

# 1. Definitions and Usage

## 1.1 DEFINITIONS

Section 1.1 of the Model Agreement provides a list of the defined terms generally used throughout the Model Agreement. In the context of an asset purchase agreement under Section 363 of the Bankruptcy Code, several terms are often used that are not commonly found in asset purchase agreements outside of bankruptcy. Accordingly, Section 1.1 of the Model Agreement should be revised to add the following terms and definitions, which are used in the Commentary that follows:

**“Affiliate” – With respect to any Person, any other Person that, directly or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, such Person, and the term “control” (including the terms “controlled by” and “under common control with”) means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of such Person, whether through ownership, by contract, or otherwise.**

**“Alternative Transactions” – A transaction or series of related transactions pursuant to which Seller accepts a bid for all or a substantial portion of the Assets or any group of assets that includes all or a substantial portion of the Assets, from a Person other than Buyer or an Affiliate of the Buyer, as the highest or best offer, in accordance with the Bidding Procedures Order or otherwise, but does not mean the sale of goods or services conducted in the ordinary course of business.**

**“Assumed Contracts” – as defined in Section 2.10.**

**“Assumption Notice” – as defined in Section 15.5(b).**

**“Auction” – shall have the meaning set forth in the Bidding Procedures Order.**

**“Back-Up Bidder” – shall have the meaning set forth in the Bidding Procedures Order.**

**“Bankruptcy Case” – the bankruptcy case to be commenced by Seller under Chapter 11 of the Bankruptcy Code in the Bankruptcy Court.**

**“Bankruptcy Code” – title 11 of the United States Code, Sections 101 et seq.**

**“Bankruptcy Court” – the United States Bankruptcy Court for the [bankruptcy district], [bankruptcy division, if applicable].**

**“Bankruptcy Rules” – the Federal Rules of Bankruptcy Procedure.**

**“Bid Deadline”** – shall have the meaning set forth in the Bidding Procedures Order.

**“Bidding Procedures”** – shall have the meaning set forth in the Bidding Procedures Order.

**“Bidding Procedures Order”** – The Order of the Bankruptcy Court approving the Bidding Procedures and setting dates for, among other things, the Sale Hearing and the Auction.

**“Break-Up Fee”** – shall have the meaning set forth in the Bidding Procedures Order.

**“Claims”** – shall have the meaning set forth in Section 101(5) of the Bankruptcy Code.

**“Competing Bid”** – shall have the meaning set forth in the Bidding Procedures Order.

**“Creditors’ Committee”** – the Official Committee of Unsecured Creditors appointed in the Bankruptcy Case.

**“Cure Amounts”** – as defined in Section 2.10(b).

**“Designation Cost Overage”** – as defined in Section 15.5(a).

**“Designation Rights Budget”** – as defined in Section 15.5(a).

**“Designation Rights Contract”** – as defined in Section 15.5(a).

**“Designation Rights Period”** – as defined in Section 15.5.

**“Escrow Agent”** – the agent as described in the Escrow Agreement.

**“Estimated Adjustment Amount”** – as defined in Section 2.8.

**“Excluded Contracts”** – as defined in Section 2.10(a).

**“Expense Reimbursement”** – as defined in Section 9.3.

**“Guarantor”** – as defined in Section 14.1(a).

**“Guaranteed Obligation”** – as defined in Section 14.2.

**“Liability”** – with respect to any Person, any liability or obligation of such Person of any kind or nature, debts, losses, damage, demand, fine, judgment, penalty, adverse claims, fee, assessment, duty, charge, deficiency, commitments, responsibilities, Taxes, whether known or unknown, absolute or contingent, accrued or unaccrued, matured or unmatured, disputed or

**undisputed, liquidated or unliquidated, secured or unsecured, joint or several, due or to become due, vested or unvested, executory, determined, determinable, or otherwise, and whether or not the same is required to be accrued on the financial statements of such Person, including those arising under any Law or Action and those arising under any contract, agreement, arrangement, commitment or undertaking, or otherwise, including any Tax liability or tort liability.**

**“Non-Debtor Subsidiary” – an officially formed and active subsidiary of the Debtor that is not a “Debtor” under the Bankruptcy Code.**

**“Non-Solicitation Period” – as defined in Section 5.6.**

**“Order” – means an Order of the Bankruptcy Court.**

**“Petition Date” – means [\_\_\_\_], which is the date of the filing of the Chapter 11 petition of Seller.**

**“Qualified Bid” – shall have the meaning set forth in the Bidding Procedures Order.**

**“Rejection Notice” – as defined in Section 15.5(c).**

**“Sale Motion” – the motion that will be filed with the Bankruptcy Court to seek approval of the Transaction.**

**“Sale Hearing” – shall have the meaning set forth in the Bidding Procedures Order.**

**“Sale Order” – the Order approving the Sale Motion.**

**“Share Consideration” – as defined in Section 2.3.**

**“Stalking Horse Bidder” – shall have the meaning set forth in the Bidding Procedures Order.**

**“Successful Bidder” – any party who acquires all or substantially all of the Purchased Assets (in a single transaction or a series of transactions) or all or substantially all of the equity interests (in a single transaction or a series of transactions) of Seller or any of its successors by reason of having submitted the successful bid at the Auction in a manner consistent with and authorized by the Bidding Procedures Order, regardless of whether such party has acquired such assets or equity interests for investment, strategic operation, liquidation, or other purpose.**

A Section 363 sale may also require modifications to several of the defined terms in the Model Agreement as follows:

***“Consent”***

In the bankruptcy context, the sales transaction proceeds under the scrutiny and control of the Bankruptcy Court. The Bankruptcy Court generally has the authority to deem any approval or authorization that is required in the Agreement or required for the transfer of a contract, or render such approval or authorization unnecessary (with certain exceptions discussed further in Section 2.10 of this Commentary and Appendix B). Accordingly, the definition of “Consent” in the Model Agreement may need to be modified in order to describe such authority of the Bankruptcy Court. An example of such a definition is below.

**“Consent” – any approval, consent, ratification, waiver, or other authorization; or an order of the Bankruptcy Court that deems, or rendered unnecessary, the same.**

***“Disclosure Letter”***

As described in the introduction to Article 3 of this Commentary, it is unusual for the shareholders of Seller to be involved in a sale under Section 363 of the Bankruptcy Code. Accordingly, the reference to shareholders in the definition of “Disclosure Letter” in the Model Agreement should be deleted. Sample language for the definition of “Disclosure Letter” is below.

**“Disclosure Letter” – the disclosure letter delivered by Seller to Buyer concurrently with the execution and delivery of this Agreement.**

***“Ordinary Course of Business”***

The definition of “Ordinary Course of Business” in the Model Agreement relies on several criteria for determining whether a practice is “in the ordinary course of business”: (a) the past practices of the debtor, (b) practices of others in the same industry, and (c) the need for shareholder approval. The first two of these criteria are derived from bankruptcy law.<sup>1</sup>

In the bankruptcy context, certain transactions undertaken by Seller “other than in the ordinary course of business” require approval of the Bankruptcy Court. Accordingly, the definition of “Ordinary Course of Business” in the Model Agreement may need to be expanded. A sample definition is provided below.

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<sup>1</sup> See, e.g., *In re Roth Am. Inc.*, 975 F.2d 949, 952-53 (3d Cir. 1992); *In re Johns-Manville Corp.*, 60 B.R. 612, 616-18 (Bankr. S.D.N.Y. 1986); *In re Dant & Russell, Inc.*, 853 F.2d 700, 704 (9th Cir. 1988). Roth described the inquiry into the practices of the debtor as a “vertical inquiry,” which is “more appropriately characterized as the creditor’s expectation test” that analyzes the transactions ““from the vantage point of a hypothetical creditor and [the inquiry is] whether the transaction subjects a creditor to economic risk of a nature different from those he accepted when he decided to extend credit.”” *In re Roth* at 953. The practices of others in the same industry is also known as the “horizontal inquiry” into “whether, from an industry-wide perspective, the transaction is of the sort commonly undertaken by companies in that industry.” *Id.*

**“Ordinary Course of Business” – an action taken by a Person will be deemed to have been taken in the Ordinary Course of Business only if that action:**

- (a) is consistent in nature, scope, and magnitude with the past practices of such Person and is taken in the ordinary course of the normal, day-to-day operations of such Person;**
- (b) does not require authorization by the board of directors or shareholders of such Person (or by any Person or group of Persons exercising similar authority) and does not require any other separate or special authorization of any nature;**
- (c) does not require authorization of the Bankruptcy Court; and**
- (d) is similar in nature, scope, and magnitude to actions customarily taken, without any separate or special authorization, in the ordinary course of the normal, day-to-day operations of other Persons that are in the same line of business as such Person.**