as proposed by the Debtors. Accordingly, section 363(f)(2) is not satisfied and cannot be relied upon for the purposes of approving the Bid Procedures Motion.

C. The Record Establishes that the Debtors Can Not Satisfy Section 363(f)(3)

36. Generally, "bankruptcy court[s] should not order property sold 'free and clear of' liens unless the court is satisfied that the sale proceeds will fully compensate secured lienholders and produce some equity for the benefit of the bankrupt's estate." *Matter of Riverside Inv. P'ship*, 674 F.2d 634, 640 (7th Cir. 1982). In considering what the "value of liens on such property" refers to in subsection (3), many courts, including courts in the Third Circuit, have held that this amount is the face value of all prepetition secured claims. *In re WDH Howell LLC*, 298 B.R. 527, 534 (D.N.J. 2003); *In re Canonigo*, 276 B.R. 257, 263 (Bankr. N.D. Ca. 2002); *In re A.G. Van Metre, Jr., Inc.*, 155 B.R. 118, 120 (Bankr. E.D. Va. 1993), *subsequently aff'd*, 16 F.3d 414 (4th Cir. 1994). In *Howell*, the District Court for the District of New Jersey applied the plain meaning statutory interpretation analysis to the term "aggregate value" in section 363(f)(3) to mean the face value of the liens securing the collateral to be sold, not the economic value of those liens. 298 B.R. at 532-33; *see In re Lutz*, No. 16-26969 (JNP), 2017 WL 3316046 at *2 (Bankr. D.N.J. May

[5] This includes Wells Fargo Bank, National Association, as Administrative Agent under the Revolving/Term Loan Credit Agreement [Docket No. 80], and GLAS USA LLC and GLAS America LLC, as Administrative Agent under the Bridge Loan Credit Agreement [Docket No. 61].

3, 2017) ("The Court agrees with the persuasive authority of *Howell* and concludes that the term 'value' [in section 363(f)(3)] means the face value of the lien.").

37. The *Howell* court substantiated this holding by reasoning that the "economic value" of the encumbered property is usually the cost at which the property is sold in a public auction. Therefore, if courts interpret the value of the liens on such property to mean the value at which the property is sold, that would mean the sale proceeds would never exceed the value of the liens on such property, rendering the "greater than" language of section 363(f)(3) surplusage.[6] *Howell*, 298 B.R. at 532-33.

38. The Bid Procedures Motion and proposed sale can only be permissible under section 363(f)(3), where the "interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property." Not only did the Debtors fail to make the requisite showing that the proceeds from a sale of the Debtors' assets under the proposed Bid Procedures Motion is likely to exceed the amount of debt outstanding under the Revolving/Term Loan Credit Agreement and the Bridge Loan Credit Agreement (which is in excess of $817 million), their own pleadings and declarations, including the First Day Declaration and Steinberg Declaration, support a contrary conclusion.

39. The Debtors engaged in a marketing process for a sale of substantially all their assets over the course of seventeen months before filing these chapter 11 cases. The Debtors

[6] This reading of subsection (3) is also substantiated by the legislative history of section 363(f): a debtor in possession may sell "free and clear if . . . the sale price of the property is greater than the amount secured by the lien." H.R. Rep. No. 95-595; S. Rep. No. 95-989 (1978). Courts prior to the enactment of the Bankruptcy Code also codified as standard practice the requirement that sales free and clear of prior liens and interests must exceed the value of the liens securing the sold property. *See e.g. Hoehn v. McIntosh*, 110 F. 2d 199, 202 (6th Cir. 1940) ("The court must be satisfied that a sale will be to the interest of the general creditors and not injure the lienholders and where a trustee files a petition to sell real estate free of liens and the lienholders join issue with him, the burden is on him to make it appear that there is a reasonable probability the property will bring more than the amount of the liens."); *Spreckels v. Spreckels Sugar Corp.*, 79 F.2d 334 (2d Cir. 1935) ("[O]rdinarily a court will not sell property free of liens unless it can see that there is a substantial equity to be preserved.")

communicated with "over 150 different parties" to evaluate market interest, and yet that process ended not in an actionable proposal but a freefall chapter 11 filing. Steinberg Declaration ¶¶ 8, 9; First Day Declaration ¶¶ 88, 100. The Debtors received no offer prior to the Petition Date more valuable than a non-binding bid in the amount of roughly 20% of the Prepetition Secured Debt. Further, the Debtors have already marketed these assets through a potential section 363 sale. Steinberg Declaration ¶ 8. Thus, it is highly unlikely that further marketing as part of a chapter 11 case will result in materially better bids for the assets than those the Debtors have received in the past seventeen months.

40. The Debtors' Bid Procedures Motion lacks any evidence that a sale under the Bid Procedures Motion is at all likely to exceed the face value of the Prepetition Secured Lenders' interest, as required in *Howell* and *Lutz*. Rather, the Debtors rely on declarations supporting the notion that any such sale price will be for a fraction of the Prepetition Secured Debt. The Debtors utterly failed to demonstrate, nor can they, that a sale under the Bid Procedures Motion would provide proceeds in excess of $817 million and therefore satisfy section 363(f)(3).

41. The Court should save the Debtors' estate the expense of running an auction for the Collateral, the proceeds of which are highly unlikely to exceed the value of the liens securing the Collateral. After seventeen months of marketing these assets prior to filing, the Debtors can hardly consider one final round of marketing an economically responsible option when the clear view in the market is that the Debtors' assets are worth nowhere near the value of their Prepetition Secured Debt.

D. The Debtors Cannot Satisfy Section 363(f)(4) Because There is No Bona Fide Dispute Regarding the Prepetition Secured Lenders' Interest

42. In order to hold that section 363(f)(4) is satisfied, the Court must make a finding that there is a bona fide dispute, which means "a genuine issue of material fact that bears upon the

Debtor's liability, or meritorious contention as to the application of law to undisputed facts." *In re Milford Grp., Inc.* 150 B.R. 904, 906 (Bankr. M.D. Pa. 1992) (internal citation omitted). To introduce a "bona fide dispute," courts will typically require parties to submit evidence showing an "objective basis for the dispute." *See In re NJ Affordable Homes Corp.*, No. 05-60442 (DHS), 2006 WL 2128624, at *10 (Bankr. D.N.J. June 29, 2006); *see also In re Milford Group, Inc.* 150 B.R. at 906-07 ("The testimony presented by the Debtor as to the existence of a 'bona fide dispute' regarding the [disputed secured claims] was sufficient to allow this Court to make such a finding of the existence of such bona fide dispute."). To this end, even filing a declaratory judgment action does not replace the need to demonstrate a factual or legal basis for a "bona fide dispute" sufficient to satisfy section 363(f)(4). *See In re Revel AC, Inc.*, 802 F.3d 558, 573 (3d Cir. 2015). Valid bona fide disputes can include, but are not limited to, challenges to claims on the basis of "fraudulent and unlawful activities" of the secured lenders, *In re NJ Affordable Homes Corp.*, 2006 WL 2128624 at *1, 11, where the secured lender has asserted a constructive trust, *In re DVI*, 306 B.R. 496, 503-04 (D. Del. 2004), or where there is a dispute with respect to a lease underlying the interest, *In re Revel AC, Inc.*, 802 F.3d at 564.

43. Not only do the Debtors fail to satisfy section 363(f)(4), they affirmatively admit the lack of any bona fide dispute regarding the Prepetition Secured Lenders' secured interests. The Debtors have repeatedly acknowledged in their first day pleadings that they do not dispute the $817 million principal amount outstanding under the Revolving/Term Loan Credit Agreement or the scope of the Prepetition Secured Lenders' liens. Accordingly, the Debtors' fail to carry their burden to establish a bona fide dispute as required under section 363(f)(4).

E. The Prepetition Secured Lenders Cannot be Compelled to Accept Money Satisfaction of their Interests

44. Section 363(f)(5) provides that assets can be sold free and clear if an entity having an interest could be compelled to accept money in exchange for its interest. 11 U.S.C. 363(f)(5). To satisfy this provision, Debtors must "demonstrate the existence of another legal mechanism by which a lien could be extinguished without full satisfaction of the secured debt." *PW, LLC*, 391 B.R. at 43. It is insufficient to point to "theoretically possible" legal proceedings, *i.e.* eminent domain, where holders of interest can be compelled to accept monetary satisfaction; such theoretical possibility does not support sale free and clear under section 363(f)(5). *In re Haskell L.P.*, 321 B.R. 1, 8-9 (Bankr. D. Mass. 2005).

45. As the *PW, LLC* court explains, to take advantage of section 363(f)(5), the Debtors must meet three elements: (1) a proceeding exits, or could be brought, in which (2) the creditor could be compelled to accept money satisfaction of (3) its interest. *PW, LLC*. 391 B.R. at 41; *In re Hassan Imports P'ship*, 502 B.R. 851, 858 (C.D. Cal. 2013) (same). The focus of the analysis is on the existence of "a legal or equitable proceeding in which the nondebtor could be compelled to take *less* than the value of the claim secured by the interest." *PW LLC,* 391 B.R. at 41 (*citing In re Gulf States Steel, Inc. of Ala.*, 285 B.R. 497, 508 (Bankr. N.D. Ala. 2002)).

46. The Debtors make no such showing. Nor could they. Of course, junior lienholders can be compelled under state law to accept general unsecured claims when sale proceeds are insufficient to pay them in full, *In re Boston Generating, LLC*, 440 B.R. 302, 333 (Bankr. S.D.N.Y. 2010), but the Debtors point to no applicable law that can compel senior lienholders, like the Prepetition Secured Lenders here, to accept money satisfaction of their interest in a foreclosure action.

CONCLUSION

47. The Bid Procedures Motion seeks approval of a bidding and sale process which would violate sections 363(f) and (k) of the Bankruptcy Code, and proposes an unjustified and wasteful extension of the Debtors' unsuccessful marketing process seventeen months in the making. As such, the Bid Procedures Motion should be denied.

Dated: October 11, 2024

/s/ Robert F. Poppiti, Jr.

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