

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re

CADENCE INNOVATION LLC, et al.,¹

Debtors.

Chapter 11

Case No. 08-11973 (KG)

Jointly Administered

Hearing Date: November 2, 2016 at 2:00 p.m. ET

Objection Due: October 11, 2016 at 4:00 p.m. ET

**MOTION OF THE LIQUIDATING TRUSTEE FOR AN ORDER APPROVING THE
SALE OF CERTAIN ASSETS OF THE DEBTORS' ESTATES TO OAK POINT
PARTNERS, INC. FREE AND CLEAR OF LIENS, CLAIMS, INTERESTS, AND
ENCUMBRANCES PURSUANT TO 11 U.S.C. §§ 105 AND 363 AND RELATED RELIEF**

James P. Carroll, the liquidating trustee ("Trustee") of the Cadence Liquidating Trust, by his counsel, Clark Hill PLC and Womble Carlyle Sandridge & Rice, LLP, requests the entry of an order, pursuant to 11 U.S.C. §§ 105 and 363, approving the sale of certain assets of the estates to Oak Point Partners, Inc. ("Oak Point") and related relief ("Motion"). In support of the Motion, the Trustee respectfully states as follows:

Jurisdiction

1. The Court has jurisdiction over this Motion pursuant to 28 U.S.C. § 1334. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A). Venue of this proceeding and this Motion is proper in this District pursuant to 28 U.S.C. §§ 1408 and 1409.

2. The statutory predicates for the relief sought herein are 11 U.S.C. §§ 105(a) and 363. Relief is also warranted under Rules 2002 and 6004 of the Federal Rules of Bankruptcy Procedure.

Background

3. On August 26, 2008 ("Petition Date"), the above-captioned debtors (collectively,

¹ The Debtors and the last four digits of their respective taxpayer identification numbers are as follows: Cadence Innovation LLC (5972) and New Venture Real Estate Holdings, LLC (2397).

“Debtors”) filed voluntary petitions for relief under the Bankruptcy Code.

4. On June 28, 2011, the Debtors filed the Debtors’ First Amended Joint Plan of Liquidation (Docket No. 1845) (“Plan”), and the Debtors’ First Amended Disclosure Statement for Debtors’ Joint Plan of Liquidation (Docket No. 1846).

5. On August 17, 2011, the Court entered an order confirming the Plan (Docket No. 1922) (“Confirmation Order”).

6. The Plan provided for the formation of the Cadence Liquidating Trust (Plan ¶ 2.2.1). Pursuant to the Plan, the Liquidating Trustee was appointed as the representative of the estates for all purposes. Plan ¶ 2.2.4 (a).

7. The Plan authorized the Liquidating Trustee, among other things, to “liquidate the Cadence Trust Assets.” Plan ¶ 2.2.5(a). The Plan further provides that “[t]he powers granted to the Cadence Liquidating Trustee shall be exercisable without further approval of the Court.” Plan ¶ 2.2.5. Notwithstanding this authorization, in the interest of maximizing the value of the Trust Assets for the benefit of creditors, the Trustee seeks the entry of an order authorizing the sale of the remaining estates’ assets to Oak Point.

8. On December 15, 2011 (the “Effective Date”), the Plan became effective in accordance with its terms as set forth in Article V of the Plan.

9. Since his appointment, the Trustee has administered the estates for the benefit of the creditors in accordance with his powers and duties. The Trustee is now in the process of winding down the administration of these cases. To that end, the Trustee is engaged in efforts to ensure that the maximum value of the estates’ assets is realized, which efforts include pursuing the sale of any remaining assets.

10. While the Trustee believes he has administered all materials assets of the estates,

the Trustee has determined that there may exist property of the estates, consisting of known or unknown claims, property rights, or assets, which have not been previously sold, assigned or transferred, which the Trustee believes, in his sound business judgment, cannot be monetized economically via auction or other method and are of a value not significant to the estates (collectively, “Remnant Assets”). The Trustee believes that the cost of his pursuit of the Remnant Assets will likely exceed the benefit that the estates would possibly receive from such pursuit.

11. The Trustee and Oak Point have negotiated an agreement (“Purchase Agreement”) for the sale of the Remnant Assets. A copy of the Purchase Agreement is attached as Exhibit A to this Motion.

Relief Requested

12. By this Motion, the Trustee seeks the entry of an order pursuant to 11 U.S.C. §§ 105 and 363(b), (f), and (m), as well as Federal Rule of Bankruptcy Procedure 6004, and Rule 6004-1 of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the “Local Rules”) (a) authorizing the Trustee to sell the Remnant Assets free and clear of all liens, claims, interests, and encumbrances; and (b) approving the terms of the Purchase Agreement.

13. The Purchase Agreement generally provides for a purchase price of \$10,000.00 (“Purchase Price”) for all Remnant Assets to be paid by Oak Point to the Trustee for the benefit of the estates. Consistent with Local Rule 6004-1(b), the Trustee highlights the following:

- a. The sale contemplated by the Purchase Agreement is a private sale with no contemplated auction;
- b. There are no sale closing deadlines, however, the Purchase Price will be paid

within three (3) business days of Oak Point's receipt of a signed Purchase Agreement;

- c. The sale contemplates relief from the fourteen-day stay imposed by Bankruptcy Rule 6004(h); and
- d. No personally identifiable information is being sold pursuant to the Purchase Agreement.

Neither the Purchase Agreement nor the proposed sale order contain any of the other provisions required to be highlighted under Local Rule 6004-1(b)(iv)(A)-(O).

14. In accordance with the Purchase Agreement, the Remnant Assets do not include cash held by the Trustee and the Purchase Price for the Remnant Assets.

15. In the Trustee's business judgment, the Purchase Price represents a fair and reasonable sale price for such assets and is the highest and best offer for the sale of the Remnant Assets. The benefit of receiving immediate payment for assets or payment rights which are largely unknown outweighs the potential benefits of retaining such assets.

16. A private sale is contemplated for the Remnant Assets, however, in the event that the Trustee receives a higher and better offer for the Remnant Assets prior to the objection deadline, the Trustee is willing to conduct an auction for the Remnant Assets.

17. It is for the foregoing reasons that the Trustee believes that the sale of the Remnant Assets in accordance with the terms of the Purchase Agreement serves the best interests of the estates and the Debtors' creditors as the sale will allow the Trustee to realize additional funds for the benefit of the estates. Accordingly, the sale to Oak Point should be approved as requested.

Authority for Requested Relief

18. Bankruptcy Code section 363(b)(1) provides that “[t]he trustee, 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)(1). To approve use, sale or lease, other than in the ordinary course of business, the Court must find “some articulated business justification.” *See In re Martin (Myers v. Martin)*, 91 F.3d 389, 395 (3d Cir. 1996) and *In re Abbotts Dairies of Pa. Inc.*, 788 F.2d 143 (3d Cir. 1986) (requiring good faith purchasing). Moreover, Bankruptcy Code section 105(a) provides that “[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code].” 11 U.S.C. § 105(a).

19. Courts have held that transactions should be approved under Bankruptcy Code section 363(b) when they are supported by the sound business judgment of the debtor or trustee, as the case may be. *See In re Martin*, 91 F.3d 389, 395 (3d Cir. 1986); *In re Del. & Hudson Ry. Co.*, 124 B.R. 169, 176 (Bankr. D. Del. 1991) (holding that transactions should be approved under Section 363(b)(1) when: (a) they are supported by the sound business judgment of a debtor’s management; (b) interested parties are provided with adequate and reasonable notice; (c) the sale price is fair and reasonable; and (d) the purchaser is acting in good faith); *In re Phoenix Steel Corp.*, 82 B.R. 334, 335 (Bankr. D. Del. 1987) (stating that the elements necessary for approval of a section 363 sale in a chapter 11 case are “that the proposed sale is fair and equitable, that there is a good business reason for completing the sale and the transaction is in good faith.”).

20. The Trustee submits that the Purchase Price is reasonable, for fair value, and was negotiated at arm’s length and in good faith. Moreover, to the best of the Trustee’s knowledge, there is no other potential buyer willing to pay more for these remaining assets. The sale will

allow the Trustee to immediately realize additional funds for the benefit of the estates, thereby increasing the pool of assets available for creditor distribution. Thus, it is the Trustee's sound business judgment that in light of the value to be realized by the estates through the sale of the Remnant Assets, and the fact that the proposed sale is the end result of good-faith negotiations between the parties, the proposed sale of the Remnant Assets to the Purchaser is in the best interest of the estates and their creditors.

21. Courts have held that approval of a proposed sale of property pursuant to Bankruptcy Code section 363(b) is appropriate if a court finds that the transaction represents a reasonable business judgment on the part of the debtor. *See Comm. of Equity Sec. Holders v. Lionel Corp.*, 722 F.2d 1063 (2d Cir. 1983); *Stephens Indus., Inc. v. McClung*, 789 F.2d 386, 391 (6th Cir. 1986); *In re Ionosphere Clubs, Inc.*, 100 B.R. 670, 675 (Bankr. S.D.N.Y. 1989); *In re Phoenix Steel Corp.*, 82 B.R. 334, 335 (Bankr. D. Del. 1987); *In re Del. & Hudson Ry. Co.*, 124 B.R. 169, 176 (Bankr. D. Del. 1991). A trustee's showing of sound business justification need not be unduly exhaustive; instead the trustee is "simply required to justify the proposed disposition with sound business reasons." *In re Baldwin United Corp.*, 43 B.R. 888, 906 (Bankr. S.D. Ohio 1984).

22. Whether or not there are sufficient business reasons to justify a sale depends upon the facts and circumstances of each case. *See Lionel*, 722 F.2d at 1071. Bankruptcy courts are given substantial discretion in deciding whether to authorize a sale of a debtor's assets outside of the ordinary course of business. *See In re Chateaugay Corp.*, 973 F.2d 141, 144 (2d Cir. 1992). The Trustee believes that the Purchase Agreement represents a prudent and proper exercise of business judgment and is in the best interest of creditors of the Debtors' estates.

23. Although the Bankruptcy Code does not define "good faith purchaser," the United

States Court of Appeals for the Third Circuit construing Bankruptcy Code section 363(m), has stated that “the phrase encompasses one who purchases in ‘good faith’ and for ‘value’.” *In re Abbott's Dairies of Pa., Inc.*, 788 F.2d 143, 147 (3d Cir. 1986); *See also In re Mark Bell Furniture Warehouse, Inc.*, 992 F.2d 7, 8 (1st Cir. 1993); *In re Willemain v. Kivitz*, 764 F.2d 1019, 1023 (4th Cir. 1985); *In re Vanguard Oil & Serv. Co.*, 88 B.R. 576, 580 (E.D.N.Y. 1988).

24. Bankruptcy Code section 363(f) permits the Trustee to sell assets free and clear of all interests which may be asserted against such assets, with any such interests attaching to the net proceeds of the sale, subject to the rights and defenses of the Trustee with respect thereto. As Bankruptcy Code section 363(f) is stated in the disjunctive, when proceeding pursuant to section 363(b), it is only necessary to meet one of the five conditions of section 363(f). To the extent that there are interests that may be asserted in the Remnant Assets, the Trustee believes that one or more of the aforementioned conditions have been satisfied.

25. In accordance with Bankruptcy Rule 6004(f)(1), asset sales outside of the ordinary course of business may be by private or public sale. Fed. R. Bankr. P. 6004(f)(1). A debtor has broad discretion in determining the manner in which its assets are sold. *Berg v. Scanlon (In re Alisa P'ship)*, 15 B.R. 802, 802 (Bankr. D. Del. 1981) (“[T]he manner of [a] sale is within the discretion of the trustee . . .”); *In re Bakalis*, 220 B.R. 525, 531 (Bankr. E.D.N.Y. 1998) (noting that a trustee has “ample discretion to administer the estate, including authority to conduct public or private sales of estate property.”) (internal quotations and citations omitted). As long as a debtor maximizes the return to its estate, a court should defer to a debtor’s business judgment of how to conduct a sale of its assets. *Id.* at 532 (recognizing that although a trustee’s business judgment enjoys great judicial deference, a duty is imposed on the trustee to maximize the value obtained from a sale); *In re Nepsco, Inc.*, 36 B.R. 25, 26 (Bankr. D. Me. 1983)

(“Clearly, the thrust of th[e] statutory scheme [governing 363 sales] is to provide maximum flexibility to the trustee, subject to the oversight of those for whose benefit he acts, i.e., the creditors of the estate.”). Accordingly, if a debtor concludes that conducting a private sale, as opposed to a public auction, is in the best interest of the estate, the debtor should be permitted to do so. *Penn Mut. Life Ins. Co. v. Woodscape Ltd. P’ship (In re Woodscape Ltd. P’ship)*, 134 B.R. 165, 174 (Bankr. D. Md. 1991) (noting that, with respect sales of estate property, “[t]here is no prohibition against a private sale . . . and there is no requirement that the sale be by public auction.”).

26. The Trustee submits that a private sale of the Remnant Assets is appropriate. The Trustee does not believe that there are any other parties that would offer funds for the Remnant Assets. The delay and costs associated with marketing the Remnant Assets would likely negate any benefit to be derived through a public sale of such assets. Accordingly, the Trustee submits that a private sale of the Remnant Assets is in the best interest of the estates and should be approved.

27. Based on the foregoing, the Trustee submits that the private sale of the Remnant Assets is a prudent exercise of his business judgment under the circumstances and is in the best interests of the estates and the Debtors’ creditors. Therefore, the Motion should be approved.

Waiver of Stay of Order

28. To successfully implement the Purchase Agreement, the Trustee also seeks a waiver of the fourteen-day stay under Bankruptcy Rule 6004(h).

Notice

29. Notice of this Motion has been given to the Office of the United States Trustee, Oak Point, and all parties requesting notice pursuant to Fed. R. Bankr. P. 2002. The Trustee

submits that such notice is proper and adequate and no further notice is required. The Trustee further requests that this Court determine that such notice is adequate and that other and further notice be waived.

WHEREFORE, the Trustee respectfully requests entry of an order authorizing the sale of the Remnant Assets pursuant to the terms of the Purchase Agreement, waiving the fourteen-day stay under Bankruptcy Rule 6004(h), and granting such further relief as this Court deems just and proper.

Date: September 23, 2016

/s/ *Ericka F. Johnson*

Mark L. Desgrosseilliers (Del. Bar No. 4083)
Ericka F. Johnson (Del. Bar No. 5024)
Womble Carlyle Sandridge & Rice, LLP
222 Delaware Ave, Ste 1501
Wilmington, DE 19801
Telephone: (302) 252-4337
Facsimile: (302) 661-7737

-and-

Robert D. Gordon
Clark Hill PLLC
151 S. Old Woodward, Ste 200
Birmingham, MI 48009
Telephone: (248) 988-5882
Facsimile: (248) 988-2502

EXHIBIT A

PURCHASE AGREEMENT AND ASSIGNMENT OF CLAIMS AND INTERESTS

THIS PURCHASE AGREEMENT AND ASSIGNMENT OF CLAIMS AND INTERESTS (this "Agreement"), dated as of September __, 2016 is between **CADENCE LIQUIDATING TRUST** ("Trust" or "Seller") and **OAK POINT PARTNERS, INC.** ("Purchaser").

WITNESSETH:

WHEREAS, on August 26, 2008, Cadence Innovation, LLC and an affiliated entity (collectively, the "Debtors") filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware ("Bankruptcy Court"), jointly administered under Case No. 08-11973 (KG) ("Bankruptcy Case"); and

WHEREAS, on August 17, 2011, the Bankruptcy Court entered an order confirming the Debtors' First Amended Joint Plan of Liquidation, pursuant to which the Trust was formed and received the assets of the Debtors' bankruptcy estates (collectively, the "Estate") and the Liquidating Trustee, James P. Carroll (the "Trustee"), was appointed as the representative of the Estate for all purposes; and

WHEREAS, at the time of the execution of this Agreement, while the Trustee believes he has administered all materials assets of the Estate, there may be property of the Estate remaining, consisting of known or unknown assets or claims which have not been previously sold, assigned, or transferred, and which the Trustee believes, in his sound business judgment, cannot be monetized economically via auction or other method and are of a value not significant to the Estate ("Remnant Assets"); and

WHEREAS, Remnant Assets specifically **exclude** (a) cash held at the time of this Agreement by Trustee; and (b) the Purchase Price (as hereinafter defined) to be delivered pursuant hereto; and

WHEREAS, Seller has the power and authority to sell and assign all right, title and interest in and to the Remnant Assets to Purchaser, including, but not limited to the proceeds thereof.

NOW THEREFORE, in consideration of the promises and mutual undertakings herein contained, Seller and Purchaser agree as follows:

1. **Purchase Price.** The Purchase Price shall be good funds in the amount of Ten Thousand and No/100 Dollars (\$10,000.00) payable within 3 business days of receipt by Purchaser of this executed Agreement.
2. **Assignment of Remnant Assets.** Seller hereby irrevocably and unconditionally sells, assigns, transfers and conveys to Purchaser all of the Seller's right, title and interest under, in and to the Remnant Assets, as well as any and all claims and rights related to the Remnant Assets, including, without limitation, all cash, securities, instruments and other property that may be paid or issued in conjunction with the Remnant Assets and all amounts, interest, and costs due under the Remnant Assets.
3. **Authority to Sell.** The sale of the Remnant Assets by the Seller is made pursuant to the authority vested in the Seller.
4. **Payments Received on Remnant Assets.** Seller further agrees that any payments received by Seller on account of any Remnant Assets shall constitute property of the Purchaser to which the Purchaser has an absolute right, and that Seller will promptly deliver such payment to Purchaser at Purchaser's address set forth below. Seller agrees to use reasonable efforts to forward to Purchaser notices received with respect to any Remnant Assets.
5. **Seller's Representations and Warranties.** In consideration of Purchaser's agreements herein and to induce Purchaser to enter into this Agreement, Seller represents and warrants to Purchaser that Seller has

full lawful right, title, power and authority to enter into this Agreement and to convey Seller's interest to Purchaser in the Remnant Assets as is set forth in this Agreement free of any liens or other encumbrances.

EXCEPT AS SPECIFICALLY SET FORTH HEREIN, THE SELLER SELLS, ASSIGNS, AND TRANSFERS THE REMNANT ASSETS TO THE PURCHASER "AS IS, WHERE IS" WITHOUT ANY REPRESENTATIONS OR WARRANTIES WHATSOEVER, WHETHER EXPRESS, IMPLIED OR IMPOSED BY LAW.

6. **No Assumption of Liabilities.** The parties agree that Purchaser is acquiring only the Remnant Assets and that Purchaser is neither acquiring nor assuming any liabilities of the Seller under this Agreement, except as may otherwise expressly be provided herein.

7. **Documents of Assignment.** From time to time upon request from Purchaser, Seller shall execute and deliver to Purchaser such documents reasonably requested by Purchaser to evidence and effectuate the transfer contemplated by this Agreement in a form reasonably acceptable to the parties hereto. However, Purchaser shall reimburse Seller for its reasonable costs associated with such compliance.

8. **Limited Power of Attorney.** Solely with respect to the Remnant Assets, and to the extent permitted by law, Seller hereby irrevocably appoints Purchaser as its true and lawful attorney and authorizes Purchaser to act in Seller's stead, to demand, sue for, compromise and recover all such amounts as now are, or may hereafter become, due and payable for or on account of the Remnant Assets herein assigned. Seller grants unto Purchaser full authority to do all things necessary to enforce the Remnant Assets and its rights thereunder pursuant to this Agreement.

9. **Entire Agreement.** This Agreement embodies the entire agreement and understanding between Seller and the Purchaser and supersedes any and all prior agreements and understandings with respect to the subject matter hereof. This Agreement may not be amended or in any manner modified unless such amendment or modification is in writing and signed by both parties.

10. **Benefits and Binding Effect.** All provisions contained in this Agreement or any document referred to herein or relating hereto shall inure to the benefit of and shall be binding upon the respective successors and assigns of Seller and the Purchaser.

11. **Governing Law.** This Agreement shall be governed by and construed in accordance with the internal laws of the State of Delaware, without giving effect to choice of law principles of the State of Delaware.

12. **Counterparts.** This Agreement may be executed in one or more counterparts, each of which shall be deemed an original but all of which together will constitute one and the same instrument, and copies or facsimiles of execution signatures shall be equivalent to original signatures.

[remainder intentionally left blank; signature page follows]

THIS AGREEMENT has been duly executed as of the day and year first above written.

OAK POINT PARTNERS, INC.

By: _____

Name: ERIC LINN

Its: President

Address (*for regular mail and mail forwarding*): PO Box 1033, Northbrook, IL 60065-1033

Address (*for overnight delivery*): 5215 Old Orchard Road, Suite 965, Skokie, IL 60077

tel (847) 577-1269 fax (847) 655-2746

CADENCE LIQUIDATING TRUST

By: _____

Name: JAMES P. CARROLL

Its: Liquidating Trustee

Address: 197M Boston Post Road West #367, Marlborough, MA 01752

tel (617) 899-9007