

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF DELAWARE**

In re:

SYNTAX-BRILLIAN CORPORATION, *et al.*,<sup>1</sup>

Debtors.

Chapter 11

Case No. 08-11407 (BLS)

(Jointly Administered)

**Bidding Procedures**

**Objection Deadline:**

**April 8, 2009 @ 4:00 p.m.**

**Bidding Procedures Hearing Date:**

**April 15, 2009 at 10:00 a.m.**

**Sale Objection Deadline:**

**April 24, 2009 @4:00 p.m.**

**Sale Hearing Date:**

**April 29, 2009 @ 10:00 a.m.**

**MOTION OF DEBTORS FOR ORDERS (I) APPROVING SALE OF  
THE DEBTORS' BRAND AND RELATED ASSETS FREE AND CLEAR OF  
ALL LIENS, CLAIMS, ENCUMBRANCES, AND OTHER INTERESTS  
PURSUANT TO SECTIONS 105, 363(b), (f), AND (m) OF THE BANKRUPTCY CODE;  
(II) APPROVING BIDDING PROCEDURES, BREAK-UP FEE, AND OTHER  
PROTECTIONS IN ADVANCE OF SALE; AND (III) GRANTING RELATED RELIEF**

The above-captioned debtors and debtors-in-possession (collectively, the “**Debtors**”) hereby move the Court (the “**Motion**”) for entry of an order (I) approving the sale of the Debtors’ brand and related assets (the “**Purchased Assets**”)<sup>2</sup> free and clear of all liens, claims, encumbrances, and other interests pursuant to Sections 105 and 363(b), (f), and (m) of Title 11 of the United States Code, 11 U.S.C. §§ 101, *et seq.* (the “**Bankruptcy Code**”), (II) approving bidding procedures, break-up fee, and other protections in advance of sale, and (III) granting

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<sup>1</sup> The Debtors are the following entities: Syntax-Brilliant Corporation, Syntax-Brilliant SPE, Inc., and Syntax Groups Corporation.

<sup>2</sup> The Debtors reserve the right to offer certain patents for sale at the Auction (as defined herein).

related relief. In support of this Motion, the Debtors respectfully state as follows:

**Status of the Case and Jurisdiction**

1. On July 8, 2008 (the “**Petition Date**”), each of the Debtors filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. The Debtors have continued in possession of their properties and are operating and managing their businesses as debtors-in-possession pursuant to Sections 1107(a) and 1108 of the Bankruptcy Code.

2. On July 16, 2008, an official committee of unsecured creditors was appointed in these cases (the “**Committee**”).

3. The Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334. Venue is proper in this district pursuant to 28 U.S.C. § 1408. This matter is core within the meaning of 28 U.S.C. § 157(b)(2)(A), (B) and (O).

4. The statutory predicates for the relief requested herein are Sections 105(a) and 363 of the Bankruptcy Code.

**Background**

5. Syntax-Brilliant Corporation (“**SBC**”) was a public entity incorporated in Delaware with offices in Tempe, Arizona, and City of Industry, California. SBC and its affiliated Debtors, Syntax-Brilliant SPE, Inc. and Syntax Groups Corporation, were leading designers, developers, and distributors of high-definition televisions (HDTVs) utilizing liquid crystal display (LCD) and, formerly, liquid crystal on silicon (LCoS) technologies. The Debtors sold their HDTVs to big box and discount retailers under the Ölevia brand name.

6. On July 7, 2008, the Debtors entered into an asset purchase agreement with Ölevia International Group (“**OIG**”) for the purchase of substantially all of the Debtors’ assets which sale was approved by order of the Court but was not and is not anticipated to be

consummated (the “OIG Sale”). In connection with the OIG Sale, the Debtors extensively marketed their assets.

7. On January 16, 2009, the Debtors filed their joint plan and disclosure statement which provide for a wind-up of the Debtors’ estates and on March 11, 2009, the Debtors filed their second amended joint plan (the “Plan”) and second amended disclosure statement. On March 12, 2009, the Court entered the Order (I) Approving the Disclosure Statement; (II) Approving Notice Of The Hearing On The Disclosure Statement; (III) Establishing Procedures For Solicitation And Tabulation Of Votes To Accept Or Reject The Plan, Including (A) Approving The Form And Manner Of Solicitation Packages; (B) Approving The Form And Manner Of Notice Of The Confirmation Hearing; (C) Establishing Record Date And Approving Procedures For Distribution Of Solicitation Packages; (D) Approving Forms Of Ballots; (E) Establishing Deadline For Receipt Of Ballots; And (F) Approving Procedures For Vote Tabulations; (IV) Establishing Deadline And Procedures For Filing Objections To Confirmation Of The Plan; And (V) Granting Related Relief [Docket No. 1020].

8. A hearing to consider confirmation of the Plan is scheduled for April 21, 2009 at 1:30 p.m.

#### **The Asset Purchase Agreement**

9. On November 17, 2008, the Debtors retained KPMG Corporate Finance LLC (“KPMGCF”) as financial advisor, which retention was approved by the Bankruptcy Court on December 8, 2008 [Docket No. 716]. KPMGCF was retained by the Debtors, *inter alia*, to act as the Debtors’ exclusive financial advisor in connection with one or more sale transactions.

10. Subsequent to its retention, KPMGCF sought, *inter alia*, potential purchasers of the Debtors’ “Ölevia” brand name. Prospective purchasers were given access to a data room subject to appropriate confidentiality agreements. Ultimately, the Debtors engaged in

discussions with Amergence Technology, Inc. (“**Amergence**”). Amergence is an electronics supplier for both OEM and ECM parts. Since 2000, Amergence’s business has focused on the wholesale brokerage of excess technology.

11. After consideration of all options, the Debtors have negotiated, prepared and executed an Asset Purchase Agreement (the “**Purchase Agreement**”)<sup>3</sup> for the sale (the “**Sale**”) of the Purchased Assets, including (i) the “Ölevia” brand name; and (ii) trademarks, licensing rights and other intellectual property associated with the Ölevia brand, to Amergence, as the stalking horse bidder and prospective purchaser (the “**Purchaser**”). A copy of the fully executed Purchase Agreement is attached as hereto as **Exhibit “A”** and is incorporated herein by reference.

12. The Debtors anticipate that the value of the Purchased Assets will continue to diminish over time. Thus, the Debtors believe that the competitive bidding process for and Sale of the Purchased Assets must take place on an expedited schedule to ensure that the value thereof is maximized. The Debtors have negotiated with their pre and post-petition lenders and the Purchaser to present this Motion on a consensual basis in order to expedite this process and achieve the highest value possible for creditors.

13. The principal terms of the Purchase Agreement are summarized and highlighted as follows:<sup>4</sup>

- (A) **Transaction:** The Purchaser would acquire certain assets of the Debtors defined in the Purchase Agreement. *See* Section 2.01 of the Purchase Agreement.

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<sup>3</sup> Capitalized terms used herein and not otherwise defined herein have the meaning ascribed to such terms in the Purchase Agreement.

<sup>4</sup> To the extent there is any inconsistency between the description of the Purchase Agreement in this Motion and the terms of the Purchase Agreement itself, the Purchase Agreement shall control. The principal terms set forth herein are highlighted in accordance with Bankruptcy Rule 6004 and Local Rule 6004-1.

- (B) **Purchase Price:** \$280,000.00 *See* Section 2.02 of the Purchase Agreement.
- (C) **Purchased Assets:** All of Sellers' rights, title and interest in and to the following assets summarized below to the extent transferable:
- (i) the Debtors' "Ölevia" brand name;
  - (ii) the <http://www.olevia.com> website; and
  - (iii) trademarks, licensing rights and other intellectual property associated with the brand.
- See* Section 2.01(a) of the Purchase Agreement.
- (D) **Deposit:** The Purchaser has deposited \$280,000.00 on the Effective Date of the Purchase Agreement, to be maintained in an interest bearing escrow account. *See* Section 2.02(b) of the Purchase Agreement.
- (E) **Sale As-Is:** Sale is on an "as is," "where is," and "with all faults" basis. *See* Section 3.09 of the Purchase Agreement.
- (F) **Closing:** No later than May 1, 2009 unless the Purchaser exercises an option to extend. *See* Section 12.1 and the definition of "Closing Date" in Section 1.1 of the Purchase Agreement.

The full terms and conditions of the proposed transaction are set forth in the Purchase Agreement annexed as **Exhibit "A"** hereto and reference should be made to the Purchase Agreement for additional terms.

14. The Debtors believe that value will be maximized by closing the Sale of the Purchased Assets as soon as is practicable, and on the terms proposed in the Purchase Agreement.

### Appointment of Consumer Privacy Ombudsman is Not Required

15. The Debtors' privacy policy dictates that it will not sell, rent or lease personal information to others. The privacy policy appears on the Debtors' website. Section 363(b)(1) of the Bankruptcy Code provides for the appointment of a consumer privacy ombudsman upon a sale of personally identifiable information unless the seller falls within the exception of Section 363(b)(1)(A). In this case, the Debtors do not seek to sell personally identifiable information and accordingly, appointment of a consumer privacy ombudsman is not required.

### Bidding Procedures

16. In connection with the Sale of the Purchased Assets, the Debtors seek the approval of the following specific bidding procedures (the "**Bidding Procedures**") and certain bid protections, as further described below, for the Purchaser (the "**Bid Protections**") which the Debtors, in consultation with their advisors, believe are necessary to induce the Purchaser to enter into the Purchase Agreement:

a. **Due Diligence.** Parties interested in conducting due diligence in contemplation of making a bid for the purchase of some or all of the Purchased Assets will be required to execute a confidentiality agreement in form and substance acceptable to the Debtors, prior to gaining access to the due diligence materials.

b. **Deadline for Submission of Bids.** The deadline for submitting any and all competing bids shall be no later than April 24, 2009 at 4:00 p.m. (Prevailing Eastern Time) or, such other date as is established by the Court (the "**Bid Deadline**").

c. **Submission of Bids.** In order to qualify as a potential Qualified Bidder (as defined below) of the Purchased Assets, an interested bidder must timely submit a written bid (a "**Qualified Bid**") for the Purchased Assets that:

i. equals or exceeds \$400,000 and is accompanied by a cash deposit in an equal amount;

ii. is accompanied by an executed Purchase Agreement in substantially the form of the Purchase Agreement attached hereto as **Exhibit "A"** with such modifications as the bidder is proposing, and that:

(a) indicates which of the Purchased Assets such bidder proposes to acquire pursuant to the Purchase Agreement; and

(b) does not contain any conditions to closing which are not contained in the Purchase Agreement (including financing and due diligence) or is based on terms or conditions any less favorable, or otherwise more burdensome or conditional than those set forth in the Purchase Agreement;

iii. is accompanied by a blacklined copy of the Purchase Agreement showing the differences between the bidder's version of such agreement and the Purchase Agreement in the form attached hereto as **Exhibit "A"**;

iv. includes financial statements of such entity (or the entity that will furnish the funding required to consummate and perform under the Purchase Agreement) establishing such entity's financial wherewithal to timely close the transactions contemplated thereunder;

v. contains a written statement identifying the controlling interest holders in the acquiring entity and evidence that the board of directors (or comparable governing body) for the entity making the bid has fully authorized and approved the submission, execution, and delivery of the Purchase Agreement and the consummation of the transactions contemplated thereby; and

vi. is delivered to the following parties such that they are received by the Bid Deadline: (i) the Debtors' counsel, Greenberg Traurig, LLP, Attn: Victoria W. Counihan, Esq., The Nemours Building, 1007 North Orange Street, Suite 1200, Wilmington, Delaware, 19801 and Nancy A. Mitchell, Esq., 200 Park Avenue, New York, New York 10166; (ii) counsel for the Pre-Petition Agent and Post-Petition Agent, Weil Gotshal & Manges, LLP, Attn: Stephen Karotkin, Esq., 757 Fifth Avenue, New York, New York 10153; (iii) counsel for the Purchaser, Leslie Cohen Law, PC, 501 Santa Monica Bl., Suite 700, Santa Monica, CA 90401 and via email to leslie@lesliecohenlaw.com; and (iv) counsel to the Committee, Pepper Hamilton LLP, Hercules Plaza Suite 5100, 1313 North Market Street, Wilmington, Delaware 19801, Attn: David B. Stratton, Esq.

d. **Qualification of Bid.** After a potential bidder has delivered a bid, the Debtors, in consultation with the Committee, and upon consent of the Lenders, will determine whether (i) the potential bidder has demonstrated the financial capacity to consummate the purchase of the Purchased Assets, (ii) is reasonably likely to be able to and willing to consummate the contemplated transactions by May 1, 2009, and (iii) has otherwise timely satisfied the requirements described above. If so, the Debtors shall designate such potential bidder as a "**Qualified Bidder**" and such bid as a "**Qualified Bid.**" Promptly after making such determination, the Debtors will advise such bidder of this determination and, if a bid is not designated as a Qualified Bid, why it is not a Qualified Bid.

e. **Auction.** In the event that competitive Qualified Bids are received, the Debtors will conduct an auction to determine the highest or best bid for the Purchased Assets on April 28, 2009 or such other date as may be established by the Court, at the law offices of Greenberg Traurig LLP, The Nemours Building, 1007 North Orange Street, Suite 1200, Wilmington, Delaware, 19801, beginning at 2:00 p.m. The Auction will be

transcribed. The Auction may adjourned by announcement of the adjournment at the Auction to those parties who appear thereat.

f. **Auction Procedures.** Only Qualified Bidders who have submitted Qualified Bids will be eligible to participate at the Auction. At the Auction, Qualified Bidders will be permitted to increase and/or improve their bids. The bidding at the Auction shall start at no less than \$400,000.00 (the “**Initial Overbid Amount**”), as determined by the Debtors in consultation with the Committee, and upon consent of the Lender, and continue in increments of at least \$50,000.00 thereafter (the “**Incremental Overbid Amount**”). The Purchaser shall be entitled to credit bid the amount of the Break-Up Fee at the Auction. The Purchaser shall have the right, but not the obligation to participate in the Auction. The Auction shall continue in one or more rounds of bidding and shall conclude after each participating bidder has had the opportunity to submit an additional subsequent bid with full knowledge of the then existing highest or best bid and the identity of other party making the then highest or best bid. The Debtors may conduct the Auction in the manner they determine will maximize the value of the Purchased Assets in consultation with and Committee and upon consent of the Lenders. If the only Qualified Bidder is the Purchaser, the Auction may be cancelled and the Purchaser be declared the Winning Bidder.

g. **Successful Bid.** At the conclusion of the bidding, the Debtors shall announce their determination as to the Qualified Bidder or Qualified Bidders (which may include the Purchaser) making the highest or otherwise best offer at the Auction for the Purchased Assets and such Qualified Bidder or Qualified Purchaser shall be declared by the Debtors to be the “**Winning Bidder**” or “**Winning Bidders**”. The Winning Bid(s) shall be determined by the Debtors in consultation with the Committee and upon consent of the Lenders. The Winning Bidder or Winning Bidders shall close the contemplated transactions within one (1) business day after entry of an order approving such sale. The Debtors may designate the next highest or best bidder or bidders for the Purchased Assets at the Auction as the “**Backup Bidder**” or “**Backup Bidders**”, except that Purchaser shall have no obligation to remain as a backup bidder at any price in excess of \$280,000.00. The Backup Bidder or Backup Bidders shall close the contemplated transactions within one (1) business day after the failure of the Winning Bidder or Winning Bidders to close the contemplated transactions.

h. **Sale Hearing.** The Court will hold a hearing to approve the Sale of the Purchased Assets to the Winning Bidder or Winning Bidders (the “**Sale Hearing**”) before the United States Bankruptcy Court, 824 North Market Street, Wilmington, Delaware, 19801, on or before April 29, 2009 at 10:00 a.m., or such other date as is established by the Court. At the Sale Hearing, the Debtors will request that the Court approve the Sale of the Purchased Assets to the Backup Bidder or Backup Bidders in the event the contemplated Sale to the Winning Bidder or Winning Bidders does not timely close; in which case such Backup Bidder or Backup Bidders shall become the Winning Bidder or Winning Bidders without further order of the Court. The Winning Bidder (if other than the Purchaser) should be substituted for the Purchaser under the Purchase Agreement (as amended to reflect terms of the Winning Bidder’s bid) and the proposed Sale Order.



i. **Closing.** Closing shall take place immediately after the Sale Hearing and entry of the Sale Order and in no event later than May 1, 2009, subject to extension as provided in the Purchase Agreement.

j. **Return of Deposits.** The Debtors shall return the deposit of any Qualified Bidder (other than Purchaser) that is not declared a Winning Bidder two (2) business days after the closing of the Sale Transaction or Sale Transactions. In addition to the return of deposits as set forth herein, the terms and timing of the return of the Purchaser's Deposit shall be governed by the Purchase Agreement. In the event a declared Winning Bidder fails to timely perform any material obligation under its Purchase Agreement, the declared Winning Bidder shall forfeit all deposits made, without regard to the Debtors' ultimate damages occasioned by such failure; such deposits shall be applied to the Debtors' damages, if any, and shall not constitute liquidated damages; and, notwithstanding the foregoing, the Debtors and the bankruptcy estates shall retain all other rights, remedies, claims, counterclaims, and defenses, including the right to seek equitable or injunctive relief. Notwithstanding the foregoing, the Deposit made by the Purchaser under the Purchase Agreement shall be dealt with and returned as provided in the Purchase Agreement.

k. **Damages for Controlling of Sales Price.** The proposed form of Notice of Bidding Procedures shall advise potential bidders that, under Section 363(n) of the Bankruptcy Code and applicable law, the Debtors and/or their estates may avoid a transaction and recover damages (actual and possibly punitive) if the sale price for the Purchased Assets was controlled by an agreement among the potential bidders, Qualified Bidders or Winning Bidder(s).

l. **Bid Protections.** The Purchaser, if outbid, and if the Bankruptcy Court approves a competing transaction with a Qualified Bidder and the Debtors consummate such transaction shall also be entitled to the payment of a break-up fee (the "**Break-Up Fee**") of \$28,000.00 at the closing of an alternative transaction with an entity other than the Purchaser. The terms and payment of the Break-Up Fee are governed by the Purchase Agreement.

17. To ensure that all parties-in-interest receive adequate notice of the Sale, not later than two (2) business days after the entry of an Order approving the portion of this Motion relating to Bid Procedures, the Debtors will cause a notice of Bid Procedures and Auction, substantially in the form attached to this Motion as **Exhibit "B"**, to be sent by first-class mail postage prepaid to (i) the United States Trustee for the District of Delaware, (ii) counsel for the Committee, (iii) counsel for the Lenders, (iv) all of the Debtors' known creditors, (v) all entities known to have expressed a *bona fide* interest in acquiring the assets being sold, (vi) federal, state and local regulatory authorities (including taxing authorities) with jurisdiction over the Debtors,

(vii) the Office of the United States Attorney for the District of Delaware, (viii) the United States Attorney General, and (ix) and all other known parties-in-interest in these bankruptcy cases (including any party who has entered an appearance and request for service of papers pursuant to Fed. R. Bankr. P. 2002). Accordingly, the Debtors submit that all parties in interest will have adequate notice of the Auction and Sale.

### **Relief Requested**

18. By this Motion, the Debtors request the entry of certain orders (I) approving the sale of certain of the Debtors' assets, identified herein as the Purchased Assets, to the Purchaser, in accordance with the terms of the Purchase Agreement, free and clear of all liens, claims, encumbrances, and other interests pursuant Sections 105, 363(b), (f), and (m) of the Bankruptcy Code; (II) approving the Bidding Procedures including the Break-Up Fee and other protections in advance of Sale; and (III) granting related relief as the Court shall deem just and proper.

### **Basis for Relief Requested**

#### **Sale of the Purchased Assets Pursuant to the Purchase Agreement is Authorized by Section 363(b) of the Bankruptcy Code**

19. Section 363(b)(1) of the Bankruptcy Code provides that a debtor, "after notice and a hearing, may use, sell or lease, other than in the ordinary course of business, property of the estate . . . ." 11 U.S.C. § 363(b)(1). Section 105(a) provides in relevant part that "[t]he Court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a).

20. A sale of the debtor's assets should be authorized pursuant to Section 363 of the Bankruptcy Code if a sound business justification exists for doing so. *See, e.g., Meyers v. Martin (In re Martin)*, 91 F.3d 389, 395 (3d Cir. 1996) (citing *Fulton State Bank v. Schipper (In re Schipper)*, 933 F.2d 513, 515 (7th Cir. 1991)); *In re Abbotts Dairies of Pennsylvania, Inc.*, 788 F.2d 143 (3d Cir. 1986); *Stephens Indus., Inc. v. McClung*, 789 F.2d 386, 390 (6th Cir. 1986); *In*

*re Lionel Corp.*, 722 F.2d 1063 (2d Cir. 1983); *In re Titusville Country Club*, 128 B.R. 396 (W.D. Pa. 1991); *In re Delaware & Hudson Railway Co.*, 124 B.R. 169, 176 (D. Del. 1991). The *Delaware & Hudson Railway* court rejected the pre-Code “emergency” or “compelling circumstances” standard, finding the “sound business purpose” standard applicable and, discussing the requirements of that test under *McClung* and *Lionel*, observing:

A non-exhaustive list of factors to consider in determining if there is a sound business purpose for the sale include: the proportionate value of the asset to the estate as a whole; the amount of elapsed time since the filing; the likelihood that a plan of reorganization will be proposed and confirmed in the near future; the effect of the proposed disposition of the future plan of reorganization; the amount of proceeds to be obtained from the sale versus appraised values of the assets; and whether the asset is decreasing or increasing in value.

124 B.R. at 176.

21. The *Delaware & Hudson Railway* court further held that “[o]nce a court is satisfied that there is a sound business reason or an emergency justifying the pre-confirmation sale, the court must also determine that the trustee has provided the interested parties with adequate and reasonable notice, that the sale price is fair and reasonable and that the purchaser is proceeding in good faith.” *Id.*

22. The Debtors have proposed the Sale of the Purchased Assets after thorough consideration of all viable alternatives, and have concluded that the Sale is supported by a number of sound business reasons. In light of the fact that the OIG Sale is not anticipated to be consummated, the Debtors have determined, with the full support of the Lenders, that a Sale of the Purchased Assets as requested herein provides the best and most efficient means for the Debtors to maximize the value of their estates, and avoid further deterioration in value.

23. As explained above, the Debtors and KPMGCF have extensively marketed the Debtors’ assets, including the Purchased Assets, and propose to conduct the Sale process

(including the Auction) in accordance with this Motion, which proposes to implement procedures designed to maximize the value that will be realized from the Sale of the Purchased Assets.

24. As a result of the Debtors' efforts to date, the Debtors believe that the Purchaser's offer is reasonable, will constitute fair and reasonable consideration for the Purchased Assets, and will maximize value. In the event that upon the competitive bidding process, as set forth in the Purchase Agreement and in the proposed order hereon, a Qualified Bidder offers a Competing Bid that is deemed higher and/or better, such Winning Bidder shall become the Purchaser under the Purchase Agreement and shall be required to close and comply therewith.

25. Based on the foregoing, the Sale of the Purchased Assets is justified by sound business reasons and is in the best interests of the Debtors and their estates. Accordingly, pursuant to Section 363(b) of the Bankruptcy Code, the Debtors request approval of the Sale to the Purchaser as set forth herein.

**The Sale of the Purchased Assets Free and Clear of Liens, Claims, and Interests is Authorized Under Section 363(f) of the Bankruptcy Code**

26. Section 363(f) of the Bankruptcy Code provides:

The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if –

- (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
- (2) such entity consents;
- (3) 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 Purchased Assets;
- (4) such interest is in a bona fide dispute; or
- (5) 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).

27. As quoted above, Section 363(f) of the Bankruptcy Code provides for the sale of assets “free and clear of any interests.” The term “any interest,” as used in Section 363(f), is not defined in the Bankruptcy Code. *Folger Adam Security v. DeMatteis/MacGregor, JV*, 209 F.3d 252, 259 (3d Cir. 2000). In *Folger Adam*, the Third Circuit specifically addressed the scope of the term “any interest.” *Id.* at 258. The court observed that while some courts have “narrowly interpreted that phrase to mean only *in rem* interests in property,” the trend in modern cases is towards “a broader interpretation which includes other obligations that may flow from ownership of the property.” *Id.* (citing 3 COLLIER ON BANKRUPTCY 363.06[1]).

28. As determined by the Fourth Circuit in *In re Leckie Smokeless Coal Co.*, 99 F.3d 573, 581-582 (4th Cir. 1996), a case cited approvingly and extensively by the Third Circuit in *Folger Adam*, the scope of Section 363(f) of the Bankruptcy Code is not limited to *in rem* interests. Thus, the Third Circuit in *Folger Adam* stated that *Leckie* held that the debtors “could sell their assets under § 363(f) free and clear of successor liability that otherwise would have arisen under federal statute.” *Folger Adam*, 209 F.3d at 258.

29. Section 363(f) is drafted in the disjunctive. Thus, satisfaction of any of the requirements enumerated therein will suffice to warrant the Sale of the Purchased Assets free and clear of all interests, except with respect to any interests that are Assumed Liabilities under the Purchase Agreement. *See Citicom Homeowners Servs., Inc. v. Elliot*, 94 B.R. 343, 345 (E.D. Pa. 1988).

30. The Debtors propose to sell the Purchased Assets with the consent of their secured lender. Moreover, the Debtors propose that any such interests attach to the proceeds of the sales. As such, the requirements of Section 363(f) of the Bankruptcy Code will be satisfied for the Sale free and clear of liens, claims, encumbrances, and other interests.

31. Accordingly, this Court should approve the Sale of the Purchased Assets to the Purchaser, free and clear of interests under Section 363(f) of the Bankruptcy Code.

**The Bidding Procedures Provided Herein Are Consistent and Appropriate in the Context of Bankruptcy Sales**

32. Courts have made clear that a debtor's business judgment is entitled to substantial deference with respect to the procedures to be used in selling assets of the estate. *See, e.g., Official Committee of Subordinated Bondholders v. Integrated Resources, Inc. (In re Integrated Resources, Inc.)*, 147 B.R. 650, 656-57 (Bankr. S.D.N.Y. 1992). The paramount goal in any proposed sale of property of the estate is to maximize the proceeds received by the estate. *See Four B. Corp. v. Food Barn Stores, Inc. (In re Food Barn Stores, Inc.)*, 107 F.3d 558, 564-65 (8th Cir. 1997) (in bankruptcy sales, "a primary objective of the Code [is] to enhance the value of the estate at hand"); *Integrated Resources*, 147 B.R. at 659 (same); *Cello Bag Co. v. Champion Int'l Corp. (In re Atlanta Packaging Products, Inc.)*, 99 B.R. 124, 130 (Bankr. N.D. Ga. 1988) (same).

33. In that regard, courts uniformly recognize that procedures intended to enhance competitive bidding are consistent with the goal of maximizing the value received by the estate and therefore are appropriate in the context of bankruptcy sales. *See, e.g., In re Montgomery Ward Holding Corp.*, Case No. 97-1409 (PJW) (Bankr. D. Del. Aug. 6, 1997); *In re Fruehauf Trailer Corp.*, Case No. 96-LS63 (PJW) (Bankr. D. Del. Feb. 26, 1997); *Integrated Resources*, 147 B.R. at 659.

34. The Bidding Procedures proposed herein will provide a framework for the Debtors to entertain Qualified Bids for the Purchased Assets and, if they receive such Qualified Bids, to conduct the Auction in a fair and open fashion that will encourage participation by financially capable bidders who demonstrate the ability to close a transaction. This should increase the likelihood that the Debtors will receive the greatest possible consideration for the

Purchased Assets. The Bidding Procedures also set forth a schedule for achieving these objectives in an expeditious manner, balancing the Debtors' desire to maximize recovery for the benefit of the estates, with the need to move quickly to avoid any further deterioration in the value of the Purchased Assets.

**The Purchaser is a Good Faith Purchaser and is Entitled to the Full Protections of Section 363(m) of the Bankruptcy Code**

35. Section 363(m) of the Bankruptcy Code provides:

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

11 U.S.C. § 363(m).

36. While the Bankruptcy Code does not define "good faith," the Third Circuit in *Abbotts Dairies*, has stated:

[t]he requirement that a purchaser act in good faith . . . speaks to the integrity of his conduct in the course of the sale proceedings. Typically, the misconduct that would destroy a purchaser's good faith status at a judicial sale involves fraud, collusion between the purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders.

788 F.2d at 147 (citations omitted).

37. Moreover, the Second Circuit has indicated that a party would have to show fraud or collusion between the buyer and the debtor-in-possession or trustee or other bidders in order to demonstrate a lack of good faith. See *In re Colony Hill Assocs.*, 111 F.3d 269, 276 (2d Cir. 1997) ("Typically, the misconduct that would destroy a purchaser's good faith status at a judicial sale involves fraud, collusion between the purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders").

38. The Debtors intend to make an appropriate showing at the Sale Hearing that the Purchase Agreement with the Purchaser is the result of a negotiated, arm's-length transaction, in which such Purchaser at all times acted in good faith. The Debtors thus request that the Court find that the Purchaser will be purchasing the Purchased Assets in good faith within the meaning of Section 363(m) of the Bankruptcy Code.

**Reservation of Rights to Offer Additional Assets for Sale at Auction**

39. Although the Debtors have not received any bids to date, the Debtors expressly reserve the right, with the consent of the Lenders, to offer for sale at the Auction any or all of the following assets: (i) a patent portfolio relating to liquid crystal display and liquid crystal on silicon technologies, as indentified in **Exhibit "C"** hereto, and (ii) the Debtors' 9.8% equity interest in Compound Photonics Ltd.

**Notice**

40. The Debtors have provided notice of this Motion to: (a) the Office of the United States Trustee; (b) counsel to the Debtors' pre-petition secured lenders; (c) counsel to the Debtors' post-petition secured lenders; (d) counsel to the Official Committee of Unsecured Creditors; (e) the Purchaser; and (f) those persons who have requested notice pursuant to Rule 2002 of the Federal Rules of Bankruptcy Procedure. The Debtors submit that, in light of the nature of the relief requested, no other or further notice need be given.

**No Prior Request**

41. No prior request for the relief sought in this Motion has been made to this or any other court.

**Conclusion**

42. The Debtors' proposed Sale of the Purchased Assets as described in this Motion and the Purchase Agreement is supported by sound business reasons, as set forth herein. The



proposed Sale is proper and necessary, and serves the best interests of the Debtors, their estates, and their creditors. The Debtors thus request that the Court approve the proposed Sale of the Purchased Assets free and clear of all liens, claims, encumbrances, and interests, as requested.

43. Therefore, the Debtors respectfully request that this Court (a) authorize the Sale of the Purchased Assets to the Purchaser on substantially the terms set forth in the Purchase Agreement, including the Escrow Agreement annexed thereto as Exhibit 2, (b) approve and implement the Bidding Procedures and Bidding Protections, and the related dates and deadlines described herein in respect of the sale of the Purchased Assets, and (c) grant other related relief.

WHEREFORE, the Debtors respectfully request that this Court enter an order granting the relief requested herein and that it grant the Debtors such other and further relief as is just and proper.

[Signature on next page]

Dated: April 1, 2009

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