

Hearing Date: June 2, 2017 at 10:00 a.m. Eastern Time  
Objection Deadline: May 26, 2017 at 4:00 p.m. Eastern Time

**ASHFORD – SCHAEL LLC**

Courtney A. Schael, Esq. (CS-1295)  
100 Quimby Street, Suite 1  
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Counsel for the Debtor and Debtor in Possession

**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK**

In re:

METROPARK USA, INC.,

Debtor.

Chapter 11

Case No. 11-22866 (RDD)

**NOTICE OF THE DEBTOR’S MOTION PURSUANT TO 11 U.S.C. §§ 105  
AND 363 SEEKING AN ORDER APPROVING THE SALE OF CERTAIN  
ASSETS OF THE DEBTOR’S ESTATE FREE AND CLEAR OF LIENS,  
CLAIMS, INTERESTS AND ENCUMBERANCES AND ALLOWING  
RECOVERY OF FEES AND COSTS FROM SALE PROCEEDS  
PURSUANT TO 11 U.S.C § 506(c)**

PLEASE TAKE NOTICE, that on **June 2, 2017 at 10:00 a.m.**, or as soon thereafter as counsel may be heard, a hearing (the “Hearing”) will be held before the Honorable Robert D. Drain, United States Bankruptcy Judge, at the United States Bankruptcy Court, Southern District of New York, located at 300 Quarropas St, Room 248, White Plains, New York, on the Motion (the “Motion”) of Metropark USA, Inc., debtor and debtor in possession (the “Debtor”), by its counsel, Ashford-Schael LLC, seeking the entry of an Order pursuant to 11 U.S.C. §§ 105, 363 and 506(c) authorizing and approving the Debtor’s sale of certain assets of the Debtor’s estate free and clear of liens, claims, interests and encumbrances, allowing

recovery of fees and costs from the sale proceeds, and granting the Trustee such other, further and different relief as this Court may deem just and proper.

**PLEASE TAKE FURTHER NOTICE** that any responses or objections to the Motion must be in writing, shall conform to the Federal Rules of Bankruptcy Procedure and the Local Bankruptcy Rules for the Southern District of New York, and shall be filed with the Bankruptcy Court (a) electronically in accordance with General Order M-399 (which can be found at [www.nysb.uscourts.gov](http://www.nysb.uscourts.gov)) by registered users of the Bankruptcy Courts' filing system and (b) by all other parties in interest on a 3.5 inch disk, compact disc, or flash drive, preferably in WordPerfect, or any other Windows-based word processing format (with two hard copies delivered directly to Chambers of the Honorable Robert D. Drain) and served upon: (i) counsel for the Debtor, Ashford Schael LLC, 100 Quimby Street, Suite 1, Westfield, NJ 07090, (Attn: Courtney A. Schael, Esq.); (ii) those parties requesting notice pursuant to Bankruptcy Rule 2002; and (iii) the Office of the United States Trustee for the Southern District of New York, U.S. Federal Office Building, 201 Varick Street, Suite 1006, New York, NY 10014 (Attn: Susan Golden, Esq.), **so as to be received no later than 4:00 p.m. on May 26, 2017 (Prevailing Eastern Time).**

PLEASE TAKE FURTHER NOTICE, that the Hearing may be adjourned from time to time without further notice other than the announcement of such an adjournment in open Court.

Dated: May 11, 2017

**ASHFORD-SCHAEL LLC**

Counsel to the Debtor

By: */s/ Courtney A. Schael*  
Courtney A. Schael, Esq.  
100 Quimby Street, Suite 1  
Westfield, NJ 07090  
908-232-5566

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Counsel for the Debtor and Debtor in Possession

**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK**

In re:

METROPARK USA, INC.,

Debtor.

Chapter 11

Case No. 11-22866 (RDD)

**DEBTOR’S MOTION PURSUANT TO 11 U.S.C. §§ 105 AND 363  
SEEKING AN ORDER APPROVING THE SALE OF CERTAIN  
ASSETS OF THE DEBTOR’S ESTATE FREE AND CLEAR OF LIENS,  
CLAIMS, INTERESTS AND ENCUMBERANCES AND ALLOWING  
RECOVERY OF FEES AND COSTS FROM SALE PROCEEDS  
PURSUANT TO 11 U.S.C § 506(c)**

Metropark USA, Inc., debtor and debtor in possession (the “Debtor”), by its counsel, Ashford-Schael LLC, seeking the entry of an Order pursuant to 11 U.S.C. §§ 105, 363 and 506(c) authorizing and approving the Debtor’s sale of certain assets of the Debtor’s estate free and clear of liens, claims, interests and encumbrances subject to higher and better offers, allowing recovery of fees and costs from sale proceeds, and granting the Debtor such other, further and different relief as this Court may deem just and proper, respectfully states as follows:

**Jurisdiction**

1. The United States Bankruptcy Court for the Southern District of New York (the “Court”) has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334
2. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A).

3. This Court is the proper venue for this proceeding in accordance with 28 U.S.C. §§ 1408 and 1409.

4. The statutory predicates for the relief sought herein are 11 U.S.C. §§ 105(a), 363 and 506(c) and Rule 6004 of the Federal Rules of Bankruptcy Procedure.

### **Background**

5. On May 2, 2011 (the “Filing Date”), the Debtor filed a voluntary petition for relief under Chapter 11 of Title 11 of the United States Code (the “Bankruptcy Code”), in the United States Bankruptcy Court for the Southern District of New York.

6. The Debtor is a debtor and debtor in possession under 11 U.S.C. § 1107.

7. The Debtor is in the process of winding down the Debtor’s estate.

8. The estate may have claims or rights to payment in connection with facts and rights (“Interchange Claim”) at issue in the class action case pending as *In re: Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, MDL No. 1720 (E.D.N.Y.) (“Interchange Litigation”).

9. The proceeds from the Interchange Claim are payable to the Debtor’s Second Secured Lien Lenders.<sup>1</sup> The Debtor and its Second Secured Lien Lenders entered into a Stipulation Regarding Global Resolution of Open Issues Between Debtor, Second Lien Lenders and Committee (“Stipulation”) approved by the Court by Order entered on January 18, 2013, docket no. 443. Pursuant to the Stipulation, all funds collected by the estate with the exception of proceeds from Chapter 5 Claims<sup>2</sup> or post-petition loans are proceeds of the Second Secured Lien Lenders’ collateral and are deemed held in trust for the Second Secured Lien Lenders for payment to the Second Secured Lien Lenders. (*See* Stipulation, docket no. 426 at pp. 10-11).

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<sup>1</sup> As defined in the Amended Motion for an Order Approving Stipulation Regarding Global Resolution of Open

<sup>2</sup> As defined in the Motion for Approval of Global Resolution, docket no. 426.

Accordingly, all proceeds from the sale of the Interchange Claim are payable to the Second Secured Lien Holders.

10. The Debtor received inquiries from Cascade Settlement Services (“Cascade”) and Fair Harbor Capital (“Fair Harbor”) several years ago to purchase the Interchange Claim, including an offer to purchase the Interchange Claim for \$60,000 from Cascade (the “Cascade Offer”). The Second Secured Lien Lenders, who are the sole beneficiaries of any proceeds from the sale of the Interchange Claim, did not accept the Cascade Offer. Subsequently, the Second Circuit Court of Appeals reversed approval of the settlement and de-certified the classes in the Interchange Litigation, leaving uncertainty as to the value or timing of any future claims settlement. *See In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 827 F.3d 223 (2d Cir. June 30, 2016).

11. The Debtor recently sent inquiries to Cascade and Fair Harbor to determine if they still had an interest in purchasing the Interchange Claim and received no response. Nevertheless, the Debtor is serving a copy of this Motion on Cascade and Fair Harbor in the event they want to make a higher and better offer for the purchase of the Interchange Claim.

12. The Debtor proposes to sell its rights in the Interchange Claim to Oak Point Partners, Inc. (“Oak Point”) in exchange for a payment of \$10,000.00 to the Debtor’s estate, pursuant to the purchase agreement attached hereto as Exhibit A (“Interchange Agreement”) subject to higher and better offers.

13. The Debtor submits that the sale of the Interchange Claim is a prudent exercise of its business judgment under the circumstances and is in the best interest of the Debtor’s estate and its creditors. The purchase price for the sale is reasonable and has been negotiated at arm’s length.

**Basis for the Relief Requested**

14. By this Motion, the Debtor seeks an order, pursuant to 11 U.S.C. §§ 105 and 363(b), (f) and (m), authorizing the Debtor to sell the Interchange Claim to Oak Point free and clear of all liens, claims, interests and encumbrances subject to higher and better offers made at or before the hearing, and allowing recovery of fees and costs to Debtor's counsel from sale proceeds pursuant to 11 U.S.C. § 506(c).

**A. Sale of Interchange Claim**

15. Section 363(b) of the Bankruptcy Code provides, in pertinent part, that a debtor, "after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b), (1); *see In re Ames Dept. Stores, Inc.*, 136 B.R. 357, 359 (Bankr. S.D.N.Y. 1992). In addition, § 105(a) of the Bankruptcy Code provides that the Court "may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]." 11 U.S.C. § 105(a).

16. The proposed use, sale, or lease of property of the estate may be approved under §363(b) of the Bankruptcy Code if it is supported by sound business justification. *See In re Lionel Corp.*, 722 F.2d 1063, 1070-71 (2d Cir. 1983); *In re Ionosphere Clubs, Inc.*, 184 B.R. 648 (S.D.N.Y. 1995); *In re Abbotts Dairies of Pennsylvania, Inc.*, 788 F.2d 143 (3d Cir. 1986); *In re Delaware & Hudson Ry. Co.*, 124 B.R. 169, 175-76 (D. Del. 1991); *In re Martin (Myers v. Martin)*, 91 F.3d, 395 (3d Cir. 1996). Moreover, pursuant to § 105, the Court has expansive equitable powers to fashion any order or decree which is in the interest of preserving or protecting the value of the Debtor's assets. *See, e.g., In re Chinichian*, 784 F.2d 1440, 1443 (9th Cir. 1986).

17. The Debtor's authority to sell the Interchange Claim is amplified in Bankruptcy

Rule 6004(f)(1), which in relevant part states that "[a]ll sales not in the ordinary course of business may be by private sale or by public auction."

18. In *Lionel*, one of the seminal and most widely followed cases dealing with asset sales, the Second Circuit determined that a sale of assets could be approved if the debtor or trustee could demonstrate an "articulated business justification" for the sale. *In re Lionel*, 722 F.2d at 1070. The Court further held that the factors to be considered in determining whether a sound business reason exists include the following:

"the proportionate value of the asset to the estate as a whole, the amount of elapsed time since the filing...the effect of the proposed disposition...of the proceeds to be obtained from the disposition vis-à-vis any appraisals of the property, which of the alternatives of use, sale or lease the proposal envisions and, most importantly perhaps, whether the asset is increasing or decreasing in value. This list is not intended to be exclusive, but merely to provide guidance to the bankruptcy judge."

*Id.* at 1071.

19. If a sound business justification exists, then a presumption attaches that the decision was informed, in good faith and in the honest belief that the action was in the best interests of the estate. *In re Integrated Resources, Inc.*, 147 B.R. 650, 656 (S.D.N.Y. 1992).

20. In addition to requiring sound business reasons to approve a sale pursuant to Section 363(b) of the Bankruptcy Code, many courts have required a showing that the price to be obtained for assets be fair and reasonable; that the sale to the proposed purchaser was negotiated in good faith; and that it does not unfairly benefit insiders, the purchaser, or a certain creditor or class of creditors. *See, e.g., In re Channel One Communications*, 117 B.R. at 494-97; *In re Indus. Valley Refrig. & Air Cond. Supplies, Inc.*, 77 B.R. 15 (Bankr. E.D. Pa. 1987).

21. Given the uncertain status of Interchange Litigation, in the Debtor's business

judgment, the purchase price proposed for the Interchange Claim represents a fair and reasonable sale price for such assets and is the highest and best offer for the sale of the Interchange Claim. While the Debtor previously received a higher offer from Cascade, the Cascade Offer was received before the Second Circuit rejected the settlement in the Interchange Litigation leaving uncertainty about the amount and timing of any payment on the Interchange Claim which significantly reduced the value of the Interchange Claim. The Debtor has endeavored to find other bidders for the Interchange Claim without success. The Debtor is aware of no other bidder.

22. The Debtor further submits that the sale of the Interchange Claim, in accordance with the terms of the purchase agreement, serves the best interest of the Debtor's estate and its creditors as the Debtor is winding up the estate and sale of the Interchange Claim is required to fully administer the estate. Accordingly, the Debtor respectfully requests that the Court grant the Motion.

**B. Recovery of Fees and Expenses**

23. Pursuant to section 506(c) of the Bankruptcy Code, “[t]he trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of benefit to the holder of such claim . . . “ 11 U.S.C. § 506(c).

24. As set forth *supra*, the proceeds from the proposed sale of the Interchange Claim are property securing the allowed claim of the Second Secured Lien Lenders and the reasonable, necessary costs and expenses of disposing such property should be paid by the Second Secured Lien Lenders pursuant to section 506(c) of the Bankruptcy Code.



25. For the foregoing reasons, the Debtor requests that the Court allow Debtor's counsel to recover reasonable, necessary costs and expenses from the sale proceeds pursuant to section 506(c) of the Bankruptcy Code.

26. The Debtor further requests that the Court order that Debtor's counsel shall file a Certification of such costs and fees on notice to the Second Secured Lien Lenders within fourteen days of entry of an Order approving the sale and, if no objection is filed, such costs and fees shall be allowed and paid from the proceeds of the sale without further Order of the Court.

**C. Waiver of Stay**

27. Pursuant to Bankruptcy Rule 6004(h), an order authorizing the sale of property is stayed for fourteen (14) days after the entry of the order unless the Court orders otherwise. The Debtor requests that the Court order that such stay not apply with respect to the sale of the Interchange Claim.

**NOTICE**

28. Notice of this Motion has been given to (a) Blakeley & Blakeley LLP, attn: Ronald Clifford, Esq., 2 Park Plaza, Suite 400, Irvine, CA 92614 (Counsel for the Official Committee of Unsecured Creditors); (b) Bricoleur Capital Partners L.P., c/o Law Offices of Sandy Mayerson, 136 East 34th Street, Suite 11E, New York, NY 10065-7380 (Counsel for the Second Secured Lien Lenders); (c) the Office of the United States Trustee for the Southern District of New York, U.S. Federal Office Building, 201 Varick Street, Suite 1006, New York, NY 10014 (Attn: Susan Golden, Esq.); (d) all parties having filed a Notice of Appearance with the Court or having made a request for service in this case; (e) Cascade Settlement Services, 100 Shoreline Hwy, Suite B-125, Mill Valley, CA 94941; (f) Fair Harbor Capital, 1841

Broadway, 10<sup>th</sup> Floor, New York, NY 10023; (g) all creditors filing secured claims (Service List attached hereto as Exhibit B); and (g) Oak Point Partners, Inc., 151 West 46th Street, 4th Fl. New York, NY 10036.

29. The Debtor has been contacted by counsel for several creditors in response to the Debtor's First Omnibus Claims Objection objecting to secured claims filed against the estate (docket no. 693). Some of these creditors assert that their security interests are superior to the security interests of the Second Secured Lien Holders. Accordingly, the Debtor has served notice of this Motion on all creditors filing secured claims on the Service List attached hereto as Exhibit B.

30. The Debtor respectfully requests that given the Second Secured Lien Lenders' exclusive interest in the proceeds of the Interchange Claim to be sold pursuant to the Stipulation approved by the Court (*see* docket nos. 426 and 443), and notice having been given to all creditors filing secured claims, that the Court deem such service of the Motion with Exhibits to be good and sufficient service.

31. No prior application for the relief requested herein has been made to this or any other Court.

**WHEREFORE**, the Debtor respectfully requests that this Court grant the relief requested in the Motion, together with such other, further and different relief as the Court deems just and proper.

Dated: May 11, 2017

**ASHFORD-SCHAEEL LLC**  
Counsel to the Debtor

By: /s/ Courtney A. Schael  
Courtney A. Schael, Esq.  
100 Quimby Street, Suite 1  
Westfield, NJ 07090  
908-232-5566

# **EXHIBIT A**

**PURCHASE AGREEMENT AND ASSIGNMENT OF CLAIMS AND INTERESTS**

**THIS PURCHASE AGREEMENT AND ASSIGNMENT OF CLAIMS AND INTERESTS** (this "Agreement"), dated as of May \_\_, 2017 is between the **METROPARKUSA, INC.** ("Seller" or "Debtor") **BANKRUPTCY ESTATE** ("Estate") and **OAK POINT PARTNERS, INC.** ("Purchaser").

**WITNESSETH:**

**WHEREAS**, on May 2, 2011, the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York ("Bankruptcy Court"), assigned Case No. 11-22866 (RDD) ("Bankruptcy Case"); and

**WHEREAS**, the Debtor is a debtor in possession under 11 U.S.C. § 1107 and is in the process of winding down its Estate; and

**WHEREAS**, the Debtor desires to sell and Purchaser desires to acquire any and all of the Debtor's claims or rights to payment in connection with the case pending as In re: Payment Card Interchange Fee and Merchant Discount Antitrust Litigation, MDL No. 1720 (E.D.N.Y.) ("Interchange Litigation"), and the facts and issues relating thereto ("Interchange Claim"); and

**WHEREAS**, subject to Bankruptcy Court approval, Seller has the power and authority to sell and assign all right, title and interest in and to the Interchange Claim to Purchaser, including, but not limited to the proceeds thereof.

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

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

Purchaser in the Interchange Claim as is set forth in this Agreement free of any liens or other encumbrances.

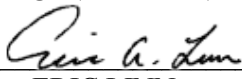
**EXCEPT AS SPECIFICALLY SET FORTH HEREIN, THE SELLER SELLS, ASSIGNS, AND TRANSFERS THE INTERCHANGE CLAIM TO THE PURCHASER “AS IS, WHERE IS” WITHOUT ANY REPRESENTATIONS OR WARRANTIES WHATSOEVER, WHETHER EXPRESS, IMPLIED OR IMPOSED BY LAW.**

6. **No Assumption of Liabilities.** The parties agree that Purchaser is acquiring only the Interchange Claim and that Purchaser is neither acquiring nor assuming any liabilities of the Seller under this Agreement, except as may otherwise expressly be provided herein.
7. **Documents of Assignment.** From time to time upon request from Purchaser, Seller shall execute and deliver to Purchaser such documents reasonably requested by Purchaser to evidence and effectuate the transfer contemplated by this Agreement in a form reasonably acceptable to the parties hereto. However, Purchaser shall reimburse Seller for its reasonable costs associated with such compliance.
8. **Limited Power of Attorney.** Solely with respect to the Interchange Claim, and to the extent permitted by law, Seller hereby irrevocably appoints Purchaser as its true and lawful attorney and authorizes Purchaser to act in Seller’s stead, to demand, sue for, compromise and recover all such amounts as now are, or may hereafter become, due and payable for or on account of the Interchange Claim herein assigned. Seller grants unto Purchaser full authority to do all things necessary to enforce the Interchange Claim and its rights thereunder pursuant to this Agreement.
9. **Entire Agreement.** This Agreement embodies the entire agreement and understanding between Seller and the Purchaser and supersedes any and all prior agreements and understandings with respect to the subject matter hereof. This Agreement may not be amended or in any manner modified unless such amendment or modification is in writing and signed by both parties.
10. **Benefits and Binding Effect.** All provisions contained in this Agreement or any document referred to herein or relating hereto shall inure to the benefit of and shall be binding upon the respective successors and assigns of Seller and the Purchaser.
11. **Governing Law.** This Agreement shall be governed by and construed in accordance with the internal laws of the State of New York, without giving effect to choice of law principles of the State of New York.
12. **Counterparts.** This Agreement may be executed in one or more counterparts, each of which shall be deemed an original but all of which together will constitute one and the same instrument, and copies or facsimiles of execution signatures shall be equivalent to original signatures.

**[remainder intentionally left blank; signature page follows]**

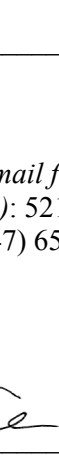
**THIS AGREEMENT** has been duly executed as of the day and year first above written.

**OAK POINT PARTNERS, INC.**

By:   
Name: ERIC LINN  
Its: President

Address (*for regular mail and mail forwarding*): PO Box 1033, Northbrook, IL 60065-1033  
Address (*for overnight delivery*): 5215 Old Orchard Rd, Ste 965, Skokie, IL 60077  
tel (847) 577-1269 fax (847) 655-2746

**METROPARK USA, INC.**

By:   
Name: RICHARD HICKS  
Its: Vice President, Finance

Address: 5750 Grace Place, Los Angeles, CA 90022