

**TRENK, DiPASQUALE,  
DELLA FERA & SODONO, P.C.**  
347 Mt. Pleasant Avenue, Suite 300  
West Orange, New Jersey 07052  
(973) 243-8600  
Anthony Sodono, III  
Michele M. Dudas  
*Counsel to VoicePulse, Inc.,  
Chapter 11 Debtor and Debtor-in-Possession*

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEW JERSEY**

In re:

VOICEPULSE, INC.,

Debtor.

Chapter 11

Case No. 16-25075 (MBK)

Honorable Michael B. Kaplan

Hearing Date and Time: December 5,  
2016, at 10:00 a.m.

**MOTION OF VOICEPULSE, INC., CHAPTER 11 DEBTOR AND DEBTOR-IN-POSSESSION, FOR ENTRY OF ORDER (I) APPROVING THE SALE OF DEBTOR'S ASSETS, FREE AND CLEAR OF LIENS, CLAIMS, AND INTERESTS PURSUANT TO 11 U.S.C. § 363(b), (f), AND (m); (II) ASSIGNING RIGHTS UNDER CERTAIN CONTRACTS PURSUANT TO 11 U.S.C. § 365; (III) REJECTING ALL OTHER UNEXPIRED EXECUTORY CONTRACTS AND UNEXPIRED LEASES ON THE CLOSING DATE PURSUANT TO 11 U.S.C. § 365; (IV) SEEKING WAIVER OF THE STAY REQUIREMENTS UNDER FED. R. BANKR. P. 6004(h); AND (V) GRANTING RELATED RELIEF**

**PLEASE TAKE NOTICE** that on **December 5, 2016, at 10:00 a.m.**, or as soon thereafter as counsel may be heard, VoicePulse, Inc., Chapter 11 debtor and debtor-in-possession herein ("Debtor"), will move before the Honorable Michael B. Kaplan, United States Bankruptcy Judge, in the United States Bankruptcy Court for the District of New Jersey, 402 East State Street, Trenton, New Jersey, for an Order (I) approving the sale of the Debtor's assets, free and clear of liens, claims and interests pursuant to 11 U.S.C. § 363(b), (f) and (m); (II) assigning the

Debtor's rights under uncertain contracts pursuant to 11 U.S.C. § 365; (III) rejecting all other contracts and unexpired leases on the Closing Date pursuant to 11 U.S.C. § 365; (IV) seeking a waiver of the stay requirements pursuant to Fed. R. Bankr. P. 6004(h); and (V) granting related relief (the "Motion").

**PLEASE TAKE FURTHER NOTICE**, that in support of the Motion, the Debtor shall rely upon the enclosed Application filed in support of the relief requested with exhibits annexed thereto.

**PLEASE TAKE FURTHER NOTICE**, that objections, if any, to the relief requested in the Motion shall: (i) be in writing; (ii) state with particularity the basis of the objection; and (iii) be filed with the Clerk of the United States Bankruptcy in accordance with D.N.J. LBR 9013-1.

**PLEASE TAKE FURTHER NOTICE**, that as the Motion does not involve any complex issue of law, no brief is required.

**PLEASE TAKE FURTHER NOTICE**, that unless an objection is timely filed and served, the Motion will be deemed uncontested in accordance with D.N.J. LBR 9013-3(d) and the relief may be granted without a hearing.

**PLEASE TAKE FURTHER NOTICE**, that an order granting the relief requested herein is submitted herewith and made part of the Motion herein.

**TRENK, DIPASQUALE,  
DELLA FERA & SODONO, P.C.**  
*Attorneys for VoicePulse, Inc.,  
Chapter 11 Debtor and Debtor-in-Possession*

By: /s/ Anthony Sodono, III  
ANTHONY SODONO, III

Dated: November 7, 2016  
4824-7025-2603, v. 1

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**APPLICATION OF VOICEPULSE, INC., CHAPTER 11 DEBTOR AND  
DEBTOR-IN-POSSESSION, IN SUPPORT OF MOTION (I) APPROVING  
THE SALE OF DEBTOR'S ASSETS, FREE AND CLEAR OF LIENS,  
CLAIMS, AND INTERESTS PURSUANT TO 11 U.S.C. § 363(b), (f),  
AND (m); (II) ASSIGNING RIGHTS UNDER CERTAIN CONTRACTS  
PURSUANT TO 11 U.S.C. § 365; (III) REJECTING ALL OTHER  
UNEXPIRED EXECUTORY CONTRACTS AND UNEXPIRED LEASES  
AS OF THE CLOSING DATE PURSUANT TO 11 U.S.C. § 365;  
(IV) SEEKING WAIVER OF THE STAY REQUIREMENTS UNDER FED.  
R. BANKR. P. 6004(h); AND (V) GRANTING RELATED RELIEF**

TO: HONORABLE MICHAEL B. KAPLAN  
UNITED STATES BANKRUPTCY JUDGE

VoicePulse, Inc., Chapter 11 debtor and debtor-in-possession (the "Debtor"), by and  
through its counsel, Trenk, DiPasquale, Della Fera & Sodono, P.C. ("Trenk DiPasquale"),  
respectfully represents as follows:

### **INTRODUCTION**

1. Through this Motion, the Debtor seeks (i) authority to sell the bankruptcy estate's interest in the Debtor's tangible and intangible assets ("Assets") to VoicePulse Holdings, LLC (the "Purchaser") for the sum of \$300,000 ("Purchase Price"), free and clear of all existing liens, claims and encumbrances pursuant to 11 U.S.C. § 363(b), (f), and (m); (ii) the authority to assign its rights under certain contracts pursuant to 11 U.S.C. § 365; (iii) to reject all other unexpired contracts and leases as of the Closing Date pursuant to Section 365; (iv) a waiver of the stay requirements pursuant to Fed. R. Bankr. P. 6004(h); (v) to provide the Purchaser with the right to certain protections in the form of reimbursable expenses if it is not the ultimate purchaser; and (vi) such and other further relief as is just and equitable.

### **JURISDICTION AND VENUE**

2. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334(b). Furthermore, this matter is a "core proceeding" pursuant to 28 U.S.C. §157(b)(2)(A), (N), and (O).

3. Venue of this case properly lies in this Court pursuant to 28 U.S.C. § 1409 in that this matter arises in and relates to a case pending in this District.

### **BACKGROUND**

4. Since April 2003, the Debtor has provided hosted phone services to wholesale and business customers as well consumer customers. Ravi Sakaria is the President of the Debtor and its sole shareholder. The Debtor is located at 1095 Cranbury South River Road, Unit 16, Jamesburg, New Jersey. Including Mr. Sakaria, the Debtor now has five (5) full-time employees (the "Employees").

5. Over the course of the last six (6) years, several issues have affected the Debtor's business. There has been a slow attrition of customers, which accelerated over the last six (6)

months. Moreover, there has been increased competition, which has put the Debtor at a strategic disadvantage, because it cannot be price-competitive based upon aging infrastructure. Furthermore, there was a contentious litigation involving Ketan P. Patel (“Patel”), Mr. Sakaria’s cousin, which resulted in a Settlement Agreement whereby the Debtor paid \$11,111.11 monthly, in addition to other significant settlement payments previously made since in or about November 2010.

6. Vendors were threatening to disconnect the Debtor’s services, which would in turn interrupt services to the Debtor’s customers. This would have lead to irreparable harm to the Debtor’s business. Cash would have ceased and enterprise value would have diminished.

7. Therefore, left with no choice based upon a pending shut-off by a creditor, the Debtor filed its voluntary Chapter 11 Petition on an emergent basis.

### **SECURED DEBT**

#### **A. WebBank**

8. The Debtor and WebBank (“Web”) entered into a Business Loan Agreement (“Web Agreement”) (as defined therein) dated February 26, 2016, whereby Secured Creditor advanced the Debtor the sum of \$150,000. The Web Agreement granted the Security Creditor a security interest, which was further secured by a UCC-1 financing statement.

9. The collateral subject to the Secured Creditor’s lien is set forth in its filed UCC-1 (and continuation statement), and includes the following:

All of [Debtor’s] present and future accounts, chattel paper, deposit accounts, personal property, assets and fixtures, general intangibles, instruments, equipment, inventory wherever located, and proceeds now or hereafter owned or acquired by [Debtor] (“collectively the “Secured Assets”).

10. Mr. Sakaria signed a Personal Guaranty for the Web debt.

11. Upon information and belief, although the Web Agreement is termed a “loan” agreement, it is a merchant services agreement, whereby the Debtor’s bank accounts linked to customer credit card deposits are swept daily.

12. There was a weekday payment amount of \$563.65, and the anticipated maturity date is approximately June 2, 2017.

13. Pursuant to the various Orders authorizing the use of cash collateral, the loan payments to WebBank were converted into monthly payments of \$1,297.18.

14. As of the Petition Date, Secured Creditor is owed approximately \$122,300.

15. According to the UCC Financing Statement in favor of Secured Creditor, it enjoys a lien on, among other things, Debtor’s accounts.

**NOTICE OF SALE AND HIGHER AND BETTER OFFERS**

16. The Debtor engaged in negotiations with the Purchaser, and ultimately executed an Asset Purchase Agreement (“Agreement”) on November 1, 2016. A copy of the Agreement is annexed as **Exhibit “A.”**

17. A copy of this Motion and notice of the return date is being provided to Purchaser, as well as any party that has expressed an interest in the Assets.

18. The Debtor will accept all higher and better offers for the Assets on the date of the hearing set by the Court on the within Motion.

19. All interested bidders must attend the sale hearing and notify the Debtor’s counsel of their intent to bid at the sale hearing no later than seven (7) days prior to the date set by the Court for the hearing.

20. All higher and better offers must be in \$10,000 increments.

21. In the event that the Purchaser is not the successful bidder, the successful bidder must agree to the terms of sale set forth in the attached Agreement of Sale. To the extent that the

Agreement provides for employment by the Purchaser of Mr. Sakaria, if Purchaser chooses not to waive this provision, Mr. Sakaria would have to agree to the terms and conditions of his employment.

22. The sale of the Debtor's business has been advertised on BusinessBroker.net since October 19, 2016, and BizBuySell.com since October 21, 2016, and will continue to be advertised through the date of the sale. Additionally, the Debtor will list the business for sale in the Business Opportunity Section of the Newark Star Ledger for two (2) consecutive weekends prior to the return date hereon.

### **TERMS OF SALE**

23. The sale of the Assets is subject to Bankruptcy Court approval pursuant to 11 U.S.C. § 363 (b), (f), and (m).

24. The Debtor is selling the Assets, free and clear of liens, claims and encumbrances pursuant to 11 U.S.C. § 363(b), (f) and (m) for the total sum of \$300,000 ("Purchase Price"). The Purchase Price will be paid as follows: (a) \$30,000 initial deposit was provided upon execution of the Agreement, and monthly installments of \$5,000 per month for fifty-four (54) consecutive calendar months beginning six (6) months following the closing. ArenaOne, LLC ("Arena"), an existing New York limited liability company, has agreed to provide a corporate guaranty for the Purchase Price.

25. The closing is expected to take place on December 31, 2016 ("Closing Date").

26. The Debtor will assign its rights under all existing customer contracts (collectively, the "Customer Contracts"), and will also assign its rights under an unexpired executory contract with Coredial (the "Coredial Contract") to the Purchaser pursuant to 11 U.S.C. § 365. All other existing contracts will be expressly rejected by the Debtor, to be effective on the actual Closing Date.

**RELIEF REQUESTED AND BASIS THEREFOR**

**A. The Debtor Should Be Authorized to Sell the Assets**

27. The Debtor should be authorized to sell the Assets to Purchaser, subject to higher and better offers. Section 363(b) of the Bankruptcy Code governs sales of assets outside the ordinary course of business and provides as follows:

The [debtor-in-possession], 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 also* Fed. R. Bankr. P. 6004(f)(1) (authorizing sales outside of the ordinary course of business to be conducted privately or by public auction).

**(1) Good Faith Buyer Requirement**

28. Although the Bankruptcy Code contains no guidance regarding the circumstances under which a sale of assets can be approved (except that notice and a hearing must be provided), the Third Circuit in *In re Abbotts Dairies of Pennsylvania, Inc.*, 788 F.2d 143, 149-50 (3rd Cir. 1986) interpreted Section 363(b) to require a finding by the Bankruptcy Court that the purchaser of a debtor's assets is a good faith buyer. The Third Circuit construed the "good faith buyer" standard to mean one who purchases "in good faith" and for "value." *Abbotts*, 788 F.2d at 147

29. The *Abbotts* court analogized the bona fides of a Section 363(b) purchaser to a buyer at a judicial sale:

The 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 Debtor, or an attempt to take grossly unfair advantage of other bidders.

*Abbotts*, 788 F.2d at 147 (quoting *In re Rock Industries Machinery Corp.*, 572 F.2d 1195, 1198 (7<sup>th</sup> Cir. 1978).



30. Purchaser was formed for the sole purpose of purchasing the Debtor's assets. Per the Agreement, the balance of the Purchase Price will be guaranteed by Arena. Neither Purchaser nor Arena are in any way affiliated with the Debtor or its principal.

31. Section 363(m) of the Bankruptcy Code provides that a reversal or modification on appeal of an authorized sale of property under Section 363(b) of the Bankruptcy Code will not affect the validity of such sale to a good faith purchaser. *See* 11 U.S.C. § 363(m).

32. The Debtor represents that the Purchaser is unaffiliated with the Debtor and/or the Debtor's officer. Purchaser's stalking horse bid is a product of good faith negotiations between the Debtor and Purchaser.

33. The offer from Purchaser was the first and currently the only offer for the Debtor's Assets. The offer from Purchaser was the highest and/or best in the Debtor's business judgment. Therefore, Purchaser is entitled to the protection of Section 363(m) of the Bankruptcy Code upon approval at the Sale Hearing.

34. Any sale under an alternative transaction likewise will be the product of arms-length and good faith negotiations. Any such transaction will be the result of a fair auction process conducted under the supervision of this Court if additional buyers come forward. The protections of Section 363(m) of the Bankruptcy Code therefore should apply with equal force in the event of an alternative transaction.

**(ii) The Assets are Being Sold for Fair "Value"**

35. Courts will only approve Section 363(b) sales if the debtor has obtained a fair and reasonable price for the assets. *In re Delaware & Hudson Railway Co.*, 124 B.R. 169, 176 (D. Del. 1991); *In re Indus. Valley Refrigeration and Air Conditioning Supplies, Inc.*, 77 B.R. 15, 20 (Bankr. E.D. Pa. 1987). At the Sale Hearing, the Debtor will demonstrate that the Successful Bidder bought the Assets for "value." At a minimum, because the sale of the Assets will have

been the subject of extensive marketing and subject higher and better bids through the hearing on the Motion, the Debtor is confident that the Assets' value will be maximized.

36. As set forth on Schedule B to its petition, the Debtor opines that its hard assets have a collective fair market value of approximately \$49,000. The balance of the consideration being paid by the Purchaser is for the intangible assets of the Debtor, including the goodwill of the business. Therefore, the Purchase Price in the amount of \$300,000 exceeds the value of the Assets.

**(2) The Debtor Is Selling the Assets for a Sound Business Purpose**

37. In addition to the *Abbotts* requirements, courts consistently require debtors-in-possession to establish a "sound business purpose" to sell any or all of their assets before confirmation of a reorganization plan. *In re Lionel Corp.*, 722 F.2d 1063 (2d Cir. 1983); *Delaware & Hudson Railway*, 124 B.R. at 175-76; *In re Titusville Country Club*, 128 B.R. 396, 399 (Bankr. W.D. Pa. 1991); *In re Sovereign Estates, Ltd.*, 104 B.R. 702, 704 (Bankr. ED. Pa. 1989); *In re Conroe Forge & Manufacturing Corp.*, 82 B.R. 781, 783-86 (Bankr. W.D. Pa. 1988); *Industrial Valley*, 77 B.R. at 21. Courts have developed the following non-exclusive list of factors to consider in determining whether a sound business purpose exists:

- Sound business reason for the sale;
- Accurate and reasonable notice;
- Proportionate value of the asset to the estate as a whole (fair and reasonable);
- 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 on the future plan;
- The amount of proceeds to be obtained from the sale versus the appraised value of the property sold; and

- Whether the asset is decreasing or increasing in value.

*Lionel*, 722 F.2d at 1071; *Delaware & Hudson Railway*, 124 B.R. at 176.

38. Courts have made clear that a debtor's showing of a sound business justification does not have to be unduly exhaustive. Rather, a debtor is "simply required to justify the proposed disposition with sound business reason." *In re Baldwin United Corp.*, 43 B.R. 888, 906 (Bankr. S.D. Ohio 1984).

39. Primarily, the Debtor is selling the Assets for a sound business purpose because the sale proceeds will be used by the Debtor to fund, in part, an orderly Plan of Liquidation. If the Assets were not sold, the Debtor would have to spend the time and resources to upgrade its current infrastructure to meet technological and other pricing demands to remain competitive.

40. Also, the form and manner of the notice of Motion used for soliciting higher and better offers for the Assets have been submitted for approval by the Court and will ensure that any and all interested parties will receive adequate notice of the sale hearing. Further, the Debtor has been advertising on various websites, and will advertise for two consecutive weekends in the Business Opportunity Section of the Newark Star-Ledger. Consideration of those sound business reasons leads to the inescapable conclusion that Debtor should be authorized to sell the Assets.

41. As of the filing of the Motion, the Proofs of Claim total \$623,813.98. Of this amount, \$352,936.48 are priority, and the remaining claims of \$270,877.50 are general unsecured claims. The deadline to file Proofs of Claim expires on November 30, 2016.

**B. The Debtor Should Be Authorized to Sell the Assets Free and Clear of All Liens Pursuant to Section 363(b) and (f) of the Bankruptcy Code**

42. Pursuant to Section 363(f), the Bankruptcy Code authorizes a debtor-in-possession to sell property of the estate under Section 363(b) free and clear of any interest or lien in such property if one of the following five criteria is met:

- (i) applicable non-bankruptcy law permits sale of such property free and clear of such interest;
- (ii) such entity consents;
- (iii) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
- (iv) such interest is in bona fide dispute; or
- (v) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

11 U.S.C. § 363(f).

43. The language of Section 363(f) is in the disjunctive, so that a sale free and clear of interests can be approved if any one of the aforementioned conditions is satisfied. *In re Heine*, 141 B.R. 185, 189 (Bankr. D.S.D. 1992); *In re Elliot*, 94 B.R. 343, 345 (E.D. Pa. 1988).

44. A sale free and clear of liens, claims, interests, options, and encumbrances is necessary to maximize the value of the Assets. Any valid liens will attach to the proceeds of the sale in the same priority as existed prior to the sale.

45. The Purchase Price clearly exceeds Web's secured claims and, as such, meets the requirements of 11 U.S.C. § 363(f)(iii). The full Purchase Price, however, will be paid over time and the Debtor submits that having Web release its lien upon closing is fair and equitable, with the remaining balance to attach to the sale proceeds.

46. Based upon the foregoing, the Debtor requests this Court permit the sale process to move forward.

**C. The Bidding Protections Should be Approved**

47. To compensate for serving as a “stalking horse,” whose bid will be subject to higher or better offers, the Debtor seeks to provide the Purchaser with certain protections, Purchaser is not the successful bidder. The Debtor believes that the protections are reasonable, given the benefits to the estate of having a definitive agreement and the risk that a third party offer ultimately may be accepted, and the protections are necessary to preserve and enhance the value of the bankruptcy estate.

48. Bidding incentives encourage a potential purchaser to invest the requisite time, money and effort to negotiate with a debtor and perform the necessary due diligence attendant to the acquisition of a debtor’s assets, despite the inherent risks and uncertainties of the Chapter 11 process. Historically, bankruptcy courts have approved bidding incentives similar to protections under the “business judgment rule,” which proscribes judicial second-guessing of the actions of an entity’s board taken in good faith and in the exercise of honest judgment. *See In re 995 Fifth Ave. Assocs., L.P.*, 96 B.R. 24, 28 (Bankr. S.D.N.Y. 1989) (bidding incentives may “be legitimately necessary to convince a ‘white knight’ to enter the bidding by providing some form of compensation for the risks it is undertaking”) (citation omitted).

49. Under the “business judgment rule,” the protections contemplated by the Purchaser (including break-up fee) are appropriate. The Agreement and protections are the product of extensive good faith, arms’ length negotiations between the Debtor and the Purchaser. The protections are fair and reasonable in amount, particularly in view of its efforts to date, the willingness to create value for the estate (while assuming the risks relating thereto) and the risk of being used as a “stalking horse.”

50. The United States Court of Appeals for the Third Circuit established standards for determining the appropriateness of break-up fees, expense reimbursement and other financial protections in the bankruptcy context in *Calpine Corp. v. O'Brien Env'tl Energy, Inc. (In re O'Brien Env'tl. Energy, Inc.)*, 181 F.3d 527 (3d Cir. 1999). See also *In re Reliant Energy Channelview LP*, 594 F.3d 200 (3d Cir. 2010) (emphasis added). In *O'Brien*, the Third Circuit identified at least two instances in which an award of a break-up fee or expense reimbursement may benefit the estate. First, a break-up fee or expense reimbursement may be necessary to preserve the value of the estate if assurance of the fee “promote[s] more competitive bidding, such as by inducing a bid that otherwise would not have been made and without which bidding would have been limited.” *O'Brien*, 181 F.3d at 537. Second, if the availability of reimbursement of expenses were to induce a bidder to research the value of the debtor and convert the value to a dollar figure on which other bidders can rely, the bidder may have provided a benefit to the estate by increasing the likelihood that the price at which the debtor is sold will reflect its true worth. *Id.* The Third Circuit held that although reimbursement of expenses and break-up fees are measured against a business judgment standard in non-bankruptcy transactions, the administrative expense provisions in section 503(b) of the Bankruptcy Code govern in the bankruptcy context. Therefore, to be approved, the debtor must demonstrate that the expenses to be reimbursed provide a benefit to its estate. *Id.* at 533.

51. In *O'Brien*, the court reviewed the nine factors set forth by the lower court as relevant in deciding whether to award a break-up fee or expense reimbursement. Such factors are:

- the presence of self-dealing or manipulation in negotiating the break-up fee;
- whether the fee harms, rather than encourages, bidding;
- the reasonableness of the break-up fee relative to the purchase price;

- whether the unsuccessful bidder placed the estate property in a “sales configuration, mode” to attract other bidders to the auction;
- the ability of the request for a break-up fee to serve to attract or retain a potentially successful bid, establish a bid standard or minimum for other bidders, or attract additional bidders;
- the correlation of the fee to a maximum of value of the debtor’s estate;
- the support of the principal secured creditors and creditors’ committees of the break-up fee;
- the benefits of the safeguards to the debtor’s estate; and
- the substantial adverse impact of the break-up on unsecured creditors, where such creditors are in opposition to the break-up fee.

*See O’Brien*, 181 F.3d at 536.

52. The protections will enable the Debtor to secure an adequate sale price floor for the Assets and, thus, require that competing bids be materially higher or otherwise better than the Purchaser’s offer – a clear benefit to the Debtor’s estate. Moreover, the Purchaser would not agree to act as a stalking horse without approval of the protections. Without the commitments under the Agreement, the Debtor will lose the opportunity to test the stalking horse offer for the Assets in the marketplace, and would lose the downside protection afforded by the existence of the offer and the Agreement. Furthermore, without the benefit of the offer from Purchaser, the bids received at Auction for the Assets, if any, could be substantially lower than that offered by the Purchaser and the Debtor will lose the opportunity to recover value for the Assets.

53. In the present case, the Purchaser seeks to be reimbursed for actual and necessary expenses in an amount not to exceed \$15,000, pursuant to 11 U.S.C. § 503(b) if such Purchaser is not the successful bidder. Such amount is consistent with expense reimbursements approved in other cases. *See, e.g., Consumer News & Business Channel P’ship v. Fin. News Network, Inc. (In re Fin. News Network, Inc.)*, 980 F.2d 165, 167 (2d Cir. 1992) (noting without discussion

\$8.2 million Break-up fee on \$149.3 million transaction, or 5.5% of consideration offered, is fair); *Cottle v. Stores Comm'ns*, 849 F.2d 570, 578-79 (11th Cir. 1988) (approving \$29 million fee on \$2.5 billion transaction, or 1.16%); *see also LTV Aerospace & Defense Co. v. Thomson-CSF, S.A. (In re Chateaugay Corp.)*, 1998 B.R. 848, 861 (S.D.N.Y. 1996). The Purchaser agrees that if it is not the successful bidder and if it seeks reimbursement of actual and necessary expenses under Section 503(b), it will file a Verified Application setting forth such expenses on notice to all applicable parties.

**D. The Debtor Should Be Authorized to Assign the Customer Contracts and the Coredial Contract to the Purchaser Pursuant to 11 U.S.C. § 365(f), and Reject all Other Contracts**

54. “Upon assuming an executory contract, the trustee is likewise authorized to assign the executory contract.” *In re Fleming Companies, Inc.*, 499 F.3d 300, 304-05 (3d Cir. 2007). Pursuant to 11 U.S.C. § 365(f), “notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in an applicable law, that prohibits, restricts, or conditions the assignment of such contract or lease, the trustee may assign such contract or lease under paragraph (2) of this subsection.” 11 U.S.C. § 365(f)(1).

55. Pursuant to 11 U.S.C. § 365(f)(2):

The trustee may assign an executory contract or unexpired lease of the debtor only if –

(A) the trustee assumes such contract or lease in accordance with the provisions of this section; and

(B) adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease.

11 U.S.C. § 365(f)(2).

56. The definition of “adequate assurance of future performance” depends on the facts and circumstances of each case, and should be given “practical, pragmatic construction.”



*Carlisle Homes, Inc. v. Azzari (In re Carlisle Homes, Inc.)*, 103 B.R. 524, 538 (Bankr. D.N.J. 1988). “Although no single solution will satisfy every case, the required assurance will fall considerably short of an absolute guarantee of performance.” *Id.* at 538.

57. In the instant case, the two (2) requirements of 11 U.S.C. § 365(f)(2) are met. First, through this Motion, the Debtor is seeking to assume the Customer Contracts and the Coredial Contract. Second, the Purchaser has provided adequate assurance of future performance as it has indicated that it has the financial capability to meet the obligations with respect to the services provided under the Customer Contracts and the Coredial Contract. Accordingly, the Debtor respectfully requests the Court authorize it to assign the Customer Contracts and the Coredial Contract to the Purchaser.

58. None of the contracts sought to be assigned are in default for any monetary or non-monetary reason. Therefore, there is no amount to cure by the Debtor before assigning its rights to Purchaser.

59. Given the confidentiality concerns in revealing customer names and rates being charged, all of the customers under the Customer Contracts are being served with a copy of the within Motion, with their names and addresses being filed in a Certification of Service under protective seal.

60. The Debtor seeks to reject all other contracts on the Closing Date.

**E. Fed. R. Bankr. P. 6004(h)**

61. Pursuant to Bankruptcy Rule 6004(h), unless the court orders otherwise, all orders authorizing the sale of property pursuant to section 363 of the Bankruptcy Code are automatically stayed for fourteen (14) days after entry of such order.

62. By this application, and although the Closing Date is not scheduled until December 31, 2016, the Debtor seeks to waive the stay requirements under Rule 6004(h) in connection with the sale of the estate's interest in the Assets, in its discretion.

### **NOTICE**

63. Notice of this Motion has been given to: (1) the United States Trustee for the District of New Jersey; (2) secured creditor WebBank; (3) counsel to the Purchaser; (4) all parties to the Customer Contracts; (5) Coredial; (6) all parties that timely have requested notice in this case; (7) the Internal Revenue Service; (8) the State of New Jersey; (9) top twenty (20) largest unsecured non-priority creditors; (10) any person or entity that are parties to any assumed or rejected contract; and (11) all persons or entities known to have expressed a *bona fide* interest in acquiring the Assets.

### **CONCLUSION**

64. Based upon foregoing, the Debtor seeks (i) to sell the Assets, free and clear of all existing liens, claims and encumbrances, pursuant to 11 U.S.C. § 363(b), (f), and (m); (ii) to assign his rights under the Customer Contracts and Coredial Contract, and reject all other contracts as of the actual Closing Date pursuant to 11 U.S.C. § 365; (iii) a waiver of the stay requirements pursuant to Fed. R. Bankr. P. 6004(h); and (iv) such and other further relief as is just and equitable.

**TRENK, DiPASQUALE,  
DELLA FERA & SODONO, P.C.**  
*Counsel to VoicePulse, Inc., Chapter 11 Debtor and  
Debtor-in-Possession*

By: /s/ Anthony Sodono, III  
ANTHONY SODONO, III

Dated: November 7, 2016

# **EXHIBIT A**

## ASSET PURCHASE AGREEMENT

THIS ASSET PURCHASE AGREEMENT (the "**Agreement**") is entered into as of October 31, 2016, by and among VoicePulse Holdings, LLC, a New York limited liability company ("**Arena**" or "**Purchaser**"), and VoicePulse, Inc., a New Jersey corporation ("**Voice**" or "**Seller**"). Certain capitalized terms used in this Agreement and not otherwise defined in the body hereof are defined on **EXHIBIT A**. Arena One, LLC (the "**Guarantor**") is a party to this Agreement for the sole purpose of agreeing to certain obligations set forth in Section 1.6.

### RECITALS

A. On August 5, 2016, Voice filed a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code (the "**Bankruptcy Code**") in the United States Bankruptcy Court for the District of New Jersey (the "**Bankruptcy Court**"). Such case is referred to herein as the "**Bankruptcy Case**."

B. On October 3, 2016, Voice and Purchaser executed a Letter of Intent, and subsequently negotiated this Agreement.

C. The Transferred Assets (as defined below) are being transferred herein are intended to be sold free and clear of all Liens, claims, Encumbrances and interests pursuant to Section 363 of the Bankruptcy Code and subject to the Sale Order.

### AGREEMENT

The parties to this Agreement, intending to be legally bound, hereby agree as follows:

#### 1. SALE OF ASSETS; RELATED TRANSACTIONS

**1.1. Purchase and Sale of Assets.** Upon the terms and subject to the conditions set forth in this Agreement, and satisfaction of the terms and conditions set forth in the Sale Order, at the Closing, Seller shall sell, assign, transfer, convey and deliver to Purchaser all of Seller's right, title and interest in and to the Transferred Assets, and Purchaser shall purchase, acquire, accept and pay for the Transferred Assets, free and clear of all Liens, claims, Encumbrances and interests, to the fullest extent permitted by Section 363 of the Bankruptcy Code. This Agreement is expressly subject to approval by the Bankruptcy Court, and the Seller soliciting higher and better offers for the Transferred Assets (defined below).

**(a) Transferred Assets.** For purposes of this Agreement, the term "**Transferred Assets**" means all of Seller's right, title and interests in all of the following assets but excluding, in all cases, any Excluded Assets:

(1) Except for the Excluded Assets, all of the assets, tangible and intangible, owned by the Seller that are used in, or necessary for the conduct of the following business (in each case as described on the Company's website as of the date hereof), not including, for the purposes of this Section 1.1(a)(1) only, any contracts comprising and/or relating to such assets:

- Residential VoIP Business;

- Cloud SIP Trunking Business;
- Cloud PBX Trunking Business;
- Business Hosted Customers; and
- Non-cloud SIP Trunking business

(2) The contracts and/or agreements listed in Schedule 1.1(a)(2) (collectively, the ***“Assigned Contracts”***);

(3) Furniture, equipment, computers and all other physical assets;

(4) All trademarks and/or copyrights owned by the Company including, without limitation, all rights to use the tradename “VoicePulse” and any derivatives thereof;

(5) All source code, licenses and/or Intellectual Property owned by Company;

(6) All Permits used or held by the Company in connection with its business;

(7) All customer lists of the Company and all sales leads, mailing lists; and

(8) All Inventory (including, without limitation, any Inventory held by customers of the Company or in transit therefrom or thereto).

Included in the Transferred Assets are all other goodwill and other intangible assets associated with Seller’s business or the Transferred Assets.

**1.2. Excluded Assets.** Notwithstanding anything contained in Section 1.1 or elsewhere in this Agreement to the contrary and for the avoidance of doubt, the Transferred Assets specifically exclude, without limitation, the following:

(1) All cash, cash equivalents and investment assets of Seller;

(2) Accounts Receivable;

(3) All tax and/or insurance refunds relating to the period of time prior to the Closing;

(4) All bank accounts and other depository accounts of Seller;

(5) Any rights and Liabilities of Seller in under its lease arrangements (including, without limitation, any leases for real property);

(6) Any Deposits;

(7) All books and records relating any other Excluded Assets;

(8) All employment agreements;

(9) Any causes of action of Seller in the within bankruptcy proceeding, now pending or which can or will be filed, including, but not limited to, any avoidance actions;

(10) Any contract that is not an Assigned Contract; and

(11) Without limiting the generality of Section 1.2(10), all rights and Liabilities of the Seller under the agreements set forth on Schedule 1.2(11) (the “Specifically Excluded Contracts”).

**1.3. Assumption of Liabilities.** Purchaser shall pay or assume, perform and discharge when due, the following, and only the following, Liabilities of Seller (collectively, the “Assumed Liabilities”): all Liabilities of Seller accruing under the Assigned Contracts in accordance with their respective terms, but in each case only to the extent (i) such Assigned Contracts have been effectively assigned and transferred to Purchaser pursuant to the provisions hereof, (ii) such Liabilities arise after the Closing Date; and (iii) such Liabilities do not include any Excluded Liabilities.

**1.4. Excluded Liabilities.** Anything contained in this Agreement to the contrary notwithstanding, Purchaser is not assuming any Liabilities of Seller other than the Assumed Liabilities, whether or not relating to the Transferred Assets or the business of the Seller (collectively, the “Excluded Liabilities”), all of which Excluded Liabilities shall at and after the Closing remain the exclusive responsibility and obligation of Seller. Without limiting the generality of the foregoing, the Excluded Liabilities shall include the following Liabilities:

(1) Any Liabilities of Seller under this Agreement;

(2) Any Liability of Seller for expenses, Taxes or fees incident to or arising out of the Transactions (including all attorneys’ and accountants’ fees, and brokerage fees incurred by or imposed upon Seller);

(3) Any Liability of Seller under any Assigned Contract arising out of a breach or alleged breach thereof that occurred as of or prior to the Closing, and any Liability of Seller under any contract or agreement which is not an Assigned Contract, whether or not arising out of a breach or alleged breach thereof;

(4) Any Liability of Seller with respect to any Tax Liens, Encumbrances or any other Taxes, including any liability for Taxes arising in connection with the sale of the Transferred Assets, which are payable by or in respect of Seller;

(5) Any Liability of Seller (A) arising by reason of any violation or alleged violation of any law or any requirement of any governmental entity or (B) arising by reason of any breach or alleged breach by Seller of any order of any governmental, regulatory or judicial body;

(6) Any Liability of Seller for which Purchaser may become liable as a result of or in connection with the failure by Seller to fully and properly comply with any bulk sales or transfer laws applicable to the sale of the Transferred Assets;

(8) Any Liability of Seller relating to any Proceeding or Claim arising out of or in connection with Seller’s conduct prior to the Closing;

(9) Any and all Liabilities howsoever arising, relating to any employee or consultant of Seller or to any Person who was at any time employed or engaged by Seller, including those relating to redundancy and severance pay, workers' compensation, salary, benefits, fringe benefits, bonus, sales commissions relating to transactions or sales occurring prior to the Closing Date, any employee plans, breach of contract, wrongful dismissal, unfair dismissal, discrimination by reason of sex, race or disability, equal pay, health and safety (including industrial injury), in each case whether under national, local or foreign law or otherwise;

(10) Any Liability for any indebtedness of Seller;

(11) Any Liability relating to the period of time prior to the Closing;

(12) Any Liability relating to the Specifically Excluded Contracts; and

(13) Any other Liability of Seller not expressly assumed by Buyer under Section 1.3.

**1.5. No Successors.** Purchaser and Seller acknowledge and agree that Purchaser shall not be deemed, as a result of any action taken in connection with the purchase of the Transferred Assets, to: (1) be a successor (or other similarly situated party) to Seller, or (2) have, *de facto* or otherwise, merged with or into any of Seller, or (3) be a continuation or substantial continuation of Seller or any business of Seller.

**1.6. Purchase Price.** As consideration for the sale, conveyance and delivery of the Transferred Assets, Purchaser shall pay to the Seller in accordance with Schedule 1.4(a) hereto at Closing, by check or by the wire transfer of immediately available funds, the sum of Three Hundred Thousand Dollars (\$300,000) (the "**Purchase Price**"). The Purchase Price is due and payable as follows: (a) \$30,000 will be paid upon execution of this Agreement (the "**Initial Deposit**"), and (b) the remaining balance will be payable in installments of \$5,000 on the 15<sup>th</sup> of each month for fifty-four (54) consecutive calendar months beginning on the date that is six (6) months following the Closing; provided, however, that the Initial Deposit will be held in escrow by counsel to Seller and may only be released either (i) at the Closing to the Seller, (ii) to the Seller in the event that all of the Conditions to the Obligations of the Purchaser set forth in Section 4.1(a) have been satisfied by December 31, 2016 and the Purchaser failed to close the transaction contemplated hereby within ten (10) Business Days thereafter (provided that the Purchaser shall have fifteen (15) Business Days following such date to cure any such failure to close) (a "**Purchaser Failure**"), (iii) upon the termination of this Agreement and/or if the Closing has not occurred by the Termination Date, or (iv) upon receipt of joint instructions from Purchaser and Seller (in accordance with such instructions). In the event that this Agreement is terminated and/or the Closing does not occur by the Termination Date other than due to a Purchaser Failure, the Initial Deposit shall immediately be returned in full to the Purchaser. Notwithstanding anything herein to the contrary, Purchaser shall have the right to withhold payments of the Purchase Price to offset any and all amounts of losses or other damages (including, without limitation, legal costs and expenses) sustained by Purchaser or its affiliates in connection with (x) the breach by Seller of any of the representations, warranties and/or covenants set forth herein, or (y) the Excluded Liabilities.

(a) Purchase Price Allocation. Purchaser and Seller agree to allocate the Purchase Price (along with all other items of consideration for income tax purposes and including any adjustment thereto) among the Transferred Assets as set forth on Schedule 1.6(a) hereto, which allocation shall be binding upon Purchaser and Seller for all federal, state and local income tax purposes. Purchaser and Seller shall timely and properly report for all federal, state and local income tax purposes (and shall defend in any tax audit or contest) the sale of the Transferred Assets in a manner consistent with the allocation set forth on Schedule 1.6(a)

(b) Taxes. The Seller shall be solely responsible for the payment of all Taxes, if any, (i) imposed on Seller for any period, (ii) imposed with respect to the Transferred Assets for any period (or portion of any period) ending on or before the Closing Date, or (iii) imposed in connection with the transactions contemplated by this Agreement (including any Transfer Taxes).

(c) Additional Bids; Expense Reimbursements. The Parties acknowledge that the transactions contemplated by this Agreement shall be noticed to all creditors of the Seller and otherwise advertised. The sale is subject to higher and better offers as determined by the Bankruptcy Court. In the event that, prior to Closing, Seller terminates this Agreement and accepts a higher and better offer, Purchaser may apply to the Court for reimbursement of its expenses relating to this proposed transaction pursuant to Section 503(b) of the Bankruptcy Code, so long as such expenses shall not exceed the sum of \$15,000. The Seller shall pay to the Purchaser, upon the closing of and out of the proceeds of the sales of any material portion of the Transferred Assets to the higher and better offerors, any amount of reimbursement approved by the Bankruptcy Court (provided that the Seller shall use its best efforts to cause the Purchaser to be reimbursed in full (up to \$15,000)).

**1.7. Closing.** The closing of the sale of the Transferred Assets to Purchaser (the "**Closing**") shall take place within five (5) days after the conditions to Closing set forth in Section 4 are satisfied (the "**Closing Date**"). The parties' target Closing Date is December 31, 2016. At the Closing, the Seller shall execute and deliver to Purchaser (a) the Bill of Sale described in Section 1.8, and (b) the Assumption and Assignment Agreement relative to any contract sought to be assigned by Purchaser, a form of which is attached hereto as Exhibit C (the "**Assumption and Assignment Agreement**"). The Closing shall be effective as of 12:01 AM on the Closing Date.

**1.8. Special Guarantee of the Payment of the Purchase Price.** The Guarantor hereby guarantees the prompt performance when due of the Purchaser's obligations to pay the Purchase Price in accordance with Section 1.6; provided, however, that in no event shall the Guarantor have any obligation to make any such payments to the extent that the failure of the Purchaser to make any payments was due to the Purchaser setting off any losses or other damages (including, without limitation, legal costs and expenses) sustained by Purchaser and/or its affiliates in connection with (i) the breach by Seller of any of the representations, warranties and/or covenants set forth herein, or (ii) the Excluded Liabilities.

**1.9. Bill of Sale.** At the Closing, Seller shall execute and deliver to Purchaser a bill of sale, assignment and assumption agreement in substantially the form of Exhibit B (the "**Bill of Sale**"), assignments of contracts, assignments of patents, trademarks, domain names and



copyrights and such other deeds, endorsements, assignments and other good and sufficient instruments of conveyance and transfer as shall be necessary or that Purchaser reasonably deems desirable to transfer, convey and assign good and marketable title to the Transferred Assets to Purchaser free and clear of any and all liens or encumbrances. Seller shall take all reasonable legal steps that may be necessary to put Purchaser in possession and operating control of the Transferred Assets.

**1.10. Further Assurances.** Seller shall promptly pay or deliver to Purchaser any Transferred Asset which may be received by Seller after the Closing. Seller shall, at any time and from time to time after the Closing, upon the request of Purchaser, do, execute, acknowledge and deliver, and cause to be done, executed, acknowledged or delivered, all such further acts, deeds, assignments, transfers, conveyances or assurances as may be reasonably required to transfer, assign, convey, grant and confirm to Purchaser, or to aid and assist in the collection or reducing to possession and operating control by Purchaser of, the Transferred Assets, or to vest in Purchaser good and marketable title to the Transferred Assets.

**1.11. Assignment of Contracts, Rights, Etc.** Anything contained in this Agreement to the contrary notwithstanding, this Agreement shall not constitute an agreement or an attempted agreement to sell, transfer, sublease or assign any contract (or any Claim or right or any benefit arising thereunder or resulting therefrom) if the attempted sale, transfer, sublease or assignment thereof, without the consent of any other party thereto, would constitute a breach thereof or would in any way affect the rights of Purchaser or Seller thereunder. Seller shall use its best efforts to obtain the consent of the other party to any contract to the transfer, sublease or assignment thereof to Purchaser in all cases in which such consent is required for the transfer, sublease or assignment of any such contract. If any such consent is not obtained and the Closing occurs, Seller shall use its best efforts to provide for Purchaser the benefits of such contract, including (a) adherence to reasonable procedures established by Purchaser for the immediate transfer to Purchaser of any payments or other funds received by Seller thereunder, and (b) enforcement for the benefit of Purchaser of any and all rights of Seller thereunder against the other party or parties thereto arising out of the breach or cancellation thereof by such other party or parties or otherwise.

## **2. REPRESENTATIONS AND WARRANTIES OF THE SELLER**

The Seller represents and warrants to Purchaser as of the date hereof and as of the Closing, as follows.

**2.1. Due Organization.** The Seller is duly formed, validly existing and in good standing under the laws of the applicable State of formation of Seller, and has all necessary power and authority to conduct its business in the manner in which it is currently being conducted and to own and use the Transferred Assets in the manner in which the Transferred Assets are currently owned and used.

**2.2. Authority; Binding Nature of Agreements.** The execution and delivery of this Agreement, the Bill of Sale and the Assignment and Assumption Agreement (collectively, the "*Selling Party Transaction Documents*") by Seller, and the performance of all obligations of Seller hereunder and thereunder, have been duly authorized, and no other action or approval is

necessary for Seller's execution, delivery or performance of this Agreement. Upon entry of the Sale Order by the Bankruptcy Court, Seller will have the requisite power and authority to execute and deliver this Agreement. Upon entry of the Sale Order by the Bankruptcy Court, this Agreement will have been, and upon execution by Seller, the Bill of Sale will be, duly executed and delivered by Seller that is a party thereto, and a valid and binding obligation of Seller, enforceable against such Seller in accordance with its terms.

**2.3. NonContravention; Consents.** Subject to the entry of the Sale Order by the Bankruptcy Court, the execution and delivery of this Agreement by Seller does not, and the execution, delivery and performance by the Seller will not cause (with or without the passage of time or the giving of notice), (a) conflict with or violate the organizational documents applicable to Seller, (b) conflict with, result in a breach of, constitute a default (or an event that, with notice or lapse of time or both, would become a default) under, require any consent of any Person pursuant to, any agreement, arrangement or contract to which Seller is a party or by which it is bound, except as listed on Schedule 2.3 ("**Contractual Consents**"), or (c) conflict with or violate any Legal Requirement to which a Seller is subject. Except as described on Schedule 2.3 attached hereto, and upon entry of the Sale Order by the Bankruptcy Court, no notices, reports or other filings are required to be made by Seller, nor are any consents, registrations, approvals, permits or authorizations required to be obtained by Seller from any Governmental Body in connection with the execution, delivery and performance of this Agreement by the Seller and the consummation of the transactions contemplated by this Agreement, the Bill of Sale and the Assumption and Assignment Agreement.

**2.4. Title to Transferred Assets; Condition of Transferred Assets; Assigned Contracts.**

(a) Seller has good, valid and marketable title to all of the Transferred Assets, free and clear of all Encumbrances, except for the lien of WebBank. The Transferred Assets are being sold free and clear of any liens, claims, interests and Encumbrances, all of which Encumbrances (including, without limitation and for the avoidance of doubt, the lien of WebBank) will be divested from the Transferred Assets by the Sale Order. Upon completion of the transaction contemplated hereby, Purchaser will be vested with good and marketable title to the Transferred Assets, free and clear of all Encumbrances. The Transferred Assets comprise all of the assets necessary and sufficient for the conduct of the Company's business in a manner consistent with its past practice (taking into account, for the limited purpose of this sentence, the exclusion of any lease for real property and employee contracts from the Transferred Assets).

(b) Purchaser acknowledges that it is purchasing the Transferred Assets "**WHERE IS**" and "**AS IS**" without reliance upon any warranty or representation made by Seller or by any agents or representatives of any kind or nature, including, without limitation the condition of the Transferred Assets. Purchaser shall be responsible, at its sole cost and expense to conduct an inspection of the Transferred Assets and/or Debtor's books and records.

(c) To Seller's Knowledge, there is not, under any of the Assigned Contracts any breach or default or event which, with notice or lapse of time, or both, would constitute a breach or default on the part of Seller, except such events of breach or default and other events as to which requisite waivers or consents have been obtained, and all such Assigned Contracts are

in full force and effect and enforceable in accordance with their terms, constitute the legal and binding obligations of the respective parties thereto, and have not been modified or amended. Except for consents which will be obtained prior to the Closing, the execution of this Agreement and the consummation of transactions contemplated hereby will not give rise to any consent requirement under any of the Assigned Contracts. Seller has delivered or made available to Buyer true and complete copies, including all amendments and waivers thereof, of each such Assigned Contract.

**2.5. Payment of Taxes.** Other than has been disclosed in the Bankruptcy Case, Seller has timely filed all tax returns required to be filed prior to the date hereof and have paid (or shall pay on or before the date of Closing) all taxes due, if any, with respect to the Transferred Assets.

**2.6. Proceedings.** Other than the Bankruptcy Case and adversary or other proceedings related thereto, there is no Proceeding pending, or to the Seller's Knowledge, threatened, seeking to prevent, hinder, modify, delay or challenge the transactions contemplated by this Agreement.

**2.7. Tax Matters.**

(a) Other than disclosed in the Bankruptcy Case, Seller has filed (or have had filed on its behalf) all material Tax returns required to have been filed by it in connection with the Business. All such Tax returns were and are true, complete and correct in all material respects. No claim has been made by a Governmental Body in a jurisdiction where Seller does not file Tax returns to the effect that Seller is or may be subject to taxation by that jurisdiction.

(b) Other than as disclosed in the Bankruptcy Case, the Seller has, within the time and in the manner prescribed by applicable Laws, paid all Taxes that are due and payable by any Seller and attributable to the business of Seller or the Transferred Assets.

(c) There are no known Tax Liens or Encumbrances for Taxes upon the Transferred Assets and as of the Closing there will be no such Tax Liens or Encumbrances. There is not and, as of the end of the day on the Closing Date there will not be, any liability for Taxes affecting the Transferred Assets for which Purchaser will at any time have any liability for payment.

**2.8. Insurance.** Seller has maintained in full force and effect, policies of general liability, property, casualty and workers compensation insurance in reasonable amounts and at least in the minimum amounts required by law, as applicable. Seller is not in default under the requirements of any such insurance policy.

**2.9. Compliance with Laws.** Seller is in compliance with all applicable statutes, rules, regulations, and requirements of any Governmental Bodies having jurisdiction over the Seller or its operations. Seller has timely filed all reports, data, and other information required to be filed with the Government Bodies.

**2.10. Licenses and Permits.** To the extent applicable, Seller holds, and has held at all times, all Permits necessary for the conduct, ownership, use, occupancy or operation of its business and/or the Transferred Assets.

**2.11. Intellectual Property.** Seller owns or has valid rights to use, transfer, license and sublicense all Intellectual Property that is necessary to conduct its business as was conducted prior to the Closing. Schedule 2.11 sets forth, for the Intellectual Property owned by Seller, a complete and accurate list of all (i) patents and patent applications, (ii) trademark or service mark registrations and applications, (iii) material unregistered trademarks and trade names, (iv) copyright registrations and applications, (v) material unregistered copyrights, service marks, trademarks, trade names, and slogans, and (vi) internet domain names, indicating for each, as may be applicable, the jurisdiction, registration number (or application number) and date issued (or date filed). The conduct by Seller of its business prior to the Closing and Seller's Intellectual Property do not infringe upon (either directly or indirectly), misappropriate or otherwise violate any Intellectual Property owned or controlled by any Person, including any Person who Seller has employed or independently retained to contribute to the preparation, writing or creation of written or digital materials or presentations used by Seller. Seller has at all times complied in all material respects with all applicable laws, as well as its own rules, policies and procedures, relating to privacy, data protection and the collection and use of personal information collected, used or held for use by Seller in connection with its business.

### **2.12. Full Disclosure**

**2.13.** . To Seller's Knowledge, all information furnished to Purchaser in accordance herewith is, and as of the Closing Date shall be, correct and complete in all material respects. No representation or warranty of Seller and no information, schedule or certificate furnished or to be furnished by or on behalf of Seller to Purchaser pursuant to or in connection with this Agreement contains or will contain any untrue statement of a material fact or omits or will omit to state a material fact necessary in order to make the statement contained herein or therein not misleading. To Seller's Knowledge, other than as disclosed in the Bankruptcy Case prior to the date hereof (copies of which disclosures have been provided to Purchaser prior to the date hereof), there is no fact or circumstance which has not been disclosed to Purchaser which constitutes or could reasonably be anticipated to result in a material adverse effect on the Purchaser.

## **3. CERTAIN ADDITIONAL COVENANTS.**

**3.1. Access to Information.** As of the date of this Agreement, Purchaser has concluded its due diligence. The Seller will afford Purchaser and its Representatives reasonable access during normal business hours to its properties, books, records and personnel during the period prior to the Closing to obtain all information concerning the Transferred Assets as Purchaser may reasonably request.

**3.2. Reasonable Efforts.** Subject to the terms and conditions set forth herein, Seller and Purchaser shall use commercially reasonable efforts to take, or cause to be taken, all actions, and to do, or cause to be done, and to assist and cooperate with the other parties in doing, all things necessary, proper or advisable to consummate and make effective, in the most expeditious manner practicable, the transactions contemplated by this Agreement. Without limitation of the generality of the foregoing, the Seller's obligations hereunder shall include using its commercially reasonable efforts to procure all Contractual Consents prior to the Closing.

**3.3. Notification of Certain Matters.** Until the Closing, Seller and Purchaser shall promptly notify the other party in writing of any fact, condition, occurrence or nonoccurrence of any event of which it is aware that is reasonably likely to result in (a) the conditions set forth in Section 4 of this Agreement becoming incapable of being satisfied or (b) a breach of any representation, warranty or covenant of such party.

**3.4. Relief from Stay of Order.** The Seller shall use commercially reasonable efforts to seek relief from the fourteen (14) day stay provided by Fed.R.Bankr.P. 6004(h). This transaction shall be free from transfer taxes, or the Seller shall file a motion seeking such relief if transfer taxes are applicable.

**4. CONDITIONS TO OBLIGATION TO CLOSE.**

**4.1. Conditions to the Obligations of Purchaser.** The obligation of Purchaser to consummate the transactions that are to be consummated at the Closing is subject to the satisfaction by or at the Closing of each of the following conditions, any or all of which may be waived by Purchaser in its sole discretion:

(a) Each of the representations and warranties of the Seller set forth in this Agreement will be true and correct as of the date of this Agreement and as of the Closing Date as though made on and as of the Closing Date.

(b) Each of the agreements, covenants and obligations that a Seller is required to perform or to comply with pursuant to this Agreement at or prior to the Closing will have been duly performed and complied with.

(c) Each consent, approval, or other authorization of any Person, government or governmental agency or instrumentality (federal, state, or local) necessary, in the reasonable opinion of Purchaser, for the consummation by Purchaser of the transactions contemplated hereby, and Purchaser's ownership and operation of the Transferred Assets, free and clear of all Encumbrances, without interruption after the Closing (including, without limitation, all Contractual Consents), will have been obtained and will be in full force and effect, and no such consent, approval, ratification, waiver or other authorization (a) will have been conditioned upon the modification, cancellation or termination of any contract, right or authorization of Seller or Purchaser, or (b) will impose on Purchaser any condition, provision or requirement not presently imposed upon a Seller or any condition that would be more restrictive after the Closing on Purchaser than the conditions presently imposed on a Seller.

(d) The performance of this Agreement, the Bill of Sale, and the Assumption and Assignment Agreement and the consummation of the Closing will not, directly or indirectly (with or without notice or lapse of time), violate, contravene, conflict with or result in a violation of any applicable law and will not violate any order of any court or Governmental Body of competent jurisdiction, and no suit, action, investigation or legal or administrative proceeding will have been brought or threatened by any Person, government or governmental agency or instrumentality (federal, state, or local) that questions the validity or legality of this Agreement or the transactions contemplated hereby.

(e) The Bankruptcy Court shall have entered a final, non-appealable Sale Order upon sufficient notice to all parties in interest, which Sale Order shall include, without limitation, findings of fact and conclusions of law that Purchaser is not a successor in interest to the Seller or any affiliate of the Seller and that Purchaser is a good faith purchaser pursuant to section 363 of the Bankruptcy Code.

(f) The Bankruptcy Court enters a final, nonappealable Order approving the Consent Order in a form that is acceptable to Purchaser pursuant to Fed.R.Bankr.P. 9019.

(g) Purchaser successfully enters into an employment agreement with Ravi Sakaria on mutually agreeable terms to both parties.

(h) Purchaser shall have entered into new versions of each of the Broadview Contract (as defined in Schedule 1.2(11)), the Lighttower Contract (as defined in Schedule 1.2(11)) and the Transbeam Contract (as defined in Schedule 1.2(11)), in each case on terms and conditions satisfactory to Purchaser.

**4.2. Conditions to the Obligations of the Seller.** The obligation of the Seller to consummate the transactions that are to be consummated at the Closing is subject to the satisfaction by or at the Closing of each of the following conditions, any or all of which may be waived by the Seller in its sole discretion:

(a) Each of the agreements, covenants and obligations that Purchaser is required to perform or to comply with pursuant to this Agreement at or prior to the Closing will have been duly performed and complied with.

(b) Each material consent, approval, ratification, waiver or other authorization of any Person, government or governmental agency or instrumentality (federal, state, or local) necessary, in the reasonable opinion of the Seller, for the consummation by the Seller of the transactions contemplated hereby, excluding Contractual Consents, will have been obtained and will be in full force and effect.

(c) The performance of this Agreement, the Bill of Sale, the Assignment and Assumption Agreement and the consummation of the Closing will not, directly or indirectly (with or without notice or lapse of time), violate, contravene, conflict with or result in a violation of any applicable law and will not violate any order of any court or Governmental Body of competent jurisdiction, and no suit, action, investigation or legal or administrative proceeding will have been brought or threatened by any Person, government or governmental agency or instrumentality (federal, state, or local) that questions the validity or legality of this Agreement or the transactions contemplated hereby.

(d) The Bankruptcy Court shall have entered the Sale Order.

(e) Purchaser shall pay the Purchase Price to the Seller in accordance with the Sale Order with the Purchase Price consistent with Section 1.6 hereto.

(f) The Bankruptcy Court enters a final, nonappealable Order approving the Consent Order in a form that is acceptable to Purchaser pursuant to Fed.R.Bankr.P. 9019.

(g) Purchaser offers employment to each of the current employees of the Company at their current salary.

## **5. TERMINATION OF AGREEMENT**

**5.1. Termination.** This Agreement may be terminated at any time prior to the Closing (the date of any such termination, the "***Termination Date***") in the manner provided below:

(a) by mutual written consent of Purchaser and the Seller;

(b) by Purchaser or the Seller, if a material breach of any provision of this Agreement has been committed by the other party or parties and such breach has not been waived by Purchaser or the Seller, as applicable;

(c) by either the Seller or Purchaser if a Governmental Body shall have issued an order, decree or ruling or taken any other action (including, without limitation, the failure to have taken an action), in any case having the effect of permanently restraining, enjoining or otherwise prohibiting the Closing or the satisfaction of the condition to Closing in Section 4, which order, decree, ruling or other action is final and nonappealable;

(d) by either the Seller or Purchaser, if the Closing does not occur on or before December 31, 2016, unless such failure of Closing to occur is on account of the breach hereof or intentional delay hereunder of the party seeking to so terminate; or

(e) automatically, and without further action by any Party, if the Bankruptcy Case is converted into cases under Chapter 7 of the Bankruptcy Code or upon the effectiveness of any dismissal order entered by the Bankruptcy Court in the Bankruptcy Case.

**5.2. Notice of Termination; Effect of Termination.** Any termination of this Agreement under Section 5.1 above will be effective immediately upon the delivery of a valid written notice of the terminating party to the other party hereto. In the event of the termination of this Agreement as provided in Section 5.1, this Agreement shall be of no further force or effect; provided, however, that (i) if such termination is pursuant to Section 5.1(b), the terminating party's or parties' right to pursue all legal remedies will survive such termination unimpaired, and (ii) Purchaser shall remain entitled to receive the Initial Deposit in accordance with Section 1.6.

**5.3. Amendment.** Subject to applicable law, this Agreement may only be amended by execution of an instrument in writing signed on behalf of Purchaser and Seller.

## **6. MISCELLANEOUS PROVISIONS**

**6.1. Survival.** All representations and warranties of the parties shall survive the Closing and continue in full force and effect for a period of three (3) years after the Closing Date. All covenants of the parties shall survive without limitation.

**6.2. Counterparts.** This Agreement may be executed in two or more counterparts, all of which shall be considered one and the same agreement and shall become effective when one

or more counterparts have been signed by each of the parties and delivered to the other party, it being understood that all parties need not sign the same counterpart. Electronic signatures shall be deemed to constitute original signatures for all purposes.

**6.3. Entire Agreement; Third-Party Beneficiaries.** Except for the Consent Order and the Sale Order, which the parties hereto acknowledge, this Agreement and the documents and instruments and other agreements among the parties hereto as contemplated by or referred to herein (a) constitute the entire agreement among the parties with respect to the subject matter hereof and supersede all prior agreements and understandings, both written and oral, among the parties with respect to the subject matter hereof and (b) are not intended to confer upon any other Person any rights or remedies hereunder.

**6.4. Other Remedies.** Except as otherwise provided herein, any and all remedies herein expressly conferred upon a party will be deemed cumulative with and not exclusive of any other remedy conferred hereby, or by law or equity upon such party, and the exercise by a party of any one remedy will not preclude the exercise of any other remedy. The parties hereto agree that irreparable damage would occur in the event that any of the provisions of this Agreement were not performed in accordance with their specific terms or were otherwise breached.

**6.5. Governing Law.** This Agreement shall be construed and enforced in accordance with the laws of the State of New Jersey, without regard to its conflicts of law principles. Each party agrees that jurisdiction and venue for any litigation arising out of this Agreement shall be in the Bankruptcy Court; provided, however, that if at the time of commencement of any such litigation, there is no longer a pending Bankruptcy Case, jurisdiction and venue for any litigation arising out of this Agreement, provided jurisdiction may be obtained under applicable Law, shall be in the U.S. District Court for the District of New Jersey, and each party hereby waives any objections they may have with respect thereto (including, without limitation, any objections based upon *forum non conveniens*). **PURCHASER AND SELLER HEREBY IRREVOCABLY WAIVE ANY AND ALL RIGHT TO TRIAL BY JURY IN ANY LEGAL PROCEEDING ARISING OUT OF OR RELATED TO THIS AGREEMENT, ANY ANCILLARY DOCUMENT, OR THE TRANSACTIONS CONTEMPLATED HEREBY OR THEREBY.**

**6.6. Assignment.** No party may assign either this Agreement or any of its rights, interests, or obligations hereunder without the prior written approval of the other parties. Any purported assignment in violation of this Section 6.6 shall be void. Subject to the preceding sentence, this Agreement shall be binding upon and shall inure to the benefit of the parties hereto and their respective successors and permitted assigns.

**6.7. Specific Performance.** Each party acknowledges and agrees that a non-breaching party would be damaged irreparably in the event any of the provisions of this Agreement are not performed in accordance with their specific terms and that any breach of this Agreement by a party could not be adequately compensated by monetary damages. Accordingly, each party agrees that, in addition to any other right or remedy to which a non-breaching party may be entitled, at law or in equity, a non-breaching party will be entitled to enforce any provision of this Agreement against a breaching party by a decree of specific performance and to temporary, preliminary and permanent injunctive relief to prevent breaches or threatened



breaches of the provisions of this Agreement, without posting any bond or other undertaking.

**6.8. Brokers and Finders.** No Person has acted, directly or indirectly, as a broker, finder or financial advisor for Purchaser in connection with the transactions contemplated hereunder, and no Person is entitled to any fee or commission or like payment in respect hereof.

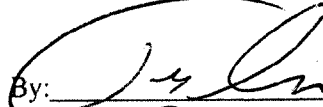
**6.9. Joint Preparation.** The parties have jointly participated in the negotiation and drafting of this Agreement. In the event of any ambiguity or question of intent or interpretation arises, this Agreement shall be construed as jointly drafted by the parties and no presumption shall arise.

**[SIGNATURE PAGE FOLLOWS]**

Purchaser and the Seller have caused this Agreement to be executed and delivered as of the date first written above.

**PURCHASER:**

VOICEPULSE HOLDINGS, LLC

By:   
Name: Jerry Solvi  
Title: CEO

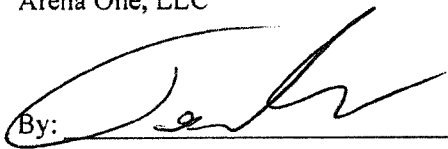
**SELLER:**

VOICEPULSE, INC.

By:   
Name: Ravi Sakaria  
Title: President

For the sole purpose of agreeing to its obligations pursuant to Section 1.6:

Arena One, LLC

By:   
Name: Jerry Solvi  
Title: CEO

## EXHIBIT A

### CERTAIN DEFINITIONS

For purposes of the Agreement (including, without limitation, this EXHIBIT A):

**Accounts Receivable.** "Accounts Receivable" means all accounts receivable and trade accounts owed to Seller and any other rights of Seller to payment from third parties relating to the period of time prior to the Closing, including, but not limited to, those reflected in the books and records of Seller and any claim, remedies or other rights relating to any of the foregoing.

**Affiliate.** "Affiliate" means, with respect to any Person, any other Person that directly, or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with, such first Person.

**Books and Records.** "Books and Records" means all books, records, files, reports, minute books and other documents of Seller of whatever nature and wherever located (whether in hard copy or stored or maintained electronically) that relate to the Transferred Assets or the operation of the Seller, including financial, business and accounting records, personnel records, records relating providers, suppliers or vendors, equipment records, medical and administrative libraries, catalogs, operating manuals, and policies and procedures.

**Claims.** "Claims" means all present and future claims, causes of action, and judgments in favor of Seller relating to the Transferred Assets and, to the extent assignable by Seller, all manufacturers and vendors' warranties (express or implied) and rights and claims assertable by (but not against) Seller related to the Assets.

**Debtor.** "Debtor" means Voice.

**Deposits.** "Deposits" shall mean all prepaid expenses and deposits related to the Seller, including prepaid lease expense, lease/security deposits, utility deposits, prepaid insurance and all other assumable deposits and claims for refunds in connection with the Seller.

**Encumbrance.** "Encumbrance" means any and all security interests, Liens, claims, pledges, encumbrances, conditional sale or title retention agreements, judgments, demands, agreements, charges, easements, equitable interests, conditions, options, rights of first refusal, mortgages, deeds of trust, restrictions of any kind, including, without limitation, any restriction on use, voting, transfer, receipt of income or exercise of any other attribute of ownership, or other liabilities or encumbrances of any nature whatsoever, real and personal, tangible and intangible, known and unknown, matured and unmatured, actual, fixed and contingent.

**Governmental Body.** "Governmental Body" means any United States or non-United States federal, national, supranational, state, provincial, local or similar government, governmental, regulatory or administrative authority, branch, agency or commission or any court, tribunal, or arbitral or judicial body (including, without limitation, any grand jury) or other legislative, executive or judicial governmental entity.

**Intellectual Property** "Intellectual Property" means any and all patents, trademarks, service marks, logos, tradenames, copyrights, trade secrets and software which are owned, license or used by any Seller, including, without limitation, all website domain names, telephone and facsimile numbers, and all applications and registrations with respect to any of the forgoing, and all computer programs and software, including source codes (where transferrable) and access codes thereto.

**Inventory.** "Inventory" means any inventory as that term is defined in the Uniform Commercial Code including, without limitation, any raw materials, components, work in process, finished goods and other materials, including without limitation, any device which supports the service to the end user (e.g., phones, network equipment, servers, etc.) and other items of inventory.

**Knowledge.** "Knowledge" means, with respect to the Seller, the actual knowledge of the Seller, and such knowledge if Seller should have obtained upon diligent investigation and inquiry into the matter in question.

**Legal Requirement.** "Legal Requirement" means any statute, law, ordinance, regulation, rule, code, common law, executive order, injunction, judgment, decree or order of any Governmental Body.

**Liability.** "Liability" means any liability or obligation, whether known or unknown, asserted or unasserted, absolute or contingent, accrued or unaccrued, liquidated or unliquidated and whether due or to become due, regardless of when asserted, and further includes all legal costs and expenses incurred in connection with, incident to or in defense of any Liability.

**Lien.** "Lien" has the meaning given to such term in the Bankruptcy Code.

**Permits.** "Permits" means permits, certificates, accreditations, registrations, licenses and any other authorizations necessary for or used in connection with operation of Seller's business.

**Person.** "Person" means any individual, entity or Governmental Body.

**Proceeding.** "Proceeding" means any claim, action, suit, inquiry, proceeding, audit or investigation by or before any Governmental Body, or any other arbitration, mediation or similar proceeding.

**Representatives.** "Representatives" means officers, managers, shareholders, members, employees, agents, attorneys, accountants, advisors and other representatives.

**Sale Order.** "Sale Order" means a final, non-appealable Order of the Bankruptcy Court pursuant to the Bankruptcy Code approving this Agreement and the transactions contemplated hereby.

**Sale Motion.** "Sale Motion" means the *Motion For Entry of An Order Authorizing The Debtor To Sell Substantially All Of Their Assets Free And Clear Of All Liens, Claim And Encumbrances* to be filed with the Bankruptcy Court in connection with this Agreement.

**Tax.** "Tax" means any multi-national, federal, state, local or foreign income, gross receipts, franchise, estimated, alternative minimum, add-on minimum, healthcare, sales, use, transfer, registration, value added, excise, natural resources, escheat or unclaimed property (whether or not characterized as a tax under applicable law), entertainment, amusement, severance, stamp, occupation, premium, windfall profit, environmental, customs, duties, real property, personal property, ad valorem, capital stock, social security, unemployment, disability, payroll, license, employee or other withholding, or other tax, of any kind whatsoever, including any interest, penalties or additions to Tax or additional amounts in respect of the foregoing.

**Transfer Taxes.** "Transfer Taxes" means all sales, transfer, documentary, stamp, recording, conveyance and similar taxes and fees (including any penalties and interest) due with regard to the transactions contemplated by this Agreement.

**EXHIBIT B**  
**BILL OF SALE**

**See attached.**

**EXHIBIT C**

**ASSIGNMENT AND ASSUMPTION AGREEMENT**

**If applicable, to be filed as part of Motion to approve the Agreement and sale.**

## **SCHEDULE 1.1(a)(2) – ASSIGNED CONTRACTS**

**All existing customer contracts and the Coredial contract.**



#### SCHEDULE 1.2(11) – SPECIFICALLY EXCLUDED CONTRACTS

- Broadview Networks (the “*Broadview Contract*”);
- Lighttower (the “*Lighttower Contract*”);
- Transbeam (the “*Transbeam Contract*”);
- Centauri Communications;
- Comcast Business;
- Earthlink;
- Forsgate Technical Partners; lease for non-commercial real property, expiring May 2017;
- Hubspot;
- Level 3 Communications;
- Onvoy;
- West Safety Services;
- YouMail, Inc..

**SCHEDULE 1.6(a) – PURCHASE PRICE ALLOCATION**

- **Tangible Assets - \$\_\_\_\_\_**
- **Intangible Assets - \$\_\_\_\_\_**

**SCHEDULE 2.3**  
**SELLER CONSENTS**

NONE

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