

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW HAMPSHIRE**

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In re: : Chapter 11

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GT ADVANCED TECHNOLOGIES INC., *et al.*, : Case No. 14-11916-HJB

:

Debtors. :

: Jointly Administered

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**OBJECTION OF CITIGROUP FINANCIAL PRODUCTS INC. TO DEBTORS’
MOTION FOR ORDER, PURSUANT TO BANKRUPTCY CODE SECTIONS 105, 362,
363, AND 553 AND BANKRUPTCY RULE 6004, (A) MODIFYING AUTOMATIC STAY,
ALLOWING SETOFF OF PREPETITION OBLIGATIONS, AND APPROVING
RELATED AGREEMENT WITH CUSTOMER; AND (B) AUTHORIZING CERTAIN
DEBTORS TO ENTER INTO INTERCOMPANY AGREEMENT RELATED TO SALE
OF ASF FURNACES AND RESERVATION OF RIGHTS**

Citigroup Financial Products Inc. (“Citi”), a creditor in the above-captioned chapter 11 cases,¹ by and through its undersigned attorneys, hereby submits this Objection to the Debtors’ Motion for Order, Pursuant to Bankruptcy Code Sections 105, 362, 363, and 553 and Bankruptcy Rule 6004, (A) Modifying Automatic Stay, Allowing Setoff Of Prepetition Obligations, and Approving Related Agreement With Customer; and (B) Authorizing Certain Debtors to Enter into Intercompany Agreement Related to Sale of ASF Furnaces (the “Motion”) [Dkt. No. 1544] and Reservation of Rights. In support of this Objection, Citi respectfully states as follows:²

¹ Citi is a creditor of several Debtor entities, including GT Hong Kong.

² Citi delayed filing this Objection because it was informed by Debtors’ counsel that the Debtors intended to bifurcate the relief sought in the Motion so that the request to approve the Intercompany Agreement would not be heard at the hearing on April 8, 2015. Subsequent to these discussions and after the objection filing deadline had passed, the Debtors filed Debtors’ Statement of Position With Respect to April 8, 2015 Hearing on Debtors’ Motion for Order, Pursuant to Bankruptcy Code Sections 105, 362, 363, and 553 and Bankruptcy Rule 6004: (A) Modifying Automatic Stay, Allowing Setoff of Prepetition Obligations, and Approving Related Agreement With Customer; and (B) Authorizing Certain Debtors to Enter into Intercompany Agreement Related to Sale of ASF Furnaces



PRELIMINARY STATEMENT³

1. The Motion to approve the Intercompany Agreement seeks relief under section 363(b) of the Bankruptcy Code based on the Debtors business judgment, on shortened notice, that shifts an economic obligation from GTAT Corp. to GT Hong Kong without adequate consideration, to the detriment of GT Hong Kong's estate and creditors. Citi objects to the Motion on the grounds that the record regarding the Intercompany Agreement does not reflect the exercise of reasonable business judgment, the applicable standard to evaluate transactions under section 363(b) of the Bankruptcy Code.

2. The Intercompany Agreement has several flaws that demonstrate it falls outside of the Debtors' reasonable business judgment. *First*, the transactions contemplated by the Intercompany Agreement may result in a post-petition fraudulent conveyance. GT Hong Kong has not received, and the Intercompany Agreement does not provide for, adequate consideration to GT Hong Kong for its obligations under the Intercompany Agreement.

3. *Second*, the Intercompany Agreement contravenes the Apple Settlement Agreement which requires GTAT Corp. or GT SPE to pay the Apple Repayment Amount and expressly excludes GT Hong Kong from any liability for the Apple Repayment Amount. The Court approved the Apple Settlement Agreement more than four months ago after having been satisfied by the evidence presented that the Apple Settlement Agreement included appropriate mechanics to compensate GT Parties that paid the Apple Repayment Amount.

("Statement of Position") [Dkt. No. 1618]. The Statement of Position contains a proposed form of order that Citi believes materially and adversely affects its rights and does not preserve the status quo. In addition, the proposed order introduces new concepts that were not part of the Motion and were not discussed with Citi prior to inclusion in the Debtors' latest filing. Citi's counsel intends to discuss this matter in greater detail at the hearing. Citi proposes that an order should be entered in a form consistent with Exhibit A.

³ Capitalized terms used herein and not otherwise defined have the respective meanings set forth in the Motion.

4. *Third*, the First Amendment and the Intercompany Agreement are severable. The Debtors are attempting to force the Court to issue a decision in an expedited timeframe on the Intercompany Agreement under the guise that it is necessary to effectuate the First Amendment and close of the sale of the ASF Furnaces to the Customer. However, nothing in the First Amendment or the related transaction requires GTAT Corp. and GT Hong Kong to enter into the Intercompany Agreement. If approved, it will not result in a “holistic” solution as the Debtors purport, but instead will prejudice GT Hong Kong and its creditors. Although the Debtors make bare assertions that the Intercompany Agreement should be approved because it reduces “inter-estate conflicts,” *see* Motion ¶ 44, the Debtors fail to explain that such resolution comes at the sole expense of GT Hong Kong and its creditors. Indeed, this proposed arrangement, and the lack of consideration of the negative effects on GT Hong Kong, magnifies the existence of serious inter-Debtor issues.

5. *Last*, the Motion and proposed Intercompany Agreement highlight that the Debtors are not independently considering or safeguarding GT Hong Kong’s interests and that the Debtors’ current governance structure is inadequate to protect the interests of GT Hong Kong and its creditors. The language of the Motion speaks for itself. From the unfavorable terms of the First Amendment to threats made to terminate the License Agreement unless GT Hong Kong capitulates, it is clear that the Debtors are acting in a manner that favors GTAT Corp. and other Debtors to the detriment of GT Hong Kong. These actions cannot, under any circumstance, amount to a reasonable exercise of business judgment to justify the relief sought in the Motion.

FACTUAL BACKGROUND

6. On December 17, 2014, after an evidentiary hearing, the Court approved the Apple Settlement Agreement. [Dkt. No. 819]. In approving the Apple Settlement Agreement,

the Court found it to be a “valid exercise of the Debtors’ business judgment” and that the “terms and conditions of the Settlement Agreement satisfy the provisions of section 363 of the Bankruptcy Code.” Apple Settlement Order ¶ E.

7. The Apple Settlement Agreement resolved the outstanding disputes among the parties and established the amount of the Apple Claim. *See* Apple Settlement Agreement, Ex. B-1. As adequate protection for the Apple Claim, Apple received a security interest in the Mesa ASF Furnaces.⁴ *Id.* ¶ 2(a). The Apple Settlement Order also required GTAT Corp to, or to cause an affiliate, *other than GT Hong Kong*, to pay the Apple Repayment Amount⁵ within three business days following the sale of an ASF Furnace. *Id.* ¶ 2(b)(iii).

8. At the hearing to approve the Apple Settlement Order, this Court considered the ramifications of GTAT Corp. paying the Apple Repayment Amount on account of an ASF Furnace it did not sell. *See* Hr’g Tr. 77:23-80:24; 83:13-84:2; 87:9-19; 88:4-15, Dec. 15, 2014. In response, the Debtors’ witness referred the Court to a provision of the Apple Settlement Order that addresses this fact pattern. The Apple Settlement Order provides that “[f]or each ASF Furnace that is not a Mesa ASF Furnace for which Apple receives the Apple Repayment Amount . . . Apple’s security interest in a Mesa ASF Furnace shall be released and such Mesa ASF Furnace released shall be deemed to be owned by the GTAT Party that made such payment.” Apple Settlement Order ¶ 2(c). The Debtors’ witness testified that this lien release and transfer of an unencumbered Mesa ASF Furnace adequately compensated GTAT Corp. for making the

⁴ The Mesa ASF Furnaces do not include the ASF Furnaces that the Debtors proposed to sell to the Customer following approval of the Motion.

⁵ The Apple Settlement Amount that is due and payable by GTAT Corp. as a result of the transactions contemplated by the Motion equals \$169,000 per ASF Furnace. Apple Settlement Agreement, Ex. B-2.

payment on account of an ASF Furnace sale by an affiliate. *See* Hr’g Tr. 84:25-85:21; 87:9-19.

Based on the record, this Court approved the Apple Settlement Order.

9. The proposed transaction with the Customer is the first time since entry of the Apple Settlement Order that the Apple Repayment Amount is due on account of an ASF Furnace owned by GT Hong Kong. In the Motion, the Debtors are seeking approval under section 363(b) of the Bankruptcy Code to enter into an Intercompany Agreement that requires GT Hong Kong to reimburse GTAT Corp. for a settlement payment that GTAT Corp. agreed to pay to Apple under the Apple Settlement Order.

10. The Motion also seeks approval for GT Hong Kong to sell ASF Furnaces to Customer as part of a settlement of certain disputes with Customer and to preserve the business relationship. *See* Motion ¶ 22. Relevant to the sale, GTAT Corp, GT Hong Kong and certain of their affiliates are parties to the License Agreement. Pursuant to the License Agreement, in exchange for GT Hong Kong’s obligation to make a royalty payment, GTAT Corp. granted GT Hong Kong an exclusive license to use the intellectual property to produce sapphire furnaces, to sell such furnaces, and to grant its customers the right to use such intellectual property in the “Territory,” which includes all countries outside of the United States and its territories and possessions. License Agreement §§ 1.9, 2.1, 2.2. The License Agreement also granted GT Hong Kong licensee rights to any “Improvements” (as such term is defined in the License Agreement). License Agreement §§ 4.1, 4.2. According to the Motion, the Customer is an existing customer of GT Hong Kong and is a Chinese purchaser, Ford Decl. ¶ 7-8, and under the License Agreement, GT Hong Kong has the exclusive license to sell ASF Furnaces and the right to use the related technology to the Customer.

OBJECTION

11. Citi objects to the Motion on the grounds that the record regarding the Intercompany Agreement does not reflect the exercise of reasonable business judgment, the standard by which to evaluate transactions under section 363(b) of the Bankruptcy Code. *In re Lionel Corp.*, 722 F.2d 1063, 1071 (2d. Cir. 1983) (“a judge determining a § 363(b) application [must] expressly find... a good business reason to grant such an application”). The transaction contemplated by the Intercompany Agreement may be a fraudulent transfer as the forbearance and other proposed consideration does not actually provide GT Hong Kong with any value. This is because GTAT Corp. cannot terminate the License Agreement without violating the automatic stay, *In re Krystal Cadillac Oldsmobile GMC Truck, Inc.*, 142 F.3d 631, 637 (3d Cir. 1998) (holding that termination of a debtor’s franchise agreement violated the automatic stay), and it cannot reject the License Agreement if GT Hong Kong elects to retain its rights under section 365(n) of the Bankruptcy Code, *see In re Spansion, Inc.*, 507 Fed. Appx. 125, 128-129 (3d Cir. Del. 2012) (“Section 365(n) allows the holder of an intellectual property license to elect to retain its rights under the contract.”).

12. In addition, the Intercompany Agreement is severable from the sale to the Customer and can proceed without the Intercompany Agreement. As such, Citi requests that the Court refrain from approving the Intercompany Agreement until the Debtors have proposed a global resolution to its intercompany relationships. The proposed Intercompany Agreement also raises questions as to whether GT Hong Kong’s fiduciaries are adequately protecting the GT Hong Kong estate, or whether they are permitting GTAT Corp. to take advantage of its subsidiary.

13. Now, without any supporting declarations, and without the opportunity for proper discovery, the Debtors ask the Court to deviate from the Apple Settlement Order and approve the Intercompany Agreement on the basis of their reasonable business judgment. *See In re Centennial Textiles*, 227 B.R. 606, 612 (Bankr. S.D.N.Y. 1998) (finding that management violated its fiduciary duty to creditors and the estate when it made inflated payments to creditor under post-petition invoices).

A. GT Hong Kong will not receive adequate consideration for its obligations under the Intercompany Agreement.

14. GT Hong Kong's reimbursement of the Apple Repayment Amount may be a post-petition fraudulent transfer. *See Hr'g Tr. at 77:23-78:4*, Dec. 15, 2014; N.H. Rev. Stat. § 545-A:4 (2015); Bankruptcy Code § 544(b). New Hampshire applies the Uniform Fraudulent Transfer Act and provides that "[a] transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation... [w]ithout receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor: (1) [w]as engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or (2) [i]ntended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due." N.H. Rev. Stat. § 545-A:4 (2015).

15. The "consideration" that GTAT Corp. claims it will provide to GT Hong Kong in exchange for GT Hong Kong's obligations under the Intercompany Agreement is insufficient. In the Motion, the Debtors claim that GTAT Corp. provided consideration to GT Hong Kong in form of: (i) lifting GT Hong Kong's exclusivity restrictions in the Apple Settlement Agreement, (ii) GTAT Corp.'s forbearance from terminating the License Agreement, and (iii) GTAT Corp.'s

continued efforts to sell ASF Furnaces owned by GT Hong Kong. *See* Motion ¶ 25. However, none of these undertakings are fair consideration for GT Hong Kong assuming the Apple Repayment Amount for the sale of its ASF Furnaces.

16. As to the first basis of consideration the Debtors assert, eliminating GT Hong Kong's restriction from selling ASF Furnaces cannot constitute new consideration for purposes of the Intercompany Agreement because it was past consideration to induce GT Hong Kong to enter into the Apple Settlement Agreement.⁶

17. As to the second basis of consideration, GTAT Corp.'s alleged forbearance from terminating the License Agreement⁷ is inadequate because the forbearance does not provide any consideration—the automatic stay bars GTAT Corp. from taking such action. *See, e.g., Krystal Cadillac Oldsmobile GMC Truck*, 142 F.3d at 637. Nor can GTAT Corp. reject the License Agreement outright because section 365(n) of the Bankruptcy Code gives the licensee of intellectual property the choice to either accept the rejection or “retain its rights” under the intellectual property contract. *See* 11 U.S.C. § 365(n)(1)(B). By the Debtors own admission, without the intellectual property under the License Agreement, the value of the ASF Furnaces reduces drastically. *See* Motion ¶ 11. It is therefore unimaginable that GT Hong Kong's

⁶ Under New Hampshire law, which governs the Intercompany Agreement, it is well-established that “past consideration is not a valid foundation of a contract or promise, unless the act has been done at the request of the party benefitted, and whom payment is claimed.” *Chadwick v. Knox*, 31 N.H. 226, 236 (1855) (citations omitted); Restatement (Second) of Contracts § 86 cmt. a (1981) (“[P]ast consideration is inconsistent with the meaning of consideration.”) (internal quotation marks omitted). Here, for the reasons stated previously and elsewhere, GT Hong Kong does not benefit from the Intercompany Agreement and there is no evidence in the record that the parties entered into the Intercompany Agreement at the request of GT Hong Kong.

⁷ GT Hong Kong and GTAT Corp. are parties to the License Agreement pursuant to which GTAT Corp. granted GT Hong Kong “an exclusive right and license” to sell ASF Furnaces to purchasers outside the United States. *See* License Agreement § 2.1. “As a result of the License Agreement, none of the Debtors (other than GT Hong Kong) has the right to sell ASF Furnaces directly to customers outside the United States.” Motion ¶ 11.

management or board could decide, in the exercise of reasonable business judgment, to relinquish its rights under the License Agreement.

18. As to the third basis, GTAT Corp. already receives consideration for the License Agreement and for making its sales force available to GT Hong Kong. Contrary to the Debtors' assertion that GT Hong Kong must pay its own "freight," *see id.* ¶¶ 42, 43, GT Hong Kong has and continues to provide substantial value to GTAT Corp. and other Debtors. Under the License Agreement, GT Hong Kong pays GTAT Corp. royalties for use of the Licensed Product, Licensed Patents and Licensed Technology (each as defined in the License Agreement). *See* License Agreement § 3.1. According to the Motion, the Debtors have other intercompany arrangements in place to allocate costs and expenses for the use by one Debtor of another Debtor's resources. *See* Motion ¶ 12. In addition, as GT Hong Kong's 100% shareholder, GTAT Corp. also benefits from GT Hong Kong's profitable ASF Furnace sales as it increases GT Hong Kong's equity value. Furthermore, as admitted in the Motion, all of the Debtors benefit from GT Hong Kong's sale to the Customer, because it sends a positive message to the market that the Debtors' customers are willing to do business with it and are economically viable. *See id.* ¶ 20. Finally, GT Hong Kong also benefits the Debtors as an enterprise by tapping into the customer base in Asia, which the Debtors concede is the "primary, if not sole, market for ASF Furnaces." *Id.* ¶ 17.

19. The Debtors also neglect to consider the value GT Hong Kong will provide GTAT Corp. by entering into the First Amendment. Under the First Amendment, GT Hong Kong will assume part of GTAT Corp.'s obligations to purchase sapphire seeds (that it does not need, for the sole intent of reselling it, *see* Motion ¶ 21) and reduce GT Hong Kong's claim against the Customer under the Prepetition ASF Purchase Orders. *See id.* ¶ 22. As described in

the Motion, the transaction contemplated by the First Amendment appears to be a triangular set-off in which GT Hong Kong loses more than it gains for the benefit of GTAT Corp. and the Customer. At a minimum, the benefit provided by GT Hong Kong to GTAT Corp. under the First Amendment should be credited against any amount due from GT Hong Kong to GTAT Corp. under the Intercompany Agreement for the Apple Repayment Amount, if the Court approves the Intercompany Agreement.

20. With regards to whether or not GT Hong Kong is solvent, the Debtors have not provided sufficient discovery to assess GT Hong Kong's current financial position and whether or not the Intercompany Agreement will render it insolvent. Upon information and belief, GT Hong Kong may currently be insolvent or may be rendered insolvent by the payment to GTAT Corp. Because the Intercompany Agreement does not provide adequate consideration for GT Hong Kong's obligations thereunder, this Court should not approve the Intercompany Agreement until the Debtors have met their burden and established that GT Hong Kong is not insolvent and will not be rendered insolvent by this transaction.⁸ *See Braunstein v. Walsh (In re Rowanoak Corp.)*, 344 F.3d 126, 131 (1st Cir. 2003) ("The trustee has the burden of proof to establish the conveyance was made under conditions that bring it within . . . 11 U.S.C. § 548 [fraudulent transfers].") (internal quotation omitted).

B. Entities other than GT Hong Kong will reap a windfall to the detriment of GT Hong Kong and in violation of the Apple Settlement Order.

21. The Intercompany Agreement transfers financial obligations from GTAT Corp. to GT Hong Kong in direct contravention of the Apple Settlement Order and the Debtors' own representations to the Court. The Debtors attempt to justify the Intercompany Agreement as a

⁸ Citi reserves its rights to challenge the Intercompany Agreement on the basis of actual fraud, which does not require a showing of insolvency. *See* N.H. Rev. Stat. § 545-A:4(a) (2015).

way to implement the Apple Settlement Agreement as it “affects the intercompany rights and obligations among [the] chapter 11 estates.” Motion ¶ 4. However, the Apple Settlement Agreement already contains mechanisms to sort out intercompany obligations.

22. At the hearing held on December 15, 2014 to approve the Apple Settlement Agreement, Debtors’ counsel spoke at length regarding the lien release and furnace replacement mechanics in the Apple Settlement Agreement and that such mechanics would adequately compensate GTAT Corp. for making payments to Apple:

So Hong Kong sells one of its furnaces. Not in Mesa; one of the Hong Kong furnaces. Apple is entitled to receive its Apple repayment amount. It gets it not from Hong Kong but from GTAT Corp. At that point, one furnace gets – one Mesa ASF furnace, which is the one against which Apple has a security interest, one of the 2,036 gets released from that pool and now it belongs into a free pool that is owned by GTAT Corp who just made the payment on behalf of Hong Kong. So that’s – that’s the – our way of protecting . . . that entity.

Hr’g Tr. at 110:1-12, Dec. 15, 2014.

23. In the Motion, the Debtors state that GTAT Corp. is compensated for making the Apple Repayment Amount: “It is true that, under the Apple Settlement Agreement, the Debtor paying the Apple Repayment Amount on account of a sale of GT Hong Kong’s ASF Furnaces would become the owner of an equivalent number of Mesa ASF Furnaces that are being released from Apple’s security interest.” Motion ¶ 42 n.33. Now, in contrast to the representations made on the record at the December 15, 2014 hearing, the Debtors claim that the release of Apple’s security interest “is little comfort . . . given that it is uncertain when, whether, and at what price these released ASF Furnaces will be ultimately sold.” *Id.* If the Court approves the Intercompany Agreement, then GTAT Corp. and its creditors would obtain a double recovery in the form of unencumbered ASF Furnaces and payments from GT Hong Kong on account of any settlement payment made to Apple. The Apple Settlement Agreement did not provide a carve-

out or other mechanism to subsequently shift obligations among the various Debtors. Therefore, the Intercompany Agreement unnecessarily revisits the terms of the Apple Settlement Agreement to rewrite GT Hong Kong's rights and obligations.

C. The Court can allow the sale to go forward but defer ruling on the Intercompany Agreement until the Debtors have fully addressed all of their intercompany issues.

24. The Debtors' request to approve the Intercompany Agreement is severable from the rest of the relief sought in the Motion and instead should be considered in connection with a global resolution of intercompany claims and transfers. Although Citi understands the urgency to close the sale of the ASF Furnaces to the Customer, the Debtors have not presented any evidence that the sale requires approval of the Intercompany Agreement. At this time, there is no immediate need for the Intercompany Agreement—and its attendant economic consequences—when, by their own admission, the Debtors intend to request approval of another agreement that will impact intercompany relationships. *See* Motion ¶ 4 n.9.

25. The Debtors have stated that if the Intercompany Agreement is not approved, they intend to sell GTAT Corp. ASF Furnaces to the Customer, and absorb between \$20,000 and \$25,000 of shipping costs. This is an empty threat. Under the License Agreement, GT Hong Kong has the exclusive right to sell to the Customer and all other customers outside of the United States. License Agreement §§ 2.1, 2.2. As discussed above, because of the automatic stay and GT Hong Kong's rights under section 365(n), GTAT Corp. can neither exercise its termination rights under the License Agreement nor reject the License Agreement. GTAT Corp.'s threat to sell its ASF Furnaces to the Customer directly is impossible without GTAT Corp. interfering with the contract between GT Hong Kong and Customer and breaching the License Agreement. And as demonstrated by the Motion, the Debtors are aware they need to work with these constraints. In fact, they intend to seek relief to implement another intercompany agreement

permitting GTAT Corp. and GT SPE to sell ASF Furnaces to GT Hong Kong “in furtherance of GT Hong Kong selling such furnaces to third-party customers in Asia.” Motion ¶ 4 n.9.

26. Furthermore, even though GTAT Corp. must make the Apple Settlement Payment when the sale closes, the Debtors have not suggested that GTAT Corp. cannot make the payment. According to the Debtors’ Monthly Operating Report for February 2015, GTAT Corp. has in excess of \$40 million in available cash on its balance sheet. *See* Monthly Operating Report for the Period of February 1, 2015 to February 28, 2015 [Dkt. No. 1552]. And if necessary, GTAT Corp. could request approval to *borrow* the amount necessary from GT Hong Kong to make the Apple Settlement Payment. Also, in the near term, the Debtors are seeking approval of debtor-in-possession financing which, if approved, will provide the Debtors with an additional \$95 million in liquidity.

27. Under these circumstances, Citi respectfully submits that the Court deny the Motion to approve the Intercompany Agreement until Debtors have presented a resolution (on standard notice) for their intercompany transactions that is fair to each Debtor. Effectuating intercompany agreements on a piecemeal basis precludes parties (at least at this juncture) from fully assessing their need.

D. GT Hong Kong’s interests have not been adequately represented.

28. The Motion demonstrates that GT Hong Kong’s interests may not have been properly considered during the structuring of the Intercompany Agreement and the First Amendment, and may not have been, and may not be, throughout the Debtors’ chapter 11 cases. The Debtors, for example, have not presented any evidence that GT Hong Kong was separately represented when the parties negotiated the Intercompany Agreement and First Amendment or that GT Hong Kong’s management assessed the costs of these transactions. The absence of such

evidence is especially critical here since the Debtors justify the relief sought under section 363(b), which requires proof that they exercised reasonable business judgment.

29. More telling is that the Motion contains several statements demonstrating that the Debtors are acting in a concerted effort to favor GTAT Corp. and other Debtors over GT Hong Kong, including that:

- Under the First Amendment, GT Hong Kong has agreed to purchase additional sapphire seeds to consummate a transaction that, among other things, relieves GTAT Corp. of its obligation to purchase those seeds and reduces the amount owed to GT Hong Kong under the Prepetition ASF Purchase Order. *See* Motion ¶¶ 1-2.
- GTAT Corp. may be forced to consider whether to terminate the License Agreement if the Intercompany Agreement is not executed. *See* Motion ¶ 43.
- GTAT Corp. and its stakeholders “generally prefer” to sell an ASF Furnace located at the Mesa Facility over selling an ASF Furnace owned by GT Hong Kong. *See id.* ¶ 44.
- Representatives of GTAT Corp. have stated that if the Intercompany Agreement is not approved, it will sell GTAT Corp. or GT SPE ASF Furnaces instead, incurring shipping costs that could amount to \$25,000 per ASF Furnace.

30. Terminating the License Agreement will likely materially impede the Debtors’ ability to sell the ASF Furnaces to the Customer, who has expressed an immediate need for them. Under the terms of the License Agreement, GTAT Corp. is permitted to terminate the License Agreement upon six months’ notice to GT Hong Kong. *See* License Agreement § 9.2(vi). However, once termination of the License Agreement becomes effective, the Customer would no longer be able to use any Licensed Technology. *See* License Agreement § 2.2 (providing that GT Hong Kong may “grant to its customers the right to use” the Licensed Product (*i.e.*, the ASF Furnace) and Licensed Technology “*consistent with the terms and conditions* contained [in the License Agreement]”) (emphasis added). The value of the furnaces purchased by the Customer would, as the Debtors concede, be reduced to “scrap value.” Motion ¶ 43.

31. It seems unlikely that an officer or director of either GTAT Corp. or GT Hong Kong, exercising reasonable business judgment and in compliance with its fiduciary duties, could decide to terminate or breach the License Agreement or not to sell the GT Hong Kong ASF Furnaces to the Customer. Beyond being outside of the Debtors' reasonable business judgment, purposefully breaching the License Agreement and selling GTAT Corp.'s ASF Furnaces is akin to usurping corporate opportunity.⁹

32. Such decision would also be in direct conflict with the Debtors' primary business justification for the Motion, which is to garner \$45.5 million in ASF Furnace sale proceeds. Yet this is exactly what GTAT Corp. has said it would do if the Intercompany Agreement is not approved. In short, these statements and proposed actions highlight the lack of reasonable business judgment and, as discussed further below, that there is an irreconcilable conflict of interest between GT Hong Kong and GTAT Corp. which can only be remedied by the appointment of an independent fiduciary to act on behalf of GT Hong Kong.

RESERVATION OF RIGHTS

33. Due to concerns stated above regarding the extent to which GT Hong Kong's interests are being protected by the other GT Parties and their professionals, Citi respectfully reserves its rights to request that the Court appoint an independent director to serve as a fiduciary to GT Hong Kong and its creditors. The independent director's duties should include evaluating all commercial transactions between GT Hong Kong and its affiliates and other third-parties. Courts have appointed independent fiduciaries for debtor subsidiaries whose interests may not be aligned with its affiliates. *See In re NII Holdings, Inc.*, No. 14-12611-scc (Bankr. S.D.N.Y. Dec. 12, 2014) [Dkt. No. 293] (appointing independent manager for debtor-subsiary solely to

⁹ Furthermore, terminating the License Agreement in violation of the automatic stay may subject GTAT Corp. to sanctions. *See* 11 U.S.C. § 362(k).

Exhibit A

REVISED PROPOSED ORDER

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

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In re: : Chapter 11
: :
GT ADVANCED TECHNOLOGIES INC., *et al.*, : Case No. 14-11916-HJB
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Debtors.¹ : Jointly Administered
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: : Re: Docket No. 1544
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ORDER, PURSUANT TO BANKRUPTCY CODE SECTIONS 105, 362, 363, AND 553 AND BANKRUPTCY RULE 6004 MODIFYING AUTOMATIC STAY, ALLOWING SETOFF OF PREPETITION OBLIGATIONS, AND APPROVING RELATED AGREEMENT WITH CUSTOMER

Upon the motion (the "Motion")² of the above-captioned debtors and debtors in possession (collectively, "GTAT" or the "Debtors"), pursuant to section 363(b) of title 11 of the United States Code (the "Bankruptcy Code") and Rule 6004 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), for entry of an order: (a) modifying the automatic stay, allowing setoff of certain prepetition obligations, and approving that certain First Amendment to 2015 ASF Purchase Order, substantially in the form attached thereto as Exhibit B (the "First Amendment"), between GT Advanced Technologies Limited ("GT Hong Kong") and a Chinese purchaser ("Customer") of GT Hong Kong's advanced sapphire furnaces ("ASF Furnaces"); and (b) authorizing GTAT to enter into the Intercompany Agreement, substantially in the form attached thereto as Exhibit C (the "Intercompany Agreement"), related to the sale of GT Hong

¹ The Debtors, along with the last four digits of each debtor's tax identification number, as applicable, are: GT Advanced Technologies Inc. (6749), GTAT Corporation (1760), GT Advanced Equipment Holding LLC (8329), GT Equipment Holdings, Inc. (0040), Lindbergh Acquisition Corp. (5073), GT Sapphire Systems Holding LLC (4417), GT Advanced Cz LLC (9815), GT Sapphire Systems Group LLC (5126), and GT Advanced Technologies Limited (1721). The Debtors' corporate headquarters are located at 243 Daniel Webster Highway, Merrimack, NH 03054.

² Capitalized terms used herein but not otherwise defined shall have the meanings ascribed to them in the Motion.

Kong's ASF Furnaces to customers outside the United States, all as further detailed in the Motion; and upon consideration of the Ford Declaration; and the Court having jurisdiction to consider the Motion and the relief requested therein pursuant to 28 U.S.C. §§ 157 and 1334; and consideration of the Motion and the requested relief being a core proceeding pursuant to 28 U.S.C. § 157(b); and venue being proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409; and due and proper notice of the Motion having been provided to the parties listed therein, and it appearing that no other or further notice need be provided; and the Court having determined that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein; and it appearing that the relief requested in the Motion is in the best interests of the Debtors, their estates and creditors; and upon all of the proceedings had before the Court and after due deliberation and sufficient cause appearing therefor,

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED to the extent provided herein.
2. The First Amendment is approved.
3. GT Hong Kong is authorized to enter into the First Amendment.
4. GT Hong Kong shall allocate the proceeds from the sale of sapphire seeds under the Seed Agreement based on the relative contributions by GTAT Corp. and GT Hong Kong to the credits and offsets under the First Amendment, as described in the Motion; provided, however, that this Court shall retain jurisdiction to allocate or re-allocate the proceeds described in this paragraph as between GTAT Corp. and GT Hong Kong pursuant to any order entered in connection with the intercompany issues described in paragraph 5 hereof.
5. The relief sought in the Motion as it relates to the Intercompany Agreement is adjourned without date; provided, however, that GTAT may renew its request for relief related to

the Intercompany Agreement by filing a notice on the Court's docket and serving such notice on (a) the Creditors' Committee, (b) the U.S. Trustee, (c) Citigroup Financial Products, Inc., and (d) those parties who have formally filed requests for notice in these chapter 11 cases pursuant to Bankruptcy Rule 2002, no less than ~~10-14~~ days' prior to a hearing on such relief; provided further, however, that in the event that GTAT chooses to renew its request for such relief in accordance with the foregoing, GTAT may also amend or modify the requested relief to include broader intercompany issues between GTAT Corp., GT SPE, and GT Hong Kong as long as such issues are related to the License Agreement, the Cost Sharing Agreement related to the License Agreement, and/or the sale of ASF Furnaces in Asia; provided further, however, that if GTAT renews its request for relief on such intercompany issues, such request for relief ~~will~~ may include a request for reimbursement of all payments made or to be made by GTAT Corp. on account of the sale of GT Hong Kong's ASF Furnaces.

6. Solely for the purpose of facilitating the sale contemplated under the 2015 ASF Purchase Orders (the "GT Hong Kong Sale"), and notwithstanding GTAT Corp.'s position that, as of the Petition Date, it had not disclosed to GT Hong Kong various technology improvements related to the growth of 165 KG sapphire boules (the "Undisclosed Improvements"), GTAT Corp. will allow GT Hong Kong to use the Undisclosed Improvements and will provide the necessary hardware and software solely to permit GT Hong Kong's ASF Furnaces to be sold pursuant to the 2015 ASF Purchase Orders to be used to produce 165 KG sapphire boules. This use and assistance shall be limited to the GT Hong Kong Sale and shall not be used by GT Hong Kong for any other purposes until further order of the Court. ~~Unless GT Hong Kong establishes, to the satisfaction of this Court, that it had received the Undisclosed Improvements prior to the Petition Date, GT Hong Kong (and any party claiming derivative rights through GT Hong Kong)~~

~~will be barred from asserting that it can use the Undisclosed Improvements (other than pursuant to the limited terms of this Order).~~

~~7. In any future litigation between GTAT Corp. and GT Hong Kong (or parties claiming derivatively through GT Hong Kong), if GTAT Corp., after the entry of this Order, sends a notice of termination of the License Agreement or files a motion to reject the License Agreement, such notice shall be deemed to have been given, and such motion shall be deemed to have been filed, as of April 7, 2015.~~

8.7. GTAT is authorized to take all actions necessary to effectuate the relief granted pursuant to this Order.

9.8. Nothing in this Order, the Motion or the Debtors' Statement of Position with Respect to the April 8, 2015 Hearing on the Motion shall be deemed an admission, finding of fact or evidence of any liability, responsibility, agreement, fault, or obligation of any Debtor with respect to the License Agreement, the Undisclosed Improvements, the Apple Settlement Agreement, or any other matter other than as expressly contemplated in this Order. This Order shall not be interpreted to be a course of dealings among the Debtors. Except as expressly provided herein, (i) ~~each Debtor~~ all parties reserves ~~its~~ their rights with respect to the Undisclosed Improvements, the Apple Settlement, and the License Agreement, or any other matter, (ii) this Order shall not be construed to be a waiver of each Debtor's rights with respect to the Undisclosed Improvements or under the Apple Settlement Agreement or the License Agreement or any other matter, and (iii) no party shall use the fact that the GT Hong Kong Sale has been approved and/or consummated prior to any intercompany agreement being approved by this Court as a basis to limit and/or reduce the entitlement of any Debtor to be reimbursed or

compensated by another Debtor for payments made or to be made on account of the GT Hong Kong Sale.

~~10.9.~~ Pursuant to Bankruptcy Rule 6004(h), this Order shall not be stayed and is effective immediately upon its entry.

~~11.10.~~ The requirement set forth in LBR 7102(b)(2) that any motion filed shall have an accompanying memorandum of law is waived.

~~12.11.~~ The Court retains exclusive jurisdiction with respect to all matters arising from or related to the implementation of this Order.

Dated: April ___, 2015
Manchester, NH

HONORABLE HENRY J. BOROFF
UNITED STATES BANKRUPTCY JUDGE

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW HAMPSHIRE**

-----X	
	:
In re:	: Chapter 11
	:
GT ADVANCED TECHNOLOGIES INC., <i>et al.</i> ,	: Case No. 14-11916-HJB
	:
Debtors.	: Jointly Administered
	:
-----X	

CERTIFICATE OF SERVICE

Citigroup Financial Products Inc. (“Citi”), a creditor in the above-captioned chapter 11 cases, by and through its undersigned attorneys, hereby submits that they have caused the following documents(s) to be served via Electronic Mail on the U.S. Trustee, Debtors’ counsel, and all other parties listed on the Court’s CM/ECF register, as well as via first class mail on the parties listed on the attached Exhibit A:

Objection of Citigroup Financial Products Inc. To Debtors’ Motion for Order, Pursuant to Bankruptcy Code Sections 105, 362, 363, And 553 and Bankruptcy Rule 6004, (A) Modifying Automatic Stay, Allowing Setoff of Prepetition Obligations, and Approving Related Agreement with Customer; and (B) Authorizing Certain Debtors to Enter Into Intercompany Agreement Related to Sale of ASF Furnaces, Request for Appointment of Independent Director and Reservation of Rights

Dated: April 7, 2015

Concord, NH

By: /s/ Lisa Snow Wade
Lisa Snow Wade, Esq. (BNH 07261)
ORR & RENO, P.A.
45 South Main Street, P.O. Box 3550
Concord, NH 03302-3550
Telephone: (603) 224-2381
Facsimile: (603) 223-9050

-and-

Raniero D'Aversa, Jr., Esq.
Laura D. Metzger, Esq.
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, New York 10019
Telephone: (212) 506-5000
Facsimile: (212) 506-5151

Co-Counsel for Citigroup Financial Products Inc.

**EXHIBIT A
TO CERTIFICATE OF SERVICE**

GE Capital Information
Technology Solutions, Inc F/D/B/A
Ikon Financial Services
c/o Christine R. Etheridge
Bankruptcy Administration
1738 Bass Road
PO Box 13708
Macon GA 31208-3708

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

Official Committee Of Unsecured Creditors
Kelley Drye & Warren, Llp James S. Carr
101 Park Avenue
New York, NY 10178

Mesmer & Deleault, PLLC
Frank B. Mesmer, Jr.
41 Brook St Manchester NH 03104

PSNH
Christopher J. Allwarden
Senior Counsel, Law Department
780 No. Commercial St.
PO Box 330
Manchester NH 03105-0330

State Of New Hampshire
Office of the Attorney General
Peter C.L. Roth,
Senior Asst. Attorney General
33 Capitol St
Concord NH 03301-6397