

	)	Chapter 11
In re:	)	
	)	Case No. 18-50757 (AMK)
FIRSTENERGY SOLUTIONS CORP., <i>et al.</i> , <sup>1</sup>	)	(Jointly Administered)
	)	
Debtors.	)	
	)	Hon. Judge Alan M. Koschik
	)	

The above-captioned debtors and debtors in possession (collectively, the “Debtors”), file this motion (the “Motion”) for entry of an order (the “Order”), substantially in the form attached hereto as Exhibit A, (I) authorizing the Debtors to assume the Asset Purchase Agreement (the “APA”) <sup>2</sup>, dated as of March 9, 2018 by and among Debtor FirstEnergy Generation, LLC (“FG”) and non-Debtor affiliate Bay Shore Power Company (“BSPC”, and together with FG, the “Sellers”), and Walleye Energy, LLC (the “Buyer”), a copy of which is attached hereto as Exhibit B; (II) authorizing the sale by FG (the “FG Asset Sale”) of the components of the Bay Shore Facilities (as defined below), all other Purchased Assets provided for in Section 2.01 of

<sup>2</sup> Capitalized terms not defined herein have the meanings ascribed to them in the APA.

the APA and the Bay Shore Retired Assets (as defined below) (collectively, the “Bay Shore Assets”) owned by FG (the “FG Assets”) free and clear of all liens, claims and interests (collectively, and as further defined in the APA, the “Liens”), other than Permitted Liens pursuant to the terms and conditions of the APA; (III) approving the Purchase Price Allocation Agreement (the “Allocation Agreement”) between the Sellers, a copy of which is attached hereto as Exhibit C; (IV) authorizing FG to assume and assign to the Buyer certain contracts (each, an “Assumed FG Contract”, and collectively, the “Assumed FG Contracts”) according to the procedures described herein (the “Contract Assumption Procedures”); and (V) granting related relief. In support of this Motion, the Debtors respectfully represent as follows:<sup>3</sup>

#### **JURISDICTION**

1. The United States Bankruptcy Court for the Northern District of Ohio (the “Court”) has jurisdiction over this Motion pursuant to 28 U.S.C. § 1334(b). This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409. The statutory and legal predicates for the relief requested herein are sections 105(a), 363 and 365 of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (the “Bankruptcy Code”), Rules 2002, 6004, 6006, 9014 and 9019 of the Federal Rules of

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<sup>3</sup> In further support of this Motion, the Debtors herein incorporate by reference (i) the *Declaration of Albert Fratini in Support of Debtors’ Motion for Entry of an Order (I) Authorizing the Assumption of the Asset Purchase Agreement for the Sale of the Bay Shore Facilities and Related Assets; (II) Authorizing the Sale of Certain Assets of the Debtors Free and Clear of All Liens, Claims and Interests Other Than Permitted Liens Pursuant to the Asset Purchase Agreement; (III) Approving the Purchase Price Allocation Agreement Among the Sellers; (IV) Authorizing the Debtors’ Assumption and Assignment of Certain Executory Contracts and Unexpired Leases According to Certain Procedures; and (V) Granting Related Relief* (the “Fratini Declaration”), a copy of which is attached hereto as Exhibit D and (ii) the *Declaration of Donald R. Schneider in Support of Debtors’ Motion for Entry of an Order (I) Authorizing the Assumption of the Asset Purchase Agreement for the Sale of the Bay Shore Facilities and Related Assets; (II) Authorizing the Sale of Certain Assets of the Debtors Free and Clear of All Liens, Claims and Interests Other Than Permitted Liens Pursuant to the Asset Purchase Agreement; (III) Approving the Purchase Price Allocation Agreement Among the Sellers; (IV) Authorizing the Debtors’ Assumption and Assignment of Certain Executory Contracts and Unexpired Leases According to Certain Procedures; and (V) Granting Related Relief* (the “Schneider Declaration”), a copy of which is attached hereto as Exhibit E, each filed contemporaneously herewith.

Bankruptcy Procedure (the “Bankruptcy Rules”) and Rule 6004-1 of the United States Bankruptcy Court Rules for the Northern District of Ohio (the “Local Rules”).

### **BACKGROUND**

2. On March 31, 2018 (the “Petition Date”), each of the Debtors filed a voluntary petition with the Court under Chapter 11 of the Bankruptcy Code. The Debtors’ chapter 11 cases (the “Chapter 11 Cases”) are being jointly administered.

3. The Debtors continue to operate their businesses and manage their property as debtors and debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in these cases. On April 11, 2018, the United States Trustee for the Northern District of Ohio (the “US Trustee”) appointed the official committee of unsecured creditors (the “Committee”) pursuant to Bankruptcy Code section 1102.

4. Non-Debtor FirstEnergy Corp. (“FE Corp.”), an Ohio corporation, is the ultimate parent company for each of the Debtors in these Chapter 11 Cases and certain of FE Corp.’s non-Debtor affiliates. Debtor FirstEnergy Solutions Corp. (“FES”), an Ohio corporation, is the parent company for Debtors FE Aircraft Leasing Corp. (“FEALC”), an Ohio corporation, FG, an Ohio limited liability company and FirstEnergy Nuclear Generation, LLC (“NG”), an Ohio limited liability company. Debtor FG is the parent company for Debtors FirstEnergy Generation Mansfield Unit 1 Corp. (“FGMUC”), an Ohio corporation, and Norton Energy Storage L.L.C. (“NES”), a Delaware limited liability company.<sup>4</sup> Debtor FirstEnergy Nuclear Operating Company (“FENOC”), an Ohio corporation, is an affiliate of FES and a direct subsidiary of FE Corp.

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<sup>4</sup> FG also owns a 99% limited partnership interest in Nautica Phase 2 Limited Partnership, which has \$10 million in outstanding debt.

5. FES sells power and provides energy-related products and services to retail and wholesale customers primarily in Illinois, Maryland, Michigan, New Jersey, Ohio and Pennsylvania. FG owns and operates three fossil generation plants<sup>5</sup>, two in Ohio and one in Pennsylvania.<sup>6</sup> FG sells the entire output from its plants to FES pursuant to a power purchase agreement. Additionally, FG operates the Bay Shore fossil generation plant (the “Bay Shore Cogeneration Facility”) where certain of the assets are owned by non-Debtor BSPC and the other assets are owned by FG (as further described below).

6. A more detailed discussion of the Debtors’ background, including its business operations and capital structure, is set forth in the *Declaration of Donald R. Schneider, in Support of Chapter 11 Petitions and First Day Motions* [Docket No. 55].

#### **SPECIFIC BACKGROUND RELATING TO THE BAY SHORE SALE**

##### **A. The Bay Shore Cogeneration Facility**

7. As stated above, Debtor FG and non-Debtor affiliate BSPC together own and operate the Bay Shore Cogeneration Facility in Oregon, OH and its ancillary facilities, improvements, buildings and other structures (collectively, and together with the Bay Shore Cogeneration Facility, the “Bay Shore Facilities”). BSPC is wholly owned by non-Debtor FirstEnergy Ventures Corp., which in turn is wholly owned by FE Corp. FE Corp. is the ultimate parent company for each of the Debtors in these Chapter 11 Cases, including FG.

8. The Bay Shore Cogeneration Facility is a merchant generation plant that sells its electrical products into the PJM market. The Bay Shore Cogeneration Facility was originally a

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<sup>5</sup> FG also owns a steam turbine and combustion turbine at the Bay Shore Cogeneration Facility (as defined herein) in Oregon, OH, as further described herein, and a combustion turbine at the Eastlake Plant in Eastlake, OH.

<sup>6</sup> FG owns and operates the W. H. Sammis Plant in Stratton, OH, which is composed of seven units and the West Lorain Plant in Lorain, OH, which is composed of six units that run on heating oil. FG operates the entire Bruce Mansfield Plant in Shippingport, PA, where it owns two of the three units. FG owns approximately 6.17% of Unit 1 of the Bruce Mansfield Plant while approximately 93.83% of Unit 1 is under a leasehold interest.

four-unit coal plant that began operation in the 1950's. Unit 1 was repowered with a circulating fluidized bed boiler (the "CFB Boiler") in 2002 to burn pet coke, and Units 2-4 (the "Bay Shore Retired Assets") were permanently shut down in 2012 in response to the United States Environmental Protection Agency's introduction of the Mercury and Air Toxics Standards (MATS) requirements.

9. BSPC owns the CFB Boiler as well as other assets and rights pertaining to the operation of the CFB Boiler, and FG owns the remaining assets and rights relating to the Bay Shore Facilities including the Unit 1 steam turbine generator, combustion turbine, associated auxiliary equipment, support buildings and equipment for plant operations. FG also owns the Bay Shore Retired Assets and all of the Owned Real Property.

10. BSPC is party to the Bay Shore Cogeneration Facility's pet coke supply agreement to purchase 100 percent of the fuel supply for the CFB Boiler. BSPC purchases pet coke to generate steam from Morgan Stanley/Boich through a take-or-pay contract (approximately 508,000 tons per year at \$50 per ton) and Morgan Stanley/Boich purchases the pet coke via a one-mile conveyor system from BP-Husky at its nearby refinery (the "Refinery"). BSPC also sells some of the steam back to the Refinery via a one-mile steam pipeline under a steam supply agreement, while selling the majority of the steam generated to FG. The current pet coke and steam contracts expire on October 1, 2020.

11. FG purchases steam from BSPC under a contract with fixed and variable monthly charges and sells operations and maintenance services to BSPC under a contract with fixed monthly charges. FG employs 70 out of the 74 employees who work at the Bay Shore Facilities. Non-Debtor affiliate FirstEnergy Service Company ("FESC") employs the remaining four employees.

## **B. Events Leading to the Bay Shore Sale**

12. In July 2016, FirstEnergy management announced its plan to sell or deactivate the Bay Shore Cogeneration Facility Unit 1 by October 2020, commensurate with the termination date of the Morgan Stanley/Boich pet coke contract. The Debtors and their non-Debtor affiliates ultimately determined that a sale of the Bay Shore Assets (the “Bay Shore Sale”) was the best way to maximize value for all stakeholders as part of the Debtors’ overall restructuring efforts.

13. As set forth in the Fratini Declaration, in May 2017, the FirstEnergy corporate development team began a marketing process for the Bay Shore Facilities. Fratini Declaration, ¶ 2. In order to ensure that the Debtors’ rights were adequately protected through the process, the Debtors retained certain governance rights, including approval rights with respect to marketing materials, potential buyers, review of bids, selection of the final buyer, and purchase agreement documentation. *Id.* The Debtors worked with Lazard Frères & Co., LLC (“Lazard”), Akin Gump Strauss Hauer & Feld LLP (“Akin Gump”) and Alvarez & Marsal North America, LLC (“Alvarez & Marsal”) as advisors in conjunction with the marketing process. Specifically, the sale process involved an initial outreach to 26 prospective buyers, of which nine signed confidentiality agreements and conducted due diligence with respect to acquisition of the Bay Shore Facilities. *Id.*, ¶ 6. FE Corp. received five initial bids, and after review by FE Corp., three of the five bidders progressed to phase two of the sale process. *Id.*, ¶ 7. Phase two involved additional due diligence and equal access to information for each of the three remaining potential buyers, which included site visits, management presentations and the consideration of a draft asset purchase agreement. *Id.*, ¶ 8.

14. FE Corp.’s non-Debtor subsidiary FESC and FES, after considering the proposals received as a result of the marketing process, chose the Buyer as the winning bidder in November 2017, as the Buyer had submitted the highest and best offer for the Bay Shore Assets.

*Id.*, ¶ 9. Following months of discussions with FES and the Buyer to negotiate the final terms of the asset purchase agreement, and arms' length and good-faith negotiations with FES regarding the allocation of the value from the sale of the Bay Shore Facilities between the Sellers, FE Corp. determined that the agreed-upon price for the Bay Shore Sale and the allocation of value from such sale between the Sellers was fair. *Id.*, ¶ 11. On March 9, 2018, the Sellers and the Buyer entered into the APA, pursuant to which, subject to Court approval, the Buyer has agreed to purchase the Bay Shore Assets for approximately \$38.7 million (the "Initial Purchase Price"), subject to customary purchase price adjustments and the establishment of an escrow as set forth therein.

15. In connection with the sale process, the Debtors worked with their professionals in order to ensure that the Debtors' rights and those of their creditors were adequately protected. In furtherance of this effort, prior to entry into the APA, the Debtors' professionals previewed the FG Asset Sale with representatives of their creditor groups, including the following: (a) members of an ad hoc group of beneficial holders of a majority in outstanding aggregate amount of (i) tax-exempt pollution control revenue bonds ("PCRBS") supported by the secured fixed-rate pollution control revenue notes ("PCNs") issued by FG and NG; (ii) PCRBS supported by secured PCNs issued by NG; (iii) PCRBS supported by secured PCNs issued by FG; and (iv) unsecured senior notes issued by FES; and (b) an ad hoc group of beneficial holders of a majority in outstanding amount of certain pass-through certificates issued in connection with the sale-leaseback transaction for Unit 1 of the Bruce Mansfield Plant (collectively, the "Creditor

Groups”).<sup>7</sup> The Debtors also discussed the FG Asset Sale with the Committee prior to filing this Motion.

16. The principal terms and provisions of the APA are summarized in the following table:<sup>8</sup>

APA Term	Summary Description
<b>Parties</b>	<u>Sellers:</u> FIRSTENERGY GENERATION, LLC BAY SHORE POWER COMPANY <u>Buyer:</u> WALLEYE ENERGY, LLC
<b>Purchase Price</b>	In consideration for the sale, assignment, conveyance, transfer and delivery of the Purchased Assets and the Bay Shore Retired Assets and the assumption of the Assumed Liabilities, the Buyer shall pay as the Purchase Price to the Sellers cash in an aggregate amount equal to U.S. \$38,700,000 plus inventory adjustment amounts and minus any amounts attributable to any penalty for a shortfall of steam supply to the Refinery. <b><u>See APA, §§ 2.06, 2.07.</u></b>
<b>Purchased Assets</b>	The Purchased Assets are (a) the Real Property; (b) the Bay Shore Facilities; (c) the Tangible Personal Property; (d) the Assumed Contracts; (e) the Transmission and Interconnection Facilities; (f) all related rights of the Sellers in and to any causes of action against a third party except for certain excluded rights under a limestone supply agreement; (g) the Intellectual Property; (h) all Records or copies of Records; (i) all other assets and rights held by the Sellers for use primarily (if located at the Bay Shore Facilities) or exclusively (if not located at the Bay Shore Facilities) in connection with their ownership, lease, use or operation of the Bay Shore Facilities; (j) all ERCs and allocated Emissions Allowances (with respect to the Bay Shore Retired Assets, only for periods on and after January 1, 2019); (k) the Inventory and any rights to supplier Inventory warranties; (l) all related Claims of either Seller against third parties to the extent based on facts or events arising on or after the Closing Date; (m) all related Permits; (n) all Purchased Warranties; and (o) all electric capacity rights and obligations. <b><u>See APA, § 2.01.</u></b>
<b>Bay Shore Retired</b>	The Bay Shore Retired Assets are the retired coal-fired generating

<sup>7</sup> The Creditor Groups are party to that certain Process Support Agreement, dated as of March 30, 2018 (the “PSA”), which PSA the Debtors have sought, and received Court approval, to assume [Docket Nos. 203, 509]. Under the PSA, the Debtors must give reasonable notice to, and consult with, the “Supporting Parties” prior to entry into any transaction outside the ordinary course of business.

<sup>8</sup> This summary is provided for the convenience of the Court and parties in interest. To the extent there is any conflict between this summary and the APA, the latter governs in all respects.



APA Term	Summary Description
<b>Assets</b>	equipment owned by FG and located on the Real Property. <u>See APA, § 1.01.</u>
<b>Assumed Liabilities</b>	The Assumed Liabilities are (a) any Liabilities arising on or after the Closing Date under the Assumed Contracts except any arising from or relating to any breach or default by a Seller before the Closing Date; (b) any Liabilities with respect to any related Proceeding arising on or after the Closing Date; (c) Buyer Environmental Liabilities; (d) all Liabilities arising out of the Buyer's employment of, or its hiring process of, the Transferred Employees after the Closing Date, and all Liabilities related to or arising out of any violation of Law by the Buyer in connection with its hiring process for all Business Employees; (e) any Liabilities for any Taxes for which the Buyer is liable under Section 8.02, and Taxes attributable to the ownership or use of any of the Purchased Assets or the Bay Shore Retired Assets after the Closing Date (except for Taxes for which a Seller is liable pursuant to Section 2.04(h) or Section 8.02); and (f) any Liabilities arising from the termination of right of entry and consent agreements by and between Norfolk Southern Railway Company and FirstEnergy Generation Corp., to the extent such agreements are terminated and are not assigned to the Buyer at Closing. <u>See APA, § 2.03.</u>
<b>Assumed Contracts</b>	All Assumed Contracts owned by the Sellers that are proposed to be assigned to the Buyer in connection with the Bay Shore Sale are set forth on Schedule 2.01(d) to the APA. <u>See APA, § 2.01(d).</u> BSPC will assign the Assumed Contracts that are not Assumed FG Contracts, including the Pet Coke Supply Agreement, Steam Supply, Facilities, and PetCoke Handling Agreement, Ash Disposal Agreement, Post Commercial PetCoke Disposal Agreement and various other executory contracts relating to the operation of the Bay Shore Facilities.
APA Provision	Summary Description
<b>Closing Conditions</b>	<p>The APA includes conditions to obligations of the Buyer and the Sellers typical and customary for transactions of this kind, including, without limitation:</p> <ul style="list-style-type: none"> <li>• <u>Buyer and Sellers:</u> (a) There must not be any order or law prohibiting the consummation of the Bay Shore Sale; (b) approval from FERC and other applicable governmental bodies shall have been received; (c) the Sellers and the Buyer shall have received the consents set forth on Schedule 9.01(c); and (d) the Order sought in this Motion shall have been entered, and the Order shall not have been reversed, stayed, modified or amended, and any appeal has been dismissed. <u>See APA, § 9.01.</u></li> </ul>

APA Provision	Summary Description
	<ul style="list-style-type: none"> <li> <p><u>Buyer</u>: (a) Each Seller shall have performed in all material respects the covenants and agreements contained in the APA; (b) the Sellers' representations and warranties shall be true, correct and complete, except for certain of those which would not have a Sellers Material Adverse Effect; (c) since the Execution Date there shall not have occurred and be continuing a Sellers Material Adverse Effect; (d) the Buyer shall have received evidence of the release of all Liens other than Permitted Liens; (e) the Buyer shall have obtained with respect to the Real Property confirmation that the Title Company stands ready, willing and able to issue an owner's title insurance policy; (f) the Buyer shall have received evidence that any Purchased Assets or Bay Shore Assets that are collateral shall be released from the Lien of the FEG Mortgage Indenture; (g) the Buyer shall have received each of the items set forth in Section 2.10(a); (h) the Buyer shall have received evidence of the Subdivision Approval consistent with the Subdivision Plan, and the Subdivision Plan shall have received government approvals and been properly recorded; (i) the Buyer shall have received the Confirmatory Agreement and Haul Road and Bridge Easement Agreement, each duly executed by the Port Authority; (j) the Sellers shall have submitted all documentation required to transfer to the Buyer all ERCs and Emission Allowances that are included in the Purchased Assets; (k) the Buyer shall have received written confirmation from the Sellers that all monetization arrangements with Morgan Stanley Bay Shore LLC relating to the Purchased Assets or the Business have been terminated, or will be terminated at Closing; and (l) subject to the Sellers' rights to eliminate this condition, the Ohio EPA shall have issued, and the Buyer shall have received a true, correct and complete copy of, a renewal of the Current NPDES Permit. <u>See APA, § 9.02.</u></p> </li> <li> <p><u>Sellers</u>: (a) The Buyer shall have performed in all material respects the covenants and agreements contained in the APA; (b) the Buyer's representations and warranties shall be true, correct and complete, except for certain of those which would not have a Buyer Material Adverse Effect; (c) since the Execution Date there shall not have occurred and be continuing a Buyer Material Adverse Effect; (d) Sellers shall have received written confirmation that all monetization arrangements with Morgan Stanley relating to the Purchased Assets or the Business have been terminated, or will be</p> </li> </ul>

APA Provision	Summary Description
	<p>terminated at Closing, on terms that impose no Liabilities on the Sellers on and after the Closing Date; (e) FG shall not have filed a motion to reject or otherwise terminate its obligations under the APA, and the Bankruptcy Court shall not have granted any such motion or otherwise entered an order rejecting or terminating FG's obligations under the APA; and (f) the Sellers shall have received each of the items set forth in Section 2.10(b). <u>See APA, § 9.03.</u></p>
<b>Representations and Warranties</b>	<p>The APA includes representations and warranties and covenants made or agreed to by the Buyer and the Sellers typical and customary for transactions of this kind, including, without limitation, representations, warranties and covenants relating to (i) corporate existence and power; (ii) corporate authorization; (iii) governmental authorization; (iv) noncontravention; (v) finders' fees; (vi) required consents; (vii) financial statements; (viii) absence of certain changes; (ix) contracts; (x) available funds; (xi) solvency; (xii) litigation; (xiii) compliance with laws; (xiv) title to Purchased Assets; (xv) employees; (xvi) environmental matters; (xvii) permits; (xviii) taxes; (xix) personal property; (xx) real property; sufficiency of purchased assets; (xxi) intellectual property; (xxii) insurance; (xxiii) operations and maintenance; and (xxiv) credit support. <u>See APA, Art. III, IV.</u></p>
<b>Covenants</b>	<p>The APA includes covenants made or agreed to by the parties typical and customary for transactions of this kind, including, without limitation, covenants relating to (i) the conduct of business through the Closing; (ii) access to information; (iii) casualty; (iv) condemnation; (v) exclusivity; (vi) real property; (vii) pre- and post-Closing transition cooperation; (viii) the provision of assets; (ix) actions in bankruptcy; (x) access; (xi) financing; (xii) cooperative action; (xiii) public announcements; (xiv) schedules; (xv) bankruptcy court filings, (xvi) PJM capacity supply obligations; (xvii) approvals; (xviii) notices of certain events; (xix) employee matters; (xx) confidentiality; (xxi) bulk sales laws; (xxii) reactive service from the Bay Shore Cogeneration Facility; and (xxiii) insurance. <u>See APA, Art. V, VI.</u></p>
<b>Seller Protections</b>	<p>The Sellers are entitled to terminate the APA prior to Closing if the incumbent unions have failed to enter into CBA Modifications due to the Buyer's failure to fulfill its obligations to provide Comparable Employee Benefits under Section 7.09(b), and upon terminating for such cause the Sellers are entitled to a liquidated damages remedy of \$3,870,000 paid by the Buyer. <u>See APA, §§ 7.09, 11.01(j), 11.02(b), 11.03.</u></p>

APA Provision	Summary Description
<b>Allocation of Proceeds</b>	Upon consummation of the Bay Shore Sale, the Purchase Price will be allocated between the Sellers on the basis provided in the Allocation Agreement. <u>See APA, § 2.06(f).</u>

### C. The Purchase Price Allocation Agreement

17. In order to effectuate the Bay Shore Sale, FG and BSPC entered into the Allocation Agreement, which allocates the proceeds of the Bay Shore Sale (the “Sale Proceeds”) between FG and BSPC. Specifically, under the Allocation Agreement the Initial Purchase Price paid by the Buyer and the Escrow Amount shall be allocated 13% to FG (“FG’s Share”)<sup>9</sup> and 87% to BSPC (“BSPC’s Share”, and together with FG’s Share, the “Respective Shares”).

18. The Allocation Agreement further provides that BSPC will pay 100% of the aggregate Escrow Amount from BSPC’s Share. Any time that the Escrow Agent releases a portion of the Escrow Amount to BSPC, all of such amount will be retained by BSPC. The portion of the Purchase Price of the Bay Shore Sale not included in the Initial Purchase Price (the Closing Adjustment Amount and BSPC’s portion of the Steam Supply Shortfall Penalty) shall be allocated 100% to BSPC. Title insurance policy, real property conveyance fees and transfer taxes, and related charges, together with the other costs and expenses related to the sale and transfer of the Real Property will be paid by FG. Other costs and expenses in connection with the consummation of the transaction will be allocated between FG and BSPC according to their Respective Shares.

19. As set forth in the Schneider Declaration, FESC retained an independent third-party consulting firm (the “Consulting Firm”) on behalf of FG and BSPC to provide a report (the “Valuation”) calculating, among other things, (i) an estimated fair market value of the Bay Shore

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<sup>9</sup> From FG’s Share, the trustee (the “Mortgage Trustee”) under the FEG Mortgage Indenture shall be paid the Payoff Amount.

Facilities and (ii) a reasonable allocation of the value of the plant between the co-owners FG and BSPC. Schneider Declaration, ¶ 6.

20. Following completion of the Valuation, representatives of FG and BSPC engaged in good-faith, arms'-length negotiations regarding the Allocation Agreement with the assistance of their respective advisors and counsel. Schneider Declaration, ¶ 8. Ultimately, the Sellers agreed upon the allocation of value provided in the Allocation Agreement. The allocation of 13% of the Initial Purchase Price to FG is an amount that FG and its advisors concluded was fair and reasonable. *Id.*, ¶ 9. Further, FG will not bear the responsibility of funding the escrow, which will provide additional value to the Debtors.

#### **D. The Assumed FG Contracts**

21. The APA provides that FG will assume and assign to the Buyer certain Assumed FG Contracts associated with the Bay Shore Facilities as part of the Bay Shore Sale. These Assumed FG Contracts include, but are not limited to, union, environmental and waste management and machinery and maintenance contracts, an interconnection service agreement with PJM and railway agreements.<sup>10</sup>

22. Each of the Assumed FG Contracts is connected with the Bay Shore Facilities or other assets involved in the Bay Shore Sale. In many instances, the counterparties to the Assumed FG Contracts (each, a “Counterparty” and collectively, the “Counterparties”) provide unique services obtained on terms that would be favorable to the Buyer.

##### **i. Contract Assumption Procedures**

23. In connection with the potential assumption and assignment of the Assumed FG Contracts, the Debtors believe it is necessary to establish Contract Assumption Procedures by

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<sup>10</sup> Under the terms of the APA, the Sellers will also assign certain contracts to the Buyer to which BSPC or FESC, but not any of the Debtors, is party. For the avoidance of doubt, the Debtors do not seek authorization in this Motion for the assumption and assignment of these contracts.

which (i) the Counterparties receive appropriate and sufficient notice of the potential assumption and assignment of the Assumed FG Contracts in the form of a filed and served notice (the “Assumption Notice”) substantially in the form attached as Annex 2 to the proposed Order, (ii) the Debtors and the Counterparties can reconcile the Debtors’ cure obligations with respect to the Assumed FG Contracts, if any, in accordance with Bankruptcy Code Section 365, and (iii) such Counterparties can object to the assumption and assignment of the Assumed FG Contracts and any applicable cure amounts (each, a “Cure Amount”, and collectively, the “Cure Amounts”).

The Contract Assumption Procedures are as follows:

- The hearing (the “Hearing”) to authorize the assumption of the Debtors and assignment to the Buyer of the Assumed FG Contracts shall take place on June 8, 2018 at 10:00 a.m. (prevailing Eastern Time), before the Honorable Alan M. Koschik, United States Bankruptcy Judge for the United States Bankruptcy Court for the Northern District of Ohio, at the John F. Seiberling Federal Building & U.S. Courthouse, 455 U.S. Courthouse, 2 South Main Street, Akron, Ohio 44308.
- At the Hearing, the Debtors will seek Court approval of the assumption and assignment to the Buyer of the Assumed FG Contracts. The Debtors and their estates reserve any and all rights with respect to any Assumed FG Contracts that are not ultimately assigned to the Buyer.
- Within fourteen (14) calendar days after the filing of this Motion with the Court (the “Assumption Notice Deadline”), the Debtors shall file with the Court and serve on each counterparty (each, a “Counterparty” and collectively, the “Counterparties”) to an Assumed FG Contract a notice (the “Assumption Notice”) substantially in the form attached as Annex 2 to the Order.
- The Assumption Notice shall include, without limitation, the cure amount (each, a “Cure Amount”), if any, that the Debtors believe is required to be paid to the applicable Counterparty under Bankruptcy Code Section 365(b)(1)(A) and (B) for each of the Assumed FG Contracts, subject to the consent of the Buyer. If a Counterparty wishes to object to the Cure Amount for, or the assumption and assignment to the Buyer of, the applicable Assumed FG Contract, the Counterparty must file with the Court and serve on the Contract Objection Notice Parties (as defined below) a written objection (a “Contract Objection”) on or before the Contract Objection Deadline (as defined below).
- Any Contract Objection shall: (i) be in writing; (ii) comply with the Bankruptcy Rules; (iii) be filed with the Clerk of the Court, United States Bankruptcy Court for the Northern District of Ohio, at 455 U.S. Courthouse, 2 South Main Street,



Akron, Ohio 44308, together with proof of service, on or before 4:00 p.m. (prevailing Eastern Time) on the date that is seven (7) calendar days after the filing and service of the Assumption Notice (the “Contract Objection Deadline”); (iv) be served, so as to be actually received on or before the Contract Objection Deadline, upon the Contract Objection Notice Parties; and (v) state with specificity the grounds for such objection, including, without limitation, the fully liquidated cure amount and the legal and factual bases for any unliquidated cure amount that the Counterparty believes is required to be paid under Bankruptcy Code Sections 365(b)(1)(A) and (B) for the applicable Assumed FG Contract, along with the specific nature and dates of any alleged defaults, the pecuniary losses, if any, resulting therefrom and the conditions giving rise thereto.

- The “Contract Objection Notice Parties” are as follows: (a) the Debtors, FirstEnergy Solutions Corp., 341 White Pond Drive, Akron, OH, 44320 (Attn: Rick Giannantonio); (b) counsel for the Debtors, Akin Gump Strauss Hauer & Feld LLP, One Bryant Park, 44th Floor, New York, NY 10036-6745 (Attn: Lisa Beckerman and David Botter), and 1333 New Hampshire Avenue, N.W., Washington, DC 20036 (Attn: Scott Alberino); (c) local counsel for the Debtors, Brouse McDowell LPA, 388 South Main St., Suite 500, Akron, OH 44311 (Attn: Kate Bradley and Marc Merklin); (d) the Office of the United States Trustee, Howard M. Metzenbaum U.S. Courthouse, 201 Superior Avenue East, Suite 441, Cleveland, OH 44114 (Attn: Tiiara Patton); (e) counsel for FE Corp., Jones Day, 901 Lakeside Avenue, Cleveland, OH 44114 (Attn: Heather Lennox); (f) counsel to the Committee, Milbank, Tweed, Hadley & McCloy, 28 Liberty Street, New York, NY 10005 (Attn: Evan Fleck); (g) counsel for BSPPC, Squire Patton Boggs, 4900 Key Tower, 127 Public Square, Cleveland, OH 44114 (Attn: Dynda Thomas); and (h) counsel for the Buyer, Orrick, Herrington & Sutcliffe, LLP, 51 W 52nd Street, New York, NY 10019 (Attn: Laura Metzger).
- If, after the Assumption Notice Deadline, additional executory contracts or unexpired leases of FG are determined to be Assumed FG Contracts, as soon as practicable thereafter and in no event less than seven (7) business days before the date of the Hearing, the Debtors shall file with the Court and serve, by overnight delivery, on the applicable Counterparties an Assumption Notice, and such Counterparties shall file any Contract Objections not later than two (2) business days prior to the date of the Hearing.
- If no Contract Objection is timely received with respect to an Assumed FG Contract: (i) the Counterparty to such Assumed FG Contract shall be deemed to have consented to the Bay Shore Sale and the assumption by FG and assignment to the Buyer of the Assumed FG Contract assumed and assigned in connection therewith, and be forever barred from asserting any objection with regard to such assumption and assignment (including, without limitation, with respect to adequate assurance of future performance by the Buyer); (ii) any and all defaults under the Assumed FG Contract and any and all pecuniary losses related thereto shall be deemed cured and compensated pursuant to Bankruptcy Code Section 365(b)(1)(A) and (B) upon payment of the Cure Amount set forth in the

Assumption Notice for such Assumed FG Contract; and (iii) the Cure Amount set forth in the Assumption Notice for such Assumed FG Contract shall be controlling, notwithstanding anything to the contrary in such Assumed FG Contract, or any other related document, and the Counterparty shall be deemed to have consented to the Cure Amount and shall be forever barred from asserting any other claims (including, without limitation, any additional cure or other default amounts) related to such Assumed FG Contract against FG and its estates or the Buyer or the Bay Shore Assets, or the property of any of them, that existed prior to the commencement of the Hearing.

- To the extent that the parties are unable to consensually resolve any Contract Objection prior to the commencement of the Hearing, including, without limitation, any dispute with respect to the cure amount required to be paid to the applicable Counterparty under Bankruptcy Code Sections 365(b)(1)(A) and (B) (any such dispute, a “Cure Dispute”), such Contract Objection will be adjudicated at the Hearing or at such other date and time as may be fixed by the Court; provided, however, that if the Contract Objection relates solely to a Cure Dispute, the Assumed FG Contract may be assumed by FG and assigned to the Buyer on the condition that the cure amount the Counterparty asserts is required to be paid under Bankruptcy Code Section 365(b)(1)(A) and (B) (or such lower amount as agreed to by the Counterparty) is deposited in a segregated account by the Debtors pending the Court’s adjudication of the Cure Dispute or the parties’ consensual resolution of the Cure Dispute. In no event shall the Buyer be responsible for any amount paid for cure in excess of such amount agreed to by the Buyer.

#### **E. The Sale Notice**

24. Upon the filing of this Motion, the Debtors will give notice of the FG Asset Sale to all parties in interest substantially in the form and manner set forth in Annex 1 to the proposed Order (the “Sale Notice”). As set forth in the Sale Notice, any objections to the FG Asset Sale or the relief requested in connection with the FG Asset Sale (a “Sale Objection”) must (i) be in writing; (ii) comply with the Bankruptcy Rules; (iii) set forth the specific basis for the Sale Objection; (iv) be filed with the Clerk of the Court, United States Bankruptcy Court for the Northern District of Ohio, at 455 U.S. Courthouse, 2 South Main Street, Akron, Ohio 44308, together with proof of service, on or before 4:00 p.m. (prevailing Eastern Time) on June 1, 2018 (the “Sale Objection Deadline”); and (v) be served, so as to be actually received on or before the Sale Objection Deadline, upon the Sale Objection Notice Parties (as defined in the Sale Notice).



If a Sale Objection is not filed and served in accordance with the foregoing requirements, the objecting party shall be barred from objecting to the FG Asset Sale and shall not be heard at the hearing on the Motion (the “Hearing”), and the Court may enter the Order without further notice to such party.

### **RELIEF REQUESTED**

25. By this Motion, the Debtors respectfully request entry of the Order, pursuant to Bankruptcy Code Sections 105(a), 363 and 365 and Bankruptcy Rules 2002, 6004, 6006, 9014 and 9019, (i) authorizing the assumption of the APA, (ii) authorizing the FG Asset Sale free and clear of all Liens, other than Permitted Liens, under the terms and conditions of the APA, (iii) approving the Allocation Agreement, (iv) authorizing FG to assume and assign to the Buyer the Assumed FG Contracts in accordance with the Contract Assumption Procedures, and (v) granting related relief.

### **BASIS FOR RELIEF REQUESTED**

#### **A. Assumption of the APA Is a Proper Exercise of the Debtors’ Business Judgment and Should Be Authorized**

26. The Debtors seek authority, pursuant to Bankruptcy Code Sections 365(a) and 105(a), to assume the APA. Bankruptcy Code Section 365(a) provides, in pertinent part, that a debtor in possession, “subject to the court’s approval, may assume or reject an executory contract or unexpired lease of the debtor.” 11 U.S.C. § 365(a). When determining whether to approve a debtor’s decision to assume or reject an executory contract or unexpired lease, courts in the Sixth Circuit apply the “business judgment” test. *See In re Greektown Holdings, L.L.C.*, 51 Bankr. Ct. Dec. 173, \*3 (Bankr. E.D. Mich. 2009) (“Courts initially apply a ‘business judgment’ and ‘benefit to the estate’ test under § 365(a) to determine whether or not a debtor should be allowed to assume an executory contract.”) (citation omitted); *In re VisionAmerica, Inc.*, 47 Collier

Bankr. Cas. 2d (MB) 166 (Bankr. W.D. Tenn. 2001) (adopting the “flexible ‘business judgment’ test” for the assumption of executory contracts) (citation omitted); *In re Federated Dep’t. Stores, Inc.*, 131 B.R. 808, 811 (S.D. Ohio 1991) (“Courts traditionally have applied the business judgment standard in determining whether to authorize the rejection of executory contracts and unexpired leases”); *Allied Tech., Inc. v. R.B. Brunemann & Sons, Inc.*, 25 B.R. 484, 495 (Bankr. S.D. Ohio 1982) (“As long as assumption of a lease appears to enhance a debtor's estate, Court approval of a debtor in possession's decision to assume the lease should only be withheld if the debtor's judgment is clearly erroneous, too speculative, or contrary to the provisions of the Bankruptcy Code, and particularly of 11 U.S.C. § 365.”).

27. Under the business judgment test, debtors are given significant discretion when requesting to assume or reject an executory contract or unexpired lease. *See Phar-Mor, Inc. v. Strouss Bldg. Assocs.*, 204 B.R. 948, 952 (N.D. Ohio 1997) (“Courts should generally defer to a debtor's decision whether to reject an executory contract.”) (citation omitted); *Allied Tech., Inc. v. R.B. Brunemann & Sons, Inc.*, 25 B.R. at 495 (“Court approval of a debtor in possession's judgment that assumption of a lease is in the best interest of the debtor's business should not be withheld on the basis of a second-guessing of the debtor's judgment”). Accordingly, so long as a debtor’s decision is reasonable and benefits the bankruptcy estate, courts generally defer to the business judgment of the debtor’s management.

28. Here, the Debtors’ decision to assume the APA satisfies the business judgment test. FE Corp. marketed the Bay Shore Facilities to twenty-six initial prospective buyers, of which nine signed confidentiality agreements and conducted due diligence with respect to the acquisition of the Bay Shore Facilities. Three of the five prospective buyers who submitted initial bids progressed to phase two of the sale process. The phase two bidders conducted

additional due diligence with equal access to information, including site visits, management presentations and the consideration of a draft asset purchase agreement. The Sellers were unable to find a bidder willing to pay a higher and better price than the Buyer for, and as such believe that the sale price reflected in the APA accurately represents the fair market value of, the Bay Shore Facilities. Thus, the Debtors reasonably determined that assumption of the APA was appropriate and would benefit the estate.

29. Bankruptcy Code Section 105(a) provides additional authority for the Court to authorize the assumption of the APA. Bankruptcy Code Section 105(a) provides, in pertinent part, that a court may “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code].” 11 U.S.C. § 105(a). Entry of an order authorizing the assumption of the APA would be an appropriate exercise of the Court’s equitable powers, as the requested relief is in the best interests of the Debtors and their estates, is consistent with the Bankruptcy Code, and will maximize value for the Debtors’ stakeholders.

30. Based on the foregoing, the Debtors respectfully submit that they have exercised reasonable business judgment in assuming the APA and that such assumption is in the best interests of all parties in interest in these Chapter 11 Cases. Accordingly, the Court should authorize the Debtors to assume the APA.

**B. The FG Asset Sale Is Appropriate and in the Best Interests of the Debtors’ Estates and Should be Authorized**

i. The FG Asset Sale Should Be Approved as an Exercise of the Debtors’ Sound Business Judgment

31. Bankruptcy Code Section 363(b) provides that a debtor may sell property of the estate outside the ordinary course of business after notice and a hearing. 11 U.S.C. § 363(b)(1). Courts have found that a debtor’s sale or use of assets outside the ordinary course of business should be approved if the debtor can demonstrate “some articulated business justification,” as

established by the Second Circuit in *In re Lionel Corp.*, which decision has been adopted in this Circuit. *Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1070 (2d Cir. 1983) *adopted by Stephens Indus., Inc. v. McClung*, 789 F.2d 386, 390 (6th Cir. 1986) (sale may be authorized “when a sound business purpose dictates such action.”). Once the Debtors articulate a valid business justification, there is under the business judgment rule “a presumption that in making the business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action was in the best interests of the company.” *In re S.N.A. Nut Co.*, 186 B.R. 98, 102 (Bankr. N.D. Ill. 1995) (quoting *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985) (citation omitted)); *see also Comm. of Asbestos-Related Litigants v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 60 B.R. 612, 615-16 (Bankr. S.D.N.Y. 1986) (“a presumption of reasonableness attaches to a Debtor’s management decisions”) (citation omitted).

32. The Debtors exercised sound business judgment in pursuing a private sale of the FG Assets to the Buyer. The Sellers engaged with a number of interested buyers through an extensive and multi-step prepetition marketing and sale process, and the Buyer presented the highest-value offer for the Bay Shore Assets through that process. Fratini Declaration, ¶ 4-9. The Debtors evaluated the financial results and projections for the FG Assets and determined that for the amounts attributable to the Debtors, the sale and divestiture of the FG Assets from the Debtors’ business will be beneficial to both the liquidity of the estates and the Debtors’ creditors.

33. The Debtors believe that it is unlikely that a higher value would be obtained for the Debtors’ estates through a formal auction process. First, following the extensive marketing process, the Debtors are not aware of any other party who would offer a higher or otherwise better bid for the Bay Shore Assets or FG Assets. Second, even if there was additional interest,

the FG Assets compose only a small portion of the fair value of the Bay Shore Assets and therefore the Debtors would receive only a small fraction of any potential increase in purchase price from an auction process. Third, going through a formal auction process would take a substantial amount of time and impose additional costs on the Debtors' estates. There is also no certainty that the Buyer would remain in place for such a process at the same fair value that is proposed in the Bay Shore Sale. Finally, FG is incurring costs from continuing to hold the FG Assets and these costs will increase with any delay in the sale process.

34. Courts have routinely authorized asset sales under Bankruptcy Code Section 363 without a public auction. *See, e.g., In re Vanguard Nat. Res., LLC*, Case No. 17-30560 (MI) (Bankr. S.D. Tex. July 12, 2017) [Docket No. 1053] (authorizing the sale of five oil and gas leases and sixteen wells in the absence of a public auction); *In re Int'l Shipholding Corp.*, Case No. 16-12220 (SMB) (Bankr. S.D.N.Y. May 2, 2017) [Docket No. 737] (authorizing the private sale of a carrier vessel following a marketing process consistent with the process used to sell a similar vessel outside of chapter 11); *In re SunEdison, Inc.*, Case No. 16-10992 (SMB) (Bankr. S.D.N.Y. Aug. 16, 2016) [Docket No. 1002] (authorizing a private sale of debtor assets where the asset purchase agreement provided for the sale of both debtor and non-debtor assets); *In re Hawker Beechcraft, Inc.*, Case No. 12-11873 (SMB) (Bankr. S.D.N.Y. Nov. 29, 2012) [Docket No. 857] (authorizing a private sale where a public auction would require the estate to incur substantial additional costs, but would result in no additional value to the estate); *In re Dewey & Leboeuf LLP*, 2012 Bankr. LEXIS 5116 at \*17-18 (Bankr. S.D.N.Y. Nov. 1, 2012) (finding a good business reason to sell assets pursuant to a private sale where a public sale would be more costly).

35. Thus, the Debtors submit that the APA constitutes the highest and best offer for the FG Assets, and will provide a greater recovery for the Debtors' estates than would be provided by any other available alternative, including by any formal auction process. As such, the Debtors' determination to sell the FG Assets pursuant to the terms of the APA is a valid and sound exercise of the Debtors' business judgment.

ii. The FG Asset Sale Should Be Approved "Free and Clear" Under Bankruptcy Code Section 363(f)

36. Bankruptcy Code Section 363(f) permits a debtor to sell property free and clear of another party's interest in such property if: (1) applicable non-bankruptcy law permits such a free and clear sale; (2) the holder of the interest consents; (3) the interest is a lien and the sale price of the property exceeds the value of all liens on the property; (4) the interest is in bona fide dispute; or (5) the holder of the interest could be compelled in a legal or equitable proceeding to accept a monetary satisfaction of its interest. 11 U.S.C. § 363(f). Because Bankruptcy Code Section 363(f) is stated in the disjunctive, it is only necessary to meet one of the five conditions of the section. *In re Shary*, 152 B.R. 724, 725 (Bankr. N.D. Ohio 1993) ("the five conditions enumerated under 363(f) are disjunctive and, as such, a sale thereunder can be authorized if the trustee can prove any of the five conditions").

37. The only lien on the FG Assets is the lien of the Mortgage Trustee under the FEG Mortgage Indenture. The Debtors anticipate that the requirements of Bankruptcy Code Section 365(f) will be satisfied because the Mortgage Trustee will consent to a release of its lien under the FEG Mortgage Indenture and to the FG Sale, as FG's Share of the Initial Purchase Price will be paid to the Mortgage Trustee to the extent of the Payoff Amount. If necessary, the Debtors believe that they will be able to provide additional evidence to demonstrate at the Hearing that they have satisfied one or more of the conditions under Bankruptcy Code Section 363(f).

Accordingly, the Debtors should be permitted to sell the FG Assets free and clear of any interests in the FG Assets, including any Liens.

iii. The FG Asset Sale Has Been Proposed in Good Faith and Without Collusion, and the Buyer Is a Good Faith Purchaser

38. Bankruptcy Code Section 363(m) provides that

[t]he 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).

39. In the Sixth Circuit, Bankruptcy Code Section 363(m) grants finality to a sale to a good faith purchaser authorized under Section 363(b) and thus maximizes value for the parties to the sale. *See Official Comm. of Unsecured Creditors v. Anderson Senior Living Prop., LLC (In re Nashville Senior Living, LLC)*, 620 F.3d 584, 594 (6th Cir. 2010).

40. A good faith purchaser under Bankruptcy Section 363(m) is one who purchases assets for value, in good faith and without notice of adverse claims. *Made in Detroit, Inc. v. Official Comm. of Unsecured Creditors of Made in Detroit, Inc. (In re Made in Detroit, Inc.)*, 414 F.3d 576, 581 (6th Cir. 2005) (adopting the "traditional equitable definition of a 'good faith purchaser,'" defined as "one who purchases the assets for value, in good faith, and without notice of adverse claims.") (quoting *In re Rock Indus. Mach. Corp.*, 572 F.2d 1195, 1197 (7th Cir. 1978)); *see also In re Abbotts Dairies of Penn., Inc.*, 788 F.2d 143, 147 (3d Cir. 1986). To be covered under the statutory protection of Bankruptcy Code Section 363(m), the purchaser must demonstrate that it purchased the assets in good faith and that it did so for value. *In re Made in Detroit, Inc.*, 414 F.3d at 581 (citation omitted). To show lack of good faith, a party "must

demonstrate that there was fraud or collusion between the purchaser and the seller or the other bidders, or that the purchaser's actions constituted 'an attempt to take grossly unfair advantage of other bidders.'" *Id.* (citing *255 Park Plaza Assocs. Ltd. P'ship v. Conn. Gen. Life Ins. Co. (In re 255 Park Plaza Assocs. Ltd. P'ship)*, 100 F.3d 1214, 1218 (6th Cir. 1996)).

41. The Debtors submit that the Buyer is a good faith purchaser and is entitled to the protections of Bankruptcy Code Section 363(m). *See Weingarten Nostat, Inc. v. Serv. Merch. Co.*, 396 F.3d 737, 741 (6th Cir. 2005) ("the primary goal of § 363(m) is to protect good faith purchasers"). The Buyer seeks to purchase the Bay Shore Assets under the APA for substantial, fair and reasonable value. Further, the Sellers and the Buyer entered into the APA in good faith and after arms'-length negotiations, during which all parties were represented by competent counsel. Fratini Declaration, ¶ 11. The Buyer had no constructive or actual notice of any adverse claims. There is no indication of any fraud or collusion between the Sellers and the Buyer, or an attempt to take grossly unfair advantage of other bidders or similar conduct that would cause or permit the FG Asset Sale to be avoided under Bankruptcy Code Section 363(n).

42. The APA is a good-faith agreement negotiated, proposed and entered into by the Sellers and the Buyer without collusion, in good faith and from arms' length bargaining positions. It should therefore be entitled to the protections of Bankruptcy Code Section 363(m), and should not be subject to future avoidance or recovery under Bankruptcy Code Section 363(n). *See In re Nashville Senior Living, LLC*, 620 F.3d at 594 ("Applying subsection (m) in this context promotes subsection (m)'s salutary policy of affording finality to judgments approving sales in bankruptcy.") (internal quotations mark omitted) (citation omitted).

43. Accordingly, the Debtors believe that the Buyer should be entitled to the full protections of Bankruptcy Code Section 363(m).



iv. Adequate and Reasonable Notice of the FG Asset Sale Will Be Provided

44. The Sale Notice satisfies the requirements of Bankruptcy Rule 6004(a). The Sale Notice (a) will be served in a manner that provides at least 21-days' notice of the date, time and location of the Hearing, (b) informs interested parties of the deadlines for objecting to the FG Asset Sale, and (c) otherwise includes all information relevant to parties interested in or affected by the FG Asset Sale.

v. The Buyer Is Not an Appointed Professional in These Chapter 11 Cases

45. Pursuant to Local Rule 6004-1, neither the Buyer nor any of its affiliates, members, officers, directors, shareholders or any of their respective successors or assigns is a professional person appointed in these Chapter 11 Cases by order of the Court (an "Appointed Professional"), employee or affiliate of an Appointed Professional or member of an Appointed Professional's immediate family.

**C. The Allocation Agreement Is a Proper Exercise of the Debtors' Business Judgment and a Fair and Equitable Compromise or Settlement and Should Be Approved**

i. The Allocation Agreement Is a Proper Exercise of the Debtors' Business Judgment

46. As stated above, the Debtors have a sound business justification for selling the FG Assets pursuant to the terms of the APA. Similarly, the Allocation Agreement reflects a sound business determination by the Debtors, an appropriate allocation of Sale Proceeds and is justified. The Debtors believe that an orderly and negotiated agreement between the Sellers maximizes their recovery on the FG Assets as it avoids a protracted and contentious allocation process over the parties' entitlement to the Sale Proceeds. The Allocation Agreement is the result of reasonable, good faith and informed business decisions by the Debtors, based upon, among other things, the advice of their advisors, to maximize the recovery of the Debtors' estates. As such, the Debtors' negotiation and execution of the Allocation Agreement is a valid

and sound exercise of the Debtors' business judgment, the Allocation Agreement should be approved and the Debtors should be authorized to carry out the transactions under the Allocation Agreement.

ii. The Allocation Agreement Reflects a Fair and Equitable Compromise or Settlement Between the Sellers

47. Bankruptcy Rule 9019(a) provides that, “[o]n motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement.” Fed. R. Bankr. P. 9019(a). Bankruptcy courts have “significant discretion to approve . . . a [trustee’s] proposed settlement by virtue of Bankruptcy Rule 9019(a). *In re Junk*, 566 B.R. 897, 911 (Bankr. S.D. Ohio 2017) (quoting *Rankin v. Brian Lavan & Assocs., P.C. (In re Rankin)*, 438 F. App’x 420, 426 (6th Cir. 2011)). Courts must review settlement agreements to determine if they are “fair and equitable” before approving them under Bankruptcy Rule 9019(a). *See Reynolds v. Comm.*, 861 F.2d 469, 473 (6th Cir. 1988). In conducting this review, the court must “apprise itself of the underlying facts and [. . .] make an independent judgment as to whether the compromise is fair and equitable.” *Hindelang v. Mid-State Aftermarket Body Parts Inc. (In re MQVP, Inc.)*, 477 F. App’x 310, 313 (6th Cir. 2012) (quoting *Reynolds*, 861 F.2d at 473). However, the court need only apprise itself of the relevant facts and law so that it can make an informed and intelligent decision and “need not hold a mini-trial or write an extensive opinion every time [it] approves or disapproves a settlement.” *In re MQVP, Inc.*, 477 F. App’x at 313.

48. A compromise may be approved as being fair and equitable when it is above the lowest point in the range of reasonableness. *See In re Junk*, 566 B.R. at 912 (“courts must canvass the issues in order to determine whether the settlement falls below the lowest point in the range of reasonableness, and if the settlement falls within a range of reasonable compromises, it may be approved”); *see also In re Nicole Gas Prod.*, 518 B.R. 429, 441 (Bankr. S.D. Ohio 2014).

49. As stated above, representatives of FG and BSPC negotiated and entered into the Allocation Agreement in order to effectuate a value-maximizing sale of the Bay Shore Assets and distribute the Sale Proceeds between the Sellers in a fair and efficient manner. The Sellers retained the Consulting Firm to provide, through the Valuation, values for the assets that each of FG and BSPC are contributing to the Bay Shore Sale. Schneider Declaration, ¶ 6. FG's Share as allocated in the Allocation Agreement is above the lowest point in the range of reasonableness. Further, because FG will not be required to fund any part of the Escrow Amount or the reimbursement amount required by Section 2.07(b)(ii) of the APA (if any), FG will obtain the full amount of FG's Share on the Closing Date. The Allocation Agreement was negotiated entirely between the representatives of FG and BSPC and serves as a reasonable settlement of any issues related to the allocation of the Sale Proceeds. The Allocation Agreement is a fair and equitable compromise or settlement, and the court should therefore approve it under Bankruptcy Rule 9019.

**D. The Assumption and Assignment of the Assumed FG Contracts According to the Contract Assumption Procedures Should Be Authorized**

i. The Assumption of the Assumed FG Contracts Reflects the Debtors' Sound Business Judgment

50. Bankruptcy Code Section 365(a) provides, in pertinent part, that a debtor in possession, "subject to the court's approval, may assume or reject any executory contract or [unexpired] lease of the debtor." 11 U.S.C. § 365(a). Courts in the Sixth Circuit apply the "business judgment" test to determine whether to approve a debtor's decision to assume or reject an executory contract or unexpired lease. *In re Federated Dep't. Stores, Inc.*, 131 B.R. at 811. Under the business judgment test, a court should approve a debtor's proposed assumption of executory contracts if such assumption will benefit the estate. *See In re Greektown Holdings, L.L.C.*, 51 Bankr. Ct. Dec. 173, \*3. Debtors in the Northern District of Ohio are given

significant discretion when requesting to assume or reject an executory contract or unexpired lease. *Phar-Mor, Inc. v. Strouss Bldg. Assocs.*, 204 B.R. at 952.

51. Pursuant to Section 365(b)(1) of the Bankruptcy Code, for a debtor to assume an executory contract, it must “cure, or provide adequate assurance that the [debtor] will promptly cure,” any default, including compensation for any “actual pecuniary loss” relating to such default, and provide “adequate assurance of future performance” under such contract. 11 U.S.C. § 365(b)(1).

52. The Debtors’ decision to assume the Assumed FG Contracts satisfies the business judgment test. The Debtors reasonably determined that the assumption of the Assumed FG Contracts would benefit the Debtors’ estate by enabling a higher sale price in the APA. Through the Contract Assumption Procedures the Debtors will provide adequate assurance to Counterparties that the Debtors will provide cure according to applicable Cure Amounts, which are subject to the prior consent of the Buyer according to the terms of the APA. The Contract Assumption Procedures also provide adequate assurance of future performance by providing that FG will assign the Assumed FG Contracts to the Buyer and furthermore having procedures for Counterparties to be heard on any claims of lack of adequate assurance. FG’s assumption of the Assumed FG Contracts is therefore proper.

ii. Adequate Assurance of Future Performance Exists for the Assignment of the Assumed FG Contracts

53. Once an executory contract is assumed, the trustee or debtor in possession may elect to assign such contract. *See L.R.S.C. Co. v. Rickel Home Ctrs. (In re Rickel Home Centers, Inc.)*, 209 F.3d 291, 299 (3d Cir. 2000) (“[t]he Code generally favors free assignability as a means to maximize the value of the debtor’s estate”). Bankruptcy Code Section 365(f) provides that the “trustee may assign an executory contract . . . only if the trustee assumes such contract . .

. and adequate assurance of future performance is provided.” 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 *In re Tama Beef Packing, Inc.*, 277 B.R. 407, 411 (Bankr. N.D. Iowa 2002); *Carlisle Homes, Inc. v. Arrari (In re Carlisle Homes, Inc.)*, 103 B.R. 524, 538 (Bankr. D.N.J. 1989); *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). Among other things, adequate assurance may be given by demonstrating the assignee’s financial health and experience in managing the type of enterprise or property assigned. *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 a lease from the debtor has financial resources and has expressed willingness to devote sufficient funding to the business in order to give it a strong likelihood of succeeding).

54. The Buyer has agreed pursuant to the APA to assume, pay, perform and discharge all liabilities under the Assumed Contracts, including the Assumed FG Contracts, upon the Closing Date except for any liabilities relating to a breach of or default by a Seller of such Assumed FG Contracts prior to the Closing Date. The Buyer has represented to the Sellers that, upon the Closing Date, the Buyer will have financial resources that are more than sufficient to perform its obligations under the Assumed FG Contracts assumed and assigned by FG. If necessary, the Debtors will adduce additional facts at the Hearing to address any objection and demonstrate the financial wherewithal of the Buyer and its willingness and ability to perform under the Assumed FG Contracts. The Hearing therefore will provide to this Court and other interested parties ample opportunity to evaluate and, if necessary, challenge the ability of the

Buyer to provide adequate assurance of future performance with respect to the Assumed FG Contracts to be assumed and assigned.

iii. The Contract Assumption Procedures Provide Sufficient Notice and Are Appropriate

55. As a procedural matter, “[a] proceeding to assume, reject, or assign an executory contract or unexpired lease . . . is governed by Rule 9014.” Fed. R. Bankr. P. 6006(a). Bankruptcy Rule 9014 provides that “[i]n a contested matter not otherwise governed by these rules, relief shall be requested by motion, and reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought.” Fed. R. Bankr. P. 9014(a). The notice and hearing requirements for contested matters under Bankruptcy Rule 9014 are satisfied if appropriate notice and an opportunity for hearing are given in light of the particular circumstances. *See* 11 U.S.C. § 102(1)(A) (defining “after notice and a hearing” or a similar phrase to mean such notice and an opportunity for hearing “as [are] appropriate in the particular circumstances”).

56. The Debtors respectfully submit that the proposed Contract Assumption Procedures are appropriate and reasonably tailored. Upon receipt of the Assumption Notice, the Counterparties will be given the opportunity to object to the Cure Amounts and assumption and assignment of the Assumed FG Contracts.

57. The Contract Assumption Procedures provide that any Counterparty that fails to object to the proposed assumption and assignment of any Assumed FG Contract will be deemed to consent to the assumption and assignment of the applicable Assumed FG Contract pursuant to Bankruptcy Code Section 365 and on the terms set forth in the Order, notwithstanding any anti-alienation provision or other restriction on assignment contained in the applicable contract or lease. Courts have routinely granted such relief. *See, e.g., In re Schwab Industries, Inc.*, Case

No. 10-60702 (RK) (Bankr. N.D. Ohio May 4, 2010) [Docket No. 408] (ordering that any person that did not object to the assumption and assignment of executory contracts prior to the hearing would not be heard at the hearing); *see also Hargrave v. Twp. of Pemberton (In re Tabone, Inc.)*, 175 B.R. 855, 858 (Bankr. D.N.J. 1994) (finding that by not objecting to the sale motion, a creditor was deemed to consent); *Pelican Homestead v. Wooten (In re Gabel)*, 61 B.R. 661, 667 (Bankr. W.D. La. 1985) (same).

58. Establishing the Contract Assumption Procedures will streamline the administration of these Chapter 11 Cases and enhance the efficiency of the reorganization process by eliminating substantial legal expenses that would otherwise be incurred if multiple hearings were held on separate motions with respect to every Assumed FG Contract. Bankruptcy Rule 6006(e) allows a trustee to seek authority to assign multiple executory contracts or unexpired leases in one motion if the contracts or leases are to be assigned to the same assignee. Fed. R. Bankr. P. 6006(e). The Debtors seek for FG to assign each and all of the Assumed FG Contracts to the Buyer.

59. Bankruptcy Rule 6006(f) sets forth six requirements that motions to assume or reject multiple executory contracts or unexpired leases must satisfy. These requirements are procedural in nature. A motion to assume or reject multiple executory contracts or unexpired leases that are not between the same parties shall:

- 1) state in a conspicuous place that parties receiving the omnibus motion should locate their names and their contracts or leases listed in the motion;
- 2) list parties alphabetically and identify the corresponding contract or lease;
- 3) specify the terms, including the curing of defaults, for each requested assumption or assignment;

- 4) specify the terms, including the identity of each assignee and the adequate assurance of future performance by each assignee, for each requested assignment;
- 5) be numbered consecutively with other omnibus motions to assume, assign, or reject executory contracts or unexpired leases; and
- 6) be limited to no more than 100 executory contracts or unexpired leases.

Fed. R. Bankr. P. 6006(f).

60. This Motion, the Contract Assumption Procedures and the Assumption Notice satisfy each of the requirements of Bankruptcy Rule 6006(f), including the 100 contract/lease limit set forth in subsection (6).

61. The Contract Assumption Procedures are reasonable and appropriate in the particular circumstances because they afford the Counterparties due process in the notice and opportunity to be heard. They also provide certainty to all parties in interest regarding their obligations and rights in respect thereof. Furthermore, to the extent that any monetary defaults exist under any Assumed FG Contracts, the Debtors will cure any such defaults prior to assuming and assigning the Assumed FG Contracts. Accordingly, the Debtors submit that implementation of the proposed Contract Assumption Procedures is appropriate in these Chapter 11 Cases, and request that the Court authorize the assumption and assignment of the Assumed FG Contracts.

**E. The Court Should Waive the Stay of Bankruptcy Rules 6004 and 6006**

62. Because time is of the essence in regard to the transactions contemplated in the APA and Allocation Agreement, the Debtors request that the Court waive the 14-day stay provided in Bankruptcy Rules 6004(h) and 6006(d).



### **NOTICE**

63. Notice of this Motion has been served on the following parties and/or their counsel, if known, via facsimile, overnight delivery, e-mail, and/or hand delivery: (a) each party or entity on the General Service List (as defined in the *Amended Order, Pursuant to Sections 102 and 105(a) of the Bankruptcy Code and Bankruptcy Rules 2002, 4001, 6007, 7016, 9013, and 9014 and Local Bankruptcy Rules Establishing: (I) Omnibus Hearing Dates; and (II) Certain Case Management Procedures* [Docket No. 280]); (b) the Mortgage Trustee; and (c) the Counterparties to the Assumed FG Contracts. The Debtors submit that, in light of the nature of the relief requested, no other or further notice need be given.

### **CONCLUSION**

WHEREFORE, the Debtors respectfully request that the Court enter the Order substantially in the form attached hereto as Exhibit A granting the relief requested in this Motion and such other and further relief as may be just and proper.

*[Reminder of page intentionally left blank.]*

Dated: May 11, 2018

**Respectfully submitted,**

/s/ Kate M. Bradley

**BROUSE MCDOWELL LPA**

Marc B. Merklin (0018195)  
Kate M. Bradley (0074206)  
Bridget A. Franklin (0083987)  
388 South Main Street, Suite 500  
Akron, OH 44311-4407  
Telephone: (330) 535-5711  
Facsimile: (330) 253-8601  
mmerklin@brouse.com  
kbradley@brouse.com  
jfairweather@brouse.com

- and -

**AKIN GUMP STRAUSS HAUER & FELD LLP**

Ira Dizengoff (admitted *pro hac vice*)  
Lisa Beckerman (admitted *pro hac vice*)  
David Botter (admitted *pro hac vice*)  
One Bryant Park  
New York, New York 10036  
Telephone: (212) 872-1000  
Facsimile: (212) 872-1002  
idizengoff@akingump.com  
lbeckerman@akingump.com  
dbotter@akingump.com

- and -

Scott Alberino (admitted *pro hac vice*)  
Kate Doorley (admitted *pro hac vice*)  
1333 New Hampshire Avenue, N.W.  
Washington, D.C. 20036  
Telephone: (202) 887-4000  
Facsimile: (202) 887-4288  
salberino@akingump.com  
kdoorley@akingump.com

*Counsel for Debtors and Debtors in Possession*