

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

|   |   |                         |
|---|---|-------------------------|
| In re:  | ) |                         |
|   | ) | Chapter 11              |
| PES HOLDINGS, LLC, <i>et al.</i> , <sup>1</sup> | ) | Case No. 19-11626 (LSS) |
|   | ) |                         |
| Debtors.  | ) | (Jointly Administered)  |
|   | ) |                         |

**DEBTORS’ MOTION FOR ENTRY  
OF AN ORDER (I) APPROVING THE AMENDMENT  
TO THE PURCHASE AGREEMENT AND (II) GRANTING RELATED RELIEF**

The above-captioned debtors and debtors in possession (the “Debtors”) hereby file this motion (the “Motion”) for entry of an order, substantially in the form attached hereto as **Exhibit A** (the “Order”): (a) approving the Amendment No. 2 (the “Amendment”) to the Purchase and Sale Agreement, dated January 17, 2020 (the “Purchase Agreement” and, as modified by the Amendment No. 1 dated February 13, 2020, the “Original Agreement”) between PES Ultimate Holdings (“PES Ultimate Holdings”), PES Intermediate, LLC (“PES Intermediate”, and, together with PES Ultimate Holdings, “Sellers”), and PES Holdings, LLC (the “Company”), and HRP Philadelphia Holdings, LLC (“HRP” or the “Purchaser”, and, together with the Company, the “Parties”) for the sale of 100 percent of the equity interests of the Company in connection with the Sale Transactions approved pursuant to the Confirmation Order;<sup>2</sup> and (b) granting other related relief. In support of the Motion, the Debtors respectfully state as follows.

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<sup>1</sup> The Debtors in these chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number, are: PES Holdings, LLC (8157); North Yard GP, LLC (5458); North Yard Logistics, L.P. (5952); PES Administrative Services, LLC (3022); PES Energy Inc. (0661); PES Intermediate, LLC (0074); PES Ultimate Holdings, LLC (6061); and Philadelphia Energy Solutions Refining and Marketing LLC (9574). The Debtors’ service address is: 1735 Market Street, Philadelphia, Pennsylvania 19103.

<sup>2</sup> *Order Confirming the Fourth Amended Joint Chapter 11 Plan of PES Holdings, LLC and Its Debtor Affiliates* [Docket No. 1004]. All capitalized terms used herein and not defined shall have the meaning ascribed to them in the Confirmation Order, the Purchase Agreement, or the Amendment, as applicable.

**Jurisdiction**

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 and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware, dated February 29, 2012 (the “Amended Standing Order”). The Debtors confirm their consent, pursuant to rule 7008 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”) and rule 9013-1(f) of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the “Local Rules”), to the entry of a final order by the Court in connection with this Motion to the extent that it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments in connection herewith consistent with Article III of the United States Constitution.

2. Venue 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, 365, 1122, 1123, 1127(6), and 1129 of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (the “Bankruptcy Code”), Rules 2002, 3020, 6004, 6006, 7062, 9007, and 9014 of the Bankruptcy Rules, and Rule 6004-1 of the Local Rules.

**Preliminary Statement**

4. That the Debtors stand on the threshold of closing the sale to HRP is an achievement that represents the largest realization of value for the Debtors’ estates to date and will enable the Debtors to consummate their chapter 11 plan. That is worthy of celebration. Just one year ago, on June 21, 2019, the Debtors sustained a catastrophic explosion at their refining facility that caused permanent damage to the Debtors and their stakeholders. Yet by February 2020, the Debtors had conducted a robust and complex sale process, and confirmed a plan of reorganization,

the linchpin of which was the sale of the equity interests of the Company to the Purchaser under the Original Agreement.

5. Since February 2020, the world as we know it has changed. The COVID-19 pandemic has led to unprecedented economic uncertainty, resulting in many counterparties abandoning acquisitions that were agreed upon prior to the pandemic, with others significantly re-trading on economic terms. While the Debtors have worked diligently to consummate the Original Agreement and effectuate the Plan, and believe that all conditions to the Purchaser's obligations to close other than closing deliverables have been satisfied, the Purchaser has taken the opposite position. Moreover, the Purchaser has taken the position that in the event it were to terminate the Original Agreement, it would be entitled to the return of the escrow deposit that it tendered.

6. The Debtors believe that under these circumstances it would be challenging to compel the Purchaser to close the Sale Transactions as reflected in the Original Agreement, and that the Debtors would face a challenge to their retention of the deposit. In addition, the Debtors are cognizant that seeking specific performance would likely require additional financing commitments to fund the necessary litigation. It is in this uncertain climate that the Parties successfully negotiated and executed the Amendment, which will provide increased closing certainty by: (i) obtaining an agreement by the Purchaser to close the Sale Transactions by June 26, 2020 lest the Purchaser forfeit \$15.0 million of its deposit (assuming the Court's approval of the Amendment prior to June 26, 2020); (ii) obtaining an agreement that the Base Purchase Price be increased by \$357,143.00 per calendar day (*i.e.*, \$2.5 million per week) from June 1, 2020 to the closing of the Sale Transactions (but excluding the Closing Date and any days, if any, which occur between the hearing regarding the Amendment and the Court's approval of the Amendment), as a means of covering the Debtors' carrying costs and incentivizing the Purchaser to close

expeditiously; and (iii) reducing the Base Purchase Price by \$27.5 million and providing that the Company and its subsidiaries will retain the emission reduction credits they presently own upon a closing of the Sale Transactions (rather than such credits being transferred to the Liquidating Trust at closing, as contemplated by the Original Agreement).

7. Entry into the Amendment was not a close call for the Debtors, and its approval should not either be for this Court. Approval of the Amendment will quickly realize value for the Debtors' estates by facilitating the closing of a transaction with a buyer that has been engaging with the Debtors since the beginning of the sale process, has already conducted extensive legal and on-site diligence, and has entered into the Amendment subject to the Amendment's approval by the Court. The Debtors' alternatives to the Amendment, in contrast, include (1) litigation with HRP and potentially its affiliates, (2) attempting to pursue a transaction with IRG (the Auction's back-up bidder) under an agreement with significant contingencies that render closing *at any time* far from certain; or (3) commencing a new sale process in the COVID-19 environment and a "busted deal" scenario, where deep discounts to previously disclosed prices are common, access to the Debtors' site is limited, and it is unclear whether *any* bidder would emerge. When considering the options available, entry into the Amendment is, without question, the optimal path forward for the Debtors.

8. Put simply, the Amendment provides the greatest combination of value and security for the Debtors' stakeholders. All of the Debtors' other options present significant risks and likely lengthy delays, and provide uncertain benefits. Moreover, the Amendment is consistent with the Debtors' Plan. The Plan was voted on by the Debtors' creditors prior to the selection of the Purchaser as the successful bidder, on the basis that the Sale Transactions would be subject to the consent of the Required Term Loan Lenders (as defined in the Plan) whose priority collateral

would be sold. The Amendment has the support of the Required Term Loan Lenders and the Official Committee of Unsecured Creditors (the “Creditors’ Committee”). Notably, the Amendment will not alter other agreements that were integral to the Plan, including the settlement with the United Steelworkers (“USW”) and the treatment of General Unsecured Creditors under the Plan.

9. For these reasons and the reasons set forth below, the Debtors respectfully request that the Court approve the Amendment.

### **Background**

10. The Debtors own and operate the largest oil refining complex on the United States Eastern seaboard that sits on an approximately 1,300 acre industrial site roughly 2.5 miles from downtown Philadelphia, Pennsylvania. Before the June 21, 2019 explosion that rendered it largely inoperable, the complex was comprised of two interconnected refineries that had a combined distillation and refining capacity of 335,000 barrels of crude oil per day. On July 21, 2019 (the “Petition Date”), each of the Debtors filed a petition with this Court under chapter 11 of the Bankruptcy Code.

#### **I. The Debtors’ Sale Process.**

11. In August 2019, the Debtors, with the assistance of PJT Partners, LP (“PJT”), began conducting an extensive marketing process to solicit interest in the Debtors’ assets to obtain value-maximizing bids for the benefit of all stakeholders. *See Declaration of Jeffrey S. Stein in Support of Amending the Purchase and Sale Agreement Between PES Holdings, LLC and HRP Philadelphia Holdings LLC* (the “Stein Declaration”) ¶ 9.

12. With the assistance of PJT and the Debtors’ management team, the Debtors contacted approximately 223 potential strategic and/or financial buyers, including, among others, refinery restart bidders, land development and/or real estate bidders, alternative fuel facility

bidders, and decommissioning and environmental remediation bidders. *See* Stein Declaration ¶ 9. Approximately thirty-eight parties executed nondisclosure agreements with the Debtors and engaged in discussions regarding a sale, thirty-six parties were granted access to the Debtors' virtual data room, and fifteen parties submitted indications of interest in the first round of the sale process conducted in accordance with the Bidding Procedures, in or around September 23, 2019. *Id.*

13. On October 10, 2019, the Debtors filed the *Joint Chapter 11 Plan of PES Holdings, LLC and its Debtor Affiliates* [Docket No. 462], the *Corrected Disclosure Statement for the Joint Chapter 11 Plan of PES Holdings, LLC and its Debtor Affiliates* [Docket No. 465], and the *Debtors' Motion for Entry of an Order (I) Approving the Adequacy of Information in the Disclosure Statement, (II) Approving the Solicitation and Notice Procedures, (III) Approving the Forms of Ballots and Notices In Connection Therewith, (IV) Scheduling Certain Dates with Respect Thereto, and (V) Granting Related Relief* [Docket No. 464] (the "Disclosure Statement Motion").

14. On November 14, 2019, the Court entered the *Order (A) Establishing Bidding Procedures, (B) Approving Bid Protections, and (C) Granting Related Relief* [Docket No. 583] (the "Bidding Procedures Order"), which approved the *Amended Bidding Procedures for the Submission, Receipt, and Analysis of Bids in Connection with the Sale of Substantially All of the Assets of the Debtors* [Docket No. 583-1] (the "Bidding Procedures"). After obtaining entry of the *Order (I) Approving the Adequacy of the Disclosure Statement, (II) Approving the Solicitation and Notice Procedures, (III) Approving the Forms of Ballots and Notices in Connection Therewith, (IV) Scheduling Certain Dates with Respect Thereto, and (V) Granting Related Relief* [Docket No. 671] (the "Disclosure Statement Order") approving the Disclosure Statement and

related solicitation procedures on December 11, 2019, the Debtors commenced solicitation on the Plan.

15. During the second and third rounds of the sale process, held from October 15, 2019 through January 9, 2020, Debtors provided potential bidders with more than 5,000 documents and conducted approximately forty-three site visits at the Debtors' refinery complex (it being pre-pandemic, the Debtors were able to facilitate visits to the site). At the conclusion of the third round of the sale process, Debtors received six bids, only four of which were binding. *See* Stein Declaration ¶ 10. Only two of the bids received were Qualified Bids, as defined by the Bidding Procedures.

16. On January 17, 2020, the Debtors, with the assistance of PJT, conducted an Auction pursuant to the Bidding Procedures between the only two parties that submitted Qualified Bids, HRP and Industrial Realty Group, LLC ("IRG"). At the conclusion of the Auction, HRP offered a purchase price of \$240 million, which was secured by a \$30 million deposit. This price represented an increase of \$86 million from the Qualified Bid HRP had submitted prior to the commencement of the Auction. Stein Declaration ¶ 12.

17. IRG's bid was a ten percent premium over HRP's bid, but IRG refused to offer a deposit greater than \$5 million, and IRG's Qualified Bid had material contingencies, including a 30-day financing contingency that would effectively permit IRG to walk away (only losing its \$5 million deposit, which pales in comparison to the overall Qualified Bid IRG submitted) at any time during this 30-day period. Stein Declaration ¶ 13. In short, IRG's abnormally small deposit and its financing contingency created real risk as to whether the bid (if accepted) would ever close.

18. Following the conclusion of the Auction, the Parties entered into the Purchase Agreement on January 17, 2020. On January 28, 2020, the Debtors filed the *First Amended Plan*

*Supplement for the First Amended Joint Chapter 11 Plan of PES Holdings, LLC and its Debtor Affiliates* [Docket No. 819] (the “First Amended Plan Supplement”), to which the Purchase Agreement was attached as Exhibit E.

19. On February 10, 2020, in response to objections filed, the Debtors filed the *Debtors’ Response to Objection of Official Committee of Unsecured Creditors, in Further Support of an Order Confirming the Debtors’ Third Amended Joint Chapter 11 Plan of Reorganization of PES Holdings, LLC and its Debtor Affiliates* [Docket No. 949] and the *Debtors’ Memorandum of Law of in Support Confirmation of the Third Amended Joint Chapter 11 Plan of PES Holdings, LLC and Its Debtor Affiliates* [Docket No. 950] (collectively, the “Confirmation Brief”), which discussed, in relevant part, the Debtors’ motivations for entering into the Original Agreement, and why the Original Agreement was in the best interests of the Debtors’ estates.

20. Following the Auction and before Confirmation, HRP’s bid was further improved when it increased its purchase price by \$12 million, for a total of \$252 million. Thus, on February 13, 2020, the Debtors entered into the Amendment No. 1, which included this increase to the purchase price, among other terms, and filed the Plan. On February 13, 2020, the Court entered the Confirmation Order, which approved the Debtors’ proposed sale to HRP, concluding that such sale was in the best interests of the Debtors’ estates and stakeholders.

## **II. The Amendment<sup>3</sup>**

21. Immediately after the Parties entered into the Original Agreement, the Parties began working towards satisfying their obligations set out in the Original Agreement in advance of the Closing Date. Despite the COVID-19 pandemic and the shutdown order issued by Pennsylvania’s

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<sup>3</sup> The following summary is included here solely for the convenience of the Court and the parties in interest. To the extent that there is any discrepancy between this summary and the Amended Agreement, the terms of the Amended Agreement shall control.



governor that restricted non-essential work in the area where the Debtors operate,<sup>4</sup> the Debtors were able to make meaningful progress toward closing. By late April 2020, the Debtors believed that the only meaningful hurdle to closing was approval of a soil management plan by the Pennsylvania Department of Environmental Protection (“PaDEP”).

22. However, prior to the Original Agreement’s May 31, 2020 outside date (which would allow either party to terminate the agreement, subject to certain limitations therein), the Purchaser informed the Debtors that the condition precedent to receiving the acknowledgment from PaDEP had not been satisfied. The Purchaser further informed the Debtors that it believed it had the right to retain its escrow deposit in the event the Sale Transactions under the Original Agreement did not close, but that the Purchaser was willing to continue to work with the Debtors on a commercial resolution of all outstanding matters. The Purchaser indicated that its costs had increased as a result of various factors, including the current condition of the property, and that it needed to resolve certain negotiations with third parties that would affect the cost and risk of the redevelopment project.

23. The Debtors considered multiple approaches to address these challenges, and ultimately recognized that continuing to constructively engage with the Purchaser would be the value-maximizing approach.

24. On June 6, 2020, the Debtors received a formal purchase price reduction request from HRP which cited difficulties created by the COVID-19 pandemic, increased environmental

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<sup>4</sup> See, e.g., Pa. Proclamation of Disaster Emergency (Mar. 6, 2020), <https://www.governor.pa.gov/wp-content/uploads/2020/03/20200306-COVID19-Digital-Proclamation.pdf>; Pa. Exec. Order for Individuals to Stay at Home (Apr. 30, 2020), <https://www.governor.pa.gov/wp-content/uploads/2020/04/20200401-GOV-Statewide-Stay-at-Home-Order.pdf>.

remediation costs, and expenses related to a post-confirmation bulkhead breach on the Debtors' property which requires a costly repair, among other items. *See* Stein Declaration ¶ 19.

25. After extensive negotiations, and following review and approval by the Debtors' wholly-disinterested Restructuring Committee, the Parties agreed upon the terms of the Amendment, a copy of which is attached to the Order as Exhibit 1. The Amendment includes certain modifications to the Original Agreement, including, without limitation, the Debtors' provision of a purchase price adjustment of \$27.5 million to the Purchaser. In exchange, the Purchaser has agreed to a firm closing date of no later than June 26, 2020, has agreed that the Base Purchase Price will increase by \$357,143 for each calendar day (*i.e.*, \$2.5 million per week) during the period starting on June 1, 2020 and ending on the Closing Date (but excluding the Closing Date and any days, if any, which occur between the hearing regarding the Amendment and the Court's approval of the Amendment) in order to at least cover the Debtors' carrying costs (thus incentivizing the Purchaser to close as expeditiously as possible), and has agreed that if closing does not occur by the later of (i) June 26, 2020 and (ii) one business day after the Amendment is approved by the Court, then the Debtors will immediately retain \$15 million from the current escrow, while reserving all of their rights to seek further relief.

#### **Relief Requested**

26. By this Motion, the Debtors respectfully request entry of the Order: (a) approving the Amendment; and (b) granting other related relief.

#### **Basis for Relief**

##### **I. Entry into the Amendment Is a Sound Exercise of the Debtors' Business Judgment.**

27. Section 363(b)(1) 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." Bankruptcy courts routinely authorize sales of a debtor's assets pursuant to Bankruptcy

Code section 363 if such sale is based upon the sound business judgment of the debtor. *See, e.g., In re Culp*, 550 B.R. 683, 697 (D. Del. 2015) (“In determining whether to authorize use, sale or lease of property of the estate under Section 363, courts require the [Debtor] to show that a sound business purpose justifies such actions. If the [Debtor’s] decision evidences a sound business purpose, then the Bankruptcy Court should approve the sale.”) (quoting *In re Montgomery Ward Holding Corp.*, 242 B.R. 147, 153 (D. Del. 1999)); *In re Schipper*, 933 F.2d 513, 515 (7th Cir. 1991) (“Under Section 363, the debtor in possession can sell property of the estate . . . if he has an ‘articulated business justification’”) (internal citations omitted); *In re Martin*, 91 F.3d 389, 395 (3d Cir. 1996) (“Under Section 363, the debtor in possession can sell property of the estate . . . if he has an ‘articulated business justification’ . . . .”) (quoting *In re Schipper*, 933 F.2d 513, at 515); *In re Abbotts Dairies of Pennsylvania, Inc.*, 788 F.2d 143 (3rd Cir. 1986); *Stephens Indus., Inc. v. McClung*, 789 F. 2d 386, 390 (6th Cir. 1986); *Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1070 (2d Cir. 1983); *In re Telesphere Commc’s, Inc.*, 179 B.R. 544, 552 (Bankr. N.D. Ill. 1999); *In re Delaware & Hudson Railway Co.*, 124 B.R. 169, 176 (D. Del. 1991).

28. 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 debtors’ conduct.” *In re Johns Manville Corp.*, 60 B.R. 612, 616 (Bankr. S.D.N.Y. 1986). In other words, if a debtor’s actions satisfy the business judgment rule, then the transaction in question should be approved under section 363(b)(1) of the Bankruptcy Code.

29. 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 (3d Cir. 1986); *In re Lionel Corp.*, 722 F.2d 1063 (2nd Cir. 1983). Indeed, the paramount goal in any proposed sale of property of the estate is to maximize the value received for the estate. *See In re Adams Res. Expl. Corp.*, No. 17-10866 (KG), at 12 (Bankr. D. Del. 2017) (“The relief requested in the Sale Motion is a necessary and appropriate step toward enabling the Debtor to maximize the value of its bankruptcy estate, and it is in the best interests of the Debtor, its estate and its creditors.”); *In re Mushroom Transp. Co.*, 382 F.3d 325, 339 (3d Cir 2004) (the debtor-in-possession “had a fiduciary duty to protect and maximize the estate’s assets”); *In re Food Barn Stores. Inc.*, 107 F. 3d 558, 564-65 (8th Cir. 1997) (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.”) (internal citations omitted).

30. Entering into the Amendment is an exercise of the Debtors’—and specifically the Debtors’ disinterested Restructuring Committee’s—business judgment. *See, e.g.*, Stein Declaration ¶ 33. As outlined in the Stein Declaration, the Amendment is clearly the value maximizing option when considering the Debtors’ other alternatives.

31. *First*, entering into the Amendment is superior to seeking to enforce remedies under the Original Agreement, either by (a) seeking to terminate the Original Agreement, retain HRP’s \$30 million earnest money deposit, and pursue another purchaser; or (b) filing a legal proceeding seeking to force HRP to close under the Original Agreement. *See* Stein Declaration ¶¶ 21–23.

32. Any action by the Debtors to enforce their remedies under the Original Agreement would likely result in value-destructive litigation. While the Debtors believe that they would prevail in retaining the escrow, litigation is never without risks. Additionally, litigation with HRP

would, at a minimum, delay the return of the escrow, which could jeopardize the Debtors' liquidity and ability to complete a second sale process with a new purchaser. *Id.* ¶ 22. Litigation with HRP seeking specific performance would be complicated further because HRP is a special purpose vehicle set up for purposes of this transaction. HRP does not currently have sufficient funds to close the Sale Transactions, so the Debtors would be forced instead to seek recourse against HRP's parent entity, Hilco Redevelopment Partners LLC ("Hilco"), who is not a named party to the Purchase Agreement. *Id.* ¶ 23. Veil-piercing litigation against Hilco, a well-capitalized opponent, would be lengthy, massively expensive, and would have (at best) a highly uncertain outcome.

33. *Second*, the Amendment is value-maximizing when compared to a potential sale with the Debtors' back-up bidder, IRG. IRG's backup bid contained a number of contingencies that make closing a transaction far from certain. For example, before closing IRG would need to reach agreement with Sunoco/Evergreen on deed modifications—a process that took HRP nearly six months to complete. To the best of the Debtors' knowledge, IRG had not even begun that process prior to confirmation and would be starting from scratch. As a result, IRG likely could not close the transaction—even if it desired to—for a number of months, during which the Debtors would exhaust their remaining liquidity and require additional financing. IRG would also have to obtain financing for the transaction, which could be challenging in the current economic environment. *Even if* IRG could satisfy these contingencies, the additional time required by IRG to do so would result in increased professional fees and carrying costs that could reduce stakeholders' ultimate recoveries. *Id.* ¶ 24.

34. *Third*, the Amendment remains a better option for the Debtors' stakeholders than conducting a new sale process. Given that the robust marketing process the Debtors recently conducted pre-COVID only resulted in two qualified bidders, IRG and HRP, it is unlikely that

another interested buyer exists who could match or exceed the consideration provided to the Debtors under the Amendment. This is particularly true given that the COVID-19 pandemic and continued economic and social uncertainty has dramatically chilled the M&A market, and because the Debtors will be entering the sale market following a “busted deal”, where purchasers often seek deep discounts to the previously disclosed sale price. *See id.* ¶ 25.

35. *Fourth*, while the Amendment provides for a downwards purchase price adjustment and the provision of the emission reductions credits presently owned by the Debtors to HRP, approval of the Amendment will nevertheless have multiple benefits for the Debtors. For example, HRP has agreed to waive certain closing conditions under the Original Agreement which it may have otherwise likely sought to assert against the Debtors. While the Debtors would dispute such assertions should the Purchaser raise them, securing such waivers by obtaining the Court’s approval of entry into the Amendment provides further assurance that the Sale Transactions will close, and obviates the risk and expense of further litigation.

36. *Finally*, the Amendment has the support of multiple important key constituencies, including, crucially, the overwhelming majority of the Term Loan Lenders. The Creditors’ Committee is also supportive of the Amendment, given that the Amendment will not disturb either the Debtors’ CBA Settlement with the USW or the treatment of General Unsecured Claims under the Plan. The only objecting party did not acknowledge, and failed to offer to provide, the substantial liquidity which would be necessary to pursue any alternative approach to entering into the Amendment. Accordingly, the Debtors respectfully submit that entering into the Amendment is an exercise of the Debtors’ business judgment, and that obtaining such benefits from the Amendment is in the best interests of the Debtors’ estates, creditors, and all parties in interest.

**II. Approval of the Amendment Is Consistent with the Court’s Findings of Fact and Conclusions of Law Set Forth in the Confirmation Order.**

37. The Debtors believe that none of the changes made to the Original Agreement by the Amendment impair any of the Court’s findings of fact or conclusions of law set forth in the Confirmation Order. The modifications contained in the Amendment were negotiated as part of the Debtors’ optimal response to developments in both the macroeconomic climate and in the Debtors’ chapter 11 cases since the Parties entered into the Original Agreement, and accordingly are in the best interests of the Debtors’ estates.

38. Thus, the Debtors respectfully request that the Court reaffirm those findings and conclusions in entering the Order with respect to the Amendment. Specifically, the Debtors submit that the Original Agreement as modified by the Amendment (the “Amended Agreement”) continues to satisfy the Court’s findings set forth in the Confirmation Order with regard to the Original Agreement:

- (a) that the Amended Agreement is an essential element of the Plan, and entry into the Amended Agreement is in the best interests of the Debtors, their estates, and their creditors (*see* Confirmation Order, at ¶ 64);
- (b) that the Debtors have exercised sound business judgment in determining to enter into the Amended Agreement and have provided adequate notice thereof (*id.*);
- (c) that the Amended Agreement has been negotiated in good faith and at arm’s length among the Debtors and the Purchaser thereunder, and any fees paid thereunder are deemed to have been extended, issued, and made in good faith. (*id.*); and
- (d) that in negotiating and consummating the Sale Transactions, the Purchaser has acted and will be acting in good faith for purposes of section 363(m) of the Bankruptcy Code (*id.*).

**III. Emergency Relief is Appropriate and in the Best Interests of the Debtors’ Estate and all Parties-in-Interest.**

39. The Debtors request that the Court approve the Amendment on an expedited basis, as doing so will reduce the diminution of estate funds and eliminate the risk that the Sale

Transactions do not close. By the terms of the Amendment, the Base Purchase Price is increased by \$357,143.00 per calendar day from June 1, 2020 until the closing of the Sale Transactions, but this \$357,143.00 per calendar day upward adjustment is paused each day that occurs between the date of the hearing regarding the Amendment and the Court's approval of the Amendment. As this Court is aware, there are significant carrying costs associated with maintaining the Debtors' assets, and each day that the transaction remains unclosed results in an additional and unnecessary cost of hundreds of thousands of dollars to the Debtors' estates. Delaying the relief requested also increases the risk that the Sale Transactions will not close. As previously noted, given the current distressed M&A market due to the COVID-19 pandemic, the Debtors seek to enter into the Amendment as expeditiously as possible to avoid the potential negative ramifications of failing to consummate the Sale Transactions and to ensure the Debtors receive the full benefit of the upward adjustment mechanic which provides the Debtors an additional \$357,143.00 per calendar day. The Parties are willing and able—and have the support of key parties in interest—to close as soon as the Court approves the Amendment. Accordingly, the Debtors request that the Court grant expedited relief to allow the Debtors to engage in this value-maximizing transaction, avoid litigation risk, and capitalize upon the Purchaser's willingness to close the Sale Transactions on the terms of the Amendment.

#### **Reservation of Rights**

40. Nothing contained herein is intended or shall be construed as: (a) an admission as to the validity of any prepetition claim against a Debtor entity; (b) a waiver of the Debtors' or any other party in interest's rights to dispute any prepetition claim on any grounds; (c) a promise or requirement to pay a prepetition claims; (d) an implication or admission that any particular claim is of a type specified or defined in this Motion or any order granting the relief requested by this Motion; (e) a request or authorization to assume any prepetition agreement, contract, or lease



pursuant to section 365 of the Bankruptcy Code; or (f) a waiver of the Debtors' or any other party in interest's rights under the Bankruptcy Code or any other applicable law.

**Waiver of Bankruptcy Rule 6004(a) and 6004(h)**

41. To implement the foregoing successfully, the Debtors request that the Court enter an order providing that notice of the relief requested herein satisfies Bankruptcy Rule 6004(a) and that the Debtors have established cause to exclude such relief from the fourteen-day stay period under Bankruptcy Rule 6004(h).

**Notice**

42. The Debtors will provide notice of this Motion to: (a) the U.S. Trustee; (b) the Committee; (c) the administrative agent under the Debtors' prepetition first lien term loan facility and counsel thereto; (d) the lenders under the Debtors' prepetition first lien term loan facility and counsel thereto; (e) Merrill Lynch Commodities, Inc. and counsel thereto; (f) NGL Energy Partners LP and counsel thereto; (g) the lenders under the Debtors' prepetition promissory note and counsel thereto; (h) counsel to ICBC Standard Bank Plc; (i) the lenders under the Debtors' debtor-in-possession financing facility and counsel thereto; (j) the United States Attorney's Office for the District of Delaware; (k) the Internal Revenue Service; (l) the state attorneys general for all states in which the Debtors conduct business; and (m) any party that has requested notice pursuant to Bankruptcy Rule 2002. The Debtors submit that, in light of the nature of the relief requested, no other or further notice need be given.

**No Prior Request**

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

**Conclusion**

44. For the foregoing reasons, the Debtors submit that approval of the Amendment is in the best interest of the Debtors, their creditors, and their estates and should be approved on an expedited basis.

*[Remainder of page intentionally left blank]*

WHEREFORE, for the reasons set forth herein, the Debtors respectfully request that the Court enter the Order (attached hereto as **Exhibit A**): (a) authorizing the Parties to enter into the Amendment for the sale of the Debtors' assets; (b) granting the other related relief requested in the Motion; and (c) granting such other and further relief as is just and proper.

Dated: June 17, 2020  
Wilmington, Delaware

*/s/ Laura Davis Jones*

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