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

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| **In re:** | ) | |
| | ) | **Chapter 11** |
| | ) | |
| **COLT HOLDING COMPANY LLC, *et al.*,[1]** | ) | **Case No. 15-11296 (LSS)** |
| | ) | |
| **Debtors.** | ) | **Jointly Administered** |
| | ) | |
| | ) | **Hearing Date: August 19, 2015 at 2:00 p.m. ET**<br>**Objection Deadline: August 12, 2015 at midnight ET (per agreement with Debtors' counsel extending deadline)** |
| | ) | |
| | ) | **Re: D.I. 13, 273, and 325** |
| | ) | |

**OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO:**

**(1) THE DEBTORS' MOTION, PURSUANT TO 11 U.S.C. §§ 105, 363, AND 365, AND FED. R. BANKR. P. 2002, 6004, 6006, 9008 AND 9014, FOR ENTRY OF (A) AN ORDER (I) APPROVING BID PROCEDURES IN CONNECTION WITH THE SALE OF SUBSTANTIALLY ALL OF THE DEBTORS' ASSETS FREE AND CLEAR OF LIENS, CLAIMS, ENCUMBRANCES, AND OTHER INTERESTS, (II) APPROVING PROCEDURES RELATED TO THE ASSUMPTION AND ASSIGNMENT OF EXECUTORY CONTRACTS AND UNEXPIRED LEASES IN CONNECTION WITH SUCH SALE, (III) APPROVING THE FORM AND MANNER OF NOTICE THEREOF, (IV) SCHEDULING THE HEARING TO CONSIDER APPROVAL OF SUCH SALE, AND (V) GRANTING CERTAIN RELATED RELIEF; AND (B) AN ORDER APPROVING THE SALE OF SUBSTANTIALLY ALL OF THE DEBTORS' ASSETS (DOCKET NO. 13); AND**
**(2) THE AMENDED EXHIBITS RELATED THERETO (DOCKET NOS. 273 AND 325)**

The Official Committee of Unsecured Creditors (the "Committee") of the debtors and debtors-in-possession in the above-captioned cases (collectively, the "Debtors"), by and through

[1] The Debtors in these cases, along with the last four digits of each Debtor's federal tax identification number, are 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); and CDH II Holdco Inc. (1782). The address of the Debtors' corporate headquarters is: 547 New Park Avenue, West Hartford, Connecticut 06110.

its counsel, hereby submits this objection (the "Objection") to the *Debtors' Motion, Pursuant to 11 U.S.C. §§ 105, 363, and 365, and Fed. R. Bankr. P. 2002, 6004, 6006, 9008 and 9014, for Entry of (A) an Order (I) Approving Bid Procedures in Connection with the Sale of Substantially All of the Debtors' Assets Free and Clear of Liens, Claims, Encumbrances, and Other Interests, (II) Approving Procedures Related to the Assumption and Assignment of Executory Contracts and Unexpired Leases in Connection with Such Sale, (III) Approving the Form and Manner of Notice Thereof, (IV) Scheduling the Hearing to Consider Approval of Such Sale, and (V) Granting Certain Related Relief; and (B) an Order Approving the Sale of Substantially All of the Debtors' Assets* [D.I. 13] (the "Sale Motion") and the *Notice of Filing of Amended Exhibits in Connection with Debtors' Motion, Pursuant to 11 U.S.C. §§ 105, 363, and 365, and Fed. R. Bankr. P. 2002, 6004, 6006, 9008 and 9014, for Entry of (A) an Order (I) Approving Bid Procedures in Connection with the Sale of Substantially All of the Debtors' Assets Free and Clear of Liens, Claims, Encumbrances, and Other Interests, (II) Approving Procedures Related to the Assumption and Assignment of Executory Contracts and Unexpired Leases in Connection with Such Sale, (III) Approving the Form and Manner of Notice Thereof, (IV) Scheduling the Hearing to Consider Approval of Such Sale, and (V) Granting Certain Related Relief; and (B) an Order Approving the Sale of Substantially All of the Debtors' Assets* [D.I. 273] (the "First Amended Exhibits"), and the *Notice of Filing of Amended Exhibits in Connection with Debtors' Motion, Pursuant to 11 U.S.C. §§ 105, 363, and 365, and Fed. R. Bankr. P. 2002, 6004, 6006, 9008 and 9014, for Entry of (A) an Order (I) Approving Bid Procedures in Connection with the Sale of Substantially All of the Debtors' Assets Free and Clear of Liens, Claims, Encumbrances, and Other Interests, (II) Approving Procedures Related to the Assumption and Assignment of Executory Contracts and Unexpired Leases in Connection with Such Sale, (III) Approving the*

*Form and Manner of Notice Thereof, (IV) Scheduling the Hearing to Consider Approval of Such Sale, and (V) Granting Certain Related Relief; and (B) an Order Approving the Sale of Substantially All of the Debtors' Assets* [D.I. 325] (the "Second Amended Exhibits", and sometimes collectively with the First Amended Exhibits, the "Amended Exhibits").[2] In support of this Objection, the Committee respectfully represents as follows:

## PRELIMINARY STATEMENT

1. Approval of the Sale Motion at this point in these cases, with the question of the duration and extension of the lease for the Debtors' primary manufacturing facility in West Hartford, Connecticut (the "Lease") very much unclear, would be antithetical to a fundamental policy that underpins the Bankruptcy Code – maximizing value for the benefit of stakeholders.

2. The Sale Motion seeks to lay the groundwork for a fast-tracked sale of all or substantially all of the Debtors' Assets – with a requested hearing on the Bid Procedures on August 19, 2015 and a final Sale hearing on October 8, 2015. In so doing, the Debtors turn a blind eye to the input of the major secured and unsecured creditor constituencies whom the Debtors openly acknowledge prefer a plan process that would allow for equity being distributed to unsecured creditors, thereby providing upside to creditors for a future reorganized, profitable company.

3. If granted, the Sale Motion would propel these cases down an unnecessarily costly course (at a time when the Debtors are constantly bemoaning their insufficient cash position and the need to keep professional fees in these cases to a minimum). Rather than focusing on a productive plan process, the attention and resources of the Debtors and the creditor constituencies will be wasted in litigation about the proposed Sale. At this time and under these

[2] Capitalized terms used, but not defined, shall have the meaning ascribed to them in the Sale Motion and the Amended Exhibits.

conditions, there is simply no rational justification for granting the bid procedures relief portion of the Sale Motion (as modified by the Amended Exhibits, the "Bid Procedures Relief").

4. In addition to the global issues identified above, the proposed sale timeline creates an unnecessary, speculative process that makes it difficult for potential bidders to participate in a meaningful manner. Moving forward with Bid Procedures that provide for no stalking horse purchaser, an unknown purchase price, and no guaranteed return to unsecured creditors from proceeds of the sale, and without clarity that the business (which currently has negative EBITDA) will have a place to operate, is value destructive to these cases and a questionable exercise of the Debtors' business judgment. Indeed, it is hard to imagine that potential bidders on such assets will take the Debtors' marketing efforts seriously when it is public knowledge that (i) every constituency in these cases prefers a plan process;[3] and (ii) the Debtors themselves have openly stated that they are pursuing a "dual track" approach[4] and could later pull the sale process in favor of a plan process. *See* Transcript of July 10, 2015 hearing at pp. 45-46.

5. Given that unsecured creditors (the Committee's constituents) are in all likelihood the fulcrum creditor constituency in these cases,[5] they are the class that will feel the impact of the value-destructive elements of the proposed sale process and Bid Procedures. As a result, their opposition to the Bid Procedures Relief, as set forth herein, should be given particular deference.

[3] The Committee understands this to be the case as of this writing.

[4] In fact, the *Final Order Pursuant to 11 U.S.C. §§ 105, 361, 362, 363, 364 and 507 Authorizing the Debtors to (A) Obtain Postpetition Financing, (B) Grant Senior Liens and Superpriority Administrative Expense Status, (C) Use Cash Collateral of Prepetition Secured Parties, and (D) Grant Adequate Protection to Prepetition Secured Parties; and (II) Granting Related Relief* [D.I. 202], entered July 10, 2015, has various milestones, including one that requires the Debtors to file a plan by August 31, 2015.

[5] In the *Objection to the DIP Motion and Response to the Debtors' Allegations Regarding the Ad Hoc Consortium* [D.I. 60] (the "Initial Consortium DIP Objection") filed by the Ad Hoc Consortium of the Debtors' 8.75% Senior Notes due 2017 (the "Consortium"), the Consortium stated that the 8.75% senior unsecured notes (i.e., unsecured claims) "are *indisputably* the fulcrum security in these cases." Initial Consortium DIP Objection at p. 1, ¶ 1 (emphasis added). The Committee does not concede at this point in these cases that any of the Prepetition Lenders are oversecured.

6. Accordingly, the Committee respectfully requests that this Court deny the Bid Procedures Relief proposed by the Sale Motion and the Amended Exhibits. However, should the Court be inclined to grant the Bid Procedures Relief despite the numerous problems with pursuing a sale at this juncture, the Court should require various modifications to the Bid Procedures in order to, among other things: (a) provide the Committee with greater access to potential bidders in the sale process; (b) extend the sale process by a mutually agreeable time period and certainly after a consensual chapter 11 plan process has been exhausted and proven fruitless; and (c) prohibit the Debtors from selling their Insurance Policies, Chapter 5 Causes of Action, and Estate Causes of Action (each as defined herein), and various other assets.

7. Simply put, the sale process contemplated in the Sale Motion will not maximize value for the Debtors' estates and, tellingly, not a single major stakeholder in these cases supports the relief sought therein. As such, the relief requested should be denied.

## BACKGROUND

8. On June 14, 2015, (the "Petition Date"), the Debtors each filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101–1532 (the "Bankruptcy Code").

9. The Debtors' cases are being jointly administered for procedural purposes only, pursuant to an order of this Court entered on June 16, 2015 [D.I. 69].

10. Since the Petition Date, the Debtors have continued to operate their businesses and manage their properties as debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in these chapter 11 cases.

11. On June 25, 2015 (the "Formation Date"), the Office of the United States Trustee for this Region appointed the Committee. Since the Formation Date, the Committee and its

professionals have been working diligently with the other constituents in these chapter 11 cases to understand the issues and various positions staked out by all such constituents in an effort to determine what course of action is optimal for enhancing value to all parties.

12. On June 15, 2015, the Debtors filed the Sale Motion along with their other "first day" procedural, operational and financing motions. A hearing to consider the Bid Procedures Relief was initially scheduled for July 14, 2015, but was postponed. After the filing of the First Amended Exhibits on July 28, 2015, the hearing on the Bid Procedures Relief was adjourned to August 13, 2015, and then subsequently adjourned to August 19, 2015 (the "Bid Procedures Hearing"). The Debtors filed the Second Amended Exhibits on August 11, 2015. The deadline to file an objection to the Bid Procedures Relief portion of the Sale Motion and the Amended Exhibits is August 12, 2015.

## OBJECTION

### I. The Relief Requested in the Sale Motion, Including the Bid Procedures Relief, is Premature and Should be Denied.

13. In determining whether to authorize the use, sale or lease of property of a debtor's estate outside the ordinary course of business, courts require a debtor to show that a sound business purpose justifies such actions. *See, generally, In re Lionel Corp.*, 722 F.2d 1063, 1071 (2d Cir. 1983); *In re Del. & Hudson Ry. Co.*, 124 B.R. 169, 176 (D. Del. 1991). The Second Circuit in *Lionel* held that a debtor does not need to prove the existence of an emergency situation as a reason for selling substantially all of its assets. *In re Lionel Corp.*, 722 F.2d at 1070. However, a debtor must articulate a justification for selling assets out of the ordinary course of business before a bankruptcy judge may approve such disposition under section 363(b) of the Bankruptcy Code. *Id*.

14. In these cases, no such justification exists. Rather, there continues to be an obvious disregard by the Debtors for the desires of each of its creditor constituents to pursue a consensual, value maximizing, plan process instead of a costly, uncertain, non-consensual sale process.

15. Moreover, the overriding goal of any proposed asset sale under section 363 of the Bankruptcy Code is to maximize the proceeds received by a debtor's estate. *See Official Comm. of Unsecured Creditors of Cybergenics Corp., v. Chinery*, 330 F.3d 548, 573 (3rd Cir. 2003). The purpose of bidding procedure orders is to facilitate an open and fair public sale designed to maximize value for the estate. *See e.g.*, *In re Food Barn Stores, Inc.*, 107 F.3d 558, 564–65 (8th Cir. 1997); *In re Edwards*, 228 B.R. 552, 561 (Bankr. E.D. Pa. 1998). To accomplish that goal, bankruptcy courts are necessarily given discretion and latitude in conducting a sale. *See id.; see also In re Wintz Co.*, 219 F.3d 807, 812 (8th Cir. 2000) (stating that in structuring a sale of assets, bankruptcy courts "have ample latitude to strike a satisfactory balance between the relevant factors of fairness, finality, integrity, and maximization of assets").

16. The sale process thus far and the proposed Bid Procedures here fail to meet these goals. In fact, the Sale Motion and the Amended Exhibits, if approved by the Court, authorize the Debtors to liquidate the prepetition collateral for some unknown price, a price that likely will be artificially low due to the uncertainty over whether and how long the Debtors will remain in their manufacturing facility and the Debtors' depressed performance resulting from supply chain issues. As a result, the only likely beneficiaries of a sale at this juncture are bidders (including potential credit bidders) because of their ability to scoop up the Debtors' assets at a distressed price. This sale process will destroy value, not maximize it.

17. Finally, pursuing a sale process when the Debtors have not resolved one of the most, if not the most, crucial issue in these cases – extension of the Lease – demonstrates the Debtors' questionable business judgement. Indeed, as the evidence at the Bid Procedures Hearing will demonstrate, Mr. Keith Maib, the Debtors' CRO, believes that the sale process would be improved if the Debtors were able to obtain an extension on the Lease so that potential bidders had certainty on this critical issue. Moreover, the evidence at the Bid Procedures Hearing will also demonstrate that potential purchasers for all or substantially all of the Debtors' Assets have expressed concerns regarding the uncertainty surrounding the Lease. As a result, it is a virtual certainty that the Lease overhang will chill bidding and that any sale process at this juncture of these cases is not only an unnecessarily costly endeavor, but also one that is unlikely to fully maximize value for the Debtors' estates.

18. In fact, moving forward with the Sale Motion could prove to be value destructive in ways that the Debtors may not fully comprehend. For instance, if the Debtors seek and obtain approval of a stalking horse bidder with a multi-million dollar break-up fee commitment, and later pull the Sale Motion in favor of a plan process, then the Debtors will have saddled these estates with an unnecessary multi-million dollar administrative expense.

19. The Debtors' attention and scarce resources should not be spent on this wasteful sale process or on litigation with its stakeholders over the sale process. The Debtors instead should be focused on building consensus around a value maximizing plan of reorganization, so that this company can emerge successfully from chapter 11 promptly, efficiently and with the support of all of its stakeholders, a process that need not last materially longer than a sale process.

20. For these reasons, the Bid Procedures Relief should be denied.

## II. If the Court is Inclined to Grant the Bid Procedures Relief, Numerous Revisions Should be Made to the Bid Procedures to Ensure a Value Maximizing Sale.

21. For the reasons described above, the Committee fundamentally contests the appropriateness of a sale process at this time. To the extent, however, that the Court is inclined to grant the Bid Procedures Relief, the Committee objects to the structure of and procedures for the Sale, as set forth in greater detail below.

### A. Summary of Proposed Bid Procedures and Marketing Process

22. Prior to explaining the numerous flaws in the Bid Procedures and marketing process, the Committee believes a brief description of the Bid Procedures and the Debtors' marketing process (or lack thereof) would be helpful for the Court.

23. The Sale Motion and the Amended Exhibits do not provide any guidance with respect to a proposed purchase price. Rather, the Debtors seek Court-approval of certain bid and auction related procedures (the "Bid Procedures"),[6] memorialized in a proposed form of order (the "Bid Procedures Order"), relating to the proposed sale (the "Sale") of substantially all of the Debtors' assets (the "Assets"). While the Bid Procedures Order would allow for the possibility of entering into an agreement (a "Stalking Horse Agreement") with a stalking horse purchaser (the "Stalking Horse Purchaser") by August 28, 2015, no such stalking horse bidder is required. And any bid protections to be granted to the Stalking Horse Purchaser are not described. The Bid Procedures Order also includes a litany of tight deadlines or overly aggressive terms.

24. In addition, the Bid Procedures provide that if the Debtors enter into a Stalking Horse Agreement by August 28, 2015, the Debtors will file and serve a notice of such Stalking Horse Agreement and request that the Court schedule an expedited hearing on or after September

[6] A copy of the proposed Bid Procedures is attached as Exhibit 1 to the proposed Bid Procedures Order, which is Exhibit A attached to the Second Amended Exhibits.

8, 2015 to approve any such Stalking Horse Purchaser, Stalking Horse Agreements, and any accompanying (still unknown) Bid Protections.

25. The Debtors concede that there was no pre-Petition Date process to market their assets. In fact, no prospective purchaser information packet (a confidential information memorandum or CIM) existed until sometime in June 2015 (the "June CIM").

26. The list of Assets to be sold is merely described as "substantially all of the Debtors' assets." While still uncertain, the Committee would like to be clear that any Assets to be sold should specifically exclude Directors and Officers Liability Policies ("Insurance Policies"); all litigation claims and causes of action under chapter 5 of the Bankruptcy Code "Chapter 5 Causes of Action"); and all commercial tort claims and causes of action ("Estate Causes of Action").

**B. Inadequate Marketing Timeline and Process Must Be Remedied**

27. The proposed Bid Procedures provide for a Bid Deadline of September 25, 2015. While the Committee acknowledges that 363 sales have been achieved in different circumstances on timeframes similar to this one, under the circumstances of these cases, this requested period is too short to allow a robust marketing process to take place. Despite the Debtors' assertions that a marketing process has begun (albeit post-Petition Date), to the best of the Committee's knowledge, the Debtors have not even updated their marketing materials since early June, including to update financial results and projections.[7] The Debtors have no current audited financial statements, making it difficult for a potential buyer to assess historical performance.

28. For these reasons, the deadlines associated with the Sale must be extended not only to allow the Debtors and their creditor constituencies to exhaust a potential consensual plan

[7] When the Committee in late July requested the CIM that was being used, they were provided a copy of the June CIM (which still, among other things, references Sciens Capital Management LLC ("Sciens") as the stalking horse bidder and contains a long since defunct sale timeline).

process (the preferred course for the creditor constituencies as noted above), but also to ensure that, if there is to be a sale, all parties-in-interest have a fair opportunity to perform due diligence and submit a bid. *In re Energy Future Holdings Corp.*, (Bankr. D. Del. Nov. 4, 2014) (Case No. 14- 10979) (CSS) Tr. at 20:16–20 (holding that "…the proposed timelines must be stretched…to allow for sufficient time for any interested party to develop an alternative transaction… and the…committee to…get up to speed."). Furthermore, extending the deadlines associated with the Sale will provide additional time hopefully to obtain a resolution of issues described above related to the Debtors' Lease.

### C. Insurance Policies, Chapter 5 Causes of Action, and Estate Causes of Action Should be Excluded From the List of Purchased Assets

29. While the list of Assets to be sold to any buyer has yet to be disclosed, if the Court is inclined to approve the Sale Motion, certain Assets, such as Insurance Policies, Chapter 5 Causes of Action, and Estate Causes of Action, should be excluded.

30. With respect to Insurance Policies, the Committee objects to any policies related to officer and director coverage, errors and omissions (a/k/a professional liability coverage), and/or employment practices liability insurance from being sold under the Sale. The Insurance Policies (and any recovery therefrom) are not property of a debtor's estate. As such, the Insurance Policies and any such recovery should be made available for all of the Debtors' creditors, not solely the Lenders.[8] *Cf. In re Allied Digital Techs. Corp.*, 306 B.R. 505, 512–13 (Bankr. D. Del. 2004) (when an estate cause of action is brought on behalf of the debtor against directors and officers, "the courts generally hold that the debtor is merely an indirect insured and the proceeds [of the D&O policy] are not property of the estate.").

[8] The Committee does not object to the sale of Insurance Policies (and proceeds thereof) from a particularly policy that covers property damage and/or any losses relating to operating assets incurred after the Sale closes.

31. Furthermore, Chapter 5 Causes of Action and Estate Causes of Action should be removed from the Assets to be sold. *Cf. Official Comm. of Unsecured Creditors of Radnor Holdings Corp. v. Tennenbaum Capital Partners, LLC (In re Radnor Holdings Corp.),* 353 B.R. 820 (Bankr. D. Del. 2006).

**D. Sciens Should Have No Role in the Decision-Making Process for the Sale**

32. In reviewing the Second Amended Exhibits, it appears that, if it is not a bidder, Sciens will be permitted to play a role in making decisions about the sale of the Debtors' Assets. The proposed Bid Procedures state in relevant part as follows: "For the avoidance of doubt, to the extent a bid is submitted or supported by Sciens … or any of its affiliates, neither Sciens nor any of its affiliates, members, or investors will have any role in any decision discussed herein to be made by the Debtors in connection with the Bid Procedures." Second Amended Exhibits, Bid Procedures at p. 3. If Sciens is not a bidder, then these proposed Bid Procedures seem to suggest by negative implication that Sciens will be permitted a decision-making role in connection with the Sale. Counsel for the Debtors previously assured counsel for the Committee that an independent committee (the "Independent Committee") was making all decisions regarding any sale of substantially all of the Debtors' Assets and that Sciens would not have a role in connection therewith. In fact, the Debtors' CRO recently testified that the Debtors have vested complete authority over the sale process to the Independent Committee. *See, e.g.*, Transcript of Deposition of Keith A. Maib dated August 5, 2015 ("Maib Tran."), at 16:2-5 (noting that the Debtors' board of directors appointed the Independent Committee when the Debtors decided pre-petition to pursue a section 363 sale transaction "in order to maintain integrity and independence of that decision process"); Maib Tran., at 18:6-19:6 (noting that the Independent Committee gave authority to file the June 15, 2015 bidding procedures motion); Maib Tran., at 84:10-13 (noting

that in connection with the amended bidding procedures, the Independent Committee will make the determination of whether to select a stalking horse bidder); Maib Tran, at 84:14-24 (noting that the Independent Committee will make the determination, after consultation with the Consultation Parties, who the successful bidder is); Maib Tran., at 108:17-25 (noting that the Independent Committee is currently directing the Debtors with respect to the current bidding procedures for which the Debtors are seeking approval).

33. Even if Sciens is not a potential bidder, that does not mean it does not have an interest in acquiring the Assets, and in any event, Sciens has an economic interest in the Debtors' landlord. The many hats that are being worn by Sciens in these chapter 11 cases presents the potential for mischief and also may lead to distrust by buyers interested in acquiring the Debtors' Assets about the general fairness of the process if Sciens is permitted a role in the decision-making process for the proposed Sale. Accordingly, Sciens should not be permitted to participate in the decision-making process for the Sale of the Debtors' Assets.

### E. Other Modifications to Bid Procedures

#### i. Greater Access to Bidders by Committee

34. Modifications to the Bid Procedures are appropriate to provide for greater Committee involvement in a Sale process. "[M]y ruling is that the official committees must be substantively involved on a real-time basis, have the ability to speak directly with potential bidders, and have consent rights to changes in the procedures." *In re Energy Future Holdings Corp.*, (Bankr. D. Del. Nov. 4, 2014) (Case No. 14-10979) (CSS) Hr'g Tr. p 21:25–22:1-5. Counsel for the Committee should be provided with copies of all correspondence from potential bidders promptly after the Debtors' receipt thereof and also should have the ability to communicate with potential bidders (if determined necessary by Committee counsel).

***ii. Any Stalking Horse Bidder or Credit Bidder Should Be Required to Post a Deposit.***

35. The Debtors' proposed Bid Procedures specifically state that "the Stalking Horse Purchaser shall not be required to make a Deposit". *See* Second Amended Exhibits, Exhibit A at p. 6. The Debtors' proposed Bid Procedures also specifically require that in order to submit a Qualified Bid, any Potential Bidder must comply with the following: "Delivery by certified check or wire transfer of a good faith deposit in immediately available funds (the "Deposit") equal to 10% of the cash portion of the proposed purchase price." *See* Second Amended Exhibits, Exhibit A at p. 5.

36. These Bid Procedures do not provide a level playing field as between (a) a Stalking Horse Purchaser (no required deposit) and a Potential Bidder for cash (required 10% deposit). The Court should require that all bidders (except for credit bidders) post a deposit equal to 10%. Doing so will foster a fair, level playing field for all bidders.

**F. Safeguard Procedures**

37. In the First Amended Exhibits, the Debtors included a section in their proposed Bid Procedures referred to as Safeguard Procedures which dealt with insider Sciens and NPA Hartford LLC and its putative independent partner. In filing the Second Amended Exhibits, however, the Debtors omitted the Safeguard Procedures.[9] The Committee objects to the deletion of the Safeguard Procedures and requests that the Court direct the Debtors to include them in the Bid Procedures.

[9] The Debtors deleted the Safeguard Procedures from the proposed Bid Procedures, except for a provision to the effect that if a bid is submitted or supported by Sciens or any related entities, then Sciens will not have a role in decision-making process in connection with the Bid Procedures, which they moved to another section of the Bid Procedures. However, as noted above, the Committee finds that objectionable and submits that Sciens should not have a role in the Sale decision-making process, irrespective of whether it is a bidder.

### G. Committee's Comments to Proposed Bid Procedures Order and Bid Procedures

38. In the event that the Court is inclined to allow the Debtors to wander down this uncertain sale path, attached hereto as **Exhibit A** is a marked copy of the Bid Procedures Order and Bid Procedures reflecting the Committee's suggested changes. Although the Committee is not proposing alternate dates in its markup, as discussed previously, the time frame for the Sale process proposed by the Debtors is too compressed.

### H. Committee's Preliminary Comments to Certain Extraordinary and Wholly Inappropriate Provisions in the Proposed Sale Order

39. The Debtors attached as Exhibit B to the First Amended Exhibits the proposed *Order (I) Authorizing the Sale of Substantially All of the Debtors' Assets Free and Clear of Liens, Claims, Encumbrances, and Other Interests, (II) Authorizing the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases In Connection Therewith, and (III) Granting Related Relief* (the "Proposed Sale Order").

40. While certainly it is premature to entertain objections to a proposed sale of unknown assets, to an unknown purchaser for an unknown price, at least two provisions of the Proposed Sale Order relating to releases and exculpation of "Released Parties"[10] merit attention (and the Committee's objection) at this juncture.

41. Paragraph 33 of the Proposed Sale Order provides as follows:

> To the fullest extent permissible under applicable law, except as otherwise provided in the APA or this Order, none of the Released Parties shall have or incur any liability to, or be subject to any right of action by, any holder of a claim against, or equity interest in, any of the Debtors or any other party in interest, or

[10] "Released Parties" is defined in the Proposed Sale Order as including (i) the Debtors, (ii) the DIP Lenders and DIP Agents, (iii) the Prepetition Lenders, (iv) the Purchaser (v) the members and shareholders of the Purchaser and its affiliates, (vi) the Prepetition Term Loan Agent and the Prepetition Senior Loan Agent, and (vii) the current and former principals, members, partners, officers, directors, employees, legal, financial, and tax advisors, and other representatives of each of the parties in clauses (i) through (vii) (each in its capacity as such). *See* Proposed Sale Order at ¶ W.

> any of their respective employees, representatives, financial advisors, attorneys, or agents, acting in such capacity, or any of their successors and assigns, for any act or omission in connection with, related to or arising out of, the Debtors' chapter 11 cases, the operation of the Debtors' businesses during the chapter 11 cases, the investigation, formulation, preparation, negotiation, execution, delivery, implementation, or consummation of the transactions contemplated by the APA, including, without limitation, the Sale Transaction and the assumption and assignment of the Selected Contracts, or any other contract, instrument, release, agreement, settlement, or document created, modified, amended, terminated, or entered into in connection with the APA, or any other act or omission in connection with the Debtors' bankruptcy; *provided, however,* that this paragraph 33 shall not affect the liability of any entity that otherwise would result from any act or omission to the extent that such act or omission is determined by a final, nonappealable order by the Bankruptcy Court or another court with jurisdiction to have constituted fraud, gross negligence, or willful misconduct by any Released Party.

*See* Proposed Sale Order at ¶ 33. Additionally, paragraph 34 of the Proposed Sale Order provides as follows:

> On the Closing Date, for good and valuable consideration, to the fullest extent permissible under applicable law, each of the Released Parties shall be deemed to completely, conclusively, absolutely, unconditionally, irrevocably, and forever release the other Released Parties from any and all claims, equity interests, liens, encumbrances, obligations, damages, demands, debts, suits, causes of action, judgments, liabilities, or rights whatsoever (including those arising under the Bankruptcy Code), whether liquidated or unliquidated, fixed or contingent, matured or unmatured, known or unknown, foreseen or unforeseen, then existing or thereafter arising, in law, equity, or otherwise, based in whole or in part on any act, omission, transaction, event, or occurrence taking place on or prior to the Closing Date in any way relating to the Debtors, the Debtors' chapter 11 cases, the business arrangements with any Debtor, for any act or omission in connection with, related to or arising out of, the chapter 11 cases, the investigation, formulation, preparation, negotiation, execution, delivery, implementation, or consummation of the transactions contemplated by the APA, including, without limitation, the Sale Transaction and the assumption and assignment of the Selected Contracts, or any other contract, instrument, release, agreement, settlement, or document created, modified, amended, terminated, or entered into in connection with the APA, or any other act or omission in connection with the Debtors' bankruptcy, without further notice to or action by the Bankruptcy Court, or act or action under applicable law, regulation, order or rule or the vote, consent, authorization or approval of any entity; *provided* that nothing in this paragraph 34 shall release (a) any Released Party's rights to enforce the terms of the APA and any ancillary documents related thereto, (b) any claims, equity interests, liens, encumbrances, obligations, damages, demands, debts, suits, causes of action,

> judgments, liabilities, or rights whatsoever of the Debtors that are Purchased Assets, or (c) the liability of any entity that otherwise would arise from any act or omission to the extent that such act or omission is determined by a final, nonappealable order by the Bankruptcy Court or another court with jurisdiction to have constituted fraud, gross negligence, or willful misconduct by any Released Party.

*See* Proposed Sale Order at ¶ 34.

42. The Debtors have articulated (and can articulate) no basis, justification or consideration to the Debtors' estates for the exculpation and release provisions in favor of the Released Parties under the Proposed Sale Order provisions that, notably, provide for full releases of the Debtors' directors and officers and the Prepetition Lenders and DIP Lenders. To the extent they are part of the Bid Procedures or Bid Protections sought to be approved by the Debtors in the Bidding Protections Relief, the Committee objects. There is no evidence suggesting that these provisions have been bargained for, or that any consideration is being paid to the Debtors for those provisions. Likewise, they lack the types of disclosures, protections and consideration that might render – under appropriate circumstances – provisions such as those enforceable under a chapter 11 plan. *In re Master Mortg. Inv. Fund, Inc.*, 168 B.R. 930 (Bankr. W.D. Mo. 1994); *In re Zenith Electronics Corp.*, 241 B.R. 92 (Bankr. D. Del. 1999); *In re Continental Airlines*, 203 F.3d 203 (3d Cir. 2000); *In re Exide Technologies*, 303 B.R. 48 (Bankr. D. Del. 2003); *In re Washington Mutual, Inc.*, 442 B.R. 314 (Bankr. D. Del. 2011).

43. Finally, the Committee has not had an opportunity to fully investigate what, if any claims or causes of action may exist against the Debtors' officers and directors, the DIP Lenders, and the Prepetition Lenders – all of whom fall within the definition of "Released Parties." The Committee similarly has not had an opportunity to fully investigate what, if any claims or causes of action may exist against Sciens. While Sciens is not being expressly released in the Proposed Sale Order, Sciens has the ability to obtain a "backdoor" release if it becomes the purchaser of

the Debtors' assets under the Proposed Sale Order inasmuch as the purchaser of such assets is included within the definition of "Released Parties."

44. This Court should not countenance the Debtors' attempt to obtain inappropriate releases in a sale order under the present circumstances of these cases.

## RESERVATION OF RIGHTS

45. The Committee reserves the right to assert additional objections to the Bid Procedures and/or Sale at or prior to the hearings on the Bid Procedures Relief and/or Sale whether or not such objections have been raised herein. The Committee cannot support a sale process unless it is fair and reasonable, maximizes the value of the Debtors' Assets, is in the best interest of their estates, and occurs **only after a consensual chapter 11 plan process has been exhausted and proven fruitless**. The Bid Procedures here cannot meet that standard.

**WHEREFORE**, the Committee respectfully requests that the Court enter an order (i) denying the Sale Motion, including the Bid Procedures Relief sought therein, and (ii) grant such other and further relief as the Court deems just and proper.

Dated: August 12, 2015
Wilmington, Delaware

/s/ Domenic E. Pacitti

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