

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

In re: Insightra Medical, Inc., <i>et al.</i> , ¹ Debtors.	Chapter 7 Case No. 21-11060 (BLS) Objection and Overbid Deadline: January 31, 2022 at 4:00 p.m. (ET) Hearing Date: February 3, 2022 at 10:00 a.m. (ET)
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**CHAPTER 7 TRUSTEE’S MOTION FOR ENTRY OF AN ORDER:
(A) APPROVING ASSET PURCHASE AGREEMENT PURSUANT TO 11 U.S.C.
§ 363(b) and (f); (B) AUTHORIZING THE ASSUMPTION AND ASSIGNMENT OF
LEASE OF NON-RESIDENTIAL REAL PROPERTY PURSUANT TO 11 U.S.C. § 365;
AND (C) GRANTING RELATED RELIEF**

Jeoffrey L. Burtch, in his capacity as chapter 7 trustee (the “Trustee”) for the bankruptcy estates (the “Estates”) of the above-captioned debtors (the “Debtors”), hereby files this motion (the “Motion”) pursuant to 11 U.S.C. §§ 105, 363, and 365 for entry of an order approving the Asset Purchase Agreement substantially in the form attached as Exhibit A hereto, authorizing the assumption and assignment of a lease of non-residential real property, and granting related relief. In support of the Motion, the Trustee respectfully states as follows:

JURISDICTION, CORE NATURE AND VENUE

1. The United States Bankruptcy Court for the District of Delaware (the “Court”) has jurisdiction to consider this Motion pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.
2. The statutory predicates for the relief requested herein are sections 105, 363, and 365 of title 11 of the United States Code (the “Bankruptcy Code”), and Rules 6004 and 6006 of the Federal Rules of Bankruptcy Procedure.

¹ The Debtors and the last four digits of their taxpayer identification number are as follows: Insightra Medical, Inc. (8576), Insightra Cardiovascular Solutions, Inc. (7535), and Insightra Surgical Solutions, Inc. (3619). The Debtors’ address is 141 Hatcher Lane, Clarksville, TN 37403.

3. Pursuant to Local Rule 9013-l(f), the Trustee consents to the entry of a final order with respect to this Motion if it is determined that the Court lacks adjudicatory authority under Article III of the United States Constitution to enter such final order absent consent of the parties.

BACKGROUND²

4. On July 25, 2021 (the “Petition Date”), the Debtors filed petitions under Chapter 11 the Bankruptcy Code, thereby commencing cases (the “Chapter 11 Cases”) with the Court.

5. On August 9, 2021 (the “Conversion Date”), the Court entered an order converting the Chapter 11 Cases to cases under Chapter 7 of the Bankruptcy Code (the “Chapter 7 Cases”).

6. On or about August 9, 2021, the Trustee was appointed interim trustee in the Chapter 7 Cases. The meeting of creditors was held and concluded on December 3, 2021, and the Trustee now serves as trustee pursuant to 11 U.S.C. § 702(d).

Debtors’ Business and Proposed Sale

7. Prior to the Petition Date, the Debtors operated a medical device business focused on developing, manufacturing, and distributing devices to medical practices performing outpatient surgical procedures.

8. Debtor Insightra Medical, Inc. (“Insightra Medical”) was founded in 2001, and its principal office was originally in Irvine, California. As of the Petition Date, its principal office was located in Clarksville, Tennessee, and it employed ten people.

² Neither the Trustee nor his professionals have any personal knowledge regarding the Debtors’ assets or business operations, and the background information provided in this Motion is based on the Trustee’s investigation of the Debtors’ financial condition and information gleaned from the filings in these cases and documents otherwise made available to the Trustee. While the Trustee has made reasonable efforts to ensure the accuracy of the information provided herein, he makes no representations regarding the accuracy of any such information.

9. Debtor Insightra Cardiovascular Solutions, Inc., which was incorporated in 2014, and Debtor Insightra Surgical Solutions, Inc., which was incorporated in 2017, are both wholly-owned subsidiaries of Insightra Medical (Debtor Insightra Cardiovascular Solutions, Inc. and Debtor Insightra Surgical Solutions, Inc. shall be referred to, together, as the “Debtor Subsidiaries”).

10. Upon information and belief, the principal purpose of the Debtor Subsidiaries was to hold certain intellectual property, and neither of them had any other significant functions or operations. However, Schedules A/B filed by each of the Debtor Subsidiaries do not identify any assets. *See* Docket Nos. 97 and 99.

11. Shortly after the Conversion Date, Kai Trompeter, Insightra Medical’s former CEO, contacted counsel for the Trustee to express an interest in purchasing certain assets of the Estates.

16. Based on communications with Mr. Trompeter and others, the Trustee determined that a sale of the assets of the Estates might be complicated due to certain regulatory requirements. Among other things, the Trustee has been advised that the sale of medical devices in the relevant markets is only authorized if the seller has ISO and CE certificates,³ both of which require the maintenance of a Quality Management System (“QMS”). Because Debtors have ceased operations, they are no longer maintaining a QMS, and sale of Debtors’ products is therefore not currently authorized.

13. Despite these potential regulatory issues, after arm’s length negotiations, the Trustee

³ ISO certification is awarded after a third party regulatory/testing body has determined that a company is in compliance with international standards developed and published by the International Organization for Standardization (ISO). CE stands for “Conformité Européenne,” the French for European conformity, and the CE mark indicates that the manufacturer takes responsibility for the compliance of a product with all applicable European health, safety, performance, and environmental requirements.

reached a tentative agreement with Tennessee Medical Innovations, Inc., an entity affiliated with Mr. Trompeter, (“Purchaser”) on the terms of an Asset Purchase Agreement (as the same may be amended, the “APA”).⁴ A true and correct copy of the current draft of the APA is attached hereto as Exhibit A.⁵

14. Subject to the terms of the APA Purchaser has agreed to purchase the Purchased Assets (as defined in the APA) for a cash purchase price of \$500,000.00 and the assumption of certain liabilities.

15. Due to the regulatory issues alluded to above, and Purchaser’s interest in beginning operations as soon as possible, the APA provides for certain post-closing deliveries by the Trustee that will facilitate certain transactions involving Purchaser and third parties. More specifically, the APA contemplates the sale of “cassettes” that were previously produced and distributed by Debtors.

16. The cassettes are used in the operation of arthroscopy pumps. These pumps serve a number of important functions related to arthroscopic procedures, including: (a) keeping the joint distended through pressurization and expansion of the operating field; (b) compressing damaged blood vessels to maintain hemostasis through increased pressure; and (c) maintaining visibility by flushing the operating field in a controlled way. The cassettes control the flow of fluids into and out of the pump.

⁴ As of the date hereof, the APA has not been executed. The Trustee has advised the prospective parties to the APA that, while it remains subject to Court approval, the Trustee intends to have the APA executed, and the deposit required under the APA paid, by no later than January 20, 2022. If such execution and payment have not occurred by January 20, 2022, the Trustee reserves the right to withdraw this Motion. The Trustee further reserves the right to make such revisions to the APA as he deems necessary or appropriate and in the best interests of the Estates at any time before execution, and will file the executed version of the APA with the Court prior to the hearing on the Motion.

⁵ Any description or discussion of the terms of the APA in this Motion is provided for convenience only. To the extent there is any inconsistency between the summary set forth in this Motion and the APA, the latter governs in all respects. Capitalized terms used but not defined in this chart have the meanings ascribed in the APA.

17. While Insightra Medical was the “legal manufacturer” of the cassettes, actual production was contracted to SteriPack Asia Sdn Bhd, a Malaysian corporation (together with any and all affiliates, “SteriPack”).⁶

18. Purchaser has advised the Trustee that it may take several months or longer before it is able to complete the process of becoming a legal manufacturer or approved seller/distributor. In order to permit it to maintain the value of the Purchased Assets pending such approval, it has made it a condition of the sale that the Trustee execute: (i) one purchase order pursuant to which Smith & Nephew SRL (“S&N”) shall purchase a number of the cassettes described above; (ii) up to ten “Delegate” forms, as necessary, substantially in the form attached to the APA; and (iii) such other documents as the Trustee, Purchaser, and SteriPack may agree upon.

19. According to Purchaser, the sale to S&N accounts for \$350,000.00 of the \$500,000.00 value that Purchaser has ascribed to the Purchased Assets.

20. Prior to making an offer to purchase assets of the Estate, Purchaser had first asked the responsible agencies⁷ whether the necessary regulatory permits, certificates, and other approvals could be transferred by the Estate, and was told that such a transfer was not permissible.

21. Because of the non-transferability of the ISO and CE certificates, in order to facilitate the sale to S&N, Purchaser has advised the Trustee that it will take steps to maintain Insightra Medical’s QMS and have its ISO and CE certificates reinstated. According to

⁶ On September 2, 2021, the Trustee filed his Motion for Entry of an Order Pursuant to Sections 105(a) and 365 of the Bankruptcy Code Approving Stipulation And Authorizing Rejection of Executory Contract, pursuant to which he sought approval of a stipulation for rejection of Insightra Medical’s contract with SteriPack. *See* Docket No. 65. An order approving the stipulation and rejection was entered on September 21, 2021. *See* Docket No. 73.

⁷ According to Purchaser and SteriPack, all of the cassettes will be exported to Europe, and the entities responsible for issuing the necessary approvals have been Intertek Certification AB and Eurofins Product Testing Italy SRL.

Purchaser, these steps will be sufficient to ensure that the S&N transaction complies with all applicable regulations, despite the fact that neither the Trustee, the Debtors, or the Estates will be involved in the transaction in anything other than a nominal capacity.

22. The Trustee has advised Purchaser and SteriPack, and by this Motion gives notice to all other known parties in interest, that he has not, and will not, operate the Debtors' business in any sense. With that understanding, and subject to S&N's execution of a prospective release of any claims against the Trustee or the Estates that might otherwise arise out of any transactions occurring after closing, and the other terms set forth in the APA, the Trustee has agreed to the post-closing deliveries as provided in the APA.

23. The Trustee has disclaimed any warranty or representation of any kind related to the sale of the Purchased Assets or any transaction contemplated in the APA. The Trustee has no personal knowledge regarding property of the Estates, and has therefore expressly disclaimed any warranty regarding the ownership, identity, scope, existence, location, or condition of any assets that might be specifically identified in the schedules filed by the Debtors or the APA (including in exhibits to the APA), or that might otherwise be included within the scope of the Purchased Assets.

24. Purchaser is managed by the individual who was CEO of Insinhtra Medical until immediately before the Petition Date, and is therefore believed to have personal knowledge regarding the assets of the Estates, and the Trustee has offered Purchaser the opportunity to inspect the Purchased Assets.

25. Because of the unusual post-closing requirements under the APA, the Trustee has not only included the standard "as is, where is" language, but has also included language expressly disclaiming any representations or warranties regarding regulatory matters.

26. The Trustee has also made it a condition under the APA that he be named as an additional insured on liability insurance policies to be maintained by both Purchaser and SteriPack, and that both Purchaser and SteriPack indemnify and hold harmless the Trustee and the Estates against any claims arising out of or related to the APA, including, but not limited to, the anticipated sale to S&N.

27. Based on communications with various parties, including former employees and others with knowledge of the product line, no claim has ever been asserted alleging any defect or other grounds for liability arising out of the manufacture, distribution, or use of the cassettes.

28. Neither the Trustee nor any representative or agent of the Estates has played or will play any role in the manufacture, transportation, distribution, marketing, or sale of any products, and the Trustee does not believe that there would be any grounds for any purchaser or user of any products to assert any claim against him or the Estates. Because the Estates will play a nominal role in the ordering process, however, the Trustee has insisted on insurance and indemnification terms that are not typical in sales made in the course of a chapter 7 case. The broad insurance and indemnification provisions described herein, and the prospective release of claims by S&N, will help ensure that the Estate is protected in the event of any product liability claims arising out of the sale of cassettes as contemplated under the APA.

Lease Assumption

29. Insightra Medical leased commercial real property located at 141 Hatcher Lane, Clarksville, Tennessee pursuant to a lease agreement dated May 9, 2017 with William H. Pollard and Susan A. Pollard (the “Lease”). Upon information and belief, the Pollards sold the leased premises and assigned the Lease to Thomas N. Bateman and Patricia A. Bateman (together, the “Landlord”) on or about May 30, 2018.

30. Based on information made available to the Trustee, the current monthly base rent under the Lease is \$7,218.75. Pursuant to the Lease, Insignia Medical was also responsible for payment of certain costs and expenses as additional rent. The terms of the Lease expires on May 31, 2023.

31. Pursuant to the APA, Purchaser has agreed to the assumption and assignment of the Lease by the Trustee. The Estates shall be liable for \$8,848.79 of all costs associated with curing any defaults in connection with the assumption and assignment of the Lease, and Purchaser shall be liable for any and all additional costs (the aggregate of such costs shall be referred to, collectively, as the “Cure Costs”). Upon information and belief, Cure Costs at present may exceed \$30,000.00.

32. Purchaser has represented that it has the ability to perform according to the terms of the Lease from and after the closing of the sale and the assumption and assignment of the Lease.

33. The Trustee does not believe that the Lease would have any value to the Estates outside of its value to Purchaser as part of the APA.

Prior Marketing Efforts

34. Before agreeing to the sale contemplated in the APA, the Trustee, through counsel, explored the possibility for alternative sales through discussions with prior counsel for Debtors and certain of Debtors’ former employees and agents. While the Trustee was informed that certain of the Debtors’ competitors and other investors in the medical device field expressed some initial interest in the assets of the Estates, Purchaser was the only party to actually make an offer.

35. Upon information and belief, Debtors had been seeking a purchaser for some time prior to and after the commencement of the Chapter 11 Cases, but no party made any definitive offer.

36. Purchaser and SteriPack have advised the Trustee that it is critical that the sale close on the timeline set forth in the APA, as S&N would otherwise likely not submit the contemplated purchase order. Because time is of the essence for closing, the Trustee is seeking a waiver under Fed. R. Bankr. P 6004(h) as part of this Motion.

37. Under the circumstances, the Trustee has determined that a private sale, rather than a competitive auction process, is necessary to maximize the value of the Purchased Assets. Notwithstanding the foregoing, the Trustee reserves the right to seek approval of a sale to a different purchaser if a higher and better offer is made by no later than the January 31, 2022 deadline for filing objections to this Motion. This Motion is being served on all parties that are believed to have expressed any interest in purchasing assets of the Estates, so all such parties will have a fair opportunity to make a competing offer.

C. Terms of the APA

38. The principal terms of the APA are summarized as follows:

Agreement Provision	Summary Description
Seller	Jeoffrey L. Burtch, solely in his capacity as chapter 7 trustee for the bankruptcy estates of the Debtors.
Purchaser	Tennessee Medical Innovations Inc.
Purchase Price	Cash in the amount of \$500,000.00, payable as follows: <ul style="list-style-type: none"> a. Deposit in the amount of \$50,000.00 to be paid upon execution of the APA; b. \$100,000.00 payable at Closing; c. \$300,000.00 payable on March 1, 2022;

Agreement Provision	Summary Description
	<p>d. \$50,000.00 payable on the date that is twelve months after the Closing Date; and</p> <p>e. all Cure Costs in excess of \$8,848.79.</p> <p>(See APA at § 1)</p>
Purchased Assets	<p>All of the Estates' right, title, and interest in and to the following:</p> <p>a. all general intangibles including but not limited to the Debtors' names, all intellectual property, technology, technical manuals, computer software, customer relationships, trade secrets, brand recognition, and proprietary business practices, all governmental and regulatory approvals to the extent transferrable and assignable;</p> <p>b. the Debtors' equity interests in Medical Vision AB, Sweden, Insightra India Pvt Ltd;</p> <p>c. all of the Debtors' inventory, finished goods, raw materials, work in progress, packaging, supplies, and parts; and</p> <p>d. all furniture, fixtures, equipment, machinery, tools, office equipment, supplies, computers, telephones, and other tangible personal property</p> <p>(See APA at § 2)</p>
Excluded Assets	<p>Any interest in and to the following:</p> <p>a. all cash, accounts receivable, deposit accounts, notes receivable, and other rights to payment, and any security, lien, claim, remedy, or other right related to any of the foregoing;</p> <p>b. all rights to any claims and causes of action of any kind, whether sounding in law or in equity, including, but not limited to, all avoidance actions under chapter 5 of the Bankruptcy Code, and all rights in and to any insurance policy or policies covering such claims and the proceeds thereof; and</p> <p>c. any books and records Seller deems necessary for the administration and winding up of the estate.</p> <p>(See APA at § 3)</p>
Sale Order	<p>The APA requires entry of the Sale Order with a 'good faith' (363(m)) finding and a waiver under Bank. R. 6004(h).</p> <p>(See APA at § 4(f))</p>
Closing Conditions	<p>The Closing is conditioned upon the satisfaction of the conditions set forth in Section 4 of the APA, including, but not limited to:</p> <p>a. Purchaser and SteriPack both have agreed to indemnification terms acceptable to the Trustee, and have named the Trustee as an additional insured under insurance policies covering product liability claims;</p>

Agreement Provision	Summary Description
	<p>b. SteriPack shall have provided evidence of its ability to meet any obligations contemplated in the APA;</p> <p>c. The Court shall have entered an order authorizing the Trustee to assume and assign the Lease;</p> <p>d. By no later than five (5) days after execution of the APA, or such later dates upon which the parties shall mutually agree, Buyer, Seller, and Steripack shall have entered into an Escrow Agreement in a form acceptable to the parties in their discretion, and the sum of four hundred, fifty-thousand, and no/100 dollars (\$450,000.00) shall have been paid to Escrow Agent in accordance with the terms thereof;</p> <p>e. The Court shall have entered an order approving the APA in a form reasonably acceptable to the Trustee and Purchaser; and</p> <p>f. The order approving the APA shall authorize the sale of the Purchased Assets free and clear of liens, interests, and encumbrances pursuant to 11 U.S.C. § 363(f) and such order will have contained a finding under 363(m) and waiver as described in Bank. R. 6004(h).</p> <p>(See APA at § 4)</p>
Termination Events	<p>The APA may be terminated by the Trustee and/or Purchaser, as applicable, upon the occurrence of the events described in Section 12 of the APA.</p> <p>(See APA at § 12)</p>

39. The APA contains the following terms, conditions and provisions that are to be highlighted in this Motion pursuant to Local Rule 6004-1(b):

- a) **Sale to Insider.** The Purchaser is controlled by Kai Trompeter, Debtors' former Chief Executive Officer.
- b) **Private Sale.** While no auction or competitive bidding process is explicitly contemplated, the Trustee will consider any competing offers that might be made by no later than the deadline for objections to this Motion.
- c) **Deadlines.** Either party may terminate the APA if the conditions to Closing have not been satisfied by February 10, 2022. (See APA at § 12)
- d) **Deposit.** The APA requires payment of a deposit in the amount of \$50,000.00, which shall be refunded to Purchaser in the event that the APA is terminated for any reason other than the Purchaser's breach. (See APA at § 13)
- e) **Relief from Bankruptcy Rule 6004(h).** The APA requires that the Sale Order include a waiver of the stay as provided in Bankruptcy Rule 6004(h). (See APA at § 4(f))

Summary of Relief Requested

40. By this Motion, the Trustee seeks the entry of the Sale Order attached hereto as Exhibit B: (a) approving and authorizing the sale of the Purchased Assets free and clear of liens, claims, interests, and encumbrances; (b) authorizing and approving the APA; (c) authorizing the assumption and assignment of the Lease; and (d) granting certain related relief.

Analysis

A. The Trustee requests authority to sell the Property outside of the ordinary course of business.

41. Section 363(b)(1) of the Bankruptcy Code provides that “[t]he trustee, after notice and a hearing, may use, sell or lease, other than in the ordinary course of business, property of the estate.” Courts have held that proposed sales of property pursuant to section 363(b) should be approved upon a finding that the decision to enter into the transaction represents a reasonable business judgment. *See, e.g., In re Delaware & Hudson Ry. Co.*, 124 B.R. 169, 176 (Bankr. D. Del. 1991) (holding that a court must be satisfied that there is a “sound business reason” justifying sale of assets); *In re Phoenix Steel Corp.*, 82 B.R. 334, 335 (Bankr. D. Del. 1987) (stating that the elements necessary for approval of a section 363 sale are “that the proposed sale is fair and equitable, that there is a good business reason for completing the sale and the transaction is in good faith”).

42. Sales of property outside of the ordinary course of business may be by private sale, as opposed to public auction. *See* Bankruptcy Rule 6004(f)(1).

43. The Trustee believes that the sale of the Purchased Assets on terms substantially similar to those set forth in the APA represents a prudent and proper exercise of the Trustee’s business judgment and is supported by concrete business reasons.

44. The Purchase Price is the result of good faith, arm's length negotiations, and, based on communications with various parties in interest, the Trustee believes that the Purchase Price is reasonable.

45. The Trustee has reason to favor proceeding by way of private sale. Purchaser has submitted an offer that appears superior to any other offer that the Trustee might reasonably expect, if any other offer were even made. Indeed, no other prospective purchaser has come forward to express an interest in the Purchased Assets, and there is no reason to assume that the additional cost of establishing bidding procedures would be offset by a higher sale price. Under these circumstances, the Trustee believes that his best course of action is to propose a private sale to the Purchaser subject to any higher and better offers that might be made by the objection deadline, and to provide notice of the sale to parties in interest.

46. As an additional test of the fairness of the APA, the Trustee will consider additional proposals for the Purchased Assets through the date by which objections to this Motion are due. If an additional proposal is received by the Trustee in writing on or before the objection deadline that the Trustee determines to be higher and better than that under the APA, the Trustee will confer with the potential purchasers and use the hearing date on the Motion as a status conference to report to the Court on the status of competing offers and his proposed procedure to conduct a prompt auction and return to Court after the auction to approve the sale to the bidder submitting the highest and best offer for the assets.

47. If no additional bids are received by the Trustee, then he will proceed with the hearing as scheduled and request that the Court approve the APA for the reasons set forth above.

B. The Trustee requests that the sale be free and clear of all liens, claims, rights, and encumbrances.

48. Section 363(f) of the Bankruptcy Code provides:

The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if -

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

49. Section 363(f) is drafted in the disjunctive. Thus, satisfaction of any one of the elements would permit sale of the Purchased Assets free and clear of all liens, claims, rights, and encumbrances (collectively, “Interests”), *See, e.g., Citicorp Homeowners Servs., Inc. v. Elliot*, 94 B.R. 343, 345 (E.D. Pa. 1988).

50. To the extent there are any Interests encumbering the Purchased Assets, the Trustee believes that, as to each and every entity or person having any such Interest in the Property, at least one of the five criteria set forth in section 363(f) of the Bankruptcy Code will apply.

51. Based on a review of filed claims and other relevant records, the Trustee believes that creditors may assert the following Interests in the Purchased Assets:⁸

- a. A security interest in substantially all assets, securing a claim in the amount of \$2,385,523.29 held by David Gentile. The security agreement attached to Mr. Gentile’s proof of claim is dated November 6, 2020. See Proof of Claim No. 27. According to a search of public records, however, the UCC financing statement perfecting Mr. Gentile’s security interest was not filed until April 26, 2021, 90 days prior to the Petition Date. Because Mr.

⁸ The investigation of claims and Interests has not been concluded, and the Trustee reserves all rights, defenses, claims, counterclaims, rights of setoff, and any other rights that the Debtors or the Estates may have with respect to any such claims or Interests.

Gentile's security interest was perfected 90 days before the Petition Date, it is subject to avoidance pursuant to section 547 of the Bankruptcy Code, and is therefore in bona fide dispute.⁹

- b. An attorney's lien on patents and trademarks, securing a claim in the amount of \$21,139.34 held by Pitchford Fugett, PLLC. See Proof of Claim No. 12. Assuming that such attorney's lien is valid, enforceable, and otherwise not subject to any defenses, avoidance actions, or counterclaims, the proceeds of the sale will be more than sufficient to satisfy the claim.
- c. Two tax liens, securing claims totaling just over \$200.00. See Proof of Claim No. 4 (Montgomery County (Tennessee) Trustee (\$187.00) and Proof of Claim No. 10 (IRS (\$25.85). Assuming that such tax liens are valid, enforceable, and otherwise not subject to any defenses, avoidance actions, or counterclaims, the proceeds of the sale will be more than sufficient to satisfy the claims.

52. Applicable caselaw provides that a trustee may sell a debtor's assets free and clear of all Interests, with all Interests attaching to the net proceeds of the sale. *See, e.g., Folger Adam Security, Inc. v. DeMatteis/MacGregor, JV*, 209 F.3d 252, 259 (3d Cir. 2000) ("[T]he holdings of the courts suggest that any interest in property that can be reduced to a money satisfaction constitutes a claim for purposes of section 363(f) and, therefore, attaches to the proceeds of the sale."); *In re WPRV-TV, Inc.*, 143 B.R. 315, 321 (D.P.R. 1991); *Citicorp Homeowners*, 94 B.R. at 345.

53. To the extent that the Court determines that Interests exist that would not be extinguished as described above, the Trustee submits that holders of any such Interests should be deemed to have waived their rights if they fail to object to this Motion. *See, e.g., Folger Adam*, 209 F.3d at 265. As the United States Court of Appeals for the Third Circuit recognized, "Due Process requires 'notice reasonably calculated, under all circumstances, to apprise interested

⁹ Upon information and belief, Mr. Gentile owns all or substantially all of the equity interests in GPB Capital Holdings, LLC, which owns all of the interests in Odyssey Life Science Holdings, LLC, which holds a majority interest in Inshightra Medical. As such, it appears that Mr. Gentile is an insider for purposes of these bankruptcy cases. Pursuant to Section 547(b)(4)(B), therefore, any transfer made on account of antecedent debt owed to Mr. Gentile that was made in the year before the Petition Date would be avoidable.

parties of the pendency of the action and afford them an opportunity to present their objections.’’
Id. (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950)).

54. Moreover, the Trustee expects that any holders of Interests that may exist will consent or be deemed to have consented to the sale, given that the sale protects their Interests by maximizing the value of the Purchased Assets, and all Interests will attach to the net proceeds of the sale. The Trustee therefore anticipates that the sale will satisfy the second element of section 363(f). *See, e.g., Hargrave v. Township of Pemberton (In re Tabone, Inc.)*, 175 B.R. 855, 858 (Bankr. D.N.J. 1994) (by not objecting to sale motion, secured creditor deemed to have consented under section 363(f)(2)); *Pelican Homestead & Sav. Ass’n v. Wooten (In re Gabel)*, 61 B.R. 661, 667 (Bankr. W.D. La. 1985) (same).

55. Accordingly, the Trustee requests that the Court declare that the transfer of the Purchased Assets to the Purchaser will be free and clear of all Interests to the fullest extent permitted under section 363(f) of the Bankruptcy Code, with Interests attaching to the proceeds of the sale.

C. The Trustee requests that the Court approve the assumption and assignment of the Lease.

56. Section 365(a) of the Bankruptcy Code provides that a trustee, “subject to the court’s approval, may assume or reject any executory contract or unexpired lease of the debtor.” The standard governing bankruptcy court approval of a trustee’s decision to assume or reject an executory contract or unexpired lease is whether the trustee’s reasonable business judgment supports assumption or rejection. *See, e.g., Sharon Steel Corp.*, 872 F.2d 36, 39-40 (3d Cir. 1989); *In re Stable Mews Assoc., Inc.*, 41 B.R. 594, 596 (Bankr. S.D.N.Y. 1984).

57. The business judgment test “requires only that the trustee demonstrate that [assumption or] rejection of the executory contract will benefit the estate.” *Wheeling-Pittsburgh*

Steel Corp. v. W. Penn Power Co. (In re Wheeling-Pittsburgh Steel Corp.), 72 B.R. 845, 846 (Bankr. W.D. Pa. 1987) (quoting *Stable Mews Assoc.*, 41 B.R. at 596). Any more exacting scrutiny would hinder the administration of the estate and increase costs. See *Richmond Leasing Co. v. Capital Bank N.A.*, 762 F.2d 1303, 1311 (5th Cir. 1985).

58. In order to assign an executory contract, a trustee must first assume it. In order to assume a contract, a trustee must “cure, or provide adequate assurance that [he] will promptly cure,” any default, including compensation for any “actual pecuniary loss” relating to such default. 11 U.S.C. § 365(b)(1).

59. Once an executory contract is assumed, the trustee may then seek to assign the contract. Pursuant to section 365(f) of the Bankruptcy Code, a trustee may assign an assumed contract only if “adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease.” 11 U.S.C. § 365(f)(2). The meaning of “adequate assurance of future performance” depends on the facts and circumstances of each case, but should be given “practical, pragmatic construction.” See *Carlisle Homes, Inc. v. Arrari (In re Carlisle Homes, Inc.)*, 103 B.R. 524, 538 (Bankr. D.N.J. 1989); see also *In re Natco Indus., Inc.*, 54 B.R. 436, 440 (Bankr. S.D.N.Y. 1985) (adequate assurance of future performance does not mean absolute assurance that the debtor will thrive and pay rent). Among other things, adequate assurance may be given by demonstrating the assignee’s financial health and wherewithal to manage the type of enterprise or property assigned. See *In re Bygaph, Inc.*, 56 B.R. 596, 605-06 (Bankr. S.D.N.Y. 1986) (adequate assurance of future performance is present when prospective assignee of lease from the debtor has financial resources and has expressed willingness to devote sufficient funding to business in order to give it strong likelihood of succeeding).

60. The Trustee has agreed to pay \$8,848.79 towards satisfaction of the Cure Costs, and Purchaser has agreed to pay any Cure Costs in excess of that amount. The Trustee believes that Purchaser has the financial wherewithal to perform such obligation, and to perform according to the terms of the Lease from and after the closing.

61. Communications with Landlord have been ongoing, and the Trustee is hopeful that an agreement between the Trustee, Purchaser, and Landlord can be reached regarding the assumption of the Lease, but if no such agreement is reached, and Landlord objects to the proposed assumption and assignment, the Trustee will be present evidence establishing grounds for approval of the relief requested herein.

D. The Trustee requests that his proposed notice be deemed adequate.

62. Under Bankruptcy Rule 2002(a) and (c), the Trustee is required to notify creditors of the terms and conditions of the sale and the objection deadline. The Trustee respectfully submits that this Motion, which contains the type of information required under Bankruptcy Rule 2002(c), will enable interested parties to participate in the sale hearing if they so choose.

63. The Trustee shall promptly serve a copy of the Motion, including all attachments, by first-class United States mail, upon: (a) the Office of the United States Trustee; (b) counsel for Debtors; (c) the Purchaser; (d) all parties who filed proofs of claims in Debtors' cases; (e) any creditors identified as secured in UCC searches and the Debtors' schedules; (f) the Food and Drug Administration; (g) Intertek Certification AB and Eurofins Product Testing Italy SRL; (h) Smith & Nephew SRL; (i) Landlord; (j) all parties known to the Trustee to have expressed any interest in purchasing any assets of the Estates; and (k) all parties in interest who requested notice pursuant to Bankruptcy Rule 2002.

64. The Trustee submits that this notice constitutes good and adequate notice, and respectfully submits that no further notice is necessary.

No Prior Request

65. No prior request for the relief sought herein has been requested from this Court or any other court.

Conclusion

WHEREFORE, the Trustee respectfully requests that the Bankruptcy Court enter the Sale Order substantially in the form attached hereto as Exhibit B: (a) approving and authorizing the Sale of the Purchased Assets free and clear of liens, claims, interests, and encumbrances; (b) authorizing and approving the APA; (c) authorizing the assumption and assignment of the Lease; and (d) granting certain related relief; and granting such other relief as the Bankruptcy Court may deem appropriate.

Dated: January 13, 2022

COZEN O'CONNOR

/s/ Mark E. Felger

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