IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	:	Chapter 11
	:	
	:	Case No. 19-11626 (LSS)
PES HOLDINGS, LLC, *ET AL.*,	:	
	:	Jointly Administered
Debtors.	:	
	;	RE: D.I. 1324

REPLY OF HRP PHILADELPHIA HOLDINGS, LLC
IN SUPPORT OF DEBTORS' MOTION FOR APPROVAL
OF AMENDMENT TO PURCHASE AGREEMENT

HRP Philadelphia Holdings, LLC ("**HRP**") respectfully submits this Reply in support of the Debtors' Motion for Entry of an Order (I) Approving the Amendment to the Purchase Agreement and (II) Granting Related Relief [D.I. 1324].

INTRODUCTION

HRP is the proposed purchaser of the membership interests of Debtor PES Holdings, LLC under a certain Purchase and Sale Agreement dated January 17, 2020 (as amended, the "**Agreement**") [D.I. 780-6, as amended by D.I. 1292-3] and the confirmed Fourth Amended Joint Chapter 11 Plan dated February 12, 2020 (as supplemented, the "**Plan**") [D.I. 994]. The Debtors have sought approval of Amendment No. 2 to the Agreement (the "**Amendment**"), which would adjust the purchase price, resolve a number of disputes regarding closing conditions, and put the parties in a position to close promptly, quite possibly before the end of this week.

Nearly all creditor constituencies support the Debtor's motion. Two dissenting lenders have imposed extraordinary amounts of professional fees upon the Debtors' estates and on HRP

in pursuit of expedited document productions and lengthy depositions, all in an effort to demonstrate that the Amendment is something other than a reasonable commercial resolution of a complex set of outstanding issues under the Agreement. They have failed. The Court should approve the Amendment so that the transaction may close, the mothballed refinery complex owned by the Debtors may be redeveloped and returned to productive use, and creditors may receive distributions under the Plan.

CLOSING-RELATED ISSUES

At the status conference held on June 22, 2020, the Court expressed some skepticism that this dispute presents the sort of coronavirus-related *force majeure* issue that has been present in several high-profile transactions in recent months. In fact, HRP has not terminated or threatened to terminate the Agreement based on *force majeure* or any other development specific to the current pandemic. Further, the main thrust of the "Objecting Lenders" in their Objection [D.I. 1329] that all other closing conditions were met, and the only thing remaining was PaDEP's approval of the SMP (as defined below) that HRP was intentionally withholding, is a false narrative. Rather, as the Termination Date of May 31, 2020[1] approached—at which point either party to the Agreement was permitted to terminate if not in breach—HRP was faced with significant unfulfilled closing conditions and unresolved issues (among others), including the following:

- Under Section 9.11 of the Agreement, the Pennsylvania Department of Environmental Protection was required to approve "a commercially reasonable site-specific soil management plan … that permits and is consistent with Purchaser's Intended Use to

[1] The Termination Date was extended by agreement of the parties for short intervals, with the parties reserving rights, through June 17, 2020, the date the Amendment was filed.

develop the Owned Real Property into a tri-modal industrial park with ancillary commercial uses." (the "**SMP**"). Deed restrictions of record, however, effectively prohibited the movement of soil on the property except in connection with refinery operations, which HRP does not intend to resume and required the approval of Evergreen/Sunoco, the former owner of the property that is responsible for certain remediation obligations and environmental indemnifications. These agreements are inextricably intertwined and work together in relation to the SMP, so HRP was thus required to negotiate with Evergreen/Sunoco to modify the restrictions and to address indemnification and similar issues and negotiate a complex new agreement called a Development and Environmental Management Agreement, a process that proved to be incredibly time-consuming and expensive, despite HRP's tireless efforts to finalize it as quickly as possible. That process did not conclude until mid-June, and PaDEP issued its approval of HRP's soil management plan on June 18.

- Section 9.12 of the Agreement requires the Debtors to own the Specified Assets (*i.e.*, certain assets that were subject to an installment-sale agreement with NGL Energy Partners) free and clear or to provide a purchase-price reduction to HRP. Neither was the case as of the May 31st Termination Date. The Court addressed a motion to compel filed by NGL in an order entered on June 3 [D.I. 1300] and then approved a settlement between the Debtors and NGL on June 9 [D.I. 1314]. The Debtors never meaningfully engaged HRP in discussions about a purchase-price adjustment relating to the Specified Assets.
- Section 4.09(b) of the Agreement requires the Debtors to have a valid lease or license in connection with any occupation or use of another party's real property, and Section

4.06(c) similarly requires that all material tangible personal property be located on owned, leased, or licensed property. Following confirmation of the Plan, the Debtors were unable to demonstrate that they had a valid license or easement authorizing a significant pipeline to traverse property owned by the City of Philadelphia.[2] HRP was informed by the City on June 12 that the prior license for the pipeline had been terminated in 2017. HRP worked quickly to negotiate a comfort letter with the City, finalized on June 19, in which the City committed to negotiating a new license for the pipeline that will additionally require HRP's payment of significant additional licensing fees to the City.

- A portion of the bulkhead or seawall where the property abuts the Schuylkill River collapsed in the second week of May. There remains considerable uncertainty about what expenses or liabilities may be associated with that incident. The Debtors' chief restructuring officer has testified that they the Debtors have no engineering estimate of the cost to repair it, but their initial internal assessment was that it could be $2.5 million to $5 million. HRP believes that the Debtor's estimate is low and the cost and potential additional environmental liability exposure could be $10 million or significantly more.
- Section 9.15 of the Agreement, as amended by the First Amendment, requires the Debtors to deliver a reasonably acceptable transition services agreement addressing a collective bargaining agreement with the United Steel Workers union in a manner consistent with language in the Plan. The parties actively worked on substantive

[2] As discussed above, HRP does not intend to operate a refinery on the property, but an existing tank farm along the Schuylkill River has significant value to HRP and any subsequent owner or lessee. The pipelines at issue are the key pipelines that connect the tank farm to a network of pipelines that permit petroleum products to move throughout the Eastern United States.

indemnification and employment issues and did not reach agreement on the body of that contract until June 15 or the exhibits until June 18.

There were other issues as well, but those above demonstrate the circumstances as May 31 approached: HRP believed that it would have been within its rights to terminate the Agreement and to have its $30 million deposit refunded. The Debtors did not necessarily agree, but neither did they give notice that they were ready, willing, and able to close the transaction by May 31. Nor did the Debtors send HRP a notice of default, accuse HRP of acting in bad faith, argue that HRP caused closing conditions to fail, or otherwise claim that HRP had frustrated the parties' progress toward closing.

THE RESOLUTION

Instead, as the Debtors explain in their motion, both parties negotiated in good faith to reach a compromise that was, for each, preferable to walking away or litigating.[3] Those terms include a price reduction that will be, by the time of closing, a discount of less than 8%, the transfer of certain emissions credits to HRP, provides an automatic forfeit by HRP of half of its $30 million deposit, and a waiver of HRP's closing conditions, aside from delivery of various documents necessary for closing.

For the reasons explained by the Debtors and recognized by most of the significant constituencies in this case, this negotiated resolution is in the best interests of the parties and of creditors. The Court should, accordingly, approve it and permit the parties to proceed to a prompt closing.

[3] HRP agrees with the Debtors' summary of the challenges involved in litigation over the parties' obligations under the Agreement. In addition to the issues identified in the Debtors' motion, any effort to pierce the corporate veil of HRP would run headlong into the parties' acknowledgment in Section 12.13(b) of the Agreement that none of the parties' affiliates "shall have any liability … based upon any theory that seeks to impose liability of an entity party against its owners or Affiliates."

Dated: June 24, 2020

Respectfully submitted,

PEPPER HAMILTON LLP

/s/ Marcy J. McLaughlin Smith
Douglas D. Herrmann (DE No. 4872)
Marcy J. McLaughlin Smith (DE No. 6184)
Hercules Plaza, Suite 5100
1313 N. Market Street, P.O. Box 1709
Wilmington, Delaware 19899-1709
Telephone: (302) 777-6500
Facsimile: (302) 421-8390
E-mail: herrmannd@pepperlaw.com
mclaughlinm@pepperlaw.com

- and -

BRYAN CAVE LEIGHTON PAISNER LLP
Brian C. Walsh (admitted *pro hac vice*)
One Metropolitan Square
211 North Broadway, Suite 3600
St. Louis, Missouri 63102
Tel: (314) 259-2000
Brian.walsh@bclplaw.com

Eric S. Prezant (admitted *pro hac vice*)
161 North Clark Street, Suite 4300
Chicago, Illinois 60601-3315
Tel: (312) 602-5033
Eric.prezant@bclplaw.com

Counsel to HRP Philadelphia Holdings, LLC

58560457