

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT NEBRASKA

In re:

S3 DIGITAL CORP.,<sup>1</sup>

Debtor.

Case No. 17-81540

Chapter 11

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In re:

CIRCLE MEDIA, INC.,

Debtor.

Case No. 17-81541

Chapter 11

**DEBTORS' MOTION TO ESTABLISH AND APPROVE (I) BIDDING PROCEDURES  
AND BID PROTECTIONS RELATED TO THE SALE OF DEBTORS' ASSETS FREE  
AND CLEAR OF LIENS, ENCUMBRANCES, AND INTERESTS, AND (II)  
ASSUMPTION AND ASSIGNMENT PROCEDURES**

The above-captioned debtors and debtors-in-possession (collectively, the "Debtors") hereby request that the Court enter an Order pursuant to 11 U.S.C. § 105(a), 363, and 365 and Federal Rules of Bankruptcy Procedure 2002, 6004, and 9006 (a) approving Debtors' proposed bidding procedures and the bid protections, attached as Exhibit "A" (the "Bid Procedures"), and notice procedures with respect to the same, (b) approving, subject to the Bid Procedures, the sale of substantially all of Debtors' assets free and clear of liens, claims, encumbrances, and interests (the "Sale"), and (c) scheduling the final hearing to approve the Sale (the "Sale Hearing"). In support of this Motion, Debtors state as follows:

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<sup>1</sup> The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: S3 Digital Corp. (9650); and Circle Media, Inc. (9123). The Debtors' location is 20965 Corral Road, Omaha, NE 68022.

### **Introduction**

1. The Debtors have entered into a purchase agreement (the “Stalking Horse Purchase Agreement”) dated as of October 27, 2017, by and among the Debtors and Circle Orange LLC (the “Stalking Horse Bidder”) for the sale of substantially all of Debtors’ assets, including its proprietary software, Fan.DexDMS (defined below).

2. Under the Stalking Horse Purchase Agreement (which is further described below), the consideration that will be paid to Debtors’ estates will be not less than \$500,000.00. Debtors believe that this represents the highest and best value for the assets and that by combining the Stalking Horse Purchase Agreement with the Bid Procedures, the Debtors will maximize the value of their bankruptcy estates for the benefit of all parties in interest.

### **Relief Requested**

3. Debtors are requesting the following specific relief pursuant to this Motion:

- a. The Court’s approval of the proposed Bid Procedures;
- b. The Court’s approval of the form and manner of notice with respect to the matters described herein, including the Bid Procedures;
- c. The Court’s approval of the Debtors’ selection of the Stalking Horse Bidder, including the bid protections for the Stalking Horse Bidder set forth in the Bid Procedures, and Debtors entering into the Stalking Horse Purchase Agreement;
- d. The scheduling of the Sale Hearing;
- e. The Court’s approval of the Debtors’ request to shorten the notice period to seven (7) calendar days and set an expedited hearing date for November 6, 2017 at 1:00 p.m. Central Time or as soon thereafter as possible, to hear and consider this Motion;

- f. The Court's authorization for the sale and other disposition of substantially all of Debtors' assets free and clear of liens, claims, interests, and encumbrances with any such interest to attach to the proceeds with the same validity and priority as such liens had prior to the competition of the sale; and
- g. Any relief related to the foregoing requests.

### **Jurisdiction & Venue**

- 4. This Court has jurisdiction pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding under 28 U.S.C. §157(b)(2).
- 5. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

### **Background**

#### **A. Debtors' Business Background and Chapter 11 Filing.**

- 6. On October 27, 2017 (the "Petition Date"), S3 Digital Corp. ("S3 Digital") and Circle Media, Inc. ("Circle Media") filed voluntary petitions for relief under chapter 11 of the United States Bankruptcy Code.
- 7. As of the Petition Date, Debtors continue to operate their businesses as debtors-in-possession pursuant to §§ 1107 and 1108 of the Bankruptcy Code.
- 8. No trustee, examiner, or creditor committee has been appointed in either case.
- 9. S3 Digital Corp., together with its wholly-owned subsidiary, Circle Media, Inc., is a data analytics marketing company primarily serving the sports market, with capabilities extending into other verticals, such as e-commerce and the arts. The company aggregates numerous disparate databases containing consumer information (*i.e.*, tickets, donations, merchandise, concessions, email, mobile, and social media) to create comprehensive consumer

fan profiles through its proprietary platform Fan.Dex Data Management Solution (“Fan.DexDMS”). These profiles are used by sports properties and their partners to develop sophisticated marketing and sales strategies tailored to individual fans and consumers. This data-powered approach leads to deeper and stronger fan and consumer engagement, which can dramatically increase revenue and decrease marketing and customer support costs for clients. S3 Digital Corp. is headquartered in Omaha, Nebraska.

10. Founded in 2012, Circle Media, Inc. is one of the leading sports fan intelligence and engagement platforms. Through its proprietary data management platform, Fan.DexDMS, Circle Media, Inc. powers the “Fan Graph” for sports properties, ranging from universities to leagues to individual teams. Circle Media, Inc. enables these sports properties to integrate property-specific and third-party databases and to unlock the value behind this data. This data can then be used to drive highly targeted engagement of sports fans from sports properties themselves, as well as companies, brands, advertisers, and sponsors.

11. Circle Media, Inc. provides two key products to sports properties: i) the Fan.DexDMS platform; and ii) Fan Profiles. The Fan.DexDMS platform serves as the intelligence layer connecting disparate on-property and third-party databases containing fan-specific information, including demographics, psychographics, behavior, and relationships. The Fan Profiles, created by the Fan.DexDMS platform enable sports properties to utilize the data to drive more meaningful engagement with fans, through various channels including social media, traditional media, special engagements, and commerce. By utilizing Circle Media, Inc.’s “Big Data” approach to fan intelligence, sports properties are enabled to generate potentially meaningfully higher return-on-investment, an overall increase in fan engagement, and an increase in revenue across their entire ecosystem (*i.e.*, ticketing, merchandise, and development).

12. Some of Circle Media, Inc.'s current and past direct and indirect clients include Notre Dame, University of Iowa, Rutgers, LSU, Temple, St. Joseph's, University of Central Florida, Virginia, UAB, Siena, FIU, Temple, University of San Francisco, Georgia State, Louisville, and Arizona Interscholastic Association.

13. Despite Circle Media, Inc.'s affiliation with outstanding universities and interscholastic associations, Circle Media, Inc. has struggled to turn prospects into paying customers as quickly as it had anticipated and has spent more capital developing the propriety software than anticipated, and thus, it has not generated the amount of revenue that it had anticipated, causing a financial strain that, along with pending litigation, has prevented the Debtors from raising additional capital.

14. In 2015, Debtors were named as third-party defendants in a lawsuit in the Supreme Court of the State of New York, County of New York (Index No. 161128/2015) related to the breach of a lease of the twelfth (12th) floor at 85 Fifth Avenue, New York, New York that resulted in a judgment being entered against the Debtors, which Debtors appealed.

15. Moreover, Debtors recently were named as defendants in a lawsuit in the Superior Court of the State of California in and for the County of San Francisco for breach of contract.

16. These lawsuits, coupled with slower-than-expected revenue growth, have impeded the Debtors' ability to raise capital and/or sell their assets.

17. Recognizing the need to explore strategic alternatives, the Debtors retained the investment banker, Frontcourt Group, LLC ("Frontcourt"), in July 2016 through November 2016 to market the Debtors to potentially interested parties. In connection with this process, Frontcourt compiled diligence information, prepared a confidential information memorandum, and compiled a targeted list of strategic and financial buyers.

18. Despite these efforts, and subsequent due diligence and discussions with potentially interested parties, this marketing process did not give rise to a viable transaction, in large part because of the pending litigation, lower than anticipated annual revenue, and a significant outstanding balance of account payables. From November to the present, the Debtors have continued to explore a transaction with interested parties to maximize value, in addition to maintaining contact with certain potentially interested parties. However, the Debtors' financial position has continued to deteriorate.

19. To preserve and maximize value, the Debtors again sought to implement a sale process, this time in connection with a chapter 11 filing that would allow the assets to be sold free and clear. Through this process, after vigorous marketing efforts and discussions with potentially interested parties, the Debtors determined that the stalking horse bid from the Stalking Horse Bidder offered the Debtors the best alternative to maximize value for their estates and creditors.

20. Debtors' need to proceed swiftly cannot be overstated. It is critical for the Debtors' preserving value for the benefit of their estates to consummate a sale to monetize their assets as soon as possible because every day that passes without a sale requires the Debtors to expend precious resources on employees and critical trade vendors that could be used to repay creditors. Once a sale is consummated, those costs will decrease dramatically.

21. A detailed description of the Debtors, their businesses, and the facts and circumstances supporting this Motion and Debtors' chapter 11 cases are set forth in the *Declaration of Joseph Casey, Chief Executive Officer of Debtors, in Support of Chapter 11 Petitions and First Day Motions*, which was filed contemporaneously with Debtors' voluntary petitions.

**B. Summary of the Timeline of the Proposed Sale.**

22. The Debtors request that the Court approve the following proposed timeline in connection with this Motion, the proposed Bid Procedures, and the approval of the Sale:

<u>Event</u>	<u>Deadline</u>
<b>Hearing on this Motion</b>	November 6, 2017 at 1:00 p.m. Central Time
<b>Bid Deadline</b>	November 22, 2017 at 5:00 p.m. Central Time
<b>Auction (if necessary)</b>	November 27, 2017 at 9:00 a.m. Central Time
<b>Sale Objection Deadline</b>	November 28, 2017 at 5:00 p.m. Central Time
<b>Sale Hearing</b>	November 29, 2017 at 1:00 p.m. Central Time

**C. Summary of the Stalking Horse Purchase Agreement.**

23. The following summarizes the material terms and conditions of the Stalking Horse Purchase Agreement, which is attached as Exhibit “B”. To the extent that there is a conflict between the summary herein and the Stalking Horse Purchase Agreement, the Stalking Horse Purchase Agreement controls:

<u>Provision</u>	<u>Description</u>
<b>Purchaser</b> <i>APA Preamble</i>	Circle Orange LLC and/or its assignee or designee
<b>Purchased Assets</b> <i>APA § 2.1</i>	Any and all of Circle Media’s right, title, and interest in, among other things and without limitation, the following: <ul style="list-style-type: none"> <li>• tangible assets, such as personal property, including, without limitation, computers;</li> <li>• all Accounts Receivable, the Transferred Contracts, Intellectual Property, Permits, insurance benefits, rights and proceeds, most books and records, and goodwill; and</li> <li>• claims against any third parties in respect of the Purchased Assets and/or any Assumed Liability.</li> </ul>
<b>Excluded Assets</b> <i>APA § 2.2</i>	The following assets, among others, are not part of the Sale and are excluded from the Purchased Assets:

	<ul style="list-style-type: none"> <li>• any Contracts other than the Transferred Contracts;</li> <li>• the Purchase Price, cash, negotiable instruments, and cash equivalents;</li> <li>• refunds or credits of Taxes or amounts otherwise owed or to be issued arising out of or related to the Purchased Assets or the Business for the Pre-Closing Tax Period;</li> <li>• the Debtors' organizational documents; and</li> <li>• all other than claims that are not claims with respect to the Purchased Assets, including without limitation claims and causes of action arising under chapter 5 of the Bankruptcy Code.</li> </ul>
<b>Assumed Liabilities</b> <b>APA § 2.3</b>	<p>Purchaser shall assume only the following Liabilities of Circle Media:</p> <ul style="list-style-type: none"> <li>• Liabilities relating to the Purchased Assets solely to the extent arising after the Closing Date;</li> <li>• All Cure Amounts, if any, as to Transferred Contracts; and</li> <li>• Taxes attributable to the Purchased Assets after Closing.</li> </ul>
<b>Excluded Liabilities</b> <b>APA § 2.4</b>	<p>Purchaser will not assume any Liability, other than the Assumed Liabilities, including, without limitation, the following:</p> <ul style="list-style-type: none"> <li>• Liabilities which are not Assumed Liabilities;</li> <li>• Liabilities relating to, asserted in, or arising out of the Bankruptcy Case (other than Cure Amounts relating to Transferred Contracts);</li> <li>• Liabilities associated with any (i) Excluded Assets, or (ii) Contracts that are not Transferred Contracts;</li> <li>• statutory Liens and other Liens against the Purchased Assets;</li> <li>• Liabilities associated with any and all Indebtedness of Circle Media;</li> <li>• Liabilities arising out of or in connection with acts or omissions that occurred prior to the Closing;</li> <li>• Taxes arising out of or attributable to the Purchased Assets or the Business for the Pre-Closing Tax Period; and</li> <li>• Liabilities in connection with any Employee or Employee Benefit Plan.</li> </ul>
<b>Purchase Price</b> <b>APA § 2.5</b>	<p>\$500,000 comprising (a) the Credit Bid Amount, (b) an amount in cash equal to the difference between (x) \$500,000 and (y) the Credit Bid Amount, and (c) the assumption of the Assumed Liabilities at the Closing.</p>
<b>Credit Bid Amount</b> <b>APA § 2.5</b>	<p>The "Credit Bid Amount" is a credit bid equal to the aggregate amount of outstanding principal and accrued and unpaid interest under the Secured Credit Agreement and the DIP Financing, as applicable, as of the Closing Date, together with up to \$75,000 of the lender's fees and</p>



	expenses under the Secured Credit Agreement and the DIP Financing. The fee-and-expense component of the Credit Bid Amount is limited only with respect to Purchaser's stalking horse bid; thus, the Credit Bid Amount is subject to increase or other modification pursuant to, and in accordance with, the Bid Procedures Order including, without limitation, Purchaser's right to credit bid all of its fees and expenses relating to the DIP Financing.
<b>Rejection of Contracts</b> <i>APA § 5.5</i>	Circle Media shall reject effective as of the Closing Date, or at any other time agreed to by the Parties, any Contract that is not a Transferred Contract.
<b>Cure Amounts</b> <i>APA § 3.9(c)</i>	Circle Media believes that there are no material cure amounts owed to counterparties of any Transferred Contract.
<b>Termination Fee</b> <i>APA § 7.2(b)</i>	\$25,000 to be paid upon the consummation of an Alternative Transaction or otherwise in accordance with the Stalking Horse Purchase Agreement.
<b>Free and Clear</b> <i>APA § 2.6</i>	The Purchased Assets will be sold free and clear of all liens, claims, encumbrances, and interests under section 363(f) of the Bankruptcy Code, including, but not limited to, any Encumbrances held holders of Statutory Liens.
<b>Conditions to Obligations</b> <i>APA §§ 8, 9</i>	Sections 8 and 9 of the Stalking Horse Purchase Agreement, respectively, set forth the various conditions to the Parties' obligations.
<b>Termination</b> <i>APA § 11</i>	The Stalking Horse Purchase Agreement contains termination provisions. Pursuant thereto, the Stalking Horse Purchase Agreement will terminate if, among other things: <ul style="list-style-type: none"> <li>• the Closing has not occurred on or before December 1, 2017;</li> <li>• the Sale Order has not been entered on or before November 29, 2017; and</li> <li>• Circle Media consummates an Alternative Transaction.</li> </ul>

**D. The Proposed Bid Procedures.**

24. The proposed Bid Procedures are set forth in the attached Exhibit "A" and incorporated herein by reference.

**E. Notice of the Bid Procedures and Proposed Sale.**

25. The Debtors propose the following notice procedures be implemented with respect to the Bid Procedures process:

- a. Notice of Sale, Auction, and Sale Hearing.

i. Within three business (3) days after entry of an Order approving the Bid Procedures, the Debtors shall serve a notice, substantially in the form attached hereto as Exhibit "C" (the "Sale Notice"), the Stalking Horse Purchase Agreement, the Bid Procedures, which include the date, time, and location of the Auction, the deadline to object to the Sale, and the Sale Hearing by first-class mail, or, for those parties who have consented to receive notice via CM/ECF, by ECF, upon:

(1) All entities reasonably known to have expressed an interest in the sale with respect to all or part of the Assets since July of 2016;

(2) All entities known to have asserted any lien, claim, interest, or encumbrance in or upon any of the Assets;

(3) Counsel for the Stalking Horse Bidder;

(4) The U.S. Trustee for the District of Nebraska;

(5) The IRS;

(6) The Nebraska Department of Revenue; and

(7) All known creditors of Debtors, including counterparties to any executory contracts.

b. Auction.

i. Per the proposed Bid Procedures, the Auction (if necessary) will take place at the offices of Koley Jessen P.C., L.L.O., located at 1125 S. 103<sup>rd</sup> Street, Suite 800, Omaha, Nebraska 68124 on November 27, 2017 at 9:00 a.m. Central Time.

c. Notice of Successful Bidder.

i. No later than one (1) business day following the Auction, the Debtors shall file (but not serve) a notice with the Court identifying the Successful Bidder.

d. Sale Hearing.

i. The Debtors request that the Court schedule the Sale Hearing November 29, 2017 at 1:00 p.m. Central Time or as soon thereafter as the Court's calendar allows. At the Sale Hearing, the Debtors will seek the approval of the Successful Bid.

e. Objection Deadline.

i. Debtors request that any objections to the Sale be filed by 5:00 p.m. Central Time the day prior to the Sale Hearing.

**F. Summary of the Assumption & Assignment Procedures.**

26. The Debtors propose the procedures below for notifying counterparties to executory contracts of proposed cure amounts in the event the Debtors determine to assume and assign such contracts (the “Contract Counterparties”) in connection with the proposed Sale.

27. Notice of Potential Assumption & Assignment.

a. Prior to the Sale Hearing, the Debtors shall file with the Court a notice of assumption and assignment in substantially the form attached hereto as Exhibit “D” (the “Notice of Potential Assumption and Assignment”) and attach thereto a list (the “Contracts List”) that sets forth:

i. Each of Debtors’ executory contracts that may be assumed and assigned in connection with the Sale, including the name of the non-Debtor counterparty to the executory contract (the “Contracts”); and

ii. The proposed amount, if any, to cure any monetary defaults, if any, under the Contracts (the “Cure Amount”).

b. The Debtors shall serve, via first class mail, the Notice of Potential Assignment and Assumption, with the Contracts List, on all Contract Counterparties and any other party entitled to notice under Bankruptcy Rule 2002.

28. Objection to Assumption & Assignment.

a. A counterparty to a Contract listed on the Notice of Potential Assignment and Assumption may file an objection (the “Contract Objection”) to the

proposed assumption and assignment or the proposed Cure Amount, if any.

- b. A Contract Objection must be filed seven (7) days following the service of the Notice of Potential Assumption and Assignment as set forth above.

29. Resolution of Objection at Sale Hearing.

- a. If a Contract Objection is filed and the Debtors and the counterparty to the Contract are unable to amicably resolve the dispute prior to the Sale Hearing, the amount to be paid or reserved with respect to such Contract Objection will be determined at the Sale Hearing or at a subsequent date determined by this Court.

**LEGAL AUTHORITY**

**A. The Proposed Sale is Supported by Debtors' Reasonable Business Judgment.**

30. Section 363(b)(1) of the Bankruptcy Code provides that the "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).

31. "The decision to enter into an agreement outside the ordinary course of a debtor's business is to be based on the reasonable business judgment of the debtor." *In re Trilogy Dev. Co., LLC*, Case No. 09-44219-DRD-11, 2010 WL 6972664 (Bankr. W.D. Mo. Aug. 31, 2010) (citing *In re Continental Air Lines, Inc.*, 780 F.2d 1223, 1226 (5th Cir. 1986); *In re Lionel Corp.*, 722 F.2d 1063, 1070 (2d Cir. 1983)).

32. Courts will approve a sale of property under § 363(b) if the debtor has established some articulated business justification for the proposed transaction. *Id.* (citing *In re Walter*, 83 B.R. 14, 16 (9th Cir. B.A.P. 1988); *In re Wilde Horse Enterprises, Inc.*, 136 B.R. 830 (Bankr. C.D. Cal. 1991)).

33. In this case, the proposed Sale is fully supported by the Debtors' reasonable business judgment. Debtors have been seeking to sell their Assets in order to generate funds to pay creditors for well over one year, but without success. Debtors have now determined, based on their business judgment, that a sale of the Assets through chapter 11 will maximize the value of the Assets and will be in the best interests of Debtors' creditors.

**B. The Bid Procedures are designed to maximize the Sale proceeds to the bankruptcy estate.**

34. With respect to § 363 sales, a primary objective of the Bankruptcy Code is to "enhance the value of the estate at hand." *In re Food Barn Stores, Inc.*, 107 F.3d 558, 564-65 (8th Cir. 1997). *See In re Integrated Resources, Inc.*, 147 B.R. 650, 659 (S.D.N.Y. 1992) (stating that "[i]t is a well established principle of bankruptcy law that the objective of the bankruptcy rules and the Debtor's duty with respect to such sales is to obtain the highest price or greatest overall benefit possible for the estate.") (internal quotations omitted).

35. In accordance with that objective, bankruptcy courts routinely authorize the use of bidding procedures that are intended to enhance competitive bidding, thus furthering the objective of maximizing the value of the assets for the bankruptcy estate. Courts provide debtors substantial deference to formulate bidding procedures for selling assets. *See Integrated Resources*, 147 B.R. at 656-57, 659 (finding that the bidding procedures, which are "important tools to encourage bidding and to maximize the value of the debtor's assets," are presumptively valid under the business judgment rule). *See also In re Financial News Network*, 126 B.R. 152, 156 (S.D.N.Y. 1991) (stating that "court-imposed rules for the disposition of assets" should "provide an adequate basis for comparison of offers" and should also "provide for a fair and efficient resolution of bankrupt estates.") (citations omitted).

36. Here, the Bid Procedures set forth a process through which Debtors' Assets will be sold via competitive bidding to the bidder making the highest and best offer for the Sale Assets. The Bid Procedures will allow the Debtors to conduct the Sale through an open, controlled and fair process, allowing interested bidders time to conduct due diligence and submit well-informed bids. The Stalking Horse Purchase Agreement sets a minimum purchase price for the Assets, a price that will then be tested in the market under the Bid Procedures, thereby ensuring that Debtors are able to obtain fair market value for the Assets. By selling the Assets in an expeditious and orderly manner, it will maximize the value of the Sale Assets for the benefit of creditors and minimize the cost of the bankruptcy process.

37. The Bid Procedures are similar to other bidding procedures approved by this Court and applied in other chapter 11 bankruptcies. *E.g., In re Gordmans Stores, Inc.*, Case No. 17-80304 (TLS) (Docs. 24 & 150); *In re Broadkey Brothers, Inc.*, Case No. 13-80203 (TLS) (Docs. 12 & 62, Feb. 15, 2013); *In re Professional Veterinary Products, Ltd.*, Case No. 10-82436 (Docs. 21 & 78).

**C. The Bid Protections included in the Bid Procedures are also designed to maximize proceeds to the bankruptcy estate.**

38. In this case, the Bid Procedures provide a modest \$25,000 break-up fee and no other fee or expense reimbursement related to the Stalking Horse Purchase Agreement and the Sale (the "Bid Protections").

39. A breakup fee is an "incentive payment to an unsuccessful bidder who placed the estate property in a sales configuration mode to attract other bidders to the auction." *Integrated Resources*, 147 B.R. at 659 (citations omitted). Breakup fees are "important tools to encourage bidding and to maximize the value of the debtor's assets." *Id.*

40. Bankruptcy courts routinely permit “break up” fees to be paid to stalking horse bidders provided that the fees create an incentive for increased bidding in sales from bankruptcy assets. *In re Wintz Companies*, 230 B.R. 840, 846 (8th Cir. B.A.P. 1999) (citations omitted). *See also Integrated Resources*, 147 B.R. at 659 (stating that “[t]he usual rule is that if break-up fees encourage bidding, they are enforceable; if they stifle bidding they are not enforceable.”). The question for this Court is whether the proposed fee, and the transaction as a whole, makes economic sense and are in the best interest of the bankruptcy estate and its creditors. *Wintz*, 230 B.R. at 846 (citations omitted).

41. Here, the payment of the Bid Protections is a critical part of the Sale process. The Stalking Horse Bidder has spent significant time and resources negotiating the debtor in possession financing and Sale, conducting due diligence, preparing the Stalking Horse Purchase Agreement, and otherwise valuing Debtors’ Assets, at the risk of not eventually becoming the Successful Bidder. The Bid Protections are a way to ensure that the Debtors’ estates receive the benefit of the Stalking Horse Purchase Agreement.

**D. The proposed sale may be made free and clear of liens pursuant to § 363(f) of the bankruptcy code.**

42. Under Section 363(f) of the Bankruptcy Code, a debtor in possession may sell property free and clear of liens, claims and encumbrances if –

- 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).

43. The conditions in § 363(f) are drafted in the disjunctive so only one of the five conditions must be met for authority to sell property free and clear of liens. *In re Heine*, 141 B.R. 185, 189 (Bankr. S.D. 1992).

44. Here, at least one of the five conditions will be satisfied. First, the Assets are subject only to the lien of the Stalking Horse Bidder, which has consented to the Sale. Second, any holders of any other liens, claims, or interests (of which Debtors are unaware) could be compelled to accept a money judgment for their purported interest in the Assets. Any lien, claim, or encumbrance will attach to the net Sale proceeds, subject to any claims or defenses Debtors may have, and thus will be adequately protected.

**E. Credit bidding is permitted under § 363(k) of the Bankruptcy Code.**

45. Section 363(k) of the Bankruptcy Code provides that at a sale of property secured by a lien under 363(b), the holder of such secured claim may bid at the sale and if the holder of the secured claim purchases such property, the holder may offset its claim against the purchase price of such property. *See* 11 U.S.C. § 363(k).

46. “It is well settled among district and bankruptcy courts that creditors can bid the full face value of their secured claims under § 363(k).” *In re SubMicron Systems Corp.*, 432 F.3d 448, 459-60 (3d Cir. 2006) (citations omitted). *See In re WBE Co.*, Case No. 06-80006, 2007 WL 4893471, \*6 (Bankr. D. Neb. Dec. 19, 2007) (stating that 363(k) gives a secured creditor has the right to credit bid upon a proposed sale of its collateral).



47. The Bid Procedures provide that any Qualified Bidder that is also a secured creditor shall have the right to bid all or a portion of the value of the secured creditor's claim(s) under 363(k). This provision is consistent with other bidding procedures that have been approved by this Court. *See, e.g., In Re Gordmans Stores, Inc.*, Case No. 17-80304 (Docs. 24 & 150).

48. This right to credit bid is consistent with § 363(k), case law, and bidding procedures previously approved by this Court and credit bidding should therefore be permitted with respect to the Sale. Moreover, although the Stalking Horse Bidder is entitled to credit bid under applicable law, it has agreed to certain concession in connection with both its bid and its extension of critical pre- and postpetition credit that are intended to maximize the cash component of the stalking horse bid. Specifically, the Stalking Horse Bidder agreed to, among other things, cap its ability to credit bid such fees and expenses at \$75,000 for purposes of the stalking horse bid.

**F. The Stalking Horse Bidder or Successful Bidder is entitled to the protections under § 363(m) of the Bankruptcy Code.**

49. Section 363(m) of the Bankruptcy Code protects a good-faith purchaser, providing that –

[t]he reversal or modification on appeal of an authorization under subsection (b) or (c) 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.

50. “In other words, § 363(m) prevents a modification or reversal of a bankruptcy court's order authorizing the sale of the debtor's assets from affecting the validity of the sale.”

*Fulmer v. Fifth Third Equip. Fin. Code (In re Veg Liquidation, Inc.)*, 572 B.R. 725, 735-36

(Bankr. E.D. Ark. May 2, 2017) (quoting *In re Trism, Inc.*, 328 F.3d 1003, 1006 (8th Cir. 2003); *In re Farmland Indus., Inc.*, 408 B.R. 497, 508 (8th Cir. B.A.P. 2009)).

51. The proposed Bid Procedures are designed so that the Successful Bidder – whether the Stalking Horse Bidder or a different Successful Bidder – will qualify as a good faith purchaser under 363(m). Further, the Stalking Horse Sale Agreement, or any revised versions thereof submitted by the Successful Bidder, is a good-faith, arm’s length transaction entitled to the protections of § 363(m). At the Sale Hearing, Debtors will present the Court with evidence to establish that the § 363(m) good faith standard has been satisfied in this matter.

**G. Debtors are providing sufficient notice of the proposed Bid Procedures and Sale.**

52. Under Bankruptcy Rule 2002(a), Debtors are required to provide creditors with 21-day notice of the Sale Hearing. FED. R. BANKR. P. 2002(a)(2). Pursuant to Bankruptcy Rule 2002(c), such notice must include the time and place of the Auction and the time fixed for filing objections. FED. R. BANKR. P. 2002(c).

53. As set forth above, Debtors will serve the Sale Notice within three (3) days of the Court’s approval of the proposed Bid Procedures upon the following parties or their respective counsel, if known:

- a. All entities reasonably known to have expressed an interest in the sale with respect to all or part of the Assets;
- b. All entities known to have asserted any lien, claim, interest, or encumbrance in or upon any of the Assets;
- c. Counsel for Circle Orange LLC, the Stalking Horse Bidder;
- d. The U.S. Trustee for the District of Nebraska;
- e. The IRS;
- f. The Nebraska Department of Revenue; and

- g. All known creditors of Debtors, including counterparties to any executory contracts.

54. The notice of this Motion and the hearing on this Motion, coupled with the Sale Notice, constitutes sufficient notice of the Sale and related proceedings and satisfies the requirements of Bankruptcy Rule 2002. Debtors request that the Court approve the form and manner of the Sale Notice.

**H. The Assumption & Assignment of the Contracts is Supported by Debtors' Reasonable Business Judgment.**

55. Debtors are seeking authority to assume and assign the Contracts to the Successful Bidder to facilitate the proposed Sale process. Debtors anticipate that any Successful Bidder will seek the assignment of certain of Debtors' executory contracts with their clients and that by facilitating the assignment of such contracts, the value of the Debtors' assets will be maximized for the benefit of the bankruptcy estate.

56. Section 365 of the Bankruptcy Code provides that a bankruptcy court may authorize a debtor to assume and/or assign its executory contracts, provided that the defaults under such contracts are cured and adequate assurance of future performance is provided. *See* 11 U.S.C. § 365(b)(1).

57. Similar to the question of whether to approve a sale under § 363 of the Bankruptcy Code, “[i]n the Eighth Circuit, the business judgment test is used in deciding whether to approve a trustee’s motion to assume, reject, or assign an unexpired lease or executory contract, which entails a determination that the transaction is in the best interest of the estate.” *In re Noranda Aluminum, Inc.*, 549 B.R. 725, 727-28 (Bankr. E.D. Mo. 2016) (internal quotations omitted). A bankruptcy court does not interfere with a debtor in possession’s

business judgment except on a finding of bad faith or gross abuse of their business discretion. *Id.* at 728 (internal quotations omitted).

58. Debtors request that the Court approve the Debtors' decision to assume and assign the Contracts as a reasonable exercise of Debtors' business judgment. The assumption and assignment of the Contracts is vital to receiving the highest and best Bids for Debtors' Assets. This is reflected in the Stalking Horse Purchase Agreement, which provides for the assignment of the Contracts. The Contract Counterparties will receive notice of the proposed assumption and assignment and will have the opportunity to object.

59. Moreover, the requirements of § 365(b)(1) will be satisfied. First, any defaults existing with respect to the Contracts must be cured pursuant to the terms of the Stalking Horse Purchase Agreement. 11 U.S.C. § 365(b)(1)(A). Based on the terms of the Stalking Horse Purchase Agreement and the Assumption and Assignment Procedures, any defaults will be cured consistent with the rights of the Contract Counterparties.

60. Second, § 365(b)'s requirement that adequate assurance of future performance be provided will also be satisfied in this matter. 11 U.S.C. § 365(b)(1)(C).

61. "In making the determination of 'adequate assurance,' the court must give a practical pragmatic construction based on the circumstances of each case." *In re Tama Beef Packing, Inc.*, 277 B.R. 407, 411 (Bankr. N.D. Iowa 2002). Courts find it helpful to show "sufficient financial backing" to demonstrate assurance of future performance. *Id.*

62. Here, the Bidding Procedures require that the Debtors receive proof of a Qualified Bidder's financial wherewithal to complete the Sale and via authorized due diligence, the Debtors will obtain the information necessary to demonstrate that the Successful Bidder is able to perform under the Contracts assigned to the Successful Bidder in connection with the Sale.

63. Further, based on the Bid Procedures and the Assumption and Assignment Procedures, the Contract Counterparties and other parties in interest will be provided with the opportunity to challenge the Successful Bidder's ability to adequately perform.

64. In this matter, assignment of the Contracts to the Successful Bidder is integral to a Sale of the Debtors' Assets and maximizing the value of the estate for the benefit of all parties in interest. The Assumption and Assignment Procedures will allow for the assignment of the Contracts in a manner consistent with § 365 of the Bankruptcy Code.

**I. Waiver of the 14-day stay period under Bankruptcy Rules 6004(h) & 6006(d) is appropriate.**

65. Bankruptcy Rule 6004(h) provides that an order authorizing the sale of property is stayed until the expiration of 14 days after entry of the order, unless the Court orders otherwise. FED. R. BANKR. P. 6004(h). Similarly, Bankruptcy Rule 6006(d) also provides that an order authorizing the trustee to assign an executory contract is stayed until the expiration of 14 days after entry of the order, unless the Court orders otherwise. Fed. R. Bankr. P. 6006(d).

66. Debtors respectfully request that the Court waive these 14-day stay periods to allow the Sale to close in an expeditious manner following the Sale Hearing. Based on the procedure and notice set forth herein, no party in interest will be prejudiced by waiver of the 14-day stay periods and it will instead enhance the value to the estate.

**No Prior Request**

67. No prior motion for the relief requested herein has been made to this or any other court.

**Notice**

68. The Debtors will provide notice of this Motion to (a) the Office of the United States Trustee for the District of Nebraska; (b) the holders of the 20 largest unsecured claims

against the Debtors (on a consolidated basis); (c) the Debtors' prepetition secured lender, Circle Orange LLC; (d) the United States Attorney's Office for the District of Nebraska; (e) the Internal Revenue Service; (f) all parties who have expressed an interest in some or all of the assets since July 2016; (g) counsel to any official committee of unsecured creditors appointed in these chapter 11 cases (upon appointment); (h) the Nebraska Department of Revenue; and (i) all parties on the Rule 2002 Notice list.

WHEREFORE, Debtors respectfully request that the court enter an Order providing the relief sought forth herein and such other, further and different relief as the Court deems just and equitable.

DATED this 27<sup>th</sup> day of October, 2017.

S3 Digital Corp. and Circle Media, Inc., Debtors,

By: /s/ **Brian J. Koenig**

Donald L. Swanson, #16385

Brian J. Koenig, #23807

Kristin M.V. Krueger, #23919

KOLEY JESSEN P.C., L.L.O.

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[Kristin.Krueger@koleyjessen.com](mailto:Kristin.Krueger@koleyjessen.com)

**CERTIFICATE OF SERVICE**

On this 27<sup>th</sup> day of October, 2017, I electronically filed the foregoing with the Clerk of the Bankruptcy Court using the CM/ECF system which sent notification of such filing to all CM/ECF participants and I caused the foregoing to be e-mailed (where applicable) and mailed by Federal Express Overnight delivery to the individuals listed below:

Circle Orange LLC  
Andrew Rosenblatt  
James Copelane  
Norton Rose Fulbright US LLP  
1301 Avenue of the Americas  
New York, New York 10019  
Email: [andrew.rosenblatt@nortonrosefulbright.com](mailto:andrew.rosenblatt@nortonrosefulbright.com)  
[james.copeland@nortonrosefulbright.com](mailto:james.copeland@nortonrosefulbright.com)

United States Attorney's Office  
1620 Dodge Street, Suite 1400  
Omaha, NE 68102

Nebraska Department of Revenue  
Attn: Bankruptcy Unit  
301 Centennial Mall South  
Lincoln, NE 68509-4818

United States Trustee's Office  
111 South 18th Plaza  
Suite 1148  
Omaha, NE 68102  
Email: [Jerry.L.Jensen@usdoj.gov](mailto:Jerry.L.Jensen@usdoj.gov)

Internal Revenue Service  
Centralized Insolvency Operation  
PO Box 7346  
Philadelphia, PA 19101-7346

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Brad Young & Associates, Inc.  
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Chip Fifth Avenue, LLC  
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Thomas Butkiewicz  
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Bedford, NY 10506-1541

Tom McNeil  
3425 S. 228 St.  
Elkhorn, NE 68022

G5 Capital  
37 Barnes St.  
Providence, RI 02906

Circle Media Investments, LLC  
1520 S. 189 Ct.  
Omaha, NE 68130

/S/ Brian J. Koenig  
Brian J. Koenig



UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT NEBRASKA

In re:

S3 DIGITAL CORP.,<sup>1</sup>

Debtor.

Case No. 17-81540

Chapter 11

In re:

CIRCLE MEDIA, INC.,

Debtor.

Case No. 17-81541

Chapter 11

**BIDDING PROCEDURES FOR THE DISPOSITION OF DEBTORS' ASSETS**

On October \_\_\_, 2017, the U.S. Bankruptcy Court for the District of Nebraska (the “Bankruptcy Court”) entered an order approving Debtors’ Motion to Establish and Approve (I) Bidding Procedures and Bid Protections Related to the Sale of Debtors’ Assets Free and Clear of Liens, Encumbrances, and Interests, and (II) Assumption and Assignment Procedures (Doc. \_\_\_) (the “Bid Procedures Order”), pursuant to which the Court approved these bid procedures.

These bid procedures set forth the process by which Debtors are authorized to conduct an auction (the “Auction”) for the sale or other disposition of substantially all of Debtors’ assets as described in the purchase agreement (the “Stalking Horse Purchase Agreement”), dated as of October 27, 2017, by and between Circle Media, Inc. and Circle Orange LLC (the “Stalking Horse Bidder”).

**I. ASSETS TO BE SOLD.**

A. S3 Digital Corp. and Circle Media, Inc. (collectively, the “Sellers” or “Debtors”) shall conduct the Auction of the following assets (the “Assets”) pursuant to § 363 of the Bankruptcy Code subject to the terms and conditions set forth herein:

1. The Purchased Assets (as defined in the Stalking Horse Purchase Agreement)<sup>2</sup>, which means all of Seller’s assets, properties, rights and interests of every kind, character and description, whether tangible or intangible (including goodwill), whether real, personal or mixed, whether accrued, contingent or otherwise, whether owned, leased or licensed,

<sup>1</sup> The Debtors in these chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number, include: S3 Digital Corp. (9650); and Circle Media, Inc. (9123). The Debtors’ location is 20965 Corral Road, Omaha, NE 68022.

<sup>2</sup> All terms not otherwise defined herein have the meaning set forth in the Stalking Horse Purchase Agreement.

wherever located, and whether or not reflected on the books and records of Seller, used in, held for use in connection with, or otherwise related to, the Business, including, without limitation, Transferred Contracts and Seller's right, title, and interest in, to and under those assets, properties and rights set forth in Section 2.1 of the Stalking Horse Purchase Agreement, but for the avoidance of doubt, Purchased Assets does not include any Excluded Assets, which means all Contracts other than the Transferred Contracts; the Purchase Price and all cash, negotiable instruments and cash equivalents, bank accounts, securities, instruments and other investments of Seller; all equity securities or other interests in Seller or any of its Affiliates; all Claims for grants, refunds or credits of Taxes or amounts otherwise owed or to be issued by a Governmental Authority of whatever nature arising out of or related to the Purchased Assets or the Business for the Pre-Closing Tax Period; (i) all corporate minute books, corporate seals, stock transfer books, minute books and other corporate books and records relating solely to Seller's organization and existence, (ii) Books and Records related solely to Excluded Assets or Excluded Liabilities, (iii) a copy of Books and Records which by law Seller is required to retain, and (iv) Books and Records prepared primarily in connection with this Agreement and which are subject to privilege; the rights that accrue or will accrue to Seller under this Agreement and the Ancillary Agreements; and all Claims that Seller may have against any Person, solely with respect to any Excluded Assets or any Excluded Liabilities, and all deposits, prepayments, refunds and rebates related to or in respect of any Excluded Assets, all avoidance claims or causes of action under the Bankruptcy Code or applicable Law (including any preference or fraudulent conveyance claims or causes of action arising under or that may be asserted pursuant to chapter 5 of the Bankruptcy Code), and all other claims or causes of action under any other provision of the Bankruptcy Code or applicable Law related to the Excluded Assets or Excluded Liabilities.

## II. POTENTIAL BIDDERS.

- A. To participate in the bidding process, a person or entity interested in completing a purchase of the Assets pursuant to a sale agreement ("Sale") (a "Potential Bidder") must deliver to the Debtors or have previously delivered to the Debtors an executed confidentiality agreement on terms acceptable to the Debtors ("Confidentiality Agreement"). **No Potential Bidder will be permitted to conduct any due diligence without entering into a Confidentiality Agreement**

## III. QUALIFIED BIDDERS.

- A. A "Qualified Bidder" is a Potential Bidder who submits (i) a Bid (as defined below) that qualifies as a Qualified Bid (as defined below), and (ii) who the Debtors determine should be considered a Qualified Bidder. Within one (1) business day after the Bid Deadline (as defined below), Debtors will notify each

Potential Bidder in writing (via e-mail) whether or not such Potential Bidder is a Qualified Bidder and will provide a copy of each Qualified Bid to the Stalking Horse Bidder.

- B. The Stalking Horse Bidder shall be considered a Qualified Bidder at all times and the Stalking Horse Bidder's Bid will be considered a Qualified Bid at all times.
- C. Between the date that the Debtors notify a Potential Bidder that it is a Qualified Bidder and the Auction, the Debtors may discuss, negotiate, or seek clarification of any Qualified Bid from a Qualified Bidder. Except as otherwise set forth in the Stalking Horse Purchase Agreement, without the written consent of the Debtors, a Qualified Bidder may not modify, amend, or withdraw its Qualified Bid except for proposed amendments to improve the terms of the Qualified Bid during the period that the Qualified Bid remains binding as set forth in these Bid Procedures.
- D. If any Potential Bidder is determined by the Debtors not to be a Qualified Bidder, the Debtors will refund such Qualified Bidder's Deposit (as defined below) within seven (7) business days after the Bid Deadline.
- E. Any dispute related to these Bid Procedures, including whether a Bid qualifies as a Qualified Bid, shall be resolved by the Court.

#### **IV. DUE DILIGENCE PROVIDED TO POTENTIAL BIDDERS.**

- A. Upon execution of a Confidentiality Agreement, Potential Bidders may receive due diligence information and will obtain access to Debtors' electronic data room to conduct due diligence.
- B. The Debtors will provide to each Potential Bidder reasonable due diligence information, as requested by such Potential Bidder in writing, as soon as reasonably practicable after such request, and the Debtors shall post all written due diligence provided to any Potential Bidder to Debtors' electronic data room. For all Potential Bidders other than the Stalking Horse Bidder, the due diligence period will end on the Bid Deadline and subsequent to the Bid Deadline the Debtors shall have no obligation to furnish any due diligence information.
- C. The Debtors reserve the right to withhold any due diligence information that the Debtors determine is sensitive or otherwise not appropriate for disclosure to a Potential Bidder.
- D. All due diligence requests must be directed to Joseph Casey at [joe.casey@circlemedia.com](mailto:joe.casey@circlemedia.com), with a copy to counsel, Brian J. Koenig at [brian.koenig@koleyjessen.com](mailto:brian.koenig@koleyjessen.com).

#### **V. DUE DILIGENCE PROVIDED BY POTENTIAL BIDDERS.**

- A. Each Potential Bidder shall comply with all reasonable requests for information and due diligence access requested by the Debtors regarding the ability of a

Potential Bidder to complete the Sale. Failure by a Potential Bidder to comply with such reasonable requests for information and due diligence materials may be a basis for the Debtors to determine that the Potential Bidder is not a Qualified Bidder or that a Bid made by the Potential Bidder is not a Qualified Bid.

## **VI. SUBMISSION OF BIDS & BID REQUIREMENTS.**

A bid ("Bid") by a Qualified Bidder that is submitted in writing and satisfies each of the requirements set forth below (collectively, the "Bid Requirements"), as determined by the Debtors in their reasonable business judgment (in consultation with the DIP Lender and any Committee in all respects), on or by the Bid Deadline (as defined below), shall constitute a "Qualified Bid." The Stalking Horse Purchase Agreement will be deemed a Qualified Bid for all purposes.

- A. **Assets.** Each Bid must provide for the purchase or other disposition of all or substantially all of the Assets and must clearly state which assets of the Debtors that the Qualified Bidder is agreeing to purchase or otherwise dispose of and which liabilities of the Debtors the Qualified Bidder is agreeing to assume.
- B. **Bid Price, Minimum Amount.** Each Bid must specify the price offered (the "Bid Price") for the assets that are being bid upon, and the contracts and leases as to which the Potential Bidder seeks contract or lease designation rights, and an allocation of the Bid Price to the specific items being bid upon. The Bid Price must be equal to or greater than (i) the sum of the Purchase Price set forth in the Stalking Horse Purchase Agreement, (ii) the value of the Bid Protections (defined below), and (iii) \$100,000.00.
- C. **Deposit.** Each Potential Bidder must submit a deposit of ten percent (10%) of the Bid Price in immediately available cash funds via wire transfer to be held in the trust account of Koley Jessen P.C., L.L.O. pending completion of the Auction (the "Deposit"). If the Potential Bidder is unsuccessful, the Deposit shall be returned to the Potential Bidder as set forth below.
- D. **Same or Better Terms.** Each Bid must be on terms that are not more burdensome or conditional than the terms of the Stalking Horse Purchase Agreement and must expressly provide for the payment in full in cash of any and all outstanding amounts under the Senior Credit Agreement and the DIP Financing, as applicable, upon the consummation of the transactions contemplated by such Bid. Further, each Bid must include duly executed, non-contingent transaction documents necessary to effectuate the Sale in substantially the form agreed to by the Stalking Horse Bidder, including a clearly marked version of the Stalking Horse Purchase Agreement that shows any differences between the Stalking Horse Purchase Agreement and the changes requested by the Potential Bidder, as well as all other material documents integral to such Bid (the "Qualified Bid Documents").

- E. **Financial Wherewithal.** Each Bid must provide information, including but not limited to the Potential Bidder's most current audited and latest unaudited financial statements, that demonstrate the financial wherewithal of the Potential Bidder to consummate the Sale. A Qualified Bidder must have, in the Debtors' reasonable business judgment, the necessary financial capacity to consummate the transactions required by its Bid and provide adequate assurance of future performance under all contracts to be assumed by such Bid.
- F. **No Contingencies.** A Bid shall include a statement that the Potential Bidder is prepared to enter into a legally binding purchase agreement, that the Bid is irrevocable until closing of the Sale of the Assets as approved by the Bankruptcy Court, and that such Bid is unconditional and not subject to any due diligence, or financing contingency, or internal approval.
- G. **Identity.** Each Bid must fully disclose the identity of each entity that will be bidding or otherwise participating in connection with the Bid, including each equity holder or other financial backer of the Potential Bidder if such Potential Bidder is an entity formed for the purpose of consummating the Sale and the complete terms of any such participation. Each Bid must also include contact information for the specific persons whom the Debtors should contact regarding the Bid.
- H. **No Break-Up Fee.** Each Bid (other than the Stalking Horse Purchase Agreement) must disclaim any purported right to receive and not request or entitle the Potential Bidder to receive a break-up fee, expense reimbursement, or any other similar form of compensation.
- I. **Authorization.** Each Bid must contain evidence that the Potential Bidder has obtained authorization from the board of directors or comparable governing body with respect to the submission of its Bid and the consummation of the Sale.
- J. **As Is. Where is.** The sale is "as is, where as" and each Bid must include a written acknowledgment that the Potential Bidder (i) has had an opportunity to conduct any and all due diligence regarding the Assets prior to making its Bid; (ii) has relied solely upon its own independent review, investigation, and/or inspection of any documents and/or Assets in making its Bid; and (iii) did not rely upon any written or oral statements, representations, promises, warranties, or guaranties whatsoever, whether express, implied by operation of law, or otherwise, regarding the Assets or the completeness of any information provided in connection therewith or the Auction, except as expressly stated in the Bid.
- K. **Bid Procedures.** By submitting its Bid, each Potential Bidder is agreeing to abide by and honor the terms of these Bid Procedures and agrees not to submit a Bid or seek to reopen the Auction after the conclusion of the Auction.
- L. **Consent to Jurisdiction.** Each Potential Bidder must submit to the jurisdiction of the Bankruptcy Court.

- M. **Binding and Irrevocable.** A Qualified Bid is irrevocable until the Debtors accept a higher Bid.
- N. **Bid Deadline.** Each Bid must be transmitted via email so as to be actually received on or before 5:00 p.m. (Central Standard Time) on November 22, 2017 (the “Bid Deadline”) by submitting proof of compliance with the Bid Requirements to the following: Joseph Casey at [joe.casey@circlemedia.com](mailto:joe.casey@circlemedia.com), with a copy to counsel, Brian J. Koenig at [brian.koenig@koleyjessen.com](mailto:brian.koenig@koleyjessen.com).

## VII. RIGHT TO CREDIT BID.

- A. At the Auction, any Qualified Bidder who has a valid and perfected lien on any assets of the Debtors’ estates (a “Secured Creditor”) shall have the right to credit bid all or a portion of the value of the Secured Creditor’s claims under § 363(k) of the Bankruptcy Code to the extent that such secured claim is not disputed.
- B. Notwithstanding anything set forth herein or in any other document, in the event of a competing Qualified Bid, the Stalking Horse Bidder will be entitled, but not obligated, to submit overbids and will be entitled in any and all such overbids to include (i) the full amount of the Bid Protections in lieu of cash and for purposes of evaluating the overbid equal to cash in the same amount and (ii) a credit bid of any reasonable and documented fees and expenses under both the Prepetition Loan Documents and the DIP Loan Documents, which credit bid amount shall not be subject to any limitations set forth in the Prepetition Loan Documents, the DIP Loan Documents, or the Stalking Horse Purchase Agreement.
- C. Credit bids, if any, by the Stalking Horse Bidder will not impair or otherwise affect its entitlement to the Bid Protections granted under the Bidding Procedures Order.

## VIII. AUCTION.

- A. If the Debtors receive a Qualified Bid, other than the Stalking Horse Purchase Agreement, the Debtors will conduct an Auction to determine the Successful Bidder. If the Debtors do not receive a Qualified Bid, other than the Stalking Horse Purchase Agreement, the Debtors will not conduct an Auction and shall designate the Stalking Horse Bidder’s Bid as the Successful Bid.
- B. No later than the start of the Auction, the Debtors will notify each Qualified Bidder of the highest or otherwise best Qualified Bid as determined in Debtors’ reasonable business judgment (the “Baseline Bid”) and provide copies of the Qualified Bid Documents supporting the Baseline Bid to each Qualified Bidder.
- C. The Auction shall take place at 9:00 a.m. (Central Time) on November 27, 2017, at the offices of Koley Jessen P.C., L.L.O., 1125 South 103<sup>rd</sup> Street, Suite 800, Omaha, NE 68124 (or such later date and time as selected by the Debtors) and Qualified Bidders shall be allowed to participate telephonically.

D. Conducting the Auction.

1. The Debtors and their professionals shall direct and preside over the Auction. At the start of the Auction, Debtors shall describe the terms of the Baseline Bid. All Bids made thereafter shall be Overbids (as defined below) and shall be made and received on an open basis, meaning the material terms of each Overbid shall be fully disclosed to all other Qualified Bidders.
2. The Debtors shall maintain a written record of all Bids made and announced at the Auction, including the Baseline Bid, all Overbids, and the Successful Bid.

E. Good Faith Offer.

1. Each Qualified Bidder participating in the Auction will be required to confirm on record at the Auction that it has not engaged in any collusion with respect to the bidding, its Bid is a good faith offer, and intends to consummate the Sale if selected as the Successful Bidder.

F. Overbids.

1. “Overbid” means any Bid made at the Auction by a Qualified Bidder subsequent to the Debtors’ announcement of the Baseline Bid.
2. The initial Overbid, if any, shall provide for total consideration to the Debtors with a value that exceeds the value of the consideration under the Baseline Bid by an incremental amount that is not less than \$125,000.00.

G. Successful Bid.

1. Debtors, after consultation with their professionals and the DIP Lender, and based on their reasonable business judgment, will select the Bid at the conclusion of the Auction that they believe to be the highest or otherwise best bid (the “Successful Bid”) at the conclusion of the Auction. The determination of the Successful Bid shall remain, however, subject to the Bankruptcy Court’s approval. The Successful Bidder must complete and sign all agreements or other documents with Debtors evidencing and containing the terms and conditions upon which a Successful Bid was made before the Auction is concluded.

**IX. SALE HEARING.**

- A. A hearing to consider the Sale of the Assets to the Successful Bidder (or to approve the Stalking Horse Purchase Agreement, if no Auction is held) (the “Sale Hearing”) is currently scheduled to take place on November 29, 2017, at 1:00 p.m., before the Honorable Judge Thomas L. Saladino at the Bankruptcy Court, 111 S. 18<sup>th</sup> Plaza, Second Floor, Courtroom No. 8, Omaha, Nebraska 68102. The

Sale Hearing may be continued to a later date by the Debtors by sending notice to or making an announcement at the Sale Hearing.

- B. At the Sale Hearing, the Debtors shall present the Successful Bid to the Bankruptcy Court for approval.

**X. FAILURE OF SUCCESSFUL BIDDER TO CONSUMMATE SALE.**

- A. If for any reason a Successful Bidder fails to consummate a Sale of the Assets, or any part thereof, the Qualified Bidder with the second highest or best bid for the Assets (the “Backup Bidder”) (as determined by the Debtors in their reasonable business judgment) will automatically be deemed to have submitted the highest and best bid, and Debtors are authorized to effect the sale of the Assets, or any part thereof, to such offeror, as soon as commercially reasonable and without further order of the Bankruptcy Court.
- B. The identity of the Backup Bidder and the amount and material terms of the Backup Bidder’s Bid shall be announced by the Debtors at the conclusion of the Auction at the same time the Debtors announce the identity of the Successful Bidder. The Backup Bidder shall be required to keep its Bid open and irrevocable until the closing of the Sale with the Successful Bidder. The Backup Bidder’s Deposit shall be held by Debtors until the closing of the Sale with the Successful Bidder.
- C. If the failure to consummate the purchase is the result of a breach by the Successful Bidder, the Successful Bidder’s Deposit shall be forfeited to Debtors.
- D. In the event that the Stalking Horse Bidder is the Backup Bidder, the Stalking Horse Bidder will serve as Backup Bidder only in accordance with the terms of the Stalking Horse Purchase Agreement.

**XI. BID PROTECTIONS.**

- A. To provide an incentive to and compensate the Stalking Horse Bidder for performing the substantial due diligence and incurring the expenses necessary to enter into the Stalking Horse Purchase Agreement with the knowledge and risk that arises from participating in the subsequent bidding process, the Debtors have agreed to pay the Stalking Horse Bidder:
  - 1. A breakup fee in the amount of \$25,000.00 (the “Bid Protections”).
- B. The Bid Protections will be paid in accordance with the Stalking Horse Purchase Agreement and DIP Credit Agreement.
- C. The Bid Protections will be an allowed administrative expense priority claim, senior to all other administrative expense priority claims, and will be secured by a claim against the proceeds of the Sale.



- D. The Stalking Horse Bidder shall have standing to appear and be heard on all issues related to the Auction, including the right to object to the conduct of the Auction and interpretation of these Bidding Procedures.

## **XII. RETURN OF DEPOSIT.**

- A. The Deposit of a Successful Bidder shall be applied to the purchase price of the Sale at Closing. The Deposits for each Qualified Bidder shall be returned (other than with respect to the Backup Bidder and Successful Bidder) on or within seven (7) business days after the Sale Hearing, provided that the Bankruptcy Court approves the Sale to the Successful Bidder. The Deposit of the Backup Bidder shall be returned as set forth above.

## **XIII. DEBTORS' RESERVATION OF RIGHTS.**

The Debtors' reserve at least the following rights:

- A. To extend the deadlines in these Bid Procedures (subject to the DIP Lender's prior written consent);
- B. To add procedural rules reasonably necessary for conducting the Auction (in consultation with the DIP Lender);
- C. To reject any or all Bids (in consultation with the DIP Lender);
- D. To adjourn the Auction at the Auction and/or adjourning the Sale Hearing in open court without further notice (subject to the DIP Lender's prior written consent); and
- E. Canceling the Auction (in consultation with the DIP Lender).

DATED this \_\_\_\_ day of October, 2017.

S3 Digital Corp. and Circle Media, Inc., Debtors,

By: /s/

Brian J. Koenig, #23807  
Kristin M.V. Krueger, #23919  
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## **ASSET PURCHASE AGREEMENT**

This ASSET PURCHASE AGREEMENT (this “Agreement”) is made as of this 27th day of October, 2017, by and between Circle Orange LLC, a Delaware limited liability company (collectively with any assignee or designee thereof, “Purchaser”), and Circle Media, Inc., a Delaware corporation (“Seller,” and together with Purchaser, the “Parties,” and each individually, a “Party”).

### **RECITALS**

WHEREAS, Seller is a data management software and solutions provider in the sports and entertainment industry engaged in the business of (a) providing digital engagement solutions and content and (b) aggregating and managing fan information for conferences, teams, media and brands using, among other things, the proprietary data analysis and management system commercially known as Fan.Dex Data Management Solutions (“Fan.DexDMS”) (the “Business”);

WHEREAS, on October 24, 2017 (the “Petition Date”), Seller and its parent company, S3 Digital Corp., filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Nebraska (the “Bankruptcy Court”) and commenced Chapter 11 Case No. 17-[•] and Chapter 11 Case No. 17-[•] (together, the “Bankruptcy Case”);

WHEREAS, in connection with the Bankruptcy Case, Purchaser or its Affiliate has entered into a debtor-in-possession financing facility with Seller in a principal amount of Five Hundred Thousand Dollars (\$500,000) (the “DIP Financing”), which is subject to approval by the Bankruptcy Court; and

WHEREAS, Seller desires to sell, convey, transfer, assign and deliver to Purchaser, and Purchaser desires to purchase from Seller, the Purchased Assets, free and clear of all Encumbrances, pursuant to Section 363 of the Bankruptcy Code and subject to the terms and conditions set forth herein and in the Sale Order.

NOW, THEREFORE, in consideration of the foregoing premises and the mutual covenants, promises and agreements contained herein, the receipt and sufficiency of which are hereby acknowledged, the Parties, intending to be legally bound hereby, hereby agree as follows:

### **SECTION 1** **INTERPRETATION**

1.1 Definitions. Whenever used in this Agreement, the following words and phrases shall have the respective meanings ascribed to them as follows.

“Accounts Receivable” means all accounts and notes receivable, unpaid drafts or checks, letters of credit, other rights of Seller to receive payments (whether current or noncurrent) outstanding as of the Closing Date, including in respect of goods shipped, products sold, licenses granted, services rendered or otherwise associated with the Business, and all related Claims, remedies and/or causes of action.

“Action” means any claim, action, charge, complaint, cause of action, demand, lawsuit, arbitration, inquiry, audit, notice of violation, proceeding, litigation, citation, summons, subpoena or investigation of any nature, civil, criminal, administrative, regulatory or otherwise, whether at law or in equity.

“Affiliate” of a Person means any other Person that directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with, such Person. The term “control” (including the terms “controlled by” and “under common control with”) means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a Person, whether through the ownership of voting securities, by contract or otherwise.

“Alternative Transaction” means the sale, transfer or other disposition, directly or indirectly, including through an asset sale, share sale, merger, amalgamation or other similar transaction, of stock or other equity interests in Seller or Seller’s assets or interests therein, in a transaction or series of transactions with one or more Persons other than Purchaser.

“Ancillary Agreements” means, collectively, the Assignment and Assumption Agreement, the Bill of Sale, and the Assignment of Intellectual Property, any assignment of software rights, and all other documents, instruments and certificates required to be delivered in connection with the Transactions, all of which must be in form and substance satisfactory to Purchaser.

“Assignment and Assumption Agreement” means the assignment and assumption agreement, in form and substance satisfactory to Purchaser, to be entered into by Purchaser and Seller on the Closing Date.

“Assignment of Intellectual Property” means the Intellectual Property assignment agreement, in form and substance satisfactory to Purchaser, to be entered into by Purchaser and Seller on the Closing Date.

“Assumed Liabilities” has the meaning set forth in Section 2.3.

“Back-up Bidder” means such Person approved by Seller and the Bankruptcy Court to purchase the Purchased Assets only upon the termination of this Agreement in accordance with its terms.

“Bankruptcy Case” has the meaning set forth in the Recitals.

“Bankruptcy Code” means Title 11 of the United States Code.

“Bankruptcy Court” has the meaning set forth in the Recitals.

“Bidding Procedures Order” means an Order of the Bankruptcy Court, in form and substance satisfactory to Purchaser, approving, among other things, the bidding procedures, the Termination Fee, Purchaser to serve as stalking horse bidder, and this

Agreement and the Transactions contemplated herein as a qualified bid in respect of the Purchased Assets.

“Bill of Sale” means the bill of sale, in form and substance satisfactory to Purchaser, to be entered into by Purchaser and Seller on the Closing Date.

“Books and Records” means all documents, files, books and records that are used, held for use or intended to be used in, or that arise out of, the Business, including those that are or that relate to products, services, marketing and advertising, Intellectual Property, personnel, customers and suppliers (including credit information), sales (including pricing history, total sales, terms and conditions of sale, sales and pricing policies and practices), correspondence (including all correspondence with any Governmental Authority), copies of Tax Returns, books of account, ledgers, financial and accounting records, financial statements, research and development and strategic plans.

“Business” has the meaning set forth in the Recitals.

“Cash Proceeds” has the meaning set forth in Section 2.5(b).

“Claim” means: (a) a “claim” as defined in Section 101(5) of the Bankruptcy Code, or (b) any “adverse claims” as defined in Section 8-102 of the Uniform Commercial Code, offset rights, setoff rights, recoupment rights or defenses.

“Closing” has the meaning set forth in Section 10.1.

“Code” means the Internal Revenue Code of 1986, as amended.

“Contracts” means any and all notes, bonds, mortgages, indentures, deeds, commitments, agreements, contracts, leases, powers of attorney, purchase orders, letters of credit, settlement agreements, franchise agreements, undertakings, covenants not to compete, employment agreements, licenses, instruments, obligations, understandings, policies, purchase and sales orders, quotations and other executory commitments to which Seller is a party or of which Seller is a beneficiary, or by which its assets or properties are bound or subject, whether oral or written, express or implied.

“Credit Bid Amount” has the meaning set forth in Section 2.5(a).

“Cure Amounts” means any and all amounts required to be paid pursuant to Section 365 of the Bankruptcy Code in connection with the assignment by Seller and assumption by Purchaser of any and all executory Transferred Contracts.

“DIP Financing” has the meaning set forth in the Recitals.

“Disclosure Schedules” means the disclosure schedules prepared by Seller and attached to and made a part of this Agreement.

“Employee” means any present or former employee of Seller.

“Employee Benefit Plan” means any employee benefit plan as defined in Section 3(3) of ERISA, and any other fund, plan, program, policy, agreement, contract or arrangement, whether formal or informal, funded or unfunded, qualified or nonqualified, whether or not set forth in writing, for or regarding bonuses, commissions, incentive compensation, severance, vacation, deferred compensation, pensions, profit sharing, retirement, payroll savings, stock options, stock purchases, stock awards, stock ownership, phantom stock, stock appreciation rights, equity compensation, medical/dental expense payment or reimbursement, disability income or protection, sick pay, group insurance, death benefits, and any other material fringe benefit or employee benefit plan, program, policy, agreement, contract or arrangement of any kind covering any current or former employee, director, officer, shareholder or independent contractor (and the spouses, dependents and other beneficiaries of any of the foregoing).

“Encumbrances” means any Lien, Claim, Liability, collateral assignment, right of setoff, escrow, encumbrance, option, right of first refusal, transfer restriction, lease, indenture, security agreement, easement, covenant, condition, restriction, servitude, proxy, voting trust or agreement or any other similar agreement, arrangement, contract, commitment, understanding or obligation of any kind whatsoever, whether written or oral, known or unknown.

“ERISA” means the Employee Retirement Income Security Act of 1974, as amended.

“ERISA Affiliate” means any Person that, together with Seller, is required to be treated as a “single employer” within the meaning of Section 414(b), (c), (m) or (o) of the Code or Sections 4001(a)(14) or 4001(b) of ERISA.

“Excluded Assets” has the meaning set forth in Section 2.2.

“Fan.DexDMS” has the meaning set forth in the Recitals.

“Financial Statements” has the meaning set forth in Section 3.6(a).

“GAAP” means United States generally accepted accounting principles as in effect on the date of this Agreement, applied on a consistent basis.

“Governmental Authority” means any federal, state, territorial, local, municipal, foreign, international or multinational government or political subdivision thereof, or any authority, agency or commission of such government or political subdivision, entitled to exercise any administrative, executive, judicial, legislative, police, regulatory or taxing authority or power, any court, tribunal, mediator, arbitrator or arbitral body or any self-regulated organization or other non-governmental regulatory authority or quasi-governmental authority (to the extent that the rules, regulations or orders of such organization or authority have the force of Law).

“Indebtedness” means, with respect to any Person, all Liabilities, contingent or otherwise, as obligor or otherwise, for or with respect to (a) all obligations for borrowed money, including as arising from corporate credit cards, which obligations shall include

the principal, accreted value, accrued and unpaid interest, unpaid fees or expenses and other monetary obligations or other interest-bearing indebtedness, whether current or funded, secured or unsecured, (b) all obligations evidenced by a note, bond or debenture, (c) all obligations created or arising under any conditional sale or other title retention agreement with respect to property acquired, including any “earnout” or similar payments or any noncompete payments, (d) all obligations secured by a purchase money mortgage or other lien to secure all or part of the purchase price of property subject to such mortgage or lien, (e) all obligations under leases which will have been or should be, in accordance with GAAP, recorded as capital leases, (f) all obligations in respect of bankers’ acceptances, letters of credit or similar credit transactions and (g) all obligations of a type referred to above which are directly or indirectly guaranteed by Seller or which Seller has agreed (contingently or otherwise) to purchase or otherwise acquire or in respect of which it has otherwise assured a credit against loss.

“Information Systems” means the information technology systems used in the Business, and the corresponding Software, hardware, computer systems, servers, information technology equipment and systems, interfaces, and networks used as part thereof.

“Intellectual Property” means all intellectual property and proprietary rights, interests and protections of any kind, however arising, pursuant to the Laws of any jurisdiction throughout the world, including the following: (a) patents, patent applications and patent disclosures, together with all reissuances, continuations, continuations in part, revisions, extensions, reexaminations, provisionals, divisions, renewals, revivals, and foreign counterparts thereof and all registrations and renewals in connection therewith, (b) trademarks, service marks, trade dress, logos, trade names and corporate names, together with all translations, adaptations, derivations and combinations thereof and including all goodwill associated therewith, and all applications, registrations and renewals in connection therewith, (c) copyrightable works, copyrights and all applications, registrations and renewals in connection therewith, (d) mask works and all applications, registrations and renewals in connection therewith, (e) trade secrets, inventions and confidential business information (including ideas, research and development, know-how, formulas, compositions, manufacturing and production processes and techniques, technical data, archives, designs, drawings, specifications, customer and supplier lists, pricing and cost information, business and marketing plans and proposals, assembly, test, installation, service and inspection instructions and procedures, technical, operating and service and maintenance manuals and data, hardware reference manuals and engineering, programming, service and maintenance notes and logs), (f) Software and all Software components (including, without limitation, any tools, utilities used to compile any code of such Software), (g) internet addresses, uniform resource locaters, domain names, websites and web pages, and (h) goodwill related to all of the foregoing.

“Knowledge of Seller” or any other similar knowledge qualification with respect to Seller, means (a) the actual knowledge of Joseph Casey, Seller’s Chief Executive Officer, and Seller’s other managers and directors, and (b) the knowledge that any such person would have based upon a reasonable due inquiry.

“Laws” means any statute, law (including common, statutory, civil, criminal, domestic and foreign law), ordinance, regulation, rule, code (including competition law or regulation, statutory instruments, guidance notes, circulars, directives, decisions, rules and regulations), Order, legislation, constitution, treaty, convention, judgment, decree, or other requirement or rule of law of any Governmental Authority.

“Liability” means any unsatisfied debt, Claim, liability, obligation, assessment, Tax, cost, expense, loss, expenditure, charge, fee, penalty, fine, or obligation of any kind, whether known or unknown, asserted or unasserted, absolute or contingent, accrued or unaccrued, liquidated or unliquidated, or due or to become due, and regardless of when sustained, incurred or asserted or when the relevant events occurred or circumstances existed, including all costs and expenses relating thereto.

“Liens” means any mortgage, hypothecation, deed of trust, pledge, lien, security interest, conditional or installment sale agreement or other title retention agreement, exaction, imposition, levy, charge, assessment, or other Claims of third parties of any kind or nature, whether imposed by law, Contract or otherwise, including, but not limited to, the Statutory Liens.

“Loss” means any and all judgments, Actions, Claims, Liabilities, amounts paid in settlement, damages, fines, penalties, deficiencies, costs, charges, Taxes, obligations, demands, fees, interest, losses and expenses (including court costs and reasonable fees of attorneys, accountants and other experts in connection with any Claim or Action).

“Material Adverse Effect” means any result, change, event, fact, development, circumstance or occurrence that (a) has had, or would reasonably expected to have, a material adverse effect on the business, assets, results of operations or financial condition of Seller, the Business or the Purchased Assets, individually or taken as a whole, or (b) results in Seller being unable to convey to Purchaser any material portion of the Purchased Assets or otherwise prevents or materially delays the Closing; provided, however, that none of the following shall be considered when determining whether a Material Adverse Effect has occurred: any result, change, event, fact, development, circumstance or occurrence resulting from (i) any change or modification in Laws, (ii) any change in GAAP, (iii) any action taken by Seller at the request of Purchaser, (iv) any change in the financial, debt, credit, capital or banking markets or conditions (including any disruption thereof), (v) any change in interest, currency or exchange rates or the price of any commodity, security or market index, or (vi) the occurrence of any force majeure events, including any earthquakes, floods, hurricanes, tropical storms, fires or other natural disasters or any national, international or regional calamity; except, in the cases of clauses (i) through (vi), only to the extent such result, change, event, fact, development, circumstance or occurrence does not otherwise have a materially disproportionate effect on the Business as compared to other similarly situated businesses in the applicable markets.

“Material Contracts” has the meaning set forth in Section 3.11(a).

“Open Source Software” means any Software that is distributed as “free software,” “open source software,” or pursuant to any license identified as an “open source license” by the Open Source Initiative ([www.opensource.org/licenses](http://www.opensource.org/licenses)) or other license that substantially conforms to the Open Source Definition ([opensource.org/osd](http://opensource.org/osd)) (including the GNU General Public License (GPL), GNU Lesser General Public License (LGPL), GNU Affero General Public License (AGPL), MIT License (MIT), Apache License, Artistic License, and BSD Licenses).

“Order” means any preliminary or permanent injunction or other order or decree of a Governmental Authority of competent jurisdiction.

“Ordinary Course” means, with respect to any Person, in the ordinary course of that Person’s business consistent with past practice, including as to the quantity, quality and frequency.

“Outside Date” has the meaning set forth in Section 11.1(j).

“Permits” means all approvals, permits, certificates, qualifications, authorizations, licenses, franchises, consents, orders and registrations, together with all modifications, amendments, supplements and extensions thereof, that are or were necessary for Seller to own the Purchased Assets and operate the Business.

“Person” means any individual or corporation, association, partnership, limited liability company, joint venture, joint stock or other company, business trust, trust, organization, Governmental Authority or other entity of any kind.

“Petition Date” has the meaning set forth in the Recitals.

“Pre-Closing Tax Period” has the meaning set forth in Section 2.4(h).

“Purchase Price” has the meaning set forth in Section 2.5.

“Purchased Assets” means all of Seller’s assets, properties, rights and interests of every kind, character and description, whether tangible or intangible (including goodwill), whether real, personal or mixed, whether accrued, contingent or otherwise, whether owned, leased or licensed, wherever located, and whether or not reflected on the books and records of Seller, used in, held for use in connection with, or otherwise related to, the Business, including, without limitation, Transferred Contracts and Seller’s right, title and interest in, to and under those assets, properties and rights set forth in Section 2.1. For the avoidance of doubt, “Purchased Assets” does not include any Excluded Assets.

“Purchaser” has the meaning set forth in the Preamble.

“Representative” means, with respect to any Person, any and all directors, officers, employees, consultants, financial advisors, counsel, accountants and other agents and advisors of such Person.



“Sale Motion” means Seller’s motion, in form and substance satisfactory to Purchaser, for entry of the Bidding Procedures Order and Sale Order, as applicable.

“Sale Order” means an Order of the Bankruptcy Court, in form and substance satisfactory to Purchaser, which approves the terms of this Agreement and the Ancillary Agreements, and authorizes and directs Seller to consummate the Transactions, including the assignment of the Transferred Contracts to Purchaser, at the Closing.

“Secured Credit Agreement” means the Senior Secured Credit Agreement, dated as of October 13, 2017, between Seller, as Borrower, and Purchaser, as Lender.

“Seller” has the meaning set forth in the Preamble.

“Seller Intellectual Property” has the meaning set forth in Section 3.13(a).

“Seller Software Products” means all proprietary Software products, including, without limitation, Fan.DexDMS, and related services of Seller and/or its Affiliates that (a) are currently or at any time in the have been offered, licensed, sold, distributed, hosted, maintained or supported, or otherwise provided or made available by or on behalf of Seller or its Affiliates; (b) are currently or at any time in the past have been used in or in connection with the operation of the Business; or (c) are currently under development by or for Seller or its Affiliates.

“Software” means any computer program, operating system, application, system, firmware or software of any nature, whether operational, active, under development or design, non-operational or inactive, including all code, object code, source code, comment code, algorithms, processes, formulae, interfaces, navigational devices, menu structures or arrangements, icons, operational instructions, scripts, commands, syntax, screen designs, reports, designs, concepts, visual expressions, technical manuals, tests scripts, user manuals and other documentation therefor, whether in machine-readable form, virtual machine-readable form, programming language, modeling language or any other language or symbols, and whether stored, encoded, recorded or written on disk, tape, film, memory device, paper or other media of any nature, and all databases, tools, utilities, and other components necessary or appropriate in connection with the operation or use of any such computer program, operating system, application, system, firmware or software.

“Statutory Liens” has the meaning set forth in Section 2.4(d).

“Subsidiary” means, with respect to any Person, any other Person of which at least 50% of (a) the total equity interest or (b) the total voting power of shares of stock (or equivalent ownership or controlling interest) entitled (without regard to the occurrence of any contingency) to vote in the election of directors, managers or trustees thereof is at the time owned or controlled, directly or indirectly, by the first Person or one or more of the other subsidiaries of such first Person or a combination thereof.

“Tangible Personal Property” has the meaning set forth in Section 2.1(a).

“Tax” or “Taxes” means all federal, state, local and foreign taxes, charges, fees, imposts, levies or other assessments, including income, gross receipts, excise, employment, sales, use, transfer, license, payroll, franchise, stamp, withholding, social security, unemployment, real property, personal property, alternative or add on minimum, estimated or other taxes, charges, fees, imposts, levies or other assessments, including unclaimed property and escheat payments, and also including any interest, penalties or additions thereto, whether disputed or not.

“Tax Return” means any report, return, information return, filing, claim for refund or other information, including any schedules or attachments thereto, and any amendments to any of the foregoing required to be supplied to a taxing authority in connection with Taxes.

“Taxing Authority” means any Governmental Authority exercising Tax regulatory authority.

“Termination Fee” has the meaning set forth in Section 7.2(b).

“Transactions” mean the transactions contemplated by this Agreement, the Ancillary Agreements and the Sale Order.

“Transferred Contracts” has the meaning set forth in Section 2.1(d).

“WARN Act” has the meaning set forth in Section 3.17(d).

**SECTION 2**  
**PURCHASE, SALE AND ASSIGNMENT OF PURCHASED ASSETS**

2.1 Sale of Purchased Assets. Subject to the terms and conditions set forth herein, at the Closing, Seller shall sell, convey, transfer, assign and deliver to Purchaser, and Purchaser shall purchase and assume from Seller, all of Seller's right, title and interest in, to and under the Purchased Assets, free and clear of all Encumbrances (other than Assumed Liabilities), including, without limitation, all of Seller's right, title, and interest in, to and under the following:

(a) all furniture, fixtures, equipment, machinery, tools, vehicles, office equipment, supplies, computers, telephones and all other tangible personal property (the "Tangible Personal Property");

(b) all Accounts Receivable;

(c) all Books and Records (other than those described in Section 2.2(e), which shall be Excluded Assets);

(d) the Contracts listed or described on Schedule 2.1(d) attached hereto (collectively, the "Transferred Contracts");

(e) (i) all Seller Intellectual Property, including, without limitation, the Intellectual Property set forth on Schedule 2.1(e), and (ii) all rights as to, Actions and other Claims for and/or remedies against infringements, dilutions, misappropriations, and other violations thereof, rights of priority and protection of interests therein and all tangible embodiments thereof;

(f) all Permits that relate in any way to the Business or the Purchased Assets (to the extent transferrable to Purchaser);

(g) all insurance benefits, rights and proceeds, and other refunds, rebates, discounts and credits, performance and other bonds, security and other deposits, advance payments, prepaid expenses and any other prepayments in favor of Seller to the extent relating to the Business, the Purchased Assets or the Assumed Liabilities;

(h) all goodwill associated with the Business and the Purchased Assets;

(i) (i) all Claims and Actions, whether known or unknown, that Seller may have against Purchaser, its Affiliates (except pursuant to this Agreement or an Ancillary Agreement) or any Employee hired by Purchaser after the Closing, and (ii) all Claims and Actions, whether known or unknown, that Seller may have against any third parties in respect of the Purchased Assets or the Assumed Liabilities; provided, however, that any Claims or Actions that cannot be assigned to Purchaser pursuant to this Section 2.1(i) shall be released or waived by Seller;

(j) other than those described in Section 2.1(i), all rights, privileges, Claims and Actions in respect of prepayments, refunds, warranty claims, indemnification

agreements in favor of Seller with, and indemnification and similar rights against, third parties, and any other rights or Claims with respect to the Purchased Assets or Assumed Liabilities; and

- (k) all other assets of Seller that are not Excluded Assets.

Notwithstanding anything in this Agreement to the contrary, Purchaser shall have the right, for any or no reason, at any time prior to entry of the Closing Date to amend from time to time and in its sole discretion Schedule 2.1(d) to add or designate a Contract as a Transferred Contract, or to exclude any Contract from being a Transferred Contract. Upon the Closing Date, the Transferred Contracts, as determined in accordance with Schedule 2.1(d) in its form as of the Closing Date, shall be assumed by Seller, as necessary, and/or assigned to Purchaser.

2.2 Excluded Assets. The following assets are excluded from the Purchased Assets, are not a part of the Transactions and shall remain assets of Seller after the Closing (collectively, the “Excluded Assets”):

- (a) all Contracts other than the Transferred Contracts;
- (b) the Purchase Price and all cash, negotiable instruments and cash equivalents, bank accounts, securities, instruments and other investments of Seller;
- (c) all equity securities or other interests in Seller or any of its Affiliates;
- (d) all Claims for grants, refunds or credits of Taxes or amounts otherwise owed or to be issued by a Governmental Authority of whatever nature arising out of or related to the Purchased Assets or the Business for the Pre-Closing Tax Period;
- (e) (i) all corporate minute books, corporate seals, stock transfer books, minute books and other corporate books and records relating solely to Seller’s organization and existence, (ii) Books and Records related solely to Excluded Assets or Excluded Liabilities, (iii) a copy of Books and Records which by law Seller is required to retain, and (iv) Books and Records prepared primarily in connection with this Agreement and which are subject to privilege;
- (f) the rights that accrue or will accrue to Seller under this Agreement and the Ancillary Agreements; and
- (g) all Claims that Seller may have against any Person, solely with respect to any Excluded Assets or any Excluded Liabilities, and all deposits, prepayments, refunds and rebates related to or in respect of any Excluded Assets and all avoidance claims or causes of action under the Bankruptcy Code or applicable Law (including any preference or fraudulent conveyance claims or causes of action arising under or that may be asserted pursuant to Chapter 5 of the Bankruptcy Code), and all other claims or causes of action under any other provision of the Bankruptcy Code or applicable Law related to the Excluded Assets or Excluded Liabilities.

2.3 Assumed Liabilities. Subject to the terms and conditions set forth herein, at the Closing, Purchaser shall assume and agrees to pay, perform and discharge only the following Liabilities of Seller (collectively, the “Assumed Liabilities”) and no other Liabilities:

(a) all Liabilities arising out of or related to the ownership and operation of the Purchased Assets, solely to the extent arising after the Closing Date (and for the avoidance of doubt, excluding any Liability arising out of or related to any breach, default (whether monetary or non-monetary), act or omission that occurred on or prior to the Closing Date);

(b) all Cure Amounts, if any, with respect to the Transferred Contracts; and

(c) all Liabilities for Taxes arising out of or related to the Purchased Assets or the Business for taxable years or other taxable periods (or portions thereof) that commence after the Closing Date.

2.4 Excluded Liabilities. Notwithstanding any provision in this Agreement to the contrary, Purchaser shall assume only the Assumed Liabilities and shall not assume or otherwise become responsible for any Liability of Seller of whatever nature, whether or not arising out of or related to the ownership and operation of the Purchased Assets or the Business. All such other Liabilities shall be retained by and remain Liabilities of Seller. Neither Purchaser nor any of its Subsidiaries or Affiliates shall assume, and shall not be deemed to have assumed, and shall not be responsible for the payment, performance or discharge of any of the following Liabilities (all such Liabilities not being assumed by Purchaser are referred to as the “Excluded Liabilities”):

(a) all Liabilities which are not Assumed Liabilities;

(b) all Liabilities related to, asserted in, or arising out of the Bankruptcy Case (other than Cure Amounts relating to Transferred Contracts, if any), including, but not limited to, scheduled claims, proofs of claim that were or could have been filed (assuming proper notice) in the Bankruptcy Case, and Claims pursuant to Section 503 or Section 507 of the Bankruptcy Code;

(c) all Liabilities arising out of or related to any (i) Excluded Asset or (ii) Contracts that are not Transferred Contracts;

(d) with respect to the Purchased Assets, all (i) statutory Liens (and related Liabilities), including Tax, artisan’s, carriers’, warehousemen’s, materialmen’s and mechanics’ Liens (collectively, the “Statutory Liens”); (ii) other Liens (and related Liabilities), with respect to the Purchased Assets; and (iii) Encumbrances (and related Liabilities);

(e) all Liabilities related to any Indebtedness of Seller;

(f) all Liabilities arising out of or related to Claims and Actions (whether initiated prior to or after the Closing) arising out of acts, omissions or events that occurred on or prior to the Closing Date;

(g) all penalties, fines, settlements, interest, costs and expenses incurred as a result of any actual or alleged violation by Seller of any Law on or prior to the Closing Date;

(h) all Liabilities for Taxes arising out of or attributable to the Purchased Assets or the Business for any taxable years or other taxable periods (or portions thereof) that end on or before the Closing Date (the "Pre-Closing Tax Period"); and

(i) all Liabilities related to any Employee or Employee Benefit Plan.

In the event of an inconsistency or conflict between the scope or meaning of "Assumed Liabilities" and "Excluded Liabilities," the scope or meaning of "Excluded Liabilities" shall govern and control. If any Liability may be interpreted as both an Assumed Liability and an Excluded Liability, it shall be treated as and deemed to be an Excluded Liability.

2.5 Purchase Price. The aggregate consideration provided by Purchaser for the Purchased Assets (the "Purchase Price") is Five Hundred Thousand Dollars (\$500,000), which amount comprises both (a) a credit bid equal to the aggregate amount of outstanding principal and accrued and unpaid interest under the Secured Credit Agreement and the DIP Financing, as applicable, as of the Closing Date, together with up to Seventy Five Thousand Dollars (\$75,000) of the lender's fees and expenses under the Secured Credit Agreement and the DIP Financing (such amount, the "Credit Bid Amount"), and (b) an amount in cash equal to the difference between (x) Five Hundred Thousand Dollars (\$500,000) and (y) the Credit Bid Amount (such amount, the "Cash Proceeds").

For the avoidance of doubt, the Purchase Price in this Section 2.5 constitutes a stalking-horse bid by Purchaser, which is subject to increase or other modification pursuant to, and in accordance with, the Bid Procedures Order including, without limitation, Purchaser's right to credit bid all of its reasonable and documented fees and expenses relating to the Secured Credit Agreement and the DIP Financing.

2.6 Free and Clear. Seller shall distribute the Cash Proceeds at the Closing as needed to permit the sale of the Purchased Assets to Purchaser free and clear of all Encumbrances.

2.7 Excluded Assets and Liabilities. Notwithstanding anything in this Agreement to the contrary, Purchaser shall neither purchase any Excluded Assets nor assume any of the Excluded Liabilities.

2.8 Withholding. Purchaser will be entitled to deduct and withhold from any amount payable pursuant to this Agreement (including payments of the Purchase Price) such amounts as Purchaser (or any Affiliate thereof) shall reasonably determine it is required to deduct and withhold with respect to the making of such payment under the Code or any other provision of applicable Law. If Purchaser reasonably determines that it is required to withhold or deduct any amount it shall notify and provide the basis for such deduction and withholding to Seller in writing at least three (3) days prior to making any such deduction and withholding and shall reasonably cooperate with Seller to mitigate such withholding or deduction. To the extent that amounts are so withheld by Purchaser, such withheld amounts will be remitted by Purchaser to

the applicable Governmental Authority and treated for all purposes of this Agreement as having been paid to the Person in respect of whom such deduction and withholding were made.

**SECTION 3**  
**REPRESENTATIONS AND WARRANTIES OF SELLER**

Seller hereby represents and warrants to Purchaser as follows:

3.1 Organization; Capitalization.

(a) Seller is duly incorporated, validly existing and in good standing under the Laws of the jurisdiction of its incorporation and has full corporate power and authority to own, operate or lease the properties and assets now owned, operated or leased by it and to operate the Business as presently conducted. Seller is duly licensed or qualified to do business and is in good standing in each jurisdiction in which the ownership of its assets or the operation of the Business as presently conducted makes such licensing or qualification necessary, except for such failures to be so qualified or licensed that have not had and would not reasonably be expected to have a Material Adverse Effect.

(b) Seller does not have any Subsidiaries and does not own any securities of, or any interest in, any Person.

(c) Set forth on Schedule 3.1(c) is the number of authorized, issued and outstanding equity securities of Seller. The stockholders set forth on Schedule 3.1(c) are the record holders of all such issued and outstanding equity securities of Seller, all of which have been duly authorized, are validly issued, fully paid and non-assessable. Such stockholders own their shares free and clear of all Encumbrances. There exist no Contracts relating to the issuance, sale or transfer of any equity securities of Seller. There are no outstanding subscription, option, call, warrant (whether or not currently exercisable) or other rights to acquire any equity securities of Seller. There are no outstanding securities, instruments or obligations that are or may become convertible into or exchangeable for any equity or debt securities of any Seller. There are no voting trusts, stockholder or equityholder agreements, proxies or other agreements or understanding in effect with respect to the voting, transfer or ownership of any equity securities of any Seller.

3.2 Authority; Enforceability. Seller has the requisite power and authority to execute and deliver this Agreement and the Ancillary Agreements and to perform its obligations hereunder and thereunder, and the execution, delivery and performance of this Agreement and the Ancillary Agreements and the consummation of the Transactions by Seller have been duly authorized by all necessary corporate action. This Agreement and the Ancillary Agreements will, at the Closing, have been duly and validly executed and delivered by Seller and, assuming the due and valid authorization, execution and delivery by Purchaser of this Agreement and the Ancillary Agreements and the entry of the Sale Order, constitute valid, legal and binding agreements of Seller, enforceable against Seller in accordance with their respective terms, except as may be limited by applicable bankruptcy, insolvency, reorganization, moratorium, fraudulent

transfer and similar Laws of general applicability relating to the rights and remedies of creditors and general principles of equity.

3.3 Consents and Approvals. Except for the Sale Order, the execution and delivery of this Agreement and the Ancillary Agreements and the consummation of the Transactions does not and will not require Seller to make any filing with or give any notice to or obtain any consent, approval or authorization from any Person.

3.4 No Conflicts. None of the execution, delivery or performance of this Agreement or the Ancillary Agreements, or the consummation of the Transactions by Seller will (with or without notice or lapse of time or both): (a) contravene, conflict with or result in a violation or breach of the certificate of incorporation, bylaws or other organizational documents of Seller, (b) subject to entry of the Sale Order, contravene, conflict with or result in a violation or breach of, or give any Person the right to challenge any of the Transactions or to exercise any remedy or obtain any relief under, any Law or Order to which Seller, or any of the assets, including the Purchased Assets, owned, leased or used by Seller, is subject, (c) subject to entry of the Sale Order, contravene, conflict with or result in a violation or breach of any of the terms or requirements of, or give any Governmental Authority the right to revoke, withdraw, suspend, cancel, terminate or modify, any Permit that is held by Seller or that otherwise relates to the Business or to any of the assets, including the Purchased Assets, owned or used by Seller, (d) subject to entry of the Sale Order, contravene, conflict with or result in a violation or breach of, or result in a default under, any provision of any Transferred Contract or (e) result in the imposition or creation of any Encumbrance upon or with respect to any asset, including any Purchased Asset, owned or used by Seller.

3.5 Compliance with Laws and Permits.

(a) Set forth on Schedule 3.5 is a true, complete and correct list of all Permits that are held by Seller. Seller currently holds all Permits which are necessary for the ownership or operation of the Purchased Assets or the Business. All such Permits are valid and in full force and effect in accordance with their terms and conditions. All material fees and charges with respect to such Permits as of the date of this Agreement have been paid in full.

(b) Except as set forth on Schedule 3.5, (i) Seller is in compliance in all material respects, and has complied in all material respects, with all Permits held by Seller and with all Laws applicable to Seller, the Purchased Assets or the Business and (ii) neither Seller nor any of its Affiliates has received notice from any Person alleging any material violation of any Permit held by Seller or any Law applicable to Seller, the Business or the Purchased Assets.

3.6 Financial Statements; Indebtedness.

(a) Seller has heretofore delivered to Purchaser the financial statements and financial information requested by Purchaser (the "Financial Statements"). All such statements other than pro forma or projected financial statements were prepared in conformity with GAAP and fairly present, in all material respects, the financial position



of the entities described in such financial statements as at the respective dates thereof and the results of operations and cash flows described therein for each of the periods then ended, subject to, in the case of any unaudited financial statement, changes resulting from audit, absence of footnotes and normal year-end adjustments.

(b) Set forth on Schedule 3.6(b) is a true, complete and correct list of all Indebtedness owed by Seller to any Person, calculated as of the date of this Agreement in accordance with GAAP.

3.7 No Undisclosed Liabilities. Except for (a) Liabilities under the Secured Credit Agreement and the DIP Financing, (b) Liabilities under this Agreement or in connection with or arising out of the Transactions, (c) Liabilities reflected on the Financial Statements, (d) Liabilities that are Excluded Liabilities, (e) Liabilities that have arisen after the date of the most recent Financial Statement in the Ordinary Course or otherwise in accordance with the terms and conditions of this Agreement (none of which is material), and (f) Liabilities set forth on Schedule 3.7, Seller does not have any material Liabilities.

3.8 Absence of Certain Changes. Except for the commencement of the Bankruptcy Case, there has not been any result, change, event, fact, development, circumstance or occurrence that, individually or in the aggregate, has had or would reasonably be expected to have a Material Adverse Effect.

3.9 Purchased Assets; Cure Amounts.

(a) Seller owns and has good, valid and marketable title to, or the right to use or possess, the Purchased Assets, and pursuant to the Sale Order, will sell, convey, transfer, assign and deliver all such right, title and interest in, to and under the Purchased Assets pursuant to this Agreement, free and clear of any Encumbrance to the fullest extent permissible by Law.

(b) Subject to the exclusion of the Excluded Assets, the Purchased Assets (i) constitute substantially all of the assets used or held for use by Seller in connection with or otherwise related to the Business, (ii) will permit Purchaser to conduct the Business substantially as it is being conducted on the date of this Agreement and (iii) are suitable for the uses for which they are intended. Except as set forth on Schedule 3.9(b), no Affiliate of Seller owns, leases or licenses any assets used in the operation of the Business.

(c) There will be no material Cure Amounts payable with respect to any Transferred Contracts.

3.10 Legal Proceedings.

(a) Except for the Bankruptcy Case and as set forth on Schedule 3.10(a), there is no Action or Claim pending or, to the Knowledge of Seller, threatened, against Seller that (i) relates to or may affect the Business or the Purchased Assets, (ii) questions or challenges the validity of this Agreement, any Ancillary Agreement or any of the

Transactions or (iii) may otherwise have a Material Adverse Effect on, or materially impair or delay, the Closing.

(b) Except for Orders issued by the Bankruptcy Court, there is no Order to which Seller, the Business or the Purchased Assets are subject.

3.11 Material Contracts.

(a) Set forth on Schedule 3.11(a) is a true, complete and correct list of each of the following Contracts to which Seller is a party or by which Seller or any of its properties or assets are bound in connection with the Business or the Purchased Assets (such Contracts, the “Material Contracts”):

(i) each Contract that involves annual expenditures or receipts, performance of services or delivery of goods or materials of Seller, in each case in excess of \$10,000;

(ii) each Contract for the use by Seller of personal property;

(iii) each Contract containing covenants that (A) restrict or limit the freedom of Seller to engage in any line of business or to compete with any Person or (B) contain “take or pay” provisions or prohibitions on Seller soliciting the employment or hiring of any Person;

(iv) each Contract for the sale of any of the Purchased Assets or for the grant to any Person of any option, right of first refusal or preferential or similar right to purchase any of the Purchased Assets;

(v) each Contract that is a broker, distributor, dealer, manufacturer’s representative, franchise, agency, sales promotion, market research, marketing, consulting or advertising Contract;

(vi) each written warranty, guaranty, or other similar undertaking with respect to contractual performance extended by Seller;

(vii) each Contract providing for the assumption of any Tax, environmental, or any other Liability of any Person;

(viii) each Contract that relates to the acquisition or disposition of any business, a material amount of stock (or other ownership interest) or assets of any other Person (whether by merger, sale of stock or ownership interest, sale of assets or otherwise);

(ix) each Contract relating to Indebtedness;

(x) each Contract relating to any of Seller’s top ten customers or top ten vendors (in each case, by dollar volume);

(xi) each Contract involving any resolution or settlement of any Claim or Action with a settlement value of greater than \$50,000, or which imposes material continuing obligations on Seller not covered by insurance;

(xii) each Contract that is a joint venture, partnership or similar Contract; and

(xiii) each Contract with any Governmental Authority.

(b) (i) each Material Contract is valid and binding on Seller in accordance with its terms and is in full force and effect, (ii) other than Seller's default under its contracts with True Ultimate Standards Everywhere, Inc., Ticketmaster, L.L.C., Austin Technology Incubator, Avai Mobile Solutions, and the parties listed in Schedule 6.1 of the Secured Credit Agreement and the DIP Financing, and other than relating to Seller's inability to pay pre-petition amounts owed under certain Material Contracts due to the commencement of the Bankruptcy Case and the implementation of the automatic stay under Section 362 of the Bankruptcy Code, neither Seller, nor to the Knowledge of Seller, any other party, is in violation or breach of, or default under (or is alleged to be in violation or breach of or default under), or has provided or received any written notice of any intention to terminate any Material Contract, including as a result of the execution of this Agreement or the anticipated consummation of the Transactions, (iii) other than Seller's default under its contracts with True Ultimate Standards Everywhere, Inc., Ticketmaster, L.L.C., Austin Technology Incubator, Avai Mobile Solutions, and the parties listed in Schedule 6.1 of the Secured Credit Agreement and the DIP Financing, and other than relating to Seller's inability to pay pre-petition amounts owed under certain Material Contracts due to the commencement of the Bankruptcy Case and the implementation of the automatic stay under Section 362 of the Bankruptcy Code, no event or circumstance has occurred, or to the Knowledge of Seller, is likely to occur, that, with or without notice or lapse of time or both, would constitute an event of default under any Material Contract or result in the termination thereof or would cause or permit the termination, acceleration or other changes of any right or obligation or the loss of any benefit thereunder, and (iv), other than as set forth above and other than the pending lawsuit in which Svitla Systems, Inc. has named Seller, among others, as a defendant in a breach of contract action that was filed September 18, 2017, in California Superior Court (Case No. 17-561354), requesting damages of \$193,289.00, and a threatened claim from Fox Sports there are no disputes pending or threatened under any Material Contract and the relationships of the contracting parties under all Material Contracts are currently on a good and normal basis.

3.12 Real Property. Seller does not own, lease, sublease, license, use or occupy, or have any other right or interest in, any real property.

3.13 Intellectual Property.

(a) Set forth on Schedule 3.13(a) is a true, complete and correct list of all Intellectual Property owned, licensed or used by Seller in connection with the Business or the Purchased Assets (the "Seller Intellectual Property"), indicating whether such

Intellectual Property is (i) owned, licensed or used by Seller and (ii) registered, recorded or filed with, or the subject of a pending application before, any Governmental Authority.

(b) To the Knowledge of Seller, the Seller Intellectual Property as currently used by Seller in the conduct of the Business does not infringe upon or misappropriate the Intellectual Property of any Person. Neither Seller nor any of its Affiliates has ever received any written communication and no Claim or Action is pending, has been settled or, to the Knowledge of Seller, is threatened, that alleges any such infringement or misappropriation. No Person is currently infringing upon or misappropriating, or has infringed upon or misappropriated, any Seller Intellectual Property. To the Knowledge of Seller, there is no existing fact or circumstance that would be reasonably expected to give rise to any such Claim or Action for infringement or misappropriation.

(c) None of the Seller Intellectual Property or any portion thereof is owned by or registered in the name of any current or former, owner, stockholder, member, manager, partner, director, executive, officer, employee, salesman, agent, consultant, customer, Representative or contractor of Seller. Seller has entered into binding Contracts with every Employee and every present and former independent contractor who contributed in any material respect to the development of Seller Intellectual Property, pursuant to which such Employees and independent contractors have assigned or will assign to Seller any ownership interest or right they may have in any Seller Intellectual Property so developed during the course of that Person's employment or provision of services to Seller.

(d) Seller has used commercially reasonable efforts, including employee training policies and procedures, to protect its rights in the Seller Intellectual Property, including all confidential information used in connection with the Business.

(e) Seller has taken commercially reasonable measures to ensure that all Software material to the Business (i) is free from any known Software defect and (ii) does not contain any virus, Software routine or hardware component designed to permit unauthorized access or to disable or otherwise harm any computer, systems or software, or any Software routine designed to disable a computer program automatically with the passage of time or under the positive control of a Person other than an authorized licensee or owner of the Software.

(f) (i) None of the Seller Software Products (other than any third party component that is not Open Source Software and is licensed to Seller or any of its Affiliates under a written license or other agreement) incorporates, links or calls to any Open Source Software; (ii) the incorporation in, or linking or calling by, any such Seller Software Products of any Open Source Software, does not obligate Seller or any of its Affiliates to disclose, make available, offer or deliver any portion of the source code of such Seller Software Products to any third party; (iii) there has been no use by Seller or any of its Affiliates of any Open Source Software that creates an obligation for Seller or any Affiliates to grant, or purport to grant, to any third party, any rights or immunities under any Seller Intellectual Property (including using any Open Source Software that requires, as a condition of use of such Open Source Software, that other Software incorporated into, derived from or distributed with such Open Source Software be (x)

disclosed or distributed in source code form, (y) licensed for the purpose of making derivative works, or (z) redistributable at no charge or minimal charge); and (iv) Seller and its Affiliates are in compliance with the notice, attribution, and other requirements of the licenses for the Open Source Software and other libraries in Seller's technology stack listed on Section 3.13(f) hereto.

(g) To the Knowledge of Seller, there are no known bugs, code, viruses, errors, and defects or any other problem or issue with respect to any of the Software (including the Seller Software Products) that adversely affects, or could reasonably be expected to adversely affect, the value, functionality, or performance of such Software or Seller Software Product.

### 3.14 Customers and Suppliers.

(a) Set forth on Schedule 3.14(a) is a true, complete and correct list of the top ten largest customers of the Business as measured by gross revenue for the year ended December 31, 2016. Except in connection with the Bankruptcy Case, no such customer set forth on Schedule 3.14(a) has cancelled or otherwise terminated or, to the Knowledge of Seller, threatened to cancel or otherwise terminate, or intends to cancel or otherwise modify or terminate, its relationship with the Business.

(b) Set forth on Schedule 3.14(b) is a true, complete and correct list of the top ten largest suppliers or vendors of the Business as measured by purchases for the year ended December 31, 2016. Except for Svitla Systems, Inc. and otherwise in connection with the Bankruptcy Case, no such supplier or vendor set forth on Schedule 3.14(b) has cancelled or otherwise terminated or, to the Knowledge of Seller, threatened to cancel or otherwise terminate, or intends to cancel or otherwise modify or terminate, its relationship with the Business.

### 3.15 Information Systems.

(a) The Information Systems are sufficient in all material respects for the operation of the Business as presently conducted, and Seller has duly licensed (e.g., purchased or licensed a sufficient number of license seats) all third party Software licensed from third parties that is currently used by Seller in such operations. The Information Systems perform in all material respects consistent with prevailing industry standards.

(b) Seller has maintained in connection with its customer facing operations, activity, conduct and Business, at all times during such operations, activity, conduct and Business, a written privacy statement or policy governing the collection, maintenance and use of customer and end user data and information that is in or comes into the possession of Seller as a result of the conduct of the Business.

3.16 Employee Benefit Matters. Neither Seller nor any of its Affiliates or ERISA Affiliates (a) maintains, sponsors, contributes to or is required to contribute, or has ever maintained, sponsored, contributed to or been required to contribute to, any Employee Benefit

Plan, or (b) has, had or may reasonably be expected to have any Liability under any such Employee Benefit Plan, including by reason of Seller having an ERISA Affiliate.

3.17 Employment Matters.

(a) Set forth on Schedule 3.17(a) is a true, complete and correct list of all Persons who are employees, independent contractors or consultants of the Business as of the date of this Agreement (including individuals on short-term disability, long-term disability or leave of absence), that sets forth for each such individual his or her (i) name and (ii) title or position (including whether full or part time).

(b) Neither Seller nor any of its Affiliates is a party to or bound by any collective bargaining agreement or other Contract with a union, works council, labor organization, or other similar agreement, nor is any such agreement or Contract currently contemplated or being negotiated nor has Seller or any of its Affiliates ever negotiated any such agreement or Contract. No Employee is represented by a union, works council, labor organization or other representative body or association or subject to a collective bargaining agreement or other similar Contract. There is not currently any threat of any strike, slowdown, work stoppage, lockout, picketing, concerted refusal to work or other similar labor disruption or dispute affecting Seller or any Employee with respect to the Business. There are not any unfair labor practices, labor disputes, or demands pending or threatened with respect to the Business involving Seller, on the one hand, and any Employee, on the other hand.

(c) All individuals characterized and treated by Seller as consultants or independent contractors of the Business are or were properly classified and treated as independent contractors under all applicable Laws. All Employees classified as exempt under any wage and hour Laws are properly classified. Set forth on Schedule 3.17(c) is a list of the names, locations, and termination dates of all Employees separated from employment with Seller during the six months prior to the date of this Agreement.

(d) Seller is and has been in compliance with all applicable Laws pertaining to employment and employment practices to the extent that they relate to employees of the Business, including all Laws relating to labor relations, equal employment opportunities, fair employment practices, employment discrimination, harassment, retaliation, reasonable accommodation, disability rights or benefits, immigration, wages, hours, overtime compensation, child labor, hiring, promotion and termination of employees, working conditions, meal and break periods, privacy, health and safety, workers' compensation, leaves of absence and unemployment insurance. There are no Actions against Seller pending, or to the Seller's Knowledge, threatened to be brought or filed, by or with any Governmental Authority or arbitrator in connection with the employment of any current or former applicant, employee, consultant, volunteer, intern or independent contractor of the Business, including, without limitation, any claim relating to unfair labor practices, employment discrimination, harassment, retaliation, equal pay, wages and hours or any other employment related matter arising under applicable Laws.

(e) Seller is in compliance with its obligations, as applicable, pursuant to the Worker Adjustment and Retraining Notification Act of 1988, as amended (the “WARN Act”), and any similar state or local Law. There has never been any “mass layoff” or “plant closing” (as defined by the WARN Act) with respect to Seller or the Business. Neither Seller nor any of its Affiliates has incurred any Liability under the WARN Act that remains unpaid or unsatisfied. Neither Seller nor any of its Affiliates has had any group layoffs of its employees within 90 calendar days prior to the Closing Date.

(f) To the Knowledge of Seller, no Employee has accepted an offer to join a business that is competitive with the Business.

(g) Since December 31, 2016 and other than in the Ordinary Course, Seller has not increased the compensation or benefits paid or payable to any employee under any Employee Benefit Plan or otherwise (including any such increase pursuant to any bonus, pension, profit sharing or other Employee Benefit Plan, and including any increase in any severance or termination pay).

3.18 Environmental Matters. Seller is not subject to any outstanding written Order or settlement agreement with any Person in respect of the Business or the Purchased Assets relating to any environmental Law, any environmental claim or similar liability. Seller is not subject to any Liability relating to any violation of environmental Law and, to the Knowledge of Seller, no event or circumstance has occurred or exists that could reasonably be expected to result in any Liability relating to an actual or possible violation of environmental Law.

3.19 Taxes.

(a) (i) Seller has properly and timely filed all material Tax Returns required to be filed by it relating to the Purchased Assets or the Business, all of which were complete and accurate in all material respects; (ii) Seller has paid all material Taxes required to be paid by it (whether or not shown on a Tax Return) relating to the Purchased Assets and the Business in all jurisdictions; (iii) no audit relating to Taxes of Seller by any Taxing Authority relating to the Purchased Assets or the Business is currently pending or is threatened in writing in any jurisdiction; (iv) no written notice of any material Tax deficiency or adjustment has been received by Seller in any jurisdiction; (v) there are no Contracts or waivers currently in effect that provide for an extension of time for the assessment of any material Tax against Seller in any jurisdiction; and (vi) no claim has ever been made by a Taxing Authority in a jurisdiction where a Tax Return is not filed by or on behalf of Seller that is subject to material Tax in that jurisdiction.

(b) Seller has complied in all material respects with the provisions of the Code relating to the withholding and payment of Taxes, including the withholding and reporting requirements under Code Sections 1441 through 1464, 3401 through 3406, and 6041 through 6049, as well as similar provisions under any other Laws, and has, within the time and in the manner prescribed by Law, withheld from employee wages and paid over to the proper Taxing Authorities all amounts required. Seller (i) has collected and remitted all material applicable sales and/or use Taxes to the appropriate Taxing

Authority or (ii) has obtained, in good faith, any applicable sales and/or use Tax exemption certificates in respect of material sales and/or use Tax.

(c) There are no Encumbrances on any of the Purchased Assets arising out of or relating to Taxes or any obligations relating to Taxes.

(d) Seller is not a foreign person within the meaning of Section 1445 of the Code.

3.20 Related Party Transactions. Except for compensation paid or payable by Seller to Employees in the Ordinary Course and reflected in the Financial Statements, no Affiliate, Employee, officer, director or current or former equity interest holder of Seller or family member of any of the foregoing is (a) a party to any transaction or Contract with Seller or (b) the owner of any interest in any Person that is a supplier or customer of Seller.

3.21 No Brokers. No broker, finder or investment banker is entitled to any brokerage, finder's or other fee or commission in connection with the Transactions based upon arrangements made by or on behalf of Seller.

#### **SECTION 4** **REPRESENTATIONS AND WARRANTIES OF PURCHASER**

Purchaser hereby represents and warrants to Seller as follows:

4.1 Organization and Good Standing. Purchaser is duly organized, validly existing and in good standing under the Laws of the jurisdiction of its formation. Purchaser is duly licensed or qualified to do business and is in good standing in each jurisdiction in which the ownership of its assets or the operation of its business as presently conducted makes such licensing or qualification necessary, except for such failures to be so qualified or licensed that, individually or in the aggregate, have not had and would not have a Material Adverse Effect.

4.2 Authorization. Purchaser has the requisite power and authority to execute and deliver this Agreement and the Ancillary Agreements and to perform its obligations hereunder and thereunder, and the execution, delivery and performance of this Agreement and the Ancillary Agreements and the consummation of the Transactions by Purchaser have been duly authorized by all necessary limited liability company action. This Agreement and the Ancillary Agreements will, at the Closing, have been duly and validly executed and delivered by Purchaser and, assuming the due and valid authorization, execution and delivery by Seller of this Agreement and the Ancillary Agreements and the entry of the Sale Order, constitute valid, legal and binding agreements of Purchaser, enforceable against Purchaser in accordance with their respective terms, except as may be limited by applicable bankruptcy, insolvency, reorganization, moratorium, fraudulent transfer and similar Laws of general applicability relating to the rights and remedies of creditors and general principles of equity.

4.3 Consents and Approvals. Except for the Sale Order, the execution and delivery of this Agreement and the Ancillary Agreements and the consummation of the Transactions does not and will not require Purchaser to make any filing with or give any notice to or obtain any consent, approval or authorization from any Person.



4.4 No Brokers. No broker, finder or investment banker is entitled to any brokerage, finder's or other fee or commission in connection with the Transactions based upon arrangements made by or on behalf of Purchaser.

4.5 Adequate Assurances Regarding Assigned Contracts. As of the Closing, Purchaser will provide, if necessary, reasonable evidence of its ability to satisfy the conditions contained in Sections 365(b)(1)(C) and 365(f) of the Bankruptcy Code with respect to the Transferred Contracts.

4.6 Investigation by Purchaser. Purchaser acknowledges and affirms that it has relied on its own independent investigation, analysis and evaluation of the Purchased Assets and the Assumed Liabilities, that it has made all such reviews and inspections of the Purchased Assets and the Assumed Liabilities as it deems necessary and appropriate, and that in making its decision to enter into this Agreement and consummate the transactions contemplated by this Agreement and the Ancillary Agreements, it has relied on its own investigation, analysis, and evaluation with respect to all matters without reliance upon any express or implied representations or warranties except as expressly set forth in this Agreement.

## **SECTION 5** **CERTAIN COVENANTS OF SELLER**

### **5.1 Conduct of Business Prior to the Closing.**

(a) Except as (i) expressly required by this Agreement or applicable Law, (ii) as required by Order of the Bankruptcy Court, (iii) consented to in writing by Purchaser, from the date of this Agreement until the Closing, Seller will (A) conduct the Business in the Ordinary Course (other than Seller's negotiation or entry into a Contract relating to an Alternative Transaction); (B) use commercially reasonable efforts to maintain and preserve intact its current organization and operations and to preserve its rights, goodwill and customer, supplier, subcontractor and other relationships; (C) maintain in good condition and repair (ordinary wear and tear excepted), the Purchased Assets; (D) preserve and maintain its good and normal relations with its customers, suppliers and vendors and others having dealings with the Business; (E) continue to maintain the Books and Records on a basis consistent with past practices; and (F) consult with Purchaser concerning the Bidding Procedures Order and Sale Order, and the bankruptcy proceedings and the Bankruptcy Case in connection therewith, provide Purchaser with copies of all filings of any kind (including motions, applications, pleadings, notices, proposed Orders and other documents) relating to such proceedings as soon as reasonably practicable prior to any submission thereof to the Bankruptcy Court, and incorporate into such filings all reasonable comments provided by Purchaser and its counsel prior to the filing thereof.

(b) Except as (i) expressly required by this Agreement or applicable Law or (ii) consented to in writing by Purchaser, Seller shall not, without the prior written consent of Purchaser, (A) make any modification to any Transferred Contract or any Permit or (B) enter into any compromise or settlement of any Action relating to the Purchased Assets or the Assumed Liabilities. In addition, between the date of this

Agreement and the Closing, unless Purchaser has previously consented in writing (which consent will not be unreasonably withheld or delayed), Seller will not, without the prior written consent of Purchaser, take any of the following actions:

(i) offer, agree or commit (in writing or otherwise) to permit, any of the Purchased Assets to become subject, directly or indirectly, to any Encumbrance except for an Encumbrance in favor of Purchaser (or its Affiliate, designee, or assignee) or otherwise pursuant to the DIP Financing;

(ii) (A) enter into any Contract that would constitute a Material Contract if in effect on the date of this Agreement, (B) amend, modify or terminate any Material Contract (including any Transferred Contract), or fail to exercise any renewal right with respect to any Material Contract that by its terms would otherwise expire or (C) enter into any Contract, or otherwise make any commitment, that is or may become an Assumed Liability;

(iii) Defer payment or satisfaction of (A) any accounts payable or (B) any Liabilities that are or may become Assumed Liabilities;

(iv) compromise any claim or waive or release any right of Seller that constitutes a Purchased Asset;

(v) omit to take any action necessary to maintain or renew any Seller Intellectual Property, or sell, assign, transfer, lease, exclusively license or allow to lapse any right in the Seller Intellectual Property;

(vi) merge or consolidate Seller with any other Person or acquire any business or equity of any other Person; or

(vii) enter into any Contract to do any of the foregoing, or authorize, recommend, propose or announce an intention to do any of the foregoing.

(c) Seller will prepare and timely file all Tax Returns required to be filed with respect to the Purchased Assets and the Business for Pre-Closing Tax Periods on a basis consistent with the elections, accounting methods, conventions and principles of taxation used for the most recent taxable periods for which Tax Returns involving similar Tax items have been filed.

## 5.2 Access to Information.

(a) Subject to any written confidentiality obligations that may be applicable to permitting access to or to information furnished to Seller by third parties that may be in Seller's possession from time to time, from the date of this Agreement until the Closing, Seller will (i) provide Purchaser and its Affiliates and Representatives with such information relating to the Business and the Purchased Assets as Purchaser may from time to time reasonably request; (ii) provide Purchaser and its Affiliates and Representatives reasonable access during regular business hours and upon reasonable notice to the Books and Records, customers, suppliers, personnel and real property of or,

in the case of real property, used by, Seller; and (iii) permit Purchaser and its Affiliates and Representatives to make such inspections thereof as Purchaser may reasonably request, during business hours and upon reasonable prior notice to Seller in order to perform non-invasive inspections and tests at such real property. Seller shall direct and use its commercially reasonable efforts to cause its Representatives to cooperate with Purchaser and Purchaser's Representatives in connection with such investigation and examination.

(b) Except as provided by the Bidding Procedures Order or other Order of the Bankruptcy Court, any investigation pursuant to this Section 5.2 shall be conducted in such manner as not to interfere unreasonably with the conduct of the Business. Notwithstanding the foregoing and except as otherwise provided in the Bidding Procedures Order, (i) Purchaser shall not have access to information relating to the sale process or any Alternative Transaction with respect to all or any portion of the Business, bids received from others in connection with such sale process or Alternative Transactions and information and analysis (including financial analysis) relating to such bids or Alternative Transactions, and (ii) as and to the extent necessary to avoid contravention or waiver, Seller may withhold any document or information the disclosure of which would reasonably be expected to violate any Contract or Law or would result in the waiver of any legal privilege or work-product privilege; provided, however, that to the extent practicable, Seller shall make reasonable and appropriate substitute disclosure arrangements under circumstances in which the restrictions of this clause (ii) apply. Seller shall have the right to have a Representative present at all times during any such inspections, interviews and examinations.

5.3 Receipt of Property Relating to Purchased Assets. Subject to the terms and conditions of this Agreement and applicable Law, if, following the Closing, Seller shall receive any money, check, note, draft, instrument, payment or other property which are Purchased Assets, Seller shall receive all such items in trust for, and as the sole and exclusive property of, Purchaser and, upon receipt thereof, shall promptly notify Purchaser of such receipt and shall promptly remit the same (or cause the same to be remitted) to Purchaser.

5.4 Assignability of Certain Contracts. To the extent that the assignment to Purchaser of any Transferred Contract pursuant to this Agreement is not permitted without the consent of a third party and such restriction cannot be effectively overridden or canceled by the Sale Order or other related Order of the Bankruptcy Court, then this Agreement will not be deemed to constitute an assignment of or an undertaking or attempt to assign such Contract or any right or interest therein unless and until such consent is obtained; provided, however, that Seller will cooperate with Purchaser before, and after, the Closing, as the case may be, to obtain all such consents; provided, further, that if any such consents are not obtained prior to the Closing Date, Seller will cooperate with Purchaser in any lawful and feasible arrangement designed to provide Purchaser with the benefits and obligations of any such Contract and Purchaser shall be responsible for performing all obligations under such Contract required to be performed by Seller on or after the Closing Date to the extent set forth in this Agreement.

5.5 Rejection of Contracts. Seller shall reject or otherwise terminate or cancel, any Contract that is not a Transferred Contract effective as of the Closing Date or at any other time agreed to by the Parties.

## **SECTION 6** **CERTAIN MUTUAL COVENANTS**

6.1 Further Assurances. Subject to the terms and conditions of this Agreement, each of the Parties shall use commercially reasonable efforts to (a) take, or cause to be taken, all actions and to do, or cause to be done, all things necessary, proper or advisable to consummate the Transactions and (b) cause the fulfillment at the earliest practicable date of all of the conditions to their respective obligations to consummate the Transactions. At any time and from time to time after the Closing Date, at the other party's request and without further consideration, Seller, on the one hand, and Purchaser, on the other hand, as applicable, shall promptly execute and deliver all such further agreements, amendments, modifications, certificates, instruments and documents and perform such further actions in order to fully consummate the Transactions and fully carry out the purposes and intent of this Agreement. Purchaser, on the one hand, and Seller, on the other hand, shall coordinate and reasonably cooperate in exchanging such information and reasonable assistance as may be requested by either of them in connection with the actions, agreements, certificates, instruments and documents contemplated by this Section 6.1.

6.2 Notification of Certain Matters.

(a) Seller shall give notice as soon as reasonably practicable to Purchaser, and Purchaser shall give notice as soon as reasonably practicable to Seller, of (i) any notice or other communication from any Person alleging that the consent of such Person which is or may be required in connection with the Transactions or the Ancillary Agreements is not likely to be obtained prior to Closing, and (ii) any written objection or proceeding that challenges the Transactions or the entry of the Sale Order by the Bankruptcy Court.

(b) In addition, Seller shall give notice as soon as reasonably practicable to Purchaser upon becoming aware of:

(i) any facts, circumstances, events or actions the existence, occurrence or taking of which (A) have had, or would reasonably be expected to have, individually or in the aggregate, a Material Adverse Effect on the Purchased Assets, Business or Closing; (B) have resulted in, or would reasonably be expected to result in, any representation or warranty made by Seller herein not being true and correct; or (C) have resulted in, or would reasonably be expected to result in, the failure of any of the conditions set forth in Section 8 or Section 9 of this Agreement to be satisfied; or

(ii) any Actions commenced or Claim asserted, threatened against, relating to or involving or otherwise affecting the consummation of the Transactions or any of the Ancillary Agreements.

No notice pursuant to this Section 6.2 will affect any representations or warranties, covenants, agreements, obligations or conditions set forth herein or limit or otherwise affect any available remedies.

6.3 Approvals and Consents. Promptly after the date of this Agreement, Seller will (a) make or cause to be made all filings and submissions required under any Law to be made by it in connection with this Agreement, the Ancillary Agreements or the consummation of the Transactions; (b) cooperate with Purchaser with respect to all filings and submissions that Purchaser elects to make or is required by Law to make in connection with this Agreement, the Ancillary Agreements or the consummation of the Transactions; and (c) obtain all consents and Orders of all Persons (including Governmental Authorities) required to be obtained in connection with the execution, delivery and performance by Seller of this Agreement or the Ancillary Agreements, and the consummation of the Transactions.

## **SECTION 7** **BANKRUPTCY COURT MATTERS**

7.1 Bankruptcy Court Matters. Seller will (a) provide Purchaser with a draft of the Sale Motion and drafts of all supporting pleadings no less than three (3) business days prior to filing them with the Bankruptcy Court (and will incorporate into such draft and supporting pleadings all reasonable comments provided by Purchaser and its counsel prior to the filing thereof) and will promptly file with the Bankruptcy Court the Sale Motion seeking entry of the Sale Order; and (b) file the Sale Motion no later than three (3) business days after the date of this Agreement. Purchaser and Seller each agree that they will promptly take such actions as are reasonably necessary to obtain entry of the Sale Order approving this Agreement and authorizing the Transactions, including furnishing affidavits or other documents or information for filing with the Bankruptcy Court for the purposes, among others, of (in the case of Purchaser) providing necessary assurances of performance by Purchaser under this Agreement and demonstrating that Purchaser is a “good faith” purchaser under Section 363(m) of the Bankruptcy Code. Purchaser shall consult with Seller prior to filing, joining in or otherwise supporting in any manner whatsoever any motion or other pleading relating to the sale of the Purchased Assets hereunder. In the event the entry of the Sale Order is appealed, Seller and Purchaser shall use their respective commercially reasonable efforts to pursue or defend such appeal, as the case may be.

### 7.2 Stalking Horse Approval; Bid Protections; Credit Bidding.

(a) The Bid Procedures Order shall approve (i) Purchaser to serve as the “stalking horse” bidder with respect to the Purchased Assets and (ii) this Agreement and the Transactions contemplated thereby as a “qualified bid” thereunder.

(b) Seller shall pay to Purchaser by wire transfer of immediately available funds to an account designated by Purchaser to Seller, in accordance with the terms hereof and the Bidding Procedures Order, a termination fee in an amount equal to Twenty-Five Thousand Dollars (\$25,000) plus documented, reasonable fees and expenses in connection with this Agreement and the Sale (the “Termination Fee”). Subject to the entry by the Bankruptcy Court of the Bidding Procedures Order approving the payment

of the Termination Fee, the Termination Fee shall be (i) actual and necessary costs and expenses of preserving Seller's estate within the meaning of Section 503(b) of the Bankruptcy Code and shall be treated as an allowed administrative expenses claim against Seller's estate pursuant to Sections 105(a), 503(b), and 507(a)(2) of the Bankruptcy Code, (ii) payable upon the termination of this Agreement pursuant to Section 11.1(e) or Section 11.1(f) in accordance with the terms hereof, and (iii) shall be paid in accordance with Section 11.3. Purchaser may waive its right to receive the Termination Fee at any time after Bankruptcy Court approval thereof, including at any auction, if Purchaser determines, in its sole discretion, such a waiver is reasonably likely to result in greater net proceeds for the estate and creditors. Seller shall seek the approval of the Bankruptcy Court of the Termination Fee in the Sale Motion. Seller acknowledges that the Termination Fee and the agreements contained in this Section 7.2 are an integral part of the transactions contemplated hereby and that, without these agreements, Purchaser would not enter into this Agreement.

(c) Subject to Section 2.5, Purchaser shall be authorized to credit bid any amount of outstanding principal and accrued, unpaid interest plus all reasonable and documented fees and expenses under and pursuant to both the Secured Credit Agreement and the DIP Financing with respect to the Purchased Assets in accordance with the Bid Procedures Order.

7.3 Notice of Transaction Required by Bankruptcy Court. The Parties acknowledge that under the Bankruptcy Code the sale of Purchased Assets is subject to approval of the Bankruptcy Court. The Parties acknowledge that to obtain such approval Seller must demonstrate that it has taken reasonable steps to obtain the highest or best price possible for the Purchased Assets, including giving notice of the Transactions to creditors and other interested parties as ordered by the Bankruptcy Court, providing information about the Purchased Assets to responsible bidders, and entertaining any higher or better offers from responsible bidders.

7.4 No Other Agreements. Seller represents that, as of the date of this Agreement, Seller is not a party to or bound by any Contract with respect to any Alternative Transaction and agrees that it will not become a party to or bound by any such Contract hereafter other than any such Contract that may come to exist as part of the sale process approved by the Bankruptcy Court.

7.5 No Successor Liability. The Parties intend that, upon the Closing, Purchaser shall not be deemed to: (a) be the successor of or successor employer (as described under ERISA and applicable regulations thereunder) to Seller, including with respect to any collective bargaining agreement and any Employee Benefit Plans; (b) have, *de facto* or otherwise, merged with or into Seller; (c) be a mere continuation or substantial continuation of Seller or the enterprise(s) of Seller; or (d) be liable for any acts or omissions of Seller in the conduct of the Business or arising under or related to the Purchased Assets or the Assumed Liabilities. Without limiting the generality of the foregoing, and except as otherwise provided in this Agreement, the Parties intend that Purchaser shall not be liable for any Encumbrances against Seller or any of its Affiliates, and that Purchaser shall have no successor or vicarious Liability of any kind or character whether known or unknown as of the Closing Date, whether fixed or contingent, existing or hereafter arising, with respect to the Business, the Purchased Assets or any Liabilities

of Seller arising on or prior to the Closing Date. The Parties agree that a provision substantially in the form of, and with comparable effect (to the extent permitted by Law) to, this Section 7.5 shall be reflected in the Sale Order.

7.6 Back-up Bidder. Notwithstanding anything to the contrary in the Bidding Procedures Order, or the bidding procedures themselves, Seller and Purchaser agree that, in the event that Purchaser is not the winning bidder at the auction undertaken pursuant to the Bidding Procedures Order, Purchaser shall act as the Back-up Bidder if so designated by Seller at the auction; provided, however, that Purchaser shall not be obligated to serve as Back-up Bidder for more than ten (10) business days after the entry of the Sale Order.

## **SECTION 8**

### **CONDITIONS TO PURCHASER'S OBLIGATIONS**

The obligation of Purchaser to consummate the Transactions is subject to the satisfaction of each of the following conditions on or prior to the Closing Date (any or all of which may be waived by Purchaser in writing, in whole or in part, to the extent permitted by Law):

8.1 Representations and Warranties. The representations and warranties of Seller set forth in Section 3 of this Agreement shall be true and correct in all respects (without giving effect to any limitation indicated by the words "Material Adverse Effect", "material" or similar qualifier) as of the Closing, with the same force and effect as if made at the Closing (except to the extent that a representation specifically speaks to an earlier date, in which case such representation shall continue to remain true and correct in all respects as of the Closing Date with respect to such earlier date), except where the failure of such representations and warranties to be so true and correct would not, individually or in the aggregate, have or be reasonably expected to have a Material Adverse Effect.

8.2 Covenants and Agreements. Seller shall have performed and complied in all material respects with all covenants and agreements required by this Agreement to be performed or complied with by it on or prior to the Closing Date.

8.3 Litigation. Neither Party shall be subject to any Action restraining or prohibiting the consummation of the Transactions.

8.4 Injunctions. No Law or Order shall have been enacted, promulgated, issued or deemed applicable to the this Agreement, the Ancillary Agreements or the Transactions that would make the consummation of the Transactions illegal or substantially delay the consummation of any material aspect of the Transactions.

8.5 Sale Order. The Bankruptcy Court shall have entered the Sale Order, as to which the time to appeal has expired and the effectiveness of the Sale Order shall not have been stayed.

8.6 Bidding Procedures Order. The Bankruptcy Court shall have entered the Bidding Procedures Order and any stay period applicable to the Bidding Procedures Order shall have expired or shall have been waived by the Bankruptcy Court.

8.7 Consents. Seller shall have made all filings, given all notices and obtained all consents, approvals or authorizations required by Seller to be so made, given or obtained in connection with the consummation of the Transactions.

8.8 No Material Adverse Effect. Since the date of this Agreement, there shall not have been a Material Adverse Effect.

8.9 Officer's Certificate. Seller shall have delivered to Purchaser a certificate duly executed by an authorized officer of Seller certifying that the conditions set forth in Sections 8.1, 8.2, 8.7, and 8.8 have been satisfied.

8.10 Employment Agreements. The Employees set forth on Schedule 8.10 shall have entered into employment agreements with Purchaser or an Affiliate thereof, in form and substance satisfactory to Purchaser.

8.11 Closing Deliveries. Seller shall have delivered to Purchaser all of the items set forth in Section 10.1.

## **SECTION 9** **CONDITIONS TO SELLER'S OBLIGATIONS**

The obligation of Seller to consummate the Transactions is subject to the satisfaction of each of the following conditions on or prior to the Closing Date (any or all of which may be waived by Seller in writing, in whole or in part, to the extent permitted by Law):

9.1 Representations and Warranties. The representations and warranties of Purchaser set forth in Section 4 of this Agreement shall be true and correct in all respects (without giving effect to any limitation indicated by the words "Material Adverse Effect", "material" or similar qualifier) as of the Closing, with the same force and effect as if made at the Closing (except to the extent that a representation specifically speaks to an earlier date, in which case such representation shall continue to remain true and correct in all respects as of the Closing Date with respect to such earlier date), except where the failure of such representations and warranties to be so true and correct would not, individually or in the aggregate, have or be reasonably expected to have a material adverse effect.

9.2 Covenants and Agreements. Purchaser shall have performed and complied in all material respects with all covenants and agreements required by this Agreement to be performed or complied with by it on or prior to the Closing Date.

9.3 Litigation. Neither Party shall be subject to any Action restraining or prohibiting the consummation of the Transactions.

9.4 Injunctions. No Law or Order shall have been enacted, promulgated, issued or deemed applicable to the this Agreement, the Ancillary Agreements or the Transactions that would make the consummation of the Transactions illegal or substantially delay the consummation of any material aspect of the Transactions.



9.5 Sale Order. The Bankruptcy Court shall have entered the Sale Order, as to which the time to appeal has expired and the effectiveness of the Sale Order shall not have been stayed.

9.6 Closing Deliveries. Purchaser shall have delivered to Seller all of the items set forth in Section 10.1.

## **SECTION 10** **CLOSING**

10.1 The Closing. The closing of the Transactions (the “Closing”) shall be held on the second (2nd) business day after the satisfaction or waiver of the conditions set forth in Section 8 and Section 9 of this Agreement (excluding those conditions which by their nature are to be satisfied as part of the Closing), or at such other time as the Parties may otherwise agree in writing (the “Closing Date”). The Closing will take place by telephonic or electronic delivery or release of documents. All of the Transactions shall be deemed to be consummated on a concurrent and simultaneous basis. The Closing shall be effective as of 11:59 p.m. New York City time on the Closing Date.

(a) Seller’s Deliveries at Closing. At the Closing, Seller shall deliver (or cause to be delivered) to Purchaser the following:

(i) a counterpart to the (A) Assignment and Assumption Agreement, (B) Bill of Sale and (C) the Assignment of Intellectual Property, in each case, duly executed by Seller; and

(ii) as necessary, fully executed consents, in form and substance acceptable to Purchaser, to assignment of all of Seller’s rights in, to and under the Purchased Assets.

(b) Purchaser’s Deliveries at Closing. At the Closing, Purchaser shall deliver (or cause to be delivered) to Seller the following:

(i) a counterpart to the (A) Assignment and Assumption Agreement, (B) Bill of Sale and (C) the Assignment of Intellectual Property, in each case, duly executed by Purchaser; and

(ii) the Cash Proceeds, paid by Purchaser to Seller or such other parties in accordance with Section 2.5 and Section 2.6.

## **SECTION 11** **TERMINATION**

11.1 Termination. This Agreement may be terminated and the Transactions abandoned at any time prior to the Closing as follows:

- (a) by mutual written agreement of Purchaser and Seller;
- (b) by either Party, if the other Party has materially breached any representation, warranty, covenant, or agreement set forth in this Agreement, such that the conditions set forth in Section 8.1 or Section 9.1 would not be satisfied and such breach is incapable of being cured or, if capable of being cured, shall not have been cured by the earlier of fifteen (15) calendar days after written notice thereof, or the Outside Date;
- (c) by either Party, if any Law that makes the consummation of the Transactions illegal or otherwise prohibited is enacted, adopted or promulgated, or if there shall be in effect a final and non-appealable Order restraining, enjoining or otherwise prohibiting the consummation of the Transactions; provided, however, that the right to terminate this Agreement under this Section 11.1(c) shall not be available to a Party if such Law or Governmental Order can be demonstrated to have primarily arisen from the failure of such Party to perform any of its obligations under this Agreement;
- (d) by either Party, if the Bankruptcy Court enters an Order that otherwise precludes the consummation of the Transactions on the terms and conditions set forth in this Agreement;
- (e) by either Party, if Seller (i) consummates an Alternative Transaction, (ii) files a motion seeking approval of a Chapter 11 plan (other than such a plan involving Purchaser) that contemplates an Alternative Transaction, (iii) executes and delivers a Contract of any kind with respect to an Alternative Transaction and Purchaser is no longer obligated to be a Back-up Bidder;
- (f) by either Party, if the Bankruptcy Court enters an Order approving any Alternative Transaction and Purchaser is not selected to serve as, or is no longer obligated to be, the Back-up Bidder;
- (g) by Purchaser, if the Bidding Procedures Order is not entered within fourteen (14) calendar days following the date of this Agreement;
- (h) by Purchaser, if the Sale Order has not been entered by the Bankruptcy Court on or before November 29, 2017;
- (i) by Purchaser, if Seller makes any filing with the Bankruptcy Court or takes any other action inconsistent with this Agreement or the Ancillary Agreements;
- (j) by Purchaser, if the Closing has not occurred on or before December 1, 2017 (the "Outside Date"); or
- (k) by Purchaser, if the Bankruptcy Case is converted into a case under Chapter 7 of the Bankruptcy Code or dismissed, or if a trustee or examiner is appointed in the Bankruptcy Case.

11.2 Procedure Upon Termination. In the event of termination of this Agreement and abandonment of the Transactions by Seller, Purchaser or both pursuant to Section 11.1, written notice thereof shall be given to the other Party and this Agreement shall terminate and the Transactions shall be abandoned without further action by either Party.

11.3 Effects of Termination.

(a) Each Party's right of termination under Section 11.1 is in addition to any other rights it may have under this Agreement, and the exercise of a right of termination will not be an election of remedies. If this Agreement is terminated pursuant to Section 11.1, all further obligations of the Parties under this Agreement will terminate, except that Section 1, this Section 11 and Section 13 shall survive any such termination.

(b) Notwithstanding Section 11.3(a), from and after the entry of the Bidding Procedures Order, if this Agreement is terminated by Party pursuant to Section 11.1(e) or Section 11.1(f) then Seller shall be liable to Purchaser for the Termination Fee and shall pay such Termination Fee to Purchaser on the date of consummation of an Alternative Transaction and from the proceeds of such Alternative Transaction by wire transfer of immediately available funds to an account designated by Purchaser.

**SECTION 12**  
**TAXES**

12.1 Tax Treatment. The Parties acknowledge and agree that Purchaser shall be treated as the owner of the Purchased Assets for tax purposes as of the Closing and no Party, on a Tax Return or otherwise, shall take any position inconsistent with such treatment.

12.2 Tax Refunds and Rebates; Liability. Seller hereby agrees to pay to Purchaser any Tax refunds, Tax rebates, or other similar such amounts received relating to the Purchased Assets, Assumed Liabilities or the Business attributable to any taxable years or other taxable periods (or portions thereof) on or after the Closing Date.

12.3 Cooperation. Purchaser and Seller agree to furnish or cause to be furnished to each other, as promptly as reasonably practicable, such information and assistance relating to the Purchased Assets as is reasonably necessary for the preparation and filing of any Tax Return, for the preparation for and proof of facts during any Tax audit, for the preparation for any Tax protest, for the prosecution or defense of any suit or other proceeding relating to Tax matters and for the answer of any governmental or regulatory inquiry relating to Tax matters.

**SECTION 13**  
**MISCELLANEOUS**

13.1 Survival of Representations and Warranties and Covenants. None of the representations and warranties contained in or made pursuant to this Agreement, any Ancillary Agreement or in any instrument delivered pursuant to this Agreement shall survive the Closing. None of the covenants or agreements contained in this Agreement, other than any covenants and agreements contained in Section 1 and Section 13, shall survive the Closing.

13.2 As Is. Subject to the terms and conditions of this Agreement, any Ancillary Agreement and any Order of the Bankruptcy Court, Purchaser is acquiring the Purchased Assets on an “as is, where is” basis.

13.3 Expenses. Except as otherwise expressly provided herein, all costs and expenses, including fees and disbursements of counsel, financial advisors and accountants, incurred in connection with this Agreement and the transactions shall be paid by the Party incurring such costs and expenses, whether or not the Closing shall have occurred.

13.4 Interpretation. For purposes of this Agreement, (a) the words “include,” “includes” and “including” shall be deemed to be followed by the words “without limitation”; (b) the word “or” is not exclusive; and (c) the words “herein,” “hereof,” “hereby,” “hereto” and “hereunder” refer to this Agreement as a whole. Unless the context otherwise requires, references herein: (i) to Sections and Disclosure Schedules mean the Sections of, and Disclosure Schedules attached to, this Agreement; (ii) to an agreement, instrument or other document means such agreement, instrument or other document as amended, supplemented and modified from time to time to the extent permitted by the provisions thereof and (iii) to a statute means such statute as amended from time to time and includes any successor legislation thereto and any regulations promulgated thereunder. This Agreement shall be construed without regard to any presumption or rule requiring construction or interpretation against the Party drafting an instrument or causing any instrument to be drafted. The Parties have participated jointly in the negotiation and drafting of this Agreement and, in the event an ambiguity or question of intent or interpretation arises, this Agreement shall be construed as jointly drafted by the Parties and no presumption or burden of proof shall arise favoring or disfavoring any Party by virtue of the authorship of any provision of this Agreement. The Disclosure Schedules referred to herein shall be construed with, and as an integral part of, this Agreement to the same extent as if they were set forth verbatim herein. The headings in this Agreement are for reference only and shall not affect the interpretation of this Agreement.

13.5 Entire Agreement. This Agreement and the Ancillary Agreements constitute the sole and entire agreement of the Parties with respect to the subject matter contained herein and therein, and supersede all prior and contemporaneous understandings and agreements, both written and oral, with respect to such subject matter (including any letter of intent, indication of interest and confidentiality agreement between Purchaser and Seller). In the event of any inconsistency between the statements in the body of this Agreement and those in the Ancillary Agreements or Disclosure Schedules (other than an exception expressly set forth as such in the Disclosure Schedules), the statements in the body of this Agreement will control.

13.6 Amendment and Modification; Waiver. This Agreement may only be amended, modified or supplemented by an agreement in writing signed by each Party. No waiver by any Party shall operate or be construed as a waiver in respect of any failure, breach or default not expressly identified by such written waiver, whether of a similar or different character, and whether occurring before or after that waiver. No failure to exercise, or delay in exercising, any right, remedy, power or privilege arising from this Agreement shall operate or be construed as a waiver thereof; nor shall any single or partial exercise of any right, remedy, power or privilege hereunder preclude any other or further exercise thereof or the exercise of any other right, remedy, power or privilege. No notice to or demand on one Party will be deemed to be a waiver

of any obligation of that Party or of the right of the Party giving such notice or demand to take further action without notice or demand as provided in this Agreement or the documents referred to herein.

13.7 Successors and Assigns. This Agreement shall be binding upon and shall inure to the benefit of the Parties and their respective successors and permitted assigns. Neither Party may assign its rights or obligations hereunder without the prior written consent of the other Party, which consent shall not be unreasonably withheld or delayed; provided, however, that, subject to the immediately following sentence, Purchaser may, at or prior to the Closing, assign some or all of its rights or delegate some or all of its obligations hereunder to one or more of its Affiliates without the consent of Seller. Upon any such permitted assignment, the references in this Agreement to Purchaser shall also apply to any such assignee(s) and/or designee(s) unless the context otherwise requires. No assignment of any obligations hereunder shall relieve such Party of any such obligations.

13.8 No Third Party Beneficiaries. This Agreement is for the sole benefit of the Parties and their respective successors and permitted assigns and nothing herein, express or implied, is intended to or shall confer upon any other Person or entity any legal or equitable right, benefit or remedy of any nature whatsoever under or by reason of this Agreement.

13.9 Governing Law; Jurisdiction; Waiver of Jury Trial.

(a) THIS AGREEMENT AND ANY CLAIM, CONTROVERSY OR DISPUTE ARISING OUT OF OR RELATING TO THIS AGREEMENT WILL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF NEW YORK, WITHOUT REGARD TO THE CONFLICT OF LAWS PRINCIPLES THEREOF THAT WOULD OTHERWISE DIRECT THE APPLICATION OF THE LAWS OF A DIFFERENT JURISDICTION.

(b) Without limiting the right of any Party to appeal any Order of the Bankruptcy Court, (i) the Bankruptcy Court (and any applicable court thereof) shall retain exclusive jurisdiction to enforce the terms of this Agreement and to decide any claims or disputes which may arise or result from, or be connected with, this Agreement, any breach or default hereunder, or the Transactions and (ii) any and all proceedings related to the foregoing shall be filed and maintained only in the Bankruptcy Court, and the Parties hereby consent to and submit to the jurisdiction and venue of the Bankruptcy Court and shall receive notices at such locations as indicated in Section 13.11; provided, however, that if the Bankruptcy Case has closed, each party hereto irrevocably and unconditionally agrees that it will not commence any action, litigation or proceeding of any kind whatsoever, whether in law or equity, or whether in contract or tort or otherwise, against the other Party or any of its Representatives in any way relating to this Agreement or the Transaction, in any forum other than the courts of the State of Delaware sitting in the Wilmington, Delaware and of the United States District Court of the District of Delaware, and any appellate court from any thereof, and each of the Parties irrevocably and unconditionally submits to the exclusive jurisdiction of such courts and agrees that any such action, litigation or proceeding may be brought in any such Delaware state court or, to the fullest extent permitted by applicable law, in such federal

court. Each of the Parties agrees that a final judgment in any such action, litigation or proceeding shall be conclusive and may be enforced in other jurisdictions by suit on the judgment or in any other manner provided by law.

(c) EACH PARTY TO THIS AGREEMENT HEREBY IRREVOCABLY AND UNCONDITIONALLY WAIVES ANY RIGHT SUCH PARTY MAY HAVE TO A TRIAL BY JURY OF ANY DISPUTE AND AGREES THAT ANY COURT PROCEEDING ARISING OUT OF OR RELATING TO THIS AGREEMENT, ANY ANCILLARY DOCUMENT OR THE TRANSACTIONS (AND AGREES THAT ANY SUCH DISPUTE SHALL BE DECIDED BY A JUDGE SITTING WITHOUT A JURY).

13.10 Severability. If any one or more of the provisions contained in this Agreement or in any other instrument referred to herein, shall, for any reason, be held to be invalid, illegal or unenforceable in any respect, then to the maximum extent permitted by applicable Law, such invalidity, illegality or unenforceability shall not affect any other provision of this Agreement or any other such instrument.

13.11 Notices. All notices, requests, demands and other communications under this Agreement shall be in writing and shall be deemed given if delivered personally, by electronic mail (with an appropriate subject heading) or telecopy if receipt is confirmed, or mailed by registered or certified mail (return receipt requested) (as to the Parties, at the following addresses, or at such other address for a Party as shall be specified by notice pursuant to this paragraph):

If to Purchaser:

Circle Orange LLC  
50 Gramercy Park North, Apt. 10A  
New York, New York 10010  
Email: dlewis@orangecap.com  
Tel: 215.939.1486  
Attn: Daniel Lewis

with a copy to:

Norton Rose Fulbright US LLP  
1301 Avenue of the Americas  
New York, New York 10019  
Email: andrew.rosenblatt@nortonrosefulbright.com  
Tel: 212.408.5559  
Fax: 646.710.5559  
Attn: Andrew Rosenblatt

If to Seller:

Circle Media, Inc.  
20965 Corral Road  
Omaha, Nebraska 68022  
Email: joe.casey@circlemedia.com  
Tel: 402.659.3384

Attn: Joseph Casey

with a copy to:

Koley Jessen P.C., L.L.O.  
1125 S. 103rd Street, Suite 800  
Omaha, Nebraska 68124  
Email: brian.koenig@koleyjessen.com  
Tel: 402.343.3883  
Fax: 402.390.9005  
Attn: Brian J. Koenig

13.12 Counterparts; Facsimile Copies. This Agreement may be executed in any number of counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. Signed facsimile or .pdf copies of this Agreement shall legally bind to the same extent as original documents.

13.13 Specific Performance. The Parties each acknowledge that the rights of each Party to consummate the Transactions are special, unique and of extraordinary character and that, in the event that either Party violates or fails or refuses to perform any covenant or agreement made by it in this Agreement, the non-breaching Party may be without an adequate remedy at Law. The Parties agree therefore that, in the event that any Party violates or fails or refuses to perform any covenant or agreement made by such Party in this Agreement, the non-breaching Party may, subject to the terms of this Agreement, institute and prosecute an Action in any court of competent jurisdiction to enforce specific performance of such covenant or agreement or seek any other equitable relief. Seller and Purchaser further agree that neither of them shall be required to obtain, furnish or post any bond or similar instrument in connection with or as a condition to obtaining any remedy referred to in this Section 13.13, and each of them irrevocably waives any right it may have to require the obtaining, furnishing or posting of any such bond or similar instrument.

13.14 Disclosure Schedules. The Parties acknowledge and agree that (a) the inclusion of any items or information in the Disclosure Schedules that are not required by this Agreement to be so included is solely for the convenience of Purchaser, (b) the disclosure by Seller of any matter in the Disclosure Schedules shall not be deemed to constitute an acknowledgement by Seller that the matter is required to be disclosed by the terms of this Agreement or that the matter is material, (c) if any section of the Disclosure Schedules lists an item or information in such a way as to make its relevance to the disclosure required by or provided in another section of the Disclosure Schedules or the statements contained in Section 3 reasonably apparent, the matter shall be deemed to have been disclosed in or with respect to such other section of the Disclosure Schedules, notwithstanding the omission of an appropriate cross-reference to such other section or the omission of a reference in the particular representation and warranty to such section of the Disclosure Schedules, (d) except as provided in clause (c) above, headings have been inserted in the Disclosure Schedules for convenience of reference only, (e) the Disclosure Schedules are qualified in their entirety by reference to specific provisions of this Agreement and (f) the Disclosure Schedules and the information and statements contained therein are not intended to constitute, and shall not be construed as constituting, representations or warranties of Seller except as and to the extent provided in this Agreement. From the date of this Agreement until the Closing Date, Seller shall have the obligation to promptly as practicable deliver to Purchaser

any new schedules or supplement or amend the Disclosure Schedules with respect to any matter that comes to the Knowledge of Seller after the date hereof that, if existing, occurring or known at the date of this Agreement, would have been required to be set forth or described in the Disclosure Schedules in order to make the representations and warranties of Seller in Section 3 true and correct as of the date of this Agreement and as of the Closing Date.

*[Signature Pages Follow]*



IN WITNESS WHEREOF, the Parties have duly executed and delivered this Agreement  
as of the date first above written.


**PURCHASER:**

CIRCLE ORANGE LLC

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

  
JOSEPH CASEY  
CEO

**SELLER:**

CIRCLE MEDIA, INC.

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

IN WITNESS WHEREOF, the Parties have duly executed and delivered this Agreement  
as of the date first above written.


**SELLER:**

CIRCLE MEDIA, INC.

By: \_\_\_\_\_  
Name:  
Title:

**PURCHASER:**

CIRCLE ORANGE LLC

By:  \_\_\_\_\_  
Name: Daniel Lewis  
Title:

**Schedule 2.1(d)**

Transferred Contracts

Counterparty	Contract	Cure Amount
[To be added.]		

**Schedule 2.1(e)**

Intellectual Property

Trademarks: None.

Copyrights: None.

Patents: None.

Software:

Owner	Software
Circle Media, Inc.	<ol style="list-style-type: none"><li>1. The proprietary data analysis and management system commercially known as “Fan.Dex Data Management Solutions (‘Fan.DexDMS’)” and all components or portions thereof and borrower-owned data related thereto, including both current and historical versions of the foregoing, in both source code and object code form, and all of borrower’s worldwide intellectual and industrial property rights appurtenant thereto.</li><li>2. All design documents, information, and material of borrower, in whatever form or media, including flow diagrams, block diagrams, database designs, scripts, pseudo-codes, presentations, and the like, including both current and historical versions of the foregoing, that describe the design, development, algorithms, processes, structure, organization, features, or functions of Fan.DexDMS and/or any component thereof, and all of borrower’s worldwide intellectual and industrial property rights appurtenant thereto.</li><li>3. All operations documents, information, and material of borrower, in whatever form or media, including all user manuals, training manuals, written guides, and the like, including both current and historical versions of the foregoing, that describe the operation, use, support, maintenance, and training with respect to Fan.DexDMS and/or any component thereof, and all of borrower’s worldwide intellectual and industrial property rights appurtenant thereto.</li><li>4. All sales and marketing documents, information, and materials of borrower, in whatever form or media, including all customer contracts, licenses, subscription agreements, distributor agreements, sales agent agreements, reseller agreements, sales channel documents, purchase orders, order forms, sales team scripts, lead generation processes, marketing plans, and the like, including both current and historical versions of the foregoing, that describe the sales, marketing, and distribution of Fan.DexDMS and/or any component thereof, and all of borrower’s worldwide intellectual and industrial property rights appurtenant thereto.</li></ol>

**Schedule 3.1(c)**

Capitalization

<b>Issuer</b>	<b>Class of Equity Interest</b>	<b>Shares Outstanding</b>	<b>Shareholder (Percentage Held)</b>
Circle Media, Inc.	Common stock	[ ]	S3 Digital Corp. (100%)

**Schedule 3.5**

Permits and Licenses

Holder/Applicant	Permit/License	Permit/License No.	Status
Circle Media, Inc.	None.	None.	None.

**Schedule 3.6(b)**

Indebtedness

<b>Debtor</b>	<b>Counterparty</b>	<b>Instrument/Contract</b>	<b>Outstanding</b>	<b>Maturity</b>
Circle Media, Inc.	Circle Orange LLC	Senior Secured Credit Agreement dated as of October 13, 2017	\$100,000 (plus interest, fees, expenses, and other amounts)	November 27, 2017
Circle Media, Inc.	Circle Orange LLC	Senior Secured, Super-Priority Debtor-in-Possession Credit Agreement dated as of October [•], 2017	[•]	December 1, 2017

**Schedule 3.7**

Liabilities

See Bankruptcy Petition, Schedules, and Statement of Financial Affairs of Circle Media, Inc.



**Schedule 3.9(b)**

Contracts of Seller's Affiliates

None.

**Schedule 3.10(a)**

Litigation

1. *Chip Fifth Avenue, LLC, et al. v. Quality King Distributors, Inc. v. S3 Digital and Circle Media, Inc.*, resulting in a judgment against S3 Digital Corp. and Circle Media, Inc. in the amount of \$298,583.86, plus attorneys' fees and interest entered on or about July 25, 2016, in the Supreme Court of the State of New York, New York County, in Case No. 161128/2015;
2. *Svitla Systems, Inc. v. Circle Media, Inc. and S3 Digital Corp.* – breach of contract action that was filed September 18, 2017, in California Superior Court (Case No. 17-561354), requesting damages of \$193,289.00, plus interest and attorneys' fees; and
3. Fox Sports Interactive Media has threatened a claim in the amount of \$377,999.89.

**Schedule 3.11(a)**

Material Contracts

<b>Counterparty</b>	<b>Contract</b>	<b>Status</b>
Rutgers University	Professional Service Provider Agreement	[to be added.]
Arizona Interscholastic Association	License Agreement	
Greenrope	License Agreement	
Outfront Media Sports	License Agreement	
Temple University	Master Subscription & Services Agreement	
University of Iowa	License Agreement	
Van Wagner Sports and Entertainment	License Agreement	

**Schedule 3.13(a)**

Intellectual Property

Trademarks: None.

Copyrights: None.

Patents: None.

Software:

Owner	Software
Circle Media, Inc.	<ol style="list-style-type: none"><li>1. The proprietary data analysis and management system commercially known as “Fan.Dex Data Management Solutions (‘Fan.DexDMS’)” and all components or portions thereof and borrower-owned data related thereto, including both current and historical versions of the foregoing, in both source code and object code form, and all of borrower’s worldwide intellectual and industrial property rights appurtenant thereto.</li><li>2. All design documents, information, and material of borrower, in whatever form or media, including flow diagrams, block diagrams, database designs, scripts, pseudo-codes, presentations, and the like, including both current and historical versions of the foregoing, that describe the design, development, algorithms, processes, structure, organization, features, or functions of Fan.DexDMS and/or any component thereof, and all of borrower’s worldwide intellectual and industrial property rights appurtenant thereto.</li><li>3. All operations documents, information, and material of borrower, in whatever form or media, including all user manuals, training manuals, written guides, and the like, including both current and historical versions of the foregoing, that describe the operation, use, support, maintenance, and training with respect to Fan.DexDMS and/or any component thereof, and all of borrower’s worldwide intellectual and industrial property rights appurtenant thereto.</li><li>4. All sales and marketing documents, information, and materials of borrower, in whatever form or media, including all customer contracts, licenses, subscription agreements, distributor agreements, sales agent agreements, reseller agreements, sales channel documents, purchase orders, order forms, sales team scripts, lead generation processes, marketing plans, and the like, including both current and historical versions of the foregoing, that describe the sales, marketing, and distribution of Fan.DexDMS and/or any component thereof, and all of borrower’s worldwide intellectual and industrial property rights appurtenant thereto.</li></ol>

**Schedule 3.13(f)**

Open Source Software and Technology Stack

Stack or Stack Component	Description
Data	Employs: <ul style="list-style-type: none"><li>• MongoDB – entity store and feed.</li><li>• ElasticSearch – runtime queries and analytics.</li><li>• Redis – caching and session.</li><li>• Kafka – streaming.</li><li>• SFTP – files.</li></ul>
Analytics	Includes: <ul style="list-style-type: none"><li>• ElasticSearch, MongoDB and Spark – platforms.</li><li>• JavaScript, Python, Scala, and R – languages.</li></ul>
Application	Leverages: <ul style="list-style-type: none"><li>• NodeJS – App server.</li><li>• Redis – event broker.</li><li>• JavaScript &amp; HTML 5 – languages.</li></ul>
Service	Applies: <ul style="list-style-type: none"><li>• NodeJS – app server.</li></ul>
Client	Includes: <ul style="list-style-type: none"><li>• HTML5, Bootstrap, BackboneD3.js, Socket.IO and ReactJS.</li></ul>

**Schedule 3.14(a)**

Customers

<b>Customer</b>	<b>Gross Revenue</b>	<b>Relationship Status</b>
Outfront Media Sports	[to be added.]	[to be added.]
Arizona Interscholastic Association		
Van Wagner Sports and Entertainment		
Temple University		
Rutgers University		
University of Iowa		

**Schedule 3.14(b)**

Suppliers

<b>Supplier</b>	<b>Amount Purchase</b>	<b>Relationship Status</b>
Rackspace	Approximately \$9,000/month	Data Storage / Server Maintenance Provider

**Schedule 3.17(a)**

Employees

<b>Employee</b>	<b>Title/Position</b>	<b>Part/Full Time</b>
Michael Dresslar	VP of Technology	Full Time
Heather Voight	VP of Business Development	Full Time
Joseph Casey	Chief Executive Officer	Full Time
Dan Libro	VP of Client Services	Full Time
Janet Hofeldt	Independent Contractor - Bookkeeper	Not an employee



**Schedule 3.17(c)**

Separated Employees

<b>Employee</b>	<b>Title/Position</b>	<b>Location</b>	<b>Date Separated</b>
Randy Eccker	Chief Executive Officer	Nebraska	July 2017
John Libro	SVP	New Jersey	March 2017

**Schedule 8.9**

Closing Obligations

Employee	Title/Position (at Seller)
[To be added.]	

**Schedule 10.1**

Closing Deliveries

***Seller's Deliveries***

1. [To be added.]

***Purchaser's Delivers***

1. [To be added.]

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT NEBRASKA

In re:

S3 DIGITAL CORP.,<sup>1</sup>

Debtor.

Case No. 17-81540

Chapter 11

In re:

CIRCLE MEDIA, INC.,

Debtor.

Case No. 17-81541

Chapter 11

**NOTICE OF BID PROCEDURES, STOCKING HORSE PURCHASE AGREEMENT,  
BID DEADLINE, AUCTION, AND SALE HEARING**

**Please take notice** that on October 27, 2017, the above-captioned debtors and debtors in possession (collectively, the “Debtors”) filed the *Debtors’ Motion to Establish and Approve (I) Bidding Procedures and Bid Protections Related to the Sale of Debtors’ Assets Free and Clear of Liens, Encumbrances, and Interests, and (II) Assumption and Assignment Procedures* (Doc. No. \_\_\_\_ ) (the “Bid Procedures Motion”) with the United States Bankruptcy Court for the District of Nebraska (the “Court”) seeking, among other things, the following:

- Approval of the proposed bidding procedures attached as Exhibit “A” hereto (the “Bid Procedures”) by which the Debtors will solicit and identify the highest or otherwise best offer for the sale, liquidation, or disposition (the “Sale”) of all or substantially all of Debtors’ assets;
- Approval of the Debtors’ selection of the Stocking Horse Bidder, the bid protections for the stocking horse bidder, and the Stocking Horse Purchase Agreement, which is attached hereto as Exhibit “B”;
- Approval of the procedures attached hereto as Exhibit “C” for the assumption and assignment of executory contracts, including notice of proposed cure amounts (the “Assumption and Assignment Procedures”);
- Approval of the form and manner of notice with respect to certain procedures, protections, schedules, and agreements described herein and attached hereto;

<sup>1</sup> The Debtors in these chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number, include: S3 Digital Corp. (9650); and Circle Media, Inc. (9123). The Debtors’ location is 20965 Corral Road, Omaha, NE 68022.

- Scheduling a final hearing (the “Sale Hearing”) to approve the Sale;
- At the Sale Hearing, authorize the sale, liquidation, or other disposition of all or substantially all of the Debtors’ assets free and clear of liens, claims, interests, and encumbrances with any such interest to attach to the proceeds of the Sale with the same validity and priority under the Bankruptcy Code as such interests had immediately prior to confirmation of the Sale; and
- Authorize the assumption and assignment of certain executory contracts.

**Please take further notice** that on November \_\_, 2017, the Bankruptcy Court approved the Bid Procedures Motion. Therefore, Debtors are soliciting offers for the sale, liquidation, or other disposition of substantially all the Debtors’ assets consistent with the Bid Procedures approved by the Court attached hereto as Exhibit “A.” All interested bidders should carefully read the Bid Procedures.

**Please take further notice** that the Debtors have received Court approval to enter into the Stocking Horse Purchase Agreement.

**Please take further notice** that if the Debtors receive qualified, competing bids within the requirements and timeframe set forth in the Bid Procedures, the Debtors will conduct an auction of the assets on or about **November 27, 2017**, at 9:00 a.m. Central Time at the offices of Koley Jessen P.C., L.L.O., located at 1125 S. 103<sup>rd</sup> Street, Suite 800, Omaha, NE 68124.

**Please take further notice** that the Debtors will seek approval of the Sale at the Sale Hearing scheduled to commence on **November 29, 2017**, at 1:00 p.m. Central Time before the Honorable Judge Thomas L. Salidino, at the Court, 111 S. 18<sup>th</sup> Plaza, Second Floor, Courtroom No. 8, Omaha, NE 68102.

**Please take further notice** that objections to the relief requested in the Bid Procedures Motion must be filed with the Court on or before 5:00 p.m. Central Time on **November 28, 2017** (the “Sale Objection Deadline”).

### **CONSEQUENCES OF FAILING TO TIMELY MAKE AN OBJECTION**

Any party or entity who fails to timely make an objection to the Sale on or before the Sale Objection Deadline set forth above shall be forever barred from asserting any objection to the Sale, including with respect to the disposition of the Debtors’ assets free and clear of all liens, claims, encumbrances, and other interests, except as otherwise set forth in the Stocking Horse Purchase Agreement or other agreement with the Successful Bidder.

DATED this \_\_\_\_ day of October, 2017.

S3 Digital Corp. and Circle Media, Inc., Debtors,

By: /s/  
Donald L. Swanson, #16385  
Brian J. Koenig, #23807  
Kristin M.V. Krueger, #23919  
KOLEY JESSEN P.C., L.L.O.  
1125 South 103<sup>rd</sup> Street, Suite 800  
Omaha, NE 68124  
(402) 390-9500  
(402) 390-9005 (fax)  
[Don.Swanson@koleyjessen.com](mailto:Don.Swanson@koleyjessen.com)  
[Brian.Koenig@koleyjessen.com](mailto:Brian.Koenig@koleyjessen.com)  
[Kristin.Krueger@koleyjessen.com](mailto:Kristin.Krueger@koleyjessen.com)

4828-2828-5777.1

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT NEBRASKA

In re:

S3 DIGITAL CORP.,<sup>1</sup>

Debtor.

Case No. 17-81540

Chapter 11

In re:

CIRCLE MEDIA, INC.,

Debtor.

Case No. 17-81541

Chapter 11

**NOTICE OF POTENTIAL ASSUMPTION AND ASSIGNMENT OF EXECUTORY  
CONTRACTS IN CONNECTION WITH THE SALE OF CERTAIN  
OF DEBTORS' ASSETS AND PROPOSED CURE COSTS**

**YOU ARE RECEIVING THIS NOTICE (THE NOTICE OF POTENTIAL ASSUMPTION AND ASSIGNMENT) BECAUSE YOU MAY BE A COUNTER PARTY TO AN EXECUTORY CONTRACT WITH CIRCLE MEDIA, INC. OR ITS AFFILIATED DEBTOR, S3 DIGITAL CORP. (COLLECTIVELY, THE "DEBTORS"). PLEASE READ THIS NOTICE CAREFULLY AS YOUR RIGHTS MAY BE EFFECTED BY THE SALE DESCRIBED HEREIN.**

**Please take notice** that on October 27, 2017, the Debtors filed the *Debtors' Motion to Establish and Approve (I) Bidding Procedures and Bid Protections Related to the Sale of Debtors' Assets Free and Clear of Liens, Encumbrances, and Interests, and (II) Assumption and Assignment Procedures* (Doc. No. \_\_\_\_ ) (the "Bid Procedures Motion") with the United States Bankruptcy Court for the District of Nebraska (the "Court") seeking, among other things, the following:

- Approval of the proposed bidding procedures attached as Exhibit "A" hereto (the "Bid Procedures") by which the Debtors will solicit and identify the highest or otherwise best offer for the sale, liquidation, or disposition (the "Sale") of all or substantially all of Debtors' assets;
- Approval of the Notice of Potential Assumption and Assignment set forth herein, including notice of proposed cure amounts;

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<sup>1</sup> The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: S3 Digital Corp. (9650); and Circle Media, Inc. (9123). The Debtors' location is 20965 Corral Road, Omaha, NE 68022.

- Approval of the form and manner of notice with respect to certain procedures, protections, schedules, and agreements described herein and attached hereto;
- Approval of the Debtors' selection of the Stocking Horse Bidder and the bid protections for the stocking horse bidder;
- Scheduling a final hearing (the "Sale Hearing") to approve the Sale;
- At the Sale Hearing, authorize the sale, liquidation, or other disposition of all or substantially all of the Debtors' assets free and clear of liens, claims, interests, and encumbrances with any such interest to attach to the proceeds of the Sale with the same validity and priority under the Bankruptcy Code as such interests had immediately prior to confirmation of the Sale; and
- Authorize the assumption and assignment of certain executory contracts.

**Please take further notice** that on October \_\_, 2017, the Bankruptcy Court approved the Bid Procedures Motion. Therefore, Debtors are soliciting offers for the sale, liquidation, or other disposition of substantially all the Debtors' assets consistent with the Bid Procedures approved by the Court attached hereto as Exhibit "A." All interested bidders should carefully read the Bid Procedures.

**Please take further notice** pursuant to these Assignment and Assumption Procedures and by this written notice thereof, the Debtors hereby notify you that they have determined in the exercise of their reasonable business judgment, that the contracts and any modifications thereto set forth on Schedule 1 attached hereto (collectively, the "Contracts") shall be assumed and assigned to the Successful Bidder subject to the Successful Bidder's payment of any cure amounts set forth on Schedule 1 or such other cure amounts that are agreed to by the parties.

**Please take further notice** that, except as otherwise provided by the Bidding Procedures Order the time for filing Objections to (a) the cure amounts related to the Contracts, (b) the Debtors ability to assume and assign a Contract, and (c) adequate assurance of future performance by the Successful Bidder must be filed and served no later than seven (7) days after service of this Notice of Potential Assumption and Assignment.



DATED this \_\_\_\_ day of October, 2017.

S3 Digital Corp. and Circle Media, Inc., Debtors,

By:      /s/       
Donald L. Swanson, #16385  
Brian J. Koenig, #23807  
Kristin M.V. Krueger, #23919  
KOLEY JESSEN P.C., L.L.O.  
1125 South 103<sup>rd</sup> Street, Suite 800  
Omaha, NE 68124  
(402) 390-9500  
(402) 390-9005 (fax)  
[Don.Swanson@koleyjessen.com](mailto:Don.Swanson@koleyjessen.com)  
[Brian.Koenig@koleyjessen.com](mailto:Brian.Koenig@koleyjessen.com)  
[Kristin.Krueger@koleyjessen.com](mailto:Kristin.Krueger@koleyjessen.com)

**SCHEDULE 1**  
**CONTRACTS**

Debtor	Counterparty	Description of Acquired Contract	Cure Amount