IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
NETVERSANT SOLUTIONS, INC., *et al.*,[1]	)	Case No. 08-12973 ( )
	)	
	)	Joint Administration Proposed
Debtors.	)	

MOTION OF DEBTORS FOR AN ORDER AUTHORIZING (I) THE SALE OF SUBSTANTIALLY ALL OF THE DEBTORS' ASSETS FREE AND CLEAR OF LIENS, CLAIMS AND ENCUMBRANCES EXCEPT FOR CERTAIN ASSUMED LIABILITIES AND (II) THE ASSUMPTION AND ASSIGNMENT OF EXECUTORY CONTRACTS AND UNEXPIRED LEASES

NetVersant Solutions, Inc. ("NetVersant") and its affiliated debtors and debtors in possession (collectively, the "Debtors") hereby move the Court, pursuant to sections 363 and 365 of title 11 of the United States Code (the "Bankruptcy Code"), Rules 2002, 6004, 6006, 9007 and 9014 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") and Rule 6004-1 of the Local Rules of this Court (the "Local Rules") for entry of an order, attached hereto as Exhibit "A" (the "Sale Order"):

(a) authorizing the sale of substantially all of the Debtors' assets (the "Sale") to the Buyer (as defined below) or such other party that is the successful bidder at the Auction (as

[1] The Debtors in these chapter 11 cases, along with the last four (4) digits of each Debtor's federal tax identification number, are: NetVersant Solutions, Inc. (9180), NetVersant – Northern California, Inc. (9034), NetVersant – Southern California, Inc. (4376), NetVersant – California, Inc. (6428), NetVersant – Denver, Inc. (4456), NetVersant GP, Inc. (8796), NetVersant LP, Inc. (8794), NetVersant Management Co., L.P. (8797), NetVersant National, Inc. (4454), NV Resources, Inc. (1923), NetVersant, Inc. (2901), NetVersant – Oregon, Inc. (6433), NetVersant – Atlanta, Inc. (1924), NetVersant – Mid-Atlantic, Inc. (9630), NetVersant – New England, Inc. (5472), NetVersant – Minneapolis/St. Paul, Inc. (9243), NetVersant – Albuquerque, Inc. (0680), Intelligent Building Systems, Inc. (2836), NetVersant – Philadelphia, Inc. (5072), NetVersant – Texas, Inc. (1747), NetVersant – Cascades, Inc. (2092), NetVersant – Washington, Inc. (0839).

defined below),[2] free and clear of all liens, claims and encumbrances, except for certain assumed liabilities;

(b) authorizing the assumption and assignment of executory contracts and unexpired leases in connection with the Sale; and

(c) granting certain related relief as described herein.

In support of this Motion, the Debtors incorporate the statements contained in the Declaration of Ronald E. Hale, Jr. in Support of First Day Relief filed contemporaneously herewith and further respectfully state as follows:

I. JURISDICTION AND VENUE

1. This Court has jurisdiction over these cases pursuant to 28U.S.C. § 1334. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A) and (O). The relief requested herein is authorized under sections 366 and 105(a) of the Bankruptcy Code.

2. Venue of the Debtors' chapter 11 cases is proper in this district pursuant to 28 U.S.C. §§ 1408(1) and (2).

II. BACKGROUND

A. THE BANKRUPTCY CASES

3. On November 19, 2008 (the "Petition Date"), the Debtors each filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code.

4. The Debtors continue to operate their businesses and manage their properties as debtors in possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

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[2] Concurrently with this Motion, the Debtors are filing the Motion of Debtors for an Order (I) Approving Bidding Procedures for the Sale of Substantially All of Their Assets, (II) Approving Certain Bidding Protections, (III) Approving the Form and Manner of Notice of Sale and Assumption and Assignment of Executory Contracts and Unexpired Leases and (IV) Scheduling an Auction and Sale Hearing (the "Bidding Procedures Motion").

5. No trustee or examiner has been appointed in the Debtors' bankruptcy cases and no official committee of unsecured creditors has been established.

B. THE DEBTORS' BUSINESSES

6. NetVersant is a Delaware corporation owned by approximately 360 stockholders. NetVersant, Inc. is a Delaware corporation and a wholly owned subsidiary of NetVersant. NetVersant, Inc. owns 100% of the issued and outstanding common stock of Intelligent Building Systems, Inc., a New York corporation, NV Resources, Inc., a Delaware corporation, NetVersant - Atlanta, Inc., a Delaware corporation, NetVersant - California, Inc., a California corporation, NetVersant – Cascades, Inc., a Washington corporation, NetVersant - Denver, Inc., a Delaware corporation, NetVersant - Mid-Atlantic, Inc., a Maryland corporation, NetVersant - Minneapolis/St. Paul, Inc., a Minnesota corporation, NetVersant - New England, Inc., a Massachusetts corporation, NetVersant - Northern California, Inc., a California corporation, NetVersant - Oregon, Inc., a Delaware corporation, NetVersant - Philadelphia, Inc., a Pennsylvania corporation, NetVersant - Southern California, Inc., a California corporation ("NV SOCAL"), NetVersant - Texas, Inc., a Texas corporation, NetVersant - Washington, Inc., a Washington corporation, NetVersant GP, Inc., a Delaware corporation ("NV GP"), NetVersant LP, Inc., a Delaware corporation ("NV LP"), and NetVersant National, Inc., a Delaware corporation. NetVersant - Albuquerque, Inc., a New Mexico corporation, is a wholly owned subsidiary of NV SOCAL. NetVersant Management Co., L.P., a Delaware limited partnership, is 1% owned by its general partner, NV GP, and is 99% owned by its limited partner, NV LP.

7. The Debtors currently have physical locations in 14 states, have operations throughout the continental United States and are industry leaders providing network infrastructure services to local and national customers. The Debtors also have, from time to time, provided services at overseas locations of U.S. customers. The Debtors' core service

platforms include: local and wide area network infrastructure, wireless network installations, high-end telephony systems and applications, and electronic security and access control systems.

8. The Debtors provide goods and services in a wide-range of industries, including technology, finance, retailing, communications, education, and healthcare. The Debtors work with a network of vendors and subcontractors to service their customers' infrastructure needs. The Debtors, their distribution vendors and the manufacturers of the underlying products, often jointly market products to potential customers.

9. As of September 30, 2008, the Debtors had approximately 1,000 employees, approximately 690 of whom were field technicians, 220 of whom were operational management and support personnel, and 170 of whom were sales and office administrative personnel. Approximately 404 of the Debtors' employees are unionized, whose relationships with the Debtors are governed by various collective bargaining agreements. Relevant unions include the International Brotherhood of Electrical Workers and the Communications Workers of America.

10. The Debtors generated revenues of approximately $240 million and $161 million during the fiscal year ended December 31, 2007, and the nine months ended September 30, 2008, respectively.

C. CAPITAL STRUCTURE[3]

11. Prior to the Petition Date, the Debtors were party to (A) that certain Credit Agreement (the "Pre-Petition Credit Agreement"), dated as of June 29, 2005, by and among the Borrowers, Wells Fargo Foothill, Inc. ("WFF"), as arranger and administrative agent (the "Pre-Petition Agent"), Patriarch Partners Agency Services, LLC ("Patriarch"), as syndication agent,

[3] For additional background and a discussion of the Debtors' capital structure, refer to the Declaration of Ronald E. Hale, Jr. in Support of First Day Relief filed on the Petition Date.

and the Lenders party thereto (collectively, the "Pre-Petition Lenders"), collectively with WFF and Patriarch, the "Pre-Petition Secured Parties"), and (B) all other agreements, documents, and instruments executed and/or delivered with, to, or in favor of Pre-Petition Secured Parties, including, without limitation, notes, mortgages, and UCC financing statements and all other related agreements, documents, and instruments executed and/or delivered in connection therewith or related thereto (collectively, as may be amended, modified or supplemented and in effect from time to time, the "Pre-Petition Loan Documents").[4]

12. The Pre-Petition Credit Agreement, as amended, provides for a $32.5 million revolving credit facility, a $12.5 million Term Loan A, a $71.3 million Term Loan B, and a $6.5 million Term Loan C. As of October 31, 2008, the principal amount outstanding under the Pre-Petition Credit Agreement was approximately $110 million. The obligations to the Pre-Petition Secured Parties under the Pre-Petition Credit Agreement are secured by liens and security interests upon substantially all of the Debtors' personal property with priority over all other liens except any liens otherwise permitted by the Pre-Petition Loan Documents.

13. As of the Petition Date, long-term debt in the Debtors' capital structure included capital lease obligations for the acquisition of equipment and transportation vehicles. As of October 31, 2008, the total principal unpaid balance under all capital leases totaled approximately $1.9 million.

14. As of the Petition Date, there were eleven outstanding subordinated notes (the "Subordinated Notes") that were issued by NetVersant with respect to NetVersant's prepetition

[4] The Lenders included Zohar CDO 2003-1, Limited ("Zohar 2003"), and Zohar II-2005-1, Limited ("Zohar 2005"). In addition, Zohar III, Limited ("Zohar III" and together with Zohar 2003 and Zohar II, the "Zohar Entities" or "Pre-Petition Term Lenders") became a lender under the Pre-Petition Credit Agreement in May 2007. Each of the Zohar Entities is managed by Patriarch or one of its affiliates.

purchase of certain of the other Debtors. The outstanding principal balance of the Subordinated Notes as of the Petition Date was approximately $691,000.

D. EVENTS LEADING TO BANKRUPTCY

15. During the fiscal years ended December 31, 2006, and December 31, 2007, and the nine months ended September 30, 2008, the Debtors had revenues, net loss and EBITDA as set forth below (in thousands):

	12/31/06	12/31/07	09/30/08
Revenues	$242,760	$240,084	$160,842
Net Loss	$ 20,740	$ 17,453	$ 13,822
EBITDA	$ (3,243)	$ 6,208	$ 1,593

16. The Debtors' operating performance has been negatively affected by the combination of several large unprofitable projects in its Southern California and Phoenix operations and poor operating results from its Baltimore/Washington D.C. and New York locations. These negative events and unprofitable operations consumed working capital totaling $20.4 million over the periods presented above which was financed primarily through additional borrowings under the Debtors' long-term debt agreements and extended credit terms from key vendors. Because of the operating losses, the Debtors were out of compliance with certain financial covenants of the Pre-Petition Credit Agreement related to operating performance during 2006, 2007 and 2008.

17. In addition to the negative margin from these events, the Debtors' increasing long-term debt and related interest expense burdened the Debtors' ability to fund normal operations. In addition to the losses from operations discussed above, the Debtors paid interest during the periods presented above totaling $29.8 million.

18. The cumulative effect of the poor operating results and debt service costs caused the Debtors' working capital situation to worsen significantly during fiscal year 2008 and negatively impacted their ability to deploy and generate revenue and cash flow to service their outstanding obligations. During the summer of 2008, the Debtors were unable to acquire inventory or to engage subcontractors on an efficient basis. This resulted in reduced production, which further reduced the Debtors' accounts receivable, thereby reducing the borrowing base under the Pre-Petition Credit Agreement and further constraining working capital. The Debtors' billings to customers fell from $20,494,000 in March 2008 to (i) $18,225,000 in June 2008 and (ii) $15,910,000 in September 2008, a 22% decrease over the six-month period.

19. Prior to the Petition Date, the Debtors and their advisors extensively explored multiple restructuring alternatives, including a sale of the Debtors' operations, a new debt or equity capital infusion and a comprehensive restructuring of the Debtors' balance sheet. In July 2006, the Debtors retained Wayne Edesis of ARC International Corporation, an investment banker with substantial experience in the Debtors' business sector, to market the Debtors to potential industry candidates. In connection with this marketing process, Edesis contacted a number of parties, several of whom expressed interest in a possible transaction with the Debtors. Ultimately, the Debtors entered into a letter of intent with one potential purchaser; however, the Debtors were unable to reach an agreement to sell the business.

20. On May 13, 2008, the Debtors engaged Solutions Management, LLC to provide financial and strategic advisory services. With the assistance of Solutions Management, LLC, the Debtors attempted to raise funds from various sources but were advised that, given their recent operating results and the level of their secured debt, it was impractical to raise additional

funds without concessions from their lenders. As a result, in August 2008, the Debtors approached their lenders in an attempt to obtain additional financing for operations.

21. In September 2008, the Debtors and Patriarch discussed a proposal pursuant to which Patriarch, or one or more affiliates thereof, would effectively acquire a majority of the equity of the Debtors. In late September 2008, Patriarch advised the Debtors that, in light of deteriorating conditions in the world financial markets and the level of the Debtors' accounts payable, Patriarch was unwilling to acquire an interest in the Debtors on the basis that had been discussed. Subsequently, the Debtors negotiated the sale, subject to higher and better offers, of substantially all of their assets to an entity affiliated with Patriarch. This sale is being implemented through the commencement of these chapter 11 cases. The Debtors believe that the proposed sale to a Patriarch affiliate, or another successful bidder identified at auction, offers the best path to preserving the Debtors' ability to continue as a going concern and maximize value for their stakeholders.

22. Avoidance of a protracted bankruptcy is critical to both the survival of the Debtors' business as a going concern and the ability to maximize value. The Debtors' principal assets are (a) the relationships, goodwill and reputation that the Debtors have established over the years with their customers and key suppliers and (b) the receivables associated with the Debtors' numerous customer contracts, which are at various stages of completion. The value of the Debtors' business, and their ability to continue as a going concern, is entirely dependent upon the Debtors' timely completion of the numerous customer projects currently in progress and the customers' continuing confidence in the Debtors' ability to do so such that they will be incentivized to enter into new contracts with the Debtors postpetition.

23. In order to preserve these key customer relationships, the Debtors are required to deal with various subcontractors and suppliers with whom the Debtors contracted in order to meet their obligations under the various customer contracts. However, because of their financial straits, the Debtors were unable to timely pay many of these subcontractors and suppliers. Consequently, upon the filing of the Debtors' chapter 11 cases, it is likely that such subcontractors and suppliers will seek to file liens against the Debtors' customers and to "trap," through applicable state lien and trust fund statutes, funds owed to the Debtors by their customers. Such claims against the Debtors' customers will have the dual effect of substantially reducing the Debtors' liquidity, while at the same time impairing the Debtors' valuable relationships with their customers.

24. While the Debtors' lenders have agreed to provide limited postpetition financing as a bridge to an expedited sale process, such funding is limited in duration. Accordingly, absent a prompt sale of the Debtors' assets, there is a substantial likelihood that the Debtors' assets and going concern value will be significantly impaired, resulting in a decreased return to creditors, including employees, suppliers, subcontractors and other vendors, and the potential, piece-meal liquidation of the Debtors.

E. EVENTS LEADING TO THE DEBTORS' BANKRUPTCY FILING AND THE PROPOSED SALE

25. The Debtors' business has been negatively affected over the last year by the increasing deterioration of general economic conditions, which, among other things, has resulted in a slowdown in construction of new commercial office space as well as a reduction in major capital expenditures as general economic uncertainty has caused companies to delay significant new projects or expansions. The Debtors aggressively responded to these adverse developments by taking a variety of actions to reduce costs, including significant reductions in their workforce and significant reductions in fixed costs. Over the last several months, the Debtors also pursued,

through their investment bankers, a potential sale of their assets and substantial new equity investments from third parties that could be used to reduce or eliminate the Debtors' substantial secured debt burden. These efforts to find a buyer or equity investor, however, have to date proved unsuccessful.

26. Despite significant cost reductions, the reduction of new business and related revenues resulted in the Debtors failing to meet certain financial covenants under the Pre-Petition Credit Agreement. In addition, the Debtors became unable to meet their ongoing principal and interest payments under the Pre-Petition Credit Agreement, and in October 2008, their lenders issued a notice of default. By late October 2008, the Debtors were facing significant liquidity issues. Although the Debtors' secured lenders agreed to increase the over-advance and line limit under the Debtors' Pre-Petition Credit Agreement to bridge the Debtors to a chapter 11 filing, the Debtors' secured lenders were otherwise unwilling to extend any further financing outside of chapter 11.

27. As a result of this lack of liquidity and in light of the nature of their business, the Debtors determined that the only option that would enable the business to continue as a going concern was to commence chapter 11 cases and seek an expedited sale of substantially all of their assets. The Debtors have developed a strategic plan pursuant to which they intend to further consolidate lines of business, close additional offices and exit low volume or unprofitable operations. The Debtors believe that following a sale of substantially all of their assets in chapter 11, which will alleviate the business of its current substantial debt burden and other significant liabilities, and with the implementation of these operational changes, the business can return to profitability.

28. Pursuant to terms negotiated with the Debtors, the Debtors' secured lenders have agreed to provide postpetition financing to enable the Debtors to pursue an expedited sale process. In addition, the Debtors have negotiated the terms of an asset purchase agreement (the "Stalking Horse Agreement") with the Pre-Petition Term Lenders, pursuant to which the Pre-Petition Term Lenders, through NetVersant Acquisition LLC (the "Buyer"), an acquisition entity, have agreed to act as a stalking horse bidder for the sale of substantially all of the Debtors' assets. Concurrently with the commencement of these chapter 11 cases and the filing of this Motion, the Debtors have filed the Bidding Procedures Motion. Because the avoidance of a protracted bankruptcy is critical to the survival of the Debtors' business as a going concern, the Debtors seek to have the Sale approved on an expedited basis. Pursuant to Local Rule 6004-1(b)(1), a copy of the Stalking Horse Agreement is attached hereto as Exhibit "B."

III. THE BIDDING PROCEDURES MOTION AND PROPOSED ORDER

29. The Bidding Procedures Motion seeks approval of bidding procedures for an auction to sell substantially all of their assets to the Buyer on the terms and conditions of the Stalking Horse Agreement, or to such other bidder or bidders who bid more for such assets at such auction to be held by the Debtors. Specifically, the Bidding Procedures Motion seeks, among other things:

(a) approval of proposed bidding procedures, as well as proposed bidder protections, for the Sale;

(b) approval of the form and manner of notice of the Sale and assumption and assignment of executory contracts and unexpired leases; and

(c) scheduling of an auction (the "Auction") and sale hearing (the "Sale Hearing") in connection with the Sale.

30. The Stalking Horse Agreement provides for the sale of substantially all of the Debtors' assets free and clear of liens, claims and encumbrances, except for certain specified

liabilities, as well as the assumption and assignment of certain executory contracts and unexpired leases in connection therewith (collectively, the "Sale Transaction"). It is the Debtors' view that the Stalking Horse Agreement represents the highest and best value that the Debtors could obtain for their business at this time. The Debtors are conducting an auction sale process to determine if any party or set of parties is willing to purchase the Debtors' assets for more than that provided for in the Stalking Horse Agreement.

IV. RELIEF REQUESTED

31. By this Motion, the Debtors seek entry of the Sale Order:

(a) approving the sale of substantially all of the Debtors' assets to the Buyer pursuant to the Stalking Horse Agreement or to such other party that is the successful bidder at the Auction, free and clear of all liens, claims and encumbrances except (i) the Specified Vendor Payables; (ii) Permitted Liens; and (iii) the Pre-Petition Term Loans, the DIP Facility, and the Pre-Petition Revolver Obligations, in each case to the extent specifically assumed by the Buyer or, only if consented to by WFF or the Pre-Petition Term Lenders, as applicable, and in their discretion, by such other party that is the successful bidder at the Auction (as each such undefined term is defined in the Stalking Horse Agreement);

(b) approving the assumption and assignment of executory contracts and unexpired leases in connection with the Sale;

(c) finding that the Buyer or such other party that is the successful bidder at the Auction is a "good faith purchaser," as that term is defined in section 363(m) of the Bankruptcy Code, and has not violated section 363(n) of the Bankruptcy Code;

(d) waiving the ten day stay requirements of Bankruptcy Rules 6004(h) and 6006(d); and

(e) granting certain related relief.

V. THE STALKING HORSE AGREEMENT

32. Local Rule 6004-1(b)(iv) provides, among other things, that a sale motion "must highlight material terms" of the proposed Stalking Horse Agreement and the Sale Order. The Debtors submit that the description of the material terms of the Stalking Horse Agreement and the Sale Order set forth herein complies with Local Rule 6004-1(b)(iv). By way of summary, the primary terms of the Stalking Horse Agreement are set forth below.[5]

33. Pursuant to Section 2.1 of the Stalking Horse Agreement, the Buyer will acquire substantially all of the Debtors' assets. The primary, but not only, assets that the Buyer will **not** be acquiring are (i) any right, demand, claim, action or cause of action that constitutes an avoidance action of the Debtors' estates under chapter 5 of the Bankruptcy Code and any other applicable provisions of the Bankruptcy Code, (ii) any lease that is not an Assumed Lease, (iii) any contract that is not an Assumed Contract or a Post-Petition Contract, (iv) any stock, partnership interest or other equity interest of any Debtor, and (v) any assets held in relation to any employee benefit plan or welfare plan or any contract, policy or arrangement relating to any such plan.

34. Local Rule 6004-1(b)(iv)(K) requires that a debtor disclose if it intends to sell any avoidance actions as part of any sale transaction. The Purchased Assets include only those avoidance actions under chapter 5 of the Bankruptcy Code relating to the Pre-Petition Term Loans, the Pre-Petition Term Lenders or Patriarch and their respective successors and assigns.

35. The Stalking Horse Agreement provides for the assumption by the Debtors and the assignment to the Buyer of various executory contracts and unexpired leases. The relevant

[5] Capitalized terms not otherwise defined herein shall have the meanings assigned to them in the Stalking Horse Agreement or the Sale Order, as the case may be. The description of the material terms of the Stalking Horse Agreement set forth herein are for summary purposes only and the terms of the Stalking Horse Agreement shall control in all circumstances.

executory contracts and unexpired leases will be listed on Schedule 2.1(a) to the Stalking Horse Agreement prior to the Bid Deadline. Pursuant to Section 3.4 of the Stalking Horse Agreement, the Buyer will be responsible for all costs of curing defaults under any Assumed Contract or Assumed Lease pursuant to section 365 of the Bankruptcy Code.

36. As set forth in Section 2.3 of the Stalking Horse Agreement, the aggregate consideration the Debtors will receive under the Stalking Horse Agreement will be the assumption of the Assumed Liabilities, which includes the Pre-Petition Term Loans and the DIP Facility.

37. Pursuant to Section 2.2 of the Stalking Horse Agreement, at the Closing, the Buyer will assume only the following liabilities: (a) the Pre-Petition Revolver Obligations; (b) the Specified Vendor Payables; (c) the Pre-Petition Term Loans; (d) the DIP Facility; and (e) all liabilities and obligations under the Assumed Leases, the Assumed Contracts and the Post-Petition Contracts arising after the Closing Date. If the Buyer is not the prevailing party at the Auction, the successful bidder at the Auction (a) will not be permitted to assume the Pre-Petition Revolver Obligations, unless WFF agrees otherwise, but instead will be required to arrange for the payment in full of all of the Pre-Petition Revolver Obligations from the cash portion of the purchase price and (b) will not be permitted to assume the Pre-Petition Term Loans or the DIP Facility unless the Zohar Entities agree otherwise, but instead will be required to arrange for the payment in full of the Pre-Petition Term Loans and the DIP Facility.

38. Local Rule 6004(b)(iv)(N) requires the disclosure of any provision that allows credit bidding. Pursuant to Section 2.2 of the Stalking Horse Agreement, the Total Consideration for the sale consists of the assumption of the Assumed Liabilities, which includes the Pre-Petition Term Loans and the DIP Facility.

39. The Stalking Horse Agreement contains a number of provisions governing the termination rights of the parties, which are set forth in Section 8.1 of the Stalking Horse Agreement. In general, (a) the parties can terminate the Stalking Horse Agreement by mutual consent, or (b) the Debtors can terminate if the Buyer is in material breach of the Stalking Horse Agreement and such breach continues for five business days following written notice from the Debtors, or (c) the Buyer may terminate the Stalking Horse Agreement under the following circumstances:

- the Debtors are in material breach of the Stalking Horse Agreement and such breach continues for five business days following written notice from the successful bidder;
- the Bidding Procedures Order has not been entered on or before November 21, 2008;
- the DIP Order has not been entered on or before December 5, 2008;
- the Sale Order has not been entered on or before December 19, 2008;
- any provision of the Bidding Procedures Order, the DIP Order or the Sale Order (in each case, after the entry thereof) has been stayed, revoked, amended or otherwise changed without the prior written consent of the Buyer;
- an order has been entered by the Court approving the sale of all or any portion of the Purchased Assets to a third party;
- if a default or event of default occurs and is continuing under the DIP Facility; or
- the Closing has not occurred on or before January 16, 2009.

40. The Buyer has not been required to post a deposit in connection with the Stalking Horse Agreement.

41. Local Rule 6004-1(b)(iv)(B) requires the disclosure of, among other things, the material terms of agreements between the management of a debtor and a proposed purchaser. The Debtors are unaware of any such agreements as of the date of the filing of this Motion. Nevertheless, to the extent that such management agreements or arrangements are implemented

in the future, the Debtors will file a notice with the Court disclosing the material terms thereof. Since the purchase price for the Sale already has been set, the Debtors would submit that any future agreements between one or more members of the Debtors' management and the Buyer does not affect the fairness of the Sale.

42. In addition to the termination provisions outlined above, Sections 7.1 and 7.2 of the Stalking Horse Agreement set forth a number of conditions that must be satisfied prior to Closing. Among other things, the Buyer's obligations to consummate the Sale is subject to the satisfaction at or prior to the Closing Date of each of the following conditions: (a) the Debtors' representations and warranties are true and correct as of the Closing Date, (b) the Debtors have performed all agreements and covenants required by the Stalking Horse Agreement to be performed by the Debtors prior to the Closing Date, (c) the claims of the Buyer or its Affiliates against the Debtors have been allowed by the Court; (d) the Buyer has obtained all licenses, permits, approvals, consents, certificates, registrations and authorizations as may be necessary for the lawful operation of the Purchased Assets by the Buyer from and after the Closing Date; (e) the Buyer and WFF will have entered into a definitive agreement, on terms acceptable to the Buyer, in its sole discretion, to restructure the Pre-Petition Revolver Obligations, effective as of the Closing, such that (i) no default or event of default exists, and (ii) no condition exists that would cause a default or event of default thereunder; and (f) the Buyer will have entered into a supply agreement, on terms acceptable to the Buyer, in its sole discretion, with each of the suppliers listed on Schedule 7.2(h) to the Stalking Horse Agreement.

43. Finally, Local Rule 6004-1(b)(iv)(J) requires that the Debtors indicate how they will retain access to their books and records to administer their estates after the Closing Date. Pursuant to Section 6.11 of the Stalking Horse Agreement, each of the Debtors and the Buyer

generally is required to preserve its records for the assets to be sold for a period of three years after Closing and to make such records available to the other party for such period of time. In addition, part of the assets excluded from the Sale pursuant to section 2.1(b)(ii) of the Stalking Horse Agreement include the Debtors' "company seal, minute books, charter documents, stock or equity record books and such other books and records pertaining to the organization, existence or capitalization of such [Debtor] as an entity."

VI. THE PROPOSED SALE ORDER

44. The proposed Sale Order attached hereto as Exhibit "A" also contains certain provisions that require disclosure under Local Rule 6004-1. Local Rule 6004-1(b)(iv)(C) requires disclosure of any releases provided pursuant to the Sale Transaction. Paragraph 22 of the Sale Order provides the Buyer with releases relating to the assets to be purchased by the Buyer and to any liabilities not otherwise characterized as Assumed Liabilities under the Stalking Horse Agreement. The Debtors submit that such releases are standard provisions in sale transactions so that purchasers know that when they close a transaction with a seller that they will not thereafter be sued by the same seller. The Debtors also submit that, as of the date of the filing of this Motion, they are aware of no claim against the Buyer that would be released by such provisions.

45. Local Rule 6004-1(b)(iv)(L) also provides that a sale motion highlight "anti-successor liability" provisions in a sale order. Paragraphs N, O and 21 of the Sale Order contain such anti-successor liability provisions for the benefit of the Buyer. Again, the Debtors submit that such language is standard in sale transactions of this type. The Debtors will have material unpaid prepetition unsecured claims after the Closing of the Sale and certain of its pension plans may be underfunded by unknown amounts. No buyer would be willing to purchase the Debtors'

assets if the buyer were at risk of liability for those claims under some theory of successor liability. In addition, the Debtors are providing direct notice of the sale to all known creditors of the estates and are publishing notice of the sale. As such, the Debtors submit that notice of the proposed "no successor liability" findings in the Sale Order is adequate as to all potentially affected parties.

46. Finally, the Sale Order provides for a waiver of the 10-day stay period for the effectiveness of the order under Bankruptcy Rule 6004(h), as well as the 10-day stay period provided for in Bankruptcy Rule 6006(d). For the reasons set forth below, the Debtors submit that cause exists for such waivers.

47. The Debtors and their advisors believe that the Stalking Horse Agreement, or such other agreement that the Debtors enter into with the prevailing bidder at the Auction, represents the best possible outcome for these cases. As noted above, extreme liquidity problems coupled with the current turmoil in the credit markets require the Debtors to sell their assets quickly or risk running out of cash imminently. Additionally, the proposed Sale ensures that the Debtors will be able to capture their value as a going concern. As a result, the sale at this time not only maximizes the value of the estates, but also ensures the preservation of approximately 1,000 jobs. The preservation of jobs, when possible, is an important element of any successful chapter 11 case. *See The LTV Corp. v. Back (In re Chateaugay Corp)*, 201 B.R. 48, 72 (Bankr. S.D.N.Y. 1996) (noting that "[p]ublic policy, as evidenced by chapter 11 of the Bankruptcy Code, strongly favors the reorganization and rehabilitation of troubled companies and the concomitant preservation of jobs . . . .").

VII. BASIS FOR RELIEF

A. APPROVAL OF THE SALE TRANSACTION UNDER SECTION 363

48. Section 363(b) of the Bankruptcy Code provides that a debtor, "after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b). A debtor must articulate a valid business justification to obtain court approval to proceed with asset sales outside of the ordinary course of business under section 363(b) of the Bankruptcy Code. *See, e.g., Myers v. Martin (In re Martin)*, 91 F.3d 389, 395 (3d Cir. 1996) (citing *Fulton State Bank v. Schipper (In re Schipper)*, 933 F.2d 513, 515 (7th Cir. 1991)); *Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1070-71 (2d Cir. 1983); *In re Abbotts Dairies, Inc.*, 788 F.2d 143, 147-48 (3d Cir. 1986) (implicitly adopting the "sound business judgment" test of *Lionel Corp.* and requiring good faith); *In re Delaware & Hudson Ry. Co.*, 124 B.R. 169, 175-76 (D. Del. 1991) (concluding that the Third Circuit adopted the "sound business judgment" test in the *Abbotts Dairies* decision); *Dai-Icho Kangyo Bank v. Montgomery Ward Holding Corp. (In re Montgomery Ward Holding Corp.)*, 242 B.R. 147, 153 (Bankr. D. Del. 1999) (same). Generally, Third Circuit courts require a debtor to satisfy the four following requirements in connection with a sale under section 363 of the Bankruptcy Code: "(1) a sound business purpose exists; (2) the sale price is fair; (3) the debtor has provided adequate and reasonable notice; and (4) the purchaser has acted in good faith." *In re Decora Indus., Inc.*, 2002 WL 32332749, at * 2 (D. Del. May 20, 2002) (citing *Del. & Hudson Ry. Co.*, 124 B.R. 169, 176 (D. Del. 1991)).

49. When a debtor demonstrates a valid business justification for a decision, a strong presumption arises "that in making [the] business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." *Official Comm. of Subordinated Bondholders v. Integrated Res., Inc.*

(In re Integrated Res., Inc.), 147 B.R. 650, 656 (S.D.N.Y. 1990) (holding that Delaware business judgment rule has "vitality by analogy" in chapter 11, especially where debtor is a Delaware corporation) (citations omitted).

50. In the instant case, the Debtors have demonstrated that a strong business justification exists for the Sale. First, a sale of the Debtors' business is the only alternative to a likely liquidation, and the proposed Sale will maximize recoveries for the Debtors' estates. Additionally, the Buyer or such other party that is the successful bidder at the Auction likely will continue to operate the Debtors' business, thus preserving nearly 1,000 jobs.

B. THE BUYER IS A GOOD FAITH PURCHASER

51. The Debtors request that the Buyer or such other party that is the successful bidder at the Auction receive the protections set forth in section 363(m) of the Bankruptcy Code. Specifically, section 363(m) of the Bankruptcy Code provides:

> The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

11 U.S.C. § 363(m). While the Bankruptcy Code does not define "good faith," the United States Court of Appeals for the Third Circuit previously addressed the meaning of the term:

> The requirement that a purchaser act in good faith . . . speaks to the integrity of his conduct in the course of the sale proceedings. Typically, the misconduct that would destroy a purchaser's good faith status at a judicial sale involves fraud, collusion between the purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders.

Abbotts Dairies, 788 F.2d at 147.

52. Here, the Buyer is not an "insider" of the Debtors. The Debtors and the Buyer have entered into the Stalking Horse Agreement without collusion, in good faith and from arm's-length bargaining positions, and, to the Debtors' knowledge, no party has engaged in any conduct that would cause or permit the Stalking Horse Agreement to be avoided under section 363(n) of the Bankruptcy Code. Similarly, the Debtors submit that any sale agreement they enter into with such other party that is the successful bidder at the Auction will also be negotiated at arms-length and in good faith. Accordingly, the Debtors seek a finding that the Buyer or such other party that is the successful bidder at the Auction is a good faith purchaser under section 363(m) of the Bankruptcy Code and has not violated section 363(n) of the Bankruptcy Code.

C. APPROVAL OF SALE FREE AND CLEAR OF LIENS, CLAIMS AND ENCUMBRANCES

53. The Debtors request approval to sell their assets free and clear of any and all liens, claims, and encumbrances in accordance with section 363(f) of the Bankruptcy Code except for (a) the Specified Vendor Payables; (b) Permitted Liens; (c) the Pre-Petition Term Loans, the DIP Facility and the Pre-Petition Revolver Obligations, in each case to the extent specifically assumed by the Buyer or, only if consented to by WFF or the Pre-Petition Term Lenders, as applicable, and in their discretion, such other party that is the successful bidder at the Auction (as each such undefined term is defined in the Stalking Horse Agreement). Pursuant to section 363(f) of the Bankruptcy Code, a debtor in possession may sell property of the estate "free and clear of any interest in such property of an entity other than the estate" if any one of the following conditions is satisfied:

- applicable nonbankruptcy law permits sale of such property free and clear of such interest;
- such entity consents;

- such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
- such interest is in bona fide dispute; or
- such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

11 U.S.C. § 363(f); *see also In re Collins*, 180 B.R. 447, 499-50 (Bankr. E.D. Va. 1995) ("Section 363(f) is phrased in the disjunctive, such that only one of the enumerated conditions must be met in order for the Court to approve the proposed sale."); *In re P.K.R. Convalescent Ctrs., Inc.*, 189 B.R. 90, 93-94 (Bankr. E.D. Va. 1995) ("[Section] 363 covers more situations than just sales involving liens . . . Section 363(f) addresses sales free and clear of any interest . . . ."). In addition, a court may authorize the sale of a debtor's assets free and clear of any liens, claims or encumbrances under section 105 of the Bankruptcy Code. *See Volvo White Truck Corp. v. Chambersburg Beverage, Inc. (In re White Motor Credit Corp.)*, 75 B.R. 944, 948 (Bankr. N.D. Ohio 1987) ("Authority to conduct such sales [free and clear of liens] is within the court's equitable powers when necessary to carry out the provisions of Title 11.").

54. WFF, as the holder of the Pre-Petition Revolver Obligations, consents to the assumption of the Pre-Petition Revolver Obligations by the Buyer (but not any other bidder), and, thus, the sale meets the requirements of section 363(f)(2) as to WFF. Similarly, the Zohar Entities consent to the assumption of the Pre-Petition Term Loans and the DIP Facility by the Buyer (but not any other bidder) and, thus, the sale meets the requirements of section 362(f)(2) as to the Zohar Entities. In addition, the Debtors believe that all lienholders could be compelled to accept a money satisfaction of their respective interests pursuant to section 363(f)(5) of the Bankruptcy Code. Furthermore, it is well established that a bankruptcy court has the power, pursuant to section 363(f) of the Bankruptcy Code, to approve the sale of a debtor's assets free and clear of any claims against the debtor. *In re TWA, Airlines, Inc.*, 322 F.3d 283, 288-90 (3d

Cir. 2003) (holding that successor liability claims are "interests in property" within the meaning of § 363(f)); *see also United Mine Workers of Am. Benefit Plan v. Leckie Smokeless Coal Co. (In re Leckie Smokeless Coal Co.)*, 99 F.3d 573 (4th Cir. 1996) (same). Accordingly, the Debtors submit that the sale of assets free and clear of liens, claims and encumbrances satisfies the statutory prerequisites of section 363(f) of the Bankruptcy Code. The Debtors also believe that the service of the sale notice in accordance with the terms set forth in the Bidding Procedures Motion will afford creditors with sufficient notice of the Sale and therefore provides additional justification for approval of the free and clear sale.

D. Approval of Assumption and Assignment of Contracts and Unexpired Leases

55. The Debtors seek authority to assume and assign executory contracts and unexpired leases in connection with the Sale. Section 365 of the Bankruptcy Code generally allows a debtor to assume or reject almost any executory contract and unexpired lease. 11 U.S.C. § 365(a). The ability to assume and reject executory contracts and unexpired leases allows a debtor to maximize the value of its estate by assuming executory contracts and unexpired leases that benefit the estate and rejecting other executory contracts and unexpired leases that are a burden on the estate. *L.R.S.C. Co. v. Rickel Home Ctrs., Inc. (In re Rickel Home Ctrs, Inc.)*, 209 F.3d 291, 298 (3d Cir. 2000); *Orion Pictures Corp. v. Showtime Networks, Inc. (In re Orion Pictures Corp.)*, 4 F.3d 1095, 1099 (2d Cir. 1993) (noting that section 365 of the Bankruptcy Code "permits the trustee or debtor-in-possession, subject to the approval of the bankruptcy court, to go through the inventory of executory contracts of the debtor and decide which ones it would be beneficial to adhere to and which ones it would be beneficial to reject.").

56. Under section 365(f) of the Bankruptcy Code, a debtor, after assuming a contract, may assign its rights under the contract to a third party. 11 U.S.C. § 365(f). Section

365(f)(2)(B) requires, however, that adequate assurance of future performance by an assignee exists. 11 U.S.C. § 365(f)(2)(B). The purpose of the adequate assurance requirement is to protect the interests of the non-debtor party to an assigned contract, as section 365(k) of the Bankruptcy Code relieves a debtor from liability for any breach of a contract that may occur after an assignment. *Cinicola v. Scharffeberger*, 248 F.3d 110, 120 (3d Cir. 2001). Adequate assurance of future performance is not required for every term of an executory contract or unexpired lease, but only such terms that are "material and economically" significant. *In re Fleming Cos., Inc.*, 499 F.3d 300, 305 (3d Cir. 2007).

57. The Stalking Horse Agreement requires, as an integral part of the Sale, the assumption and assignment of certain executory contracts and unexpired leases. It is thus an appropriate exercise of business judgment for the Debtors to agree to assume and assign the contracts and leases as will be required by the Stalking Horse Agreement. Additionally, the Debtors submit that (i) the procedures for resolving M&M Lien Claims with respect to Continuing Customers (as each such term is defined in the Debtors' Motion for Authority to Establish Procedures for the Resolution of Mechanic's, Materialman's, and Supplier's Liens and Statutory and Common Law Trust Claims and the orders related to same) and (ii) the notice provisions, and the objection deadline for counterparties to raise objections to the assumption and assignment of contracts and leases, as proposed in the Bidding Procedures Motion, are adequate to protect the rights of counterparties to the Debtors' contracts and leases.

E. WAIVER OF TEN DAY STAY IMPOSED BY BANKRUPTCY RULES 6004(h) AND 6006(d)

58. The Debtors also request that, upon entry of the Sale Order, the Court waive the ten day stay requirements of Bankruptcy Rules 6004(h) and 6006(d). First, as demonstrated by the facts of these cases, it is crucial to the Debtors' bankruptcy cases that the Sale be consummated as soon as possible. Second, the waiver of the ten day stay imposed by

Bankruptcy Rules 6004(h) and 6006(d) is a condition desired by the Buyer and the product of extensive arm's length negotiations. For these reasons, the Debtors respectfully submit that the Court waive the ten day stay requirements contained in Bankruptcy Rules 6004(h) and 6006(d).

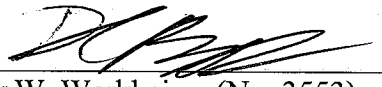
VIII. NOTICE

59. Notice of this Motion has been given to: (a) the Office of the United States Trustee for the District of Delaware; (b) the Debtors' thirty largest unsecured creditors, as identified in the Debtors' chapter 11 petitions; (c) counsel to the Lenders; and (d) counsel to the Buyer. In light of the nature of the relief requested, the Debtors submit that no other or further notice is required.

WHEREFORE, the Debtors respectfully request that the Court (a) enter the Sale Order in substantially in the form attached hereto as Exhibit "A," or such other order approving a sale to such other party that is the successful bidder at the Auction; and (b) grant such other and further relief to the Debtors as the Court may deem just and proper.

Dated: November 19, 2008

MORRIS, NICHOLS, ARSHT & TUNNELL LLP



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