IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
PLASTIQ INC., *et al.*,[1]	)	Case No. 23-10671 (BLS)
	)	
Debtors.	)	(Jointly Administered)
	)	
	)	**Re: Docket Nos. 23 & 186**

DEBTORS' REPLY TO LIMITED OBJECTION OF OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO APPROVAL OF SALE OF DEBTORS' ASSETS AND DISTRIBUTION OF SALE PROCEEDS UNDER STALKING HORSE BID

The above-captioned debtors and debtors-in-possession (collectively, the "**Debtors**") hereby file this reply (the "**Reply**") to the limited objection (the "**Objection**") [Docket No. 186], of the Official Committee of Unsecured Creditors (the "**Committee**") to the *Debtors' Motion for Entry of (A) an Order (I) Approving Bidding Procedures in Connection with the Sale of the Debtors' Assets and Related Bid Protections, (II) Approving Form and Manner of Notice, (III) Scheduling Auction and Sale Hearing, (IV) Authorizing Procedures Governing Assumption and Assignment of Certain Contracts and Unexpired Leases, and (V) Granting Related Relief; and (B) an Order (I) Approving the Purchase Agreements, and (II) Authorizing a Sale Free and Clear of All Liens, Claims, Encumbrances, and Other Interests* [Docket No. 23] (the "**Sale Motion**").[2] In support thereof, the Debtors respectfully represent as follows:

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: Plastiq Inc. (6125), PLV Inc. d/b/a/ PLV TX Branch Inc. (5084), and Nearside Business Corp. (N/A). The corporate headquarters and the mailing address for the Debtors is 1475 Folsom Street, Suite 400, San Francisco, California 94103.

[2] Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Sale Motion or Objection, as applicable.

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PRELIMINARY STATEMENT

1. The Debtors' primary goal in these chapter 11 cases is to maximize the value of their estates through the consummation of a going-concern sale that preserves jobs for their employees—a goal that the Debtors are on the verge of achieving. The Debtors spent months marketing their Assets, soliciting interest from 202 parties. These efforts resulted in 45 parties executing non-disclosure agreements, accessing a confidential data room, and performing diligence. The market has been adequately tested and has conclusively established that the offer embodied in the Stalking Horse APA by and between the Debtors and Plastiq, Powered by Priority, LLC ("**Priority**"), which is the only bid received by the Debtors, is fair, reasonable, and represents the highest and best offer for the Purchased Assets. The Debtors' decision to seek approval of the Stalking Horse APA is therefore supported by sound business justifications and represents a value maximizing transaction. Absent approval of the Sale to Priority, the value of the Assets would suffer enormous erosion to the detriment of all constituents, and would jeopardize the Debtors' pursuit of the *Combined Disclosure Statement and Chapter 11 Plan of Liquidation of Plastiq Inc. and its Affiliated Debtors* [Docket No. 168] (as may be amended or modified, the "**Combined Disclosure Statement and Plan**").

2. It is against that backdrop that the Committee objects to the Sale. Importantly, the Committee does not contest the Debtors' business judgment in seeking approval of the Sale to Priority. Rather, the Committee singles out Priority's assumption of the Colonnade liability and argues that the agreement reached between Priority and Colonnade as to the satisfaction of that liability by Priority following its assumption (the "**Colonnade Agreement**") magically transforms the Stalking Horse APA and the Sale of the Purchased Assets into a *sub rosa* plan. Such argument simply is not supported by the reality of the transaction or controlling precedent.

3. The Letter Agreement (as defined in the Stalking Horse APA) is an agreement between two non-debtors that addresses the satisfaction of an assumed liability by Priority. The Debtors are not a party to that Letter Agreement and will not receive any monetary benefit from Priority if the consideration under the Letter Agreement is not provided to Colonnade. If the Colonnade liability is not assumed by Priority, the consideration being received by the Debtors' estates under the Stalking Horse APA will not be increased by $2 million. In other words, there is no diversion of the purchase price to Colonnade and therefore no distribution of property of the Debtors' estates. However, there are significant benefits to the Debtors and their estates as a result of the assumption of the Colonnade liability, including: (a) avoiding costly and complex litigation regarding the validity and amount of claims asserted by Colonnade; (b) preventing dilution of recoveries to other general unsecured creditors if an $82 million claim is allowed; and (c) most importantly, costs the Debtors nothing.

4. The Sale to Priority is the result of extensive arms' length and good faith negotiations and a thorough court-approved sale process. It represents the highest and best means available to the Debtors for maximizing the value of their assets and creditor recoveries, as reflected by the absence of any objection to the Debtors' business judgment. Accordingly, the Objection should be overruled and the Sale approved.

ARGUMENT

I. THE PROPOSED SALE DOES NOT CONSTITUTE A *SUB ROSA* PLAN

5. This Court has made clear that a section 363 sale transaction is not objectionable as a *sub rosa* plan based on the fact that a purchaser assumes some but not all of a debtor's liabilities. *See In re Trans World Airlines, Inc.*, 2001 WL 1820325 at *11 (Bankr. D. Del. Apr. 2, 2001). A section 363 sale is also not improper because some creditors may benefit disproportionately compared with others whose claims are not being assumed by the buyer.

> [N]othing in section 363 suggests that disparate treatment of creditors, such as is likely to occur here, disqualifies a transaction from court approval. The purpose of a section 363(b) sale is to transform assets . . . into cash in an effort to maximize value. ***Distribution of the value generated in accordance with section 1129 and other priority provisions occurs and is intended to occur subsequent to the sale.***
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> * * *
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> The treatment of creditors in a section 363(b) context is dictated by the fair market value of those assets of the debtor that the purchaser in its business judgment elects to purchase. A purchaser cannot be told to assume liabilities that do not benefit its purchase objective. Thus, ***the disparate treatment of creditors occurs as a consequence of the sale transaction itself and is not an attempt by the debtor to circumvent the distribution scheme of the Code.***

Id. (emphasis added).

6. Rather, a transaction is a *sub rosa* plan if it prescribes the terms of a potential chapter 11 plan. *See In re Capmark Fin. Grp., Inc*., 438 B.R. 471, 513 (Bankr. D. Del. 2010) (finding that "[a] settlement constitutes a sub rosa plan when the settlement has the effect of dictating the terms of a prospective chapter 11 plan."). A transaction dictates the terms of a plan if it "either (i) dispose[s] of all claims against the estate or (ii) restrict[s] creditors' rights to vote." *Id.* at 513; *see also Del. Trust Co. v. Energy Future Immediate Holdings, LLC (In re Energy Future Holding Corp.)*, 527 B.R. 157, 168 (Bankr. D. Del. 2015).

7. The Sale to Priority is not a *sub rosa* plan. The fact that certain unsecured creditors may not have their claims against the Debtors assumed under the Stalking Horse APA does not render the Sale a *sub rosa* plan. While the liabilities associated with a number of unsecured claims will be assumed or otherwise satisfied through the assumption and assignment process, the Sale to Priority does not resolve all claims or restrict creditors' rights to vote. The Debtors are simply selling the Purchased Assets free and clear of claims and interests, other than those claims which

Priority has determined, in the exercise of its business judgment, would be beneficial to the business to assume.

8. The Committee incorrectly asserts that assumption of liabilities is only permissible in the context of assumed contracts under section 365 of the Bankruptcy Code.[3] Typical to section 363 sales is the assumption of liabilities at the acquired business that a purchaser deems important. As the Court is aware, purchasers commonly utilize the assumption of debts as currency in section 363 sales. The question in these scenarios is not whether the purchaser can assume the debts, but how the seller values the assumed liabilities.[4] This practice does not offend any priority rules or other statutory provisions applicable to chapter 11 plans, as Court approval of section 363 sales is not subject to the same requirements. Proving this point, the Committee takes no issue with any of the Assumed Liabilities set forth in Section 2.3 of the Stalking Horse APA, including the agreement of Priority to assume liabilities that are not subject to executory contracts to be assumed and assigned pursuant to section 365 of the Bankruptcy Code.

9. Claims and liabilities that are not assumed by Priority will remain with the Debtors' bankruptcy estates, and will be addressed pursuant to the terms of the Combined Disclosure Statement and Plan. Indeed, while Colonnade is releasing its $82 million asserted claim against the Debtors, nothing in the Stalking Horse APA or the Sale Order prevents the Debtors (or the trust proposed in the Combined Disclosure Statement and Plan) from pursuing claims or causes of action against Colonnade. This is distinct from *In re Braniff Airways, Inc.*, 700 F.2d 935, 940 (5th Cir. 1983), where the sale provided for broad releases of claims by ***all*** parties in favor of not only the debtor, but also its secured creditors, officers, and directors.

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[3] Objection ¶¶ 25-26.

[4] Valuation is not an issue here as no competing bids were submitted.

10. Further, contrary to the Committee's assertion that the payment to Colonnade by Priority is an "unlawful diversion of the proposed purchase price,"[5] the consideration underlying the Colonnade Payment is not (and will not ever become) property of the Debtors' estates. Rather, it is a payment rooted in an agreement between two non-debtors, Priority and Colonnade, and does not involve the Debtors or the assets of the Debtors' estates (aside from the benefit of the liability being satisfied and the Debtors receiving a release from Colonnade). Under no circumstance will the Debtors' estates receive the $2 million being paid by Priority to Colonnade. Thus, if the Court unwinds the Colonnade Agreement, not only will the Debtors' estates not receive any of the consideration Colonnade is receiving from Priority (or the benefit of the release of Colonnade's claims), there is no guarantee that Priority will consummate the Sale, and without a back-up bidder or liquidity to continue operations, the Debtors would likely be forced into liquidation to the detriment of all stakeholders.

11. Indeed, "an objector arguing that a proposed sale constitutes a *sub rosa* plan must clearly articulate the rights and benefits the [] creditor is being deprived of through the sale that it would gain through a Chapter 11 plan." *In re Summit Global Logistics, Inc.*, 2008 WL 819934, at *16 (Bankr. D.N.J. Mar. 26, 2008) (citing *In re Torch Offshore, Inc.*, 327 B.R. 254, 257 (Bankr. D. La. 2005)) (citing *In re Continental Air Lines, Inc.*, 780 F.2d 1223, 1228 (5th Cir. 1986) (concluding that the objecting creditor's "inability to establish its detriment through the sale . . . and the Debtors' satisfaction of the sound business judgment and good faith requirements given their severe liquidity crisis, mandate a finding that the proposed asset sale does not constitute a *sub rosa* plan")). The Debtors' extensive marketing process has proven, beyond any doubt, that the Stalking Horse APA is the highest and best offer for the Purchased Assets, and it also is the

[5] Objection ¶ 5.

only bid for the Purchased Assets. In addition, the Debtors' cash projections show that, absent the sale closing by the end of July, they will quickly run out of cash and be forced to liquidate. Further, the final order approving the Debtors' post-petition financing [Docket No. 138] (the "**Final DIP Order**") contains certain milestones related to the Sale Process, including entry of the sale order by August 2, 2023, and closing the sale by August 7, 2023. Failing to consummate the Sale within a few days of the sale hearing would therefore also cause a default under the Final DIP Order, leaving the Debtors without access to cash collateral or additional liquidity. Thus, if the proposed Sale is not approved and promptly consummated, no economic recovery would or could, under any realistic scenario or model, be distributed to general unsecured creditors.

12. The sole purpose of the Sale is to maximize the value of the Debtors' assets—not to evade the confirmation requirements of section 1129 of the Bankruptcy Code. The Stalking Horse APA provides significant value to the Debtors' estates, including satisfaction of the Debtors' prepetition secured debt, and a path forward towards a plan of liquidation and resolution of these chapter 11 cases. Neither the Stalking Horse APA nor the proposed Sale Order contain any provisions that dictate the terms of the Combined Disclosure Statement and Plan, describes creditor voting rights, or provides for releases of claims against the Debtors or its current or former officers and directors (other than the consensual releases provided by Colonnade). Creditors will be afforded their full protections under the Bankruptcy Code to assert their claims and participate in a plan process. *See In re Allegheny Intern., Inc.*, 117 B.R. 171 (W. D. Pa. 1990) (holding that agreements containing terms which might dictate terms of particular future plan, as opposed to terms of any plan, did not violate Bankruptcy Code's procedures for confirming plan of reorganization because creditors were retaining their rights regarding issues of disclosure, voting, and priority, and could still vote to reject plan once proposed). The Stalking Horse Agreement

does not disrupt the priority rule. The cash and assets remaining in the Debtors' estates after the closing of the Sale will be distributed to creditors in accordance with the priority scheme established by the Bankruptcy Code and the Combined Disclosure Statement and Plan.

CONCLUSION

13. For the reasons set forth above and in the Sale Motion, the Court should overrule the Objection and approve the Sale.

Dated: July 24, 2023
Wilmington, Delaware

YOUNG CONAWAY STARGATT & TAYLOR, LLP

/s/ Joseph M. Mulvihill

Michael R. Nestor (No. 3526)
Matthew B. Lunn (No. 4119)
Joseph M. Mulvihill (No. 6061)
Jared W. Kochenash (No. 6557)
1000 North King Street
Rodney Square
Wilmington, Delaware 19801
Tel.: (302) 571-6600
Facsimile: (302) 571-1253
Email: mnestor@ycst.com
mlunn@ycst.com
jmulvihill@ycst.com
jkochenash@ycst.com

Counsel for Debtors and Debtors in Possession