IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
FLYING J INC., et al.,[1]	)	Case No. 08-13384 (MFW)
Debtors.	)	Jointly Administered
	)	**Hearing Date: October 15, 2009 at 9:30 a.m. ET (requested)**
	)	**Objection Deadline: October 12, 2009 at 4:00 p.m. ET (requested)**

MOTION OF THE DEBTORS FOR ENTRY OF AN ORDER (A) APPROVING THE DEBTORS' NOTICE OF SALE AND NOTICE PROCEDURES, (B) APPROVING THE SALE OF CERTAIN EMISSION REDUCTION CREDITS (C) APPROVING THE DEBTORS' ENTRY INTO A PURCHASE AND SALE AGREEMENT AND ALL ANCILLARY DOCUMENTS RELATING TO THE SALE, AND (D) AUTHORIZING THE TRANSFER OF THE EMISSION REDUCTION CREDITS AS CONTEMPLATED BY THE PURCHASE AND SALE AGREEMENT FREE OF ALL LIENS, CLAIMS, INTERESTS, LIABILITIES, AND ENCUMBRANCES

Flying J Inc. and certain of its affiliates, as debtors and debtors in possession (collectively, the "Debtors"), file this motion (the "Motion") for entry of an order (the "Sale Order"), substantially in the form attached hereto as **Exhibit A**, (a) approving the Debtors' notice of the Sale (the "Sale Notice") and notice procedures, (b) approving the sale (the "Sale") of certain emission reduction credits for Nitrogen Oxide ("NOx") and Sulfur Dioxide ("SOx") (collectively, the "Transferred ERCs") to Hydrogen Energy California LLC (the "Buyer"), (c) approving the Debtors' entry into that certain Purchase and Sale Agreement (the "PSA" attached hereto as **Exhibit B**), dated as of September 28, 2009, and all ancillary documents

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: Flying J Inc. (3458); Big West of California, LLC (1608), Big West Oil, LLC (6982); Big West Transportation, LLC (6984); Longhorn Partners Pipeline, L.P. (0554); Longhorn Pipeline Holdings, LLC (0226), Longhorn Pipeline Inc. (0654). The location of the Debtors' corporate headquarters and the service address for all Debtors is: 1104 Country Hills Drive, Ogden, UT 84403.

relating to the Sale,[2] (d) authorizing the transfer of the Transferred ERCs as contemplated by the PSA free of all liens, claims, interests, liabilities, and encumbrances, (e) finding that the Buyer is a good faith purchaser and is entitled to the full protection of section 363(m) of the Bankruptcy Code, (f) finding that the Sale has been proposed and entered into by the Debtors and the Buyer without collusion, in good faith, and from arm's-length bargaining positions, and that the Sale does not violate section 363(n) of the Bankruptcy Code, and (g) ordering that the Sale Order be effective immediately by providing for a waiver of the 10-day stay under Bankruptcy Rule 6004(h). In support of this Motion, the Debtors respectfully state as follows:

Jurisdiction and Venue

1. The United States Bankruptcy Court for the District of Delaware (the "Court") has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2).

2. Venue in this District is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

3. The statutory bases for the relief requested herein are sections 105(a), 363(b), 363(f) and (m), 503 and 507 of title 11 of the United States Code (the "Bankruptcy Code") and rules 2002(a)(2), 6004(a), (b), (c), (e), (f) and (h), 9007 and 9014 of the Federal Rules of Bankruptcy Procedures (the "Bankruptcy Rules") and Rule 6004-1 of the United States Bankruptcy Court District of Delaware Local Rules (the "Local Bankruptcy Rules").

Relief Requested

4. By this Motion, the Debtors seek entry of an order (a) approving the Debtors' Notice of Sale and notice procedures, (b) approving the Sale, (c) approving the Debtors' entry into the PSA and all ancillary documents relating to the Sale, (d) authorizing the transfer of the

[2] In order to effectuate the terms of the PSA, the Debtors have also agreed to execute the Escrow Agreement (as that term is defined in the PSA).

Transferred ERCs as contemplated by the PSA free of all liens, claims, interests, liabilities, and encumbrances, (e) finding that the Buyer is a good faith purchaser and is entitled to the full protection of section 363(m) of the Bankruptcy Code, (f) finding that the Sale has been proposed and entered into by the Debtors and the Buyer without collusion, in good faith, and from arm's-length bargaining positions, and that the Sale does not violate section 363(n) of the Bankruptcy Code, and (g) ordering that the Sale Order be effective immediately by providing for a waiver of the 10-day stay under Bankruptcy Rule 6004(h).

Background

5. On December 22, 2008 (the "Petition Date"), each of the Debtors filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. The Debtors continue to operate their businesses and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of title 11 of the Bankruptcy Code. On January 5, 2009, the United States Trustee for the District of Delaware appointed an official committee of unsecured creditors (the "Creditors' Committee") [Docket No. 85].

6. The Debtors and their wholly-owned non-debtor subsidiaries (collectively, the "Flying J Group") are a fully integrated oil company with operations in the field of exploration, production, refining, transportation, wholesaling and retailing of petroleum products. Debtor Flying J Inc. is one of the 20 largest privately held companies in America with 2008 consolidated sales of approximately $18.5 billion and is the direct or indirect parent corporation of each of the other members of the Flying J Group.

7. The Flying J Group operates approximately 250 retail locations, including state-of-the-art travel plazas, convenience stores, restaurants, motels and truck service centers in 43 states and six Canadian provinces. In addition to usual rest stop services (food, fuel, shower facilities), the Flying J Group offers banking, bulk-fuel programs, communications (wireless

Internet connections), fuel cost analysis, insurance and truck fleet sales. Furthermore, the Flying J Group explores for, refines and transports petroleum products and is one of the largest retail distributors of diesel fuel in North America. Other operations of the Flying J Group include online banking, card processing, truck and trailer leasing, and payroll services. In these widespread operations, the Flying J Group employs approximately 13,408 people.

8. Each of the Debtors in these chapter 11 cases is involved in or associated with the Flying J Group's core businesses of petroleum refining, supply and distribution. In particular, Debtors Big West Oil LLC and Big West of California LLC own and operate two refineries in North Salt Lake City, Utah and Bakersfield, California, respectively, which have the combined cPSAcity to refine over 100,000 barrels of crude oil per day. These Debtors also are responsible for purchasing and transporting crude oil in parts of California, Utah, Wyoming and Colorado. On the Petition Date and through July 2009, the Debtors owned a 700-mile common carrier pipeline from the Gulf Coast near Houston to El Paso, Texas (the "Longhorn Pipeline"). On July 27, 2009, the Court approved the sale of the Longhorn Pipeline to Magellan Midstream Partners, L.P. [Docket No. 1578].

9. The Debtors have filed these chapter 11 cases to address near-term liquidity and operational challenges brought on in part by the precipitous drop in the price of oil beginning in September of 2008 and continuing through the first quarter of 2009, as well as the recent tightening credit markets. Over the past nine months, the Debtors have implemented a range of aggressive restructuring actions, including shutting down and selling non-performing businesses and downsizing continuing operations, designed to improve cash flow performance and financial results. The Debtors believe that, after these restructuring actions, their going forward

businesses are fundamentally sound and profitable and that these chapter 11 cases will allow them to resolve their liquidity constraints and emerge as stronger, healthier companies.

10. The Debtors have determined that a sale of substantially all of the Debtors' retail operations to Pilot Travel Centers LLC ("Pilot") will maximize creditor recoveries and is in the best interests of the Debtors' estates. On July 30, 2009, the Court granted the Debtors the authority to obtain up to $100,000,000 of secured superpriority postpetition financing (the "DIP Facility") from Pilot and to execute a letter of intent to sell its travel center and trucking operations, corporate headquarters building and certain other assets relating to the Debtors' retail business operations to Pilot.[3] The DIP Facility provides the Debtors with much needed liquidity to continue business operations pending the sale to Pilot. Although there are no guarantees, the Debtors reasonably expect that the transaction currently being negotiated with Pilot would pay all creditors of Flying J Inc. ("Flying J") in full in cash, provide value to Flying J's shareholders, allow Flying J to exit bankruptcy protection expeditiously as a stronger, healthier business and position Flying J to succeed in today's highly competitive market.

The Debtors' Emission Reductions Credits

I. The Emission Program

11. In connection with the operation of the Debtors' Bakersfield, California refinery (the "Refinery"), the Debtors are required to obtain extensive environmental permits and comply with complex regulations governing the operation of the refinery. One subset of these environmental regulations is a program (the "Emission Program") managed by the San Joaquin Valley Unified Air Emission Control District (the "District") for emission reduction credits

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3 See Final Order Under 11 U.S.C. §§ 105, 362, 363 and 364 and Fed. R. Bankr. P. 2002, 4001 and 9014 Authorizing Flying J Inc. to (A) Obtain Postpetition Financing, (B) Grant Liens and Superpriority Claims, and (C) Execute a Letter of Intent Relating to the Target Assets [Docket No. 1631].

("ERCs") and the banking of such credits. ERCs are covered by Rules 2301 (Emission Reduction Credit Banking) and Rule 2201 (New and Modified Stationary Source Review Rule) of the Rules and Regulations of the District (the "Emission Rules").

12. The Emission Program is qualified under EPA regulations as a new source review permitting program (an "NSR"), which were authorized as part of the 1977 Clean Air Act Amendments. NSRs are preconstruction permitting programs that are designed to ensure that air quality is not significantly degraded from the addition of new emission sources and that new emissions do not slow progress toward cleaner air. In other words, any new project must have sufficient ERCs in place in order to offset any new emissions or the project cannot be built.

II. Emission Reduction Credits Issued Under the Emission Program

13. The Debtors receive ERCs under the Emission Program based on improvements made to the Refinery. ERCs issued under the Emission Program are offsets based on actual emission reductions, generally obtained from shutdown of a particular pollution source or installation of pollution control technology at existing sources. ERCs are measured as an actual decrease in emissions as compared to a baseline period. In order to qualify for ERCs, emission reductions must meet particular criteria as defined by the District in Emission Rule 2301. Once a party has demonstrated the District's criteria are met, the District will certify the ERC and issue a certificate in order to document title to an owner of a defined quantity and type of ERC, on an individual pollutant basis.

III. Selling or Trading ERCs

14. The owner of the ERC certificate can use the ERCs at any time after deposit in the District's ERC bank in order to provide offsets for an increase in emissions either from new facilities or modifications to existing facilities. Alternately, ERCs can be used, traded or sold for use by facilities to be used in or outside of the San Joaquin Valley Air Basin. If the ERCs are

traded or sold, an offset ratio (the "Offset Ratio") is applied to the use of ERCs. The Offset Ratio is 1.2 to 1 for use of the ERCs within 15 miles of where they were generated. Beyond 15 miles, the ratio is 1.5 to 1. In other words, the ERCs are more valuable if they are used within 15 miles of the San Joaquin Valley. An Offset Ratio must be negotiated for use in another Air District or another state. The negotiations surrounding the use of an Offset Ratio in different states tend to be lengthy and difficult.

IV. The ERC Market

15. As discussed above, ERCs have a market value and can be traded, bought or sold between companies. The value of ERC transactions must be reported to the District, which then makes the information publicly available. The ERC market widely varies by state and region. Companies can buy and sell directly with each other, but often such transactions are brokered by firms that specialize in the ERC market. Generally, the market for ERCs issued by the District relies on a match between preconstruction projects and available ERCs within a small geographic area. As a result, the market for the Debtors' ERCs tends to be highly illiquid and prone to sudden price movements. Further, the Transferred ERCs only represent a portion of the ERCs contained within a single certificate. Where a sale contemplates selling a portion of the ERCs contained within one certificate, the District cancels the original ERC certificate and then issues two new certificates reflecting the sale transaction. Although this process is formalized and used frequently, it does take several weeks to complete.

V. Equivalency and the Potential Devaluation of the ERCs

16. While the District's Emission Program is well defined under the Emission Rules, the Environmental Protection Agency (the "EPA") and the District have different philosophies regarding the value of an ERC. EPA policy documents state that that the amount of an ERC must be determined "at the time of use," while the District prefers to quantify and set the value

of the ERCs at the time they are created. EPA and the District, however, reached a compromise that allowed EPA to approve the Emissions Program as an NSR. Specifically, the District is allowed to value ERCs at the time they are created, provided that the District makes an annual demonstration to EPA that the District program achieves emission reductions and makes equivalent progress towards air quality standards as the progress that would have occurred under the EPA's standards. This annual process is known as "equivalency" and is demonstrated on a pollutant-by-pollutant basis. The District must submit its equivalency demonstration to EPA in November of each year.

17. Essentially, to determine the "equivalency" of an ERC under EPA's policy, the source generating the emission reduction is compared to current standards and regulations in effect at the time the credit is to be used as an offset, rather than the standards in place at the time the emissions were actually reduced. For example, if an industrial heater were shutdown in 1994, at which time it was subject to a permit with a maximum limit of 30-ppm NOx emissions, the District would give credit for a 30-ppm reduction for the shutdown. However, for a source to use this reduction today, EPA would consider only the allowable emissions for that heater under current regulations, which is now a 5-ppm NOx limit, generating only a 5-ppm credit. Therefore, there is a substantial risk to the value of the ERCs if the District cannot demonstrate equivalency. In the example above, the value of ERCs granted by the District would be decreased by greater than 80% (from 30-ppm to 5-ppm) using EPA's methodology. Most of the Debtors' ERC's were generated in the 1990s or earlier, so any failure of equivalency would likely result in substantial devaluation of the Transferred ERCs. If ERCs are locked in to a particular project prior to the annual "equivalency" test, however, the ERCs are not affected by an adverse ruling on equivalency under the EPA's rules. Thus, in order to maximize the value of

the Transferred ERCs, the Sale must be completed in time for the Buyer to "lock in" the Transferred ERCs to a planned project.

18. So far, the District has been able to show equivalency with the EPA policy. In November 2008, however, the District demonstrated equivalency for NOx offsets but with little margin of safety. In informal conversations, District personnel express confidence that the district will demonstrate equivalency again in November 2009; nonetheless, it is nearly impossible to predict whether the District will be able to continue to demonstrate equivalency. If the District were to fail to demonstrate equivalency, the value of previously issued (but unused) ERCs will be substantially devalued at the time of use – possibly by as much as 90%. Actual devaluation would be determined on a case-by-case scenario given the actual historic reductions giving rise to each ERC certificate held. Given the potential that the District may fail to demonstrate "equivalency" under the EPA's standards, and the illiquidity of the ERC market, it is imperative that the Debtors take advantage of the opportunity to sell the Transferred ERCs now.

VI. The Hydrogen Energy California Project

19. Buyer is purchasing the Transferred ERCs in connection with its Application for Certification to construct the Hydrogen Energy California project ("HECA"), which is designed to address the global climate change challenge and assist California in reducing greenhouse gas emissions. The HECA project, when constructed, would be a first-of-a-kind integrated gasification combined cycle facility with carbon capture for use in enhanced oil recovery ("EOR") and sequestration. The HECA project, located approximately 20 miles from where the Transferred ERCs were generated, would produce hydrogen used to generate "clean" electric power and the carbon dioxide would be captured and transported to the nearby oil and gas fields for EOR and sequestration.

20. In addition, Buyer is also unique and distinguished from other projects in the area, in that, on July 1, 2009, HECA was selected by the National Energy Technology Laboratory ("NETL") of the U.S. Department of Energy ("DOE") for negotiations that led to a $308 million award under the DOE's Funding Opportunity Announcement entitled "Clean Coal Power Initiative – Round 3" ("CCPI-3"). This funding represents more than 75% of the funds awarded by DOE under CCPI-3, and HECA was only one of two projects so selected.

The Sale Process

21. Starting in June, the Buyer has made repeated inquiries about purchasing the Transferred ERCs. During that period, however, the Debtors were concerned that selling the ERCs would chill the Debtors' ongoing efforts to market and sell the Refinery. Indeed, until recently, all the proposals to purchase the Refinery included all of the Debtors' ERCs. However, as a result of negotiations occurring over the last few weeks, the Debtors are now comfortable that separately selling the Transferred ERCs will not endanger the overall sale of the Refinery. As a result, the Debtors have been pursuing various options with respect to the Transferred ERCs. The Debtors have contacted several brokers, including the broker for the Buyer, in an attempt to sell the Transferred ERCs. Since June, however, substantially more ERCs from third parties have also became available, causing an increasingly depressed market.

22. As a result of these dynamics, the Debtors have contacted several brokers specializing in emissions credits, who have in turn contacted certain other potential purchasers. Nevertheless, as described above, because the market for the Transferred ERCs is illiquid and geographically limited, there simply are not a significant number of potential purchasers, since an essential prerequisite to making any purchase of ERCs economically viable is a preconstruction emission producing project in the San Joaquin valley. At this time, there are not enough preconstruction projects to satisfy all the ERCs currently on the market. Further, with

the looming "equivalency" test in November, the Debtors have determined that it is in the best interests of the Debtors' estates to execute the Sale immediately, which allows the Buyer to lock in the Transferred ERCs to a particular project and thus maximizes the consideration for the Sale. As a result, the Buyer's offer represent the highest and best offer available to the Debtors.

Terms of the Sale

23. The primary terms of the PSA are as follows:[4]

(A) **Purchase Price and Payment**

(1) The purchase price (the "Purchase Price") for the sale and conveyance to the Buyer of the ERC Assets shall be Nine Million Six Hundred Ninety-Five Thousand Dollars ($9,695,000.00) and payment thereof shall be made as set forth in Section 3.2 of the PSA.

(2) Execution by the Buyer and the Seller, Initial and Secondary Payment Terms.

(a) Payment of Initial Purchase Price. Within the later of: (i) 3 Business Days after the Sale Order becomes a Final Order, and (ii) November 13, 2009, Seller shall submit to the appropriate Governmental Authority all necessary documents to transfer a portion of the ERC Assets consisting of 200 tpy NOx ERCs from the Seller to the Buyer and shall use reasonable best efforts to obtain regulatory approval for the transfer of such ERC Assets to Buyer as set forth herein, and Buyer shall transfer Seven Million Dollars ($7,000,000.00) (the "Initial Purchase Price") to the Escrow Agent to be held and disbursed in accordance with the Escrow Agreement. The escrow instructions agreed upon by Buyer, Seller, and the Escrow Agent shall provide that, immediately upon written confirmation of the transfer of such ERC Assets from the Seller's name to the Buyer's name pursuant to applicable Governmental Authority approval ("Initial ERC Transfer"), the Escrow

4 In the event of any conflict between this summary and the PSA, the PSA controls. Any terms not defined herein shall have the meaning assigned to them in the PSA.

Agent shall be instructed to release to Seller by wire transfer of immediately available funds, the Initial Purchase Price. Notwithstanding the forgoing, in the event that SJVAPCD has not issued its next annual demonstration report regarding determination of ERCs (which is scheduled to occur on or about November 20, 2009), Seller shall not deliver the ERC certificates effectuating ERC transfer, and no escrow instruction regarding payment of funds to Seller shall be provided to the Escrow Agent, until the first business day following issuance of such report demonstrating equivalency. The Initial Purchase Price shall be wire transferred to Seller's bank account designated in Section 3.4.

(b) Payment of Second Purchase Price. At any time agreed to by Buyer and Seller, but in no event later than January 31, 2010, and subject to the Sale Order being a Final Order, Seller shall submit to the appropriate Governmental Authority all necessary documents to transfer the remaining ERC Assets consisting of 41 tpy NOx and 84 tpy SOx ERCs from the Seller to the Buyer and shall use reasonable best efforts to obtain regulatory approval for the transfer of such ERC Assets to Buyer as set forth herein and Buyer shall transfer Two Million Six Hundred Ninety-Five Thousand Dollars ($2,695,000.00) (the "Second Purchase Price") to the Escrow Agent to be held and disbursed in accordance with the Escrow Agreement. The escrow instructions agreed upon by Buyer, Seller, and the Escrow Agent shall provide that, immediately upon written confirmation of the transfer of such ERC Assets from the Seller's name to the Buyer's name pursuant to applicable Governmental Authority approval (the "Second ERC Transfer"), the Escrow Agent shall be instructed to release to Seller by wire transfer of immediately available funds, the Second Purchase Price to Seller's bank account designated in Section 3.4.

(B) **Reasonable Efforts.** The Buyer shall, if requested by the Seller, use its commercially reasonable efforts to cooperate with, and assist, the Seller with submitting documentation to the applicable Governmental Authority for the transfer of the ERC Assets.

(C) **Transfer of Funds.** All funds to be paid to the Seller by the Buyer pursuant to the PSA shall be disbursed by the Escrow Agent pursuant to the terms and conditions of the PSA and the Escrow Agreement. Neither the Initial Purchase Price nor the Second Purchase Price shall constitute assets of the Debtors' estates until such time as all of the conditions set forth herein to delivery of such funds to the Seller have been satisfied. Buyer's right (if any) to the return of such funds under the terms of the PSA are and shall at all times be senior in right and priority to any security interest or other rights of Seller's secured lenders or other parties in interest in the Bankruptcy Cases.

(D) **Broker, Brokerage Commissions.** Seller and Buyer each represent and warrant to one another that each has dealt with no broker or agent in connection with this Agreement or its negotiations other than E3 Solutions, LLC. Seller agrees that it will pay E3 Solutions, LLC, as broker, a commission in the amount of 3.75% of the Purchase Price, such commission to be payable upon receipt, at any time, by Seller of the Purchase Price or any portion thereof. E3 Solutions, LLC shall be a third party beneficiary of this Agreement solely for the purposes of Seller's obligations under Section 3.6 of the PSA and shall not have standing to assert or enforce any other rights or obligations hereunder on behalf of itself or any other person. Commissions payable by Buyer to E3 Solutions, LLC, as broker, shall be governed by a separate agreement between Buyer and E3 Solutions, LLC.

(E) **Conditions Precedent:**

(1) **Conditions Precedent to Performance by Buyer.** The obligations of Buyer to consummate the transactions contemplated by the PSA are subject to satisfaction or waiver by the Buyer of the following conditions:

(a) Due Diligence. The Buyer confirming that the ERC Assets may be applied to offset emissions associated with Buyer's SJVAPCD project. Buyer shall have a period of ten (10) Business Days from the date of the PSA (the "Due Diligence Period") to perform due diligence, to the Buyer's reasonable satisfaction, with respect to the suitability of ERC Assets for the Buyer's SJVAPCD project. Unless the Buyer provides Seller with written notice that the ERC Assets cannot be used to offset emissions associated with Buyer's SJVAPCD project, this

condition shall be deemed to be automatically satisfied at the end of the Due Diligence Period.

(b) Representations and Warranties of Seller. The representations and warranties made by Seller in the PSA shall be true and correct as of (i) the date of the Final Order, and (ii) the date of payment of the Initial Purchase Price or Second Purchase Price, as applicable, in each case as though made at and as of such time.

(c) Performance of the Obligations of Seller. Seller shall have performed all obligations required under the PSA to be performed by it, including, without limitation, those under Sections 2.2, 3.2(a) and 3.2(b), as applicable.

(d) Bankruptcy Court Approval. The Sale Order shall have been entered on or before November 2, 2009.

(e) Delivery of Documents. With respect to (i) the Initial ERC Transfer, delivery to the Governmental Agency (with simultaneous copies to Buyer) of duly completed documents reflecting the requested transfer to the Buyer of the portion of the ERC Assets consisting of 200 tpy NOx ERCs in accordance with Section 3.2(a), upon the Seller's confirmation that the Buyer has deposited the Initial Purchase Price with the Escrow Agent; and (ii) the Second ERC Transfer, delivery to the Governmental Agency (with simultaneous copies to Buyer) of duly completed documents reflecting the requested transfer to the Buyer of the remaining ERC Assets consisting of 41 tpy NOx and 84 tpy SOx ERCs in accordance with Section 3.2(b), upon the Seller's confirmation that the Buyer has deposited the Second Purchase Price with the Escrow Agent.

(2) Conditions Precedent to Performance by Seller. The obligations of Seller to consummate the transactions contemplated by the PSA are subject to satisfaction or waiver by the Seller of the following conditions:

(a) Representations and Warranties of Buyer. The representations and warranties made by Buyer in the PSA shall be true and correct as of (i) the date of

the Final Order, and (ii) the date of payment of the Initial Purchase Price or Second Purchase Price, as applicable, in each case as though made at and as of such time.

(b) Performance of the Obligations of Buyer. Buyer shall have performed all obligations required under the PSA to be performed by it, including, without limitation, those under Sections 3.2(a) and 3.2(b), as applicable.

(3) Conditions Precedent to Performance by Seller and Buyer. The respective obligations of Seller and Buyer to consummate the transactions contemplated by the PSA are subject to satisfaction of the following conditions:

(a) Escrow Agreement. Execution of a mutually acceptable escrow agreement among Seller, Buyer and an escrow agent acceptable to both Buyer and Seller (the "Escrow Agent") governing the rights and obligations of the parties thereto with respect to the ERC Assets, the deposit of the Purchase Price, and the payment of the Initial Purchase Price and the Second Purchase Price (the "Escrow Agreement").

(b) No Violation of Orders or Applicable Law. No preliminary or permanent injunction or order, or law or regulation, that declares the PSA invalid or unenforceable in any respect or that prevents the consummation of the transactions contemplated hereby shall be in effect.

(F) **Termination:** The PSA may be terminated:

(1) by mutual written consent of Buyer and Seller;

(2) by Buyer, at its sole election and upon written notice to Seller, if: (i) the Initial ERC Transfer shall not have occurred on or before December 29, 2009 (and SJVAPCD has not indicated in writing that the transfer will be accomplished), or (ii) the Second ERC Transfer shall not have occurred on or before February 28, 2010 (and SJVAPCD has not indicated in writing that the transfer will be accomplished); provided that Buyer shall not have the right to terminate the PSA under this Section 8.2(b) if Buyer's failure to fulfill any of its obligations hereunder is

the reason such transfer has not occurred on or before said date.

(3) The PSA may be terminated, by either Buyer or Seller, prior to the Initial ERC Transfer, immediately upon a Final Order declaring the PSA or the Escrow Agreement invalid or unenforceable in any material respect or that prevents consummation of the transactions contemplated hereby or thereby; provided that neither Buyer nor Seller shall have the right to terminate the PSA if it sought or supported entry of, or failed to use commercially reasonable steps to oppose, such an order.

(4) The PSA may be terminated by the Buyer if the SJVAPCD ceases (or indicates or proposes in writing that it intends to cease) for any reason to recognize on a temporary or permanent basis any of the ERC Assets as available, to any extent, for use as trade-offs or offsets ("Regulatory Invalidation"), with respect to both the Initial ERC Transfer and the Second ERC Transfer, if such Regulatory Invalidation occurs prior to the payment to the Seller of the Initial Purchase Price.

(5) If the PSA is terminated: (i) the Initial Purchase Price and/or the Second Purchase Price to extent not paid to Seller in accordance with Section 3.2, less any fees and expenses of the Escrow Agent, shall be returned to Buyer, (ii) Seller and Buyer shall take all steps required by the Governmental Authority to return any transferred ERC to Seller; and (iii) the PSA shall be null and void and have no effect except for this Article, Section 3.3, and Articles, 1, 4 and 9, which shall survive termination.

Basis for Relief

The Proposed Notice of the Sale is Appropriate

24. Under Bankruptcy Rule 2002(a) and (c), the Debtors are required to notify creditors of the proposed Sale, including a disclosure of the terms and conditions of a sale and the deadline for filing any objections. The Debtors request the Sale Notice, substantially in the

form attached hereto as **Exhibit C**,[5] be deemed adequate and sufficient if within two business days of the filing of the Motion, the Debtors (or their agents) have served by overnight mail, postage prepaid, copies of the Sale Notice upon the following entities (collectively, the "Notice Parties"):

(A) all parties entitled to receive notice as of the date hereof pursuant to Bankruptcy Rule 2002(a)(2);

(B) all parties known to the Debtors who have an interest in or rights to the Transferred ERCs;

(C) all entities who have recorded in the public record any lien, interest or encumbrance in or upon the Transferred ERCs;

(D) the Office of the United States Trustee for the District of Delaware;

(E) applicable federal, state and local governmental authorities or units thereof;

(F) all taxing authorities having jurisdiction over any of the Transferred ERCs, including the Internal Revenue Service;

(G) counsel for the Creditors' Committee;

(H) counsel for the agents for the Debtors' prepetition and post petition secured lenders;

(I) all persons known or reasonably believed to have expressed an interest in acquiring the Transferred ERCs;

(J) counsel for Buyer; and

(K) the Buyer.

25. The Debtors submit that the foregoing notice complies fully with Bankruptcy Rule 2002 and was reasonably calculated to provide timely and adequate notice of the Sale to the

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5 The Sale Notice and Publication Notice will direct parties to contact Kirkland & Ellis LLP, counsel to the Debtors, for more information and will provide that any party that wishes to obtain a copy of any related document (subject to any necessary confidentiality agreement) may make such a request in writing to: Kirkland & Ellis LLP, 300 North LaSalle Street, Chicago, Illinois 60654, Attn.: Samuel M. Gross, Esq., Facsimile: (312)-862-2200 (samuel.gross@kirkland.com).

Debtors' creditors and other parties in interest. Based upon the foregoing, the Debtors respectfully request that the Court approve the notice procedures herein.

The Proposed Sale Transaction is Appropriate

26. In accordance with section 363(b)(1) of the Bankruptcy Code and Bankruptcy Rule 6004(f)(1), sales of property outside the ordinary course of business may be conducted as a private sale. The Debtors have determined that the Sale through a private negotiated sale will enable it to capture the maximum value from this transaction for the Debtors' estates, especially given the timing associated with the Sale and the need for expedited relief to protect the purchase price, and that the Sale is in the best interests of the Debtors, their estates, and their stakeholders.

27. The PSA memorializes a comprehensive, arms-length transaction which will provide a greater recovery for the Debtors' estates than would be provided by any other available existing alternative. The bases for the relief requested in this Motion are founded in a number of provisions of the Bankruptcy Code and Bankruptcy Rules. These bases are discussed in detail below.

I. The Sale of the Transferred ERCs Pursuant to the PSA is Authorized by Section 363 as a Sound Exercise of the Debtors' Business Judgment

28. Section 363 of the Bankruptcy Code provides that a debtor, "after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b). Although section 363 of the Bankruptcy Code does not specify a standard for determining when it is appropriate for a court to authorize the use, sale or lease of property of the estate, bankruptcy courts routinely authorize sales of a debtor's assets if such sale is based upon the sound business judgment of the debtor. See, e.g., Meyers v. Martin (In re Martin), 91 F.3d 389, 395 (3d Cir. 1996); In re Trans World Airlines, Inc., No. 01-00056, 2001 Bankr. LEXIS 980, at *29 (Bankr. D. Del. Apr. 2, 2001); In re Montgomery Ward Holding

Corp., 242 B.R. 147, 153 (D. Del. 1999); In re Delaware & Hudson Ry. Co., 124 B.R. 169, 176 (D. Del. 1991).

29. Courts typically consider the following factors in determining whether a proposed sale satisfies this standard: (a) whether a sound business justification exists for the sale; (b) whether adequate and reasonable notice of the sale was given to interested parties; (c) whether the sale will produce a fair and reasonable price for the property; and (d) whether the parties have acted in good faith. See In re Delaware & Hudson Ry., 124 B.R. at 176; In re Phoenix Steel Corp., 82 B.R. 334, 335-36 (Bankr. D. Del. 1987); In re United Healthcare Sys., Inc., No. 97-1159, 1997 U.S. Dist. LEXIS 5090, at *13-14 and n.2 (D.N.J. Mar. 26, 1997). The Delaware & Hudson Railway court further held that:

> [o]nce a court is satisfied that there is a sound business reason or an emergency justifying the pre-confirmation sale, the court must also determine that the trustee has provided the interested parties with adequate and reasonable notice, that the sale price is fair and reasonable and that the purchaser [or proposed purchaser] is proceeding in good faith.

In re Delaware & Hudson Ry., 124 B.R. at 176.

30. A sound business purpose for the sale of a debtor's assets outside the ordinary course of business may be found where such a sale is necessary to preserve the value of assets for the estate, its creditors or interest holders. See, e.g., In re Abbotts Dairies of Pa, Inc., 788 F.2d 143 (3rd Cir. 1986); In re Lionel Corp., 722 F.2d 1063 (2nd Cir. 1983). In fact, the paramount goal in any proposed sale of property of the estate is to maximize the proceeds received by the estate. See Food Barn, 107 F.3d at 564-65 (in bankruptcy sales, "a primary objective of the Code [is] to enhance the value of the estate at hand"); In re Integrated Res., 147 B.R. at 659 ("It is a well-established principle of bankruptcy law that the [Debtor's] duty with respect to such sales is to obtain the highest price or greatest overall benefit possible for the

estate.") (quoting In re Atlanta Packaging Prods., Inc., 99 B.R. 124, 130 (Bankr. N.D. Ga. 1988)).

31. Furthermore, once "the debtor articulates a reasonable basis for its business decisions (as distinct from a decision made arbitrarily or capriciously), courts will generally not entertain objections to the debtor's conduct." Creditors' Committee of Asbestos-Related Litigants and/or Creditors v. Johns-Manville Corp. (In re Johns-Manville Corp.), 60 B.R. 612, 616 (Bankr. S.D.N.Y. 1986). There is a presumption that "in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." In re Integrated Res., 147 B.R. at 656 (quoting Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985)). Thus, if a debtor's actions satisfy the business judgment rule, then the transaction in question should be approved under section 363(b)(1). Indeed, when applying the "business judgment" standard, courts show great deference to a debtor's business decisions. See Pitt v. First Wellington Canyon Assocs. (In re First Wellington Canyon Assocs.), Case No. 89C593, 1989 WL 106838, at *3 (N.D. Ill. Sept. 8, 1989) ("Under this test, the debtor's business judgment . . . must be accorded deference unless shown that the bankrupt's decision was taken in bad faith or in gross abuse of the bankrupt's retained discretion").

32. The value the Debtors will receive through the Sale exceeds any value the Debtors could obtain for these assets if the Debtors were to sell the Transferred ERCs to another party and the Sale is the only possible transaction that can close prior to the annual "equivalency" test occurring in mid-November. As discussed above, the Debtors, in their business judgment, determined that sales to other possible buyers were not practical because those offers simply did not exist due to a lack of preconstruction projects or could not close in

time. The Debtors believe that the value of the consideration to be received for the Transferred ERCs under the PSA is fair and reasonable, by providing approximately $9.6 million in proceeds for an asset the Debtors are otherwise unable to use or sell and which have a significant risk of being substantially devalued in the short term.

33. The Debtors submit that under the particular facts and circumstances presented here, the PSA constitutes the highest and best offer for the ERCs, and will provide a greater recovery of value for the Debtors' estates than would be provided by any other available alternative. Further, given the Debtors' marketing efforts, the lack of potential buyers, the limited geographic scope of the market for ERCs, and the deteriorating price for ERCs, the Debtors' determination to enter into the PSA to sell the ERCs through a private negotiated sale is a valid and sound exercise of their business judgment. The Debtors respectfully request that the Court make a finding that the proposed Sale is a proper exercise of the Debtors' business judgment, that the Sale and the Debtors' entry into the PSA are authorized, and that the PSA and the Sale are approved.

II. The Sale of the Transferred ERCs Free and Clear of Liens is Authorized by Section 363(f)

34. The Debtors further submit that it is appropriate to sell the Transferred ERCs free and clear of "any interest in such property of an entity other than the estate" pursuant to section 363(f) of the Bankruptcy Code. Section 363(f) of the Bankruptcy Code authorizes a debtor to sell assets free and clear of liens, claims, interests and encumbrances if any of the following are met:

(1) applicable non-bankruptcy law permits sale of such property free and clear of such interests;

(2) such entity consents;

(3) such interest is a lien and the price at which such property is to be sold is greater than the value of all liens on such property;

(4) such interest is in bona fide dispute; or

(5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

11 U.S.C. § 363(f).

35. Because section 363(f) of the Bankruptcy Code is drafted in the disjunctive, satisfaction of any one of its five requirements will suffice to permit the sale of the Transferred ERCs "free and clear" of liens and interests. In re Dundee Equity Corp., 1992 Bankr. LEXIS 436, at *12 (Bankr. S.D.N.Y. March 6, 1992) ("[s]ection 363(f) is in the disjunctive, such that the sale free of the interest concerned may occur if any one of the conditions of § 363(f) have been met."); In re Bygaph, Inc., 56 B.R. 596, 606 n.8 (Bankr. S.D.N.Y. 1986) (same); Michigan Employment Sec. Comm'n v. Wolverine Radio Co. (In re Wolverine Radio Co.), 930 F.2d 1132, 1147 n.24 (6th Cir. 1991) (stating that Bankruptcy Code section 363(f) is written in the disjunctive and holding that the court may approve the sale "free and clear" provided at least one of the subsections of Bankruptcy Code section 363(f) is met).

36. One or more of the tests of section 363(f) will be satisfied with respect to the Sale of the Transferred ERCs. In particular, at least section 363(f)(2) will be met in connection with the transactions proposed because each of the parties holding liens on the Transferred ERCs, if any, will consent, or absent any objection to this Motion, will be deemed to have consented to, the Sale. Any lienholder also will be adequately protected by having their encumbrances, if any, in each instance against the Debtors or their estates, attach to the cash proceeds of the Sale ultimately attributable to the Transferred ERCs in which such creditor alleges an interest, in the same order of priority, with the same validity, force and effect that such creditor had prior to the

Sale, subject to any claims and defenses the Debtors and their estates may possess with respect thereto. Accordingly, section 363(f) authorizes the transfer and conveyance of the Transferred ERCs free and clear any such encumbrances.

III. The Buyer is a Good Faith Purchaser and is Entitled to the Full Protection of Section 363(m) of the Bankruptcy Code, and the Sale of the Transferred ERCs Does Not Violate Section 363(n)

37. Section 363(m) of the Bankruptcy Code provides:

> The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

11 U.S.C. § 363(m).

38. While the Bankruptcy Code does not define "good faith," the Third Circuit in In re Abbotts Dairies of Pa., Inc., held that:

> [t]he requirement that a [buyer] act in good faith . . . speaks to the integrity of his conduct in the course of the sale proceedings. Typically, the misconduct that would destroy a [buyer's] good faith status at a judicial sale involves fraud, collusion between the [Proposed Buyer] and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders.

788 F.2d at 147 (citations omitted).

39. The PSA was negotiated at arm's length and in good faith. Thus, the Buyer should be entitled to the full protections of section 363(m) of the Bankruptcy Code. A party would have to show fraud or collusion between a purchaser and a debtor in possession or trustee or other bidders in order to demonstrate a lack of good faith. See Kabro Assocs. of West Islip, LLC v. Colony Hill Assocs. (In re Colony Hill Assocs.), 111 F.3d 269, 276 (2d Cir. 1997) ("[t]ypically, the misconduct that would destroy a [purchaser]'s good faith status at a judicial

sale involves fraud, collusion between the [purchaser] and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders"); see also In re Angelika Films, 57th, Inc., Case No. 97 Civ. 2239, 1997 WL 283412, at *7 (S.D.N.Y. May 29, 1997); In re Bakalis, 220 B.R. 525, 537 (Bankr. E.D.N.Y. 1998).

40. By the time of execution of the PSA, the Debtors and the Buyer had engaged in thorough arm's-length negotiations over the terms of the PSA, and there was no fraud or collusion in those negotiations. Additionally, all payments to be made by the Buyer and other agreements or arrangements entered into by the Buyer in connection with the Sale have been disclosed.

41. Additionally, section 363(n) of the Bankruptcy Code provides:

> The trustee may avoid a sale under this section if the sale price was controlled by an agreement among potential bidders at such sale, or may recover from a party to such agreement any amount by which the value of the property sold exceeds the price at which such sale was consummated, and may recover any costs, attorneys' fees, or expenses incurred in avoiding such sale or recovering such amount. In addition to any recovery under the preceding sentence, the court may grant judgment for punitive damages in favor of the estate and against any such party that entered into such an agreement in willful disregard of this subsection.

11 U.S.C. § 363(n).

42. As discussed above, the Debtors and the Buyer have engaged in thorough arm's-length negotiations over the terms of the PSA, and there has been no fraud or collusion in those negotiations. In addition, the Buyer is not an "insider" of any of the Debtors, as that term is defined in section 101(31) of the Bankruptcy Code.

43. In this case, there is absolutely no evidence or indication of fraud or improper insider dealing of any kind. The PSA does not constitute an avoidable transaction pursuant to section 363(n) and the Buyer should receive the protections afforded good faith purchasers by

section 363(m). Accordingly, the Debtors request that the Court make a finding that the PSA entered into with the Buyer was at arm's length and is entitled to the full protections of section 363(m) of the Bankruptcy Code.

Highlighted Provisions Under the Local Rule 6004-1

44. Local Rule 6004-1 requires that the Sale Motion "must highlight material terms, including but not limited to (a) whether the proposed form of sale order and/or the underlying purchase agreement constitutes a sale or contains [certain highlighted provisions], (b) the location of any such provision in the form of order or purchase agreement and (c) the justification for the inclusion of such provision." Local Rule 6004-1(b)(iv). The Sale Order requests certain of these highlighted provisions. In accordance with Local Rule 6004-1, the reasons are set forth below.

I. A Private Negotiated Sale is Appropriate

45. The Sale does not contemplate a "stalking horse" bidder and public auction. As discussed in detail above, the market for ERCs is highly illiquid given the geographical limitations on their use and fact that a sale requires a preconstruction project need ERCs at the same time that ERCs are for sale. Thus, there is a sharply limited number of potential buyers for the Debtors' ERCs. The Debtors have comprehensively surveyed the market and aver that a public auction would not result in a higher and better offer for the ERCs. Further, given the time constraints and the looming November "equivalency" test, the ERCs need to be sold immediately in order to maximize value to the Debtors' estates and minimize the risk associated with the November test. Indeed, rather than representing the prototypical "melting ice cube," the ERCs are akin to an ice cube that may completely evaporate in a matter of weeks. As a result, it is clear that a private sale is necessary and appropriate in these circumstances.

46. Pursuant to Bankruptcy Rule 6004(f)(1), sales outside of the ordinary course of business may be by private sale. The Debtors respectfully submit that a private negotiated sale will allow the Debtors to maximize the value from this situation, and that there essentially is no viable alternative that does not have unacceptable risk associated with it. See In re Jewel Terrace Corp., 10 B.R. 1008, 1012 (E.D.N.Y. 1981) (private sale appropriate when sale must be consummated expediently); In re National Health & Safety Corp., 1999 WL 703208 at *2 (Bankr. E.D. Pa. 1999) (court approved sale with no competitive bidding on one day notice due to "the Debtor's precarious financial predicament"). Cf. Uniform Commercial Code, § 9-610, Comment 2 ("Although subsection (b) permits both public and private dispositions [of collateral after default] . . . [t]his section encourages private dispositions on the assumption that they frequently will result in higher realization on collateral for the benefit of all concerned." The Debtors submit that this negotiated sale provides the best value for the Debtors' estates under these particular circumstances, and is supported by sound business reasons.

II. Relief Under Bankruptcy Rule 6004(h) is Appropriate

47. Bankruptcy Rule 6004(h) provides that an "order authorizing the use, sale, or lease of property . . . is stayed until the expiration of 10 days after entry of the order, unless the court orders otherwise." The Debtors request that the Sale Order be effective immediately by providing that the 10-day stay under Bankruptcy Rule 6004(h) be waived. The Advisory Committee notes on Rule 6004(h) expressly state that "[t]he court may, in its discretion, order that Rule 6004(h) is not applicable so that the property may be used, sold, or leased immediately . . . ." Advisory Committee Notes to Bankruptcy Rule 6004(h). Such an order should be granted upon a showing that there is a sufficient business need to close the transaction within the 10-day period. Hower v. Molding Sys. Engineering Corp., 445 F.3d 935, 938 (7th Cir. 2006); In re Perry Hollow Mgmt. Co., Inc., 297 F.3d 34, 41 (1st Cir. 2002).

48. Paragraph B of the Sale Order provides for a waiver of the 10-day stay under Bankruptcy Rule 6004(h). The Debtors are in a situation where in order to maintain the ERCs' value, the Sale needs to be completed and the new ERCs issued prior to the EPA's decision on "equivalency" in mid-November. Further, until the Sale is approved by the Court, the Debtors and the Buyer are unable to start the regulatory approval process to transfer the ERCs from the Debtors to the Buyer. Due to these time constraints, it is necessary to consummate the Sale as soon as possible. Waiving the 10-day stay period under Bankruptcy Rule 6004(h) will facilitate the Sale process and mitigate the risk of a substantial devaluation due to a failure by the District. Therefore, the Debtors respectfully submit that a sufficient business need has been demonstrated to waive the 10-day stay period.

The Debtors' Reservation of Rights

49. Nothing contained herein is intended or should be construed as an admission of the validity of any claim against the Debtors, a waiver of the Debtors' rights to dispute any claim, or an assumption of any agreement, contract or lease under section 365 of the Bankruptcy Code. The Debtors expressly reserve their rights to contest any asserted lien, encumbrances or other claims against the Transferred ERCs or the proceeds of the Sale in accordance with applicable non-bankruptcy law.

Notice

50. The Debtors have provided notice of this Motion via first class mail to:

(A) all parties entitled to receive notice as of the date hereof pursuant to Bankruptcy Rule 2002(a)(2);

(B) all parties known to the Debtors who have an interest in or rights to the ERCs;

(C) all entities who have recorded in the public record any lien, interest or encumbrance in or upon the ERCs;

(D) the Office of the United States Trustee for the District of Delaware;

(E) applicable federal, state and local governmental authorities or units thereof;

(F) all taxing authorities having jurisdiction over any of the ERCs, including the Internal Revenue Service;

(G) counsel for the Creditors' Committee;

(H) counsel for the agents for the Debtors' prepetition and post petition secured lenders;

(I) all persons known or reasonably believed to have expressed an interest in acquiring the ERCs;

(J) counsel for Buyer; and

(K) Buyer.

51. In light of the nature of the relief requested, the Debtors respectfully submit that no further notice is necessary.

No Prior Request

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

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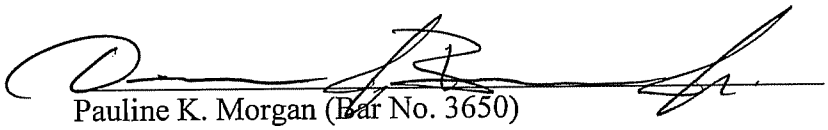
WHEREFORE, for the reasons set forth herein, the Debtors respectfully request that the Court enter an order, substantially in the form attached hereto as **Exhibit A**, granting the relief requested herein and granting such other and further relief as the Court deems appropriate.

Dated: October 2, 2009
Wilmington, Delaware

YOUNG CONAWAY STARGATT & TAYLOR, LLP



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