IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: COLT HOLDING COMPANY LLC, *et al*.,[1] Debtors.	Chapter 11 Case No. 15-11296 (LSS) Jointly Administered **Hearing Date: July 29, 2015 at 9:30 a.m. (Eastern) (Shortened notice requested)** **Objection Deadline: To Be Determined.**

EMERGENCY MOTION OF AD HOC CONSORTIUM OF HOLDERS OF 8.75% SENIOR NOTES DUE 2017 FOR ENTRY OF ORDER, PURSUANT TO FEDERAL BANKRUPTCY RULE 2004 AND LOCAL BANKRUPTCY RULE 2004-1, DIRECTING SCIENS CAPITAL MANAGEMENT LLC, NPA HARTFORD LLC AND VALNIC CAPITAL REAL ESTATE FUND I LLC TO PRODUCE DOCUMENTS AND TO APPEAR FOR DEPOSITIONS UPON ORAL EXAMINATION

The Ad Hoc Consortium of Holders of 8.75% Senior Notes due 2017 (the "Consortium"), by and through its undersigned bankruptcy co-counsel, respectfully files this emergency motion (the "Motion"),[2] pursuant to Rule 2004 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") and Rule 2004-1 of the Local Rules for the United States Bankruptcy Court District of Delaware (the "Local Rules"), for entry of an order, substantially in the form attached hereto as Exhibit A, directing each of Sciens Capital Management LLC (collectively, with its affiliates and/or subsidiaries, "Sciens"), NPA Hartford LLC (collectively, with its affiliates and/or subsidiaries, the "Landlord"), and Valnic Capital Real Estate Fund I LLC (collectively, with its affiliates and/or subsidiaries, "Valnic") to: (i) produce documents within their

[1] The Debtors and the last four digits of their respective taxpayer identification numbers are as follows: Colt Holding Company LLC (0094); Colt Security LLC (4276); Colt Defense LLC (1950); Colt Finance Corp. (7687); New Colt Holding Corp. (6913); Colt's Manufacturing Company LLC (9139); Colt Defense Technical Services LLC (8809); Colt Canada Corporation (5534); Colt International Coöperatief U.A. (6822); CDH II Holdco Inc. (1782). The address of the Debtors' corporate headquarters is 547 New Park Avenue, West Hartford, Connecticut 06110.

[2] Contemporaneously herewith, the Consortium has filed a motion seeking to shorten notice with respect to this Motion.

possession, custody, or control that are responsive to the categories set forth on the applicable document requests attached as Annexes A, B, and C to the proposed order (each a "Document Request" and, collectively, the "Document Requests") by no later than August 2, 2015 at 12:00 p.m. (Eastern); and (ii) designate an informed representative to appear for oral examination regarding the topics raised herein and in the applicable Document Request at the offices of Brown Rudnick LLP, Seven Times Square, New York, New York 10036, on: (i) August 4, 2015 beginning at 9:00 a.m. (Eastern) for Sciens' informed representative; (ii) August 5, 2015 beginning at 9:00 a.m. (Eastern) for the Landlord's informed representative; and (iii) August 5, 2015 beginning at 1:00 p.m. (Eastern) for Valnic's informed representative.[3] In support of this Motion, the Consortium respectfully states as follows:

PRELIMINARY STATEMENT

1. One of the most critical issues in the Debtors' chapter 11 cases is resolution of the Debtors' lease of the West Hartford Facility.[4] Barring an extension, renewal, or court-ordered relief, the lease is currently scheduled to expire on October 25, 2015. If the Debtors are evicted from the West Hartford Facility or forced to hastily vacate the premises, potentially hundreds of jobs would be lost and hundreds of millions of dollars in value would be destroyed.

2. The Landlord, NPA Hartford LLC, is affiliated with and controlled by the Debtors' equity sponsor, Sciens. Prior to the Petition Date, the Landlord agreed to extend the lease contingent on Sciens remaining in control of the Debtors. Although Sciens and the

[3] In addition to the discovery sought through this motion, the Consortium may seek limited discovery from the Debtors in connection with the Lease and the Bid Procedures Hearing.

[4] Capitalized terms used herein but not otherwise defined shall have the meanings ascribed to them in *Keith A. Maib's Declaration in Support of the Debtors' Chapter 11 Petitions and First Day Pleadings* [Dkt. No. 17] (the "Maib Decl.").

Landlord contend that this agreement is not "exclusive" and is open to third parties, the facts tell a different story.

3. The Consortium and the Debtors recently conducted a joint meeting with the Landlord's counsel and offered to match the material terms of the extension already agreed to with Sciens. The Landlord has thus far refused to extend the Lease to the Consortium. Instead, counsel to the Landlord informed the parties that: (i) the Landlord was no longer willing to extend the Lease on the terms already agreed to with Sciens; (ii) the Landlord's decision regarding the Lease would include many "non-financial" factors, including, in particular, the Landlord's long-standing relationship with Sciens; and (iii) the "Independent Member" of the Landlord would consult with Sciens prior to making any decisions regarding an extension or renewal of the Lease.

4. The Consortium is gravely concerned that Sciens continues to control the Landlord and is leveraging its control position to the detriment of the Debtors and their estates. An investigation is necessary to determine whether any claims or causes of action exist against Sciens, the Landlord, the "Independent Member," and potentially other third parties, including whether there is sufficient grounds to obtain injunctive or other relief to prevent the potentially devastating consequences of Sciens' latest gambit to coercively retain control over Colt.

5. As set forth in the Document Requests, the investigation that the Consortium seeks is limited in scope and focused on the Lease and the West Hartford Facility.

6. Emergency relief is necessary as time is of the essence. The actions of Sciens, the Landlord, and the "Independent Member" have the potential to do irreparable harm to the Debtors and their estates if they are not remedied immediately. The DIP Facilities (one of which is not controlled by the members of the Consortium) contain certain near-term case milestones

that the Debtors may not be able to meet without resolution of the Lease situation. For example, the substantial uncertainty surrounding the Lease is the only issue preventing the development of a plan of reorganization. Absent resolution of the Lease, a plan of reorganization may not be able to be timely proposed, which could trigger an event of default under the DIP Facilities.

7. Further, the Lease is a large "overhang" that may impair exit financing and chill any sale process should the cases ultimately need to move towards a Section 363 process. The issues raised herein bear substantially on the Debtors' proposed sale process. With the Bid Procedures Hearing fast approaching, it is critical that the Consortium obtain the discovery requested in this Motion so that the evidence adduced can be presented to the Court in connection with the Bid Procedures Hearing and enable the Court to make an informed decision regarding the propriety of the Bid Procedures and the Debtors' proposed sale process. The discovery requested herein is also needed with respect to any motion by the Debtors regarding assumption of the Lease (or to extend the time for filing such motion) and potentially a declaratory judgment action seeking injunctive relief.

JURISDICTION, VENUE, AND STATUTORY PREDICATES

8. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

9. The statutory predicates for the relief requested herein are section 105 of title 11 of the United States Code (the "Bankruptcy Code"), Bankruptcy Rule 2004, and Local Rule 2004-1.

BACKGROUND

10. The facts relevant to this Motion are set forth below. A more fulsome description of the facts surrounding the Debtors' chapter 11 cases is set forth in: (i) the *Supplemental Objection of Ad Hoc Consortium of Holders of Senior Notes to Debtors' DIP Motion* [Dkt. No. 100] (the "Supplemental Objection"); (ii) the *Declaration of Abraham T. Han in Support of the Objection and Supplemental Objection of the Ad Hoc Consortium of Holders of 8.75% Colt Defense LLC and Colt Finance Corp. Senior Notes Due 2017 to the Debtors' Motion for Interim DIP Loan Approval* [Dkt. No. 101] (the "Han Decl."); and (iii) the *Declaration of Vladimir Jelisavcic in Support of the Objection and Supplemental Objection of the Ad Hoc Consortium of Holders of the 8.75% Senior Notes to the Debtors' Motion for DIP Loan Approval* [Dkt. No. 102] (the "First Jelisavcic Decl."), all of which are fully incorporated herein by reference.

11. Additionally, the Consortium incorporates by reference the *Declaration of Vladimir Jelisavcic in Support of Ad Hoc Consortium's Rule 2004 Motion* (the "Second Jelisavcic Decl."), which is filed contemporaneously herewith.

I. Sciens' Control Over The Landlord And The West Hartford Facility.

12. The Debtors' primary manufacturing facility is located in West Hartford, Connecticut. (Maib Decl. ¶ 13) The Debtors lease the West Hartford Facility from NPA Hartford LLC, an affiliate of Sciens, pursuant to a lease that is currently set to expire on October 25, 2015 (the "Lease"). (*Id*.)

13. The Debtors' alleged failure to secure an extension of the lease or develop any alternatives to the West Hartford Facility in the years leading up to their bankruptcy filings (and while under Sciens' control) contributed to the "emergency" need for a Section 363 sale. (Maib Decl. ¶ 61; June 16, 2015 Hr'g Tr. 23:5-9) Indeed, the Debtors view resolution of the Lease as

one of the most critical factors in its chapter 11 cases. (Maib Decl. ¶ 53 ("Continuity of the West Hartford Facility for a minimum period of three years is critical to the ongoing viability of the Debtors."); Sale Motion ¶ 17)

14. The Landlord is a special purpose entity established and controlled by Sciens. (Maib Decl. ¶ 51; Sale Motion ¶ 17; Lease § 19.1) Sciens has long dominated the Landlord. Sciens and/or affiliates of Sciens, including Daniel J. Standen, chairman of the Colt Governing Board, and John P. Rigas, member of the Colt Governing Board, own or control no less than 30% of the membership interests in the Landlord. (Maib Decl. ¶ 51) Mr. Standen has historically acted as the Landlord's "Authorized Member." (Lease at 30; Lease Amendment, dated October 25, 2012, at 3) During prepetition discussions with the Consortium, Mr. Standen represented to the Consortium that he was the Landlord's "decision-maker" and the party with whom the Consortium would need to negotiate regarding a Lease extension. (Han Decl. ¶ 43; First Jelisavcic Decl. ¶ 33)

15. Sciens has previously indicated that it intends to use its domination of the Landlord to retain control of Colt. In prepetition discussions with the Consortium, Mr. Standen made it clear that Sciens would terminate the Lease, and by extension destroy the Company, if the Consortium did not accept their proposed exchange offer that left Sciens in control. (Han Decl. ¶ 43; First Jelisavcic Decl. ¶ 33) Further, the Debtors' prepetition exchange offers contained a thinly veiled threat regarding the fate of the Company should the Lease not be extended. (Exchange Offer and Disclosure Statement at 45-46)

II. Sciens' Control Over Landlord Represents Clear Conflict Of Interests; Debtors' Purported Attempts To Remedy Conflict.

16. Sciens concedes that its domination and control over the Landlord requires this Court to apply heightened scrutiny to questions regarding the Lease and the proposed sale

process. (Sciens Reply ¶ 4 [Dkt. No. 114] ("Heightened scrutiny applies here: for Sciens to successfully acquire Colt's assets, it is imperative that there be a fair process and a fair price."))

17. The Debtors' Governing Board is also well aware that Sciens and its control over the Landlord represent a substantial "impediment" to any sale of the Company:

> Sciens principals were the general partners of [the Landlord], as well as limited partners in the partnership. And we wanted, if we were heading towards a Section 363 sale, to know that the lease would not be an impediment to the company—to the receipt of the highest and best offer in a Section 363 sale, so as to reduce the interest of third parties in seeking a lease from the landlord, given the Sciens relationship…. Sciens might have been the impediment.

(Deposition of Alan B. Miller 39:4-21)

18. Sciens' myriad conflicts of interest (as owner, landlord, and 363 bidder) are so serious that the Debtors saw the need to preemptively establish so-called "safeguards" in an attempt to salvage the fairness and integrity of these chapter 11 proceedings. (Sale Motion ¶ 17 ("The Independent Committee believes that because Sciens is affiliated with the Landlord it is important to implement certain safeguards that preserve the fairness and integrity of the 363 sale process and ensure that other parties will not be at a disadvantage to bid."))

19. Chief among these so-called "safeguards" is that Sciens has purportedly agreed to delegate "full, exclusive and final authority" regarding the extension or renewal of the Lease to a single member of the Landlord, Valnic Capital Real Estate Fund I LLC ("Valnic"). (Sciens' Reply ¶ 6; Maib Decl. ¶ 51; Sale Motion ¶ 17; Resolution of the Managing Member of NPA Hartford LLC, effective as of May 1, 2015 (the "Landlord Resolution"), attached hereto as Exhibit B)

20. Valnic, the so-called "Independent Member," is a limited liability company and its members have not been disclosed. Accordingly, it is unclear who the ultimate decision-maker

will be regarding any Lease-related decisions. Moreover, it is unclear whether Sciens or any affiliates of Sciens own any interests in Valnic or vice versa.[5] Although the Debtors have represented that Valnic has no interest in Colt ***or Sciens*** (Maib Decl. ¶ 51; Sale Motion ¶ 17), Sciens and the Landlord will only go so far as to state that Valnic has no interest in the Debtors (Sciens Reply ¶ 6; Landlord Resolution at 1 ("[T]he Managing Member hereby appoints Valnic Capital Real Estate Fund I LLC, the largest member of the Company that does not hold any direct or indirect pecuniary interest in Colt, as a Managing Member….")[6]

21. This information is critical as the Debtors and Sciens have repeatedly represented to this Court that Sciens will have absolutely no role in decisions respecting the West Hartford Facility or the Lease and that final and complete authority over all such decisions has been vested in the "Independent Member." (Maib Decl. ¶ 51; Sale Motion ¶ 17; Sciens Reply ¶ 7 ("[T]he Independent NPA Director represents and protects the interests of NPA Hartford, and Sciens and its designees will act only as a potential acquirer, with no power to make any decisions respecting the 363 sales, the DIP financing or the lease.") (emphasis in original); June 16, 2015 Hr'g Tr. at 59:17-25 (an "individual … that has no investment in Sciens [or] Colt" has been "invested with final and exclusive decision making authority with respect to the disposition of that property."))

22. The Debtors and Sciens have further represented that the Landlord "is prepared to consider" any potential tenant and to "potentially negotiate" a lease with such tenants "consistent

[5] Nothing in this Motion is intended to imply that the estates are not entitled to relief even if a truly independent member or manager of the Landlord is vested with authority to decide whether to extend or renew the Lease.

[6] This is reminiscent of the situation involving the conflicted Lord Guthrie's membership on the Independent Committee, which prompted this surreal reply from Sciens: "The fact that Field Marshal the Lord Guthrie of Craigiebank … has served as an independent member of other Sciens affiliates does not mean he is not independent…." (Sciens Reply n.5) Sciens seems to mistakenly believe that a party's relationships with Sciens have nothing to do with that party's "independence." However, the various "safeguards" erected by the Debtors are explicitly intended to remove ***Sciens*** from critical decision making in these cases. Thus, packing these "independent" positions with affiliates of Sciens is self-defeating.

with their own economic interest." (Maib Decl. ¶ 52; June 16, 2015 Hr'g Tr. 60:1-6 ("[Landlord is] prepared to enter into a new lease if [Sciens] is the successful bidder here. It is not an exclusive arrangement. They will consider and talk to other potential bidders, but they're going to act however they act at the behest of their own attorney … and consistent with their own economic interest.”))

III. Landlord Agrees To Extend Lease In Connection With Sciens' Stalking Horse Bid; Refuses To Extend Lease To Consortium.

23. On the Petition Date, the Debtors filed their Sale Motion, pursuant to which the Debtors seek approval to sell substantially all of their assets pursuant to Section 363 of the Bankruptcy Code. (Dkt. No. 13)

24. Not surprisingly, Sciens chose to serve as the stalking horse bidder in connection with the 363 sale process. Sciens' meager stalking horse bid featured only the assumption of certain of the Debtors' liabilities (excluding the Senior Notes) and a promise to contribute up to $5 million to a "NewCo" to be established to acquire the Debtors' assets.[7] (Stalking Horse Term Sheet, attached as Exhibit C to Sale Motion, at 3, 9)

25. An additional feature of Sciens' now-defunct stalking horse bid was the extension of the Lease on terms agreed upon between Sciens and the Sciens-controlled Landlord. (Stalking Horse Term Sheet at 5) The terms of this extension have not been disclosed. However, prior to the Petition Date, the Landlord agreed to another lease extension in connection with a Restructuring Support Agreement among the Company, Sciens and the Debtors' secured lenders. The material terms of this extension are set forth in a term sheet dated May 28, 2015, signed by

[7] As stated by counsel for Sciens at the June 24, 2015 hearing, Sciens' stalking horse bid is "gone" because Sciens is no longer able to assume the Debtors' secured debt. (June 24, 2015 Hr'g Tr. 17:9-19 ("[W]hen this case filed …, my client had decided to be a backup stalking horse bidder …. [T]hat's gone because the consideration for that stalking horse bid was largely assumption of the secured debt and the DIP."))

Henry P. Baer, Jr. as counsel to the Landlord (the "Lease Extension Term Sheet," attached hereto as Exhibit C).

26. Although Sciens contends that extension of the Lease is open to third parties, the Lease Extension Term Sheet and the Landlord's recent conduct tell a dramatically different story.

27. First, renewal of the lease under the Lease Extension Term Sheet was contingent on amending the Lease: (i) to eliminate Colt's ability to enter into a sale of the company without the Landlord's (*i.e.*, Sciens') express consent; and (ii) to allow the Landlord to withhold its consent to any such sale, even if withholding consent were unreasonable. (Lease Extension Term Sheet at 2) Combined, these amendments would have had the practical effect of providing the Landlord (*i.e.*, Sciens) with a veto over any sale of Colt, and reinforced a message that Sciens has broadcast loud and clear since November 2014: It will fight any attempt by the Consortium to realize its value entitlement in these cases.

28. Second, the Consortium and the Debtors have jointly contacted the Landlord's counsel, Henry P. Baer, Jr., and offered to match the economic terms set forth in the Lease Extension Term Sheet. By letter dated July 7, 2015, the Debtors notified the Landlord that they were interested in extending the Lease on the same terms as contained in the Lease Extension Term Sheet. (Exhibit D, attached hereto) The following day, July 8, 2015, members of the Consortium and representatives of the Debtors met with Mr. Baer, counsel for the Landlord, and reiterated their desire to extend the Lease on the same materials terms as contained in the Lease Extension Term Sheet. (Second Jelisavcic Decl. ¶ 3) In connection with this meeting, the Consortium provided the Landlord with credentials and additional materials regarding the

qualifications of the Consortium members to serve as equity sponsors of the Company. (Second Jelisavcic Decl. ¶ 4)

29. The response provided by Mr. Baer made it clear to the members of the Consortium in attendance that the Landlord was not negotiating in good faith. First, Mr. Baer stated that the Landlord was no longer willing to extend the Lease on the terms set forth in the Lease Extension Term Sheet. (Second Jelisavcic Decl. ¶ 6) When asked what had changed in the fewer than six weeks since the Landlord agreed to the Lease Extension Term Sheet, Mr. Baer did not provide any specific answer. (*Id*.)

30. Second, Mr. Baer stated that the Landlord's decision regarding the Lease would include many "non-financial" factors. (Second Jelisavcic Decl. ¶ 7) Mr. Baer stated that the Landlord's long-standing relationship with Sciens as the owner of Colt was an important factor. (*Id*.)

31. Third, Mr. Baer stated that the "Independent Member" of the Landlord would consult with Sciens prior to making any decisions regarding an extension or renewal of the Lease. (Second Jelisavcic Decl. ¶ 8) The fact that the "Independent Member" would consult with Sciens before making any decisions regarding the Lease led the members of the Consortium in attendance to conclude that Sciens would have final authority over any decision to extend or renew the Lease. (*Id*.)

IV. <u>The Need For, And Scope Of, The Investigation</u>.

32. The Landlord's refusal to extend the Lease to the Consortium and its counsel's troubling statements regarding Sciens' continued role in the process raise grave doubts regarding the "independence" of the Landlord and whether Sciens continues to wield undue control over the Landlord to the detriment of the Debtors' estates. Such actions could give rise to a multitude

of claims and causes of actions against Sciens, the Landlord, Valnic, and potentially other third parties (including other members of the Landlord), and could form the basis for obtaining injunctive or other relief preventing an eviction and facilitating a successful reorganization. Accordingly, the expedited investigation requested herein is necessary and appropriate.

A. Potential Defenses To Eviction.

33. The purported "ticking time bomb" in these cases is the October 25, 2015 expiration of the Lease, coupled with the brazen willingness of Sciens and the Landlord to evict the Debtors—and effectively destroy the Company—if Sciens' demands are not met. Discovery is needed to determine whether the Debtors possess any equitable or other defenses to eviction.

34. Connecticut law provides tenants with certain equitable defenses to eviction to prevent a tenant from sustaining substantial harm. *Westfarms Assocs. v. Kathy-John's, Inc.*, No. 851130901-733, 1986 WL 400555, at *2 (Conn. Super. Ct. Mar. 17, 1986) (citations omitted) ("Courts have a longstanding general power of equity to afford relief against unreasonable conduct even when the activity is otherwise lawful.").

35. These equitable doctrines consider factors such as: (i) whether the tenant had been willfully or grossly negligent; (ii) the potential loss to the lessor; and (iii) the hardship to the tenant. *Nicoli v. Frouge Corp.*, 368 A.2d 74, 76 (Conn. 1976); *Rich-Taubman Assocs. v. Masterworks, Inc. (In re Masterworks, Inc.)*, 94 B.R. 262, 267 (Bankr. D. Conn. 1988); *In re M & R Apparel, Inc.*, 92 B.R. 565, 569 (Bankr. D. Conn. 1988).

36. One such equitable defense is audita querela, which is an equitable remedy "to inhibit the unconscionable use of a lawful judgment because of matters arising subsequent to the judgment." *Westfarms Assocs.*, 1986 WL 400555, at *2 (citations omitted); *Federation Square Assocs. v. Kaplan*, No. 8410-25567, 1985 WL 263904, at *1 (Conn. Super. Ct. Nov. 29, 1985)

("Audita querela is a common law writ or motion which applies equitable factors to provide relief against the unconscionable use of a judgment.").

37. In *Westfarms*, the landlord obtained an eviction order calling for the immediate eviction of the tenant. 1986 WL 400555, at *1. The tenant sought a stay of execution, arguing "as the postjudgment factor an inability to immediately transfer its operations to a new location without significant loss to its business." *Id*. at *2. The landlord argued for immediate eviction based on "loss of income and possible loss of tenant." *Id*. The court engaged in a comparative evaluation of the conflicting interests and granted the stay of execution, finding, *inter alia*, that: (i) the tenant was not willfully or grossly negligent in failing to obtain a replacement location; (ii) the loss to the landlord would be small; and (iii) "[n]ot to grant relief would result in such hardship to the tenant as to make it unconscionable to immediately enforce the judgment." *Id*.

38. Similarly, in *Federation Square*, a commercial tenant sought a stay of execution so as to facilitate an orderly relocation of its business. 1985 WL 263904, at *1. Relying on audita querela, the court granted the stay, noting that although immediate eviction "would not be fatal to the continued existence of the business," it would "pose hardship for the tenant." *Id*. The court granted the stay, finding, *inter alia*, that: (i) the tenant was not willfully or grossly negligent in not securing an alternative location; (ii) the loss to the landlord would be small, as the tenant would be paying for its use and occupancy of the space; and (iii) the hardship sustained by the tenant would be unconscionable in the absence of a stay. *Id*. at *2.

39. An additional equitable remedy potentially available to the Debtors is the defense of equitable nonforfeiture, which focuses on: (i) whether the tenant was grossly or willfully negligent; (ii) the harm to the tenant as compared to the landlord; and (iii) whether the landlord's

damages can be adequately compensated. *See Pondy Assocs., LP v. Max's Oyster Bar, LLC*, No. X07CV74028205S, 2007 WL 2318145, at *5 (Conn. Super. Ct. 2007).

40. In *Pondy Associates*, a tenant's lease expired and the tenant failed to timely exercise an extension option. *Id*. at *1. Thereafter, the landlord initiated a summary eviction process in which the tenant asserted the defense of equitable nonforfeiture. *Id*. at *3. The court found that the tenant had met its burden of proving equitable nonforfeiture and refused to evict the tenant. *Id*. at *8. The court's analysis focused on several key facts, including that the loss to the tenant would be substantial (*e.g.*, the tenant would "lose its initial investment, valuable improvements, employees, good will and location if evicted"), while the loss to the landlord would be minimal. *Id*. at *6.

41. Critically, "a landlord's conduct is relevant in determining whether to grant equitable relief." *See 19 Perry Street, LLC, v. The Unionville Water Co.*, 987 A.2d 1009, 1023 (Conn. 2010); *Cumberland Farms, Inc. v. Dairy Mart, Inc.*, 627 A.2d 386, 391 (Conn. 1993).

42. In *19 Perry Street*, the landlord sought to evict a tenant for non-payment of rent. *Id*. at 1013. The trial court entered judgment in favor of the landlord. *Id*. On appeal, the Supreme Court of Connecticut reversed, finding that the tenant's failure to tender rent was due in large part to the landlord's own actions and, thus, was not the product of willful or gross negligence. *Id*. at 1023. Further, the tenant had no alternative location available and had made capital investments to the premises, which would be forfeited if the tenant were forced to vacate. *Id*. at 1024-25. Because the landlord's damages could be addressed through payment of back rent, the court concluded that "the [tenant's] losses upon eviction would be wholly disproportionate to the [landlord's] injury." *Id*. at 1025. Accordingly, the court found that the tenant had adequately pled the defense of equitable nonforfeiture. *Id*. at 1026.

43. Similarly, in *PIC Associates*, the landlord sought to evict the tenant for, *inter alia*, failure to adequately bond off mechanic's liens that the tenant had allowed to be placed on the premises, which violated the lease. *PIC Assocs., LLC v. Greenwich Place GL Acquisition, LLC*, 17 A.3d 93, 95 (Conn. App. Ct. 2011). The Appellate Court of Connecticut affirmed the trial court's judgment that the tenant had proven its defense of equitable nonforfeiture, finding that the landlord was responsible, in part, for the tenant's breach of the lease because it failed to notify the tenant that it had not adequately bonded off the mechanic's liens. *Id*. at 106-07. The court further noted that the impact to the tenant resulting from the forfeiture would be wholly disproportionate to the injury suffered by the lessor because: (i) the tenant would lose its business; (ii) the tenant had paid substantial sums to acquire the lease interest (including the cost of improvements to the premises); and (iii) the landlord's damages were easily reparable. *Id*. at 102. "Comparing losses, the court found that the loss to the defendant, if the plaintiff were to prevail was monumental in comparison with that of the plaintiff." *Id*.

44. Finally, Connecticut courts have found that under certain circumstances a landlord has a duty of good faith and fair dealing with respect to a tenant. *See, e.g., Warner v. Konover*, 210 Conn. 150, 154 (Conn. 1989). A landlord breaches this duty through "some sinister motive, dishonest purpose, ill will or furtive design." *See Savin Gasoline Properties, LLC v. CCO, LLC*, No. CV094046741S, 2011 WL 726110, at *18 (Conn. Super. Ct. Jan. 31, 2011) (citing *Buckman v. People Express, Inc.*, 530 A.2d 596 (Conn. 1987)).

45. The information requested herein relates to the inequitable conduct of Sciens, the Landlord, and Valnic regarding the Lease, and is thus relevant and necessary to determine whether the Debtors may be able to assert certain state law equitable defenses to eviction. Because of the near-term threat of eviction, a decision by this Court regarding the Lease should

be made as expeditiously as possible. Accordingly, the information requested herein and the expedited timeframe are necessary and appropriate.

B. Potential Claims For Breach Of Fiduciary Duties.

46. Sciens' actions may constitute breaches of their fiduciary duties to the estates, and the Landlord's and Valnic's actions may constitute aiding and abetting Sciens' breaches of fiduciary duties.

47. As debtors-in-possession, Colt owes fiduciary duties to the estates. *In re Marvel Entm't Grp., Inc.*, 140 F.3d 463, 474 (3d Cir. 1989) ("When the chapter 11 petition was filed in this case, the debtor-in-possession assumed the same fiduciary duties as would an appointed trustee."); *In re Reliant Energy Channelview LP*, 594 F.3d 200, 210 (3d Cir. 2010) (citations omitted) ("[D]ebtors-in-possession have a fiduciary duty to maximize the value of the estate."); *Official Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinery*, 330 F.3d 548, 573 (3d Cir. 2003).

48. As the Debtors' controlling equity holder, Sciens also owes fiduciary duties to the estates. *See Pepper v. Litton*, 308 U.S. 295, 306 (1939) ("A director is a fiduciary. So is a dominant or controlling stockholder or group of stockholders.") (internal citations omitted); *In re High Strength Steel, Inc.*, 269 B.R. 560, 569 (Bankr. D. Del. 2001) (finding that debtor's fiduciary duties apply to controlling shareholders).

49. These fiduciary duties include the duties of care and loyalty. *In re Brook Valley VII, Joint Venture*, 496 F.3d 892, 900-01 (8th Cir. 2007) (quoting 7 COLLIER ON BANKRUPTCY ¶ 1107.02[4]) (15th ed. rev. 2006)) ("The duty of care requires the fiduciary to make good-faith decisions that can be attributed to a rational business purpose…. The duty of loyalty comes into play when there appears to be a conflict between the interests of the fiduciary and the entity to

which he owes loyalty. For a debtor in possession, this duty 'includes an obligation to refrain from self-dealing, to avoid conflicts of interests and the appearance of impropriety, to treat all parties to the case fairly and to maximize the value of the estate"); *In re Integrated Res., Inc.*, 147 B.R. 650, 656) (Bankr. S.D.N.Y. 1992); *In re Mundy Ranch, Inc.*, 484 B.R. 416, 426 (Bankr. D. N. Mex. 2012).

50. Also among these fiduciary duties is "an obligation to refrain from acting in a manner which could damage the estate, or hinder a successful reorganization." *Marvel Entm't*, 140 F.3d at 471; *see also Mushroom Transp. Co. v. Ganz* (*In re Mushroom Transp. Co., Inc.)*, 382 F.3d, 325, 339 (3d Cir. 2004) (Also among the fiduciary obligations of a debtor-in-possession is the "duty to protect and conserve property in its possession for the benefit of creditors.").

51. The Landlord's refusal to extend the Lease in light of the facts set forth above raises serious questions regarding: (i) whether Sciens continues to control the Landlord and/or Valnic to the detriment of the Debtors' estates and in derogation of its fiduciary duties (and in contravention of myriad representations made to this Court); and (ii) whether the Landlord, Valnic, or any other members of the Landlord have been complicit in these potential breaches of fiduciary duty, potentially giving rise to additional claims and causes of action, including claims of aiding and abetting breaches of fiduciary duties.

52. Claims against the Landlord for aiding and abetting breaches of fiduciary duties could provide the basis for obtaining preliminary and/or permanent injunctive relief to prevent irreparable harm to the Debtors' estates. *See Black v. Hollinger Int'l Inc.*, 872 A.2d 559, 565, 568 (Del. 2005) (affirming Delaware Chancery Court's decision enjoining controlling shareholder of holding company from consummating a transaction in breach of the controlling

shareholder's fiduciary duties). Indeed, injunctive relief would be particularly appropriate here as courts often find that no adequate remedy at law exists in matters concerning real property. *See, e.g., Osborn v. Kemp*, 991 A.2d 1153, 1162 (Del. 2010) ("We recognize that real property is unique and often the law cannot adequately remedy a party's refusal to honor a real property contract.").

C. Potential Claims For Tortious Interference.

53. Sciens' actions with respect to the Lease may give rise to claims for tortious interference with business relations. "Connecticut has long recognized a cause of action for tortious interference with business relations." *Blake v. Levy*, 464 A.2d 52, 54 (Conn. 1983); *DiNapoli v. Cook*, 682 A.2d 603, 608 (Conn. App. Ct. 1996), *cert. denied*, 686 A.2d 124 (Conn. 1996).

54. The elements of tortious interference with business relations are: (i) the existence of a business relationship; (ii) an intentional and improper interference with that relationship; and (iii) a resulting loss of benefits of the relationship. *DiNapoli A.2d at 607; G.J. Swanson, LLC v. Cehovsky*, No. FBTCV126027498S, 2013 WL 2278767 (Conn. Super. Ct. 2013); *see generally Blake v. Levy* 464 A.2d at 55.

55. "A defendant is guilty of tortious interference if he has engaged in improper conduct." *G.J. Swanson, LLC v. Cehovsky*, 2013 WL at *6 (citing Restatement (Second) of Torts, § 766, 766B, 767 (1979)). Improper conduct includes acting with an "improper motive" or through "improper means." *Kakadelis v. DeFabritis*, 464 A.2d 57, 59-60 (Conn. 1983).

56. "Loss" as a result of the tortious interference can be shown by demonstrating that "except for the tortious interference of the defendant, there was a reasonable probability that the

plaintiff would have entered into a contract or made a profit." *DiNapoli*, 682 A.2d at 608 (citing *Goldman v. Feinberg*, 37 A.2d 355, 355 (Conn. 1944)).

57. Remedies for tortious interference include monetary damages and injunctive relief. *See Lavery's Main St. Grill v. Hotel Emps. Union*, 147 A.2d 902, 908 (Conn. 1959); *Hart Nininger & Campbell Assocs. v. Rogers*, 548 A.2d 758, 766 (Conn. App. Ct. 1988); *Custard Ins. Adjusters, Inc. v. Nardi*, No. CV980061967S, 2000 WL 562318, at *38 (Conn. Super. Ct. April 20, 2000).

58. Here, there is no question that the Debtors and the Landlord have a long-standing business relationship. If Sciens is interfering with that relationship by causing the Landlord to not extend the Lease, such actions would potentially give rise to claims for tortious interference with business relations. Sciens' status as the Company's equity sponsor and control investor in the Landlord is no defense to a claim for tortious interference as Sciens claims to have abdicated all authority regarding the Lease. Thus, any actions taken by Sciens in respect of the Lease would be outside its authority and solely for personal gain. *See Appleton v. Bd. of Educ. Stonington*, 730 A.2d 88, 97 (Conn. App. Ct. 1999), *rev'd in part on other grounds*, 757 A.2d 1059 (Conn. 2000) (noting that agent of company "could be held liable for … interference or inducement if he did not act legitimately within his scope of duty but used the corporate power improperly for personal gain.") (quoting *Wellington Sys., Inc. v. Redding Grp., Inc.*, 714 A.2d 21, 30 *cert. denied*, 740 A.2d 516 (Conn. 1998) (citation omitted)); *see also Metcoff v. Lebovics*, 2 A.3d 942, 951 (Conn. App. Ct. 2010); *see generally Binder v. Windmill Mgmt., LLC*, No. FSTX08CV106004435S, 2013 WL 593936, at *9 (Conn. Super. Ct. 2013).

D. Potential Existence Of New Lease Agreement Or Modification To Existing Lease.

59. Under Connecticut law, the general rules of contract law apply to leases. *Warner Associates v. Logan*, 718 A.2d 48, 50-51 (Conn. App. Ct. 1998).

60. "The rules governing contract formation are well settled. To form a valid and binding contract in Connecticut, there must be a mutual understanding of the terms that are definite and certain between the parties...." *See Duplissie v. Devino*, 902 A.2d 30, 42 (Conn. App. Ct. 2006), *cert. denied*, 280 Conn. 916 (2006); *Viera v. Cohen*, 927 A.2d 843, 855 (Conn. 2007) (a contract is simply "[t]he union of two or more minds in a thing done or to be done; a coming together of parties in opinion or determination...") (internal citations omitted).

61. Mutual assent to form a contract is a question of fact and can be shown by written words, spoken words, or other acts evidencing assent. *Precision Mech. Servs., Inc. v. Shelton Yacht & Cabana Club, Inc.*, 903 A.2d 692, 696 (Conn. App. Ct. 2006), (internal citations omitted) *cert. denied*, 280 Conn. 928 (2006). "If there was a meeting of the minds of the parties, without fraud or unfair conduct on either side, the contract must stand…." *T Properties, LLC v. Hill*, No. CVH8203, 2013 WL 2278997, at *2 (Conn. Super. Ct. May 7, 2013) (quoting *Ross v. Koenig*, 28 A.2d 875, 877(Conn. 1942)).

62. A new lease agreement (or modification to an existing lease) can be established by informal writings between the parties. *See, e.g., Bellini v. Patterson Oil Co.*, 111 A.3d 987 (Conn. App. Ct. 2015). In *Bellini*, the landlord and tenant had a lease agreement with a five year extension option. *Id*. at 988-989. Pursuant to letters exchanged between the parties, the court found that the landlord and tenant had formed a new agreement that abrogated certain provisions of the original lease (notably, the extension provision under the original lease). *Id*. at 990.

63. A lease can also be established through the conduct of the parties. For example, where a landlord has specified terms for future occupancy and the tenant, by its conduct, accepts such terms, a contract may be implied from the conduct of the parties. *See Molaver v. Thomas*, 6 A.3d 232, 236 (Conn. App. Ct. 2010) (citing *Welk v. Bidwell*, 73 A.2d 295 (Conn. 1950)); *Benios v. Brown*, No. CVN-1105-2282, 2012 WL 663548 (Conn. Super. Ct. Feb. 9, 2012); *Longobardi v. Longobardi*, No. CVNH 901 3007 1989 WL 516478, (Conn. Super. Ct. Aug. 11, 1989).

64. An investigation is necessary here to determine whether any communications or other actions evidencing an extension or modification of the Lease exist. If such evidence exists, the Debtors' may possess a leasehold interest in the West Hartford Facility post-October 25, 2015.

V. <u>Time Is Of The Essence</u>.

65. Emergency relief is necessary here as time is of the essence. The actions of Sciens, the Landlord, and Valnic have the potential to do irreparable harm to the Debtors and their estates if they are not remedied immediately. The DIP Facilities (one of which the members of the Consortium do not control) contain near-term case milestones. Resolution of the Lease situation is a critical element in meeting many of those milestones. For example, the substantial uncertainty surrounding the Lease is the only issue preventing the development of a plan of reorganization. Absent resolution of the Lease situation, a plan of reorganization may not be able to be timely proposed.

66. Further, the Lease is a large "overhang" that may impair exit financing and chill any sale process should the cases ultimately need to move towards a Section 363 process. The issues raised herein bear substantially on the Debtors' proposed sale process.

67. The Bid Procedures Hearing is currently scheduled for August 13, 2015 at 10:30 a.m. (Eastern), with objections due by August 6, 2015 at 4:00 p.m. (Eastern). (Dkt. No. 219) At the Bid Procedures Hearing, the Debtors currently intend to introduce evidence from Sciens and the purported "Independent Member" of the Landlord regarding Sciens' and the Landlord's respective roles and authority in connection with the Debtors' sale process and any Lease extension negotiations. (Sale Motion ¶ 18)

68. In the face of Sciens' myriad conflicts of interest in these cases, the Debtors are relying on these so-called "Safeguard Procedures" to salvage the fairness and integrity of its proposed sale process. (Maib Decl. ¶ 29; Sale Motion ¶¶ 17, 18; June 16, 2015 Hr'g Tr. at 31:25-32:13) It is therefore critical that the Consortium obtain the limited discovery requested herein so that the issues raised in this Motion, which speak directly to the fairness and integrity of the Debtors' proposed sale process, are fully presented to the Court at the Bid Procedures Hearing so as to enable the Court to make an informed decision regarding the propriety of the Bid Procedures and the Debtors' proposed sale process. The discovery requested herein is also needed with respect to any motion by the Debtors regarding assumption of the Lease (or to extend the time for filing such motion) and potentially a declaratory judgment action seeking injunctive relief.

RELIEF REQUESTED

69. By this Motion, the Consortium seeks entry of an order, substantially in the form attached hereto as Exhibit A, directing: (i) Sciens to produce documents within their possession, custody, or control that are responsive to the Document Request attached as Annex A to the proposed order; (ii) the Landlord to produce documents within their possession, custody, or control that are responsive to the Document Request attached as Annex B to the proposed order;

and (iii) Valnic to produce documents within their possession, custody, or control that are responsive to the Document Request attached as Annex C to the proposed order. The Consortium requests that the responses to the Document Requests be delivered to the attention of Robert J. Stark, at Brown Rudnick LLP, Seven Times Square, New York, New York, 10036, by no later than August 2, 2015 at 12:00 p.m. (Eastern).

70. The Consortium further seeks entry of an order directing each of Sciens, the Landlord, and Valnic to designate an informed representative to appear for oral examination regarding the Document Requests and the matters raised in this Motion at the offices of Brown Rudnick LLP, Seven Times Square, New York, New York 10036, on: (i) August 4, 2015 beginning at 9:00 a.m. (Eastern) for Sciens' informed representative; (ii) August 5, 2015 beginning at 9:00 a.m. (Eastern) for the Landlord's informed representative; and (iii) August 5, 2015 beginning at 1:00 p.m. (Eastern) for Valnic's informed representative.

ARGUMENT

71. Bankruptcy Rule 2004 provides that, on the motion of any party in interest, the Court may order an examination of, and the production of documentary evidence by, any entity concerning any matter relating "to the acts, conduct, or property or to the liabilities and financial condition of the debtors, or to any matter which may affect the administration of the debtor's estate…." Fed. R. Bankr. P. 2004(b). The examination "may also relate to the operation of any business and the desirability of its continuance, the source of any money or property acquired or to be acquired by the debtor for purposes of consummating a plan and the consideration given or offered therefor, and any matter relevant to the case or to the formulation of a plan." *Id.*

72. Accordingly, Bankruptcy Rule 2004 permits any party with an interest in the bankruptcy estate to conduct an examination of any matter affecting the administration of the

estate or the formulation of a plan. Fed. R. Bankr. P. 2004(b); *In re Teleglobe Commc'ns Corp.*, 493 F.3d 345, 354 n.6 (3d Cir. 2007).

73. The goals of Rule 2004 examinations include "discovering assets, examining transactions, and determining whether wrongdoing has occurred." *In re Wash. Mutual, Inc.*, 408 B.R. 45, 50 (Bankr. D. Del. 2009) (quoting *In re Enron Corp.*, 281 B.R. 836, 840 (Bankr. S.D.N.Y. 2002); *see In re Recoton Corp.*, 307 B.R. 751, 755 (S.D.N.Y. 2004).

74. "The scope of a Rule 2004 examination is 'unfettered and broad.'" *Wash. Mutual, Inc.*, 408 B.R. at 49 (quoting *In re Bennett Funding Group, Inc.*, 203 B.R. 24, 28 (Bankr. N.D.N.Y. 1996)); *see In re Countrywide Home Loans, Inc.*, 384 B.R. 373, 400 (Bankr. W.D. Pa. 2008).

75. Indeed, the broad scope of Rule 2004 has been described as permitting a "fishing expedition." *See 2435 Plainfield Ave., Inc. v. Twp. of Scotch Plains (In re 2435 Plainfield Ave)*, 223 B.R. 440, 456 (Bankr. D. N.J. 1998) (citations omitted); *In re Drexel Burnham Lambert Group*, 123 B.R. 702, 711 (Bankr. S.D.N.Y. 1991); *Keene Corp. v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 42 B.R. 362, 364 (S.D.N.Y. 1984).

76. This broad scope extends to any third parties who have a relationship with the Debtors and includes the designation of an informed person to appear for an oral examination. *Ionosphere Clubs, Inc. v. Am. Nat Bank and Trust Co. of Chicago (In re Ionosphere Clubs, Inc.)*, 156 B.R. 414, 432 (S.D.N.Y. 1993), *aff'd*, 17 F.3d 600 (2d Cir. 1994) ("Because the purpose of the Rule 2004 investigation is to aid in the discovery of assets, any third party who can be shown to have a relationship with the debtor can be made subject to a Rule 2004 investigation."); *In re Wilcher*, 56 B.R. 428, 433 (Bankr. N.D. Ill. 1985 (Rule 2004 examination "may extend to creditors and third parties who have had dealings with the debtor.") (citations omitted); *In re*

Analytical Sys., Inc., 71 B.R. 408, 412 (Bankr. N.D. Ga. 1987) ("The application of the discovery device of Bankruptcy Rule 7030 (Fed. R. Civ. P. 30), for a corporation to designate and inform persons to testify on its behalf to Bankruptcy Rule 2004 examinations is both consistent with and assists in the accomplishment of expeditious administration."); *see also In re Mittco, Inc.*, 44 B.R. 35, 36 (Bankr. D. Wis. 1984) ("Where there is a showing that the purpose of the examination is to enable a party to probe into matters which may lead to the discovery of assets by examining not only the debtor, but also other witnesses, such inquiry is allowed.").

77. An investigation is necessary here. The Landlord's refusal to extend the Lease to the Consortium raises the specter that Sciens continues to dominate the Landlord and is wielding its control to the detriment of the Debtors' estates. An expedited investigation is necessary to prevent irreparable harm to the Debtors' estates and determine whether Sciens, the Landlord and/or Valnic have engaged in inequitable conduct with respect to the Lease and the West Hartford Facility, and whether such conduct gives rise to certain claims or causes of action or potential remedies and defenses with respect to the same. Finally, the investigation and Document Request are narrowly tailored and focused on the Lease and the West Hartford Facility, the most critical issues in these cases. The limited scope of the investigation falls squarely within the broad permissible scope of Bankruptcy Rule 2004.

CERTIFICATION OF COMPLIANCE WITH LOCAL RULE 2004-1

78. Attached hereto as Exhibit E is a certification from William P. Bowden, counsel to the Consortium, in accordance with Local Rule 2004-1.

NO PRIOR REQUEST

79. No previous motion for the relief requested herein has been made to this or any other court.

NOTICE

80. Notice of this Motion has been provided to the following parties: (i) counsel to the Debtors; (ii) the office of the United States Trustee for the District of Delaware; (iii) counsel to the Official Committee of Unsecured Creditors; (iv) counsel to Sciens; (v) counsel to the Landlord and Valnic; (vi) counsel to the Term Loan Lenders; and (vii) the parties requesting notice under Bankruptcy Rule 2002. The Consortium submits that no other or further notice is required.

[Remainder of page intentionally left blank.]

CONCLUSION

WHEREFORE, the Consortium respectfully requests that the Court: (a) enter an order, substantially in the form attached hereto as Exhibit A, directing each of Sciens, the Landlord and Valnic to: (i) produce documents within their possession, custody, or control that are responsive to the applicable Document Request; and (ii) designate an informed representative to appear for oral examination regarding the topics raised herein and in the applicable Document Request; and (b) grant such other or further relief as the Court deems just and proper.

Dated: July 22, 2015

ASHBY & GEDDES, P.A.

/s/ William P. Bowden
William P. Bowden, Esq. (#2553)
Karen Skomorucha Owens (#4759)
Benjamin W. Keenan (#4724)
500 Delaware Ave., 8th Floor
P.O. Box 1150
Wilmington, DE 19899
Tel: (302) 654-1888

-and-

BROWN RUDNICK LLP
Robert J. Stark, Esq. (admitted *pro hac vice*)
Andrew M. Carty, Esq. (admitted *pro hac vice*)
Seven Times Square
New York, NY 10036
Tel: (212) 209-4800

Jeffrey L. Jonas, Esq. (*pro hac vice* pending)
One Financial Center
Boston, MA 02111
Tel: (617) 856-8200

Counsel for Ad Hoc Consortium of Holders of 8.75% Senior Notes due 2017