IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	:	Chapter 11
FISKER AUTOMOTIVE HOLDINGS, INC., et al.	:	Case No. 13-13087-KG
Debtors.	:	(Jointly Administered)

EMERGENCY MOTION OF HYBRID TECH HOLDINGS, LLC, PURSUANT TO 11 U.S.C. § 105(A), 28 U.S.C. § 158(A) AND FED. R. BANKR. P. 8001, 8002, AND 8003 FOR LEAVE TO APPEAL DECISION LIMITING CREDIT BID

Hybrid Tech Holdings, LLC ("Hybrid Holdings"), in its capacity as assignee of the rights of the United States Department of Energy (the "DOE") as lender to Fisker Automotive Holdings, Inc. and its affiliated debtors and debtors in possession in the above-captioned cases (the "Debtor" or "Fisker"), by and through its undersigned counsel, hereby submits this motion (the "Motion") for leave to appeal, pursuant to 11 U.S.C. § 105(a), 28 U.S.C. § 158(a)(3), and Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") 8001, 8002 and 8003, from the Bankruptcy Court's decision of January 10, 2014 (the "Credit-Bid Decision"),[1] improperly limiting the credit bid of Hybrid Holdings under section 363(k) of the Bankruptcy Code to purchase the assets of Fisker.

The Credit-Bid Decision is a final order from which Hybrid Holdings appeals as of right pursuant to 28 U.S.C. § 158(a)(1) and Bankruptcy Rule 8001(a).[2] It therefore submits the

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1 A copy of the Credit-Bid Decision is attached hereto as Exhibit A.

2 See, e.g., In re Marcal Paper Mills, Inc., 650 F.3d 311, 314 (3d Cir. 2011) ("We have held that because of the unique nature of bankruptcy cases, finality under § 158(d)(1) should be viewed 'in a more pragmatic and less technical way' than it would under 28 U.S.C. § 1291.") (quoting F/S Air lease II, Inc. v. Simon (In re F/S Airlease II, Inc.), 844 F.2d 99, 103 (3d Cir. 1988)).

Motion in abundance of caution in the event its appeal is challenged as being interlocutory.[3] In support of the Motion, Hybrid Holdings respectfully states as follows:

I. PRELIMINARY STATEMENT

1. In November 2013, the United States of America, through the Department of Energy ("DOE"), accomplished a seminal transaction when it sold to Hybrid Technology, LLC ("Hybrid Technology"),[4] through a public auction, the DOE's $168 million interest in the secured loan previously extended by the Federal Financing Bank ("FFB") to Fisker. The DOE's widely-publicized marketing and sale process involved 35 inquiring parties and five formal bids, including one submitted by an affiliate of Wanxiang Group Corp. Hybrid Technology also extended debtor-in-possession financing to Fisker while Hybrid Holdings was to acquire Fisker's assets through a partial ($75 million) credit bid of the DOE Loan. But the Bankruptcy Court has capped Hybrid Holdings' credit bid to the discounted amount paid for the loan ($25 million).

2. The Bankruptcy Court's decision was reached at the behest of the statutory committee of unsecured creditors appointed in Fisker's bankruptcy cases (the "Committee"), which preferred an alternative bidder. Unable to find one who could top Hybrid Holdings' $75 million bid, the Committee challenged the validity of the transaction between the DOE and Hybrid Holdings, casting aspersions on the marketing process conducted under non-bankruptcy federal law. To that end, the Committee objected to Hybrid Holdings' bid and proposed alternative bidding procedures that discounted the credit bid to what it represented was the purchase price paid in the DOE Auction. The Bankruptcy Court accepted the Committee's recommendation, expressing concerns about the efficacy of the DOE Auction and finding that

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[3] Hybrid Holdings responsibly sought to obviate the need for motion practice by repeatedly requesting (on and off the record) that the Committee and the Debtors agree the Credit Bid Decision finally disposed of Hybrid Holdings' credit bid rights and there was no just cause for delay in having it reviewed. The litigants' lack of agreement—while transparently gamesmanship—forces Hybrid Holdings to elaborate on this self-evident truth herein.

[4] Hybrid Holdings, an affiliate of Hybrid Technology, thereafter acquired the DOE's claim through Hybrid Technology.

section 363(k) of the Bankruptcy Code authorized the Bankruptcy Court to limit credit bids based on the price paid to acquire the claim when general notions of equity and fairness support it.

3. The Bankruptcy Code does not permit courts to arbitrarily cap a secured creditor's credit bid on the basis of the price paid to acquire the secured claim. That result eviscerates the rights of a secured creditor to credit bid under section 363(k) of the Bankruptcy Code. It also ignores, and therefore undermines the integrity of the DOE's most significant distressed loan auction process (which the DOE designed to comport with the statutory intent and purpose of federal (non-bankruptcy) legislation) and creates substantial uncertainty among potential bidders for the government's distressed assets that those bidders will not have the ability to enforce the government's rights as successor in bankruptcy cases. An unwillingness to afford purchasers of loans extended by the United States the very same rights in bankruptcy cases that the government (itself) would have injects a chilling unpredictability to governmental dispositions.

4. Given the unique circumstances surrounding the government's involvement in Fisker's capital structure and the DOE's disposition of that interest to Hybrid Technology through the first major auction of its kind, Fisker's bankruptcy cases implicate legal issues of transcendent public importance. The Bankruptcy Court's interpretation and application of section 363(k) is inconsistent with controlling Third Circuit precedent and attempts to sidestep recent Supreme Court precedent reiterating the significant role of credit bidding in bankruptcy sales.[5] Moreover, the Bankruptcy Court's construction of "cause" for denying a secured creditor's right to credit bid is tantamount to a roving commission to do equity that is unsupported even by lower court cases that have found cause to exist if challenges to the secured

[5] See RadLax Gateway Hotel, LLC v. Amalgamated Bank, 132 S. Ct. 2065, 2072 (2012) (finding plan that did not permit secured lender to credit bid at sale could not be confirmed); In re SubMicron Sys., Corp., 432 F. 3d 448, 459 (3d Cir. 2006) (finding section 363(k) "empowers creditors to bid the total ***face*** value of their claims – it does not limit bids to claims' economic value.") (emphasis added).

debt are substantiated.[6]

5. The immediate appeal of the Credit-Bid Decision is the only way to ensure an expeditious conclusion of the Debtors' chapter 11 cases. The decision whether to limit Hybrid Holdings' credit bid will dictate the outcome of the ongoing auction process and residual creditor distributions by determining the ultimate fate of the Debtors' senior-most obligations. Similarly, the significance of these questions (and the extent to which the disposition of this appeal raises other federal issues like the conduct of the United States in disposing of assets under non-bankruptcy law) confirms that the Credit-Bid Decision and the resulting effects on the sale process is central to the dispute between the parties and the Debtors' chapter 11 cases.

6. Lastly, the Debtors and the Committee (both of which have refused to agree to expedition) agree that time is of the essence (hence the request for expedited relief) given the Debtors' current intent (urged by the Committee) to consummate the sale of substantially all of their assets to Wanxiang in 2-3 weeks. Accordingly, Hybrid Holdings respectfully submits this Motion seeking leave to appeal the Credit-Bid Decision (on an expedited basis).

II. FACTUAL BACKGROUND

A. DEPARTMENT OF ENERGY SECURED LOAN

7. The Debtors were established in 2007 with the goal of designing and developing electric vehicles with extended range technology, also known as Plug-in Hybrid Electric Vehicles, or "PHEVs."[7] To finance their businesses, the Debtors applied for loans that the DOE had arranged through the FFB under federal legislation known as the Advanced Technology

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[6] Compare, In re Merit Group, Inc., 464 B.R. 240, 257 (Bankr. S.D.C. 2011) (finding creditors' committee's mere suspicion that claims should be reclassified was insufficient basis to deny right to credit bid), with, In re L.L. Murphrey Co., 2013 WL 2451368, at *5 (Bankr. E.D.N.C. June 6, 2013) (finding cause to deny right to credit bid in light of "allegations advanced by the trustee and ***facts provided in support***, together with failure of the debtor and Wachovia to abide by the explicit language of the confirmed plan requiring them to execute amended and restated loan documents in accordance with the treatment provided thereunder.") (emphasis added).

[7] Declaration Of Marc Beilinson In Support Of First Day Motions (hereinafter "Beilinson Declaration"), at 2 (¶ 5).

Vehicles Incentive Program.[8] That program was part of a federal initiative to spur the production of alternative-energy vehicles.

8. Fisker Automotive, Inc., as borrower, and Fisker Automotive Holdings, Inc. entered into that certain Loan Arrangement and Reimbursement Agreement, dated as of April 2010, with the DOE providing for loans totaling approximately $530 million (the "DOE Loan").[9] Fisker's obligations under the DOE Loan were secured by a first-priority liens on substantially all of the Debtors' assets, including personal and real property.[10] The Debtors drew on approximately $192 million of the DOE Loan, of which approximately $168.5 million remained outstanding as of the time Hybrid Holdings acquired it as assignee.[11]

B. DOE PUBLIC AUCTION FOR LOAN SALE

9. Following Fisker's failure to comply with certain financial covenants and project milestones contained in the DOE Loan agreements, the DOE informed the Debtors in 2011 that it would cease funding and not permit further disbursements.[12] At or about this time, the Debtors faced other financial and operational obstacles, including safety recalls, the bankruptcy of their battery supplier (A123 Systems, Inc. ("A123")), and shipments lost to Hurricane Sandy.[13]

10. In 2013, the Debtors began negotiations with the DOE concerning the consensual use of cash collateral to fund potential chapter 11 cases and a sale process.[14] No agreement was

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8 Id. The Advanced Technology Vehicle Manufacturing Incentive Program was promulgated under section 136 of the Energy Independence and Security Act of 2007, Pub. L. 110-140, 121 Stat. 1492, 42 U.S.C. § 17013. Id. at 2 n.2 (¶ 5).

9 Id. at 2 (¶ 5), at 10 (¶ 24).

10 Id. at 11 (¶ 26).

11 Beilinson Decl. at 2, 25 (¶¶ 5, 25). In 2013, the DOE applied approximately $20.6 million of cash it controlled to the Debtors' outstanding indebtedness of approximately $192 million. See id. at 2, 5, 11 (¶¶ 5, 9, 27).

12 Id. at 3, 18 (¶¶6, 43).

13 Id. at 4, 17–18 (¶¶ 9, 39–40, 42–43). The Debtors filed for bankruptcy on November 22, 2013 (the "Petition Date").

14 Id. at 4-5 (¶ 9).

reached, and, thereafter, the DOE initiated a public marketing and auction process for the purchase of the DOE's interest in the DOE Loan. This included a competitive auction process (the "DOE Auction") commencing on September 17, 2013, pursuant to which:

- Houlihan Lokey Capital, Inc. ("Houlihan") acted as the DOE's financial advisor, having been retained in February 2012 to advise on the development and implementation of strategic alternatives regarding the DOE Loan;[15]

- the DOE publicized its plan to sell its interest in the DOE Loan through an auction on a public website maintained by the United States government and widely reported in the media; the public notice of the auction advised interested parties to contact the DOE to obtain information and established a bid deadline of October 7, 2013;[16]

- Houlihan received inbound inquiries "and/or proactively contacted over 35 original equipment manufacturers, financial sponsors, and prospective investors to gauge their interest in participating in the competitive auction process;" over "ten of the potentially interest parties engaged with DOE and Houlihan and ultimately executed non-disclosure agreements with both the DOE and the Debtors;" and, ultimately "five parties submitted binding bids … including … an entity affiliated with Wanxiang;"[17] and

- "[o]n October 11, 2013, Houlihan conducted the final, live phase of the auction wherein three separate bidders were deemed qualified and participated, including …. the Wanxiang affiliate;" and Hybrid Technology emerged as the successful bidder, purchasing the DOE Loan for $25 million.[18]

11. Significantly, the DOE Auction represented the first significant transaction in which a United States government agency sold a debt it owned to private sector investors through an auction process.[19]

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15 See Declaration Of J.P. Hanson In Connection With Motion Of Debtors For Entry Of: (I) An Order (A) Approving Form and Manner of Notices and (B) Scheduling a Sale Hearing and Establishing Dates and Deadlines Related Thereto; and (II) An Order (A) Authorizing the Sale of Substantially all of the Debtors' Assets Free and Clear of Liens, Claims, Encumbrances, and Other Interests, (B) Granting the Purchaser the Protections Afforded to a Good Faith Purchaser, and (C) Granting Related Relief (Docket No. 294) (the "Hanson Decl.") at 2 (¶ 3).

16 Id. at 3 (¶ 4).

17 Id. at 3-4 (¶¶ 4, 7, 9).

18 Id. at 4-5 (¶¶ 10-11).

19 Philip Scipio, Sandrine Bradley & Christoper Spink, International Finance Review—Restructuring Advisor: Houlihan Lokey, available at http://www.ifre.com/restructuring-adviser-houlihan-lokey/21120263.article (referring to the transaction as "groundbreaking").

C. HYBRID HOLDINGS PURCHASE AGREEMENT AND DIP FINANCING LOAN

12. On November 22, 2013, the Debtors entered into an agreement with Hybrid Holdings to acquire the Debtors' assets through a $75 million credit bid by Hybrid Holdings of the DOE Loan (the "Hybrid Purchase Agreement"). On November 22, 2013, the Debtors filed a motion to approve the Hybrid Purchase Agreement (the "Hybrid Sale Motion").[20] On November 24, 2013, the Debtors filed the DIP Financing Motion providing for DIP financing loans from Hybrid Technology in the aggregate principal amount of $8.14 million,[21] which the Bankruptcy Court approved in part on an interim basis on November 26, 2013 and December 17, 2013.[22]

D. COMMITTEE-INITIATED LITIGATION

13. Following its appointment on December 5, 2013, the official committee of unsecured creditors (the "Committee"), facing a secured lender with liens on substantially all the Debtors' assets, immediately embarked on an extensive litigation campaign designed to undermine the proposed transaction with Hybrid Holdings by, among other things, disparaging Hybrid Holdings, David Manion, and the DOE, and challenging the propriety of the DOE

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[20] Beilinson Declaration, at 21 (¶ 50-51).

[21] See Motion Of The Debtors For Entry Of Interim And Final Orders (I) Authorizing Postpetition Financing, (II) Granting Liens And Providing Superpriority Administrative Expense Priority, (III) Authorizing Use Of Cash Collateral, (IV) Granting Adequate Protection, (V) Modifying The Automatic Stay, And (VI) Scheduling A Final Hearing Pursuant To Sections 105, 361, 362, 363 And 364 Of The Bankruptcy Code And Bankruptcy Rules 2002, 4001, and 9014 (Docket No. 17) (the "DIP Financing Motion").

[22] See Interim Order (I) Authorizing Postpetition Financing, (II) Granting Liens And Providing Superpriority Administrative Expense Priority, (III) Authorizing Use Of Cash Collateral, (IV) Granting Adequate Protection, (V) Modifying The Automatic Stay, And (VI) Scheduling A Final Hearing Pursuant To Sections 105, 361, 362, 363 And 364 Of The Bankruptcy Code And the Bankruptcy Rules 2002, 4001, And 9014 (Docket No. 67); Second Interim Order (I) Authorizing Postpetition Financing, (II) Granting Liens And Providing Superpriority Administrative Expense Priority, (III) Authorizing Use Of Cash Collateral, (IV) Granting Adequate Protection, (V) Modifying The Automatic Stay, And (VI) Scheduling A Final Hearing Pursuant To Sections 105, 361, 362, 363 And 364 Of The Bankruptcy Code And the Bankruptcy Rules 2002, 4001, and 9014 (Docket No. 167).

Auction process, including, among other things:

- a motion seeking approval of an alternative sale process naming Wanxiang America Corp. as the "stalking-horse" bidder with a supposed lead offer of $25.8 million (later increased to $35.7 million);

    - according to the Committee, "one way in which the Bidding Procedures will better serve the debtors' creditors and parties in interest is either by rejecting Hybrid's credit bidding rights or, at a minimum, limiting any credit bidding rights on account of the Hybrid debt – which was purchased from the Department of Energy by an insider (i.e., a Fisker Board member) on the Petition Date … to no more than $25,000,000 …. [T]his limitation is appropriate since, prior to Hybrid's purchase of the DOE Loan …, the DOE Loan was subjected to an auction process by DOE and the winning bid reflects a market-tested) (and Government-approved) valuation of the underlying DOE Loan collateral. Additionally, a rejection of credit bidding rights on account of the DOE Loan is appropriate in light of (i) evidence establishing Hybrid's bad faith in connection with a breach of fiduciary duty on the part of an insider of the Debtors affecting Hybrid's acquisition of the DOE Loan; and (ii) an existing dispute regarding the validity of Hybrid's liens, which, as the case law demonstrates, constitutes 'cause.'"[23]

- an omnibus objection to Hybrid Holdings' DOE Loan claim, the Hybrid Sale Motion, the DIP Financing Motion, and the Debtors' disclosure statement, also arguing, among other things, that Hybrid Holdings' credit bid for the DOE Loan claim should be capped at the $25 million purchase price given purported issues associated with the auction and the claim;[24]

- a motion for standing to bring claims and causes of action against Hybrid Technology, Hybrid Holdings, Manion, and other individuals claiming, among other things, that (a) Manion breached his fiduciary duties to Fisker owed as a result of his membership on the

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[23] See Committee Motion For Entry Of Order (I)(A) Approving Bid Procedures In Connection With The Sale Of Certain Assets Of The Debtors, (B) Scheduling Hearing To Consider Approval Of The Sale Of Assets, (C) Approving Form And Manner Of Notice Thereof; (D) Authorizing And Directing Debtors To Enter Into Stalking Horse Purchase Agreement; (E) Approving Break-Up Fee And Expenses Reimbursement And (F) Granting Related Relief; And (II) Authorizing Debtors To Obtain Replacement Post-Petition Secured Financing, Utilize Cash Collateral, Grant Adequate Protection And Modify The Automatic Stay, And Scheduling A Final Hearing With Respect To Same (Docket No. 265) (the "Committee Sale Motion") at 26 (¶ 36); Statement Of Wanxiang America Corporation In Support Of The Committee's Motion, at 3 (Docket No. 392). A copy of the Committee Sale Motion is attached hereto as Exhibit B.

[24] See Official Committee Of Unsecured Creditors' Omnibus Objection To (I) The Debtors' (A) Sale Motion, (B) DIP Financing Motion, (C) Plan Of Liquidation And (D) Disclosure Statement And (II) The Allowance Of Claims Of Hybrid Against The Debtors (Docket No. 264) the "Committee Omnibus Objection"). See id. at 16–28 (¶¶30–56). A copy of the Committee Omnibus Objection is attached hereto as Exhibit C.

Fisker Board by, among other things, acting in Hybrid's interests at the expense of Fisker; (b) Hybrid Holdings and Hybrid Technology aided and abetted that breach; and (c) Hybrid Holdings' DOE Loan claim should be equitably subordinated because of its alleged misconduct and "the inequitable conduct of DOE that is transferred to Hybrid Technology as successor-in-interest to DOE, such misconduct having resulted in injury to creditors of the Debtors and having conferred an unfair advantage on Hybrid Technology;"[25] and

- a draft, unverified complaint (the "Proposed Complaint") containing the same allegations with respect to the DOE, Manion, Hybrid Technology, Hybrid Holdings and other individuals and entities and setting forth claims for breach of contract, breach of fiduciary duty, fraudulent transfer (relating to the DOE's application of $20 million in a Fisker account to the DOE Loan), equitable subordination, and aiding and abetting claims.[26]

E. BANKRUPTCY COURT DECISION CAPPING CREDIT BID

14. On Friday, January 10, 2014, the Court held a hearing to consider, among other things, whether the Debtors' assets should be sold through an auction in lieu of confirming the Debtors' proposed chapter 11 plan and whether Hybrid Holdings' bid should be capped at $25 million as the Committee requested. In connection with that hearing, the Committee and the Debtors stipulated that, for purposes of the hearing, the Committee was ***not*** asserting that "cause" existed to limit Hybrid's rights as assignee of the DOE Loan based on any alleged misconduct or wrongdoing on behalf of the DOE, Hybrid Holdings, or Hybrid Holdings' affiliates (including Mr. Manion).[27] Rather, it was limiting its argument based on the existence of certain assets it asserted were not perfected collateral for the DOE Loan, and its argument that

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[25] See Motion Of Official Committee Of Unsecured Creditors For Entry Of An Order Pursuant To Bankruptcy Code §§ 1103(c) And 1109(b) Granting Leave, Standing, And Authority To Commence, Prosecute And, If Appropriate Settle Certain Causes Of Action On Behalf Of Debtors' Estates (Docket No. 267) (the "Committee Standing Motion") at 8-10 (¶ 17).

[26] See Complaint (Docket No. 267-1) (the "Committee Complaint"). See, e.g., id. at 21 (¶ 92) ("Upon information and belief, the DOE had knowledge that Manion was breaching fiduciary duties to Fisker in the acquisition of the DOE Loan for his own benefit and consciously assisted by turning down Fisker's request for additional funding for alternate restructuring opportunities. Manion's affiliate, Hybrid, is the successor in interest to the DOE through its acquisition at auction of the DOE Loan, with full knowledge of the DOE's role in aiding and abetting Manion's breach of fiduciary duty at this crucial turning point.").

[27] See Tr. 19:3-6 ("[T]here is no basis for the [C]ommittee to proceed with an argument today under § 363(k) to limit credit bidding based upon any alleged misconduct by the debtors or any other party.") (statement of Committee counsel).

the Bankruptcy Court had discretion to limit credit bidding.[28]

15. The Bankruptcy Court accepted the Committee's invitation to limit the credit bid to the purchase price, principally citing concerns about the DOE Auction and a general (purported) need to assure a "fair price." Specifically, the Bankruptcy Court reasoned:

> [I]n approving the sale, the Court would have to make a decision that it is a fair and reasonable price for that – that it is fair value. I recognize that the parties have argued that there was an auction; there was the Department of Energy auction. But that was not an auction under the auspices of this Court. That was an auction that was not noticed by this court. And that was not marketed under the auspices of this Court. So I don't take great comfort in the fact that there was a Department of Energy auction for debt.[29]

16. The Bankruptcy Court also recognized issues concerning the perfection of security interests in certain assets, but did not base its decision on any findings as to the value of that allegedly unencumbered collateral. Presumably due to the lack of any evidence as to such fundamental issues and the Committee's stipulation regarding its cause argument, the Bankruptcy Court also did not cite any basis other than a generalized wish to achieve "fair value" as "cause" under section 363(k) of the Bankruptcy Code to limit the credit bid to the purchase price paid for a distressed loan.[30]

III. RELIEF REQUESTED

17. Hybrid Holdings respectfully requests that, pursuant to 11 U.S.C. § 105(a), 28 U.S.C. § 158(a)(3), and Bankruptcy Rules 8001, 8002 and 8003, this Court grant Hybrid

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[28] See Tr. 19:9-15 ("Rather, the [C]ommitee's cause argument is limited to a type of facilitation of an open and fully competitive cash auction . . . and not the type of cause related to any alleged misconduct.") (statement by Committee counsel); Tr. 93:15-18 ("[C]redit bidding may be and should be limited in the interest of any policy advanced by the Code including to foster a competitive bidding environment.") (statement by Committee counsel)

[29] See Tr. at 136:21-25.

[30] See Tr. at 137:2-5 ("Courts can place conditions upon the right to credit bid, without denying the right completely; I'm simply saying that it should be capped at the twenty-five million dollars.").

Holdings leave to appeal the Credit-Bid Decision.

IV. ARGUMENT

18. Courts in this District typically grant motions for leave to appeal where "the order at issue (1) involves a controlling question of law upon which there is (2) substantial grounds for a difference of opinion as to its correctness, and (3) if appealed immediately, may materially advance the ultimate termination of the litigation." In re AE Liquidation, Inc., 451 B.R. 343, 346 (D. Del. 2011) (applying the standards set forth in 28 U.S.C. §1292(b) governing appeals of District Court interlocutory orders). See also In re SemCrude, L.P., BR 08-11525 BLS, 2010 WL 4537921 (D. Del. Oct. 26, 2010) ("In deciding whether an interlocutory order is appealable in the bankruptcy context, courts have typically borrowed the standard found in 28 U.S.C. § 1292(b), which governs whether an appeal of a district court's interlocutory order to a court of appeals is warranted.").

A. CREDIT BID DECISION INVOLVES A CONTROLLING QUESTION OF LAW UPON WHICH THERE IS SUBSTANTIAL GROUNDS FOR DIFFERENCE OF OPINION AS TO ITS CORRECTNESS

19. Courts consider an issue a "controlling question of law" if it could materially affect the outcome of the dispute.[31] Whether Hybrid Holdings can credit bid the full amount of its debt has a dispositive effect on the outcome of the asset sale process, residual distributions to creditors, and the entire contents of any chapter 11 plan confirmed in the Debtors' cases. Thus, the Credit-Bid Decision constitutes the paradigmatic example of a controlling question of law.

20. Moreover, there are substantial grounds for difference of opinion as to the correctness of the Bankruptcy Court's ruling. Both the Supreme Court and the Third Circuit

[31] See In re Cement Antitrust Litig. (MDL No. 296), 673 F.2d 1020, 1026 (9th Cir. 1981) ("[A]ll that must be shown in order for a question to be 'controlling' is that resolution of the issue on appeal could materially affect the outcome of litigation in the district court."); Katz v. Carte Blanche Corp., 496 F.2d 747, 755 (3d Cir. 1974) ("A controlling question of law must encompass at the very least every order which, if erroneous, would be reversible error on final appeal," and "[i]f the statute were interpreted to exclude any such order that interpretation would be inconsistent with the clear intention of the sponsors to avoid a wasted trial.").

have recognized the importance of the secured creditor's right to credit bid in the face of junior stakeholder mischief. See Radlax, 132 S. Ct. 2065 (2012) (plan stripping right to credit bid under section 363(k) cannot be confirmed); Submicron Sys. Corp., 432 F.3d 448 (secured creditors can bid full amount of secured claims under section 363(k)). While section 363(k) of the Bankruptcy Code provides the right to credit bid can be limited for "cause," neither the Supreme Court nor the Third Circuit has addressed the issues of whether a bankruptcy court can limit a credit bid to the purchase price paid in acquiring the claim. Similarly, courts examining "cause" have reached inconsistent results (albeit neither supports the Bankruptcy Court's decision here), almost exclusively based on acts that were disclaimed by the Committee in the stipulation that it entered into the record at the outset of the hearing.[32]

21. Moreover, the Bankruptcy Court limited Hybrid Holdings' bid expressing concern about the DOE Auction (which could only be based on allegations set forth in the Committee Sale Motion and the Interim Objection) and general considerations of "fairness." If parties in interest could so easily destroy a secured creditor's statutory rights, it would be commonplace to allege wrongdoing simply to gain leverage. For this reason, other courts have held that unsubstantiated allegations do not rise to the level of "cause."[33] The Credit-Bid Decision also

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[32] None of the cases justifies capping a credit bid at the price paid to acquire the claim. Compare In re Monarch Beach Venture, Ltd., 166 B.R. 428, 433 (C.D. Cal. 1993) (noting that "[n]otwithstanding the discretionary language of 363(k), each of the six decisions that has addressed this issue has held that the secured creditor had a right to credit bid his entire claim" and that "the right to credit bid may not be taken from the creditor."); and In re Merit Grp., Inc., 464 B.R. at 254-55 (creditors' committee suspicions of misconduct insufficient to deny credit-bid rights); with In re L.L. Murphrey Co., 2013 WL 2451368 (Bankr. E.D.N.C. June 6, 2013), at *5 (finding "cause" existed, based on ***evidence***, to deny right to credit bid when "allegations advanced by the trustee and facts provided in support, together with failure of the debtor and Wachovia to abide by the explicit language of the confirmed plan requiring them to execute amended and restated loan documents in accordance with the treatment provided thereunder.").

[33] See e.g., In re Merit Grp., Inc., 464 B.R. 240, 254-55 (Bankr. D.S.C. 2011) ("While the Committee may have suspicions and has offered allegations in its Objection, at this point, these allegations, together with the facts provided in support thereof, do not convince the Court that an adequate challenge to Stonehenge's claim exists that rises to the level of the disputes set forth in the cited cases."). Indeed, the court in Merit was presented with cites to cases, which, as is the case here, had no bearing on the facts before it. Id. ("[T]he cases cited in support of a limitation

impermissibly shifts the burden to the secured creditor to prove its entitlement to credit bid, even in the absence of an evidentiary record.[34] Here, there were ***no facts whatsoever before the Bankruptcy Court***—only unsubstantiated allegations in the Committee Sale Motion and the Committee Omnibus Objection.

B. AN IMMEDIATE APPEAL WILL MATERIALLY ADVANCE FISKER'S CHAPTER 11 CASES

22. The outcome of whether Hybrid Holdings can credit bid the full amount of its debt will dictate the outcome of these cases and, more specifically, the permissible contents of a chapter 11 plan and residual creditor distributions. As noted above, the issue of whether the Bankruptcy Court properly interpreted section 363(k) to restrict Hybrid Holdings from credit bidding its full claim is a gating issue to the advancement of the sale and plan process, and ultimately the fate of the Debtors' chapter 11 cases. An immediate appeal of this decided issue would allow the sale process, plan process, and thus the case to proceed efficiently and would materially advance these chapter 11 cases.

V. CONTACT INFORMATION FOR COUNSEL FOR DEBTORS AND COUNSEL FOR THE COMMITTEE

23. Pursuant to Fed. R. Bankr. P. 8011(d), the names, addresses, and telephone numbers of counsel for the Debtors and the Committee are set forth below:

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on credit bidding seem to involve a clearly defined (both factually and procedurally) existing dispute to a claim or lien .... After a review of those cases and the evidence in this matter, the Court is not convinced that there is an adequate basis for depriving Stonehenge of an unlimited right to credit bid at this time.").

[34] See Merit, 464 B.R. at 254-55 (noting absence of "evidence as to the effect on Stonehenge [the secured creditor] if it is denied the right to credit bid or if that right is conditioned as requested. The Court ***does not*** view this as an evidentiary burden not met by Stonehenge because § 363(k) gives it the credit bid right ***unless*** cause is found. The Court also has no evidence or indication that the estate will suffer measurable harm if Stonehenge does credit bid without additional safeguards. As the Committee is the party requesting that the right be denied or conditioned 'for cause,' the Court ***does*** view the lack of evidence as a weakness in the Committee's position.").

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CONCLUSION

For the foregoing reasons, to the extent required, Hybrid Holdings respectfully requests that the Court grant Hybrid Holdings leave to appeal the Credit-Bid Decision, and award such further relief as it considers appropriate.

Respectfully submitted,

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Dated: January 14, 2014

Exhibit A

In Re:

FISKER AUTOMOTIVE HOLDINGS, INC., et al.

Case No. 13-13087 (KG)

January 10, 2014

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UNITED STATES BANKRUPTCY COURT

DISTRICT OF DELAWARE

Case No. 13-13087 (KG)

- -x

In the Matter of:

FISKER AUTOMOTIVE HOLDINGS, INC., ET AL.,

Debtors.

- -x

United States Bankruptcy Court

824 North Market Street

Wilmington, Delaware

January 10, 2014

9:42 AM

B E F O R E:

HON. KEVIN GROSS

CHIEF U.S. BANKRUPTCY JUDGE

ECR OPERATOR: GINGER MACE

Motion of the Debtors for an Entry of an Order (A) Authorizing the Employment and Retention of Beilinson Advisory Group, LLC as Restructuring Advisors for the Debtors, Effective Nunc Pro Tunc to the Petition Date and (B) Waiving Certain Time-Keeping Requirements Pursuant to Local Rule 2016-2(H) (Filed 12/13/13) [Docket No. 157]

Application Pursuant to Section 327(a) of the Bankruptcy Code, Rule 2014 of the Federal Rules of Bankruptcy Procedure and Local Rule 2014-1 for Authorization to Employ and Retain Pachulski Stang Ziehl & Jones LLP as Co-Counsel for the Debtors and Debtors in Possession Nunc Pro Tunc to the Petition Date (Filed 12/13/13) [Docket No. 159]

Motion of the Debtors for Entry of Interim and Final Orders (I) Authorizing Postpetition Financing, (II) Granting Liens and Providing Superpriority Administrative Expense Priority, (III) Authorizing Use of Cash Collateral, (IV) Granting Adequate Protection, (V) Modifying the Automatic Stay, and (VI) Scheduling a Final Hearing Pursuant to Sections 105, 361, 362, 363 and 364 of the Bankruptcy Code and Bankruptcy Rules 2002, 4001, and 9014 (Filed 11/22/13) [Docket No. 17].

Motion of the Debtors for the Entry of: (I) An Order (A) Approving Form and Manner of Notices and (B) Scheduling a Sale Hearing and Establishing Dates and Deadlines Related Thereto; and (II) An Order (A) Authorizing the Sale of Substantially All of the Debtors' Assets Free and Clear of Liens, Claims, Encumbrances, and Other Interests, (B) Granting the Purchaser the Protections Afforded to a Good Faith Purchaser, and (C) Granting Related Relief (Filed 11/22/13) [Docket No. 13]. Debtors' First Amended Joint Plan of Liquidation Pursuant to Chapter 11 of the Bankruptcy Code (Filed 1/1/14) [Docket No. 284].

Motion of Creditors' Committee for Entry of Orders (I) (A) Approving Bid Procedures in Connection with the Sale of Certain Assets of the Debtors, (B) Scheduling Hearing to Consider Approval of the Sale of Assets, (C) Approving Form and Manner of Notice Thereof; (D) Authorizing and Directing Debtors to Enter into Stalking Horse Purchase Agreement; (E) Approving Break-Up Fee and Expense Reimbursement and (F) Granting Related Relief; and (II) Authorizing Debtors to Obtain Replacement Post-Petition Secured Financing, Utilize Cash Collateral, Grant Adequate Protection and Modify the Automatic Stay, and Scheduling a Final Hearing with Respect to Same (Filed 12/30/13) [Docket No. 265].

Motion of the Official Committee of Unsecured Creditors Pursuant to 11 U.S.C. Sections 105(a) and 107(b), Fed. R. Bankr. P. 9018, and Del. Bankr. L.R. 9018-1, for Leave to File Certain Exhibits to the Madden Declaration Under Seal (Filed 12/30/13) [Docket No. 269].

Transcribed by: Aliza Chodoff

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P R O C E E D I N G S

THE CLERK: Please rise.

THE COURT: Good morning, everyone. Please be seated. It's good to see you all. I guess there's no better place to spend a rainy day than in a courtroom.

Good morning, Mr. Dahl. How are you, sir?

MR. DAHL: Good morning, Your Honor. For the record, Ryan Preston Dahl, of Kirkland & Ellis, on behalf of the debtors and debtors-in-possession.

Your Honor, we'd like to thank the Court's time on this very important day for the company. As the Court is aware, there are a number of significant matters up --

THE COURT: Yes.

MR. DAHL: -- for hearing today, including, with respect to the debtors' proposed sale, their proposed DIP financing, plan confirmation and sale previously filed by the unsecured creditors' committee. And I think in this process, all parties, including the debtors and the creditors' committee, recognized that there are material issues before the Court. But I think it's also fair to say that all parties share the goal of trying to bring these cases to a successful conclusion in a way that maximizes value for creditors and parties-in-interest and recognizing that there are a number of interests involved given the nature of these Chapter 11 cases.

Your Honor, over the last few weeks, the parties have

worked very hard to narrow the issues being presented before the Court today. And you'll hear me discuss later in the presentation how we've attempted to do that. Certainly, there's not agreement on all matters, but the debtors, as fiduciaries, have been mindful of the need to narrow the matters to bring before the Court, to identify those matters that do require resolution by the Court to allow these Chapter 11 cases to proceed.

Your Honor, before I do proceed, though, I should note that we did file an amended agenda this morning --

THE COURT: Yes.

MR. DAHL: -- and there are a few retention matters that, if the Court would permit, we'd like to address at the outset to move on to the more substantive matters --

THE COURT: You bet.

MR. DAHL: -- before the Court today.

THE COURT: That would be certainly fine and appropriate, Mr. Dahl.

MR. DAHL: Thank you, Your Honor. The first, which is item number 1 on the agenda, is the debtors' application to retain Kirkland & Ellis as debtors' counsel. And then, also, as item number 3 on the agenda, is the debtors' application to retain Pachulski Stang Ziehl & Jones as debtors' counsel. We filed certifications of counsel and certifications of no objection. Unless Your Honor has any questions, we'd be happy

to hand up orders for the Court to sign.

THE COURT: If you would do that, it will save us all a lot of time while I search through all these pleadings for them.

MR. DAHL: It would be my pleasure --

THE COURT: Thank you.

MR. DAHL: -- Your Honor.

THE COURT: You bet. Thank you, Mr. Dahl. I am prepared to sign those orders, and I understand that any informal matters or objections have already been resolved.

MR. DAHL: That's correct, Your Honor.

THE COURT: Very well. Thank you, Mr. Dahl. Thank you, sir. I am signing the orders, and you certainly are free to proceed when ready.

MR. DAHL: Thank you, Your Honor. Your Honor, as I mentioned, the debtors have worked very hard to resolve a number of open matters or open issues before the Court today.

With respect to the debtors' proposed sale motion, the debtors proposed sale of all or substantially all their assets to Hybrid, which is filed at docket number 13, twenty objections to that motion were originally filed with the Court. At this time, thirteen of those objections have been resolved. And a number of those objections have actually been withdrawn from the docket. At this point, Your Honor, open objections remain from Mr. Diamond; the Delaware Economic Development

Authority; WWG Canyon, the landlord for the debtors' former headquarters in Anaheim; Atlas Capital; ZF; Fisker Automotive Switzerland and the unsecured creditors' committee.

Your Honor, with respect to our DIP financing, which is also up today, there are two objections that remain pending; one from the unsecured creditors' committee and then one filed by the WARN plaintiffs.

And then, with respect to plan confirmation, fourteen objections were originally filed with the Court, with five remaining: those filed by the WARN plaintiffs, Atlas Capital, DEDA, Fisker AAG, Jing-Jin and Delmarva, and, of course, the unsecured creditors' committee.

THE COURT: Yes.

MR. DAHL: But turning then, Your Honor, to discussions between the debtors and the creditors' committee, as fiduciaries of these estates, I think it's fair to say that we did both work very hard to try to find a path forward, if not an agreement on all issues, but again, to identify those narrow issues we think it would be appropriate for the Court to address to allow these Chapter 11 cases to proceed in an efficient manner that could drive value for these Chapter 11 estates.

Obviously, there is disagreement, Your Honor, but that's the nature of Chapter 11. But we do appreciate the committee's efforts to help narrow the issues before the Court

in this resolve -- in this regard so as to provide the Court with a clear picture of what those open issues are, and so we can move forward with the common goal of achieving the most value reasonably possible under the circumstances of these Chapter 11 cases and trying as much as possible to bring these Chapter 11 cases to a successful conclusion, recognizing the many competing interests involved.

So again, Your Honor, while we may disagree on the best approach and there are open issues, I think it's fair to say that our negotiations have been productive, and we'd like to update the Court in that regard.

THE COURT: All right.

MR. DAHL: With respect to what has been agreed in terms of the process today, Your Honor, again, it doesn't resolve the entirety of the various matters before the Court, but we do think that these agreements will help focus the proceeding in a relatively narrow band.

I do want to stress that the agreements between the debtors and the committee I would like to describe for the Court on the record today are between the debtors and the committee only. Our board, the debtors' board, have approved these agreements, and the committee has approved them. And counsel is obviously here to proceed on those terms. But Hybrid, our prospective purchaser has not agreed, nor has any other creditor or any other party-in-interest.

But with the Court's permission, I'd like to detail the band of agreements that we've identified or we've agreed to with the committee and proceed on that basis. And then, committee counsel, Ms. Beville, who's sitting here at the table today, may read some additional agreements into the record as well.

THE COURT: All right.

MR. DAHL: Your Honor, first, the debtors and the creditors' committee agree that based on the events that have transpired since the commencement of these Chapter 11 cases in November, and especially the recent bid submitted by Wanxiang America, it does now appear to both the debtors and the creditors' committee that if Hybrid's ability to credit bid is limited, as the committee has advocated, specifically, that if any auction or if at any auction Hybrid either would have no right to credit bid or if its credit-bidding right were capped at twenty-five million dollars, there is a strong likelihood that there would be an auction that has a material change of creating material value for the Chapter 11 estates over and above the present Hybrid bid.

That auction would, of course, be open to all qualified bidders and certainly to include Hybrid and Wanxiang and possibly others. I'm sorry, Your Honor. I --

THE COURT: That's quite all right.

MR. DAHL: Second, Your Honor, if Hybrid's ability to

credit bid is not capped, it appears to both the debtors and the committee that there is no realistic possibility of an auction, as we have no reason to believe that Wanxiang or any anyone else would bid more than the amount of Hybrid's asserted secured claims.

Third, Your Honor, the debtors and the creditors' committee agree that limiting -- I apologize -- that limited of Hybrid's ability to credit bid, for these reasons alone, would likely foster and facilitate a competitive bidding environment, as those words were used by the Third Circuit in Philadelphia Newspapers, and that such a competitive environment would likely result in material benefit to the estate.

Fourth, all of the work here has shown to both the debtors and the committee that the highest and best value for the estate is achieved only in the sale of all of the Fisker assets as an entirety.

Fifth, Your Honor, based on all the work that is done -- been done by all parties, and a constructive and collaborative exchange of views and information as appropriate in Chapter 11, we each also believe that within that entirety of assets being offered for sale are material assets that we believe consist of properly perfected Hybrid collateral, material assets that are not subject to properly perfected liens in favor of Hybrid and material assets where there is a dispute as to whether Hybrid has a properly perfected lien,

which dispute is not likely subject to quick or easy resolution.

We may not agree exactly on where those lines are drawn between those three groups in certain respects and we may not agree as to the allocation of value between those groups in all respects, but we agree that there are material assets in each category.

With that, Your Honor, I'd like to turn the podium over to committee counsel, Ms. Beville, for some additional agreements between the debtors and the creditors' committee in this regard.

THE COURT: All right. Thank you, Mr. Dahl.

Ms. Beville, good morning.

MS. BEVILLE: Good morning. Good morning. Thank you, Your Honor.

THE COURT: Yes.

MS. BEVILLE: As you know, Your Honor, the committee has undertaken what we believe to be a good and thorough investigation of events leading up to this case and the formulation of the claim, sale and DIP loan transaction presented here by the debtors. Investigations are never complete in all respects as there are always more stones left to be turned if the time and money were no concern. But here, we believe that the investigation has certainly reached a point where it -- we are comfortable making these additional

agreements.

Our sixth agreement, accordingly, that -- based on our investigation and the consideration of the debtors' agreements to proceed at today's hearing that we are discussing now, we agree that if the current plan is not confirmed that, at the baseline, under all circumstances and scenarios, there is no basis for the debtors, the committee or any other estate representative to pursue any cognitive action that the debtors may have against the present estate representatives under any theory, including with respect to any matters relating the debtors' pre-petition affairs or these cases.

And we would support under all scenarios the release and exculpation of estate representatives as to such causes of action in connection with these cases as to the representatives of these debtors serving during these Chapter 11 cases. And for this purpose, we would also include Huron and any representatives assigned to their former engagement with the debtors: Matthew Peroli (ph.), James Yost (ph.) and Tony Pasowitz (ph.), provided, however, that as to Barney Collor (ph.), this would include an exculpation as to post-petition conduct only. It would not include a release or exculpation of claims as related to any pre-petition conduct and provided further that as to Tony Pasowitz, the committee may interview Mr. Pasowitz based on -- and based upon such interview, reserve such rights to withdraw its agreement as to and in support for

a release or exculpation for Mr. Pasowitz.

We would accordingly and further agree, at the seventh agreement then, as part of this set of agreements, that there is no basis for the committee to proceed with an argument today under 363(k) to limit credit bidding based upon any alleged misconduct by the debtors or any other party. We want to stress here that this agreement does not mean that the committee does not believe that there is good cause under 363(k) to limit credit bidding. Rather, the committee's cause argument is limited to a type of facilitation of an open and fully competitive cash auction of the type cited in the Third Circuit in Philadelphia Newspapers --

THE COURT: Um-hum.

MS. BEVILLE: -- and not the type of cause related to any alleged misconduct.

We also want to stress that this seventh agreement is solely as to the credit bidding issue to be resolved by the Court and as relating to our belief and agreement that there is no basis for claims to be asserted against present estate representatives and not relating to any other issues that may be before this Court or come before this Court at a later time, including as to the allocation of sale proceeds, the allowance of claims and possible claims that may exist against other parties, including specifically Hybrid and its affiliates.

As our eighth agreement, the committee agrees that if,

based on these agreements and such other evidence, argument presented by all parties at today's hearing consistent in all respects with these agreements, the Court rules that there is no basis to limit Hybrid's ability to credit bid as we propose, the committee will withdraw all of its opposition to the debtor's present sale, DIP loan, plan and other related motions that they are currently proposed; conditioned, of course, on Hybrid confirming that its most recent proposal still stands and is not conditioned in any respect on plan acceptance or any other formality.

Finally, Judge, as to our ninth and final agreement, each of the committee and debtors have agreed not to present any evidence at today's hearing that is inconsistent with the agreements reached today, including but not limited to testimony from witnesses in support of the parties' positions.

Thank you, Your Honor.

THE COURT: All right.

MS. BEVILLE: That sums up our professional agreements. And with that, I will turn it over to Mr. Dahl.

THE COURT: Thank you, Ms. Beville.

MS. BEVILLE: Thank you.

THE COURT: Thank you.

MR. DAHL: May I have one moment, Your Honor?

THE COURT: Yes.

MR. DAHL: Thank you, Your Honor. For the record,

Ryan Preston Dahl, of Kirkland & Ellis. Judge, those are our agreements between the debtors and the creditors' committee. And with those made, we would propose that today's proceedings, if it would please the Court, be conducted as follows. Based on these agreements, Your Honor, the debtors and the creditors' committee would ask the Court to rule on whether Hybrid's ability to credit bid should be limited exclusively based on the committee's positions that credit bidding should not be permitted here given that a material portion of the assets to be sold in their entirety are not subject to a properly perfected lien in favor of Hybrid or are subject to a lien in favor of Hybrid, which is in bona fide dispute, which dispute cannot be quickly and easily resolved or, Your Honor, that causes exists, because limiting the credit bid will facilitate an open and fully competitive cash auction or that cause exists because the debtors' assets to be sold in their entirety include encumbered, unencumbered and disputed assets.

The committee will not seek a limitation on the credit bid for any other basis. To be clear, Your Honor, there is a disagreement between the parties on whether, as a matter of law, the Court can limit the credit bid under these circumstances. Based on the agreements reached, the debtors and the committee will not present further argument or evidence on these issues, but will be able to respond to direct inquiries from the Court. Moreover, the debtors and the

committee may also respond to oppositions to their respective positions. However, the committee's response to an opposition by a third party shall not in and of itself constitute an opposition to the debtors' position.

We'd also secure at this time confirmation from Wanxiang that its replacement DIP and purchase agreements are as filed and that Wanxiang stands ready and fully willing to close in the replacement DIP loan that is proposed, including with respect to the filings that occurred, I think, late last night, Your Honor.

THE COURT: That was a concern, of course, that I had expressed at our -- during our telephone conference. And by the way, I am going to give parties a chance to kind of collect their breaths here, because, clearly, these agreements put a completely different sort of approach to today's hearing. And -- on today's hearing, and parties should have an opportunity, I think, to give it some thought. And I had indicated, for example, that it would difficult, perhaps, for me to rule; knowing that the parties are not putting on evidence casts that sort of concern of mine in a different light as well.

So that's just my initial reaction.

MR. DAHL: Certainly, Your Honor. And to continue, and we would -- I apologize, Your Honor.

THE COURT: That's quite all right.

MR. DAHL: With respect to the procedure, then, Your Honor, again, subject to receiving that confirmation from Wanxiang and after any other evidence or argument and after such time the Court feels is appropriate for deliberation and whether that is today or at a later date, we would ask the Court to make its ruling on the credit bid limitation request as set forth in these agreements.

Your Honor, once that ruling is made and again on the basis of these agreements, the remainder of the proceedings would follow in a manner consistent with these agreements in all respects.

THE COURT: All right.

MR. DAHL: If it would please the Court, I have a copy of the agreements themselves I could hand up to the Court, if that would please Your Honor.

THE COURT: That would be helpful, certainly, Mr. Dahl. I was taking notes, obviously, but I might have missed a word or two here or there.

MR. DAHL: Certainly, Your Honor.

THE COURT: Thank you. All right.

MR. DAHL: So --

THE COURT: I know that we have a couple of matters outstanding. First of all, other parties may wish to be heard on the procedure. Secondly, I know that you've asked for Wanxiang to confirm their commitment on the financing, and so

those are issues that we really ought to hear from parties as to now.

MR. DAHL: Certainly, Your Honor. And we would certainly respond to any questions from the Court with respect to the procedure and the agreements that we've laid out on the record now.

THE COURT: I have this question for you, I guess. May -- it may be more for the committee to answer, but I'll ask you first. If I decide that an auction is appropriate and that we should cap credit bidding or eliminate it completely, what dollar amount would the debtor propose is the appropriate amount for that cap?

MR. DAHL: In terms of the cap on the credit bidding --

THE COURT: Yes.

MR. DAHL: -- Your Honor?

THE COURT: For purposes of an auction. You've indicated that if there is no cap there won't be an auction, which means if I determine that there is a cap, there will be an auction.

MR. DAHL: Your Honor, if I may have a minute, I'd like to consult with some --

THE COURT: Absolutely.

MR. DAHL: -- of my colleagues?

THE COURT: I know that the committee -- I think the

number that the committee had been using was twenty-five million. Actually, it was proposing no credit bidding, but if I determined that some credit bidding was appropriate, the twenty-five million dollars was -- should be the cap.

MR. BALDIGA: Exactly. William Baldiga for the committee. But that's exactly what we've asked for.

THE COURT: All right. Thank you. And get close -- keep close to a microphone so we make sure to pick you up on the record, Mr. Baldiga. And there should be one at the table, but --

MR. BALDIGA: Thank you, Your Honor. Yes. William Baldiga for the committee. Again, leaving argument aside, as we've agreed, but that is exactly what we've asked for in our papers; that credit bidding not be permitted to foster the auction that needs to be had. But if it is limited, it would be limited to twenty-five million dollars for Hybrid.

THE COURT: Which is what Hybrid paid for the Department of Energy --

MR. BALDIGA: Yes.

THE COURT: -- loan? Okay.

MR. BALDIGA: Yes. And the Wanxiang bid does provide for at least twenty-five million dollars in cash that would go to Hybrid under that bid, not that that bid has been accepted or valued yet. That would be part of the process going forward, but --

THE COURT: That's right.

MR. BALDIGA: -- that is contemplated, at least. And in that regard, Your Honor, Wanxiang's counsel is in the courtroom. If you have questions or any of us have questions later in the proceedings, I do want to confirm that they are here.

THE COURT: Yes, thank you.

MR. BALDIGA: Thank you.

THE COURT: Thank you. Good to see you.

Yes, good morning.

MR. GUZINA: If I may have a moment, Your Honor?

THE COURT: Sure.

MR. GUZINA: Thank you. Your Honor, if I may take advantage of the break --

THE COURT: Yes.

MR. GUZINA: -- in the proceedings. Bojan Guzina, on behalf of Wanxiang --

THE COURT: Good morning.

MR. GUZINA: -- America. Good morning, Your Honor. I just wanted to confirm on the record that we are indeed prepared to close -- to sign the documents, to close the replacement DIP loan and to sign the stalking horse APA that was filed with the Court late last night. We do need to know exactly the amount of funding that the debtors would need on an interim basis to take out the existing DIP loan and provide

incremental funding, but we are ready to move forward, Your Honor.

THE COURT: Is that sufficient? Yes, Mr. --

MR. DAHL: Yeah, if --

THE COURT: That's a sufficient representation for your purposes?

MR. DAHL: That confirmation from counsel to Wanxiang satisfies our requirement there, Your Honor.

THE COURT: All right. Thank you. Thank you --

MR. DAHL: But we would --

THE COURT: -- Mr. Dahl.

MR. DAHL: But we would -- could we ask for a brief five-minute recess?

THE COURT: Sure.

MR. DAHL: Thank --

THE COURT: I suspect there may be a few of those throughout the day, and we'll take our first one now.

MR. DAHL: It's possible, Your Honor.

UNIDENTIFIED SPEAKER: Thank you, Judge.

MR. DAHL: Thank you.

THE COURT: Very well. Thank you.

(Recess from 10:07 a.m. until 10:31 a.m.)

THE CLERK: Please rise.

THE COURT: Thank you all. Please be seated. All right. Mr. Dahl, I think you were standing there when I left

the courtroom.

MR. DAHL: Thank you very much for your patience --

THE COURT: Yes.

MR. DAHL: -- Your Honor.

THE COURT: Of course.

MR. DAHL: Your Honor, as we've said in our agreements with the committee and really, I think, since the outset of these Chapter 11 cases, that the debtors do believe that there is value that could be realized and additional value that could be realized through a competitive auction process. However, Your Honor, and as we've said, I think, earlier today, we disagree with the committee that, as a matter of law, the Court can limit Hybrid's credit bid rights under these circumstances here. As a result, Your Honor, the debtors don't have a cap that they could propose, as the Court has asked.

THE COURT: That's fine. I understand. All right. Does anyone wish to be heard on this matter at this time?

MR. KELLER: Good morning, Your Honor.

THE COURT: We have a taker. Good morning. Good to see you --

MR. KELLER: Good morning, Your Honor.

THE COURT: -- again.

MR. KELLER: Tobias Keller of Keller & Benvenutti, appearing on behalf of Hybrid.

It's an honor to appear before Your Honor --

THE COURT: It's --

MR. KELLER: -- for the first time, I believe.

THE COURT: It's a pleasure to have you here, Mr. Keller.

MR. KELLER: Also, I would note the first time that I believe Keller & Benvenutti has appeared in court. So --

THE COURT: All right.

MR. KELLER: As I come to the podium, I was thinking of the old poker adage that when you come to a new game you should look to your left and your right to figure out who's the mark. You don't know who the mark is?

THE COURT: It's you.

MR. KELLER: You're the mark.

THE COURT: That's right.

MR. KELLER: As a housekeeping matter, first, I want to emphasize what's already been put on the record, which is Hybrid wasn't a party to these conversations. We don't accept a number of the assertions that are made, the stipulations that are made and, in fact, we think that some of the evidence is not consistent with some of the assertions that have been made here. So for the time being, I will -- I'd simply underscore that Hybrid is not a party to that agreement, and we reserve our rights thereby.

We have very little evidence that we need to put in. We do not propose to put in live evidence. We understand, but

did not receive, notice of a deposition of the committee's financial advisor, Mr. Madden. We've received a transcript, and we would like to put in some excerpts of that transcript, because we think it conflicts with his declaration to some degree and helps us explain our case.

THE COURT: Okay.

MR. KELLER: The other point, I think, is -- should be fairly noncontroversial, but there are a number of documents before Your Honor: the debtor-in-possession loan agreement, a sale agreement, the plan. We were not planning to go through the process of asking, of going through the details of getting those judicially noticed, but they are very germane to the discussion today. So unless a party has an objection, we will simply treat those as if they are in the record for purposes of any further proceedings.

THE COURT: That's acceptable to me, Mr. Keller, for purposes of our record.

MR. KELLER: Okay.

THE COURT: Mr. Baldiga? They may not be acceptable to you.

MR. BALDIGA: No. William Baldiga for the committee. Certainly, as to the credit documents, the bid documents, that -- all the -- I believe that there is a volume on the docket. But to the extent that docket entries -- and I think we'll have some -- for example, the Wanxiang ones that -- the

same thing -- we have no problem at all. And the debtor, obviously, could look through them as well to have those be admitted as part of the record of today's proceeding.

As to Mr. Madden, we weren't involved in the noticing of his deposition. But in any event, he is here in the courtroom. We would -- he's available to testify. Again, it's not the committee's desire that he testify, but we have agreed with the debtor that were he to be called by someone else, he would obviously testify truthfully and that testimony would be the best evidence of whatever his opinions are today, especially given that even in the relatively minor few days between the date of his deposition and today there is significant new facts on the grounds; obviously, there is to the Court and all other parties as well.

And so the subject of his -- what he -- opinions that he were to express, as well as the facts as he knows them, would be best expressed through his testimony and not by reference to what is now in certain several -- in several important respects, stale transcript.

THE COURT: Okay.

MR. BALDIGA: Thank you.

THE COURT: Thank you, Mr. Baldiga.

Yes, Mr. Dahl?

MR. DAHL: Your Honor, I think we've moved rather seamlessly into some procedural aspects, of the proceeding. So

on that note, Your Honor, the debtors would like to admit into evidence certain of the declarations that were filed in connection with their sale motion. Specifically, we would --

THE COURT: And I have those all in the binders, I believe, that have been --

MR. DAHL: That --

THE COURT: -- submitted to me?

MR. DAHL: That's correct, Your Honor.

THE COURT: All right.

MR. DAHL: And specifically, it would be the declaration of Mr. J.P. Hanson, just --

THE COURT: Why don't we do this? Somewhere -- I'm sure I have them. I'm sorry. Somewhere, I'm sure I have an index of the exhibits, and we can go through that if you'd like. Well, I guess we -- yes, here it is. I have an exhibit list. Here's your exhibit list, Mr. Dahl. And if you'd like, we can just go through it and you can indicate which documents you'd like to have admitted and whether -- we'll then determine whether there's any objection.

MR. DAHL: If I may have a --

THE COURT: Does that make sense?

MR. DAHL: -- moment to consult, Your Honor?

THE COURT: Sure.

(Pause)

MR. DONOVAN: Good morning, Your Honor. Dan Donovan

from Kirkland.

THE COURT: Of course. Good to see you, Mr. Donovan.

MR. DONOVAN: Good to see you, Your Honor. Your Honor, I've conferred with committee counsel, and the exhibits -- I know you've got some healthy binders provided to --

THE COURT: Yes.

MR. DONOVAN: -- chambers. We believe the best way, since it is, Your Honor, to just review the documents, goes to the weight of the evidence, is both sides, all the exhibits we've provided to Your Honor, can be moved into the record. And both sides and Your Honor can consider them for their weight for what they're worth.

THE COURT: That's acceptable to the Court. Mr. Donovan, yes?

MR. DONOVAN: Yes, Your Honor. The committee also, as part of their exhibits, had both Mr. Madden's declaration, and then I think they have another declaration in there too --

THE COURT: Yes.

MR. DONOVAN: -- so both sides have declarations plus exhibits. And --

THE COURT: Absolutely.

MR. DONOVAN: -- our proposal is to submit it all to Your Honor for your consideration.

THE COURT: Okay. Very well. That's acceptable to

me. And I don't know -- Mr. Keller, any concern about --

MR. KELLER: We have a peculiar problem that we haven't seen all the exhibits.

THE COURT: Okay.

MR. KELLER: I -- they weren't provided to us at any time, and I don't propose to review them --

THE COURT: Are we --

MR. KELLER: -- at this time. But --

THE COURT: We got to get you on the record here, Mr. Keller. I'm sorry. If you would come up to the microphone.

MR. KELLER: I apologize. Hybrid was not given copies of the exhibits. Some of them look to be fairly substantive. It's one of the impairments that we've had. We weren't noticed of the depositions in advance. So we don't object in principle, but we're not in a position where we can stipulate to anything, because we don't know what we're talking about.

THE COURT: All right. All right. I understand, and we can talk about that housekeeping matter or matter of importance later. I think -- if I understand correctly, Mr. Keller, you were going to proceed with evidence, either by proffer or -- I don't know -- or by --

MR. KELLER: I do have a fairly substantive presentation. Hopefully, it will be riveting prose. But I think given that we're dealing with the evidence, what I'd like to do is introduce my partner, Mr. Benvenutti, to address just

the excerpts of a transcript -- or the transcript excerpts from Mr. Madden and how that should be handled. And then, I can go to the presentation.

THE COURT: All right. That -- all right.

MR. KELLER: Thank you, Your Honor.

THE COURT: Mr. Benvenutti, good morning.

MR. BENVENUTTI: Yes.

THE COURT: Good morning. Good to have you here.

MR. BENVENUTTI: Good morning, Your Honor. It's a pleasure to be here. Peter Benvenutti, Keller & Benvenutti.

As with Mr. Keller, my first time before Your Honor. And my first time appearing on behalf of our new firm.

THE COURT: Wonderful. Congratulations --

MR. BENVENUTTI: I'm delighted --

THE COURT: -- to both of you.

MR. BENVENUTTI: Thank you. Your Honor, I think it's a fairly simple proposition. We wish to submit excerpts of the deposition taken of Mr. Madden on Tuesday. He submitted a declaration. We understand at the very least there's a declaration that was submitted back at -- ages ago, I think on December 30th. And his testimony, as we've now seen from the transcript, is germane to some of the opinions that he expressed there.

Under the rules, we're entitled, I believe, to submit the deposition -- excerpts of the deposition transcript. And

that's all of the evidence that we intend to put in, other than what's already in the record. I would point out, to give a little color, the deposition was taken on Tuesday. We were not noticed with respect to the deposition. We inquired as to where the deposition was being held, and we were not told where the deposition was being held. So we, functionally, had no opportunity to participate in it.

And we got a copy of the transcript for the first time about 8 o'clock last night. And we've endeavored within that time frame and in the process of preparing for today's hearing to review the transcript and to designate those limited portions that we think are germane. So I've provided a copy of our --

THE COURT: You're --

MR. BENVENUTTI: -- designation --

THE COURT: -- basically designating a portion of the transcript?

MR. BENVENUTTI: Yes, that's all -- that's what we've done, Your Honor.

THE COURT: Yes.

MR. BENVENUTTI: So I've already provided a copy of that designation to Mr. Baldiga. I've provided a copy of that designation to counsel for the debtor. With the Court's permission, I would like to tender up a copy of the designation to the Court. If I may approach?

MR. BALDIGA: No, I'll need to object, Your Honor.

THE COURT: You object? All right. Let's have a little argument on your objection.

MR. DAHL: If I may while Mr. Baldiga approaches -- thank you, Mr. Baldiga.

THE COURT: Yes, Mr. Dahl.

MR. DAHL: One item I would like to clear up on the record, though, is the assertions that -- from Hybrid's counsel that Hybrid was somehow wrongly or improperly excluded from the Madden deposition. The fact is Mr. Madden's deposition included or potentially included subject matter related to competing bidders and could have potentially divulged highly sensitive commercial information --

THE COURT: Right.

MR. DAHL: -- in the context of a potential auction process to what would then be a stalking horse bidder. And on that basis, Hybrid didn't participate, Your Honor. And I did want to make sure that the record was very clear in that regard.

MR. BENVENUTTI: Well, I accept counsel's representations at face value. It would have been nice to get the representations a little earlier, but the fact remains we weren't permitted to be there.

THE COURT: All right. Let me hear from Mr. Baldiga, then Mr. Benvenutti before we determine what we're going to do

with the designation. Mr. Baldiga?

MR. BALDIGA: Thank you, Your Honor. William Baldiga for the committee. In that regard, just to complete or augment Mr. Dahl's comments, we've never been asked by Hybrid as to any of the ongoing discovery. Obviously, as the Court well knows, from the sheer volume of paper and the good advocacy by all parties, there has been some pending disputes. And if there had been an inquiry as to any of that, we certainly would have responded. But I am looking at -- on our team, we were not. So we ascribe no blame anywhere, but we are where we are.

As to the narrow question before the Court -- and I'm not going to repeat myself on everything -- that the transcript of a deposition is hearsay, unless offered to contradict the testimony in court of a witness who is testifying. And that is especially important here, not meant to be standing on principle, but this has been a fast moving case in the extreme. And there is substantive new factual developments that have been learned by the witness since he took the deposition.

So at the very most, the deposition would be an indication of what the exhibit -- what the witness knew at a prior time, unless information that he knows today. And so we would say that there is no probative value of those -- of that document. Certainly, it does not go to the truth of the assertions made in there. And again, we have Mr. Madden available. There is better evidence available to the Court.

Again, it is not the committee's desire that Mr. Madden take the stand. But we certainly had him be here and be available to Hybrid or any other partners -- party to the extent they wish to compel his testimony on whatever issue they think is appropriate. Thank you, Your Honor.

THE COURT: All right. So Mr. Benvenutti, they're suggesting that you can use that deposition transcript to impeach the witness.

MR. BENVENUTTI: I understand that they're suggesting that, Your Honor. It -- they may have their reason why they think that's appropriate as a matter of trial tactics. But under the rules, they submitted his evidence in the form of the affidavit.

THE COURT: Yes.

MR. BENVENUTTI: So his evidence is before the Court now. The rules make it very clear that where a witness has testified -- and de facto, he's testified with his affidavit. We're not objecting to the admission of the affidavit. Another party's entitled to submit a deposition with respect to matters as to which he testifies in his testimony, his affidavit.

That's all we're seeking to do. If Mr. Baldiga believes that he's entitled to call Mr. Madden to the stand after we do that, he's certainly free to do that. And if I wish to cross-examine him based upon whatever that testimony is, so be it. I don't know whether that's permitted under the

terms of their stipulation or not. That's an issue, I guess, we'll address if he tries to call Mr. Madden.

But I think -- I forget what the rule is, but it's pretty clear under the rules that where somebody who's testified, another party's entitled to submit his deposition with respect to the matters as to which he testified. And the matters that he designated in the deposition fall squarely within that principle.

THE COURT: Well, here's my concern. The Madden declaration, which was submitted into evidence, is dated at least several days ago. I don't even recall what the --

MR. BENVENUTTI: I --

THE COURT: -- date is --

MR. BENVENUTTI: -- I --

THE COURT: -- of the declaration.

MR. BENVENUTTI: I believe it was the 30th, Your Honor.

THE COURT: Yes. Okay. And so I think that the argument that there are new facts since the deposition is -- rings a little bit hollow with me. And so I'm going to admit the -- your designations. And of course, as you've indicated, Mr. Benvenutti, and is the case, Mr. Madden's in the courtroom and if the committee would like to sort of augment his testimony and bring it up to date, they're certainly free to do so.

(Mr. Madden's Deposition Transcript Excerpt Designations was hereby received into evidence as, as of this date.)

MR. BENVENUTTI: Thank you, Your Honor.

THE COURT: Yes.

MR. BENVENUTTI: So if I may, I would like to approach.

THE COURT: Please. Thank you, sir.

MR. BENVENUTTI: Thank you, Your Honor.

THE COURT: You're welcome.

MR. BENVENUTTI: Your Honor, I have some extra copies if there's anybody who has still -- who would like to receive one hasn't. I'm happy to pass those up.

THE COURT: All right. Thank you, Mr. Benvenutti.

MR. BENVENUTTI: Your Honor, one housekeeping matter and then one procedural one. The housekeeping matter is that the designation -- if you look at the designation, you'll see that there are a number of pages that are copied, twenty or twenty-five or thirty, something like that. The designation is solely those matters which are marked in yellow.

THE COURT: Okay. Understood.

MR. BENVENUTTI: So it's not the entirety of the pages.

THE COURT: I would have assumed that, but I appreciate the clarification.

MR. BENVENUTTI: With the exception, Your Honor, of

the first four or five pages of the exhibit, which is simply the title of the case and the information that shows who the parties are. We didn't bother to -- who was present, we didn't bother to mark that. So pages 1 through -- so it's everything in yellow, plus pages 1 through 5.

THE COURT: Okay.

MR. BENVENUTTI: Where is -- is part of our designation. The other part that's procedural, Your Honor, is that -- with the Court's indulgence, I would like to read into the record and read to the Court portions of what we've excerpted. I don't think it'll take more than about five or ten minutes, but I think given the fact that there's been an awful lot of information presented to the Court, I would ask the Court to indulge me in going through that exercise, if I may.

THE COURT: I will do so, yes.

MR. BENVENUTTI: Thank you, Your Honor.

THE COURT: Because it will be helpful to me as well.

MR. BENVENUTTI: Excellent. So Your Honor, if I may, the first excerpt is on page 8, lines 13 to 22.

THE COURT: Yes, sir.

MR. BENVENUTTI: And the questioning is now is by counsel for Fisker, and the answers are Mr. Madden's answers. "Q. So it sounds like the three primary things you've done is you've done financial analysis of the claims, the assets that

counsel has identified as unencumbered, the DIP expenditures, one; two, the Hybrid business" -- excuse me -- "potential business plan, and three, the Long John bid and their business plan. Is that fair?

"A. Yes, that's fair. There's been other things, but those are the main areas of focus, I believe."

Next, on page 48, Your Honor, starting at page 18 and then continuing until --

THE COURT: At line 18, yes.

MR. BENVENUTTI: I'm sorry, line 18 -- I beg your pardon, Your Honor -- and then continuing to page 50 --

THE COURT: Sure.

MR. BENVENUTTI: -- line 12.

"Q. As part of your work for the committee, have you investigated and valued any of the assets of Fisker?

"A. I've looked at the assets that have been identified to me by counsel for the committee as unencumbered, and in consultation with counsel for the committee, done some work on the potential value of those assets.

"Q. What assets has counsel told you are unencumbered?

"A. There's various causes of actions: Chapter 5 claims, commercial tort claims, D&O claims, which probably fall under one of those buckets. There's also foreign intellectual property. There's four or five certificated Fisker vehicles. And then, there's foreign inventory, essentially vehicles that

are in Europe, finished vehicles in Europe.

"Q. What is the value that you've attributed to the commercial tort claims?

"A. Well, essentially, between all of the causes of action types, there's really three potential claims that we will ascribe value to."

Your Honor, if I may, I'd like to get some water. This is --

THE COURT: Of course.

MR. BENVENUTTI: Thank you.

THE COURT: Yes, Mr. Benvenutti.

MR. BENVENUTTI: Thank you, Your Honor.

"A. One would be a potential claim against BMW, which I relied upon the debtors' chief restructuring officer, his knowledge of the situation, to help value, and he's told me that he believes the claim against BMW is worth approximately five million dollars. Then, there's -- also in terms of causes of action, there's one potential preference action that has been identified as having value that is against Ignited counterparty, and the value of that would be in the range of 4 or 500,000-dollar range.

And then, the last cause of action with value would be a directors and officer claim. With regard to that, again, I've consulted with counsel to the committee. I'm aware that there is a twenty-million-dollar policy. I've been told that the

claim is a real claim, not just a nuisance claim. In my experience before in situations like that, there's been significant recoveries, especially in connection with a policy. So we placed a value, you know, in the range of five million on that as well."

Next, Your Honor, page 62, beginning on line 12 and going through page 63, line 5.

"Q. And the DOE loan is a senior secured loan, correct?

"A. Yes, secured by certain assets of the debtors.

"Q. What assets secure the DOE loan?

"A. Well, I think the best way for me to answer would be all of the assets, except for the five of six buckets that I mentioned earlier in my deposition.

"Q. We'll come back to that. But your understanding is the DOE loan is secured by all assets of Fisker other than the five or six categories you listed earlier that I believe the committee the noncollateral assets, true?

"A. True.

"Q. And at the petition date, the senior secured loan had a principal balance of approximately 168 million, true?

"A. True."

I noted that we neglected to highlight the answer at line 5, but I'd like that to be part of the designation.

THE COURT: Very well.

MR. BENVENUTTI: Thank you, Your Honor. Next, Your

Honor, page 79, beginning at line 15 and continuing through page 80, line 4.

"Q. Your fifth category is foreign IP. What amount do you attribute to be the -- to be valued for the foreign IP?

"A. We put a range of value on that between a million and two million dollars.

"Q. What is that based on?

"A. It's based on really three things. One is we've looked at how many trademarks and how many patents exist. We then looked at the marketplace for trademarks and patents, in particular with other OEMs, and we've layered on top of that our experience in selling IP in other bankruptcies. And the combinations of those three things resulted in a million or two, that range.

"Q. And is that million to two million an independent value for the foreign IP or only if the foreign IP is sold with the other DOE collateral?

"A. I believe that would be an independent value."

And that's the end of what I'm going to read from that excerpt. And then, finally, beginning on page 82 at line 5 and concluding on page 83 at line 4. Question -- this is a continuation of a question that started before.

"Q. Do you believe Fisker is worth more as an enterprise, that is, including being sold with the DOE collateral and noncollateral together or broken apart?

"A. Well, certainly, if you were to buy the collateral assets and the noncollateral assets together, that's worth more than one or the other broken up. Absolutely.

"Q. And just to be clear, if you sold them as broken up and you add DOE collateral plus the noncollateral assets, you believe that would be less than if you sold the DOE collateral along with the noncollateral assets as one package? You believe that amount that you would get would be higher than if you sold the DOE collateral and the noncollateral and just added it together, true?

"A. Well, what I'm hearing you say now, because I didn't hear it the first time, was that -- is the whole greater than the sum of the parts. We haven't put a lot thought into that, quite honestly. So I will continue to refine our thought on that, but I really have no opinion on whether the whole or the sum of the parts is greater at this point."

Your Honor, that's all I have that I would ask the Court -- had to ask the Court's indulgence to read into the record. But I do ask that the entirety of the designations be accepted in evidence.

THE COURT: Thank you, Mr. Benvenutti. Mr. Baldiga?

MR. BALDIGA: We will not -- well, we've objected. The Court has heard that, so I'm not going to repeat the objection.

THE COURT: All right.

MR. BALDIGA: I -- if the designation is to be accepted by the Court, we would have testimony -- clarifying testimony, I believe, by Mr. Madden that I could offer by way of proffer. But if Mr. Benvenutti prefers, again, Mr. Madden is here. I could proffer what that testimony would be if that were preferred. And there may not be a contest as to that, but I'll proceed as the Court wishes.

THE COURT: Mr. Benvenutti?

MR. BENVENUTTI: Your Honor, I have no objection to listening to the proffer. I'd like to reserve decision on whether I want to have him presented for testimony --

THE COURT: That's fair.

MR. BENVENUTTI: -- after -- until after I hear the proffer.

THE COURT: That's certainly fair. Yes.

MR. BALDIGA: Then, Your Honor -- and I'm going to keep this more brief than is usually done. William Baldiga for the committee.

Were Mr. Madden were to take the stand, he would testify under oath as follows. His name is John P. Madden. He is a founder and principal of Emerald Capital Advisors. Emerald Capital Advisors has been, subject to the Court's approval, retained as the committee's financial expert, financial advisor in this case. There is a CV that we would have of Mr. Madden. It would -- for efficiency's sake and

given the number of people and the number of things to be achieved in the courtroom today, be prepared to simply -- it goes through his educational history and so forth.

But Mr. Madden has been providing restructuring advice, including as an expert witness, for more than fifteen years. He was CRO in a recent matter, Your Honor, Coda, in Judge Sontchi's courtroom, which is another electric car case. Mr. Madden has held that position now for, I think, about a year, which provides some additional expertise in many things relevant here, including that he has sold, liquidated and otherwise managed an extensive portfolio of inventory, electric car inventory, parts, tooling and so forth at locations all over the world. A challenge that is faced by this company as well.

He has -- before founding Emerald this year, he was previously with several other extremely well known advisory firms, including Chanin Capital Partners, Zolfo Cooper. And we would, Your Honor -- if we were to put Mr. Madden on the stand, we would seek to have him accepted as an expert on the matters for which he were to testify. Again, we would, for brevity's sake, not go through the entirety of his expertise and the foundation for him in that regard.

The one substantive area of testimony, Your Honor, and so the proffer is made, that Mr. Madden would testify accordingly, that if the -- what has been described in the

transcript portion read to you as commercial tort claims were to be liquidated, resolved, whether by litigation or by settlement, that the cash portion, as you heard of those resolutions, would be something in the range of five million dollars, but that in addition to that, because the question wasn't asked of him in this way, Mr. Madden believes that it is highly likely that the deficiency claims here of Hybrid and its affiliates and its other note claims and other claims in these cases would also be resolved for no consideration.

That is, as part of an overall resolution of the tort claims, there would be a net recovery of something in the five-million-dollar range on top of -- and whether that's by, again, litigation or settlement -- a waiver release and so forth of the deficiency balance.

That would be, we believe, Your Honor, trying to keep things as narrow as possible here, the extent of the countertestimony and that would be the end of the proffer. And again, Mr. Madden is here to testify accordingly if called. Thank you.

THE COURT: Thank you. Mr. Benvenutti.

MR. BENVENUTTI: Yes, Your Honor. I have no objection to the proffer with respect to Mr. Madden's qualifications and history. I do object to the proffer on evidentiary grounds. Mr. Madden, as I understand it, would be testifying effectively to his legal opinion regarding the appropriateness of

subordination of claims. I think the Court can do the numbers as to what would happen if there were subordination. There's been absolutely no evidence, there's been no briefing, and it's inappropriate for the Court to be asked to take third-hand and unreliable legal opinion from a financial expert as to whether subordination is appropriate.

So I object on those grounds to the proffer with respect to any possible subordination or other effect of deficiency claims.

THE COURT: Well, there would need to be a factual predicate, it seems to me, foundationally, for that opinion. Whether -- and the conclusion may be a legal conclusion in any event, which would not be admissible. But -- and to which an objection would be sustained. But it just strikes me that it's so conclusory that it's very difficult for me to give it any weight.

MR. BENVENUTTI: Well, Your Honor, I think that's part of the issue too. The legal basis for the objection is that it's a legal opinion. It also lacks foundation.

THE COURT: Yes, yes.

MR. BENVENUTTI: As I've said before, there's been no -- this is a totally undeveloped issue. We absolutely dispute there's any basis for subordination. That's not within the scope of the issues to be tried here today, and I think it's just fundamentally inappropriate to have the record

include any possibility that this can be used against my client on this background.

THE COURT: Is it subordination, though? Is that what the argument is?

MR. BENVENUTTI: I think so. I think the -- well, I think --

THE COURT: Well, isn't it more of a --

MR. BENVENUTTI: -- the proffer --

THE COURT: -- set-off?

MR. BENVENUTTI: Well, I'm hearing it for the first time, Your Honor. So --

THE COURT: Yeah.

MR. BENVENUTTI: -- it's very difficult to figure it out. But the proffer is that they're going to have Mr. Madden testify that because of unspecified conduct, which is outside the scope, as I understand it, of their stipulation anyway, for purposes of today's hearing, that there's some basis that the Court should give credit to for doing anything to my client's secured claim. The only things before the Court today -- the only thing that's before the Court today is whether we should be permitted to credit bid or not. And this goes far beyond that, and I think it's just fundamentally inappropriate and unfair and highly prejudicial.

So I object and think the Court should not accept the proffer with respect to that subject.

THE COURT: All right. Let's hear from Mr. Baldiga, so I perhaps understand the nature of the proffer a little better as well.

MR. BALDIGA: Thank you, Your Honor. This is, I guess, why transcripts are not a good way to make the record. The -- again, I want to stress, the committee's prepared to rest on its papers, and we were not the ones who attempted to introduce more evidence --

THE COURT: Right.

MR. BALDIGA: -- as to the value of the commercial tort claims. It is the case, Your Honor, that people in Mr. Madden's position, whether as CRO or as financial advisor, testify -- or manage, first of all, and then testify on a regular basis as to the value of estate assets based on their experience in many other matters.

Mr. Madden has a great deal of experience in other matters as an expert, but also factually as to, generally speaking, what is the range of recovery on these types of tort claims. Mr. Madden is not an expert, legal or otherwise, as to the merits of these particular claims. And by agreement with the debtor, that's the last thing we intend to go into today. And we think the case is better managed without that being -- playing out today.

However, Hybrid chose to introduce testimony that's inconsistent with the testimony that the witness would offer if

taking the stand today as to this witness' opinion as to the value of the commercial tort claims. And all we're saying is if Hybrid wishes to introduce evidence in that regard, let's get the most accurate evidence in, and my proffer is to correct an incomplete version of what Mr. Madden would testify to as to that particular asset based on his experience as a CRO and expert in the financially distressed situations.

That's all.

THE COURT: All right.

MR. BALDIGA: And we could go -- and -- but not as a lawyer. Obviously, he's not a lawyer.

THE COURT: Right.

MR. BALDIGA: And not as to the merits of this particular potential dispute. You do have all of the committee's papers, STN type motion and so forth, in the record before the Court. We're not going to flip one page of that --

THE COURT: Okay.

MR. BALDIGA: -- unless the Court requires us to do that. We would prefer not to do that. But we don't want Mr. Madden's testimony to be mischaracterized by a portion of the transcript where he was not ask the full question so as to get the full answer of his opinion of value of a particular estate asset.

THE COURT: All right.

MR. BALDIGA: Thank you.

THE COURT: All right. Mr. Benvenutti?

MR. BENVENUTTI: Your Honor, I don't think anything that Mr. Baldiga described has happened in the real world between Tuesday and today. And what he's essentially telling you is that there has -- that -- he's saying when Mr. Madden testified on Tuesday, he left something out. Well, the something is something that I think he wouldn't be qualified to testify about anyway for the reasons that I've described. But it's further prejudicial to us in these circumstances where he testified on Tuesday. Now, he wants to come back in and say, oh, I forgot this big value, this asset of great value.

So Your Honor, I persist in my objection. I don't think it's permissible. I don't think the Court should take his proffer, and I don't think they should -- the Court should permit Mr. Madden to testify about it.

THE COURT: All right. Well, I guess where the problem arises is my permitting the designation, as Mr. Baldiga has indicated. And I think both -- frankly, I think both the designation of testimony and the proffer are of very limited benefit to me in making a decision here because it's such a very narrow picture of the facts. But since I have permitted the designation of the transcript, I am also going to accept the proffer into evidence and we'll proceed from there. Mr. Benvenutti?

MR. BENVENUTTI: Yes, Your Honor. Since this comes as

a total surprise to me, I'd ask for a short recess.

THE COURT: Well, I'm willing to give you a short recess. I don't mind one myself, so we'll take -- what would you say, ten minutes?

MR. BENVENUTTI: Ten minutes would be fine.

THE COURT: All right. And I will be out in ten minutes. So --

MR. BENVENUTTI: Thank you.

IN UNISON: Thank you, Your Honor.

THE COURT: Thank you.

(Recess from 11:10 a.m. until 11:19 a.m.)

THE CLERK: Please rise.

THE COURT: Thank you. Please be seated. Thank you. Mr. Baldiga?

MR. BALDIGA: Thank you, Your Honor. Just to complete the last thread, Your Honor, we've been able to accomplish something during the break.

THE COURT: Yes.

MR. BALDIGA: It is a couple of other pages to the Madden deposition that deals with the issue that we were just debating. And the parties have agreed -- debtors, Hybrid and the committee -- to submit additional lines of the Madden transcript. I don't have them separated out right now, but we have someone that will do that --

THE COURT: I certainly --

MR. BALDIGA: -- shortly.
THE COURT: That's fine. Sure.
MR. BALDIGA: But for the record, it is page 160, line 12 of the transcript, through page 162 at line 10. And at some point, Your Honor, we will hand up those pages. And I believe that the agreement is that with that counterdesignation there would be no need for any of us to call Mr. Madden.
THE COURT: All right. Mr. Benvenutti?
MR. BENVENUTTI: Yes, Your Honor, that's correct.
THE COURT: All right. Very well. And do you want to read that to me while we're all gathered and while it's kind of fresh in the context --
MR. BALDIGA: Just read it --
THE COURT: -- on my mind?
MR. BALDIGA: -- into the record?
THE COURT: Would you, sir? Yes.
MR. BALDIGA: Certainly, Your Honor. "Question" -- and again, Your Honor, for the record, I'm reading from page 160, line item 12 in the Madden transcript forward.
"Q. So under the Wanxiang deal, you have a claims-pool estimate in the low case of 265 million. Do you see that?
"A. Yes.
"Q. And does that assume that all of Hybrid's DOE loan position is a deficiency claim?
"A. It assumes 143 million of it is a deficiency claim. 168-

25.
"Q. If we go down further, the claims-pool estimate, which is pre-Delaware facility in equity stake. Do you see that?
"A. Yes.
"Q. So there, under the low case, again, you have 265 million, correct?
"A. Correct.
"Q. Then, under the mid case on that same row, it goes from 265 million down to 85 million. Do you see that?
"A. Yes, I do.
"Q. What is the cause of that delta?
"A. Sure. The assumption there is that as part of the settlement on the D&O cause of action, not only" --
-- I'm sorry --
-- "that not only there would be four million dollars of proceeds, but there would be a waiver of the Hybrid deficiency claim, and also the Manion and Li related party notes.
"Q. And so you assume in your mid-case, for the claim's full estimate, that how much of the Hybrid deficiency claim is waived?
"A. The entire amount.
"Q. And so you assume that as well in your high Wanxiang case?
"A. Yeah."
-- I'm sorry --
"A. That's correct.

"Q. If you assume, like you do now under the low case, that neither of those are waived, everything else is kept constant, what is the recovery under mid case?

"A. The recovery under the mid case if the claims pool is kept constant with the low case, which it would be actually be kept constant with the low case, the mid case from above, the 251, because there's other moving parts, such as the trade credit and other things."

Continuing with the answer.

"So if you kept it at 251, okay, then the recovery would go down to approximately in the five to six-percent range. I'd need a calculator to do it exactly."

That would be the end of the additional designation, Your Honor.

THE COURT: Thank you. Thank you --

MR. BALDIGA: Thank you.

THE COURT: -- Mr. Baldiga. All right. Mr. Keller?

MR. KELLER: Your Honor, with the agreement about the documents that are otherwise being admitted into evidence, we have no further evidence to proffer at this time. I don't know if there are other parties who evidence, but otherwise I'd turn it over to argument.

THE COURT: Thank you, sir. Mr. Dahl? Yes, sir.

MR. DAHL: We're getting close to afternoon, Your Honor.

THE COURT: Yes.

MR. DAHL: Good afternoon. Ryan Preston Dahl, for the record.

Before we move into argument, Your Honor, I believe it might be helpful to the Court, again, to reframe the issues that we're asking the Court to decide, as we announced, I think, at the beginning of these proceedings. And, again, and to repeat, we've asked that the Court rule on whether Hybrid's ability to credit bid should be limited exclusively based on the committee's positions that: one, credit bidding should not be permitted here given that a material portion of the assets to be sold in their entirety are not subject to a properly perfected lien in favor of Hybrid, or are subject to a lien in favor Hybrid which is in bona fide dispute and which dispute cannot be quickly and easily resolved; two, whether cause exists because limiting the credit bid will facilitate an open and fully competitive cash auction; or, three, whether cause exists because the debtors' assets to be sold in their entirety include encumbered, unencumbered, and disputed assets.

And, Your Honor, those are the three bases on which we've asked the Court to rule.

THE COURT: Yes.

MR. DAHL: If it would be helpful, I have this in writing, and could hand up, if it'd be convenient for the Court to be able to refer to these three bases during the course of

argument, or during the day. I'd certainly defer to Your Honor's choice there.

THE COURT: I'd be happy to accept it, but I want to make certain that other parties have seen it, or have it, and that the answers aren't there.

MR. DAHL: Would that they were, Your Honor.

May I approach, Your Honor?

THE COURT: Please. Thank you. Yes, you may. Thank you, Mr. Dahl. It's helpful.

Any other evidence before we turn to argument? All right.

MR. DAHL: I believe evidence is closed, Your Honor.

THE COURT: Yes.

MR. DAHL: With respect to argument, I believe Hybrid would be proceeding first before the Court.

THE COURT: That's fine. Mr. Keller, when you're ready.

MR. KELLER: It's my pleasure to appear as the first mark.

Your Honor, I wanted to start by sort of acknowledging a regret of my clients'. When they first undertook to assist the debtors in their restructuring, frankly, the idea that there would have to be a bankruptcy wasn't really thinkable. Events subsequently overtook the company and when the filing became inevitable, they hoped for a speedy exit from bankruptcy

in order to stabilize the operations, begin hiring people back, address the perennial risks of technical obsolescence in this area, and commit financing not to restructuring costs, but to operational growth.

Rightly or wrongly, the client was persuaded that the best way to do this was not through a garden-variety 363 sale, but to support a plan process so that creditors would know what they could expect and that the administration of the liquidating estates would be assured. Part of the problem, of course, is that we tried to hold the plan process to a sale timetable, and that's obviously resulted in time pressure that in retrospect we could and should have avoided. We're sorry for the stress and difficulty that that has placed on Your Honor and on the parties in the case.

So, that said, we are where we are and we remain hopeful that we'll be able to consummate a transaction that we believe will be in the interest, certainly, of Hybrid, but also of the debtors and the creditors alike.

THE COURT: Sure.

MR. KELLER: The presentation today is comprised of three parts. First, I want to briefly discuss some of the history and the context in which my client came to this business.

Second, I think it's important that rather than talk about abstraction like DOE collateral, and noncollateral, and

the like, that we get right down into the guts of what the Hybrid proposal is after we renegotiated with the debtors and their chief restructuring officer.

And then, finally, I'll get to the gist, which is the legal arguments that guarantee Hybrid's credit bid rights under 363 of the Bankruptcy Code.

THE COURT: Okay.

MR. KELLER: With regards to the history, I don't mean to raise the issues of cause. We are pleased that those are being dropped for these purposes. It's more to give the context in which my client came to the table.

Although Hybrid, the entity, was established as an acquisition vehicle, its affiliates have been involved with the debtors for a long time. They believe strongly in the promise of hybrid electric vehicles and invested over sixty million dollars into the equity of the company. Then, as Mr. Dahl described to you on the first day, the company suffered a number of setbacks which collectively destroyed the company's short-term prospects. Those included technical problems, the bankruptcy and rejection of the debtors' sole source battery contract at the hands of A123, and the loss of the majority of its domestic inventory in Hurricane Sandy.

THE COURT: Right.

MR. KELLER: Indeed, but for the Series A -- sorry, Series E preferred equity rates in which my clients

participated in which approximately half a billion new equity was raised, the company would have run out of cash in 2012. By that time, my client represented that Mr. Manion was on the board of Fisker, and he, along with the rest of the board fought mightily to save the company.

The board had hired a blue-chip investment bank, Evercore --

THE COURT: Um-hum.

MR. KELLER: -- who scoured the world, literally, for investors, and when that didn't seem to come together, then for operating partners, and finally for outright buyers. None of those options yielded a third party that would pay or invest anything close to the indebtedness that the debtors' senior secured creditor was owed. That was the Department of Energy.

What became evident was that no sale or restructuring could be accomplished without first dealing with the debt. The Department of Energy, for its part, actively sought to recover on its loan, as any senior secured creditor would do. It stopped funding on the loan in 2011. Through 2012, it monitored the debtors' activities and pressed the debtors to solve their operating problems. When a buyer for substantially less than thirty million dollars was identified, the Department of Energy refused to provide debtor-in-possession financing, and ultimately, it actually swept the debtors' cash altogether --

THE COURT: Um-hum.

MR. KELLER: -- leaving the filing of a Chapter 7 case, we thought, a near certainty for the debtors. They were simply out of cash.

Instead, however, my clients arranged unsecured subordinated to the debtors of approximately fourteen million dollars. That was money that they knew would not be paid back given the capital structure was there. They then participated in the Department of Energy's auction of its loan and prevailed, paying over twenty million dollars in an open process run by the DOE with investment bankers, Houlihan Lokey.

Then, immediately upon Hybrid's purchase of the loan, the debtors filed these cases to allow for the recapitalization of Hybrid and, of course, Hybrid is committed to reinvesting heavily in the debtors' enterprise. This is not to say we're not aware of the tremendous losses that have inflicted on the debtors' stakeholders. After the Department of Energy, in fact, my clients are suffering one of the largest financial losses of the stakeholders, and that's to say nothing of the human beings who lost jobs, vendors who have lost significant revenues, and as Your Honor pointed out earlier, taxpayers who were hoping for a better outcome than this.

If there is a silver lining, it's that my clients continue to believe in the debtors' promise and is prepared to see that tens if not hundreds of new dollars of new investment

are made to follow the tens of millions of dollars it's already committed. And those investments will create new jobs, new tax revenues, and new business opportunities for vendors and others.

And through its post-petition negotiations with the debtors and their CRO -- this is what we've been calling the mediator's proposal -- Hybrid has agreed to a proposal that promises a meaningful return to creditors, continued employment for many, warranty support for customers, and engagement with the State of Delaware to see that the Delaware facility is handled responsibly, and in a way that's most likely to provide benefits to the citizens of this state.

That's the background and the context.

With respect to what we're talking about, we're fearful that in talking about disputed assets, and unencumbered assets, and encumbered assets, that we're losing some of the gist of what we're really talking about here. And so my task today is not to appear before you on behalf Hybrid in its capacity as a buyer, but to defend Hybrid as the debtors' senior secured lender, as successor to the DOE, and in particular, to do my best to persuade Your Honor that neither law nor policy support the committee's proposal to deny Hybrid its credit bidding rights. Because we're not talking about this issue of cause, I would submit to Your Honor that Hybrid is utterly indistinguishable from the DOE. It is as though the

DOE were still holding that paper and I'll argue from that perspective.

Before I address Section 363(k) though, as I've said, I'd like to explain the revised deal that the debtors and their CRO had negotiated, but we have called the fee mediator's proposal, and the benefits that it brings to the estate.

First of all, the following are the assets for which the committee has filed objections. These are assets for which there is no discussion of objection. They appear to be fully perfected collateral that are the collateral to what we've been calling the DOE loan.

That includes the real property that we've been calling the Delaware facility. It includes all the personal property thereon, and that a number of robots, dozens of robots that are actually capable of building cars. They are the debtors' leases. They are numerous contracting contract rights. They are deposits. They are inventory. They are raw materials. With the exception of four or five vehicles, they are all the vehicles located in the United States. They are mach -- excuse me. They are machinery, tooling, and equipment. They are the intellectual property located in the United States. They are workstations, computers, and software, and the technical work that's on there that we call trade secrets. They are business records and documents. They're permits, employee benefit plans, cash, receivables, and good will.

If Your Honor looks through the filings, these have not been raised as encumbered assets. This is the business that we are trying to acquire.

There are disputes. You've heard about four or five vehicles for which there are certificates. We take the position that those are still inventory subject to a UCC-1, but there's a dispute and we acknowledge that.

There are approximately ninety vehicles in Germany and Berl -- and Belgium. The perfection regime in Europe is very different than it is in the United States. We're not going to belabor today why we believe we're still covered under their perfection regimes. We'll acknowledge that there's a dispute there.

Finally, there's foreign intellectual property. Those are the three baskets for which the committee has raised issues and we will concede for purposes of this hearing that there's a bona fide dispute.

There are two other baskets that they have raised that we don't quite understand the issue. One is causes of action. Those are officially excluded. And one is Chapter 5 claims. We have no claim on Chapter 5 claims.

And then there are two classes of assets that we agree are unencumbered but will be lost to the estate if the transaction goes forward. That's claims against my client and affiliated entities, and its, right now, director and officer

claims. So to the extent that those are causes of action or Chapter 5 claims, we agree we don't have a perfected security interest in them, but they are part of our overall proposal.

The transaction we're proposing is supported by significant consideration. We don't call it a credit bid because it's not a credit bid. It is a package that includes the waiver of 168 million dollars of senior secured debt. Without getting into what the value of the underlying collateral is, it's a 168-million-dollar commitment.

There is a commitment of over eight million dollars of debtor-in-possession financing loans. We expect that that will be fully drawn, and part of that budget includes advances for wind-down costs and professional fees to finish up the case.

That includes the waiver of fif -- of fourteen million dollars of unsecured loans, those bridge loans --

THE COURT: Yeah.

MR. KELLER: -- that we made to get through the DOE auction. There is sharing in the ultimate sale of the Delaware facility after 8.5 million dollars is recovered, and significantly, three months of operating expenses during that time. That support is meaningful because it's real dollars.

It also supports Fisker's ongoing negotiations with the State of Delaware because it's a very important parcel of property, and the State has made it clear that it wants it placed in the right hands under the right circumstances, and

Hybrid is looking to be supportive of that process even though we acknowledge that on the scale that Hybrid is going to be operating, it just isn't realistic for us to take on that site. We would love to be at the scale that that was an issue. It won't be for the foreseeable future.

And I would point out, parenthetically, we've seen the Wanxiang proposal, and notwithstanding the press releases, the Wanxiang proposal exactly mirrors the terms that we have. If the sell the facility, they'll share as well.

We are also offering two million dollars in additional cash. We've agreed to assume approximately 900,000 dollars of taxes on the Delaware facility. We are giving up the proceeds to the EcoSport trademark. We are creating a warranty and customer support program at the suggestion of the CRO, and we are funding the payment of the other pari passu secured creditor, Silicon Valley Bank, to the extent that it has collateral.

So this isn't a credit bid. It's a purchase proposal, but the waiver of our secured claims is extremely valuable, and indeed, we believe that Hybrid's right to credit bid under that senior secured facility form the basis for the debtors' decision not to hold an auction but just do a direct sale. And that issue that's before us here today.

THE COURT: Um-hum.

MR. KELLER: As I understand the committee's request,

it's to hold an auction to test the sale to Hybrid, and in doing so, they would deny Hybrid a core property right, which is the right to credit bid those assets.

We need to be very clear then, that rather than talking about abstractions, we're talking about specific assets in dispute that are cited as material claims -- or material assets that allegedly warrant the denial of the credit bid. That's roughly a hundred vehicles in total. It's the foreign intellectual property that you've heard the testimony from Mr. Madden might be worth a million, two million dollars. It's D&O claims. And it's claims against Hybrid.

And if it's not patently obvious, I'll just make this point. These are not assets that are necessary to run the business. We are looking to take over the business and run the business that Fisker heretofore run. These are ancillary assets. In the context of this proceeding, we appreciate the reference to it being meaningful or material value, but they're not material to the operations of the company.

It also bears emphasis at this point that they're disputed assets. We're very confident that we have first priority secured rights on several of those assets. For a few, we acknowledge that the analysis is less clear. Only the released claims are clearly unencumbered. In all events, moreover, Hybrid expects to recover a significant amount of the value from the sale of those assets, and any proceeds that do

come to the estate would first have to made available to pay down the debtor-in-possession financing loans.

Now, I will discuss the law in detail -- more in detail shortly, but more specifically, it's worth noting now that we are not aware of any case law that cites the presence of ancillary disputed assets like the foreign IP, or like the vehicles, to establish cause to deny a senior secured creditor right to credit bid against the assets that are unencumbered without dispute. And that is crux of our argument. It bears repeating.

The principle that's espoused by the committee that the presence of a few ancillary disputed assets gives you discretion to limit Hybrid's credit bid rights on the fully perfected assets sets up an exception that would swallow the rule. We have never seen a case in which there are no assets that are unperfected, or no assets that are subject to dispute. So the mere presence of those cannot, as matter of law, we would submit, allow for the denial of the credit bid.

Now, let's engage in a hypothetical exercise and assume that the committee were right and that the committee prevailed on its claim that disputed assets are no perfected Hybrid collateral. The first question, of course, would be whether the additional consideration that my client has put on the table, and is being offered, and that's the waiver of over a hundred million dollars worth of unsecured claims, or

deficiency claims, two million dollars in cash, the waiver of an eight million dollar debtor-in-possession facility that's fully funded, the sharing of proceeds on the Delaware facility and the EcoSport trademark, whether all that, which is not credit bid -- that's new consideration -- is fair value for those assets.

We think the record before Your Honor, the papers have been filed by the debtors, reveals that Fisker's board and management has done that analysis, and has concluded in the exercise of its fiduciary duty that this is a good financial deal for the estate. If there is any debate on that point, then the debtor can certainly speak to it. I know that their chief restructuring officer is in the courtroom.

It appears to us that the committee is unpersuaded with that value proposition as is their right. It seems to believe that the estate is not receiving adequate value for those disputed assets.

Alternatively, there is a suggestion in the opening statement, or the statement that's been shared, that the sum of the parts exceeds the value of the isolated assets. We certainly don't concede that point and the testimony before Your Honor, I think, is limited to Mr. Madden who said he's never really thought about it. So we don't think there's actually any evidence, save for a stipulation between two parties who don't have our dog in this fight, who aren't the

mark, who are agreeing that the assets valued together would be more than if they were valued separately. We don't think that that has legal significance separately, but we don't think the evidentiary record is even there.

Finally, let's assume that the Court was, in fact, troubled by the existence of the dispute over the vehicles, the foreign IP, and the releases, even then, we think the way forward is uncontroversial. It's not the one that we want, but the answer is you hold two auctions.

The first auction is the one you have for the undisputed assets, where we get the operating assets of the business, the crux and the core of what we need, which, of course, would be subject to Hybrid's 363(k) credit bid rights. There's been no dispute about those assets that we started the process on.

The second auction would be on the assets for which, for purposes of this discussion, we're going to concede, for argument's sake, there's a bona fide dispute about or we don't have as collateral. And we concede that under existing law, the Court could rule that Hybrid may not exercise its credit rights as to those assets. But that would only be assets subject to bona fide dispute over which we don't have a collateral interest. And Hybrid, of course, would reserve its right to the proceeds, either to apply against its debtor-in-possession facility or its senior secured first position to the

extent that it turns out that that collateral position occur.

So with all the combative talk, let me be clear. Hybrid is committed to going forward under the mediator's proposal, the one that was negotiated in good faith with the debtor -- or with Fisker's CRO, and we hoped he would bring the committee along with him. Apparently he hasn't.

However, if the committee is insistent on an auction, and the Court believes that an auction is necessary and appropriate, Hybrid's undisputed rights in the Fisker collateral must be protected. And the absence of allegations of wrongdoing, which is the ground rule of this hearing today, we've identified no authority whatsoever that would allow the Court deny Hybrid its rights in that collateral for which no bona fide dispute exists.

Finally, the law. The committee wishes to find cause as Section 363(k) uses the term, as anything that would facilitate bidding. We are here to stand that -- stand for the proposition that that is not an appropriate definition of cause and is unsupported in the case law. We take as our starting and ending point the legal analysis of Judge Ambro in his SubMicron Systems decision.

The case, on the facts is, in fact, very similar to the one before us today. There, the company was overleveraged, and as the Third Circuit noted, "If the debtor failed to reach a deal with the acquisition vehicle that had acquired a

substantial portion of the secured debt, it would have been forced to liquidate, leaving secured creditors with pennies on the dollar, and unsecured creditors, and shareholders with nothing." Those last lines were taken from the decision.

Now, while here, by the committee's agreement, no bad acts are being asserted, in the SubMicron case there was a complaint that sought to subordinate the debt of the pre -- for the pre-petition behavior of the lenders.

The most important part of the decision, for our purposes, was the discussion of the lender's credit bid rights under Section 363(k) of the Bankruptcy Code. There, the trial court had actually found that there was no collateral available to secure the fundings.

This, notwithstanding Judge Ambro's decision, state and affirmed, "It is well settled among the district and bankruptcy courts that creditors can bid the full face value of their secured claims under Section 363(k)."

Judge Ambro proceeds thereafter to explain the statutory and policy reasons that this is the case. In particular, he rejected the very arg -- or one of the very arguments that the committee's made, that the claim can be valued and limited based on a market valuation, concluding that "This would contravene the basis for the provision's very existence."

I make as a final observation on SubMicron, it's worth

noting that the committee's equitable subordination claims were rejected in large part because creditors were already out of the money before the bidder's alleged inequitable conduct occurred. Because equitable subordination is remedial in nature, and they were out of the money, there could be no showing that unsecured creditors were in anyway disadvantaged or harmed by the sale of assets.

While I understand that today the committee's not asserting inequitable conduct except through the backdoor of saying that our claims wouldn't be allowed at all, the exact same facts exist here today.

Now, in the statement that was read to Your Honor, there were several references to Philadelphia Newspapers, with the implication that the holding of Philadelphia Newspapers is that Your Honor has broad discretion to deny the right credit bid even in the absence of alleged bad acts. We fail to find any such implication.

First, Philadelphia Newspapers is first and foremost a case about statutory interpretation, and whether credit bidding may be suppressed in a plan in favor of an apparent statutory alternative. That was the provision of the indubitable equivalent under 1129(b)(2). The only part of the decision that was joined by both of the judges was determined entirely on the so-called plain language of 1129(b)(2), and Judge Ambro, once again, or in this case, offered a well-reasoned dissent to

the decision. That was a dissent that was subsequently cited by the Supreme Court when it reviewed the same --

THE COURT: Um-hum.

MR. KELLER: -- subject matter in the RadLAX case, and that's not an insignificant point.

The Supreme Court functionally overruled Philadelphia Newspapers in RadLAX, and while Judge Scalia's decision was characteristically focused on language rather than policy, he did have a footnote that discussed the purpose in credit -- of credit bidding. And that footnote reads in full, "The ability to credit bid helps to protect a creditor against the risk that its collateral will be sold at a depressed price. It enables" --

THE COURT: Um-hum.

MR. KELLER: -- "the creditor to purchase the collateral for what it considers the fair market price up to the amount of its security interest without committing additional cash to protect the loan."

And then what was particularly interesting is Judge Scalia went on to say, "That right is particularly important for the Federal Government, which is frequently a secured creditor in bankruptcy and which often lacks appropriations authority to throw good money after bad in a cash-only bankruptcy auction."

Here, of course, the Federal Government had to sell

the loan to Hybrid as being the prevailing bidder in the auction to large a degree because of its inability to act otherwise. By the committee's agreement, Hybrid's pre-petition conduct is not relevant to this hearing and, accordingly, we see no legitimate way under the law that the committee can distinguish Hybrid in its capacity as a lender from the Department of Energy in this instance.

There is a curious detail about Philadelphia Newspaper because I know that we're spending our time talking about footnote 14 which makes a reference that was identified a couple of times, that the Court "may deny a lender the right to credit bid in the interest of any policy advanced by" -- got a blotch here -- "but such as to ensure the success of the reorganization or foster a competitive bidding environment."

That portion of the opinion was issued by a single judge. The concurrents refused to endorse that part. He excepted himself from the policy issues, which he couldn't concede, but he felt that the statutory argument was persuasive. And Judge Ambro's dissent is now history in disagreeing with entire approach.

So even if one was to treat Philadelphia Newspapers as good law, that is clearly dictum and it's dictum issued by one judge, not by two judges.

So from long before it became evident that a bankruptcy case would be necessary, my clients had believed in

and supported with money, time, and sweat, the debtors' business. They've demonstrated their commitment time and again. In putting me before you today, they once again look for the opportunity to invest tens and perhaps hundreds of millions of dollars into this enterprise for the benefit of vendors, employees, taxpayers, and the community as well for itself. And Hybrid hopes it will get that opportunity.

In the meantime, however, Hybrid's task is much narrower. It has not proposed a credit bid for the debtors; rather it is committed to a comprehensive sale and plan process. We're disappointed to have encountered resistance, and we understand the nature of the process, and the committee's desire to hold an auction in lieu of proceeding with the proposed sale. Clearly, Hybrid would like to have the Court approve its sale, but its rights as a secured creditor are an entirely distinct issue, and those rights are entitled to protection.

There is no bona fide dispute over Hybrid's perfected collateral position in the operational assets of these debtors. The disputed assets are vehicles, primarily in Europe, and some foreign IP rights. They're also the litigation claims that are being given up.

Hybrid's right to credit bid against the remaining assets is a property right, and it's a property right guaranteed to Hybrid by the Constitution, by the Bankruptcy

Code, by the Third Circuit, and by Supreme Court. To say that the estate would get more if Hybrid took less is unquestionably true, but it's irrelevant.

The only question is whether cause exists under Section 363(k) of the Bankruptcy Code and if that can be invoked to deprive Hybrid of a valuable property right. And on the record before Your Honor, we submit to you that you must reject the radical extension of the law that's being proposed by the committee. The credit bid right must survive unimpaired.

Unless Your Court (sic) has any questions, that's the end of my presentation.

THE COURT: No. Thank you, Mr. Keller.

Mr. Baldiga?

MR. BALDIGA: Thank you, Your Honor. William Baldiga, Your Honor, for the creditors' committee. Thank you for hearing us today.

Your Honor, we've all been involved in cases that start strong and then disappoint us all. Other cases appear bleak at the outset and then the parties -- all parties and the court have an opportunity to pull a success from what was the apparent jaws of disappointment and perhaps even administrative insolvency. Those cases don't happen often enough for any of us.

We had that opportunity here and there are several

versions of the facts as portrayed by attorney comments, so I'm going to keep my -- my comments are not evidence any more than Mr. Keller's. He didn't mean them as that, but there'll be other times for that, but we really need to look at what is in front of us here.

I thought the reference to SubMicron was interesting and, in fact, important, because, as you hear Mr. Keller say, the court there emphasized that if not for the deal that had been put forward and pressed on the court at the outset, the estate would have been harmed.

We have the opposite here. We have stipulations by the debtors, the parties that know this company, its prospects, this case, the circumstances here the best. We have an opportunity to greatly benefit the estate and everything here must be seen in that context.

Even with the changes that Hybrid has made to its proposal, the committee believes that at best there is a extremely small dividend that might be paid to unsecured creditors. More likely, perhaps, administrative insolvency.

The benefit of claim waivers, which are, as you heard from Mr. Keller, a critical part of the Hybrid bid, have themselves, no meaningful value when there is no meaningful dividend by which they dilute. We wish this case were different where claims waivers would have meaningful value. This is not this case if Hybrid's plan goes forward.

We'll have a chance, perhaps this afternoon, I hope, to hear more about Wanxiang, the economics there, and so forth. The committee strongly believes that the Wanxiang opportunity here gives rise to very significant opportunity for the estate, one in which where we're pleased, working strongly with the debtors, to have been able to present really against a backdrop here where there wasn't even invited an opportunity for others to come to the fore.

The economics are exceptionally different. We believe that the distribution to unsecured creditors based on the Wanxiang bid would be north of forty percent. There's a lot of variability in that. There's a lot of work left to be done, but it's exceptionally strong.

The Court can and we think also should take into account as to the Delaware facility. Wanxiang has publicly announced its intention to keep the facility, to employ people again at a facility that his been a blight in this city, and to build the next generation of Fisker cars at that facility. Again, that will take hundreds of millions of dollars of investment, but there's -- it's a consideration that is appropriately taken into account in a reorganization or any type of Chapter 11 case such as this, that real opportunity.

The cost of upkeep to that plant is very considerable. It's not getting any better, but you should and, I think, will hear today from the Delaware Economic Development agency as to

its own views. And I think they filed papers --

THE COURT: They did.

MR. BALDIGA: -- yesterday --

THE COURT: Yes.

MR. BALDIGA: -- in that regard.

The opinion of creditors, Your Honor. Creditors voted down this Hybrid proposal before there was even a hint of an alternative. That's compelling. The only class to vote in favor of the plan -- this week's papers indicated the only noninsider class was Silicon Valley Bank, which claim was bought by Hybrid in order to do that.

So there's overwhelming creditor rejection of the program that has been put on the table. And, again, Your Honor, those votes were cast before there was a glimmer of hope. And we do, working with the debtor, believe that we will get to this, in this case, where creditors have an opportunity again to greatly benefit.

On the law, Your Honor, we start with Section 363 of the Bankruptcy Code.

THE COURT: Uh-huh.

MR. BALDIGA: I think whatever the cases say, one of the things they do is to start with the Code. And there is not a section of the Code that says when you can credit bid, but by negative implication under Section 363(k), it's made pretty clear.

And this is before we get to cause because our argument, first and foremost is that you don't even need to get cause here at a sale under subsection (b) of the section of property that is subject to a lien. Well, that's not why we're here today, Your Honor. We are here to sell now, by agreed facts, property, some of which is subject to a lien, a material part of which is not subject to a lien, and a material part of which the lien is in bona fide dispute. And these are difficult disputes.

You heard Mr. Keller say that he didn't even want to venture into that morass. I do a little bit, but not too much either because these are the types of perfection disputes that make, as my finance partner said when we were testing her as to some of these issues, "As a finance lawyer, thinking about what bankruptcy lawyers do on these issues, it makes me want to throw up."

And I think that's a fair indication of what happens when we look at issues such as what is the law in various countries around the world as to how you perfect an interest in patents pending in those jurisdictions. This company never had enough cash to do everything that it wanted to. There's no criticism, then, of not making an effort to perfect liens on its foreign IP, which is more than half of its IP.

THE COURT: Is the committee still investigating the perfection issue?

MR. BALDIGA: Yes, but we've done a lot of work, and we briefed the issue, as you saw in our omnibus objection, Your Honor. And we feel pretty comfortable that -- and I want to go into what these assets are, because the facts, again, are important.

There are, as Mr. Keller said, some assets that are clearly collateral. The Delaware facility. But again, that facility, Hybrid doesn't intend to take. It's --

THE COURT: Right.

MR. BALDIGA: Some indication of value is that one bidder has passed on it. That's some indication of value. The Madden testimony that you have is that the upkeep is three or four million dollars a year, which is -- I'm sure Your Honor is familiar with the plant. It -- I was surprised how long it took to drive around the plant, but it's of no surprise that it's of exceptional difficulty in terms of simple security, and heat, and so forth. There's robotics in the plant and so you can't just lock it up and hope for another day.

The domestic IP is subject to perfection, but let's talk about some of the things that is not subject to perfection. Mr. Keller said, and I think now all parties do agree, commercial tort claims of all types plus the twenty-million-dollar D&O policy that supports those claims, which are a big part of the basis for Mr. Madden's testimony in that regard, have very significant value. Mr. Madden's testimony,

which I believe is the only evidence in this regard, is that the commercial tort claims together with the D&O policy that supports those have a range in the magnitude of something like five million dollars plus the elimination of the deficiency claims.

As the Court has already noted, perhaps there should be low weight given to testimony such as that without a full explication of the facts underlying those opinions --

THE COURT: Yeah.

MR. BALDIGA: -- but as we sit here today, with everybody acknowledging we need a sale, those are -- that's the evidence that's in the record. There is no counter evidence.

Chapter 5 causes of action: there does seem to be, after investigation and, again, according to Mr. Madden, a fairly low-hanging fruit of 4- to 500,000 dollars of a transfer of vehicles and settlement of a unsecured pre-petition claim within ninety days. Those are the types of transfers that the company had to do, frankly, to remain afloat. No criticism of doing that, but preference law, as other judges have said, is not fair, but it does equalize distributions and there is value.

Certificated automobiles, 100 to 200,000 dollars; that's at liquidation value. The foreign IP, again, the company did not -- or DOE, I guess, did not make an effort to perfect as to the foreign IP. And, again, the Court should

note that the foreign IP -- and this is not disputed -- is more than half of the company's IP. This is a worldwide company. It had its headquarters in Anaheim, but it manufactured its vehicles in Finland --

THE COURT: Um-hum.

MR. BALDIGA: -- had distributorships in Austria and other places. And the two buyers that have come forward are Chinese head -- Chinese-affiliated companies.

There's no indication, certainly nothing on the record, that would indicate that the U.S. IP is worth more than the foreign. If you just do it by number of patents, for example, the weight seems to go to the foreign patents. But again, in time, maybe more evidence could be had on that.

The foreign inventory. There's two types of inventory and the Court should understand. This is all in our papers. There is some inventory in tooling at a location in Finland called Valmet. That does seem to be perfected and Mr. Madden knows that very well, because in Coda, he liquidated similar inventory with a higher book value than there is here. But that inventory, even if perfected, is subject to liens in favor of the Valmet facility owner giving rise to being speculative as to what those assets are worth given the warehouse-type liens under Finnish law.

There is inventory at the port in Belgium and in Germany, something in the magnitude of eighty to a hundred

cars, that there is, again, no effort to perfect -- there was no effort to perfect as to those vehicles. There could be a dispute. We haven't seen any papers challenging that by Hybrid, but we think those are unencumbered assets.

There's another unencumbered asset which we believe is a subsegment of the BM -- of the commercial tort claims, the claim against BMW. Now, whether that's a setoff claim, a turnover claim, whether it's characterized as part 5, I guess, or a commercial tort, it's the recovery of a very significant deposit that seems to either be already set off, or might -- there may be leave sought to set off against its claims.

Mr. Madden, in the testimony that you have, accepted the company's CRO's opinion of value as to that, which is admittedly -- we're just getting started as to types of things like this, but the evidence you have is that it's worth something in the magnitude of five million dollars, something that both the committee and the debtor would have a lot of work to do to recover and to understand it better, but we agree in terms of Mr. Madden's testimony in the transcript you have is based on his discussions with Mr. Beilinson, and Mr. Beilinson's own opinion, admittedly with work to do, is something in that range.

So these are not immaterial assets. When we're talking about IP -- more than half of the company's IP, perhaps most of its inventory, all of the commercial tort claims, and

this BMW claim, I -- and the company has agreed with the committee, as you see, that the highest and best value here is a sale of the whole.

And it's easy for Hybrid to now say, well, let's have two auctions -- not sure exactly how that would do except increase our administrative budget for professional fees significantly -- because it knows that Wanxiang here is an operating company.

They employ about 8,000 people in the United States. They have bought, I think, somewhere in the neighborhood of two dozen companies like this in this industry, automotive companies, in the U.S. They bought A123 at a purchase price of something in the magnitude of eight to ten times what their bid is here. They have the wherewithal to bid well. Creditors did amazingly well given that effort.

And so I think Hybrid made the point that the case law goes to. There are ways here -- and to the debtors' credit, they did not permit that to happen at the beginning of the case, but there were ways to discourage other bidders. And the debtors, to their credit, set up a bid of the entirety because they know what the Court now knows, and what we certainly agree with, that the entirety brings highest value to these estates.

Now, with all these facts, creditor preferences, the reality of a -- what would be most charitably described in Hybrid's favor as a tremendously mixed bag with lots of

fascinating legal issues about the foreign IP rights, Your Honor, in all sorts of countries that we would maybe enjoy more visiting than discussing their IP laws, we're fortunate to have the stipulation read into the record today. There are material assets that are not subject to Hybrid's lien. There are material assets that are -- and there are material assets for which this Court has not yet had an opportunity, and realistically would not be able to make a final judgment as to -- in some reasonable time frame for -- in the context of this case.

So I go back, again, to Section 363. There is no credit bid right. We don't have to demonstrate cause. There simply is no credit bid right in the -- of any type, in any amount, in the sale of mixed collateral. And there's not been, in all the briefing that has been done, the suggestion of a single case where that actually has happened.

Mr. Keller challenged us to show a case where that has been criticized, and, in fact, there are at least a few.

THE COURT: Um-hum.

MR. BALDIGA: They're in our papers, but for the record, Hickey Properties, 181 B.R. 171. They cite to -- there, it was a proposed sale of mixed collateral, and citing to, actually, my favorite Judge of all time, Your Honor, I have to say, retired Judge James Queenan in Worcester, they cited to his excellent treatise on value, saying that 360(k) (sic)

simply doesn't apply here because the lien holder doesn't have a lien on part of what was proposed to be sold, so the court didn't even need to get into 363(k).

There's another case, Your Honor, Pine Coast Enterprises, 147 B.R. 30. There, a court, by mistake -- the court didn't seem to be too sympathetic to who suggested the facts contrary, but the court had already approved a sale of real estate in the entirety, some of which was subject to lien and some of which was not.

And the matter came before the court as to whether to undo the sale in the light of a 363(m) finding in favor of the buyer. And the court remitted it for further findings as to whether, in fact, it was good faith, but the quoting at -- from that decision, "The subordination agreement, although recorded with the County Recorder of Deeds, does not assign any of Horizon's lien rights to Boyne", the buyer, and a secured party. "Therefore, the court should not have allowed Boyne to bid in its lien to acquire the disputed property." That's the type of decision that we're looking to avoid here.

So what is the law here? The law is, Your Honor, that before getting to 363(k) at all, we have no authority whatsoever for the ability to credit bid in a mixed bag such as here. I know that Mr. Keller should have and did, then, go to argue that there was no materiality. And I think as an abstract principle it would be interesting to test the

boundaries of that, but that's why we worked so hard with the debtors to take that off the table. There's no question of materiality. In fact, the debtors, who own this property and know it best, agree with us that there is materiality.

Again, there is no case that would permit a credit bid in this context.

Now getting to cause. We all feel -- everybody in the courtroom seems to share that we've benefited from narrowing the cause argument here and we certainly do that, but we don't need to go further than simply the type of cause that is cited in Philadelphia Newspapers; a great deal of that case has been criticized. RadLAX cite that 1129(b) indubitable equivalent is no longer the way around credit bid rights.

We're not -- we're a long ways away from 1129(b) indubitable equivalent. Where we are, though, is right in the Third Circuit's teaching here that credit bidding may be and should be limited in the interest of any policy advanced by the Code including to foster a competitive bidding environment.

Those are the facts before the Court. Wanxiang is not here unless you do. Creditors get nothing unless you do. Creditors will get a lot if we have an auction. Hybrid may be the biggest beneficiary of that. A lot of its collateral can be sold. Hybrid may, at the end of the day, when we're back here in a month, be the happiest we did this. Creditors, we want to be made happy too. We want to be made happy with

Hybrid. We don't want to be excluded from the happiness.

And in Philadelphia Newspaper, credit bidding should be limited if it would chill the bidding process. Again, to their credit, the debtors did not set up something at the beginning that limited the auction to be sold to the Hybrid collateral. The debtors also did not think that there was another bidder to be had, but, again, we're in a fortunate case where one has come to the fore. We wish it would happen more often in these cases. It seems by all accounts, and there's been no dispute -- Hybrid has not a bad thing to say about Wanxiang, and that's good. We don't think bidders should be throwing stones at each other. But it would chill the bidding process not to allow us to proceed in that way.

The bidding procedures that have been suggested, Your Honor, are market tested. We developed them based on the A123 ones that we worked successfully with Wanxiang to bring extreme value in another case. There are the market terms all the way through. They don't chill anything. We would have a lot to do this afternoon, perhaps, in order to sit down and think through dates and so forth, but that's where we want to put ourselves.

Hybrid will have additional benefits with the other creditors. What happens with the deficiency claim, what happens with all of these things, we have plenty of time left, but this case shouldn't end today and not give any of us the opportunity to see what lies ahead, and that's all we're asking

the Court to do today.

Thank you.

THE COURT: Thank you, Mr. Baldiga.

Mr. Dahl, do you --

Mr. Lastowski?

MR. LASTOWSKI: Well, good afternoon, Your Honor.

THE COURT: Good afternoon, yes.

MR. LASTOWSKI: I had a brief --

THE COURT: You're here --

MR. LASTOWSKI: I --

THE COURT: -- for the Development --

MR. LASTOWSKI: Correct.

THE COURT: -- the Delaware Development --

MR. LASTOWSKI: Michael Lastowski, here today for the --

THE COURT: -- Economic Development.

MR. LASTOWSKI: -- Delaware Economic Development Authority --

THE COURT: Yes.

MR. LASTOWSKI: -- which I'll refer to as DEDA.

Your Honor, I had a short statement to make and it would probably be appropriate if I made it now --

THE COURT: Sure.

MR. LASTOWSKI: -- before the debtors speak.

THE COURT: You're welcome to.

MR. LASTOWSKI: Your Honor, DEDA entered into two transactions with Fisker. First, it was a loan agreement. DEDA also entered into a grant agreement and under both of those transactions, DEDA advanced considerable sums to Fisker.

The purpose for these transactions was very simple. DEDA was trying to assist Fisker in opening and operating a manufacturing facility here in Delaware.

THE COURT: Yes.

MR. LASTOWSKI: Specifically, a former General Motors facility that's sometimes referred to as the Boxwood Road facility.

Unfortunately, we know as we stand here today that Fisker never operated that facility and Fisker never will. I think it's important to note today that Hybrid has no intention of opening or operating that facility, and, in fact, under the asset purchase agreement, which was filed in the beginning of this case, Hybrid has exercised its right to identify that Boxwood Road facility as an excluded asset.

So if Your Honor were to approve a sale today to Hybrid pursuant to that agreement, the Boxwood Road facility would not be sold.

THE COURT: Right.

MR. LASTOWSKI: I wanted to address, briefly, the statements made by Hybrid's counsel that Hybrid intends -- has negotiated with DEDA and intends to continue to do so. I'll

represent to the Court that I am DEDA's counsel in this case and I am aware of no negotiations. I am aware of the following, however.

Under the documents that were filed on the first day, both the sale agreement and the plan, Hybrid had agreed to pay the maintenance costs for the Boxwood Road facility for an eighteen-month period following the effective date/closing. Recently, DEDA was approached by the debtors' CRO, presumably at Hybrid's behest, and asked if we would pay these maintenance expenses, specifically utility costs, for a one-year period. We declined to do so. Immediately after our saying we declined to do so, two things happened. The debtors amended their sale agreement and they amended their plans so that now this eighteen-month period has been reduced to three months.

Now, I've provided you with this narrative. The Court can decide whether or not that could be properly characterized as negotiations. I know of no other discussions other than what I've just recited.

Your Honor, we've filed this statement with the Court yesterday and I could rest on it, but I think it bears repeating that, again, we entered into these transactions hoping that eventually there would be a manufacturing facility here in Delaware, and that certainly is our ultimate goal, and our fervent hope, and wish. And for that reason, we're in favor of a procedure where there'll be an open auction, where

bidders can participate, including those bidders who have a present intention to operate that facility.

If the Court has any questions, I'm here to answer them. Otherwise, I'm done.

THE COURT: Thank you, Mr. Lastowski.

MR. LASTOWSKI: Thank you.

THE COURT: Good afternoon.

MS. BROWN-EDWARDS: Good afternoon, Your Honor. Terri Brown-Edwards of Darby Brown-Edwards, on behalf of New Castle County and, derivatively, the tax payers of New Castle County.

I rise today because, Your Honor, given the procedural posture before you, this could either be the last day, essentially, of this case if the transaction with Hybrid goes forward and then, ultimately, a plan confirmation process or as you weigh a decision with respect to the credit bid. And I just wanted to point from New Castle County's perspective, its position with respect to the Delaware facility and its liens, without reciting too in depthly (sic), as you are aware, under 363, a debtor cannot sell free and clear --

THE COURT: Right.

MS. BROWN-EDWARDS: -- if there are parties-in-interest who have needs and they do not consent. New Castle County has a statutory lien arising out of Title 9, Section 8705 of the Delaware Code.

This lien is on property taxes that it has assessed

pre-petition, all for 2013. And the lien arose as of July 1 of 2013, based on the statute. The priority of New Castle County's liens is established in 25 Delaware Code, Section 2901, which provides that statutory liens have priority over all other liens, including those of nongovernmental units that would pre-date them. So in the facts at hand, we would assert a priority lien over Hybrid as any other claimant of a lesser priority.

We filed an objection to this sale --

THE COURT: Yes.

MS. BROWN-EDWARDS: -- which we've had language that we resolved with the debtors, preserving our ability to assert this lien. But given that today could possibly be the last day of the case, I see no other future time wherein we would do such a thing. So I rise to assert that lien today with respect to the Hybrid transaction or any other transaction that ultimately would be before Your Honor for approval.

And just to be clear, New Castle County would not agree to any transaction that did not regard its lien, place us in the first line with respect to the Delaware facility and would then accordingly either, from the proceeds of that sale of that property, be first in line for a payment in satisfaction of its tax liens.

Now, I know we've heard that Hybrid states that it would not be buying the Delaware facility, but it's not

unclear -- it's not clear to us then why they have some sort of sharing component and a future disposition of that facility up to a certain amount. To the extent that any provision like that were to go forward, we would -- we, again, now assert our lien that we would be first in line to any of the proceeds that would attach.

So if -- Your Honor, today, I think it would -- you need to consider and resolve that nothing today would eviscerate New Castle County's liens. And equally, more importantly, to the extent that there was a proceeds of sales flowing from this -- from that asset or as a result of the disposition of that asset, that the county's liens, which are roughly 1.1 million dollars for property taxes on that Delaware facility, would be first in line and satisfied in full.

And lastly, on behalf of my client and the taxpayers, provided their claim is satisfied, of -- they wouldn't oppose a transaction, but based on the citizens of the county, wanted to make clear that they would much prefer a transaction with the facility continued -- was up and running and providing a benefit to the constituents.

THE COURT: Thank you, Ms. Brown-Edwards.

Mr. Etkin, good to see you, sir.

MR. ETKIN: Good to see, Your Honor. And again, I just think it's appropriate for me to speak very, very briefly --

THE COURT: Go right ahead.

MR. ETKIN: -- prior to the debtor.

THE COURT: Yes.

MR. ETKIN: I don't want to be the tail wagging the dog here. But we filed -- I represent Atlas Capital.

THE COURT: Yes.

MR. ETKIN: And we filed --

THE COURT: The plaintiff in a class action.

MR. ETKIN: It's not a class action. It's an individual case, Your Honor.

THE COURT: Oh, excuse me.

MR. ETKIN: Although, there -- since the filing of that case, there has, as you can well imagine, been many people who have expressed interest in that case and the --

THE COURT: Okay.

MR. ETKIN: -- allegations in that case. But I'm not here to discuss that, specifically, Your Honor.

We filed a very limited objection to the sale motion. One aspect of it, I believe, is resolved. The debtor has confirmed that there's nothing in the sale order that would operate as a release or impact --

THE COURT: No.

MR. ETKIN: -- the claims of third parties. It's only intended to deal with the debtors' claims. And although we express some concern that issue, we'll leave the issue of the

debtors' claims in the capable hands of the committee, who has expressed some concerns and has some reached some agreements as far as that's concerned. I'm not particular sure of the extent, but clearly that that's been the subject of discussion.

The only issue that remains, Your Honor, is the issue of document preservation as it relates to the books and records, both electronic and otherwise of the debtor. And we have had some discussions about that issue. Obviously, that's of great concern --

THE COURT: Sure.

MR. ETKIN: -- to us in the context of the transaction, particularly in a case where although there's been a lot of discussion of the extent of creditor recoveries in the case, investor recoveries have kind of been put to the side to the extent that they're not creditors of the estate.

But in any event, as it currently stands, although there's been some effort and some continued discussion this morning regarding a resolution of the document preservation issue, we're not there yet. I'm prepared to continue to discuss that. Right now, what the debtors have included in the order is just an obligation to advise us if they're advised as to the destruction of the documents, but then we're left on our own to scramble to get an injunction or whatever with regard to documents and material that should be preserved, especially given the pendency of our litigation and potentially other

claims yet to come.

So I just --

THE COURT: And I believe you proposed some language, didn't you, Mr. --

MR. ETKIN: I -- we did propose some --

THE COURT: Yes.

MR. ETKIN: -- language. We discussed some additional ways to skin that cat. We're not there yet. I'm certainly prepared to continue to try to resolve that issue to the extent that this sale does go forward. But right now, we're not there, and I just wanted to put that on the Court's radar to the extent that it becomes relevant and the Court decides to move forward with the Hybrid sale today.

THE COURT: Very well. I appreciate that, Mr. Etkin, certainly. Thank you.

Anyone else?

MR. PALACIO: Your Honor, are you taking all objections to the sale or -- I don't know how you want to --

THE COURT: I thought that's what we would do. Is that fine with your, Mr. Dahl?

MR. DAHL: It is, Your Honor.

THE COURT: All right. Next time, you better get a better ticket.

MR. PALACIO: The story of my life, Your Honor. For the record, Your Honor --

THE COURT: Yes.

MR. PALACIO: -- Ricardo Palacio of Ashby & Geddes --

THE COURT: Of course.

MR. PALACIO: -- on behalf of --

THE COURT: Good to see you.

MR. PALACIO: -- WWG Corporate Canyon.

THE COURT: I'm sorry. And you're representing?

MR. PALACIO: The landlord, the Anaheim --

THE COURT: Oh, yes.

MR. PALACIO: -- landlord. You heard Mr. Dahl reference them earlier and indeed, WWG is the landlord for the corporate headquarters. There has been a motion to reject, and that's not set for hearing for another week or two. And we'll be filing a response that I expect in the near future. I'm not going to get into the merits of that motion and any response we might have thereto.

The issue that remains -- and we did have some discussions during the breaks, and I'm hopeful that perhaps another break we may be able to get there, but the main issue we have is language in the APA that, at least to us, suggests that the debtor is disavowing any liability for any damage and precludes us from asserting a claim against the debtors on account thereof. We've had some back and forth over the last few days. We haven't reached an agreement. There was some language proposed today. And I don't know if it's the function

of a misunderstanding or just --

THE COURT: Mr. Dahl, can you address -- are you standing to address this issue?

MR. DAHL: I'm just prepared to respond.

THE COURT: Oh, okay.

MR. PALACIO: Oh, okay.

THE COURT: I'm sorry, yes.

MR. DAHL: A number of objections have been raised without the debtors having an opportunity --

MR. PALACIO: Understood.

MR. DAHL: -- to --

MR. PALACIO: And I'll be very brief, Your Honor.

THE COURT: Go ahead.

MR. PALACIO: Again, we think, as a matter of contract, we have a right to assert a claim against the debtor. The debtor will have any rights or defenses they may assert, and that's all we were looking to preclude. We think by virtue of the lease itself, there's privity. And again, we simply want the right to assert a claim. And if they want to assert a defense or an argument to the contrary that it's not a valid claim, that's fine.

The way we read it and, again, by this express language, it had nothing in there that said that the buyer would solely be liable. That's all we were trying to address.

THE COURT: All right. And maybe --

MR. PALACIO: And again, I'm hopeful, Your Honor, that we can resolve this. If not, we may ask for Your Honor's assistance.

THE COURT: Okay. Mr. Dahl, any response? Perhaps, you've -- you're prepared to --

MR. DAHL: Yeah.

THE COURT: -- address the issue.

MR. DAHL: I believe we should be able to address the issue. Your Honor, frankly, my concern is --

THE COURT: Yes.

MR. DAHL: -- that we've now had a number of objectors stand up and effectively talk about settlement discussions in open court --

THE COURT: Okay.

MR. DAHL: -- saying that they're hopeful resolutions can be reached. We'd like the additional opportunity just to reach those resolutions as opposed to having to negotiate through the Court, which I don't even think is the best --

THE COURT: All right.

MR. DAHL: -- perhaps use of Your Honor's time.

THE COURT: All right. I think that's fair.

MR. DAHL: Frankly, what I would propose at this point, Your Honor, is actually to proceed on what is the credit bid issue, because depending ultimately on how that is resolved, frankly --

THE COURT: Well, that's why I -- I'm hearing a lot of objections, which will be, at least, postponed, if the Court goes one way rather than another.

MR. DAHL: That's right, Your Honor.

THE COURT: Yeah. All right. Let's do that. Let's do that, Ms. Klein. All right? Thank you.

MR. DAHL: And with that, Your Honor, I think you had asked if the debtors could provide a view here on that, and --

THE COURT: Sure.

MR. DAHL: -- we're prepared to do that.

THE COURT: Yes. And then, what I would do -- Mr. Baldiga, yes, sir?

MR. BALDIGA: Could I have one second with Mr. Dahl?

THE COURT: You may.

MR. BALDIGA: A procedural point, Your Honor.

THE COURT: Sure.

MR. BALDIGA: We spent -- William Baldiga for the committee.

MR. DAHL: I apologize, Your Honor. One moment, please. Your Honor, if we may prevail on the Court's good graces for a very brief chambers conference before we proceed on the credit bid issue.

THE COURT: And who would participate? I'm just --

MR. DAHL: The unsecured creditors' committee and the debtors, Your Honor.

THE COURT: Well --

MR. DAHL: And we'd be more than happy to have the Office of the United States Trustee and Hybrid as well.

THE COURT: I think that would be well to do. Let's do that then. All right. We'll take however long this recess may be and meet in chambers.

MR. DAHL: Thank you, Your Honor.

THE COURT: Go out the back and then -- yes.

(Recess from 12:37 p.m. until 12:49 p.m.)

THE CLERK: Please rise.

THE COURT: Please be seated everyone, thank you.

All right, Mr. Dahl, I think that I had suggested that you might wish to respond.

MR. DAHL: Thank you for the opportunity, Your Honor.

THE COURT: Yes.

MR. DAHL: And for the record, Ryan Preston Dahl of Kirkland & Ellis, on behalf of the debtors.

Your Honor, I think a lot's been said now, by Hybrid, by the committee, about these Chapter 11 cases and where people would like to see these Chapter 11 cases go. And, Your Honor, the debtors certainly are mindful of the interests of all the stakeholders in these Chapter 11 cases. And I think the debtors, more than any other party here, recognize that Fisker is not all that it could have been, that the realities of Fisker's business troubles have affected many parties,

individuals, employees, their families, the U.S. government, local governments. And I don't think there's anyone in this courtroom who would say that Fisker's present reality is what they wished it would have been when Fisker was originally formed.

The debtors, in particular, though, are the lone fiduciaries of these Chapter 11 estates as a whole. And the debtors are the parties tasked with administering these Chapter 11 estates, in a responsible manner and in a way that affirms the different parties' rights under law, but under the circumstances tries to maximize what opportunities may be available. Your Honor, the debtors didn't undertake this process lightly. We've been working with Fisker for an enormous amount of time to try to make the most of, again, what I think everybody recognizes as a very, very difficult situation, but in particular, Your Honor, one that recognizes the reality of what Fisker's capital structure actually is, which is, that in their capital structure, there is 165-million-dollar senior secured loan.

And I think a point you heard counsel of the committee make, is that the creditors have spoken, and the creditors have somehow rejected the Hybrid transaction out of hand, or the creditors have somehow rejected the debtors' proposed sale out of hand. And Your Honor, frankly, I just think that's an incomplete characterization of the facts, as it is undisputed

that the single largest creditor in these Chapter 11 cases, Your Honor, is Hybrid. And Hybrid isn't simply any creditor. It is a party that took acquisition of the senior loan from the United States government. It acquired that loan through an auction process in which it bid twenty-five million dollars and won, after a process in which Hybrid had contributed the cash, and the only cash that was available, to get the Department of Energy to a position where it could monetize that loan. And, Your Honor, I think if you say in the Hanson declaration, but for that auction process, the recoveries available to the United States government could have been more challenged than they already were. But the fact remains that Hybrid does stand in these Chapter 11 cases as the largest creditor and that, on a total value basis, holders of approximately ninety percent of value voted in favor of the plan, including Hybrid.

And, Your Honor, I think that's important to bear in mind because the debtors, as fiduciaries, can't forget their estates as a whole. The creditors committee is certainly doing its best to maximize recovery for unsecured creditors, and we acknowledge the productive efforts they've made in that regard. We share in those efforts to try to maximize recoveries. But we differ, I think, in goals, in that the debtors believe they have an obligation to maximize recoveries for all in a way that responsibly upholds the parties' rights under the Bankruptcy Code and provides for a transaction that can be executed within

those rights afforded by the bankruptcy code.

But Your Honor, I'd like to differ somewhat in approach than counsel to Hybrid and the creditors' committee took and start with the issue of the unencumbered assets first, if I may, because I think that's been the subject of much discussion with the parties, but I think there's some level of interpretation or review that the debtors can provide here. I think we said at the beginning, in our agreements with the committee, that the debtors agree that there are material assets that may be unencumbered or the liens may be in dispute. But we do disagree as to where the lines could be drawn on there. And the debtors, like any debtor, took a look at what assets could be encumbered, what could be unencumbered, in connection with their own evaluation of our capital structure. The debtors then made a business judgment as to whether it would be in the best interest of these Chapter 11 estates to proceed with the transaction, predicated on cherry-picking different categories of assets that may be unencumbered or may be subject to lien avoidance or may have little or no value, as opposed to proceeding with a holistic transaction that tried to bring these Chapter 11 estates to as good a conclusion as possible under the circumstances.

In this respect, I think the committee is in absolute agreement with our approach, in that the committee has endorsed an approach that provides for the sale of the transaction for

all of the debtors' assets in its entirety.

THE COURT: Um-hum.

MR. DAHL: I think the committee has done that, as you've heard, because they believe that under these facts and these circumstances, that approach, rather than a piecemeal dismantling of the Chapter 11 estates, is the best way to provide for recoveries under the circumstances.

And Your Honor, that's exactly what we're proposing here with Hybrid. But frankly, one of the issues that we have with the transaction that the committee is proposing, or the course that the committee is proposing, is that it's not, ultimately, what, at the end of the day, the committee is proposing to do. I think at this point, the committee has identified six categories of assets that they believe may be unencumbered: Chapter 5 causes of action, D&L insurance, commercial tort claims, foreign IP, vehicles, and foreign vehicles. Of those, three I think you've heard today that really three of those categories aren't even in dispute at this point, namely: Chapter 5 causes of action, which aren't being sold; commercial tort claims, which aren't being sold; and the D&L policy, which will now remain in the estate. But certainly that does leave three categories of assets, namely: the extent perfection under foreign IP, six certificated vehicles, and certain inventories sitting in a foreign port. I think we can all agree that the six vehicles, in and of themselves, may not

be material, but the questions of perfection under foreign law versus U.S. law are certainly material. And certainly with respect to the perfection of inventory under foreign laws, U.S. law may raise a question.

But what the committee's proposing here isn't a solution, by its transaction. It's frankly, more complication, because those questions would remain if the transaction here isn't solved, because what the committee is proposing to do is to undertake yet another sale, which would be subject, potentially, to Hybrid's rights to assert its liens in that property. So what the committee is proposing by its transaction is continued litigation.

In addition, Your Honor, with the transaction that the committee is proposing, or the course of action that the committee is proposing that the debtors undertake, is one that the committee believes has the prospect for higher and better unsecured creditor recoveries. Again, in this, we agree with the creditors' committee. That if everything that the creditors' committee is assuming is true, there may be the prospect for higher and better unsecured creditor recoveries. But most fundamentally, I think, in the creditors' committee's assumptions there, is that the claims asserted by Hybrid will ultimately be avoided or disallowed. So a fundamental part of the value proposition being provided or asserted by the committee, with its alternative transaction, is predicated on

subsequent litigation, and not only subsequent litigation, but the success of that litigation.

Your Honor, as fiduciaries of these Chapter 11 estates, we made the determination that the prospect of continued and protracted litigation, and the uncertainty that's associated with that, may not be in the best interest of creditors. The committee obviously disagrees. But what the creditors' committee, I think, has agreed, is that the value of eliminating those claims is material, and the value of wiping out those claims is material to unsecured creditor recoveries. And as Your Honor is considering the value of this potentially unencumbered collateral, I think, then, the Court would really need to consider the value that's already on the table with the proposed Hybrid transaction, which is that the self-same claims that the creditors committee is seeking to disallow, or is assuming would be disallowed to provide its recoveries, are already being waived. And that value is already being given.

So if the creditors' committee is saying, on the one hand, that there is potential value with respect to the unencumbered assets, and that value may not be reflected in a transaction, I think that misses the point that the creditors' committee's fundamental assumption, which is that these claims are -- would be disallowed in the subsequent litigation, is already happening here. And that's a material piece of the consideration being proposed by Hybrid under its transaction.

And that matters regardless of whether one ultimately concludes that intellectual property in China is subject to a perfected lien filed in the United States.

Similarly, Your Honor, I don't think there's any dispute that the value that we're receiving from Hybrid, in the form of an eight-million-dollar DIP that's being waived, is material. That's certainly one of the pieces of the puzzle that our prospective competing bidder has brought to the table and why we take them seriously. And I don't think there's any dispute that Hybrid's agreement to assume certain tax liabilities, or contribute cash, have real value. So I think that ultimately all goes to another area of agreement between us and the committee, Your Honor, is that if unencumbered collateral, disputed collateral, is going to be sold, it needs to be done for value. And Hybrid, at the end of the day, we think, is providing material value with respect to that collateral, in precisely the manner that the committee has demanded, in the form of claims, waivers, or a DIP, or the assumption of liability. But it's doing it in a way that doesn't require the debtor of these estates to undertake litigation that may or may not be successful at the end of the day.

But Your Honor, in our role as estate fiduciaries, too, we also considered, I think very carefully, the approach the committee is advocating, which is an interpretation in

Philly Newspapers, which could allow for the capping of the credit bid rider, potentially the credit bid right, in its entirety for cause. But the question, then, becomes whether that's permissible or whether that's, in fact, in the best interest of these Chapter 11 estates and the stakeholders. It's obviously not an easy, question, Your Honor. But it's one we took very seriously.

So I think that begs, in the first instance, of the question of what did the Philly Newspapers actually say. And, Your Honor, it's been said before, but I'd like to read it again, because it's important, and I think really the crux of the argument here. And the disagreement that we identified to the Court at the beginning, in terms of where we come out on this with the committee, which is at footnote 14 of Philly Newspapers provides that -- and I quote: "A court may deny the lender the right to credit bid in the interest of any policy advanced by the Bankruptcy Code, such as to ensure the success of the reorganization or to foster a competitive bidding environment."

So I'd like to parse that out, if we could, Your Honor. So first and foremost, the "Court may deny the lender the right to credit bid in the interest of a policy advanced by the Bankruptcy Code." So what's the policy that's issue here, Your Honor? I think you've heard from the creditors' committee that the policy that should guide the Court's decision is the

policy, or the goal, or maximizing creditor recoveries. And we certainly don't dispute that it is a policy of the Bankruptcy Code. And the debtors share in that. And we've guided our efforts towards that end. But, Your Honor, that's not the only policy at work in the Bankruptcy Code. The Bankruptcy Code itself has a fundamental policy that respects the rights of secured creditors. In particular, Your Honor, that policy respects the rights of secured creditors to protect their property interest in a debtor, to protect their right to enforce that property interest against the debtor, and if necessary commoditize that property interest in the debtor.

And, Your Honor, I think here there's, kind of, the one fundamental issue that I do think makes this case different than potentially other credit bid cases, is that the lender here is effectively the United States government. The loan at issue was made by the government to Fisker to fund a business plan that ultimately was unsuccessful. And nobody -- to be clear -- nobody is happy about that outcome. But the federal government is not in a position where it can equitize its debt. The federal government is not ordinarily in the business of buying companies or becoming the shareholders in companies, with, perhaps, notable exceptions in the auto cases. But not this auto case, Your Honor. What the federal government did, then, instead is undertake a competitive auction process to monetize that loan. And it monetized that loan in a process

that I think the record is clear now in the Hanson declaration, was a process in which parties were effectively bidding on the option value associated with the credit bid right. They were effectively bidding on the right, provided by the Bankruptcy Code to any secured lender, to effectively acquire the assets through a credit bid.

Your Honor, I think it's fair to ask whether the United States government would have been able to realize the twenty-five million dollars that it did if there was a cloud over that right or if any participant had to wonder whether, at the end of the day, its credit bid could be disallowed if there's the prospect of higher and better recoveries for unsecured creditors. And, Your Honor, I think that's precisely why Justice Scalia at footnote 2 of RadLAX emphasized the government's interest in preserving a credit bid right to that effect.

But Your Honor, I think I'm getting ahead of myself a little bit, because I would like to go back to the policy advanced by the Bankruptcy Code. Because again, the rights of secured creditors to credit bid reflects, again, this general proposition in the code itself that property rights should be preserved, and I think for good reason. That's found at 1111(b) of the Bankruptcy Code but also recognized most recently in the Court's RadLAX opinion, insofar as it effectively refused to prevent a debtor from precluding a

secured creditor the right to credit bid through a plan. So Your Honor, the debtors, as we approached this problem, I think had a difficult time coming to terms with a policy, on the one hand, where secured creditors' rights should be respected, particularly that of the U.S. government, but the competing policy, potentially, of maximizing creditor recoveries by limiting a credit bid right. And again, I think we're all in agreement that if a credit bid right is limited, in and of itself, unsecured creditor recoveries could be higher.

But, Your Honor, I think that then takes us to the next question, which is the second part of footnote 14: "such as to ensure the success of reorganization or to foster a competitive bidding environment." And obviously these are examples, Your Honor. But obviously the success of a reorganization unfortunately isn't at issue here. This is a liquidation. But then it's to foster a competitive bidding environment. And the creditors' committee, I think, is in asking the Court to take a view on this particular statement that a competitive bidding environment means one where buyers have to bid in full in cash.

Again, as the debtors thought about this problem, Your Honor, we thought, is that really the only way to look at it? And in fact, Your Honor, I don't think it is. A competitive bidding environment goes both ways. You can't make a creditor -- a competitive process competitive by handicapping

one of the parties to that. And I think that's precisely what Judge Ambro noted in his dissent to Philly Newspapers, where as a rule that effectively capped credit bid rights in the interest of preserving, or sort of enhancing, value for junior creditors would be the same as one that kept deep-pocketed buyers out of actions. And I do think if the goal is to foster a competitive bidding environment, then you have to let people compete, and a competition needs to be full and fair.

But Your Honor, I think that the broader problem the debtors had with the rule advanced by the creditors' committee, and that frankly really troubled us, was two-fold. The first is that at the end of the day, Philly Newspapers didn't advocate a rule. I think as counsel to Hybrid noted, footnote 14 at Philly Newspapers isn't holding; it's not a rule of the Third Circuit. And the holding in Philly Newspapers was -- and I quote: "limited" -- I'm sorry; I apologize, Your Honor -- but the holding, by its terms, in Philly Newspaper, was limited. And I quote: "Our holding here only precludes a lender from asserting that it has an absolute right to credit bid when its collateral is being sold pursuant to a plan of reorganization." That's 599 F.3d at 317, Your Honor.

So it becomes pretty difficult for us, Your Honor, reading Philly Newspapers, to find support in Philly Newspapers, or more specifically a rule of law, that would have authorized the debtors to cap the credit bid rights and to

limit the clear policy interest in the Bankruptcy Code afforded to a secured lender on the basis of footnote 14, because at the end of the day, I just don't think that's what the Third Circuit actually decided. And I think, more fundamentally, with that, Your Honor, is that footnote 14 of Philly Newspapers really can't be reconciled squarely with the Third Circuit's own case law in SubMicron, where I think Judge Ambro, who was of course the dissenting judge in Philly Newspapers --

THE COURT: Um-hum.

MR. DAHL: -- took the approach quite clearly that even when a secured creditor's collateral is worth zero dollars, you couldn't take away that secured creditor's right to credit bid. And that was a fundamental protection afforded to that creditor and a fundamental protection afforded to secured lenders generally. And that should be respected in the Bankruptcy Code under the Third Circuit's ruling there. And I don't think there's any question, then, that SubMicron is, in fact, holding and that SubMicron -- really it should be controlling on the question.

But too, Your Honor, I think the Third Circuit's opinion in SubMicron is really consistent with a broader proposition that the Third Circuit has consistently recognized, namely that secured creditors have lawfully bargained on a prepetition basis, for unequal treatment. And I don't mean unequal in a disparaging way or an unfair way, but that's part

of the bargain entered into by the secured creditor when he extends credit to the debtor for collateral.

And here, it wasn't, again, just any creditor that extended credit on this basis, it was the U.S. government extending credit on the basis, for collateral, presumably under the theory that its rights under 363(k) would be respected. But Your Honor, that still begs the question as to whether or not cause could exist under the theory advocated by the committee. Namely, whether the prospect of higher or better recoveries for unsecured creditors could itself be an independent policy that overrides the protections afforded to secured creditors. And again, I think what the committee is doing here is not asking the Court to apply Philly Newspapers, because again, we the debtors have a very difficult time seeing how Philly Newspapers provides a rule to that effect, but effectively asking the Court to announce a new rule or to identify new policy in the Bankruptcy Code that would operate in derogation of secured creditors' rights, or to override secured creditors' rights, notwithstanding SubMicron and notwithstanding RadLAX.

And, Your Honor, as the debtors, I think it becomes very difficult for us to have identified a principled basis for that exception, because at the end of the day that exception follows the rule. I think it's fair to say in almost any auction, Your Honor, where a secured creditor would

participate, unsecured creditor recoveries could be higher if there wasn't a credit bid. I think we've said that at the outset of these cases, that if we had a different capital structure, if we had a lower amount of secured debt, creditor recoveries could be different, or the case could be different. But at the end of the day, if that is cause, under 363(k), and that is a policy of the Bankruptcy Code which overrides a secured creditor's property rights, that really becomes an exception that has no limiting principle at the end of the day, because every auction could suffer the same infirmity, and every secured creditor could suffer the same infirmity. And I think that policy consideration is also another aspect of Judge Ambro's dissent in Philly Newspapers that is worth noting. I think Judge Ambro rightly noted that the chilling effect that that could have to lenders, particularly lenders such as the U.S. government who really rely on their credit bid rights, for monetizing their credit bid rights could be profound. So I think from a policy perspective, then, when we look from footnote 14, the question of whether or not the Court should adopt an independent policy, notwithstanding what I think is the guidance from SubMicron, becomes a very difficult one, or it becomes a very difficult place on which to identify a principled basis for distinction, because it’s a rule that really offers no limiting principle at the end of the day.

But, Your Honor, I think that still begs the question

as to whether or not that course of action would be one worth pursuing. And this is certainly a question that the debtors asked themselves, whether notwithstanding the limitations of the case law, or notwithstanding the limitation of the facts of these cases insofar as the value being provided by Hybrid with respect to the noncredit bid component of its assets could be worthwhile. And this is a very difficult question for the debtors, Your Honor; it's one we didn't undertake lightly.

But in the first instance, and I think as I noted earlier, the course of action that's ultimately being proposed is not what the creditors' committee and the debtors have agreed are the right solution here, which is a holistic transaction for these assets, or one transaction for these assets. The course of action that's being advocated is one that capped credit bid rights, setting aside the legal issues with that, but is ineffectively endorsing subsequent litigation to disallow a claim, although that claim's going to be released under the terms of purchasing deal: Subsequent litigation regarding the nature of unencumbered assets or the factor of scope of perfection on those assets, although those assets are being paid for under our deal with Hybrid. And subsequent litigation around these Chapter 11 estates as a whole. So the certainty associated with the alternative that's being proposed has some really fundamental practical issues, which I think cut against the goal of both the committee and the debtors, which

is one transaction that can bring these cases to a successful conclusion.

But most fundamentally is the fact that the theory that's being proposed, the theory on which capping the credit bid would proceed is, again, one that has no limiting principle. And I think everyone in this courtroom is probably sensitive to the record of Philly Newspapers, in that the reason that case ultimately wound its way to the Third Circuit, and, indirectly, to the Supreme Court was not the debtor's attempt to cap credit bid rights in the way that it did, even though it was under 1129, and not 363, was heavily litigated. And candidly, Your Honor, given that the Supreme Court has seemed to agree, I think that it's a reasonable position to think that it was litigated for good reason by the lender there, particularly, again, given that the Supreme Court adopted the position of Judge Ambro's dissent.

So the debtors, on the one hand, absolutely share a broad goal of maximizing creditor recoveries. But the debtors, on the other hand, think that it needs to be done in a way that provides the best chance of success under the circumstances, that doesn't provide these Chapter 11 estates with the prospect of better recoveries if, or better recoveries might, or better recoveries could be, if everything works out. But at the same time, also proposes a solution for these Chapter 11 estates that complies with what, at the end of the day, we believe are

the requirements of applicable law and aren't predicated on the Court announcing a new rule that ultimately could swallow the more fundamental proposition of the Bankruptcy Code, which the protection of rights, not the derogation of them.

THE COURT: Aren't there many cases saying that where the nature of the collateral is at issue, the Court can impose conditions on the credit bid?

MR. DAHL: The nature of the collateral, Your Honor, or the scope of perfection of the collateral?

THE COURT: Well, that's, that's really what I meant, the scope of perfection. I mean --

MR. DAHL: Yeah, please Your Honor, I'm --

THE COURT: -- the committee has not had an opportunity -- committees get forty-five at minimum, it's usually sixty days to investigate perfection questions.

MR. DAHL: Certainly, Your Honor. There are some cases which limit the right to credit bid on unencumbered property, Your Honor, when there is a bona fide dispute of the nature of the perfection in the collateral. Here, I think we've narrowed that field to three, and we've agreed with the committee that the value could be material. But, Your Honor, I don't think that rule can work the other way, as the committee is advancing it, which is that because there may be some disputed collateral, a secured creditor can't credit bid in its entirety. And that that ultimately, is what the creditors'

committee is proposing. And that, again, it deviates somewhat, I think, from our general agreement that the best outcome here is a transaction for all of the assets -- a transaction for all of the assets, regardless, frankly, of whether or not there may be some issues associated with perfection. Because I think that the response from our perspective, Your Honor, is that if we believe we're getting sufficient value for those assets, even if there's a question about whether or not they are perfected or not, that ultimately is the guiding factor there, because the converse of that is to say, well, there's some dispute over a particular pool of collateral, so a secured lender holding 168 million dollars of secured debt can't credit bid it all. And again, this becomes the sort of exception that swallows the rule here.

I concede, Your Honor, it would be a very different case if the only bid that were on the table were a 168-million-dollar credit bid, full stop, and Hybrid was proposing to acquire the foreign IP, and Hybrid was proposing to acquire the foreign vehicles. That's not the transaction that's being proposed, Your Honor. And I think the cases Your Honor is speaking of, are situations that are more commonly seen, where you have a single-asset real estate property where a lender has a mortgage that's in dispute, and it's not permitted to bid on that piece of collateral. And I think that's an important and significant distinguishing factor with respect to this bid,

Your Honor. And it doesn't turn this situation into one where I think the committee is advocating that because there may be some disputed pieces of collateral, the credit bid should be invalid in its entirety, notwithstanding the noncredit bid forms of consideration being provided. And I think there is agreement here, and in particular with respect to the claims waiver, that's a material piece of the consideration and the noncredit bid consideration being given here, because it's a fundamental driver of the creditor recoveries that the creditors' committee has identified. And that's absolutely on the table with their bid from Hybrid.

THE COURT: All right. Thank you. Well, I'm -- I was going to take a lunch recess. I had understood it was going to be a very brief presentation; it obviously wasn't very brief. And --

MR. DAHL: I'm sorry, Your Honor.

MR. BALDIGA: Mine is two minutes.

THE COURT: Two minutes?

MR. BALDIGA: Two minutes.

THE COURT: I'm going to hold you to it. I'll give you a chance if you want more time, but I'm going to hold you to -- how about you, Mr. Keller?

MR. KELLER: Your Honor, I might go to three, but I --

THE COURT: All right.

MR. BALDIGA: All right, then, we can do this after --

THE COURT: No, no, no. If you -- if it's two minutes, we'll go now.

MR. BALDIGA: So William Baldiga for the committee, Your Honor. We are incredibly disappointed that the debtors, even now, in the face of and in spirit of our agreements this morning, continue to persist in defending the Hybrid transaction, even notwithstanding how hard the committee has worked to bring Wanxiang to the table here. It -- Mr. Dahl says it's because it's the debtors' efforts to bring this case to a successful close, in his words. I think it comes down to, then, a dramatically different view of what defines success.

Saying to just the three specific points that were, we think, subject to being misinterpreted, yes, commercial tort claims -- I mean, and again, it's unfortunate even needing to do this -- but commercial tort claims, and the director and officer policies, Mr. Dahl is technically -- hyper-technically correct they're not being sold; they're being dismissed. There may be a distinction, but as I've been reminded by bankruptcy judges before, in other contexts, it’s a distinction without a difference. And very disappointed, again, that these are the types of things that are advanced at this point.

Second, Mr. Dahl stated that the committee has agreed that there's value in minimizing claims. Yes, under the Wanxiang bid there would be significant value in avoiding dilution; under the Hybrid bid, there is no consequence to

dilution when dividends are of no consequence.

Third, Mr. Dahl stated a couple times that the agreement is that there might be material unencumbered assets. No; that's not our agreement, which is why we worked so hard yesterday to put this in writing, which, I guess turned out to be important, that there is agreement that the unencumbered assets are material. No footnotes; no asterisks; no pulling back.

That's my two minutes, Your Honor. Thank you.

THE COURT: Thank you, Mr. Baldiga.

MR. DAHL: Your Honor, if I might -- if I misspoke, and left any equivocation about there being the material level of assets that Mr. Baldiga identified, I apologize, and that was not my intent.

THE COURT: All right.

MR. DAHL: I'm sorry, Your Honor.

Mr. Baldiga; that was not my intent, okay?

THE COURT: Mr. Keller.

MR. KELLER: Don't be the mark. Don't keep a hungry judge away from his lunch. I will be quick.

THE COURT: I missed it a couple times this week.

MR. KELLER: I want to respond very quickly just to a couple of the points that were made, because I don't want the record to be unclear. It is true that Hybrid is not maintaining ownership of the Delaware property that's

maintaining its liens on a nonrecourse basis against the Delaware property. So it's -- we are the beneficiaries of the sale of the Delaware property. I don't want to give the misimpression that it's being left back with the estate, and we're moving on; that would be misleading.

Secondly, as to Mr. Lastowski's points about the negotiations. Those negotiations are far above my pay grade. My understanding is that my principals have spoken to the governor on a number of occasions. I suspect those negotiations are above Mr. Lastowski's pay grade. Clearly he's frustrated that he hasn't been able to get something for the State. I'm just not party to those conversations. But it's not skullduggery; it is conversations that are going on at a much higher level than I even aspire to participate.

I would -- I don't want to respond on the Wanxiang deal. I think they're right; that's between the estates. The numbers that are being bandied about, the forty percent clearly anticipates the waiver of -- or getting rid of our entire deficiency claim, things of that nature. And I would invite the judge to cast a very careful eye on some of those assertions.

The core issue here is whether cause exists to deprive my client, the assignee of the Department of Energy loan, of its right to credit bid. The committee has seized on a footnote issued in dictum by one judge on the Third Circuit.

It seems to have picked up some language from Collier's, that's not supported by any citations in Collier's that expands the notion of cause beyond anything we can find in the cases. They advocate two standards that Your Honor should pioneer new law on. The first one is that where an unencumbered asset is material, that the Court can deprive a secured creditor of their credit bid on assets that are clearly encumbered. The example I would use is if I own a beautiful house, and I have a Ferrari, that my mortgagor -- or my mortgagee -- can be stopped from credit bidding on my house, so long as they don't have an interest in my Ferrari. In fact, what we have is a company; we have a hundred Fiskers in a port in Germany and Belgium, but it's the same principle. The fact and materiality cannot be the standard upon which we are deprived of the right to credit bid. Clearly, these rights are material, but they don't go to the asset that we're trying to acquire here.

THE COURT: But we don't know how to apportion your credit.

MR. KELLER: That is a very easy task, with respect, Your Honor. You simply auction off the Ferrari. You simply auction off the Fiskers.

Now there is another argument that they're making, which is that the entirety -- the sale of the assets in the entirety is more favorable than if one sells off one lot versus another. First, we looked at the cases that were cited. One

is -- stands for the proposition that if you're selling an interest, the mortgage on the assets within the entity can't be used to credit bid. That doesn't go to this issue at all. The second one involved a lien where there was a bona fide dispute, and the Court didn't allow -- committee counsel cited them; they're 181 B.R. and 147 B.R. I'd simply urge Your Honor to read them; they don't stand for the proposition that was cited.

We're not aware of any cases that hold what the committee's urging. We believe that the evidentiary record is bereft of anything that would suggest that sale of the unencumbered assets would be higher, or better, if they were all combined. What we have is a stipulation of two parties, without evidence, and the one person who has been asked about it on the record, Mr. Madden, offered testimony that he really hadn't thought about the question. So there is no evidentiary record for it.

But if the evidence was there, this is a principle that -- let's be very careful the precedent that you're setting for yourself and your brethren. If I happen to have goods that are not subject to trademark in Taiwan, if those could be sold with all the other assets, and taken advantage of the trademark, you can sell those goods for more if you can put it all together in one sale, because now I don't have to scrape off the trademark and sell this as rubbish. Those assets are always out there; you can always get a premium for those

assets.

If Your Honor makes new law over this topic, or on this point, I would predict that every case, the first fight that the creditors' committee is going to have with the secured creditor is finding that asset that's worth more if you sell all the assets together, and tell the secured creditor that they can't credit bid -- that they can't exercise their rights; they have to put up the cash. That has to be terrible precedent. We can't find anything that would suggest that that is the state of the law today. And we would urge Your Honor not to make new law on that topic.

THE COURT: All right.

MR. KELLER: Thank you, Your Honor.

THE COURT: Thank you, Mr. Keller.

Well, I'd like to resume at 2:30, and it would be my hope to be able to issue a ruling at that time on the issues. So while I'm eating -- I don't know how well I'll be digesting, but I will be eating. So we'll stand in recess until 2:30. Thank you, everyone.

(Recess from 1:29 p.m. until 2:35 p.m.)

THE CLERK: Please rise.

THE COURT: Thank you, everyone; please be seated. I hope you all had a good lunch. And I was almost going to say, does anyone else wish to be heard, but I think I better stop it right here.

One thing I'd like to say at the outset, and that is this: it's a little intimidating when parties tell the bankruptcy judge that what he's doing, or ruling, or considering could be a dangerous precedent, because in my view, asking a bankruptcy judge -- if people want a precedential opinion they should give the judge four to six weeks to think about it and read all the cases and write the opinion and that sort of thing. And then I remembered that the Third Circuit has this procedure for issuing nonprecedential opinions. And those apply just to the parties and are not to be precedent. And I think that that's the case here, because really bankruptcy judges have the unenviable duty of keeping a case moving, and that doesn't always permit time for the kind of consideration that you would want to put into a decision under normal circumstances.

Let me -- I'll say something else. And I won't say a lot of things that I was thinking of saying. But I'll say this. When I heard the stipulation, the parties' stipulation at the beginning of the argument, I got a different sense of where the debtor was heading than when I heard Mr. Dahl make his argument right before the luncheon recess. And I am inclined here to rule -- not I'm inclined, I am going to rule that there ought to be an auction and that the only way for there to be an auction is to cap the -- is to place a cap on the credit bidding. And I think it's appropriate to do so

under these circumstances.

So let me just -- let me just say this, the Bankruptcy Code provides that in a sale not in the ordinary course of business, the holder of a lien may bid at the sale and, if successful, may offset its claim against the purchase price of the assets. The purpose of this provision is that it enables a creditor to protect against the risk that its secured interest will be eliminated at a depressed price. And then you go to Section 363 of the Code -- which I had here a few minutes ago, and Section 363(k), which everyone has been discussing appropriately -- Section 363(k) provides that "at a sale under Section (b) of this section of property that is subject to a lien that secures an allowed claim, unless the court for cause or" -- and this is credit bidding, of course -- "unless the court for cause orders otherwise the holder of such claim may bid at such sale, and, if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property." And the operative words really are "unless the court for cause orders otherwise." And that's what I'm doing here.

The cases, I think, are fairly clear that the cause in this situation is that we have undetermined perfected liens on a group of assets. We don't know -- I don't know, at the moment, the value of those liens -- I should say the value of those assets. But we know they exist, and it's been agreed

that they exist. And I think that that certainly has to provide for cause. Courts can place conditions upon the right to credit bid, without denying the right completely. I'm not denying the right completely; I'm simply saying that it should be capped at the twenty-five million dollars.

The other issue that the Court faces, frankly, is that in approving a sale, the Court would have to make a decision that it is a fair and reasonable price for that -- that it is fair value. I recognize that the parties have argued that there was an auction; there was the Department of Energy auction. But that was not an auction under the auspices of this Court. That was an auction that was not noticed by this Court. And that was not marketed under the auspices of this Court. So I don't take great comfort in the fact that there was a Department of Energy auction for debt. And I think that in order for me, at the end of the case, to determine whether or not the price paid is fair and reasonable and in the best interests of the debtors' estates, I think that an auction will provide that mechanism, that it otherwise really would not be available for the Court's consideration.

That is the most favored method of determining fair and reasonable is that there's an auction at which parties, at arms length and in good faith, bid for the assets. And that's what's going to take place here. So in the absence of evidence on the perfection of the liens, which would take time and would

unduly delay this case, the Court will cap the credit bid of Hybrid, for purposes of the auction -- for the purposes of the auction only of course -- at the twenty-five million dollars, which hopefully will promote an active auction.

And that's the Court's ruling.

Mr. Baldiga?

MR. BALDIGA: Thank you, Your Honor.

THE COURT: Mr. Dahl?

Well, you got up first, Mr. Baldiga.

MR. BALDIGA: Thank you. Your Honor, at this point, several things would then follow. You have a committee motion as to an alternative process.

THE COURT: Correct.

MR. BALDIGA: Wanxiang is here. I think the most appropriate thing to do, is we first have to decide whether Hybrid intends to continue to fund the case or whether we instead call upon Wanxiang as replacement DIP lender.

THE COURT: That takes us -- yes.

MR. BALDIGA: I think what is probably appropriate is yet to have another short recess to allow Hybrid to think about the Court's ruling, and then we can come back and suggest a process for going forward this afternoon.

THE COURT: Mr. Dahl, yes?

MR. DAHL: First of all, thank you for your ruling, Your Honor. And that certainly does clarify, I think to some

degree, the path going forward. But in the interim, again, we do think it's appropriate for a short recess, so we can confer both with our DIP lender and the relevant parties about the immediate and near-term path through this process.

THE COURT: And then we'll have to talk about auction procedures, so that we can keep things moving along, the bidding procedures, I should say.

MR. DAHL: Yes, Your Honor.

THE COURT: All right. How long do you think you realistically need? Twenty minutes? Thirty minutes?

MR. DAHL: Why don't we start with thirty minutes, Your Honor --

THE COURT: Thirty min --

MR. DAHL: -- and if we're able to resolve it sooner, we'll certainly alert chambers.

THE COURT: Knock on the door. Thank you.

MR. DAHL: Thank you.

MR. BALDIGA: Thank you, Judge.

(Recess from 2:43 p.m. until 4:02 p.m.)

THE CLERK: Please rise.

THE COURT: Thank you everyone; please be seated. Remember me? All right.

Mr. Dahl?

MR. DAHL: Yes. Good afternoon, Your Honor.

THE COURT: It is still afternoon; it's not evening

yet, no.

MR. DAHL: For the record, Ryan Preston Dahl, Kirkland & Ellis. Your Honor, we've spent this time productively. And, I think, identified a path forward in light of Your Honor's ruling. We are not in a position right now where we're able to present bid procedures -- a bid procedures order to the Court. But the parties, I think collectively agreeable to work collaboratively over the weekend to finalize documents with respect to the bid procedures and bid procedures order, as well as the financing documents. And if the Court has availability, we would ask for the Court's time --

UNIDENTIFIED SPEAKER: Monday or Tuesday.

MR. DAHL: -- on Monday or Tuesday to be in a position where we'd have that.

THE COURT: Let's see. On Monday, I've got -- Tuesday's a little better for me. But if you think you need Monday, I'll make time. I mean, I would think -- I'm assuming you would probably want Monday, a little later in the day --

MR. DAHL: We would if the Court could accommodate us, Your Honor.

THE COURT: Let's see --

MR. DAHL: We would not expect this Monday hearing to last, for example, as long as today's hearing has lasted.

THE COURT: Would we do it telephonically, or would you come back and --

UNIDENTIFIED SPEAKER: We could come back.

THE COURT: Come back?

MR. DAHL: We'd prefer to come back, Your Honor.

THE COURT: Well, let us do this, then, at -- I'm going to take a leap of faith on another case I've got; so let's say 2 o'clock.

MR. DAHL: 2 p.m. Eastern, Your Honor?

THE COURT: Yes. Does that work?

MR. DAHL: That works, Your Honor.

UNIDENTIFIED SPEAKER: I'm sorry, which day, Your Honor?

THE COURT: That would be Monday, Monday the 13th.

UNIDENTIFIED SPEAKER: Thank you.

THE COURT: Okay. Will you be able to get anything over to me in advance, or is that going to be cutting it too close --

MR. DAHL: Your Honor --

THE COURT: -- and we'll review it as we go?

MR. DAHL: -- we would certainly endeavor to get documents to you in real time as much as we possibly can.

THE COURT: Okay, I understand.

MR. DAHL: And we can send them directly to your clerk if that would --

THE COURT: That would be wonderful; sure. What else is there for us to do today?

MR. DAHL: Your Honor --

THE COURT: Is that it?

MR. DAHL: -- with that, that actually moots, to some degree, the balance of the agenda --

THE COURT: All right.

MR. DAHL: -- and that covers it for today, Your Honor.

THE COURT: All right, I'll see you, then, on Monday at 2, and if you need me for any reason over the weekend, I think you have the number.

MR. DAHL: We do, Your Honor. And thank you.

UNIDENTIFIED SPEAKER: We do.

THE COURT: Okay. All right, everyone.

MR. DAHL: Thank you, Judge.

THE COURT: We'll stand in recess. Good weekend, good travel, folks.

MR. DAHL: Thank you, Judge.

(Whereupon these proceedings were concluded at 4:04 PM)

I N D E X

E X H I B I T S

TESTIMONY

RULINGS

C E R T I F I C A T I O N

I, Aliza Chodoff, certify that the foregoing transcript is a true and accurate record of the proceedings.

January 13, 2014

ALIZA CHODOFF **DATE**

AAERT Certified Electronic Transcriber CETD-634**

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New York, NY 10040

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Exhibit B

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
FISKER AUTOMOTIVE HOLDINGS, INC., *et al.*,[1]	Case No. 13-13087 (KG)
Debtors.	Jointly Administered **Proposed Hearing Date: January 3, 2014 at 9:30 a.m. (EST)** **Proposed Objection Deadline: January, 3, 2014**

MOTION OF CREDITORS' COMMITTEE FOR ENTRY OF ORDERS (I)(A) APPROVING BID PROCEDURES IN CONNECTION WITH THE SALE OF CERTAIN ASSETS OF THE DEBTORS, (B) SCHEDULING HEARING TO CONSIDER APPROVAL OF THE SALE OF ASSETS, (C) APPROVING FORM AND MANNER OF NOTICE THEREOF; (D) AUTHORIZING AND DIRECTING DEBTORS TO ENTER INTO STALKING HORSE PURCHASE AGREEMENT; (E) APPROVING BREAK-UP FEE AND EXPENSE REIMBURSEMENT AND (F) GRANTING RELATED RELIEF; AND (II) AUTHORIZING DEBTORS TO OBTAIN REPLACEMENT POST-PETITION SECURED FINANCING, UTILIZE CASH COLLATERAL, GRANT ADEQUATE PROTECTION AND MODIFY THE AUTOMATIC STAY, AND SCHEDULING A FINAL HEARING WITH RESPECT TO SAME

The Official Committee of Unsecured Creditors (the "Creditors' Committee") appointed in the above-captioned cases (the "Chapter 11 Cases") of Fisker Automotive Holdings, Inc. *et al.* (the "Debtors"), by and through its proposed undersigned counsel, hereby moves the Court (the "Motion"), pursuant to sections 105(a), 363, 365, 503 and 507 of title 11 of the United States Code, 11 U.S.C. §§ 101 – 1532 (the "Bankruptcy Code") and Rules 2002, 6004, 6006, 9007 and 9014 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), for the entry of an order approving, among other things, (i) the bidding procedures described herein (the "Bidding Procedures") related to the sale of substantially all of the Debtors' assets (the "Sale"), (ii) the form and manner of notices, (iii) the form of asset purchase agreement (the "Stalking Horse

[1] The Debtors, together with the last four digits of each Debtor's federal tax identification number, are Fisker Automotive Holdings, Inc. (9678) and Fisker Automotive, Inc. (9075). The service address for the Debtors is 5515 East La Palma Avenue, Anaheim, California 92807.

Purchase Agreement") by and among each of the Debtors, as Seller, and Wanxiang America Corporation and its specified designees, as Buyer ("Wanxiang" or "Stalking Horse Bidder" or "DIP Lender"), including the Break-Up Fee and Expense Reimbursement (as defined therein), a copy of which is attached to the Declaration of John P. Madden in Support of Committee Omnibus Objection, Wanxiang Transaction Motion, and UCC Standing Motion (the "Madden Declaration"), which is being filed contemporaneously herewith, as **Exhibit "8"**, and authorizing and directing the Debtors to enter into the Stalking Horse Purchase Agreement; and (iv) dates to conduct an auction (the "Auction") and a hearing to consider final approval of the Sale (the "Sale Hearing").

By this Motion, the Committee also seeks the entry of an order, pursuant to sections 105, 361, 362, 363, 364 and 507 of the Bankruptcy Code and Bankruptcy Rules 2002, 4001, 6004 and 9014 for the entry of interim and final orders (together, the "DIP Orders"): (i) authorizing the Debtors to (a) obtain replacement post-petition secured financing from the DIP Lender and (b) utilize cash collateral; (ii) granting adequate protection to the prepetition lenders; (iii) modifying the automatic stay; (iv) granting related relief; and (v) scheduling a final hearing (the "Final Hearing") on the Motion pursuant to Bankruptcy Rules 4001(b) and 4001(c). In support of this Motion, the Creditors' Committee respectfully states as follows:

Jurisdiction

1. This Court has jurisdiction over this Motion under 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2). Venue is proper in this judicial district under 28 U.S.C. §§ 1408 and 1409.

2. The statutory bases for the relief requested herein are sections 105(a), 361, 362, 363, 364, 365, 503 and 507 of the Bankruptcy Code, Bankruptcy Rules 2002, 4001, 6004, 6006,

9007 and 9014 and Rule 4001-2 of the Local Rules of Bankruptcy Procedure for the United States Bankruptcy Court for the District of Delaware (the "Local Rules").

Background

A. The Need for an Alternative Sale Process.

3. As set forth more fully in the Motion of the Official Committee of Unsecured Creditors for Entry of an Order Pursuant to §§ 1103(c) and 1109(b) Granting Leave, Standing, and Authority to Commence, Prosecute, and, if Appropriate, Settle Certain Causes of Action on Behalf of the Debtors' Estates (the "Committee Standing Motion") and the Omnibus Objection of the Official Committee of Unsecured Creditors to the Debtors' (I) Sale Motion, (II) DIP Financing Motion, (III) Plan of Liquidation, and (IV) Disclosure Statement (the "Omnibus Objection),[2] the Debtors' proposed sale to Hybrid Tech Holdings, LLC ("Hybrid"), as well as the related bid procedures, are improper and will not serve the best interests of the Debtors' creditors and parties in interest. In the alternative, the Creditors' Committee, by this Motion, is proposing a sale procedure that allows for a fair and open sale process and best serves the interests of the Debtors' creditors. This proposed sale process contemplates the approval of the proposed Bidding Procedures with Wanxiang serving as a stalking-horse bidder and, unlike the private sale process the Debtors are currently pursuing with Hybrid, allows other parties to submit higher and better bids for the Debtors' assets. For the reasons set forth herein, the Creditors' Committee submits that the proposed alternative sale procedures should be approved.

B. The Need for Replacement DIP Financing.

4. On November 24, 2013, the Debtors filed the Motion of the Debtors for Entry of Interim and Final Orders (I) Authorizing Postpetition Financing, (II) Granting Liens and

[2] Additional information regarding the background of the Debtors and the events surrounding this Motion can be found in the Committee Standing Motion and the Omnibus Objection.

Providing Superpriority Administrative Expense Priority, (III) Authorizing Use of Cash Collateral, (IV) Granting Adequate Protection, (V) Modifying the Automatic Stay, and (VI) Scheduling a Final Hearing Pursuant to Sections 105, 361, 362, 363 and 364 of the Bankruptcy Code and Bankruptcy Rules 2002, 4001 and 9014 [Docket No. 17] (the "Hybrid DIP Financing Motion").

5. The Hybrid DIP Financing Motion included a detailed description of the terms and conditions of the proposed financing with Hybrid and a copy of the proposed Hybrid Credit Agreement (the "Hybrid Agreement"), and highlighted those provisions of the Hybrid Agreement and the proposed order that are required to be highlighted pursuant to Bankruptcy Rule 4001(c)(1)(B)(i)-(xi) and Local Rule 4001-2(a)(i)(A)-(G).

6. The Court approved certain provisions of the Hybrid DIP Financing Motion on an interim basis by orders dated November 26, 2013 [Docket No. 67] and December 17, 2013 [Docket No. 167] (the "Interim Hybrid DIP Orders").

7. Notice of the Hybrid DIP Financing Motion was served and filed on November 27, 2013 [Docket No. 74]. A hearing on final approval of the Hybrid DIP Financing Motion is scheduled for January 3, 2014.

8. As part of the alternative sales process proposed by the Creditors' Committee, as described above, the Creditors' Committee has negotiated a replacement debtor-in-possession financing agreement with Wanxiang (the "DIP Agreement"), a copy of which is attached to the Madden Declaration as **Exhibit "1"** and incorporated by reference herein. For obvious reasons, the Creditors' Committee believes that Hybrid will most certainly not fund its proposed alternative sale process.

9. The proposed budget under the DIP Agreement (the "Budget") is the same as that provided under the Hybrid Agreement. Moreover, the DIP Agreement is substantially the same as the Hybrid Agreement but includes the following changes:

A. The DIP Lender is Wanxiang.

B. Upon interim approval of the DIP Agreement, a portion of financing to be provided under the DIP Agreement (the "DIP Loans") will be used to repay the existing obligations outstanding under the Hybrid Agreement that were authorized under the Interim Hybrid DIP Orders.

C. A condition precedent to the DIP Loans is that the Court has entered an order approving the Bidding Procedures (the "Bidding Procedures Order"), pursuant to which the Debtors would be authorized and directed to (i) enter into the Stalking Horse Purchase Agreement and (ii) pursue a sale of substantially all of their assets in accordance with the terms of the Bidding Procedures Order. A proposed form of the Bidding Procedures Order is attached to the Madden Declaration as **Exhibit "6."**

D. The Debtors are not required to stipulate to the extent, validity or priority of Hybrid's alleged claims and liens and the DIP Agreement does not contain any deadline for parties-in-interest to challenge the liens and claims of Hybrid or any other prepetition creditor.

E. The DIP Lender is not seeking priming liens pursuant to Bankruptcy Code section 364(d)(1).

F. The amount of borrowings under the DIP Loans shall be up to amounts set forth in the Budget as of the approximate date of initial funding on an interim basis and as per the Budget on a final basis.

G. Subject to approval of the Court, the Committee's professionals may be paid from any assets or funds available to pre-petition creditors in excess of the line items in the Budget.

H. There is no limit on the amount of the Carve Out that can be used to fund the Committee's investigation and challenge of the alleged liens and claims of Hybrid.

I. The obligations under the DIP Agreement shall be repaid in full in cash upon the closing of a sale of substantially all of the Debtors' assets to any purchaser other than Wanxiang; if Wanxiang is the purchaser, the obligations under the DIP Agreement will remain outstanding and will only be payable from a portion of the proceeds of the Designated Causes of Action (as such term is defined in the Stalking Horse Purchase Agreement).[3]

10. A blackline copy of the DIP Agreement reflecting changes from the Hybrid Agreement is attached to the Madden Declaration as **Exhibit "2"** and incorporated by reference herein.

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[3] The Designated Causes of Action consist of (a) all commercial tort causes of action not related to the Acquired Assets or Assumed Liabilities (as such terms are defined in the Stalking Horse Purchase Agreement), including all pending and potential causes of action against all present and former directors, officers and all other representatives of the Debtors, and any persons acting in concert with (or aiding and abetting) the same, (b) all causes of action arising under Part V of the Bankruptcy Code, (c) any rights of recovery against BMW Group under prepetition agreements with the Debtors (by way of offset against BMW's claims against the Debtors' estates or affirmative recovery), and (d) all rights under and to insurance policies that may pertain to any of the foregoing.

11. A proposed order approving the DIP Agreement on an interim basis (the "Interim Order") is attached hereto and to the Madden Declaration as **Exhibit "3."** A redline copy of the proposed Interim Order reflecting changes from the Hybrid Interim Orders is attached to the Madden Declaration as **Exhibit "4"** and incorporated by reference herein.

12. Pursuant to Local Rule 4001-2(a)(i)(A)-(G), the Committee highlights the following provisions of the DIP Agreement, which will be sought in connection with final approval of the DIP Agreement:

A. The Committee will seek a waiver under Bankruptcy Code section 506(c) in favor of the DIP Lender. See DIP Agreement at 10.

B. The Committee will seek to provide the DIP Lender with a first priority lien on the Debtors' Avoidance Actions. See DIP Agreement at 2-3.

13. As made clear in the Omnibus Objection and the Committee Standing Motion, the Committee seeks to have the Debtors conduct an efficient auction process to sell substantially all of the Debtors' assets in an open and competitive sale process. The terms of the DIP Agreement, which would allow the Debtors to conduct such a sale process, are reasonable under the circumstances and were negotiated by the parties in good faith and at arm's length. The purpose of the DIP Agreement is to permit, among other things, (i) the management and preservation of the Debtors' assets and properties and (ii) a sale of substantially all of the Debtors' assets pursuant to the Bidding Procedures Order.

Relief Requested

14. By this Motion, the Creditors' Committee seeks entry of the Bidding Procedures Order (i) approving the Bidding Procedures relating to the Sale, as set forth below, (ii) scheduling a hearing to consider the Sale, (iii) approving the form and manner of notices, (iv) authorizing and directing the Debtors to enter into the Stalking Horse Purchase Agreement,

(v) approving the Break-Up Fee and Expense Reimbursement, and (vi) granting related relief. Further, the Creditors' Committee requests the entry of the proposed Interim Order, authorizing the Debtors to obtain replacement debtor-in-possession financing on an interim basis from the DIP Lender pursuant to the DIP Agreement and to use cash collateral, subject to the granting of adequate protection, as provided in the DIP Agreement and the proposed Interim Order.

A. Auction

15. The Creditors' Committee believes that the auction process proposed herein will expose the Acquired Assets, as defined below, to a broad and diverse market and ensure a sale to the highest and best offer. Accordingly, the Creditors' Committee proposes to conduct an Auction in or about the last week of January 2014, pursuant to Bankruptcy Rule 6004(f)(1).

B. Proposed Bidding Procedures

16. The Creditors' Committee seeks to receive the highest and best value for the assets to be acquired under the Stalking Horse Purchase Agreement (the "Acquired Assets"). Although the Creditors' Committee believes the Stalking Horse Purchase Agreement is fair and reasonable and reflects the highest and best value for the Acquired Assets as of the date of this Motion, the Creditors' Committee desires to hold the Auction in accordance with the procedures prescribed herein in an effort to conduct an open sale process that generates higher and better offers for the Acquired Assets.

17. The Bidding Procedures describe, among other things, the assets available for sale, the manner in which bidders and bids become "qualified," the coordination of diligence efforts among bidders, the Creditors' Committee and the Debtors, the receipt, negotiation and qualification of bids received, the conduct of any auction and the selection and approval of any ultimately successful bidders. The Bidding Procedures were developed in a manner consistent

with the competing needs to expedite the sale process and promote participation and active bidding. In addition, the Bidding Procedures reflect the Creditors' Committee objective in conducting the Auction in a controlled, but fair and open, fashion.

i. The Bidding Procedures

18. This section summarizes key provisions of the proposed Bidding Procedures but is qualified in its entirety by reference to the Bidding Procedures attached to the Bidding Procedures Order as **Schedule 1.**

(a) Assets to be Sold. The Debtors shall offer for sale the Acquired Assets, including the Assumed Contracts and Assumed Leases.

(b) Bidding Process. Set forth below is the general process to be employed by the Debtors with respect to the proposed Sale of their assets:

(i) Any person or entity who wishes to participate in the Bidding Process must meet the participation requirements for Potential Bidders, as described below, and must thereafter timely submit a Qualified Bid in order to become a Qualified Bidder that can participate in the Auction.

(ii) The Creditors' Committee, in consultation with and the assistance of Debtors, shall: (a) coordinate the efforts of Potential Bidders in conducting their respective due diligence investigations regarding the Acquired Assets; (b) determine whether any person or entity is a Qualified Bidder; (c) receive and evaluate bids from Qualified Bidders; and (d) administer the Auction.

(c) Participation Requirements. To participate in the Sale process, each interested person or entity (a "Potential Bidder"), with the exception of Wanxiang, shall deliver the following documents (the "Participation Materials") to the parties set forth below on the date that is at least five (5) days before the Bid Deadline (or such later date to which the Creditors' Committee consents, as set forth in the Bidding Procedures):

(i) an executed confidentiality agreement in form and substance satisfactory to the Creditors' Committee and the Debtors that inures to the benefit of the Successful Bidder;

(ii) a statement demonstrating to the Creditors' Committee's satisfaction a *bona fide* interest in purchasing the Acquired Assets from the Debtors;

(iii) current audited financial statements of (i) the Potential Bidder, or (ii) if the Potential Bidder is an entity formed for the purpose of acquiring the Acquired Assets, current audited financial statements of the equity holder(s) of the Potential Bidder who shall either guarantee the obligations of the Potential Bidder or provide such other form of financial disclosure and credit-quality support information or enhancement reasonably acceptable to the Debtors

(iv) written evidence of the Potential Bidder's commitment for debt or equity funding that is needed to close the contemplated transaction acceptable to the Creditors' Committee, demonstrating that such Potential Bidder has the ability to close the contemplated transaction; provided, however, that the Creditors' Committee shall determine in its discretion and in consultation with their advisors whether the written evidence of such financial wherewithal is acceptable; and

(v) information that can be publicly filed and/or disseminated representing that the Potential Bidder has the financial wherewithal to satisfy adequate assurance requirements with respect to the Assumed Contracts and Assumed Leases under the Bankruptcy Code.

(d) The Participation Materials must be transmitted to each of the following parties (collectively, the "Notice Parties"): (i) the Debtors, c/o Fisker Automotive, Inc., [ ] (Attn: [ ]); (ii) co-counsel to the Debtors, (a) Kirkland & Ellis LLP, 300 North LaSalle Street, Chicago, Illinois 60654 (Attn: Ryan Preston Dahl, Esq.) and (b) Pachulski Stang Ziehl & Jones LLP, 919 Market Street, 17th Floor, PO Box 8705, Wilmington, Delaware 19800 (Attn: James E. O'Neill, Esq.); (iii) co-counsel to the Creditors' Committee (a) Brown Rudnick LLP, One Financial Center, Boston, Massachusetts 02111 (Attn: William R. Baldiga, Esq.) and (b) Saul Ewing LLP, 222 Delaware Avenue, Suite 1200, Wilmington, Delaware 19801 (Attn: Mark Minuti, Esq.); (iv) co-counsel to the Stalking Horse Bidder, (a) Sidley Austin LLP, One South Dearborn Street, Chicago, IL 60603 (Attn: Bojan Guzina, Esq. and Andrew F. O'Neill, Esq.) and (b) Young Conaway Stargatt & Taylor, Rodney Square, 1000 North King Street, Wilmington, Delaware 19801 (Attn: Edmon L. Morton, Esq.).

(e) If the Creditors' Committee determines that a Potential Bidder has a *bona fide* interest in the Acquired Assets, then promptly after such determination, (a) the Creditors' Committee will deliver to the Potential Bidder an electronic copy of the Stalking Horse Purchase Agreement; and

(b) the Debtors will provide access to a confidential electronic data room concerning the Acquired Assets (the "Data Room").

(f) Due Diligence. Until the day of the Auction, or the Bid Deadline if a Potential Bidder shall not have submitted a Qualified Bid by the Bid Deadline, the Debtors will afford any Potential Bidder such due diligence access or additional information as may be reasonably requested by the Potential Bidder that the Creditors' Committee or Debtors determine in their reasonable discretion to be reasonable and appropriate under the circumstances. All due diligence requests shall be directed to the Debtors, as indicated above.

The Debtors shall coordinate all reasonable requests for additional information and due diligence access from Potential Bidders. If the Creditors' Committee or Debtors determine that due diligence material requested by a Potential Bidder is reasonable and appropriate under the circumstances, but such material has not previously been provided to any other Potential Bidder or the Stalking Horse Bidder, the Debtors shall post such materials in the Data Room and provide email notice of such posting to all Potential Bidders, as well as to the Notice Parties.

With certain exceptions, unless otherwise determined by the Creditors' Committee or Debtors, the availability of additional due diligence to a Qualified Bidder will cease on the Auction date.

(g) Bid Deadline and Requirements.

(i) A "Qualified Bid" is (1) Wanxiang's offer to acquire the Acquired Assets pursuant to the Stalking Horse Purchase Agreement and, if applicable, (2) another Qualified Bidder's offer to acquire the Acquired Assets if such offer was received prior to the Bid Deadline and if such offer included each of the following:

a) Bulk Bid. The bid must be a bulk bid to purchase all of the Acquired Assets from the Debtors at the purchase price and upon the terms and conditions set forth in an executed purchase agreement, a clean copy of which shall be submitted, together with a marked copy showing any proposed changes to the Stalking Horse Purchase Agreement.

b) Contingencies. The bid must not be subject to any due diligence or financing contingency, must not be conditioned on bid protections or any expense reimbursement, must not be subject to any corporate consent or approval, or any regulatory contingencies (other than a condition that any applicable waiting period required

for any regulatory approval shall have expired or have been terminated and required authorization of any other governmental entity whose approval is identified in the bid as required for the transaction as set forth in such Potential Bidder's bid shall have been obtained). **Any required governmental approvals identified in the bid may impact the evaluation of whether the bid is a Qualified Bid and shall be taken into account when determining the highest and best bid.**

c) Higher and Better Offer. The purchase price in such bid must be a higher and better offer for the Acquired Assets (as compared to the offer of the Stalking Horse Bidder), and such offer shall not be considered a higher and better offer unless such bid (including any credit bid) provides for

i. a sufficient cash component for the payment to the Stalking Horse Bidder in cash (A) the outstanding balance of the DIP Obligations (as defined in the Bidding Procedures Order) of $8,140,000 on the closing date of the Sale, and (B) the Break-Up Fee and Expense Reimbursement upon the Court's approval and closing date of the Sale, or as otherwise set forth in the Stalking Horse Purchase Agreement; and

ii. consideration to the Debtors' estates of at least $1,100,000 (inclusive of the Break-Up Fee and Expense Reimbursement) more than that provided under the Stalking Horse Purchase Agreement.

d) Bid Deadline. The bid must be received by the Debtors by the Bid Deadline.

e) Absence of Bid Protections. The bid must not entitle the Potential Bidder to any break-up fee, termination fee or similar type of payment or reimbursement and, by submitting a bid, the bidder waives the right to pursue a substantial contribution claim under 11 U.S.C. § 503 related in any way to the submission of its bid or the bidding process.

f) Deposit. The bid (including any credit bid) must be accompanied by a cash deposit in the amount of $5,000,000 (the "Deposit").

g) Designation of Assumed Contracts and Leases. The bid must include a comprehensive list of all executory contracts and unexpired leases that the Qualified Bidder proposes to assume and the corresponding cure amounts associated with the assumption and assignment of such contracts and leases.

h) Adequate Assurance. The bid must demonstrate the Potential Bidder's ability to provide adequate assurance of future performance under any executory contracts or unexpired leases to be assumed and/or assigned pursuant to such bid.

i) Proof of Financial Ability to Perform/Corporate Authority. A Potential Bidder shall accompany its bid with: (a) written evidence of available cash, a commitment for financing or ability to obtain a satisfactory commitment if selected as the Successful Bidder and such other evidence of ability to consummate the Sale Transaction as the Debtors may request; (b) a copy of a board resolution or similar document demonstrating the authority of the Potential Bidder to make a binding and irrevocable bid on the terms proposed; and (c) any pertinent factual information regarding the Potential Bidder's operations that would assist the Creditors' Committee in its analysis of issues arising with respect to any applicable antitrust laws, governmental regulatory approvals, national security laws, foreign investment laws or other aspects of the bid and with respect to any conditions contained in the bid.

j) Irrevocable: Each Qualified Bid submitted (other than the Stalking Horse Purchase Agreement) shall constitute an irrevocable offer and be binding upon the applicable Qualified Bidder from the time the bid is submitted until the entry of the Sale Order. The Back-Up Bid (defined below) shall be irrevocable and binding upon the bidder until the earlier of one (1) business day after the closing of the Sale of the Acquired Assets or thirty (30) days after the Sale Order is entered.

(ii) In order to be considered, Bids must be received on or before 5:00 p.m., prevailing Eastern Time, on January [28], 2014, or such later date to which the Creditors' Committee consents, after consultation with the Debtors and the Stalking Horse Bidder, but in no event after the commencement of the Auction (the "Bid Deadline").

(iii) Bid Assessment Criteria. A Qualified Bid will be valued based upon factors such as: (a) the purported amount of the Qualified Bid, including any benefit to the Debtors' bankruptcy estates from any assumption of liabilities of the Debtors; (b) the fair value to be provided to the Debtors under the Qualified Bid; (c) the length of time expected to close the proposed Sale Transaction including the necessary time to obtain necessary antitrust, governmental, foreign investment or other regulatory approvals for the proposed transaction; (d) the ability to obtain all necessary antitrust, governmental, foreign investment or other regulatory approvals for the proposed transaction; and (e) any other factors the Creditors' Committee reasonably may deem relevant.

(iv) Within one (1) day after the Creditors' Committee determines that a bid is a Qualified Bid, the Creditors' Committee shall distribute a copy of such bid to counsel to the Debtors and Stalking Horse Bidder, respectively, by e-mail, hand delivery or overnight courier. The Creditors' Committee may reject any bid if, among other things, the Creditors' Committee determines such bid is on terms that are in their totality materially more burdensome or conditional than the terms of the Stalking Horse Purchase Agreement.

(h) Auction. If there is timely delivered a Qualified Bid other than that of Wanxiang's bid, the Creditors' Committee will conduct an Auction. The Auction shall take place at the offices of [Kirkland & Ellis LLP, co-counsel to the Debtors, at 300 North LaSalle Street, Chicago, Illinois 60654] on January [31], 2014, commencing at a time to be determined. Subject to the "Reservation of Rights" set forth in the Bidding Procedures, the Auction shall be governed by the following procedures:

(i) Only the Debtors, the Committee, the Stalking Horse Bidder and any other Qualified Bidder that has timely submitted a Qualified Bid, and their respective professionals and representatives, shall attend the Auction in person, and only the Stalking Horse Bidder and such other Qualified Bidders will be entitled to make any subsequent bids at the Auction.

(ii) Each Qualified Bidder shall be required to confirm on the record of the Auction that it has not engaged in any collusion with respect to the bidding or the sale of the Acquired Assets.

(iii) At least one (1) Business Day prior to the Auction, each Qualified Bidder who has timely submitted a Qualified Bid must inform the Creditors' Committee whether it intends to attend the Auction; provided that in the event a Qualified Bidder elects not to attend the Auction, such Qualified Bidder's Qualified Bid shall

nevertheless remain fully enforceable against such Qualified Bidder until the date of the selection of the Successful Bidder and the Back-Up Bidder. Prior to the commencement of the Auction, the Creditors' Committee will provide notice of the Qualified Bid which the Creditors' Committee believes, in its reasonable business judgment, is the highest or otherwise best offer(s) (the "Starting Bid(s)") to the Debtors, Stalking Horse Bidder and all other Qualified Bidders.

(iv) All Qualified Bidders who have timely submitted Qualified Bids will be entitled to be present for all Subsequent Bids (as defined below) at the Auction with the understanding that the true identity of each Qualified Bidder at the Auction will be fully disclosed to all other Qualified Bidders at the Auction and that all material terms of each Subsequent Bid will be fully disclosed to all other bidders throughout the entire Auction; provided that all Qualified Bidders wishing to attend the Auction must have at least one individual representative with authority to bind such Qualified Bidder attending the Auction in person. All proceedings at the Auction shall be conducted before and transcribed by a court stenographer.

(v) The Creditors' Committee may employ and announce at the Auction additional procedural rules that are reasonable under the circumstances for conducting the Auction, provided that such rules are (i) not inconsistent with these Bidding Procedures, the Bankruptcy Code, or any order of the Bankruptcy Court or any other applicable court entered in connection herewith, (ii) disclosed to each Qualified Bidder at the Auction, and (iii) acceptable to the Committee and the Stalking Horse Bidder in all respects.

(vi) The Creditors' Committee reserves its right, in its reasonable business judgment (after consultation with the Debtors and the Stalking Horse Bidder) to make one or more adjournments of the Auction for the purposes prescribed in the Bidding Procedures.

(vii) No Qualified Bidder shall consult with any other Qualified Bidder prior to the conclusion of the Auction, or submit at any time a "joint bid" with any other Qualified Bidder, without the express consent of the Creditors' Committee (after consultation with the Debtors.

(viii) Bidding at the Auction will begin with the Starting Bid and continue, in one or more rounds of bidding, so long as during each round at least one subsequent bid is submitted by a Qualified

Bidder that (i) improves upon such Qualified Bidder's immediately prior Qualified Bid (a "Subsequent Bid") and (ii) the Creditors' Committee determines that such Subsequent Bid is (A) for the first round, a higher or otherwise better offer than the Starting Bid(s), and (B) for subsequent rounds, a higher or otherwise better offer than the Leading Bid(s) (as defined below).

Each Subsequent Bid at the Auction shall provide net value to the estate of at least **$100,000** (which amount cannot be reduced or increased without the consent of the Stalking Horse Bidder) over the Starting Bid(s) or the Leading Bid(s), as the case may be, which net value may be in the form of cash or non-cash consideration (any such non-cash consideration to be valued in the discretion of the Debtors). After the first round of bidding and between each subsequent round of bidding, the Creditors' Committee shall announce the bid or bids that it believes to be the highest or otherwise best offer (the "Leading Bid(s)"). A round of bidding will conclude after each participating Qualified Bidder has had the opportunity to submit a Subsequent Bid(s) with full knowledge of the Leading Bid(s).

Except as specifically set forth herein, for the purpose of evaluating the value of the consideration provided by Subsequent Bids (including any Subsequent Bid by the Stalking Horse Bidder), the Creditors' Committee will, at each round of bidding, give effect to the Break-Up Fee and Expense Reimbursement payable to the Stalking Horse Bidder under the Stalking Horse Purchase Agreement, and take into account any additional liabilities to be assumed by a Qualified Bidder and any additional costs which may be imposed on the Debtors' estates in connection with such Subsequent Bid.

(i) Credit Bidding. Only holders of allowed valid secured claims (that are otherwise Qualified Bidders) are permitted to credit bid at the Auction to the extent set forth below; *provided* that such bids must also include a sufficient cash component to allow for the payment, in cash on the closing date of the Sale (or with respect to the Break-Up Fee and Expense Reimbursement, as otherwise provided in the Stalking Horse Purchase Agreement), of (a) the outstanding balance of the DIP Obligations and (b) the Break-Up Fee and Expense Reimbursement.

Unless expressly consented to in writing by the Creditors' Committee in advance of the Bid Deadline, no party shall be permitted or entitled to credit bid, or attempt to credit bid, any alleged obligation of the Debtors, or any affiliate or subsidiary of the Debtors, relating to any claim (as that term is defined in the Bankruptcy Code) that the Debtors or the Creditors'

Committee assert constitutes, or will constitute at some point, a contingent, unliquidated or disputed claim against the Debtors or any subsidiaries or affiliates of the Debtors. The Creditors' Committee reserves all rights to contest the propriety of any credit bid pursuant to section 363(k) and 105 of the Bankruptcy Code, and no party shall be permitted to credit bid more than $25,000,000 of the outstanding obligations under the Loan Arrangement and Reimbursement Agreement dated as of April 22, 2010, by and among the Debtors and the United States Department of Energy, for the Acquired Assets.

(j) Successful Bid/Back-Up Bid. Immediately at the conclusion of the Auction, the Creditors' Committee shall (a) determine, consistent with the Bidding Procedures, after consultation with the Debtors, which bid constitutes the highest and best bid (such bid, the "Successful Bid") and (b) communicate to the Stalking Horse Bidder and the other Qualified Bidders the identity of the Successful Bidder and the details of the Successful Bid. At such time, the Creditors' Committee shall also determine, after consultation with the Debtors, which bid constitutes the second highest and best bid, and may, in their discretion, deem such second highest and best bid a Back-Up Bid (such bid, the "Back-Up Bid" and the party submitting the Back-Up Bid, the "Back-Up Bidder") and communicate to the Stalking Horse Bidder and other Qualified Bidders the identity of the Back-Up Bidder and the details of the Back-Up Bid. In no circumstances shall the Stalking Horse Bidder be required to be a Back-Up Bidder; *provided*, *however*, that the Creditors' Committee may give weight to or otherwise deem to be value in the commitment of a Qualified Bidder to be a Back-Up Bidder.

If no Qualified Bids are received for the Acquired Assets other than the Stalking Horse Purchase Agreement, the Stalking Horse Purchase Agreement shall be designated as the Successful Bid and there shall be no Auction. The Qualified Bidder making the Successful Bid is referred to as the "Successful Bidder." The determination of the Successful Bid and the Back-Up Bid by the Debtors at the conclusion of the Auction shall be final, subject only to approval by the Bankruptcy Court. If the Successful Bid is terminated or fails to close within the time period specified in the Successful Bid, the Debtors shall be authorized, but shall not be required, to consummate the Sale Transaction with the Back-Up Bidder without further order of the Bankruptcy Court.

(k) Assumption and Assignment Procedures. The Debtors intend to assume and assign certain executory contracts and unexpired leases to any Successful Bidder, and to be relieved of any liability under such contracts and leases after the closing of the Sale upon such assumption and assignment:

(i) No later than three (3) business days after the entry of the Bidding Procedures Order (the "Initial Cure Notice Deadline"), the Debtors shall serve by first class mail or hand delivery, a notice of potential assumption, assignment and/or transfer of the executory contracts and unexpired leases to which any Debtor is a party (the "Executory Contracts and Unexpired Leases"), substantially in the form attached to the Bidding Procedures Order as **Schedule 3** (the "Notice of Potential Assumption and Assignment"), on all non-debtor parties to the Executory Contracts and Unexpired Leases. The Notice of Potential Assumption and Assignment shall include the calculation of the cure amounts (the "Cure Amounts") that the Debtors believe must be paid to cure all defaults outstanding under the Executory Contracts and Unexpired Leases as of such date. In addition, if the Debtors identify additional Executory Contracts or Unexpired Leases that are not set forth in the original Notice of Potential Assumption and Assignment, the Debtors shall promptly send a supplemental notice (a "Supplemental Notice of Potential Assumption and Assignment") to the applicable counterparties to such additional Executory Contracts or Unexpired Leases.

(ii) Unless the non-debtor party to an Executory Contract or Unexpired Lease files an objection (the "Cure Amount/Assignment Objection") to (a) its Cure Amount, and/or (b) the proposed assumption, assignment and/or transfer of such Executory Contract or Unexpired Lease (including the transfer of any related rights or benefits thereunder) to the Stalking Horse Bidder or to any other Successful Bidder, as applicable, by the later of (i) 5:00 p.m. (prevailing Eastern Time) on **January [ ], 2014**, and (ii) ten (10) days after service of the Supplemental Notice of Potential Assumption and Assignment, if applicable (collectively, the "Cure/Assignment Objection Deadline") and serves a copy of the Cure Amount/Assignment Objection so as to be received by the Notice Parties no later than the Cure/Assignment Objection Deadline, such non-debtor party will (i) be forever barred from objecting to the Cure Amount and from asserting against the Debtors or the Stalking Horse Bidder (or any other Successful Bidder, as applicable) any additional cure or other amounts with respect to such Executory Contract or Unexpired Lease, and (ii) be deemed to have consented to the assumption, assignment and/or transfer of such Executory Contract or Unexpired Lease (including the transfer of any related rights and benefits thereunder) to the Stalking Horse Bidder, any other Successful Bidder or any other assignee of the relevant Executory Contract or Unexpired Lease.

(iii) Cure Amount/Assignment Objections with respect to any Notice of Potential Assumption and Assignment that is served on or before

the Initial Cure Notice Deadline, shall be heard at the Sale Hearing, unless the Debtors, the Creditors' Committee and the Stalking Horse Bidder agree otherwise or the Court orders otherwise.

(iv) No later than seven (7) days prior to the consummation of the Sale (the "Closing"), the Debtors shall serve a notice, substantially in the form attached to the Bidding Procedures Order as **Schedule 4** (the "Assumption Notice Deadline"), identifying the Successful Bidder and stating which Executory Contracts and Unexpired Leases will be assumed and assigned (the "Assumed Contracts and Assumed Leases") to the Successful Bidder as of the Closing (as defined below) (the "Assumption Notice"). Notwithstanding anything in the Stalking Horse Purchase Agreement to the contrary, the Successful Bidder shall not have the right to designate additional Executory Contracts and Unexpired Leases as Assumed Contracts and Assumed Leases to be assumed and assigned at Closing following the Assumption Notice Deadline; *provided, however*, that the Successful Bidder may designate additional Executory Contracts and Unexpired Leases as Assumed Contracts and Assumed Leases to be assumed and assigned following the date of the Closing and following a seven (7) day period from the date of service of a subsequent Assumption Notice relating to such additional Executory Contracts and Unexpired Leases.

(v) Upon a determination by the Debtors made in accordance with the Stalking Horse Purchase Agreement that an Executory Contract or Unexpired Lease should be rejected, the Debtors shall serve by first class mail or hand delivery, a notice, substantially in the form attached to the Bidding Procedures Order as **Schedule 5** (the "Notice of Rejection"), of rejection of such Executory Contract or Unexpired Lease on all non-debtor parties to such Executory Contract or Unexpired Lease, and such Executory Contract or Unexpired Lease shall be deemed to have been rejected ten (10) days from the date of service of such Notice of Rejection.

(vi) The Stalking Horse Bidder (or another Successful Bidder, as applicable) may determine to exclude any Executory Contract or Unexpired Lease (an "Excluded Contract") from the list of Acquired Assets at any time prior to the Closing. The non-debtor party or parties to any such Excluded Contract will be notified of such exclusion by written notice as soon as practicable after such determination, which may be after the Sale Hearing.

(vi) In the event that the Stalking Horse Bidder is not the Successful Bidder for the Acquired Assets, within one (1) business day after the conclusion of the Auction the Debtors will file a notice identifying the Successful Bidder and will serve such notice on all parties that received service of the Notice of Potential Assumption and Assignment.

(l) Sale Hearing. The Sale Hearing shall take place in the courtroom of Honorable Kevin Gross in the United States Bankruptcy Court for the District of Delaware, 824 Market Street, Courtroom 3, 6th Floor, Wilmington, Delaware on February [3], 2014 at a time to be determined. At such Sale Hearing, the Debtors shall present the Successful Bid to the Bankruptcy Court for approval.

(m) Return of Deposits. A Deposit submitted by the Back-Up Bidder will be held until forty-eight (48) hours after the Back-Up Bid has been terminated in accordance with the Bidding Procedures. As to all other bidders (except the Successful Bidder), Deposits will be returned promptly after conclusion of the Sale Hearing. Other than with respect to the Deposit of the Stalking Horse Bidder, which shall be governed by the Stalking Horse Purchase Agreement, if the Successful Bidder or the Back-Up Bidder fails to consummate an approved sale because of its own breach or failure to perform, the Debtors shall be entitled to retain the Deposit in partial satisfaction of any damages resulting from the breach or failure to perform by the Successful Bidder or the Back-Up Bidder, as the case may be, without prejudice to any other rights the Debtors may have. The Debtors may credit the Deposit of the Successful Bidder or the Back-Up Bidder towards the purchase price on the closing of the sale of the Acquired Assets to the Successful Bidder or the Back-Up Bidder, as the case may be.

ii. The Expense Reimbursement and Break-Up Fee

19. Without the Expense Reimbursement and Break-Up Fee (together, the "Bid Protections") sought herein, Wanxiang would not be proceeding with this proposed acquisition. Accordingly, the Creditors' Committee has agreed to provide, and to seek at this time, this Court's approval of certain Bid Protections provided to Wanxiang pursuant to the Stalking Horse Purchase Agreement. First, the Stalking Horse Purchase Agreement provides that Wanxiang shall be paid a break-up fee of $500,000 (the "Break-Up Fee") if the Stalking Horse Purchase Agreement is terminated pursuant to Sections 10.2(b), 10.2(g) or 10.2(i) thereof and the Debtors

consummate a "Competing Transaction" with anyone other than Wanxiang within twelve (12) months following such termination. The Break-Up Fee represents less than 2% of the total consideration for the Acquired Assets in the Stalking Horse Purchase Agreement.

20. Next, the Debtors shall also pay Wanxiang an amount equal to reasonable and documented out-of-pocket costs, fees and expenses incurred by Wanxiang in connection with the Stalking Horse Purchase Agreement and the sale process, up to $500,000 (including fees and expenses of legal, accounting and financial advisors) (the "Expense Reimbursement"), if the Stalking Horse Purchase Agreement is terminated for any reason other than pursuant to Sections 10.2(a), 10.2(c) or 10.2(j) thereof and the Debtors consummate a "Competing Transaction" with anyone other than Wanxiang within twelve (12) months following such termination.

21. If the Debtors become obligated to pay the Expense Reimbursement or the Break-Up Fee, then such obligations shall constitute actual and necessary costs and superpriority administrative expenses of preserving the Debtors' estates, within the meaning of sections 364(c)(1) and 503(b)(1) of the Bankruptcy Code (subject only to the carve-out as defined pursuant to any applicable order approving debtor-in-possession financing (a "DIP Order")).

22. Notably, other protections, such as the minimum overbid protections were also negotiated with Wanxiang. Such protections, which present themselves in the Bidding Procedures and the Bidding Procedures Order, have all been the product of arm's length negotiations.

23. The Debtors submit that the implementation of the Bidding Procedures will not chill the bidding (if any) for the Acquired Assets. To the contrary, approval of the Bidding Procedures is in the best interests of the Debtors, their estates and their creditors since the

Bidding Procedures provide a structure and format for potentially interested parties to formulate a Bid for all of the Acquired Assets.

24. Failure to approve the Bidding Procedures may jeopardize the sale of the Debtors' assets in a manner that is more efficient and fair and that serves the best interests of the Debtors and their estates.

C. Notice of Sale Hearing, Auction, Bidding Procedures and Objection Dates

25. The Creditors' Committee proposes to hold the Auction at Kirkland & Ellis LLP, co-counsel to the Debtors, at 300 North LaSalle Street, Chicago, Illinois 60654 on January 31, 2014 at a time to be determined.

26. The Creditors' Committee further requests that the Court schedule the Sale Hearing on February 3, 2014.

27. In accordance with Bankruptcy Rule 2002, the Creditors' Committee proposes that the Debtors give notice of the Bidding Procedures, the Proposed Order, the Auction and the proposed Sale in the following form and manner:

(a) No later than (3) business days after entry of the Bidding Procedures Order, the Debtors will cause the notice substantially in the form attached to the Bidding Procedures Order as **Schedule 2** (the "Notice of Auction and Sale Hearing") and the Bidding Procedures Order to be sent by first-class mail postage prepaid, to the following: (a) the U.S. Trustee; (b) counsel for the Creditors' Committee; (c) all taxing authorities having jurisdiction over any of the Acquired Assets, including the Internal Revenue Service; (d) all parties that have requested or that are required to receive notice pursuant to Bankruptcy Rule 2002; (e) all persons known or reasonably believed to have asserted an interest in any of the Acquired Assets; (f) all non-Debtor parties to the Executory Contracts and Unexpired Leases; (g) all persons known or reasonably believed to have expressed an interest in acquiring all or a substantial portion of the Acquired Assets or making an equity investment in the Debtors within the twelve (12) months prior to the Petition Date; (h) the Attorneys General in the State(s) where the Acquired Assets are located; (i) the Environmental Protection Agency; (j) all state and local environmental agencies in any jurisdiction where the Debtors own or have owned or used real property; (k) the United States Department of Energy; (l) the United States

Department of Justice; (m) all current and former customers, dealers and sales representatives of the Debtors; (n) all current employees of the Debtors and all former employees of the Debtors employed within six (6) months of the Petition Date; and (o) counsel to the Stalking Horse Bidder.

(b) In addition to the foregoing, (i) electronic notification of this Motion, the Bidding Procedures Order and the Notice of Auction and Sale Hearing also will be posted by the Debtors on: (A) the Court's website, www.deb.uscourts.gov; and (B) the case website maintained by the Debtors' claims and noticing agent, Rust Omni; and (ii) no later than three (3) business days after entry of the Bidding Procedures Order, the Debtors will: (A) serve the Notice of Auction and Sale Hearing on all known creditors of the Debtors; and (B) subject to applicable submission deadlines, publish the Notice of Auction and Sale Hearing once in one national publication the Debtors deem appropriate. Failure to timely file an objection in accordance with the Bidding Procedures Order shall forever bar the assertion of any objection to the Motion, entry of the Sale Order, and/or consummation of the Sale, and shall be deemed to constitute consent to entry of the Sale Order and consummation of the Sale and all transactions related thereto.

28. The Creditors' Committee proposes that objections, if any, to the Sale be filed by **January 28, 2014 at 4:00 p.m.** (prevailing Eastern Time) (the "Sale Objection Deadline"). Objections, if any, must: (i) be in writing; (ii) conform to the applicable provisions of the Bankruptcy Rules and the Local Rules; (iii) state with particularity the legal and factual basis for the objection and the specific grounds therefor; and (iv) be filed with this Court and served so as to be actually received no later than the Sale Objection Deadline by the following parties (the "Notice Parties"): (a) co-counsel to the Debtors, (1) Kirkland & Ellis LLP, 300 North LaSalle Street, Chicago, Illinois 60654 (Attn: Ryan Preston Dahl, Esq.) and (2) Pachulski Stang Ziehl & Jones LLP, 919 Market Street, 17th Floor, PO Box 8705, Wilmington, Delaware 19800 (Attn: James E. O'Neill, Esq.); (c) co-counsel to the Creditors' Committee, (1) Brown Rudnick LLP, One Financial Center, Boston, Massachusetts 02111 (Attn: William R. Baldiga, Esq.) and (2) Saul Ewing LLP, 222 Delaware Avenue, Suite 1200, Wilmington, Delaware 19801 (Attn: Mark Minuti, Esq.); and (d) co-counsel to the Stalking Horse Bidder, (1) Sidley Austin LLP, One

South Dearborn Street, Chicago, IL 60603 (Attn: Bojan Guzina, Esq. and Andrew F. O'Neill, Esq.) and (2) Young Conaway Stargatt & Taylor, Rodney Square, 1000 North King Street, Wilmington, Delaware 19801 (Attn: Edmon L. Morton, Esq.).

29. Any party failing to object to the Sale on or before the Sale Objection Deadline shall be precluded from asserting any objection to the relief sought in the Sale Motion.

30. The Creditors' Committee submits that the foregoing notice is reasonably calculated to provide timely and adequate notice to the Debtors' creditors and other parties in interest, along with parties that have expressed interest (or may express interest) in bidding on the Acquired Assets, the Bidding Procedures, the Auction, the Sale and all proceedings to be held thereon.

31. Based upon the foregoing, the Creditors' Committee submits that the relief requested herein is necessary and appropriate and in the best interests of the Debtors and their estates, and should be granted in all respects.

Basis for Relief Requested

I. The Proposed Bidding Procedures Should be Approved

A. Conducting the Auction Pursuant to the Bidding Procedures is in the Best Interests of the Debtors' Estates

32. The Creditors' Committee believes that the Auction and proposed Bidding Procedures will promote active bidding from seriously interested parties and will identify the best or highest offer(s) for the Acquired Assets. The proposed Bidding Procedures will allow the Creditors' Committee and the Debtors to conduct the Auction in a controlled, fair and open fashion that will encourage participation by financially capable bidders who demonstrate the ability to close a transaction. The Creditors' Committee further believes that the Bidding Procedures are: (a) sufficient to encourage bidding for the Acquired Assets; (b) consistent with

other procedures previously approved by the Court; (c) appropriate under the relevant standards governing auction proceedings and bidding incentives in bankruptcy proceedings; and (d) best suited, particularly in comparison to the Debtors' proposed sale to Hybrid, to maximize the value of the Debtors' assets for the benefit of the Debtors' creditors and parties in interest while also ensuring an orderly sale process that is consistent with the timeline available under the Stalking Horse Purchase Agreement and the terms of the DIP Agreement.

33. The paramount goal in any proposed auction of property of the estate is to maximize the proceeds received by the estate. *See, e.g., In re Food Barn Stores, Inc.*, 107 F.3d 558, 564-65 (8th Cir. 1997) (noting that in bankruptcy sales, "a primary objective of the Code [is] to enhance the value of the estate at hand"); *In re Integrated Res., Inc.*, 147 B.R. 650, 659 (S.D.N.Y. 1992) ("It is a well-established principle of bankruptcy law that the . . . [debtors'] duty with respect to such sales is to obtain the highest price or greatest overall benefit possible for the estate.") (quoting *In re Atlanta Packaging Prods., Inc.*, 99 B.R. 124, 130 (Bankr. N.D. Ga. 1988)).

34. To that end, courts uniformly recognize that procedures intended to enhance competitive bidding are consistent with the goal of maximizing the value received by the estate and therefore are appropriate in the context of bankruptcy transactions. *See, e.g., Integrated Res.*, 147 B.R. at 659 (explaining that such procedures "encourage bidding and [] maximize the value of the debtor's assets"); *In re Fin. News Network, Inc.*, 126 B.R. 152, 156 (Bankr. S.D.N.Y. 1991), (stating that "court-imposed rules for the disposition of assets . . . [should] provide an adequate basis for comparison of offers, and [should] provide for a fair and efficient resolution of bankrupt estates").

35. The Creditors' Committee believes that the Bidding Procedures will establish the parameters under which the value of the proposed Sale may be tested at the Auction. Indeed, the Bidding Procedures are designed to encourage competitive bidding in an orderly manner to maximize value for the Debtors' estates. The proposed procedures further contain terms typical for a process through which a sale of this nature is consummated and will increase the likelihood that the Debtors will receive the greatest possible consideration because they will ensure a competitive and fair bidding process.

36. In addition, as noted above, one of the ways in which the Bidding Procedures will better serve the debtors' creditors and parties in interest is by either rejecting Hybrid's credit bidding rights or, at a minimum, limiting any credit bidding rights on account of the Hybrid debt – which was purchased from the Department of Energy ("DOE") by an insider (i.e., a Fisker board member) on the Petition Date, as more fully discussed in the Omnibus Objection – to no more than $25,000,000. As explained in the Omnibus Objection, this limitation is appropriate since, prior to Hybrid's purchase of the DOE Loan (as defined in the Omnibus Objection), the DOE Loan was subjected to an auction process by DOE and the winning $25 million bid reflects a market-tested (and Government-approved) valuation of the underlying DOE Loan collateral. Additionally, a rejection of credit bidding rights on account of the DOE Loan is appropriate in light of (i) evidence establishing Hybrid's bad faith in connection with a breach of fiduciary duty on the part of an insider of the Debtors in effecting Hybrid's acquisition of the DOE Loan and (ii) an existing dispute regarding the validity of Hybrid's liens, which, as case law demonstrates, constitutes "cause" to bar a secured creditor from credit bidding under Bankruptcy Code section 363(k). In light of the foregoing, which are more fully discussed in the Omnibus Objection, the proposed limitations/restrictions on credit bidding in

the Bidding Procedures will best serve the Debtors and their constituents by avoiding the self-serving auction process proposed by Hybrid and the Debtors and instead allowing for an open auction process in which other parties may realistically bid on the Debtors' assets and in turn maximize the value of the Debtors' estates for the benefit of all creditors and parties in interest.

37. Next, as additional support for the Bidding Procedures, section 105(a) of the Bankruptcy Code provides that the Court "may issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). As described above, approval of the Bidding Procedures will greatly assist the Debtors in maximizing the value that they may obtain for all or portions of the Acquired Assets. Consequently, the Creditors' Committee respectfully submits that granting the requested relief is "appropriate" under the circumstances.

38. Finally, similar procedures have been previously approved by this Court. *See, e.g.*, *In re Furniture Brands International, Inc.*, Case No. 13-12329 (Sontchi, J.) (Bankr. D. Del. Oct. 3, 2013); *In re A123 Systems. Inc.*, Case No. 12-12859 (Carey, J.) (Bankr. D. Del. Nov. 8, 2012); *In re DSI Holdings, Inc.*, Case No. 11-11941 (Carey, J.) (Bankr. D. Del. June 28, 2011); *In re Universal Building Products, Inc.*, Case No. 10-12453 (Walrath, J.) (Bankr. D. Del. Aug. 27, 2010); *In re Goldcoast Liquidating, LLC,* Case No. 10-12819 (Gross, J.) (Bankr. D. Del. Oct. 1, 2010); *In re Radnor Holdings Corp.*, Case No. 06-10894 (Walsh, J.) (Bankr. D. Del. Sept. 22, 2006); *In re Russell-Stanley Holdings, Inc.*, Case No. 05-12339 (Walrath, J.) (Bankr. D. Del. Sept. 9, 2005); *In re Ultimate Elecs., Inc.*, No. 05-10104 (Walsh, J.) (Bankr. D. Del. March 24, 2005); *In re Polaroid Corp.*, No. 01-10864 (Walsh, J.) (Bankr. D. Del. Nov. 19, 2001). Accordingly, based on the foregoing, the Creditors' Committee respectfully requests that the Court enter the Bidding Procedures Order.

B. The Bid Protections, if Applicable, are in the Best Interests of the Debtors' Estates

39. As indicated above, Wanxiang would not be proceeding with this proposed acquisition without the Bid Protections. In addition, Wanxiang is the only party that has proposed a sale process that would be beneficial to *all* parties in interest in these cases, not just Hybrid. Wanxiang's willingness to assist in preserving the value of the Debtors' businesses by funding and participating in the section 363 sale process as stalking horse purchaser furthers the Debtors' objectives in receiving the highest and best value for the Acquired Assets by allowing for a structured sale process that allows other potentially interested parties to participate. Moreover, in light of the time, energy and resources expended by Wanxiang to submit a stalking horse bid in these cases, the Creditors' Committee has agreed to provide, and seek this Court's approval of, the Bid Protections provided to Wanxiang under the Stalking Horse Purchase Agreement.

40. The Expense Reimbursement and Break-Up Fee are material inducements for, and conditions of, Wanxiang's entry into the Stalking Horse Purchase Agreement. The Creditors' Committee believes that the Bid Protections are fair and reasonable in view of (a) the analysis and negotiation undertaken by Wanxiang in connection with the transaction and (b) the fact that, if the Expense Reimbursement and Break-Up Fee are triggered, Wanxiang's efforts will have influenced the chances that the Debtors receive the highest or otherwise best offer for the Acquired Assets, to the benefit of the Debtors' creditors and parties in interest.

41. The United States Court of Appeals for the Third Circuit has held that although bidding incentives in favor of a stalking horse are measured against a business judgment standard, in order to receive administrative expense priority pursuant to section 503(b) of the Bankruptcy Code, the bidding incentive must provide some postpetition benefit to the estate. *See*

In re O'Brien Envtl Energy, Inc., 181 F.3d 527, 533 (3d Cir. 1999). The *O'Brien* Court identified two instances in which such a benefit to the estate may be found. First, a benefit may be found if the incentive promoted a more competitive bidding process, "such as by inducing a bid that otherwise would not have been made and without which bidding would have been limited." Second, a benefit may be found where bidding incentives induce a bidder to research the value of the debtor and submit a bid that serves as the floor bid upon which other bidders can rely.

42. The Expense Reimbursement and Break-Up Fee are consistent with the Third Circuit's test above since the Expense Reimbursement and Break-Up Fee provisions are material considerations without which Wanxiang would not have entered into the Stalking Horse Purchaser Agreement. Additionally, the Wanxiang required such Bid Protections as inducements to conduct the costly research necessary to provide a competitive floor bid for purposes of the Creditors' Committee's proposed Bidding Procedures.

43. The Creditors' Committee submits that the Expense Reimbursement and Break-Up Fee are normal, and often times necessary, components of sales outside the ordinary course of business under section 363 of the Bankruptcy Code. *See, e.g., In re Kupp Acquisition Corp.*, Case No. 96-1223 (PJW) (Bankr. D. Del. March 3, 1997); *In re Kmart*, Case No. 02-B-02474 (SPS) (Bankr. N.D. Ill. May 10, 2002) (authorizing a termination fee and overbid amounts for potential bidders); *In re Comdisco, Inc.*, Case No. 01-24795 (RB) (Bankr. N.D. Ill. Aug. 9, 2002) (approving a termination fee as, *inter alia*, an actual and necessary cost and expense of preserving the debtor's estate, of substantial benefit to the debtor's estate, and a necessary inducement for, and a condition to, the proposed purchaser's entry into the purchase agreement);

In re Crowthers McCall Pattern, Inc., 114 B.R. 877 (Bankr. S.D.N.Y. 1990) (approving an overbid requirement in an amount equal to the approved break-up fee).

44. Moreover, the amount of the Expense Reimbursement and Break-Up Fee are reasonable and appropriate in light of the size and nature of the Sale of the Acquired Assets and the efforts that have been and will be expended by Wanxiang. *See, e.g.*, *AES Thames, L.L.C.*, Case No. 11-10334 (KJC) (Bankr. D. Del. Nov. 16, 2011) (D.I. 471) (approving a potential break-up fee of $300,000 in the event the debtor entered into a stalking horse purchase agreement with a purchase price of at least $10 million); *In re AgFeed USA, LLC*, Case No. 13-11761 (BLS) (Banker D. Del. Aug. 1, 2013) (court approved break-up fee of 3% and expense reimbursement of 1% in connection with a $79 million sale); *In re Solyndra LLC*, Case No. 11-12799 (MFW) [D.I. 1113] (Bankr. D. Del. Sept. 28, 2012) (court approved break-up fee of 2.6% in connection with $90 million sale); *In re Chi-Chi's Inc.*, Case No. 03-13063 (Bankr. D. Del. Nov. 4, 2003) (fee of 5.1% permitted).

45. Payment of the Expense Reimbursement and Break-Up Fee will not diminish the assets of the estates available for distribution to creditors. The Creditors' Committee does not intend to terminate the Stalking Horse Purchase Agreement if to do so would incur an obligation to pay the Expense Reimbursement and Break-Up Fee, unless to accept an alternative bid, which bid must exceed the consideration offered by Wanxiang by an amount sufficient to cover the Bid Protections.

46. In sum, the ability to offer the Expense Reimbursement and Break-Up Fee to Wanxiang enables the Creditors' Committee to ensure the sale of substantially all of the Acquired Assets to Wanxiang at a fair price and in a manner that best preserves the interests of the Debtors' estates and creditors.

47. Thus, to the extent such Bid Protections become due under the terms of the Stalking Horse Purchase Agreement, and subject to the DIP Agreement, the Creditors' Committee requests that the Court authorize payment of the Expense Reimbursement and Break-Up Fee, pursuant to the terms and conditions of the Stalking Horse Purchase Agreement.

II. The Proposed Alternative DIP Financing Should be Approved

48. Bankruptcy Code section 364(c) provides:

> If the trustee is unable to obtain unsecured credit allowable under section 503(b)(1) of this title as an administrative expense, the court, after notice and a hearing, may authorize the obtaining of credit or the incurring of debt —
>
> (1) with priority over any or all administrative expenses of the kind specified in section 503(b) or 507(b) of this title;
>
> (2) secured by a lien on property of the estate that is not otherwise subject to a lien; or
>
> (3) secured by a junior lien on property of the estate that is subject to a lien.

11 U.S.C. § 364(c).

49. Courts have articulated a three-part test to determine whether a debtor is authorized to obtain secured financing under Bankruptcy Code section 364(c). Specifically, courts look to whether: (i) the debtor is unable to obtain unsecured credit under Bankruptcy Code section 364(b) by, for example, allowing a lender only an administrative claim; (ii) the credit transaction is necessary to preserve the assets of the estate; and (iii) the terms of the transaction are fair, reasonable and adequate given the circumstances of the debtor-borrower and the proposed lender. *In re Ames Dep't Stores*, 115 B.R. 34, 37-39 (Bankr. S.D.N.Y. 1990); *see also In re St. Mary Hospital*, 86 B.R. 393, 401 02 (Bankr. E.D. Pa. 1988); *In re Crouse Group, Inc.*, 71 B.R. 544, 549 (Bankr. E.D. Pa. 1987).

50. Based upon the record in these cases, as particularly outlined in the Omnibus Objection and the Committee Standing Motion, the Creditors' Committee has easily satisfied the standard for approval of the proposed financing under Bankruptcy Code section 364(c).

51. The DIP Agreement is absolutely essential to the Debtors' ability to conduct their Chapter 11 Cases and the proposed Auction. Without the infusion of additional capital, the Debtors will suffer immediate and irreparable harm, including the cessation of their operations and the orderly wind-down currently in progress. Accordingly, entry of the proposed Interim Order is necessary to preserve the Debtors' estates.

52. Moreover, as set forth more fully above, the Creditors' Committee negotiated the DIP Agreement in good faith with the DIP Lender. Given the Debtors' current financial circumstances, funding on better terms than those provided in the DIP Agreement were not available. *See In re Snowshoe Co.*, 789 F.2d 1085, 1088 (4th Cir. 1986) (noting that a debtor need only demonstrate "by a good faith effort that credit was not available without" the protections afforded to potential lenders by Bankruptcy Code sections 364(c) and (d)); *see also In re Plabell Rubber Prods., Inc.*, 137 B.R. 897, 900 (Bankr. N.D. Ohio 1992). For the foregoing reasons, among others, the terms of the DIP Agreement are fair, reasonable and adequate, and DIP Lender should be accorded the benefits of Bankruptcy Code section 364(e).

53. The Debtors further request that the automatic stay provisions of Bankruptcy Code section 362 be vacated and modified to the extent necessary so as to permit the DIP Lender to exercise all remedies provided for in the DIP Agreement and proposed Interim Order upon the occurrence of an Event of Default (as defined in the DIP Agreement and the proposed Interim Order).

54. Additionally, Bankruptcy Rules 4001(b) and (c) provide that a final hearing on a motion to obtain credit pursuant to Bankruptcy Code sections 363 and 364 may not be commenced earlier than fourteen (14) days after the service of such motion. Upon request, however, the Court is empowered to conduct an expedited preliminary hearing on the motion and authorize the obtaining of credit to the extent necessary to avoid immediate and irreparable harm to the Debtors' estates. This Motion is an integral part of the Committee's alternative sale process, as described herein. To the extent the Court sustains the Omnibus Objection, the Debtors will be without funding. As such, expedited consideration of the DIP Agreement is necessary to avoid immediate and irreparable harm to the Debtors and their estates.

55. Lastly, the Creditors' Committee respectfully requests that the Court schedule the Final Hearing on this Motion, subject to appropriate notice to parties-in-interest.

Notice

56. The Debtors have provided notice of this Motion to: (a) the Office of the United States Trustee for the District of Delaware; (b) PNC Bank, N.A., d/b/a Midland Loan Services, Inc., a division of PNC Bank, N.A., as successor by merger to Midland Loan Services, Inc., as collateral agent under that certain Amended and Restated Collateral Agency Agreement dated as of July 30, 2010; (c) the United States Department of Energy; (d) Silicon Valley Bank; (e) the Delaware Economic Development Authority; (f) Hybrid Technology; (g) all known holders of liens, claims, and other encumbrances secured by the assets constituting the Acquired Assets; (i) all applicable federal, state and local taxing authorities, including the Internal Revenue Service, (j) all parties entering an appearance in these cases pursuant to Rule 2002; and (k) counsel to Wanxiang. In light of the nature of the relief requested, the Debtors respectfully submit that no further notice is necessary.

No Prior Request

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

WHEREFORE, the Debtors respectfully request entry of an order: (i) granting the relief requested herein; and (ii) granting such other relief as the Court deems just and proper.

Dated: December 30, 2013

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Proposed Co-Counsel to the Official Committee of Unsecured Creditors

Exhibit C

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
FISKER AUTOMOTIVE HOLDINGS, INC., *et al.*,[1]	Case No. 13-13087 (KG)
Debtors.	Jointly Administered
	Related to Doc. Nos. 13, 17, 127, 128

THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS' OMNIBUS OBJECTION TO (I) THE DEBTORS' (A) SALE MOTION, (B) DIP FINANCING MOTION, (C) PLAN OF LIQUIDATION AND (D) DISCLOSURE STATEMENT AND (II) THE ALLOWANCE OF CLAIMS OF HYBRID AGAINST THE DEBTORS

[1] The Debtors, together with the last four digits of each Debtor's federal tax identification number, are Fisker Automotive Holdings, Inc. (9678) and Fisker Automotive, Inc. (9075). The service address for the Debtors is 5515 East La Palma Avenue, Anaheim, California 92807.

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The Official Committee of Unsecured Creditors (the "Committee") appointed in the above-captioned proceedings (the "Chapter 11 Cases") of Fisker Automotive Holdings, Inc., *et al.* (the "Debtors" or "Fisker"), by and through its proposed co-counsel, hereby objects (the "Committee Omnibus Objection") to (I) the Debtors' (A) Sale Motion, (B) DIP Financing Motion, (C) Plan of Liquidation, and (D) Disclosure Statement (each defined below) and (II) the allowance of claims of Hybrid (defined below) against the Debtors. As ground therefor and in support hereof, the Committee states as follows:

PRELIMINARY STATEMENT

1. In their present posture, these Chapter 11 Cases present several significant business, legal and fairness of process concerns, many of which the Court has itself noted at prior hearings:

- The Debtors seek to rush through a sale at lightning speed of all of their assets to a buyer that is controlled by a person who was a director and insider of the Debtors up to the day on which these cases were commenced, in a process that entirely precludes any competitive offer;
- The proposed sale would permit the sale to the insider for consideration that consists almost entirely of a "credit bid" of a debt purchased at a significant discount by the insider literally as these cases were being filed and purchased by the insider for the sole purpose of effectively foreclosing out the purchased lien with the protection of this Court – but without any opportunities for others to present competitive bids or suggest alternative outcomes;
- The proposed sale would provide little or no distribution to holders of general unsecured claims (less than a cent on the dollar), and may be insufficient even to fully pay (as required) priority and administrative claims in these cases;
- The proposed sale and related plan have virtually no support from the holders of claims in these cases other than the claim purchased by the insider on the day these cases were commenced;
- The insider's credit bid transaction would extend to material estate assets that do not serve as perfected collateral for the purchased debt, which unencumbered assets would be available for the realization of significant value for general unsecured claims if not for these insider transactions; and

- The proposed transactions would also require the dismissal or release of all estate causes of action, including as against insiders and other related parties, all for no consideration, thereby eliminating assets otherwise available to unsecured creditors under any alternative scenarios.

2. The Committee is therefore pleased to be able to present to the Court and all parties an alternative outcome (the "Wanxiang Transaction")[2] that is in stark contrast to the insider/no competition/no dividend/lightning speed transaction urged from day one by the Debtors:

- A sale to an exceptionally well-regarded, ***non***-affiliated, industry leader, Wanxiang America Corporation ("Wanxiang"), on business terms and for a package of consideration that are much more favorable to creditors than the insider transaction;

- The Wanxiang Transaction is fully subject to higher and better offers on customary terms, and contains no impediments to being topped at an auction if other parties (including Hybrid) believe that there is even more value to be had;

- This strategic buyer, Wanxiang, is a proven and reliable partner in the industry and in these distressed situations. For example, earlier this very year, Wanxiang spent nearly $300 million in cash in a transaction before this Court to buy A123 Systems at a competitive auction in a case pending before Judge Carey. By virtue of that acquisition, Wanxiang ***already*** owns the primary component of Fisker's electric cars – the lithium ion battery;

- Wanxiang's offer includes an equity stake in the reorganized company to be distributed to creditors of 20% of its common stock. Beyond that, Wanxiang offers the Debtors' many trade creditors an opportunity to make good and valuable trade relationships with a proven market leader, something highly valued by all concerned;

- The present Hybrid transaction is being forced upon creditors and the Court, as is all too common, by a "drop dead" DIP loan that will expire if the Court fails to approve the Hybrid transaction within a few days. To give all parties, and the Court, a fair opportunity to catch their respective breaths and not to be backed into a corner, Wanxiang has stepped up and made available a fully funded

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[2] See *Motion of Creditors' Committee for Entry of Orders (I) (A) Approving Bid Procedures in Connection with the Sale of Certain Assets of the Debtors, (B) Scheduling Hearing to Consider Approval of the Sale of Assets, (C) Approving Form and Manner of Notice Thereof; (D) Approving Break-Up Fee and Expense Reimbursement and (E) Granting Related Relief; and (II) Authorizing Debtors to Obtain Replacement Post-Petition Secured Financing, Utilize Cash Collateral, Grant Adequate Protection, Modify the Automatic Stay and Scheduling a Final Hearing with Respect to Same*, filed contemporaneously herewith.

replacement DIP loan, available immediately and for the entirety of the auction process;

- Most striking, that replacement DIP loan ***requires no priming*** – the replacement DIP loan is subordinate to all valid and duly perfected prepetition liens and takes out the present Hybrid quick-expiration DIP loan;
- The Wanxiang Transaction in economically superior, by a wide margin, over the present Hybrid transaction; and
- The Wanxiang Transaction requires ***no*** releases.

3. In every respect, therefore – legally, financially, fairness of process, and otherwise – the Wanxiang Transaction is clearly superior. And, as stated, it ***merely sets a floor***: the Wanxiang proposal can be topped on market terms. The Hybrid proposal cannot – that is, ***unless*** this Court now steps in and permits the Committee to introduce Wanxiang to the otherwise closed process. The Committee, therefore, strongly supports denial of the integrated set of Hybrid transactions and strongly supports approval of the Wanxiang Transaction. See Madden Decl. ¶¶ 3-4 & Exs. 1-11.[3]

4. As discussed more fully below, a condition to Wanxiang's bid and enabling replacement of the DIP loan is that, in any auction going forward, the credit bid rights on account of the Hybrid debt, bought from the Department of Energy by an insider (a Fisker board member) literally on the petition date in order to foreclose out that lien – and to acquire material non-collateral assets to boot – would be limited to no more than $25,000,000. (The Wanxiang bid, even without an auction ***already*** provides for the full replacement, ***with*** interest and fees of Hybrid's DIP Loan, plus return of the entire $25,000,000 paid by the Hybrid/insider consortium on the petition date for the loan, so there is no possibility that Hybrid, a volunteer to this case, can take a loss.)

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[3] "Madden Decl. Ex. ___" refers to the exhibits to the *Declaration of John P. Madden in Support of the Committee Omnibus Objection, Wanxiang Transaction Motion, and UCC Standing Motion* (the "Madden Decl."), filed contemporaneously herewith.

5. The Committee believes that there are many legal and factual bases for the elimination altogether, or at least the restriction, of Hybrid's credit bid rights. As more fully explained below:

- The proposed sale (that is, the stalking horse bid now presented by the Committee, as well as the non-competitive transaction urged by Hybrid) is a single-lot sale of all or substantially all of the Debtors' assets. Those assets comprise, in material part, assets that may be subject to a perfected Hybrid lien, ***and*** in material part ***other*** valuable assets which are not. It is axiomatic that credit bid rights extend only to collateral and, as all parties (including, of course, Hybrid, as that is what has been requested here since the first day of these cases) believe that the only value-maximizing transactions are of a mix of collateral and non-collateral assets, there is no right to credit bid at that sale;

- A second, but equally good, reason credit bidding is not permitted here, is that "cause" exists under Bankruptcy Code section 363(k) to deny or limit Hybrid's right to credit bid. First, good cause exists to deny the right to credit bid, or at the very least cap any credit bid to $25,000,000 as here we have a sale of mixed collateral and non-collateral. As stressed throughout the Debtors' initial Sale Motion, the Debtors and Hybrid believe that the DOE's loan sale efforts, and the Debtors' own prepetition sale efforts, each over many months, were open, fair and produced the top dollar available. The DOE loan, now Hybrid's loan, was purchased ***on the petition date*** for $25,000,000. The collateral securing that loan comprises a portion of the assets to be sold. As a result, and by the Debtors' and Hybrid's own submission here, the $25,000,000 purchase price is the ***best possible evidence*** that the value of the collateral securing the Hybrid loan is no more than $25,000,000. Consequently, in a mixed-sale of the Hybrid loan collateral and other assets which are ***not*** collateral, any purchase price paid in excess of $25,000,000 must be apportioned to the assets that are not DOE loan collateral. Again, the Committee stresses that in this situation, ***no*** credit bid right should pertain – but if any at all are permitted, Section 363(k) and fundamental fairness certainly dictate that the credit bid rights should be limited to $25,000,000, the value of the Hybrid loan collateral; and

- Lastly, Hybrid acquired the DOE loan and the security interest in the DOE loan collateral at a significant discount, literally on the petition date and with all of the benefits of an insider's full access to all conceivably relevant information, with the main purpose of foreclosing on the DOE loan collateral. Notably, at all relevant times, David Manion, a principal of Hybrid, was also a member of Fisker's board of directors. Manion participated in all board meetings discussing the sale of Fisker's assets and the sale of the DOE loan, all the while working with the other principals of Hybrid to implement its own plan to acquire the DOE loan and Fisker's assets. In similar circumstances, courts have held that an insider's acquisition of the company's secured debt at a discount for the purpose

of foreclosing on the collateral is a breach of fiduciary duty. In light of the self-dealing and breaches of fiduciary duty, "cause" clearly exists to preclude Hybrid from credit bidding and to enable an open and fair sale process that encourages cash bidding by all parties.

INTRODUCTION

I. Background to the Debtors' Chapter 11 Cases.

6. As early as April 2013, Hybrid embarked on its plan to acquire Fisker's assets through a credit bid of the $168.5 million in outstanding principal under the loan (the "DOE Loan") provided to Fisker by the Department of Energy (the "DOE"). At that time, Fisker was heavily involved in marketing its assets for sale in various ways. Notably, Fisker had developed a potential strategic sale process with Wanxiang and its partner VL Automotive, LLC ("VL"). Fisker planned to sell its assets through an open and fully competitive bankruptcy auction, with Wanxiang/VL providing a floor as a stalking-horse bidder. Fisker ultimately abandoned this stalking-horse strategy with Wanxiang/VL, after Ace Strength International Ltd. ("Ace Strength"), both a large shareholder of Fisker and an affiliate of Hybrid, refused to guarantee postpetition financing for the sale and Wanxiang/VL declined to backfill the funding gap.

7. At the same time, Ace Strength, Fisker Board member David Manion, Richard Li, and other affiliates (collectively, the "Hybrid Group") were pursuing an alternative path to acquire the DOE's interests in the DOE Loan and subsequently implement a foreclosure-type purchase of all of Fisker's assets. Indeed, before the failure of the proposed Wanxiang/VL restructuring, in April 2013, the Hybrid Group had made an offer to acquire DOE's claims for $25 million. See Madden Decl. Ex. 32.

8. In September 2013, the DOE commenced a public marketing process for its interests under the DOE Loan, which included purported liens on certain of Fisker's assets (the "DOE Loan Collateral"). On September 17, 2013, the DOE publicized its plan to sell these

interests through a competitive auction. Several interested parties executed non-disclosure agreements with the DOE and Fisker to obtain access to an electronic dataroom for due diligence. Certain of these interested parties submitted binding bids before the bid deadline of October 7, 2013.

9. The final, live phase of the auction occurred on October 11, 2013, at which Hybrid Technology, LLC ("Hybrid Technology" or the "DIP Lender"), an entity affiliated with the Hybrid Group, entered the winning bid of $25 million (the "DOE Loan Purchase Price"). Hybrid Technology and the DOE later executed that certain Loan Purchase Agreement, dated November 13, 2013, at which time Hybrid Technology effectively succeeded to the DOE as Fisker's senior secured lender.

10. Throughout this fast-changing period, the one constant at both Fisker and the Hybrid Group was the presence of David Manion. Ace Strength, an affiliate of Hybrid, arranged for Manion to be appointed to the Fisker's Board in November 2012, and Manion continued to serve in this capacity while actively negotiating with both the DOE and Fisker regarding Hybrid Technology's purchase of the DOE Loan *and* the acquisition of the Debtors' assets by Hybrid Tech Holdings, LLC ("Hybrid Holdings" or the "Buyer" and, with Hybrid Technology, "Hybrid"). See generally *Motion of the Official Committee of Unsecured Creditors for Entry of an Order Pursuant to §§ 1103(c) and 1109(b) Granting Leave, Standing, and Authority to Commence, Prosecute, and, if Appropriate, Settle Certain Causes of Action on Behalf of the Debtors' Estates* (with accompanying draft complaint, the "UCC Standing Motion"), filed contemporaneously herewith.

11. Manion's dual role (and acutely conflicting loyalties) lasted through November 22, 2013 (the "Petition Date"), when he, all on the ***same*** day, resigned from the Fisker Board of

Directors, became CEO of Hybrid Holdings, became Manager of Hybrid Technology, and signed the DIP Agreement and the APA (each defined below) with the Debtors on Hybrid's behalf.

II. Procedural History.

A. The Debtors' APA and Sale Motion.

12. On the Petition Date, the Debtors filed the Sale Motion with this Court,[4] seeking authorization to consummate the transaction embodied in that certain Asset Purchase Agreement, dated November 22, 2013 (the "APA").[5] The APA and Sale Motion contemplate the private, non-competitive sale of substantially all of the Debtors' assets – both the DOE Loan Collateral ***and*** substantial assets that are not encumbered by perfected liens securing the DOE Loan (the "Non-Collateral Assets" and, with the DOE Loan Collateral, the "Sale Assets") – free and clear of all liens, claims, encumbrances, and other interests (the "Proposed Sale").

13. The material consideration for the Proposed Sale, which must close within 60 days of the Petition Date, includes:

- a $75 million credit bid of a portion of the DOE Loan;
- the waiver of $4 million of the Debtors' liability under the DIP Loans (defined below);
- Hybrid's assumption of what appear to be *de minimis* obligations and liabilities of the Debtors; and
- the commitment by Hybrid Holdings, subject to the terms and conditions discussed below, to make $725,000 in cash payments in connection with the confirmation of the Debtors' proposed Plan of Liquidation. Of that cash, a portion of up to $500,000, ***less*** certain priority claims, could be made available to general creditors.

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4 "Sale Motion" refers to the *Motion of the Debtors for the Entry of: (I) An Order (A) Approving Form and Manner of Notices and (B) Scheduling a Sale Hearing and Establishing Dates and Deadlines Related Thereto; and (II) An Order (A) Authorizing the Sale of Substantially all of the Debtors' Assets Free and Clear of Liens, Claims, Encumbrances, and Other Interests, (B) Granting the Purchaser the Protections Afforded to a Good Faith Purchaser, and (C) Granting Related Relief* [Docket No. 13].

5 The APA is attached as **Exhibit B.1** to the Sale Motion.

14. In exchange therefor, Hybrid will acquire (subject to certain exceptions) "all of the properties, assets, interests, goodwill and rights, wherever located, of Sellers, including the following":

> (s) All Claims of Sellers or of their respective bankruptcy estates of any nature or description, arising or based in whole or in part upon events, actions or inaction occurring prior to the Closing Date (and whether or not asserted prior to the Closing Date), including claims available to Sellers under Chapter 5 of the Bankruptcy Code and any claims (as defined in Section 101(5) of the Bankruptcy Code) that are filed, scheduled or otherwise arising in the Seller Chapter 11 Cases, against or with respect to Buyer and any individual or entity that is a Related Person of Buyer, ***specifically including Ace Strength International Limited, Richard Li, Tzar Kai and David Manion*** (the "Buyer Related Person Claims").

APA § 1.1 (emphasis added). Prior to the closing of the Proposed Sale, Fisker must also "deliver to Buyer . . . (ix) a full release of all Buyer Related Person Claims, duly executed by Seller." Id. § 2.3(a).

15. The Court considered the proposed scheduling of the Sale Motion on November 26, 2013 (the "First Day Hearing"). There, counsel for the Debtors argued that market testing the interest of any party other than Hybrid in acquiring the Sale Assets would be fruitless because Fisker's prepetition marketing efforts – overseen by David Manion and other members of Fisker's Board of Directors, and now working for Hybrid – had exhausted all alternative avenues. The Court then entered an order setting a hearing on the Proposed Sale for January 3, 2014.[6]

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[6] See *Order (A) Approving Form and Manner of Notices and (B) Scheduling a Sale Hearing and Establishing Dates and Deadlines Related Thereto* [Docket No. 62].

B. The DIP Agreement and DIP Financing Motion.

16. Two days after the Petition Date, on November 24, 2013, the Debtors filed the DIP Financing Motion,[7] requesting interim and final authorization from the Court to obtain up to $8.14 million of debtor-in-possession financing (the "DIP Loans") from Hybrid Technology. The Debtors have little or no on-going business operations. Accordingly, the bulk of the proceeds of the DIP Loans are devoted to the professional and similar costs necessary to completing the sale of all of the Debtors' assets to Hybrid, the DIP Lender and Buyer, including the cost of moving Fisker's main location from Anaheim, California to Irvine, California to implement Hybrid's business plan. See Madden Decl. ¶ 3.

17. The formal terms and conditions governing the DIP Loans are set forth in that certain Binding Commitment and Agreement for DIP Financing and Use of Cash Collateral, dated November 22, 2013, between the Debtors and Hybrid Technology as DIP Lender (the "DIP Agreement").[8]

18. Following the First Day Hearing, the Court authorized the Debtors to borrow up to $1.7 million from Hybrid Technology on an interim basis.[9] After a subsequent hearing, the

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7 "DIP Financing Motion" refers to the *Motion of the Debtors for Entry of Interim and Final Orders (I) Authorizing Postpetition Financing, (II) Granting Liens and Providing Superpriority Administrative Expense Priority, (III) Authorizing Use of Cash Collateral, (IV) Granting Adequate Protection, (V) Modifying the Automatic Stay, and (VI) Scheduling a Final Hearing Pursuant to Sections 105, 361, 362, 363 and 364 of the Bankruptcy Code and Bankruptcy Rules 2002, 4001 and 9014* [Docket No. 17].

8 The DIP Agreement is attached as **Exhibit B** to the DIP Financing Motion.

9 See *Interim Order (I) Authorizing Postpetition Financing, (II) Granting Liens and Providing Superpriority Administrative Expense Priority, (III) Authorizing Use of Cash Collateral, (IV) Granting Adequate Protection, (V) Modifying the Automatic Stay, and (VI) Scheduling a Final Hearing Pursuant to Sections 105, 361, 362, 363 and 364 of the Bankruptcy Code and Bankruptcy Rules 2002, 4001 and 9014* [Docket No. 67].

Court raised this limit by an additional $2.7 million, again on an interim basis.[10] A final hearing to consider the DIP Financing Motion is set for January 3, 2014.

19. Among its other terms, the DIP Agreement provides that:

- Borrowings under the DIP Agreement are to be entitled to superpriority administrative claim status under Bankruptcy Code Section 364(c)(1) and secured by priming liens on all encumbered property of the Debtors' estates under Bankruptcy Code Section 364(d)(1) and first priority liens on all previously unencumbered property under Bankruptcy Code Section 364(c)(2), including all claims and causes of action arising under chapter 5 of the Bankruptcy Code (the "Avoidance Actions");

- If the Proposed Sale to Hybrid Holdings (i) is not approved within 45 days of the Petition Date (January 6, 2014) or (ii) does not close within 60 days after the Petition Date (January 21, 2014), the DIP Loans will be in default;

- The DIP Lender will "waive" $4 million of the claims arising under the DIP Loans, if the Proposed Sale to Hybrid Holdings is consummated. Given that all of the estates' assets, even the ones not subject to perfected liens, will have been "sold" to Hybrid at the point, there may be no practical effect of that waiver, especially as Hybrid has dictated that there can be no "market testing" of the purchase price, and thus no way to know (if the Hybrid transactions are approved) whether a competing bidder would raise the price to be paid beyond the full amount of the DIP Loans; and

- The Committee must complete its investigation and file a standing motion describing specific claims and defenses in a draft complaint attached thereto to preserve existence of any such claims and defenses.

C. The Proposed Plan of Liquidation and Disclosure Statement.

20. Also on November 24, 2013, the Debtors filed an initial Plan of Liquidation and related Disclosure Statement.[11] The next day, the Debtors filed the Disclosure Statement

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10 See *Second Interim Order (I) Authorizing Postpetition Financing, (II) Granting Liens and Providing Superpriority Administrative Expense Priority, (III) Authorizing Use of Cash Collateral, (IV) Granting Adequate Protection, (V) Modifying the Automatic Stay, and (VI) Scheduling a Final Hearing Pursuant to Sections 105, 361, 362, 363 and 364 of the Bankruptcy Code and Bankruptcy Rules 2002, 4001 and 9014* [Docket No. 167].

11 See *Debtors' Joint Plan of Liquidation Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 15]; *Disclosure Statement for the Debtors' Joint Plan of Liquidation Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 16].

Motion,[12] which the Court heard on December 10, 2013 and granted on a provisional basis, "subject to the right of the [Committee] and any other party in interest to object thereto."[13] Upon entry of the Provisional DS Order, the Debtors filed a revised Plan of Liquidation and Disclosure Statement.[14]

21. Among its other features, the Plan contains noteworthy provisions relating to creditor voting, the treatment of claims and improper control by the Debtors, including:

- Notwithstanding Bankruptcy Code section 1126(d), the deemed acceptance of the Plan by a class of nonvoting claimants, see Plan § III.F,
- Conditioning the funding of the ***$500,000*** "Unsecured Creditor Recovery Pool" on acceptance of the Plan by one of two classes of general unsecured creditors, see Plan § III.C.5; and
- The Debtors, and not the Committee, shall designate the Liquidator responsible for winding down the estates and pursuing and resolving claims against creditors, see Plan § IV.I.2.

22. In addition, the Plan provides for:

> A FULL RELEASE TO THE RELEASED PARTIES AND THEIR RESPECTIVE PROPERTY FROM ANY AND ALL CAUSES OF ACTION AND ANY OTHER DEBTS, OBLIGATIONS, RIGHTS, SUITS, DAMAGES, ACTIONS, DERIVATIVE CLAIMS, REMEDIES, AND LIABILITIES WHATSOEVER . . . IN LAW, AT EQUITY, OR OTHERWISE, WHETHER FOR TORT, CONTRACT, VIOLATIONS OF

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12 The "Disclosure Statement Motion" refers to the *Motion of the Debtors for Entry of an Order (A) Approving the Adequacy of the Debtors' Disclosure Statement, (B) Approving Solicitation and Notice Procedures with Respect to Confirmation of the Debtors Proposed Joint Plan of Liquidation, (C) Approving the Form of Various Ballots and Notices in Connection Therewith, (D) Scheduling Certain Dates with Respect Thereto, and (E) Granting Related Relief* [Docket No. 39].

13 See *Order (A) Provisionally Approving the Adequacy of the Debtors' Disclosure Statement, (B) Approving Solicitation and Notice Procedures with Respect to Confirmation of the Debtors' Proposed Joint Plan of Liquidation, (C) Approving the Form of Various Ballots and Notices in Connection Therewith, (D) Scheduling Certain Dates with Respect Thereto, and (E) Granting Related Relief* [Docket No. 126] (the "Provisional DS Order") at 2.

14 "Plan of Liquidation" and "Plan" refer to the *Debtors' Joint Plan of Liquidation Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 127]. "Disclosure Statement" and "DS" refer to the *Disclosure Statement for the Debtors' Joint Plan of Liquidation Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 128].

> FEDERAL OR STATE SECURITIES LAWS, OR OTHERWISE
> . . . .

Plan § VII.D. The "Released Parties" include:

> [E]ach of the Debtors' current and former officers, directors, managers, principals, employees, agent, financial advisors, attorneys, accountants, investment bankers, consultants, representatives, and other professionals, in each case in their capacity as such.

Id. § I.A.97.[15]

23. Notwithstanding the breadth of this non-debtor release, the Debtors' Disclosure Statement provides virtually no information to creditors regarding potential claims and causes of action against the Released Parties, including – most importantly – the value and colorability of each.

24. The Disclosure Statement similarly provides scant or incomplete information regarding the following important issues highly relevant to creditor voting on the Debtors' Plan of Liquidation:

- **Issue: Specificity as to DOE Loan Defaults and the Availability of Funds under the DOE Loan.**
  - Disclosed Information: "The Debtors' operating position was further complicated in 2011 when DOE informed the Debtors that it would not honor future disbursement requests pursuant to the Senior Loan Agreement, and since that time all funding under the Senior Loan ceased." DS § Art. IV.E.2.
  - **Undisclosed Information:**
    - The Debtors failed to achieve a certain "Milestone" in February 2011 under the DOE Loan related to the "Commencement of commercial production of the Karma vehicle."

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[15] The non-debtor release under the Plan does not apply to Buyer Related Person Claims, which (as noted above) to the same practical effect will instead be released by the Debtors prior to the closing of the Proposed Sale. See APA § 2.3(a)(ix).

- Fisker nevertheless continued to receive reimbursements while in default totaling approximately $30 million, until the DOE issued a "Drawstop Notice" in June 2011 and ceased funding.

- **Issue: The Extensive Turnover of Fisker's Prepetition Management and Members of Its Board of Directors.**

  - Disclosed Information: Names, positions, and biographical information of the two current members of the Debtors' Board of Directors – Barry W. Huff and Bernard L. Zaroff – and one active executive officer, Chief Restructuring Officer Marc Beilinson, as of the Petition Date. DS § IV.D.

  - **Undisclosed Information:**

    - An explanation of the termination or resignation of the **37** former directors and officers listed in the Debtors' SOFA at Ex. 22b.[16] For example:

    - Henrik Fisker, one of the founders and the namesake of Fisker, was so integral to the company that if he was "no longer responsible for the management of the Company" it was an event of default under the DOE Loan. Mr. Fisker left the company in March 2013, around the time the company began to heavily market its assets and negotiate with Wanxiang as a potential stalking-horse bidder.

    - David Manion, resigned from the Fisker Board of Directors on the Petition Date and instantly became a principal at Hybrid. Mr. Manion's concurrent service as a Board member and the lead advocate for affiliates of the Hybrid Group during the marketing and sale of the DOE Loan and the Debtors' Proposed Sale process is missing. Indeed, Mr. Manion is mentioned nowhere in the Disclosure Statement.

    - Anthony Posawatz, former CEO of Fisker and Board member, attended all Board meetings during the marketing efforts for the sale of the Debtors' assets. He resigned in August 2013, leaving only Mr. Huff and Mr. Manion in attendance, at a time when the Debtors were heavily negotiating the Proposed Sale to Hybrid.

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16 "SOFA" refers to the *Statement of Financial Affairs* [Docket No. 96] (the "SOFA").

- Richard Li, the principal individual behind Hybrid and its purchase of the DOE Loan, was a Board member through 2011 and regularly attended Board meetings through the Petition Date.

- **Issue: Strategy to Sell Company to Wanxiang/VL as Stalking-Horse Bidder and the Board's Support of the Hybrid Group to Purchase the DOE Loan and the Debtors' Assets.**

  - Disclosed Information: "The Debtors then sought to market their assets for sale in three discrete groups, with the goal of reaching agreements with one or more bidders that would serve as stalking horses for a sale process in chapter 11 that would be funded by either DOE or third parties. . . . Again, however, the Debtors were unable to reach definitive agreements with any parties, again, largely due to funding issues." DS § IV.E.3.

  - **Undisclosed Information:**

    - As early as April 2013, the Hybrid Group made an offer to acquire the DOE Loan. See Madden Decl. Ex. 32.

    - In May 2013, the Board abandoned the strategy of selling the company in a chapter 11 sale to Wanxiang/VL Automotive in part because Ace Strength was unwilling to guarantee the postpetition financing. See Madden Decl. Ex. 41.

    - The Hybrid Group actively pursued the purchase of the DOE Loan while Mr. Manion served as go-between for the DOE and Fisker's Board of Directors. See, e.g., Madden Decl. Exs. 41, 42, 49, 50.

    - The participation of Wanxiang and other interested parties' involvement in the DOE Loan auction. See, e.g., Madden Decl. Ex. 49.

RELIEF REQUESTED

25. The Committee objects to the improper, fast-tracked Proposed Sale of substantially all of Fisker's assets to Hybrid. If approved, the Sale Motion, DIP Financing Motion, Plan, and Disclosure Statement – separately and taken together – would allow Hybrid to acquire substantially all of the Debtors' assets (including Fisker's considerable Non-Collateral

Assets) through a non-competitive process that will benefit Hybrid alone. As detailed below, numerous grounds exist for the Court to deny approval of the Proposed Sale and, in its place, provide for the exploration of the Wanxiang Transaction and a competitive sale process.

I. The Proposed Sale Should Be Rejected in Favor of an Open, Competitive Auction Process.

26. The Debtors, through the Sale Motion, seek this Court's approval of a sale process tainted by bad faith and insulated from market realities or competitive pressure. The Committee objects to the sale of substantially all of the Debtors assets under these conditions. The Sale Motion should be denied in favor of the open auction process available in the Wanxiang Transaction.

A. The Debtors Cannot Meet the Standard for Approval of the Proposed Sale.

27. Although section 363 of the Bankruptcy Code does not specify a standard for authorization of a debtor's use, sale, or lease of property, bankruptcy courts authorize sales of a debtor's assets only if the sale is based upon the sound business judgment of the debtor. See, e.g., Meyers v. Martin (In re Martin), 91 F.3d 389, 39 (3rd Cir. 1996); In re Trans World Airlines, Inc., No. 01-00056, 2001 WL 1820325, at *4 (Bankr. D. Del. April 2, 2001); Dai-Ichi Kangyo Bank Ltd. v. Montgomery Ward Holding Corp. (In re Montgomery Ward Holding Corp.), 242 B.R. 147, 153 (D. Del. 1999); In re Del. & Hudson Ry. Co., 124 B.R. 169, 176 (D. Del. 1991).

28. Courts typically consider the following factors in determing whether a proposed sale satisfies this standard: (i) whether a sound business justification exists for the sale; (ii) whether adequate and reasonable notice of the sale was given to interested parties; (iii) whether the sale will produce a fair and reasonable price for the property; and (iv) whether the parties have acted in good faith. See Del. & Hudson Ry., 124 B.R. at 176; In re Phx. Steel

Corp., 82 B.R. 334, 335-36 (Bankr. D. Del. 1987); In re United Healthcare Sys., Inc., No. 97-01159, 1997 WL 176574, at *4 n.2 (D.N.J. March 26, 1997). However, the "sound business judgment" standard does not permit a court simply to rubberstamp a debtor's proposal. See, e.g., Key3media Grp., Inc. v. Pulver.com, Inc. (In re Key3Media Grp., Inc.), 336 B.R. 87, 92-93 (Bankr. D. Del. 2005). Rather, a debtor must act in a manner that maximizes the value of its estate for all parties in interest. In re Reliant Energy Channelview LP, 594 F.3d 200, 209-210 (3d Cir. 2010); In re Pinnacle Brands, 259 B.R. 46, 53-54 (Bankr. D. Del. 2001).

29. As detailed herein and the UCC Standing Motion, and particularly in light of the Wanxiang Transaction, the Debtors cannot satisfy the standards for approval of the Proposed Sale to Hybrid Holdings, as such a sale is not supported by a sound business justification, will not produce a fair and reasonable price, is not the product of good faith and inures only to the benefit of Hybrid and its affiliates.

B. Hybrid Should Not Be Allowed to Credit Bid for the Sale Assets.

30. As noted above, the Proposed Sale contemplates Hybrid's acquisition of both the DOE Loan Collateral and the Debtors' Non-Collateral Assets through a credit bid of portion of the DOE Loan. It is axiomatic that where a "creditor's lien reaches only some of the property to be sold, the creditor cannot credit bid the secured claim for the unencumbered property ***but must pay cash***." 3 Collier on Bankruptcy ¶ 363.09[3] (emphasis added); see also Quality Props. Asset Mgmt. Co. v. Trump Va. Acquisitions, LLC, No. 11 Civ. 00053, 2012 WL 3542527, at *7 n.13 (W.D Va. Aug. 16, 2012) (a "'credit bid' allows the secured creditor to bid for ***its collateral*** using the debt it is owed to offset the purchase price") (emphasis added); In re Hickey Props., Ltd., 181 B.R. 171, 173 (D. Vt. 1995) (concluding that secured creditor could not credit bid at sale of partnership interest because partnership interest was not collateral asset); In re Pine Coast Enters., Ltd., 147 B.R. 30, 31 (Bankr. N.D. Ill. 1992) (holding that a credit bid to acquire

collateral and non-collateral assets amounted to bad faith by secured creditor). In fact, the Supreme Court recently affirmed that a credit-bidding party may credit bid only in auctions of its own collateral. See RadLAX Gateway Hotel, LLC v. Amalgamated Bank, --- U.S. ---, 132 S.Ct. 2065, 2073 n.2 (2012).

31. Thus, as a matter of law, Hybrid should not be permitted to credit bid for the sale of substantially all of the Debtors' assets, as it does not have a perfected lien on all of the assets to be sold.

1. "Cause" Exists to Disallow Hybrid's Credit Bid.

32. Moreover, the Committee submits that "cause" exists to disallow – or, at a minimum, limit – any credit bid by Hybrid for the DOE Loan Collateral. 11 U.S.C. § 363(k). "[T]he right to credit bid is not absolute," and the Bankruptcy Code "plainly contemplates situations in which estate assets encumbered by liens are sold without affording secured lenders the right to credit bid." In re Phila. Newspapers, LLC, 599 F.3d 298, 315 (3d Cir. 2010). Section 363(k) empowers bankruptcy courts to "deny a lender the right to credit bid in the interest of any policy advanced by the Code, such as to ensure the success of the reorganization or to ***foster a competitive bidding environment***." Id., 599 F.3d at 315 n.14 (emphasis added) (citing 3 Collier on Bankruptcy ¶ 363.09[1] ("The Court might [deny credit bidding] if permitting the lienholder to bid would chill the bidding process.")).

a. Any Credit Bid Must be Limited to the Established Value of DOE Loan Collateral.

33. "The term 'cause' is not defined in the Bankruptcy Code and is left to the courts to determine on a case-by-case basis." In re Old Prairie Block Owner, LLC, 464 B.R. 337, 348 (Bankr. N.D. Ill. 2011). Here, as an initial matter and at a minimum, "cause" exists to limit the amount of Hybrid's credit bid to the $25 million Hybrid paid for the DOE Loan on the date these

Chapter 11 Cases were commenced. Prior to that, the DOE Loan was subjected to what has been widely described by the Debtors as an open auction process by the Department of Energy. This process, which lasted several months, drew numerous interested parties, each of which had the opportunity to evaluate the collateral securing the DOE Loan. At the first day hearing, counsel for the Debtors stated:

> I think, your Honor, all parties involved in that process understood that what was at issue in the sale process for the DOE loan was another marketing process with respect to ***the company in and of itself***. And from our perspective, that was really the fourth separate marketing process undertaken by the company.

Nov. 26, 2013 Hr'g Tr. at 19:19-24 (emphasis added).

34. As a result, the Debtors readily admit that the winning $25 million bid reflects a market-tested (and Government-approved) valuation of the underlying DOE Loan Collateral. See Madden Decl. ¶ 3. Accordingly, the $25 million winning bid represents the best evidence of the value of the DOE Loan Collateral. As Hybrid is legally incapable of bidding credit for the Non-Collateral Assets if credit bidding is permitted at all, "cause" exists to limit any credit bid by Hybrid to $25 million.

35. More significantly, the Committee submits that two additional, commonly recognized examples of "cause" – bad faith on the part of a lender and a dispute regarding the validity of a lender's liens – are present in these Chapter 11 Cases. Each presents sufficient grounds to reject Hybrid's credit bid of any amount of the DOE Loan and allow, instead, for an open, cash bidding auction of the Sale Assets.

b. Manion's Breach of Fiduciary Duty Relating to the Acquisition of the DOE Loan.

36. "Cause" is traditionally found, like here, in "situations in which a secured creditor has engaged in inequitable conduct." Phila. Newspapers, 599 F.3d at 316 n.14; accord In re

Aloha Airlines, Inc., No. 08-00337, 2009 WL 1371950, at *8 (Bankr. D. Haw. May 14, 2009); In re Theroux, 169 B.R. 498, 499 & n.3 (D.R.I. 1994).

37. Understandably, courts are loath to disallow a credit bid based on mere "suspicions" or unsubstantiated allegations. In re The Merit Grp., Inc., 464 B.R. 240, 255 (Bankr. D.S.C. 2011). Here, in contrast, the Committee has fully documented the grounds on which it challenges the validity of Hybrid's liens, both below and in the UCC Standing Motion filed with this Court. See, e.g., In re L.L. Murphrey Co., No. 12-03837, 2013 WL 2451368, at *1 n.1 (Bankr. E.D.N.C. June 6, 2013) (denying credit bid after reviewing "***a draft of the complaint*** [the trustee] intends to file initiating an adversary proceeding against [the creditor] seeking avoidance of liens") (emphasis added).

38. These include, most prominently, David Manion's conflicting loyalties during his prepetition tenure on Fisker's Board of Directors. As a Board member, Manion owed "fiduciary duties of loyalty and care to [Fisker] and its shareholders." Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 179 (Del. 1986). With regard to his duty of loyalty, Manion, like all officers and directors, was under a fiduciary obligation:

> to protect the interests of the corporation [and] to refrain from conduct which would injure the corporation and its stockholders or deprive them of profit or advantage. In short, directors must ***eschew any conflict*** between duty and self-interest They cannot succumb to influences which convert an otherwise valid business decision into ***a faithless act***.

Ivanhoe Partners v. Newmont Mining Corp., 535 A.2d 1334 (Del. 1987) (emphasis added) (citations committed).

39. Nevertheless, while an active (and perhaps controlling) member of the Fisker Board, Manion negotiated Hybrid Technology's acquisition of the DOE Loan, knowing that Hybrid intended to use the DOE Loan to acquire all of Fisker's assets in bankruptcy. Manion

was "on both sides of the deal" to acquire the DOE Loan and effectively foreclose on Fisker's assets, all the while owing a duty of loyalty to Fisker and its creditors and owners. On this precise fact pattern, courts have found bad faith and a breach of the duty of loyalty. See, e.g., BT-I v. Equitable Life Assurance Soc. of the U.S., 89 Cal. Rptr. 2d 811, 815 (Cal. Ct. App. 1999) (where fiduciary purchased and foreclosed on the debt of the entity to which duty was owed, "such conduct is a breach of fiduciary duty").

40. David Manion's repeated breach of his fiduciary duties to Fisker in effecting Hybrid's acquisition of the DOE Loan are sufficient evidence of Hybrid's bad faith. Moreover, as a result of this and other conduct, and as further described in the UCC Standing Motion, any security interest Hybrid holds is subject to avoidance under sections 544, 547, and 548 of the Bankruptcy Code and/or equitable subordination pursuant to section 510(c) of the Bankruptcy Code.[17] "Cause" therefore exists to deny a credit bid for the Sale Assets by Hybrid.

c. The Attempted Credit Bid for Non-Collateral Assets.

41. In addition, "when [a] creditor's lien ***is questioned or otherwise in dispute***," courts have consistently "found 'cause' under § 363(k) to bar a secured creditor from credit bidding." Old Prairie Block Owner, 464 B.R. at 348 (emphasis added); see also Nat'l Bank of Commerce of El Dorado v. McMullan (In re McMullan), 196 B.R. 818, 835 (Bankr. W.D. Ark. 1996) (finding "cause" where "the validity of [creditor's] liens and security interests are unresolved"); In re Daufuskie Island Props., LLC, 441 B.R. 60, 64 (Bankr. D.S.C. 2010) ("Based on the assertions, and the adversary proceedings filed, the Court finds that the [creditor's] mortgage and claim are disputed, and thus [it] is not eligible to credit bid . . . ."); 3 Collier on

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[17] The Committee has requested authority to seek avoidance of these liens in the UCC Standing Motion.

Bankruptcy ¶ 363.09[3] ("if the sale requires a complicated valuation process that could delay the sale, [the court] should 'order otherwise' and deny the right to credit bid").

42. Here, the Proposed Sale contemplates a credit bid by Hybrid for substantially all of the Debtors' assets – both the DOE Loan Collateral and the Non-Collateral Assets. As explained in detail below, however, Hybrid holds no perfected lien under the DOE Loan in the Non-Collateral Assets, and as described above, any purported security interest held by Hybrid in Non-Collateral Assets and DOE Loan Collateral is subject to avoidance under sections 544, 547 and 548 of the Bankruptcy Code and/or equitable subordination pursuant to section 510(c) of the Bankruptcy Code.[18] Accordingly, the validity and extent of Hybrid's liens are in serious dispute. The Committee submits that "cause" therefore exists to disallow Hybrid's credit bid under Bankruptcy Code section 363(k).

43. To date, the Committee has identified the following Non-Collateral Assets, but reserves its right to identify other Non-Collateral Assets subject to the completion of its ongoing diligence.

i. Commercial Tort Claims.

44. Although the Debtors' commercial tort claims remain unliquidated, it is clear even now that they have the potential to generate substantial value for unsecured creditors. In addition to the claims alleged in the UCC Standing Motion, third-party lawsuits have been filed against Fisker's current and former Directors and Officers alleging various tortious conduct. See, e.g., Madden Decl. Ex. 54.

45. The DOE Loan is not secured by a perfected security interest in any of the Debtors' commercial tort claims whatsoever. Under Article 9 of the Uniform Commercial Code,

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[18] The Committee has requested authority to seek avoidance of these liens in the UCC Standing Motion.

commercial tort claims are not "general intangibles"; rather, they constitute an independent category of collateral requiring special steps in order to obtain an effective security interest.[19] A security interest does not attach to a commercial tort claim unless and until such claim is described with specificity in the underlying security documents between the parties. See UCC § 9-108(e)(1) (stating that a security agreement that purports to create a security interest in a commercial tort claim must describe such commercial tort claim specifically, rather than by any mere "description only by type of collateral"); UCC § 9-203(b)(3)(A). In other words, a secured party cannot obtain a security interest by simply referencing "all commercial tort claims" in the underlying security agreement. To obtain an effective security interest in a commercial tort claim, the subject commercial tort claim must be described with specificity and reliance on an after-acquired property clause is prohibited. See UCC § 9-204(b)(2) (stating that "[a] security interest does not attach under a term constituting an after-acquired property clause to . . . a commercial tort claim."). Here, the DOE Loan's governing security documents contain no qualifying identification or specificity with respect to ***any*** commercial tort claims of the Debtors. Accordingly, no effective security interest attached to any of those estate assets. Accordingly, commercial tort claims are not subject to a security interest as to the DOE Loan and clearly constitute Non-Collateral Assets with respect to which Hybrid may not credit bid.

ii. Directors' and Officers' Insurance Coverage.

46. The Debtors own, at significant cost, substantial directors' and officers' liability insurance (the "D&O Insurance"), with primary and excess coverage totaling $20 million. See

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19 See UCC § 9-102(a)(42) (indicating that the term "general intangibles" applies to "any personal property, including things in action . . . other than commercial tort claims"); UCC § 9-102a)(13) (defining a commercial tort claim as "a claim arising in tort with respect to which: (A) the claimant is an organization; or (B) the claimant is an individual and the claim (i) arose in the course of the claimant's business or profession; and (ii) does not include damages arising out of personal injury").

Schedules at Ex. B-9;[20] see also Madden Decl. Ex. 54. Security interests in insurance policies are not governed by the filing of a Uniform Commercial Code financing statement. See UCC § 9-109(d)(8) (Article 9 does not apply to "a transfer of an interest in or an assignment of a claim under a policy of insurance"); see also Brown v. Nationscredit Commercial, No. 99 Civ. 00592, 2000 WL 888507, at *5 (D. Conn. June 23, 2000) ("The Security Agreement gives NCC all interest in collateral to secure [the debtor's] obligations under the Financing Documents. Lawsuits against companies and/or its officer and directors could never be considered as 'collateral,' as they plainly are considered to be liabilities and insurance policies covering such liabilities simply cannot be fit into the definition of 'collateral.'"). And, to the extent that proceeds from the D&O Insurance are used to settle commercial tort claims of the Debtors (e.g., derivative claims for breach of fiduciary duty), these proceeds will not be encumbered by perfected security interests of Hybrid because, as noted above, Hybrid does not hold a perfected security interest in the commercial tort claims themselves. See UCC § 9-315(c) ("a security interest in proceeds is a perfected security interest if the security interest in the original collateral was perfected"). No other basis exists for Hybrid to claim a perfected security interest in the D&O Insurance, which therefore constitutes a Non-Collateral Asset.

iii. Chapter 5 Causes of Action.

47. A third substantial Non-Collateral Asset of the Debtors consists of actions to avoid preferential and fraudulent transfers under chapter 5 of the Bankruptcy Code. These causes of action, which are "acquired by the estate . . . after the commencement of the case," are "not subject to any lien resulting from any security agreement entered into by the debtor before the commencement of the case." 11 U.S.C. § 552(a); see also Mellon Bank (East), N.A. v. Glick

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[20] "Schedules" refers to the Debtors' *Schedules of Assets and Liabilities* [Docket No. 95].

(In re Integrated Testing Prods. Corp.), 69 B.R. 901, 905 (D.N.J. 1987) ("as the right to recover preferences clearly attaches only post-petition . . . the debtor cannot assign this right").

48. To date, the Committee has identified over $400,000 in clearly avoidable prepetition transfers. See, e.g., SOFA at Ex. 13. These are in addition to the Avoidance Actions the Committee seeks to pursue through the UCC Standing Motion. None of these causes of action constitute DOE Loan Collateral, and Hybrid is therefore unable to credit bid for them.

iv. Certificated Automobiles.

49. As disclosed in Schedule B-25, the Debtors are in possession of six certificated automobiles at their facilities in Anaheim, California, valued at a total of approximately $400,000. Pursuant to UCC § 9-311(a), perfection of a security interest in a certificated automobile is governed by applicable state motor-vehicle law – here, the California Vehicle Code, which provides that "no security interest in any vehicle registered under this code . . . is perfected until the secured party or his or her successor or assignee has deposited . . . a properly endorsed certificate of ownership to the vehicle subject to the security interest showing the secured party as legal owner." Cal. Veh. Code § 6300. No such endorsement in favor of Hybrid exists on the certificates of ownership for these vehicles and, therefore, such vehicles are not DOE Loan Collateral susceptible to a credit bid from Hybrid.[21]

v. Foreign Intellectual Property.

50. It naturally follows that the market for Fisker automobiles is worldwide. Fisker's primary production facility is in Finland. Most of Fisker's inventory is in Germany and Belgium. The Sale Assets include substantial foreign-registered intellectual property owned by the Debtors. As disclosed on Schedule B-22, these include 79 foreign-registered trademarks (as

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[21] Because these certificated automobiles are not held by the Debtors as inventory for sale or lease, the limited exception to the certification notation rules provided in UCC § 9-311(d) is inapplicable here.

compared to only 10 U.S.-registered marks) and 164 foreign-registered patents and applications (as compared to only 101 U.S.-registered patents and applications). In other words, ***most*** of the Debtors' intellectual property is outside the United States. Given that Fisker automobiles are produced and sold all over the world and, indeed, that the competing parties to the purchase of the Debtors' assets are based outside the United States, the considerable value of this foreign-registered intellectual property is apparent. Equally apparent, however, is that under the DOE Loan, Hybrid does not hold perfected and unavoidable security interest in ***any*** of the Debtors' foreign trademarks or patents.

51. It is well settled that intellectual-property rights "only have effect in the country under whose laws they are issued." AMP, Inc. v. United States, 492 F. Supp. 27, 24 (M.D. Pa. 1979); see also Aluminum Co. of Am. v. Sperry Prods., Inc., 285 F.2d 911, 925 (6th Cir. 1960) ("Foreign patents grant no monopolies in the United States, nor do United States patents grant any monopolies in foreign countries.").[22] It follows, *a fortiori*, that the perfection of a security interest in foreign intellectual property is governed by law of the jurisdiction that granted the property right.

52. Here, no effort was made by Hybrid or its predecessor to comply with the perfection requirements of the jurisdictions governing the Debtors' foreign intellectual property. Thus, any security interest Hybrid may hold therein under the DOE Loan is unperfected, or subject to avoidance by a hypothetical lien creditor under Bankruptcy Code section 544(a)(1), or both. See, e.g., Varon v. Trimble, Marshall & Goldman, P.C. (In re Euro-Swiss Int'l Corp.), 33 B.R. 872, 879 (Bankr. S.D.N.Y. 1983) ("The power conferred by this grant of hypothetical status depends . . . upon the substantive law ***of the jurisdiction governing the property in question.***")

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[22] The fact that Fisker is domiciled in the United States has no bearing on a determination of where its patents are located. See In re Elpida Memory, Inc., No. 12-10947, 2012 WL 6090194, at *1-2 (Bankr. D. Del. Nov. 20, 2012) (debtor's patents located in the country where issued, not in which the debtor is domiciled).

(emphasis added). Given this, the Debtors' foreign patents and trademarks constitute Non-Collateral Assets that Hybrid cannot acquire through a credit bid of the DOE Loan.

vi. Foreign Inventory

53. In Schedule B-30, the Debtors disclose approximately $8.9 million of inventory held in Zeebrugge, Belgium and Bremerhaven, Germany. In order to obtain a perfected security interest in this inventory having priority over all creditors, including, without limitation, hypothetical and foreign lien creditors, compliance with both Article 9 of the Uniform Commercial Code and foreign law is required. Mere compliance with standard Uniform Commercial Code practice is insufficient. Indeed, Article 9 of the Uniform Commercial Code itself recognizes the impact of foreign laws on the effect of perfection and non-perfection and issues of priority. See UCC § 9-301(3) (when goods, including inventory, are "located in a jurisdiction, the local law of that jurisdiction governs . . . (C) the effect of perfection ***or nonperfection*** and the priority of a nonpossessory security interest in the collateral") (emphasis added). Given the separate and distinct requirements for obtaining liens and perfected status in Belgium and Germany, none of which has been followed here, the DOE Loan fails to secure any interest having priority status over other creditors.

54. Moreover, given that no security interest was properly perfected in foreign inventory in Belgium or Germany pursuant to the local laws of those jurisdictions, the "security interest" Hybrid holds in this collateral under the DOE Loan, if any, is subject to avoidance under Bankruptcy Court section 544(a)(1). Section 544 of the Bankruptcy Code expressly gives the Committee (in the event that standing is granted to it by this Court) the power to avoid any obligation that is voidable by a hypothetical lien creditor at the time of commencement of these cases. See 11 U.S.C. § 544(a)(1); In re McGee, 196 B.R. 78, 81 (Bankr. W.D. Mich. 1996) (avoiding transfer under section 544(c); where perfection is governed by Bahamas law, "the

Trustee is deemed to have taken all steps necessary to perfect the purchase of the Bahamian property, including recording a hypothetical deed"); Euro-Swiss Int'l, 33 B.R. at 879 ("The power conferred by this grant of hypothetical status depends . . . upon the substantive law of the jurisdiction governing the property in question."); accord Neil B. Cohen & Edwin E. Smith, International Secured Transactions and Revised UCC Article 9, 74 Chi.-Kent L. Rev. 1191, 1245-46 (1999); See also Aluminum Co. of Am., 285 F.2d at 925 ("A patent is granted by a sovereign power and its rights, privileges and obligations begin and end with the country that issues it."). Accordingly, like the Debtors' foreign intellectual property, the foreign inventory simply cannot be acquired by Hybrid through a credit bid of the DOE Loan. Hybrid's attempt to do so is in bad faith and justifies denying its credit bid for the Sale Assets.[23]

C. A Fair and Open Auction Will Maximize the Price Paid for the Sale Assets.

55. The Sale Motion seeks approval of a private sale without any competitive auction process – all inuring to the benefit of Hybrid. However, the sale Motion provides insufficient grounds to excuse the sale of substantially all of the Debtors' assets from competitive bidding. As discussed above, in the short time since the Committee was formed, its professionals have received inquiries from multiple parties interested in participating in a full, fair auction for the Debtors' assets. See also Madden Decl. ¶ 4. Indeed, the stalking-horse bid proposed as part of the Wanxiang Transaction – which would serve only as a ***floor*** in an auction of the Sale Assets – represents a substantial improvement over Hybrid's untested proposal and affords creditors an opportunity to improve their recoveries.

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[23] To the extent the Debtors or Hybrid argue that Hybrid Holdings' waiver of advances under the interim DIP Loans constitutes "value" for the purchase of post-petition collateral, the value of the waiver is *de minimus* compared to the value of the post-petition collateral that constituted Non-Collateral Assets as of the Petition Date.

56. In light of this alternative, the private purchase of substantially all of the Debtors' assets to Hybrid cannot be justified. See, e.g., In re Encore Healthcare Assocs., 312 B.R. 52, 55 (Bankr. E.D. Pa. 2004) (requiring "some business justification, ***other than appeasement of major creditors***" for the terms of an asset sale) (emphasis added) (citing Comm. of Equity Sec. Holders v. Lionel Corp. (In re The Lionel Corp.), 722, F.2d 1063, 1071 (2d Cir. 1983) (creditor appeasement "is insufficient as a matter of fact because it is not a sound business reason and insufficient as a matter of law because it ignores the equity interests required to be weighed and considered under Chapter 11")).[24] The Committee submits that "a fully competitive auction sale," In re Antaeus Tech. Servs., Inc., 345 B.R. 556, 565 (Bankr. W.D. Va. 2005) (cited in Phila. Newspapers, 599 F.3d at 316), will maximize recoveries available to unsecured creditors by generating the highest possible purchase price for the Sale Assets.

II. The Proposed DIP Financing Should Be Denied.

A. The Proposed DIP Financing Fails to Meet the Standards for Approval.

57. It is well settled that, in order to be approved, proposed postpetition financing must satisfy three tests. First, it must be found to be "***fair, reasonable, and adequate*** under the circumstances." In re Ames Dep't Stores, Inc., 115 B.R. 34, 39 (Bankr. S.D.N.Y. 1990) (emphasis added) (quoting In re Crouse Grp., Inc., 71 B.R. 544, 551 (Bankr. E.D. Pa. 1987)). Second, a debtor must show that a "proposed financing is in ***the best interests of the general creditor body***." In re Roblin Indus., Inc., 52 B.R. 241, 244 (Bankr. W.D.N.Y. 1985) (emphasis added); see also In re Aqua Associates, 123 B.R. 192, 196 (Bankr. E.D. Pa. 1991) (requiring that "the credit acquired is of significant benefit to the debtor's estate"). Third, the financing must

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[24] See also Lionel, 722 F.2d at 1071 ("As the Supreme Court has noted, it is easy to sympathize with the desire of a bankruptcy court to expedite bankruptcy reorganization proceedings for they are frequently protracted. 'The need for expedition, however, is not a justification for abandoning proper standards.'") (quoting Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 450 (1968)).

have been "negotiated ***in good faith and at arm's length*** between the Debtors, on the one hand . . . and the Lenders, on the other hand." In re Farmland Indus., Inc., 294 B.R. 855, 880 (Bankr. W.D. Mo. 2003) (emphasis added) (citing In re WorldCom, Inc., No. 02-13533, 2002 WL 1732646, at *3 (Bankr. S.D.N.Y. July 22, 2002)); see also Norris Square Civic Ass'n v. St. Mary Hosp. (In re St. Mary Hosp.), 86 B.R. 393, 402 (Bankr. E.D. Pa. 1988) (rejecting postpetition financing from entity that was "not an outside lender but ***the puppeteer of a marionette-debtor***") (emphasis added).

58. Here, the proposed debtor-in-possession financing with Hybrid (the "Proposed DIP Financing") fails to meet any of the tests set forth above. Given that the Debtors have ceased operations and, in the absence of an auction process, it cannot be said that the DIP Loans are providing a benefit to any party other than Hybrid. See Madden Decl. ¶ 3. Indeed, the amount and structure of the financing are designed to preclude a competitive sale process for the Debtors' assets and ensure the transfer of the Debtors' assets to Hybrid for a credit bid of the DOE Loan acquired by Hybrid under circumstances that constitute a breach of duty. In essence, the DIP Loans are merely paying the cost of implementing a self-dealing sale transaction commenced by Manion and Hybrid in April 2013.

59. As discussed above, in addition to requiring that the DIP Financing Motion be approved within two days of the Petition Date on an interim basis and on a final basis 25 days thereafter (which date was moved at the request of the Committee to January 3, 2014), the DIP Agreement requires approval of the Sale Motion within 45 days of the Petition Date and, by its own terms, terminates upon the consummation of the Proposed Sale – as early as 60 days after the Debtors commenced these Chapter 11 Cases. See DIP Agreement at 5-7. The events of default under the DIP Agreement further include termination of the Hybrid APA. See DIP

Agreement at 6. Thus, unlike almost every other case of which the Committee is aware, the proposed DIP Financing does not provide funding, or accommodate the time necessary, for a competitive sale process.

60. Courts routinely reject postpetition financing agreements containing sale-related case milestones, refusing to "allow terms in financing arrangements that convert the bankruptcy process from one designed to benefit all creditors to one designed for the unwarranted benefit of the postpetition lender." In re Mid-State Raceway, Inc., 323 B.R. 40, 59 (Bankr. N.D.N.Y. 2005) (quoting In re Defender Drug Stores, Inc., 145 B.R. 312, 317 (B.A.P. 9th Cir. 1992)); see also Aqua Assocs., 123 B.R. at 196 ("[c]redit should not be approved when it is sought for the primary benefit of a party other than the debtor"); In re FCX, Inc., 54 B.R. 833, 838 (Bankr. E.D.N.C. 1985) ("[T]here is a difference between approval of a priority and a lien, which are specifically authorized under § 364, and other terms which are not."). To do otherwise would risk "pervert[ing] the reorganizational process from one designed to accommodate all classes of creditors and equity interests to one specially crafted for the benefit of the [lender]." In re Tenney Vill. Co., 104 B.R. 562, 568 (Bankr. D.N.H. 1989).

61. To add insult to injury, Hybrid is proposing to be rewarded for funding a process designed for its exclusive benefit through the granting of liens on unencumbered pre- and postpetition assets (including Avoidance Actions) and a superpriority administrative claim for both postpetition loans and the alleged diminution in value of Hybrid's alleged prepetition collateral. See DIP Agreement at 2-3. But for the Proposed DIP Financing, these substantial unencumbered assets would otherwise be available for general unsecured creditors or to serve as collateral for alternative, less onerous post-petition financing – such as that included in the Wanxiang Transaction.

62. As set forth above, the Wanxiang Transaction stands in stark contrast to the Proposed Sale to Hybrid and Proposed DIP Financing. Rather than a closed sale process that benefits only one party, which party ***volunteered*** to come into this case by acquiring its alleged secured position under improper circumstances, the Wanxiang Transaction preserves Hybrid's rights and claims and permits an open and fair sale process designed to maximize value for all creditors. In these circumstances, the Proposed DIP Financing is neither fair nor reasonable and certainly is not in the best interest of any party other than Hybrid.

B. The Proposed DIP Financing Is Not the Product of Good-Faith Negotiation.

63. Moreover, the Proposed DIP Financing was not negotiated at arms' length or in good faith. This is perhaps best demonstrated by the Debtors' admission, through silence in the DIP Financing Motion, that it made no attempt to obtain financing from anyone else on any other terms. Instead of reciting unsuccessful attempts to obtain alternative financing from other sources, as is typical, the DIP Financing Motion simply contains the Debtors' conclusions that "alternative financing was not available to the Debtors given the lack of unencumbered assets and the Pre-Petition Lenders' materially under secured position." See DIP Financing Motion ¶ 39. The Debtors' belief that it was futile to even explore other financing alternatives, as well as the terms of the Proposed DIP Financing themselves, demonstrate the "one-sided" nature of the proposed financing and belie the notion that the Proposed DIP Financing was the product of good-faith, arms'-length negotiation.

C. The Debtors Cannot Satisfy the Requirements of Bankruptcy Code Sections 364(c) and (d).

64. For these same reasons, the relief requested in the DIP Financing Motion fails to satisfy Bankruptcy Code sections 364(c) and 364(d), which both require a showing that the Debtors were unable to obtain unsecured credit. See, e.g., Ames Dep't Stores, 115 B.R. at 40.

Courts do not "require a debtor to contact a seemingly infinite number of possible lenders" to meet this burden, but the Bankruptcy Code does "require the debtor to ***make an effort*** to carry the burden established in Section 364(d)." In re Reading Tube Indus., 72 B.R. 329, 332 (Bankr. E.D. Pa. 1987) (emphasis in original); see also Crouse Grp., 71 B.R. at 550 (stating that debtor must show that it "made the requisite unsuccessful efforts to obtain credit . . . on other than the proposed less-than-desirable terms").

65. As demonstrated by the Wanxiang Transaction and UCC Standing Motion, alternative, more favorable sources of financing are available, the Debtors hold significant unencumbered assets, and Hybrid's prepetition secured position is subject to challenge. Accordingly, the requirements of Bankruptcy Code sections 364(c) and (d) are not satisfied in this case.

D. Specific Provisions of the Proposed DIP Financing Are Inappropriate.

66. In the unlikely event that the Court considers granting final approval of the Proposed DIP Financing on any basis, there are a number of provisions that should be removed or, at a minimum, modified, as follows:

- The Committee objects to the granting of superpriority administrative claims or liens on any unencumbered assets, including Avoidance Actions. Generally, avoidance actions belong to and are intended to benefit creditors. See Official Comm. of Unsecured Creditors v. Chinery (In re Cybergenics Corp.), 226 F.3d 237, 241 (3d Cir. 2000) (holding that avoidance action was not sold to purchaser of debtor's assets because such rights belong to creditors generally). To grant Hybrid liens and superpriority administrative claims under these circumstances would be "granting the lender excessive control over the debtor or its assets so as to unduly prejudice the rights of other parties in interest" and "convert[ing] the bankruptcy process from one designed to benefit all creditors to one designed for the unwarranted benefit of the post-petition lender." Mid-State Raceway, 323 B.R. at 59 (quoting Defender Drug Stores, 145 B.R. at 317.

- The Committee also objects to the various forms of adequate protection granted to Hybrid, including superpriority administrative expense claims and replacement liens. Absent a showing of postpetition diminution in the value of its collateral, Hybrid is not entitled to such adequate protection. "To determine whether an

entity is entitled to adequate protection and the type and the amount of adequate protection required, a court must determine the value of the collateral, the creditor's interest in the collateral and the extent to which the value will decrease during the course of the bankruptcy case." In re Megan-Racine Assocs., 202 B.R. 660, 663 (Bankr. N.D.N.Y. 1996).

- The Committee further objects to the proposed waivers of Bankruptcy Code section 506(c) and the "equities-of-the-case" provision under Bankruptcy Code section 552(b). Courts routinely reject attempted waivers of surcharge rights under section 506(c). See In re Colad Grp., Inc., 324 B.R. 208, 224 (Bankr. W.D.N.Y. 2005) (refusing to approve DIP financing with a section 506(c) waiver intact); In re Willingham Invs., Inc., 203 B.R. 75, 80 (Bankr. M.D. Tenn. 1996) (holding that claim was not immune from surcharge under section 506(c)); Precision Steel Shearing, Inc. v. Fremont Fin. Corp. (In re Visual Indus., Inc.), 57 F.3d 321, 325 (3d Cir. 1995) ("[section] 506(c) is designed to prevent a windfall to the secured creditor . . . . The rule understandably shifts to the secured party . . . the costs of preserving or disposing of the secured party's collateral, which costs might otherwise be paid from the unencumbered assets of the bankruptcy estate"); Kivitz v. CIT Grp./Sales Fin., Inc., 272 B.R. 332, 334 (D. Md. 2000) (secured party, and not other creditors, must bear the cost of preserving or disposing of its own collateral); In re AFCO Enters., Inc., 35 B.R. 512, 515 (Bankr. D. Utah 1983) ("When the secured creditor is the only entity which is benefited by the trustee's work, it should be the one to bear the expense. It would be unfair to require the estate to pay such costs where there is no corresponding benefit to unsecured creditors."); see also In re Motor Coach Indus. Int'l, Inc., Case No. 08-12136 (Bankr. D. Del. Oct. 22, 2008) [Docket No. 244] (removing section 506(c) waiver from the final postpetition financing order following committee objection). Moreover, Hybrid has provided no basis for curtailing the Court's authority to exclude postpetition proceeds from the DOE Loan Collateral based on the equities of the case under section 552(b) of the Bankruptcy Code.

- The provision for payment for the Committee Professionals should be treated the same as payment of the Debtors' Professionals – i.e., Committee Professionals should be entitled to be paid the full allowed amount of their fees and expenses in order to ensure the Committee is adequately equipped to fulfill its fiduciary role. See In re Channel Master Holdings, Inc., 309 B.R. 855, 859-60 (Bankr. D. Del. 2004) (cap on committee professional fees was unreasonable relative to the larger budgets for other professionals in the case and provided for inadequate compensation).

- The Challenge Period for the Committee to investigate and bring claims relating to Hybrid is inadequate. As described further in the UCC Standing Motion, the Committee objects to the unreasonably brief timeframe allocated for its investigation. Despite its diligent efforts, the Committee has not completed its investigation, and moreover, the Committee has identified certain facts and circumstances that warrant further investigation. As a result, the Committee reserves all rights with regard to the UCC Standing Motion, including but not

limited to, the right to amend the same to allege additional facts, identify additional causes of action, and identify additional defendants.

III. Confirmation of the Debtors' Plan Should Be Denied.

A. The Debtors' Plan is Not Feasible.

67. The Debtors' Plan is inextricably intertwined with the Proposed Sale to Hybrid which, as demonstrated above, must be denied. Once the Proposed Sale to Hybrid is denied, the Plan fails of its own accord and, as drafted, is no longer feasible, thereby preventing the Debtors from satisfying Bankruptcy Code section 1129(a)(11).

68. To satisfy Bankruptcy Code section 1129(a)(11), the Debtors must present evidence upon which the Court can find that the Plan presents "a workable scheme of organization and operation from which there may be reasonable expectation of success." See e.g., In re Am. Capital Equip., LLC, 688 F.3d 145, 155-56 (3d Cir. 2012); In re Flinkote Co., 486 B.R. 99, 139 (Bankr. D. Del. 2012); In re Indianapolis Downs, LLC, 486 B.R. 289, 298 (Bankr. D. Del. 2013) (explaining that the purpose of the feasibility test is to protect against visionary or speculative plans). In the present case, absent the sale to Hybrid, the proposed Plan cannot succeed and thus the feasibility requirement imposed by Bankruptcy Code section 1129(a)(11) cannot be satisfied.

B. The Debtors' Plan Has Not Been Proposed in Good Faith.

69. For the same reasons that the Sale Motion and Proposed DIP Financing must be denied, the Debtors cannot prove that their Plan "has been proposed in good faith and not by means forbidden by law," as required under Bankruptcy Code section 1129(a)(3). "The Bankruptcy Code does not define the term 'good faith,' but case law has defined the term as requiring, alternatively, that (1) the plan be consistent with the objectives of the Bankruptcy Code; (2) the plan be proposed with honesty and good intentions and with a basis for expecting

that reorganization can be achieved; or (3) there was fundamental fairness in dealing with the creditors." 7 Collier on Bankruptcy ¶ 1129.02[3][a][ii][A] (citing Stonington Partners, Inc. v. Official Comm. of Unsecured Creditors (In re Lernout & Hauspie Speech Prods. N.V.), 308 B.R. 672, 675 (D. Del. 2004)).

70. As detailed above and in the UCC Standing Motion, both the Debtors' proposed Plan and the Proposed Sale to Hybrid were the product of a flawed process that was orchestrated and now dictated by certain of the Debtors' insiders, who prevented meaningful competition for the Debtors' assets, to the detriment of the Debtors and their estates and in favor of the insiders' own self-interests. Because the proposed Plan is part and parcel of this improper scheme, the Debtors cannot satisfy the requirements of Bankruptcy Code section 1129(a)(3).

71. Further, central provisions of the Debtors' Plan fail to satisfy any of the three above-referenced standards of "good faith." By way of example, the Plan provides broad releases to "each of the Debtors' current and former officers, directors, managers, principals, employees, agents, financial advisors, attorneys, accountants, investment bankers, consultants, representatives, and other professionals," see Plan §§ VII(D), I(A)(97), and permanently enjoins all claims and causes of action against these parties "THAT THE DEBTORS WOULD HAVE BEEN LEGALLY ENTITLED TO ASSERT OR THAT ANY HOLDER OF A CLAIM AGAINST OR INTEREST IN THE DEBTORS OR ANY OTHER ENTITY COULD HAVE BEEN LEGALLY ENTITLED TO ASSERT DERIVATIVELY OR ON BEHALF OF THE DEBTORS," id. § VII(E).

72. The Debtors bear the burdens of proof and persuasion in demonstrating that the proposed releases of third parties under the Plan are appropriate under the Bankruptcy Code and applicable law in this Circuit. See In re Global Ocean Carriers Ltd., 251 B.R. 31, 43 (Bankr. D.

Del. 2000) ("[o]n this record, the Debtors have not met their burden of establishing that the revised releases are appropriate").

73. The five factors applied in determining whether a release of a non-debtor by the debtor is appropriate are: (a) an identity of interest between the debtor and non-debtor such that a suit against the non-debtor will deplete the estate's resources; (b) a substantial contribution to the plan by the non-debtor; (c) the necessity of the release to the reorganization; (d) the overwhelming acceptance of the plan and release by creditors and interest holders; and (e) the payment of all or substantially all of the claims of the creditors and interest holders under the plan. See Indianapolis Downs, 486 B.R. at 303 (citing In re Zenith Elecs. Corp., 241 B.R. 92, 110 (Bankr. D. Del. 1999)).

74. Here, the Committee is unaware of any evidence to support such broad releases and the Debtors cannot satisfy any of the Zenith factors necessary to approve the proposed third-party releases under the Plan, particularly with respect to the releases provided to the Debtors' ***former*** officers, directors, and employees.

75. Further evidencing the Debtors' intent to improperly usurp the rights and interests of creditors, the Plan provides that the Debtors, and not the Committee, select a Liquidator to wind down the Debtors' estates and to prosecute and resolve claims for the benefit of creditors.

76. In addition, the Plan improperly conditions the creation of the Unsecured Creditor Recovery Pool – the ***$500,000*** to which general unsecured creditors may look for compensation on their claims – on a majority of holders of unsecured claims against at least one of the Debtors voting to accept the Plan. See Plan §§ III(C)(5), (6). This "heads-I-win, tails-you-lose" approach is cynical at best and, at worst, an abuse of the creditor voting process. The Plan provisions relating to the funding of the Unsecured Creditor Recovery Pool risk distorting

creditor incentives to vote for a recovery projected to yield less than $0.01 on the dollar and are dismissive and heavy-handed in their treatment of unsecured creditors' rights under the Bankruptcy Code. Such provisions therefore preclude the finding of good faith necessary to confirm the Debtors' Plan.

C. The Debtors Cannot Satisfy the Requirements of Bankruptcy Code Section 1129(a)(7).

77. Next, the Debtors' Plan should not be confirmed because the Debtors cannot satisfy section 1129(a)(7) of the Bankruptcy Code, which requires a plan proponent to prove, with respect to each class of impaired claims or interests that:

> (A) each holder of a claim or interest of such class –
>
> (i) has accepted the plan; or
>
> (ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date.

11 U.S.C. § 1129(a)(7).

78. To satisfy the requirements of Bankruptcy Code section 1129(a)(7), the Debtors must demonstrate that each non-consenting impaired creditor will receive not less than the creditor would receive in a hypothetical chapter 7 liquidation. See, e.g., In re Aurora Foods, Inc., No. 04-00166, 2006 WL 3747306, at *7 (D. Del. Dec. 19, 2006); In re G-1 Holdings Inc., 420 B.R. 216, 265 (D.N.J. 2009).

79. As discussed more fully herein, the Debtors cannot satisfy the requirements of Bankruptcy Code section 1129(a)(7), because the Debtors' unsecured creditors would have received more in a hypothetical chapter 7 case, in which Hybrid would not have received liens

on Avoidance Actions or superpriority administrative claims, Hybrid would not be permitted to credit bid the DOE Loan, and valuable estate claims would be preserved and not released.

D. The Debtors Cannot Satisfy the Requirements of Bankruptcy Code Section 1129(a)(10).

80. The Committee also suspects that the Debtors' Plan cannot be confirmed because the Debtors will be unable to satisfy Bankruptcy Code section 1129(a)(10), which requires the affirmative acceptance of the Plan by at least one impaired class of claims, with acceptance determined without counting any acceptances by an insider. See 11 U.S.C. § 1129(a)(10).

81. Although the Plan voting deadline falls on the same date as the filing of the Omnibus Committee Objection, the Committee expects that, of the four classes entitled to vote under the Plan, only Hybrid – as the sole claimant in Class 1 under the Plan of Liquidation – will vote in favor of the Plan. For purposes of Plan voting, however, Hybrid should be treated as an insider.

82. "The definition of 'insider' under the Code is flexible and not amenable to precise formulation. An insider is any person or entity whose relationship with a debtor is sufficiently close that any transactions between them ought to be subjected to closer scrutiny than those occurring at arm's length." TSIC, Inc. v. Thalheimer (In re TSIC, Inc.), 428 B.R. 103, 111 (Bankr. D. Del. 2010) (citing Equibank v. Dan-Ver Enters., Inc. (In re Dan-Ver Enters., Inc.), 86 B. R. 443, 449 (Bankr. W.D. Pa. 1988)). As recognized by the court in TSIC, there are two types of "insiders" under the Code: statutory insiders set forth in section 101(31) of the Bankruptcy Code and non-statutory insiders as defined in In re Winstar Communications, Inc., 554 F.3d 382, 394 (3d Cir. 2009). The distinction between these two types of "insiders" turns on "whether the creditor's close relationship to the debtor suggests the absence of arm's length in a transaction." TSIC, Inc., 428 B.R. at 111 n.3. Where a creditor with a close relationship to a

debtor acquires its claim for purposes of helping a debtor obtain confirmation of its plan, the vote of such creditor should be deemed to be the vote of an "insider" for purposes of Bankruptcy Code section 1129(a)(10). See In re Holly Knoll P'ship, 167 B.R. 381, 389 (Bankr. E.D. Pa. 1994) (finding that creditor who purchased claim for the purpose of creating an impaired accepting non-insider class was an insider whose vote would not count for the purposes of section 1129(a)(10)); In re Lichtin/Wade, LLC, No. 12-00845, 2012 WL 6589794, at *4 (Bankr. E.D.N.C. Dec. 18, 2012) (holding creditor to be a non-statutory insider for purposes of Bankruptcy Code section 1129(a)(10) where creditor acquired its claim for the sole purpose of assisting the debtor in confirming its plan).

83. Here, Hybrid improperly acquired its claims for the purpose of effectuating its scheme of acquiring the Debtors' assets through a non-competitive bankruptcy process. The Plan represents a further step in support of this scheme. In these circumstances, Hybrid is a non-statutory insider and Hybrid's Plan vote cannot be counted for purposes of Bankruptcy Code section 1129(a)(10). Moreover, because Hybrid's vote with respect to the Plan cannot be counted, there is no impaired accepting class and the Debtors' Plan cannot be confirmed.

E. Section III.F of the Plan Is Contrary to Bankruptcy Code Section 1126(d).

84. Section III.F of the Plan improperly provides that if no holder of a claim in a given class votes to accept or reject the Plan, that class will be deemed to accept. This is directly contrary to the case law interpreting Bankruptcy Code section 1126(d). As Collier explains, "[t]he failure or inability of a creditor to vote on a plan is not the equivalent of the acceptance of the plan." 7 Collier on Bankruptcy ¶ 1126.04 (citing Bell Rd. Inv. Co. v. M. Long Arabians (In re M. Long Arabians), 103 B.R. 211, 216 (B.A.P. 9th Cir. 1989); In re Vita Corp., 380 B.R. 525, 528 (C.D. Ill. 2008); In re 7th St. & Beardsley P'ship, 181 B.R. 426, 432 n.10 (Bankr. D. Ariz. 1994); In re Townco Realty, Inc., 81 B.R. 707, 708 (Bankr. S.D. Fla. 1987)).

F. The Debtors Cannot Satisfy Bankruptcy Code Section 1129(b)(1).

85. In the unlikely event that the Debtors are able to satisfy all of the requirements of Bankruptcy Code section 1129(a), other than section 1129(a)(8), the Debtors would nevertheless be unable to confirm the Plan of Liquidation pursuant to Bankruptcy Code section 1129(b)(1), which provides:

> Notwithstanding section 510(a) of this title, if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of a proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

11 U.S.C. § 1129(b)(1).

86. Here, the Debtors cannot satisfy the "fair and equitable" standard to support confirmation of their Plan, as the Wanxiang Transaction provides a clear path to a better outcome in these cases for all constituents, free from the taint of Hybrid's improper conduct.

IV. The Disclosure Statement Provides Inadequate Information to Creditors and Should Not Be Approved.

87. As noted in detail above, the Debtors' Disclosure Statement does not provide adequate information to unsecured creditors regarding important features of the Plan, including:

- The events leading up to the commencement of these Chapter 11 Cases;
- The nature and value of the claims and causes of action proposed to be released under the Debtors' Plan; and
- Most importantly, Hybrid's post-bankruptcy business plans for Fisker.

Lacking such information, the Disclosure Statement does not satisfy the requirements of the Bankruptcy Code – see 11 U.S.C. § 1125(b) (disclosure statement must be "approved . . . by the court as containing adequate information"); id. § 1125(a)(1) ("'adequate information' means

information of a kind, and in sufficient detail . . . that would enable [] a hypothetical investor of the relevant class to make an informed judgment about the plan") – and accordingly cannot be approved.

88. It is well settled that the "adequate information" required by section 1125 includes "[t]he circumstances that gave rise to the filing of the bankruptcy petition." In re Scioto Valley Mortg. Co., 88 B.R. 168, 170 (Bankr. S.D. Ohio 1988); see also In re Babayoff, 445 B.R. 64, 79 (Bankr. E.D.N.Y. 2011) (rejecting "disclosure statement [that] did not provide adequate information about the debtors' financial difficulties"). As noted, the Disclosure Statement contains incomplete information regarding the events culminating in the commencement of these Chapter 11 Cases, including details of:

- prepetition defaults under the DOE Loan and the availability (*vel non*) of funds under the DOE Loan,
- the termination or resignation of any of Fisker's 37 former directors and officers, or the grounds therefor, and
- Fisker's prepetition restructuring and sale efforts and the reasons for their failure.

This information would allow creditors to evaluate the causes of the Debtors' bankruptcy and determine, in light of those causes, whether to support or oppose the Debtors' proposed Plan. Without it, creditors will not have adequate information to vote on the Plan, and the Disclosure Statement does not satisfy section 1125.

89. In addition, the Disclosure Statement provides inadequate information regarding potential sources of recovery for unsecured creditors, in particular the nature and value of the claims and causes of action that are proposed to be released under the Plan. It is plain that a "description of available assets and their value is a vital element of necessary disclosure," In re Beltrami Enters., Inc., 191 B.R. 303, 304 (Bankr. M.D. Pa. 1995). This applies with equal force to assets such as the Debtors' causes of action and claims. See, e.g., In re Source Enters., Inc.,

No. 06-11707, 2007 WL 2455182, at *8 (Bankr. S.D.N.Y. Aug. 23, 2007) (sustaining objection "to the disclosure relating to releases – in particular, the absence of the identity of the [ ] affiliates being released and the value of such releases" and requiring debtors "identify the [ ] affiliates being released" and "state the Debtors' view with respect to the value of such causes of action"). Here, where the claims and causes of action represent substantial Non-Collateral Assets and where lawsuits have already been commenced against the Released Parties, see, e.g., Madden Decl. Ex. 54, the limited information provided in the Disclosure Statement wholly fails to meet the standard set forth in the Bankruptcy Code.

90. Most importantly, the Disclosure Statement lacks adequate – indeed, ***any*** – information regarding Hybrid's post-emergence business plans for Fisker. A Chapter 11 debtor's "disclosure statement must contain ***all pertinent information*** bearing on success or failure of proposals in the plan." In re Cardinal Congregate I, 121 B.R. 760, 765 (Bankr. S.D. Ohio 1990) (emphasis added), including, at a minimum, "a discussion of the anticipated future of the debtor's business," id. at 767. Here, where a majority of unsecured creditors hold claims based on prepetition trade or service relationships with Fisker, information regarding the Debtors' post-bankruptcy business model is of paramount importance. The complete absence of such information is far from "adequate," and the Debtors' Disclosure Statement must not be approved.

V. Hybrid's Claims Should Be Disallowed Pursuant to Bankruptcy Code Section 502(d).

91. Section 502(d) of the Bankruptcy Code provides:

> Notwithstanding subsections (a) and (b) of this section, the court shall disallow any claim of any entity from which property is recoverable under section 542, 543, 550, or 553 of this title or that is a transferee of a transfer avoidable under sections 522(f), 522(h), 544, 545, 547, 548, 549, or 724(a) of this title , unless such entity or transferee has paid the amount, or turned over any such

> property, for which such entity or transferee is liable under section 522(i), 542, 543, 550, or 553 of this title.

11 U.S.C. § 502(d).

92. As set forth more fully in the UCC Standing Motion, the allegations of which are incorporated by reference herein, Hybrid is in possession of property which must be turned over to the Debtors' estates or for which Hybrid must pay the Debtors' estates. Unless, and until, the transferees have paid for and/or turned over such property, the claims of Hybrid must be disallowed under Bankruptcy Code Section 502(d).

WHEREFORE, the Committee respectfully requests that the Court (i) sustain this Committee Omnibus Objection, (ii) allow these Chapter 11 Cases to proceed under the terms and on the timeframe proposed under the Wanxiang Transaction, and (iii) grant the Committee such other and further relief as is equitable and proper.

Dated: December 30, 2013
Wilmington, Delaware

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Proposed Co-Counsel to the
Official Committee of Unsecured Creditors

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

	:	No. _____
In re:	:	
	:	Chapter 11
FISKER AUTOMOTIVE HOLDINGS, INC., *et al.*	:	
	:	Bankr. Case No. 13-13087-KG
Debtors.	:	
	:	(Jointly Administered)

ORDER

AND NOW, this _____ day of _____, 2014, upon consideration of Hybrid Tech Holdings, LLC's Emergency Motion for Leave to Appeal and any responses thereto, it is hereby:

ORDERED that, to the extent the Bankruptcy Court's decision of January 10, 2014 limiting the credit bid of Hybrid Tech Holdings, LLC and/or Hybrid Technology, LLC ("Hybrid") under section 363(k) of the Bankruptcy Code to $25 million is not a final order, Hybrid is granted leave to appeal that decision pursuant to 11 U.S.C. § 105(a), 28 U.S.C. § 158(a)(3), and Bankruptcy Rules 8001, 8002 and 8003.

Dated: _____
Wilmington, Delaware

_____
_____, J.
United States District Judge