

**UNITED STATES BANKRUPTCY COURT  
FOR THE EASTERN DISTRICT OF KENTUCKY  
COVINGTON DIVISION**

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 In re: : Chapter 11  
 :  
 Xcelerated, LLC,<sup>1</sup> : Case No. 17-20886-tnw  
 :  
 Debtor. : Honorable Gregory R. Schaaf  
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**MOTION OF THE DEBTOR AND DEBTOR IN  
 POSSESSION FOR ENTRY OF AN ORDER APPROVING  
 AND AUTHORIZING PROCEDURES FOR: (A) THE SALE OF SUBSTANTIALLY  
 ALL OF THE DEBTOR’S ASSETS FREE AND CLEAR OF ALL LIENS, CLAIMS,  
 EMCUMBRANCES, AND OTHER INTERESTS PURSUANT TO 11 U.S.C. §§ 105(A),  
 363 AND 365; AND (B) THE ASSUMPTION AND ASSIGNMENT OF CERTAIN  
EXECUTORY CONTRACTS AND UNEXPIRED LEASES RELATED THERETO**

Xcelerated, LLC (the “Debtor”), the debtor and debtor in possession in the above-captioned chapter 11 case, by and through its undersigned counsel, hereby moves (the “Motion”) under sections 105(a), 363 and 365 of title 11 of the United States Code (the “Bankruptcy Code”), rules 2002, 6005, 6006, 9007 and 9014 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), and rule KYEB LBR 2002-1, 6006-1 and 9014-1 of the Local Rules of the United States Bankruptcy Court for the Eastern District of Kentucky (the “Local Rules”) for entry of an order approving and authorizing procedures (the “Bidding Procedures”) for (a) the sale of substantially all of the Debtor’s assets (the “Sale”) pursuant to the successful bidder’s asset purchase agreement free and clear of all liens, claims, encumbrances, and other interests; and (b) approving the assumption and assignment of certain executory contracts (the

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<sup>1</sup> The last four digits of the Debtor’s taxpayer identification number are (2949). The Debtor’s mailing address, solely for purposes of notices and communications, is 2940 Hebron Park Drive, Suite 307, Hebron Kentucky 41048.

“Contracts”) and unexpired leases (the “Leases”) related thereto. In support of this Motion, the Debtor respectfully states as follows:

### **Jurisdiction and Venue**

1. The Court has jurisdiction over this matter under 28 U.S.C. §§ 157 and 1334. This is a core proceeding under 28 U.S.C. § 157(b). Venue is proper in this district under 28 U.S.C. §§ 1408 and 1409.

### **Background**

2. On June 21, 2017 (the “Petition Date”), the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code with the United States Bankruptcy Court for the Eastern District of Kentucky (the “Court”). The Debtor continues to manage and operate its business as a debtor in possession under sections 1107 and 1108 of the Bankruptcy Code. To date, the Office of the United States Trustee (the “U.S. Trustee”) has not appointed an official committee of unsecured creditors in this chapter 11 bankruptcy case (the “Chapter 11 Case”). No trustee or examiner has been appointed in the Chapter 11 Case.

3. The Debtor is a Florida limited liability company with its principle operations in Hebron, Kentucky. The Debtor is a premier source for automotive intelligence marketing. Specifically, the Debtor provides companies with targeted data that drives the marketing of vehicles through mail, e-mail and telephone advertising. This data includes information about up-to-date vehicle ownership and demographics that might identify future vehicle buyers and the types of vehicles those buyers might want to purchase.

4. The Debtor purchased its business from 621 Holdings, Inc., formerly known as Xcelerated Investments, Inc. (the “Noteholder”) in exchange for \$2,472,663.81, which was fully financed by the Noteholder and which accrues interest at a rate of four percent (4%) per annum. The Debtor’s obligation to the Noteholder is reflected in the Promissory Note dated October 31,

2015 (the “Note”). The Debtor’s obligations to the Noteholder are secured by a lien on the Debtor’s assets, but significantly, not on the Debtor’s cash or accounts receivable. The Note provides that the Debtor shall satisfy its obligation to the Noteholder in thirty-five (35) equal monthly payments of \$70,000 beginning on January 1, 2016 with a maturity date of December 1, 2018. As of the Petition Date (defined below), the Debtor has an outstanding obligation to the Noteholder in the amount of \$2,472,506.

5. On the Petition Date, the Debtor filed its *Motion of the Debtor and Debtor In Possession for Entry of an Order Under 11 U.S.C. §§ 105(a), 363 and 365 (I)(A) Approving and Authorizing the Sale of Substantially All of the Debtor’s Assets Pursuant to the Successful Bidder’s Asset Purchase Agreement Free and Clear of All Liens, Claims, Encumbrances, and Other Interests; (B) Approving the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases Related Thereto; and (C) Granting Related Relief* [Docket No. 17] (the “Initial Sale Motion”), which identified Direct Performance Data, Inc. as the stalking horse bidder.

6. Authenticom, Inc. (“Authenticom”), an affiliate of the Noteholder and one of the Debtor’s largest unsecured creditors, as well as M1 Data and Analytics, LLC (“M1”) objected to the Initial Sale Motion. On July 13, 2017, at the continued hearing on the Sale Motion, the Debtor’s counsel informed the Court that the Debtor was negotiating with these objecting creditors and Direct Performance Data, Inc. in an attempt to arrive at agreeable sales procedures terms.

7. The Debtor subsequently learned that Authenticom and the Noteholder had reached an agreement in principle to sell their claims against the Debtor to M1, which intended to use such claims to acquire the Debtor’s business as a going-concern. On July 28, 2017, the

Debtor thereafter filed its *Motion of the Debtor and Debtor in Possession for Entry of an Order Approving and Authorizing: (A) the Sale of Substantially All of the Debtor's Assets Free and Clear of All Liens, Claims, Encumbrances, and Other Interests Pursuant to 11 U.S.C. §§ 105(a), 349, 363, 365, and 1112(b); (B) the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases Related Thereto; and (C) Terms and Conditions for Voluntary Dismissal* [Docket No. 62] (the "M1 Sale Motion") seeking approval of the sale to M1. Unfortunately, the deal for the sale of the claims of Authenticom and the Noteholder to M1 fell through on the eve of the August 2, 2017 hearing on the M1 Sale Motion.

8. The Debtor has since evaluated and considered all options for reorganization and/or a sale, and has been in ongoing discussions with creditors regarding potential options for resolving the Chapter 11 Case. As a result of those discussions, the Debtor now seeks to pursue a sale of substantially all of its assets under section 363 of the Bankruptcy Code without any stalking-horse bidder identified and a longer marketing timeline in order to generate additional interest in the Debtor's business.

#### **Proposed Sale of Assets**

9. The Debtor requests entry of an order (the "Sale Procedures Order") approving certain bidding procedures (the "Bidding Procedures"), a copy of which is attached to this Motion as **Exhibit A**, for the marketing, auction and Sale of the Debtor's assets.

#### **Assets to be Sold**

10. The Debtor seeks to complete a Sale of substantially all of its assets (the "Purchased Assets"), which comprise, among other things, but not limited to the following: all tangible assets, inventory (including potentially obsolete and non-job specific inventory), supplies, specifications, equipment, work in progress, pending orders, the DataVast application and database, all intellectual property (including all trademarks, service marks, patents,

copyrights, and trade secrets), software, telephone numbers, URLs, websites, domain names, the Contracts (as defined below), all deposits under contracts, all formulas, business methodology, goodwill, client contact lists, client records and files, names of the Debtor used in the Debtor's business, including "Xcelerated" and "DataVast" and all derivations of such names used by the Debtor, all permits, licenses and prepaid expenses relating to the Purchased Assets, and all other assets or business "know how" used in the operation of the Business, wherever located, and all goodwill associated with the Debtor's business and the Purchased Assets

11. The Purchased Assets shall not include certain excluded property (the "Excluded Assets") which include, without limitation:

- All accounts receivable of the Debtor existing as of the closing of the Sale;
- Any rights, claims, counterclaims, third party claims or causes of action of the Debtor against any person and any actions under chapter 5 of the Bankruptcy Code, including, without limitation, under sections 545, 547, 548, 549, 550, 551 and 724(a) of the Bankruptcy Code or under other applicable law;
- Any of the right, title, or interest of the Debtor in or to the Debtor's cash, bank accounts;
- The Debtor's minute book, membership interest records, company seal and any other records of Debtor relating to its limited liability company organization;
- All books, records, files, and papers (whether in hard copy or computer format) that are not used in, or that do not relate to or affect, the Business;
- All governmental authorizations, licenses and permits owned, held or utilized by the Debtor in connection with the ownership of the Purchased Assets and the operation of the Debtor's business, and all pending applications related to the Debtor's business; and
- Any insurance policies to which the Debtor is a party; and
- Any Privilege that relates to any Excluded Asset or any excluded liability.

12. Except as otherwise provided in an Asset Purchase Agreement (as defined below) or order approving the sale, all of the Debtor's rights, title and interest in all of the Purchased Assets shall be sold free and clear of any liens, security interests, claims, charges or encumbrances in accordance with section 363 of the Bankruptcy Code. The Debtor proposes that any such liens, security interests, claims, charges or encumbrances shall attach to the amounts payable to the Debtor's bankruptcy estate resulting from the Sale, net of any transaction fees (the "Sale Proceeds"), in the same order of priority and subject to the rights, claims, defenses, and objections, if any, of all parties with respect thereto, subject to any further order of the Court.

#### **Proposed Bidding Procedures**

13. In order to insure the highest and best offer for the Debtor's assets, the Debtor has developed the Bidding Procedures as a means of allowing competitive bidding. As set forth more specifically in the Bidding Procedures, in order to participate in the sales process, a party must first execute a nondisclosure agreement in a form acceptable to the Debtor to be considered a potential bidder (a "Potential Bidder"). Potential Bidders who timely submit a bid are each a "Qualified Bidder." Only Qualified Bidders and the Noteholder will be permitted to participate in the sales process.

14. To be deemed a Qualified Bidder, a Potential Bidder should be required to submit its bid to (i) the Debtor and (ii) the Noteholder no later than 5:00 p.m. Eastern Time on March 14, 2018 (the "Bid Deadline"), which must include evidence of the Potential Bidder's ability to close on a sale of the Purchased Assets on or before April 16, 2018, and also a deposit submitted to the Debtor's counsel in an amount equal to 10% of the cash amount of the Potential Bidder's bid, which deposit shall be held in escrow (the "Deposit" and, collectively with the other items described above, the "Bid Package").

15. After reviewing any Bid Packages, the Debtor, in consultation with the Noteholder, will determine who is a Qualified Bidder for the Debtor's assets. Under the Bidding Procedures, a Qualified Bidder is a Potential Bidder that delivers the Potential Bid Package to the Debtor and the Deposit to the Debtor's counsel, and that the Debtor, in consultation with the Noteholder, determines is reasonably likely to close on a sale of the Purchased Assets on or before April 16, 2018 if selected as the successful bidder. The Noteholder is automatically deemed a Qualified Bidder based on its ability to credit bid its secured claim. The Debtor may extend the Bid Deadline once or successively, but is not obligated to do so.

16. All initial bids by Qualified Bidders must include the following documents (the "Required Bid Documents"):

- A letter stating that the Bidder's offer is irrevocable until thirty (30) days after a hearing to approve the Sale;
- An executed copy of a purchase and sale agreement (each an "Asset Purchase Agreement");
- Written evidence of a commitment for financing or other evidence of ability to consummate the proposed transaction satisfactory to the Debtor; and
- Written acknowledgment that the bid is not subject to due diligence review, board approval, obtaining financing, or the receipt of any nongovernmental consents.

17. After all Qualified Bids have been received, the Debtor intends to conduct an auction (the "Auction") with respect to the Purchased Assets if the Debtor has received more than one Qualified Bid. Subject to the Court's approval, the Auction shall take place March 19, 2018 at 10:00 a.m. Eastern Time at the offices of Bingham Greenebaum Doll LLP, 3500 PNC Tower, 101 S. 5th Street, Louisville, KY 40202. Only the Noteholder and any other Qualified Bidders who have submitted Qualified Bids will be eligible to participate in the Auction. Based upon the terms of the Qualified Bids received, the level of interest expressed as to the Purchased

Assets, and such other information as the Debtor determines is relevant, the Debtor, in consultation with the Noteholder, will conduct the Auction in the manner it determines will result in the highest or otherwise best offer for the Debtor's assets.

18. Upon the Auction's conclusion, the Debtor, in consultation with the Noteholder, shall (i) review each Qualified Bid on the basis of financial and contractual terms and the factors relevant to the sale process, including those factors affecting the speed and certainty of consummating the sale, and (ii) identify the highest and otherwise best offer (the "Successful Bid"). At the Sale Hearing, the Debtor shall present the Successful Bid to the Court for approval.

19. If the Successful Bidder fails to consummate the transactions by April 16, 2017 the Debtor shall (i) retain such bidder's Deposit; and (ii) be free to consummate the proposed sale of the Purchased Assets with the next highest and best bidder (the "Back Up Bidder") at the final price bid by the Back Up Bidder at the Auction (the "Back Up Bid") (or, if that competing bidder is unable to consummate the purchase of the Purchased Assets at that price, the Debtor may consummate the transaction with the next highest and best competing bidder, and so forth) without the need for an additional hearing or order of the Court.

#### **Notice of Sale**

20. Within one (1) business day after entry of the Sale Procedures Order, the Debtor will serve a notice of sale on all of its known creditors by first class United States mail, postage prepaid, and also serve the notice of sale and the Bidding Procedures by first class, United States mail, postage prepaid, upon (i) the Noteholder, and all other entities known to have asserted any lien, claim or encumbrance in or upon the Purchased Assets; (ii) all federal, state, and local regulatory or taxing authorities or recording offices which have a reasonably known interest in the relief requested herein; (iii) and the Debtor's twenty largest unsecured creditors; (iv) the U.S. Trustee, the United States Attorney's Office, and the Internal Revenue Service; (v) all parties

requesting notice pursuant to Bankruptcy Rule 2002; and (vi) all parties known to the Debtor to have expressed an interest in acquiring the Debtor's assets and other potential purchasers. A proposed notice of sale is attached herewith as **Exhibit B**.

**Procedures for the Assumption and Assignment of Assumed Contracts and Leases**

21. As noted above, the Debtor will seek to assume and assign certain Contracts and Leases (collectively, the "Assumed Executory Contracts").

22. At least initially, the Assumed Executory Contracts will be those Contracts and Leases that the Debtor believes may be assumed and assigned as part of the orderly transfer of the Purchased Assets. The Successful Bidder may choose to exclude (or to add) certain Contracts or Leases to the list of Assumed Executory Contracts, subject to further notice.

23. In the interim, the Debtor will serve the Bid Procedures and the Cure Notice, substantially in the form of **Exhibit C**, upon each counterparty to the Assumed Executory Contracts by no later than seven (7) days following entry of the Bid Procedures Order. The Cure Notice will state the date, time and place of the Sale Hearing as well as the date by which any objection to the assumption and assignment of Assumed Executory Contracts must be filed and served. The Cure Notice also will identify the amounts, if any, that the Debtor believes are owed to each counterparty to an Assumed Executory Contract in order to cure any defaults that exist under such contract (the "Cure Amounts"). If a Contract or Lease is assumed and assigned pursuant to Court order, then unless the Assumed Executory Contract counterparty properly files and serves an objection to the Cure Amount contained in the Cure Notice, the Assumed Executory Contract counterparty will receive at the time of the Closing of the sale (or as soon as reasonably practicable thereafter), the Cure Amount as set forth in the Cure Notice, if any, with payment to be made pursuant to the terms of the Successful Bidder's Asset Purchase Agreement. If an objection is filed by a counterparty to an Assumed Executory Contract, the Debtor proposes

that such objection must set forth a specific default in any executory contract or unexpired lease and claim a specific monetary amount that differs from the amount, if any, specified by the Debtor in the Cure Notice. To the extent that there is a contract to be assumed pursuant to the Successful Bidder's Asset Purchase Agreement, the Bid Procedures and the Sale Motion constitute separate motions to assume and assign that contract to the Successful Bidder pursuant to section 365 of the Bankruptcy Code; each such contract will be listed on an exhibit to the Successful Bidder's Asset Purchase Agreement, and will be given a separate Cure Notice.

24. If any counterparty objects for any reason to the assumption and assignment of an Assumed Executory Contract (a "Cure Amount Objection"), the Debtor proposes that the counterparty must file the objection by no later than (i) March 31, 2018, or (ii) the date otherwise specified in the Cure Notice (or, alternatively, the date set forth in the motion to assume such Assumed Executory Contract if such contract is to be assumed and assigned after the Auction), *provided, however*, that any counterparty may raise at the Sale Hearing an objection to the assumption and assignment of the Assumed Executory Contract solely with respect to the Successful Bidder's ability to provide adequate assurance of future performance under the Assumed Executory Contract. After receipt of a Cure Amount Objection, the Debtor will attempt to reconcile any differences in the Cure Amount. In the event that the Debtor and the non-debtor party cannot resolve the Cure Amount Objection, and the Court does not otherwise make a determination at the Sale Hearing, the Debtor may, in its discretion, segregate any disputed Cure Amounts pending the resolution of any such disputes by the Court or by mutual agreement of the parties.

25. The Successful Bidder shall be responsible for satisfying any requirements regarding adequate assurance of future performance that may be imposed under section 365(b) of

the Bankruptcy Code in connection with the proposed assignment of any Assumed Executory Contract, and the failure to provide adequate assurance of future performance to any counterparty to any Assumed Executory Contract shall not excuse the Successful Bidder from performance of any and all of its obligations pursuant to the Successful Bidder's Asset Purchase Agreement. The Debtor proposes that the Court make its determinations concerning adequate assurance of future performance under the Assumed Executory Contracts under section 365(b) of the Bankruptcy Code at the Sale Hearing. Cure Amounts disputed by any counterparty will be resolved by the Court at the Sale Hearing or such later date as may be agreed to or ordered by the Court.

26. Except to the extent otherwise provided in the Successful Bidder's Asset Purchase Agreement, the Debtor and the Debtor's bankruptcy estate shall be relieved of all liability accruing or arising after the assumption and assignment of the Assumed Executory Contracts under section 365(k) of the Bankruptcy Code.

#### **Applicable Legal Authority**

##### **A. The Sale of the Purchased Assets is Authorized by Section 363 as a Sound Exercise of the Debtor's Business Judgment.**

27. In accordance with Bankruptcy Rule 6004, sales of property rights outside of the ordinary course of business may be by private sale or public auction. The Debtor has determined that the Sale of the Purchased Assets by public auction will enable it to obtain the highest and best offer for these assets (thereby maximizing the value of its bankruptcy estate) and is in the best interests of the Debtor's creditors.

28. Section 363 of the Bankruptcy Code provides that a trustee, "after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b). Although section 363 of the Bankruptcy Code does not specify a

standard for determining when it is appropriate for a court to authorize the use, sale or lease of property of the estate, a sale of a debtor's assets should be authorized if a sound business purpose exists for doing so. *See, e.g., Meyers v. Martin (In re Martin)*, 91 F.3d 289, 295 (3d Cir. 1996); *In re Abbotts Dairies of Pennsylvania, Inc.*, 788 P.2d 143 (2d Cir. 1986); *In re Titusville Country Club*, 128 B.R. 396 (Bankr. W.D. Pa. 1991); *In re Delaware & Hudson Ry. Co.*, 124 B.R. 169, 176 (Bankr. D. Del. 1991); *see also Official Committee of Unsecured Creditors v. The LTV Corp. (In re Chateaugay Corp.)*, 973 F.2d 141, 143 (2d Cir. 1992); *Committee of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1070 (2d Cir. 1983); *Committee of Asbestos-Related Litigation and/or Creditors v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 60 B.R. 612, 616 (Bankr. S.D.N.Y. 1986).

29. The paramount goal in any proposed sale of property of the estate is to maximize the proceeds received by the estate. *See, e.g., In re Food Barn Stores, Inc.*, 107 F.3d 558, 564-65 (8th Cir. 1997) (finding that 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 ("It is a well-established principle of bankruptcy law that the ... [trustee's] duty with respect to such sales is to obtain the highest price or greatest overall benefit possible for the estate.") (quoting *In re Atlanta Packaging Prods., Inc.*, 99 B.R. 124, 130 (Bankr. N.D. Ga. 1988)). As long as the sale appears to enhance a debtor's estate, court approval of a trustee's decision to sell should only be withheld if the trustee's judgment is clearly erroneous, too speculative, or contrary to the provisions of the Bankruptcy Code. *GBL Holding Co., Inc. v. Blackburn/Travis/Cole, Ltd.*, 331 B.R. 251, 255 (Bankr. N.D. Tex. 2005); *In re Lajijani*, 325 B.R. 282, 289 (Bankr. 9th Cir. B.A.P. 2005); *In re WPRV-TV, Inc.*, 143 B.R. 315, 319 (Bankr. D. P.R. 1991) ("The trustee has ample discretion to administer the estate, including authority to conduct public or private sales of estate property.

Courts have much discretion on whether to approve proposed sales, but the trustee's business judgment is subject to great judicial deference."').

30. Applying section 363, the proposed Sale of the Purchased Assets should be approved. As set forth above, the Debtor has determined that the best method of maximizing the recovery of the Debtor's creditors would be through the Sale of the Purchased Assets. In order to ensure a fair auction process, the Debtor has and will continue to solicit interest from numerous potential purchasers.

31. Further, the Debtor believes that the value the Debtor's bankruptcy estate – and, thus, the Debtor's creditors – will receive for the Sale of the Purchase Assets as a going concern exceeds any value the Debtor's bankruptcy estate could get for the Purchased Assets if the Debtor were required to liquidate its assets piecemeal. The Debtor is hopeful that the value of the consideration likely to be received for the Purchased Assets under the Bidding Procedures will be fair and reasonable. The bids will be tested through the Auction consistent with the requirements of the Bankruptcy Code, the Bankruptcy Rules, and pursuant to the Bidding Procedures approved by the Court. Consequently, the fairness and reasonableness of the consideration to be paid by the Successful Bidder ultimately will be demonstrated by adequate "market exposure" and an open and fair auction process – the best means, under the circumstances, for establishing whether a fair and reasonable price is being paid. It is significant that this process is actively supported by the Debtor's secured creditor, the Noteholder, and one of its largest unsecured creditors, Authenticom.

32. The Debtor believes that the timeline for the marketing and sale of the Purchased Assets is adequate, and balances the need to fully market the Purchased Assets and maintain continuity in the operation of the business for vendors, customers and employees. The Debtor's

management team and professionals are prepared to quickly contact potential interested parties and determine the level of interest in a potential acquisition and provide them access to a confidential business overview management presentation and access to a data room that has been assembled upon the execution of an appropriate confidentiality agreement. There is a limited universe of potential acquirers of the Purchased Assets, namely other data services companies. The Debtor intends to contact regional investment banks, regional private equity firms, and other companies involved in data marketing with a focus in the automotive industry. What is more, although the Debtor's business has stabilized since the Petition Date, in order to decrease administrative expense costs the Debtor does not believe an extremely elongated sale process would be beneficial.

**B. The Sale of the Purchased Assets Free and Clear of Liens and Other Interests is Authorized by Sections 363(f) and 105(a) of the Bankruptcy Code.**

33. The Debtor further submits that it is appropriate to sell the Purchased Assets free and clear of all liens pursuant to section 363(f) of the Bankruptcy Code, with any such liens attaching to the sale proceeds of the Purchased Assets to the extent applicable. Section 363(f) of the Bankruptcy Code authorizes a trustee to sell assets free and clear of liens, claims, interests and encumbrances if:

- (1) applicable nonbankruptcy law permits sale of such property free and clear of such interests;
- (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 value of all liens on such property;
- (4) such interest is in 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).

34. This provision is supplemented by section 105(a) of the Bankruptcy Code, which provides that “[t]he Court may issue any order, process or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code].” 11 U.S.C. § 105(a).

35. Because section 363(f) of the Bankruptcy Code is drafted in the disjunctive, satisfaction of any one of its five requirements will suffice to permit the sale of the Purchased Assets “free and clear” of liens and interests. *Michigan Employment Sec. Comm’n v. Wolverine Radio Co. (In re Wolverine Radio Co.)*, 930 F.2d 1132, 1147 n. 24 (6th Cir. 1991); *In re Bygraph, Inc.*, 56 B.R. 597, 606 n. 8 (Bankr. S.D.N.Y. 1986).

36. The Debtor believes that one or more of the tests of section 363(f) are satisfied with respect to the transfer of the Purchased Assets pursuant to the Asset Purchase Agreement of the Successful Bidder. In particular, the Debtor believes that Debtor’s creditor, the Noteholder, will consent to the Sale of the Purchased Assets free and clear of all liens, because the Debtor would receive substantially less for its assets if the Debtor’s assets are not sold as an ongoing concern. Even if that were not the case, a sale free and clear can proceed under section 363(f)(5) of the Bankruptcy Code because the liens on the Purchased Assets may attach to the proceeds of the Sale and the Debtor can establish at the Sale Hearing that any secured parties can be compelled to accept a monetary satisfaction of their claims.

37. Although section 363(f) of the Bankruptcy Code provides for the sale of assets “free and clear of any interests,” the term “any interest” is not defined in the Bankruptcy Code. *Folger Adam Security v. DeMatteis/MacGregor JV*, 209 F.3d 252, 257 (3d Cir. 2000). In the case of *In re Trans World Airlines, Inc.*, 322 F.3d 283, 288-89 (3d Cir. 2003), the United States Court of Appeals for the Third Circuit specifically addressed the scope of the term “any interest.” That 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 more expansive reading of ‘interests in property’ which ‘encompasses other obligations that may flow from ownership of the property.’” *Id.* At 289 (citing 3 *Collier on Bankruptcy* ¶ 363.06[1] (15<sup>th</sup> rev. ed. 1988)). As determined by the United States Court of Appeals for the Fourth Circuit in *In re Leckie Smokeless Coal Co.*, 99 F.3d 573, 581-82 (4th Cir. 1996), the scope of section 363(f) of the Bankruptcy Code is not limited to in rem interests. Thus, debtors can “sell their assets under § 363(f) free and clear of successor liability that otherwise would have arisen under federal statute.” *Folger*, 209 F.3d at 258.

38. Courts have consistently held that a buyer of a debtor’s assets pursuant to a section 363 sale takes such assets free from successor liability resulting from pre-existing claims. *See The Ninth Avenue Remedial Group v. Allis-Chalmers Corp.*, 195 B.R. 716, 732 (Bankr. N.D. Ind. 1996) (stating that a bankruptcy court has the power to sell assets free and clear of any interest that could be brought against the bankruptcy estate during the bankruptcy); *MacArthur Company v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 837 F.2d 89, 93-94 (2d Cir. 1988) (channeling of claims to proceeds is consistent with intent of sale free and clear under section 363(f) of the Bankruptcy Code); *WBO P’ship v. Virginia Dept. of Medical Assistance Servs. (In re WBO P’ship)*, 189 B.R. 97, 104-05 (Bankr. E.D. Va. 1995) (Commonwealth of Virginia’s right to recapture depreciation is an “interest” as used in section 363(f)).<sup>2</sup> The purpose of an order purporting to authorize the transfer of assets free and clear of all “interests” would be frustrated if claimants could thereafter use the transfer as a basis to assert claims against the purchaser arising from the Debtor’s pre-sale conduct. Under section 363(f) of the Bankruptcy

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<sup>2</sup> Some courts, concluding that section 363(f) of the Bankruptcy Code does not empower them to convey assets free and clear of claims, have nevertheless found that section 105(a) of the Bankruptcy Code provides such authority. *Volvo White Truck Corp. v. Chambersburg Beverage, Inc. (In re White Motor Credit Corp.)*, 75 B.R. 944, 948 (Bankr. N.D. Ohio 1987).

Code, the purchaser is entitled to know that the Debtor's assets are not infected with latent claims that will be asserted against the purchaser after the proposed transaction is completed. Accordingly, consistent with above-cited case law, the order approving the Sale should state that the Successful Bidder is not liable as a successor under any theory of successor liability, for claims that encumber or relate to the Purchased Assets.

**C. The Assumption and Assignment of Certain Executory Contracts and Unexpired Leases is Appropriate.**

39. Section 365(a) of the Bankruptcy Code provides that, subject to the court's approval, a trustee "may assume or reject any executory contracts or unexpired leases of the debtor." 11 U.S.C. § 365(a). Upon finding that a trustee has exercised its sound business judgment in determining to assume an executory contract or unexpired lease, courts will approve the assumption under section 365(a) of the Bankruptcy Code. *See Nostas Assocs. v. Ostich (In re Klein Sleep Prods., Inc.)*, 78 F.3d 18, 25 (2d Cir. 1996); *Orion Pictures Corp. v. Showtime Networks, Inc. (In re Orion Pictures Corp.)*, 4 F.3d 1095, 1099 (2d Cir. 1993).

40. Under section 365(f)(2) of the Bankruptcy Code, a trustee may assign an executory contract or unexpired lease of nonresidential real property 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).

41. The meaning of "adequate assurance of future performance: depends upon the facts and circumstances of each case, but should be given "practical, pragmatic construction." *See Carlisle Homes, Inc. v. Arrais (In re Carlisle Homes, Inc.)*, 103 B.R. 524, 538 (Bankr. D.N.J. 1989); *see also In re Bon Ton Rest. & Pastry Shop, Inc.*, 53 B.R. 789, 803 (Bankr. N.D. Ill.

1985) (“Although no single solution will satisfy every case, the required assurance will fall considerably short of an absolute guarantee of performance.”).

42. Among other things, adequate assurance may be given by demonstrating the assignee’s financial health and experience in managing the type of enterprise or property assigned. *In re Bygraph, Inc.*, 56 B.R. at 605-06 (adequate assurance of future performance is present when prospective assignee of lease has financial resources and expressed willingness to devote sufficient funding to business to give it strong likelihood of succeeding; chief determinant of adequate assurance is whether rent will be paid).

43. The Debtor and the Successful Bidder will present evidence at the Sale Hearing to provide the financial credibility, willingness and ability of the Successful Bidder to perform under the Contracts and Leases. The Court and other interested parties therefore will have the opportunity to evaluate the ability of the Successful Bidder to provide adequate assurance of future performance under the Contracts or Leases, as required by section 365(b)(1)(C) of the Bankruptcy Code.

44. In addition, the Cure procedures are appropriate and consistent with section 365 of the Bankruptcy Code. To the extent that any defaults exist under any Assumed Executory Contracts, any such defaults will be cured pursuant to the Successful Bidder’s Asset Purchase Agreement. Any provision in the Assumed Executory Contracts that would restrict, condition, or prohibit an assignment of such contracts will be deemed unenforceable under section 365(f)(1) of the Bankruptcy Code.

45. Accordingly, the Debtor submits that the Cure procedures for effectuating the assumption and assignment of the Assigned Contracts as set forth herein are appropriate and should be approved.

**D. The Successful Bidder should be Afforded All Protections Under Section 363(m) as a Good Faith Purchaser.**

46. Section 363(m) of the Bankruptcy Code protects a good-faith purchaser's interest in property purchased from the debtor's estate notwithstanding that the sale conducted under section 363(b) is later reversed or modified on appeal. Specifically, section 363(m) states that:

The reversal or modification on appeal of an authorization under [section 363(b)] ... does not affect the validity of a sale ... to an entity that purchased ... such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale were stayed pending appeal.

11 U.S.C. § 363(m). Section 363(m) of the Bankruptcy Code “fosters the ‘policy of not only affording finality to the judgment of the bankruptcy court, but particularly to give finality to those orders and judgments upon which third parties rely.’” *In re Chateaugay Corp.*, 92 Civ. 7094 (PKL), 1993 U.S. Dist. LEXIS 6130, \* 9 (S.D.N.Y. May 10, 1993) (citations omitted).

47. The selection of the Successful Bidder will be the product of arm's length, good faith negotiations in an anticipated competitive purchasing process. The Debtor intends to request at the Sale Hearing a finding that the Successful Bidder is a good faith purchaser entitled to the protections of section 363(m) of the Bankruptcy Code.

**E. Relief from the Fourteen-Day Waiting Period Under Bankruptcy Rules 6004(h) and 6006(d) is Appropriate.**

48. Bankruptcy Rule 6004(h) provides that an “order authorizing the use, sale or lease of property ... is stayed until the expiration of 14 days after entry of the order, unless the court orders otherwise.” Similarly, Bankruptcy Rule 6006(d) provides that an “order authorizing the trustee to assign an executory contract or unexpired lease ... is stayed until the expiration of 14 days after the entry of the order, unless the court orders otherwise.” The Debtor requests that the Order be effective immediately by providing that the fourteen (14) day stays under Bankruptcy Rules 6004(h) and 6006(d) are waived.

49. The purpose of Bankruptcy Rules 6004(h) and 6006(d) is to provide sufficient time for an objecting party to appeal before an order can be implemented. *See* Advisory Committee Notes to Fed. R. Bankr. P. 6004(h) and 6006(d). Although Bankruptcy Rules 6004(h) and 6006(d) and the Advisory Committee Notes are silent as to when a court should “order otherwise” and eliminate or reduce the fourteen-day stay period, *Collier on Bankruptcy* suggests that the fourteen-day stay period should be eliminated to allow a sale or other transaction to close immediately “where there has been no objection to the procedure.” *Collier on Bankruptcy* ¶ 6004.11 (16<sup>th</sup> ed.). Furthermore, *Collier on Bankruptcy* provides that if an objection is filed and overruled, and the objecting party informs the court of its intent to appeal, the stay may be reduced to the amount of time actually necessary to file such appeal. *Id.*

50. The Debtor hereby requests that the Court waive the fourteen-day stay period under Bankruptcy Rules 6004(h) and 6006(d) or, in the alternative, if an objection to the Sale is filed, reduce the stay period to the minimum amount of time needed by the objecting party to file its appeal.

#### **Compliance with Local Rules**

51. The Debtor believes that the Sale Motion generally complies with Local Rules as applicable.

#### **Notice**

52. PLEASE TAKE NOTICE that a hearing shall be held on the Motion on **Thursday, December 21, 2017 at 9:00 a.m. (Eastern Time)** before the Honorable Gregory R. Schaaf, at the U.S. Bankruptcy Court for the Eastern District of Kentucky, located at 100 East Vine Street, 2<sup>nd</sup> Floor Courtroom, Lexington, Kentucky 40507. A motion to shorten notice of the hearing on the Motion under Bankruptcy Rule 2002 is being filed contemporaneously herewith.

WHEREFORE, the Debtor respectfully requests that the Court enter an order: (i) granting the Sale Motion, (ii) approving the Bid Procedures in connection with the Sale; (iii) scheduling the Auction and the Sale Hearing; (iv) approving the Assumption Procedures; (v) approving the form and manner of notice thereof; and (vi) granting such other and further relief as the Court deems just an proper.

Dated: December 7, 2017

Respectfully submitted,

/s/ James R. Irving

James R. Irving  
April A. Wimberg  
Christopher B. Madden  
BINGHAM GREENEBAUM DOLL LLP  
3500 PNC Tower  
101 South Fifth Street  
Louisville, Kentucky 40202  
Telephone: (502) 587-3606  
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E-mail: jirving@bgdlegal.com  
awimberg@bgdlegal.com  
cmadden@bgdlegal.com

*Counsel to the debtor Xcelerated, LLC*

**CERTIFICATE OF SERVICE**

I certify that on December 7, 2017, the Motion was served electronically through the Court’s ECF system to all persons receiving electronic notifications in the Chapter 11 Case. Also on December 7, 2017, a copy of the Motion was sent via first-class United States Mail to the addresses set forth below:

Xcelerated, LLC 2940 Hebron Park Drive, Suite 307 Hebron, KY 41048	621 Holdings 400 Main Street, 3 <sup>rd</sup> Street LaCrosse, WI 54601
Kent Durning STOLL KEENON OGDEN PLLC 500 West Jefferson Street, Suite 2000 Louisville, Kentucky 40202	Office of the United States Trustee 100 East Vine Street, Suite 500 Lexington, KY 40507
Duke Energy 1000 E Main Street Mail Drop WP 890 Plainfield, IN 46168	Time Warner Cable Attn: Legal 13820 Sunrise Valley Dr. Herndon, VA 20171
M1 Data & Analytics LLC 1000 NW 65 <sup>th</sup> Street, Suite 200 Ft. Lauderdale, FL 33309	National Auto Research a Division of Hearst Media Corp, DBA Black Book Attn: Jared Kalfus, Sr VP Sales PO Box 758 Gainesville, GA
Broadtela 1491 Polaris Parkway, Ste. 65 Columbus, OH 43240	Authenticom, Inc. 300 Main Street, Suite 300 Lacrosse, WI 54601
JKL Global, LLC P.O. Box 698 Palisades, NY 10964	R. L. Polk & Co. 26933 Northwestern Hwy Southfield, MI 48033-4703
Carlos de Zayas LYDECKER DIAZ LLP 1221 Brickwell Avenue, 19 <sup>th</sup> Floor Miami, FL 33131	Taft A. McKinstry Christopher G. Colson FOWLER BELL PLLC 300 West Vine Street, Suite 600 Lexington, KY 40507

/s/ James R. Irving

**Exhibit A**

**(Bidding Procedures)**

**UNITED STATES BANKRUPTCY COURT  
FOR THE EASTERN DISTRICT OF KENTUCKY  
COVINGTON DIVISION**

-----X  
 In re: : Chapter 11  
           : :  
 Xcelerated, LLC,<sup>1</sup> : Case No. 17-20886-grs  
           : :  
           Debtor. : Honorable Gregory R. Schaaf  
 -----X

**BID PROCEDURES**

Set forth below are the bid procedures (the “Bid Procedures” or “Bidding Process”) to be used with respect to the prospective sale (the “Sale”) of substantially all of the assets owned by Xcelerated, LLC (the “Debtor”). The Debtor will seek entry of an order from the Bankruptcy Court authorizing and approving the Sale of the Purchased Assets (defined below) to the Qualified Bidder (as hereinafter defined) that the Debtor determines to have made the highest or otherwise best offer to purchase the Property (the “Successful Bidder”) in the exercise of its business judgment, and after consultation with its counsel.

**Assets to be Sold**

The Debtor seeks to complete a Sale of substantially all of its assets (the “Purchased Assets”), which comprise, among other things, but not limited to the following: all tangible assets, inventory (including potentially obsolete and non-job specific inventory), supplies, specifications, equipment, work in progress, pending orders, the DataVast application and database, all intellectual property (including all trademarks, service marks, patents, copyrights, and trade secrets), software, telephone numbers, URLs, websites, domain names, the Contracts (as defined below), all deposits under contracts, all formulas, business methodology, goodwill, client contact lists, client records and files, names of the Debtor used in the Debtor’s business, including “Xcelerated” and “DataVast” and all derivations of such names used by the Debtor, all permits, licenses and prepaid expenses relating to the Purchased Assets, and all other assets or business “know how” used in the operation of the Business, wherever located, and all goodwill associated with the Debtor’s business and the Purchased Assets

**Excluded Assets**

The proposed sale does not include certain excluded assets (collectively, the “Excluded Assets”), which will remain part of the bankruptcy estate and will in all likelihood be liquidated in

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<sup>1</sup> The last four digits of the Debtor’s taxpayer identification number are (2949). The Debtor’s mailing address, solely for purposes of notices and communications, is 2940 Hebron Park Drive, Suite 307, Hebron Kentucky 41048.

accordance with the Bankruptcy Code and Rules, any approved Plan of Reorganization or Liquidation and the further orders of the Court. The Excluded Assets include, without limitation:

- All accounts receivable of the Debtor existing as of the closing of the Sale;
- Any rights, claims, counterclaims, third party claims or causes of action of the Debtor against any person and any actions under chapter 5 of the Bankruptcy Code, including, without limitation, under sections 545, 547, 548, 549, 550, 551 and 724(a) of the Bankruptcy Code or under other applicable law;
- Any of the right, title, or interest of the Debtor in or to the Debtor's cash, bank accounts;
- The Debtor's minute book, membership interest records, company seal and any other records of Debtor relating to its limited liability company organization;
- All books, records, files, and papers (whether in hard copy or computer format) that are not used in, or that do not relate to or affect, the Debtor's business;
- All governmental authorizations, licenses and permits owned, held or utilized by the Debtor in connection with the ownership of the Purchased Assets and the operation of the Debtor's business, and all pending applications related to the Debtor's business; and
- Any insurance policies to which the Debtor is a party; and
- Any Privilege that relates to any Excluded Asset or any excluded liability.

### **The Bidding Process Participation Requirements**

To participate in the Bidding Process, each person (a "Potential Bidder") must deliver to the Debtor's counsel an executed confidentiality and non-disclosure agreement in form and substance reasonably acceptable to the Debtor (an "NDA"). At the same time that the Potential Bidder executes the NDA, the Debtor shall allow the Potential Bidder to conduct due diligence with respect to the Property sought to be acquired as hereinafter provided.

### **Due Diligence**

The Debtor shall immediately afford each Potential Bidder due diligence access to the Purchased Assets, including, but not limited to, access to an electronic data room set up for Potential Bidders. The Debtor will designate a representative to coordinate all reasonable requests for additional due diligence from such bidders.

Neither the Debtor nor any of its representatives are obligated to furnish any information relating to the Purchased Assets to any person except to a Potential Bidder. Bidders are advised to exercise their own discretion before relying on any information regarding the Property provided by anyone other than the Debtor or its representatives.

### **Bid Deadline**

A Potential Bidder that desires to make a bid shall deliver a written copy of its bid to Debtor and Debtor's counsel, not later than March 14, 2018, at 5:00 p.m. (Eastern) (the "Bid Deadline"). The Debtor's counsel shall then distribute copies of the bids to the United States Trustee and the Noteholder. The Debtor may extend the Bid Deadline once or successively, but is not obligated to do so.

### **Bid Requirements**

All initial bids by Qualified Bidders must include the following documents:

- A letter stating that the Bidder's offer is irrevocable until thirty (30) days after a hearing to approve the Sale;
- An executed copy of a purchase and sale agreement;
- Written evidence of a commitment for financing or other evidence of ability to consummate the proposed transaction satisfactory to the Debtor; and
- Written acknowledgment that the bid is not subject to due diligence review, board approval, obtaining financing, or the receipt of any nongovernmental consents.

### **The Auction and Sale Hearing**

After all Qualified Bids have been received, the Debtor intends to conduct an auction (the "Auction") with respect to the Purchased Assets if the Debtor has received more than one Qualified Bid. Subject to the Court's approval, the Auction shall take place March 19, 2018 at 10:00 a.m. Eastern Time at the offices of Bingham Greenebaum Doll LLP, 3500 PNC Tower, 101 S. 5th Street, Louisville, KY 40202. Only the Noteholder and any other Qualified Bidders who have submitted Qualified Bids will be eligible to participate in the Auction. Based upon the terms of the Qualified Bids received, the level of interest expressed as to the Purchased Assets, and such other information as the Debtor determines is relevant, the Debtor, in consultation with the Noteholder, will conduct the Auction in the manner it determines will result in the highest or otherwise best offer for the Debtor's assets.

Upon the Auction's conclusion, the Debtor, in consultation with the Noteholder, shall (i) review each Qualified Bid on the basis of financial and contractual terms and the factors relevant to the sale process, including those factors affecting the speed and certainty of consummating the sale,

and (ii) identify the highest and otherwise best offer (the “Successful Bid”). At the Sale Hearing, the Debtor shall present the Successful Bid to the Court for approval.

If the Successful Bidder fails to consummate the sale by April 16, 2016 the Debtor shall (i) retain such bidder’s Deposit; and (ii) be free to consummate the proposed sale of the Purchased Assets with the next highest and best bidder (the “Back Up Bidder”) at the final price bid by the Back Up Bidder at the Auction (the “Back Up Bid”) (or, if that competing bidder is unable to consummate the purchase of the Purchased Assets at that price, the Debtor may consummate the transaction with the next highest and best competing bidder, and so forth) without the need for an additional hearing or order of the Court.

**Exhibit B**

**(Sale Notice)**

**UNITED STATES BANKRUPTCY COURT  
FOR THE EASTERN DISTRICT OF KENTUCKY  
COVINGTON DIVISION**

-----X  
In re: : Chapter 11  
: :  
Xcelerated, LLC,<sup>1</sup> : Case No. 17-20886-grs  
: :  
Debtor. : Honorable Gregory R. Schaaf  
-----X

**NOTICE OF PROPOSED SALE OF SUBSTANTIALLY ALL DEBTOR’S ASSETS**

**PLEASE TAKE NOTICE**, that on \_\_\_, 2018 at \_:00 a.m. eastern standard time, a hearing (the “Sale Hearing”) will be held before the Honorable Gregory R. Schaaf, Bankruptcy Judge, in the United States Bankruptcy Court for the Eastern District of Kentucky, located at 100 East Vine Street, Lexington, Kentucky in the 2nd Floor Courtroom to consider the motion of Xcelerated, LLC, the debtor and debtor-in-possession (the “Debtor”) in the above-referenced proceedings, to sell substantially all of the assets owned by the Debtor (the “Purchased Assets”) on a “going concern basis,” free and clear of all liens, claims, interests and encumbrances, to the party who submits the highest or otherwise best bid. A copy of the Debtor’s motion is on file with the Clerk of the Bankruptcy Court and is available upon request from the attorney for the Debtor.

**PLEASE BE ADVISED** that the Debtor is authorized to solicit competitive bids for the Purchased Assets.

**PLEASE BE FURTHER ADVISED** that in order to review due diligence materials, interested parties must execute a Confidentiality and Non-Disclosure Agreement in form and substance reasonably acceptable to the Debtor (an “NDA”). In addition, the interested party must comply with the bidding procedures approved by the Court in this matter. A copy of the bidding procedures will be made available upon request to the Debtor’s counsel.

**PLEASE BE FURTHER ADVISED** that to submit a timely bid under the bidding procedures, parties must deliver to the Debtor certain required bid documents and a deposit by the bid deadline of March 14, 2018 at 5:00 p.m. (Eastern).

**PLEASE BE FURTHER ADVISED** that any objections to the proposed sale of the Purchased Assets shall be filed with the Clerk of the Bankruptcy Court, 100 East Vine Street, Lexington, Kentucky 40507, on or before March 31, 2018 and any objector must appear at the Sale Hearing to present the objection. If you mail your objection to counsel, you must mail it early enough so counsel will receive it on or before the date set forth above.

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<sup>1</sup> The last four digits of the Debtor’s taxpayer identification number are (2949). The Debtor’s mailing address, solely for purposes of notices and communications, is 2940 Hebron Park Drive, Suite 307, Hebron Kentucky 41048.

To obtain further information regarding this matter, please contact the attorneys for the Debtor.

Dated: December \_\_, 2017

Respectfully submitted,

/s/ James R. Irving

James R. Irving

April A. Wimberg

BINGHAM GREENEBAUM DOLL LLP

3500 National City Tower

101 South Fifth Street

Louisville, Kentucky 40202

Telephone: (502) 587-3606

Facsimile: (502) 540-2215

E-mail: jirving@bgdlegal.com

awimberg@bgdlegal.com

*Counsel to the debtor,*

*Xcelerated, LLC*

**Exhibit C**

**(Cure Notice)**

**UNITED STATES BANKRUPTCY COURT  
FOR THE EASTERN DISTRICT OF KENTUCKY  
COVINGTON DIVISION**

-----X  
In re: : Chapter 11  
: :  
Xcelerated, LLC,<sup>1</sup> : Case No. 17-20886-grs  
: :  
Debtor. : Honorable Gregory R. Schaaf  
-----X

**CURE NOTICE**

PLEASE TAKE NOTICE that:

1. On December 7, 2017, Xcelerated, LLC (the “Debtor”), filed the *Motion of the Debtor and Debtor In Possession for Entry of an Order Approving and Authorizing Procedures For: (A) the Sale of Substantially All of the Debtor’s Assets Free and Clear of All Liens, Claims, Encumbrances, and Other Interests Pursuant to 11 U.S.C. §§ 105(a), 363 and 365; and (B) the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases Related Thereto* (the “Motion”)<sup>2</sup>, seeking, under sections 105(a), 363, and 365 of Title 11 of the United States Code (the “Bankruptcy Code”) for entry of an order approving and authorizing procedures for the sale of substantially all of the Debtor’s assets (the “Sale”) free and clear of all liens, claims, encumbrances, and other interests, and approving the assumption and assignment of certain executory contracts (the “Contracts”) and unexpired leases (the “Leases”) related thereto.

2. The Court entered an order granting certain relief in the Motion, including, among other things approving (a) the Bidding Procedures and (b) procedures for the assumption and assignment of executory contracts and unexpired leases (collectively, the “Assumed and Assigned Contracts”).

3. The Debtor hereby provides notice (the “Cure Notice”) of its intent to potentially assume and assign the Contracts and Leases listed on the attached **Exhibit A** to the potential Successful Bidder.

4. As soon as practicable after the closing of the Sale, the Debtor will pay the amount that the Debtor’s records reflect is owing for prepetition arrearages as set forth on **Exhibit A** (the “Cure Amounts”) for all Assumed and Assigned Contracts designated by the Successful Bidder.

5. **The deadline to object to any Cure Amount is March 31, 2018.** Objections to any Cure Amount, must: (a) be in writing; (b) conform to the applicable provisions of the

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<sup>1</sup> The last four digits of the Debtor’s taxpayer identification number are (2949). The Debtor’s mailing address, solely for purposes of notices and communications, is 2940 Hebron Park Drive, Suite 307, Hebron Kentucky 41048.

<sup>2</sup> Capitalized terms used herein and not otherwise defined shall have the same meanings given to them as the Motion.

Bankruptcy Rules, the Local Rules and any case management order entered in this case; (c) state with particularity the legal and factual basis for the objection and the specific grounds therefor; and (d) be filed with the Court and served, so as to be actually received no later than March 31, 2018 on: (i) counsel to the Debtor, Bingham Greenebaum Doll LLP, Attn: James R. Irving, 3500 PNC Tower, 101 S. 5th Street, Louisville, KY 40202, email: jirving@bgdlegal.com; (ii) the U.S. Trustee; and (iii) all parties requesting notice pursuant to Bankruptcy Rule 2002. The Debtor will ensure that all objections to any Cure Amount are served upon all Qualified Bidders.

6. If any objection to the proposed Cure Amount is timely filed, a hearing with respect to such objection will be held before the Court at the United States Bankruptcy Court for the Eastern District of Kentucky, Lexington Division located at 100 East Vine Street, Lexington, Kentucky 40205 in the 2nd Floor Courtroom. A hearing regarding the Cure Amount, if any, may be continued until after the closing of the Sale.

7. Notwithstanding the foregoing, this Cure Notice does not constitute a determination by the Debtor to assume or assign the Contracts and Leases set forth on **Exhibit A** hereto. The final list of what Contracts and leases will actually be Assumed and Assigned Contracts will be set forth in the agreement for the Sale approved by the Court.

**Consequences Of Failing To Timely File And Serve An Objection**

**Any counterparty to an Assumed and Assigned Contract who fails to timely file and serve an objection to the proposed Cure Amount of an Assumed and Assigned Contract shall be forever barred from asserting an objection to the Cure Amount, including asserting additional Cure Amounts with respect to the Assumed and Assigned Contract relating to any period prior to the time of assumption and assignment.**

Dated: December \_\_, 2017

Respectfully submitted,

/s/ James R. Irving

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101 South Fifth Street  
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*Counsel to the debtor,  
Xcelerated, LLC*

**UNITED STATES BANKRUPTCY COURT  
FOR THE EASTERN DISTRICT OF KENTUCKY  
COVINGTON DIVISION**

-----X  
In re: : Chapter 11  
: :  
Xcelerated, LLC,<sup>1</sup> : Case No. 17-20886-tnw  
: :  
Debtor. : Honorable Gregory R. Schaaf  
-----X

**ORDER GRANTING MOTION OF THE DEBTOR AND DEBTOR IN  
POSSESSION FOR ENTRY OF AN ORDER APPROVING  
AND AUTHORIZING PROCEDURES FOR: (A) THE SALE OF SUBSTANTIALLY  
ALL OF THE DEBTOR’S ASSETS FREE AND CLEAR OF ALL LIENS, CLAIMS,  
EMCUMBRANCES, AND OTHER INTERESTS PURSUANT TO 11 U.S.C. §§ 105(A),  
363 AND 365; AND (B) THE ASSUMPTION AND ASSIGNMENT OF CERTAIN  
EXECUTORY CONTRACTS AND UNEXPIRED LEASES RELATED THERETO**

Upon consideration of the *Motion of the Debtor and Debtor In Possession for Entry of an Order Approving and Authorizing procedures For: (A) the Sale of Substantially All of the Debtor’s Assets Free and Clear of All Liens, Claims, Encumbrances, and Other Interests Pursuant to 11 U.S.C. §§ 105(a), 363 and 365; and (B) the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases Related Thereto* (the “Motion”)<sup>2</sup> of Xcelerated, LLC (the “Debtor”), debtor and debtor in possession in the above-captioned chapter 11 case, for the entry of an order authorizing and approving bidding procedures and certain other matters relating to the Debtor’s intended sale of substantially all Debtor’s assets (“Purchased Assets”); this Court having determined that granting the preliminary relief requested in the Sale Motion, as it pertains to the preliminary relief approved in this Order, is in the best interests of

<sup>1</sup> The last four digits of the Debtor’s taxpayer identification number are (2949). The Debtor’s mailing address, solely for purposes of notices and communications, is 2940 Hebron Park Drive, Suite 307, Hebron Kentucky 41048.

<sup>2</sup> Capitalized terms used herein and not otherwise defined shall have the same meanings given to them as the Motion.

the Debtor, the estate and the Debtor's creditors; that proper and adequate notice of the Sale Motion has been given and that the Court has jurisdiction over this matter under 27 U.S.C. §§ 1334 and 157; the Court having found that good and sufficient cause appears for granting the preliminary relief requested upon the record herein; no objections to the preliminary relief approved in this Order having been filed; and after conducting a hearing in open court regarding the relief provided herein,

IT IS ORDERED that:

1. The Motion is granted to the extent set forth in this Order solely to the extent related to the relief set forth in this Order.
2. The following are approved in all respects, and the Debtor is authorized to comply with them: the proposed Bidding Procedures, as set forth in **Exhibit A** to the Motion; the form of proposed notice of sale, as set forth in **Exhibit B** to the Motion; and the form of Cure Note, as set forth in **Exhibit C** to the Motion.
3. To be deemed a Qualified Bidder, a Potential Bidder must submit its bid to (i) the Debtor and (ii) the Noteholder no later than 5:00 p.m. Eastern Time on March 14, 2018, which must include evidence of the Potential Bidder's ability to close on a sale of the Purchased Assets on or before April 16, 2018, and also a deposit submitted to the Debtor's counsel in an amount equal to 10% of the cash amount of the Potential Bidder's bid, which deposit shall be held in escrow. The Noteholder is automatically deemed a Qualified Bidder based on its ability to credit bid its secured claim. The Debtor may extend the Bid Deadline once or successively, but is not obligated to do so.
4. The Auction shall take place March 19, 2018 at 10:00 a.m. Eastern Time at the offices of Bingham Greenebaum Doll LLP, 3500 PNC Tower, 101 S. 5th Street, Louisville, KY

40202. Only the Noteholder and any other Qualified Bidders who have submitted Qualified Bids will be eligible to participate in the Auction. Based upon the terms of the Qualified Bids received, the level of interest expressed as to the Purchased Assets, and such other information as the Debtor determines is relevant, the Debtor, in consultation with the Noteholder, will conduct the Auction in the manner it determines will result in the highest or otherwise best offer for the Debtor's assets. Within 24 hours of the conclusion of the Auction, the Debtor will file a notice of the winning bidder.

5. The Bankruptcy Court will schedule a hearing to approve the sale by separate order. The hearing to approve the sale will be scheduled after March 31, 2018 and before April 16, 2018.

6. A notice of the sale and Bidding Procedures must be served by first class United States mail, postage prepaid, upon (i) all parties on the creditor matrix; (ii) all federal, state, and local regulatory or taxing authorities or recording offices which have a reasonably known interest in the relief requested herein; (iii) the U.S. Trustee, the United States Attorney's Office, and the Internal Revenue Service; (iv) all parties requesting notice pursuant to Bankruptcy Rule 2002; and (v) all parties known to the Debtor to have expressed an interest in acquiring the Debtor's assets and other potential purchasers. The Cure Notice, as referenced in the Sale Motion must be served by first class United States mail, postage prepaid, upon (i) all counterparties to executory contracts that are subject to assumption and assignment as part of the Sale; (ii) counsel for the Noteholder; and (iii) all parties known to the Debtor to have expressed an interest in acquiring the Debtor's assets and other potential purchasers.

7. All parties-in-interest will retain the right to object to the relief requested by the

Sale Motion to the extent not expressly granted in this Order.

8. The deadline for filing any objections to the relief requested by the Motion, including the sale of substantially all of the Debtor's assets, including any objection to the Cure Amounts, is March 31, 2018 (the "Objection Deadline").

Tendered by:

/s/ James R. Irving  
BINGHAM GREENEBAUM DOLL LLP  
3500 National City Tower  
101 South Fifth Street  
Louisville, KY 40202  
Telephone: (502) 587-3606  
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*Counsel to the Debtor*