

**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 Tracey N. Wise  
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**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, EMCUMBRANCES, AND OTHER INTERESTS PURSUANT TO  
11 U.S.C. §§ 105(A), 363 AND 365; (B) THE ASSUMPTION AND ASSIGNMENT  
OF CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES  
RELATED THERETO; AND (C) BIDDING PROCEDURES, BREAK-UP FEE,  
EXPENSE REIMBURSEMENT AND FORM OF ASSET PURCHASE AGREEMENT**

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 “Sale 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 (a) approving and authorizing 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; (b) approving the assumption and assignment of certain executory contracts (the “Contracts”) and unexpired leases (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.

“Leases”) related thereto; and (c) approving and authorizing bidding procedures, a break-up fee and form of asset purchase agreement in connection with the sale of substantially all of the Debtor’s assets (the “Bidding Procedures”). In support of this Sale 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 intelligent 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 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. Unfortunately, almost immediately after it was founded the Debtor had difficulty meeting both its secured obligations to the Noteholders and its regular trade creditors. As a result, the Debtor stopped making monthly payments to the Noteholder in early 2016. Recently, the Debtor's financial situation worsened when it became involved in a contract dispute with M1 Data & Analytics, LLC ("M1") which has turned into litigation pending in both Florida state court and the United States District Court for the District of Delaware.

6. As a consequence of its financial difficulties, prior to the Petition Date, the Debtor made extensive efforts to preserve the going-concern value of its business. Among other things, the Debtor attempted to modify its operations to increase profitability and solicited offers for the sale of its business as a going-concern. As a result of those efforts the Debtor has identified Direct Performance Data, Inc. ("DPD") as a stalking-horse purchase of substantially all of its assets as a going-concern. DPD is not an affiliate of the Debtor and neither it nor any of its owners are related to or hold claims against the Debtor.

7. A copy of the proposed Purchase and Sale Agreement between the Debtor and DPD (the "Stalking Horse Agreement") is attached hereto as **Exhibit A**. The Stalking Horse

Agreement reflects the terms of the proposed sale of the Debtor's assets, although it is subject to further minor modifications. Among other things, the Stalking Horse Agreement authorizes the Debtor to market its assets subject to higher and better bids, provided, however, that DPD seeks to be designated as "stalking horse bidder," it seeks a break-up fee and expense reimbursement in the event its purchase of the Debtor's assets does not close, and it seeks an expedited sale process.

### **Proposed Sale of Assets**

8. The Debtor requests entry of an order (the "Sale Order") pursuant to sections 105, 363 and 365 of the Bankruptcy Code authorizing and approving: (a) the Sale of Purchased Assets to be free and clear of all liens, claims, encumbrances and liabilities, except as provided for in an Asset Purchase Agreement (defined below); and (b) authorizing the Debtor to consummate the Sale and all documents, agreements and contracts executed in conjunction therewith.

9. As a preliminary matter, the Debtor requests the entry of an order (the "Sale Procedures Order"), the form of which is attached to this Motion as **Exhibit B**, approving (i) the form of the Purchase and Sale Agreement; and (ii) certain bidding procedures (the "Bidding Procedures"), a copy of which is attached to this Motion as **Exhibit C**, for the auction of the Debtor's Purchased Assets.

10. The Debtor further requests that it be authorized to pay to DPD a break-up fee of \$35,000 (the "Break-Up Fee") which shall include all of DPD's out-of-pocket expenses incurred by it in connection with the transactions contemplated by the Stalking Horse Agreement, including, without limitation, legal fees incurred by it, in the event the Stalking Horse Agreement is terminated for any reason.

11. Under the terms of the Stalking Horse Agreement, DPD shall pay an amount equal to twenty percent of the Debtor's Net Income (as defined in the Stalking Horse

Agreement) not to exceed \$500,000 attributable to the Purchased Assets. In addition, DPD will assume certain liabilities of the Debtor associated with transferred employees, assumed contracts and certain other of the Purchased Assets.

12. After the entry of the Sales Procedures Order, the Debtor intends to propose a plan of liquidation. Accordingly, the Debtor will not have any relationship with DPD after the Sale.

13. Under the terms of the Stalking Horse Agreement, the Debtor's key management, Pam Lang, will enter into an employment agreement with DPD.

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

14. 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, all claims of the Debtor against third parties relating to the Purchased Assets and the Business, all avoidance claims or causes of action under the Bankruptcy Code or applicable law with respect to the Purchased Assets, all accounts receivable of Debtor existing as of the Closing Date, 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

15. The Excluded Assets include, without limitation:<sup>2</sup>

- any rights, claims, counterclaims, third party Claims or causes of action of 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;
- all actions and/or causes of actions that Debtor has brought and/or may bring against any person relating to any Excluded Asset and/or Excluded Liabilities, including, without limitation, all Actions and/or causes of action that Debtor may bring against any [current or] former director, officer, employee or consultant;
- any Liabilities related to any employees or independent contractors of Debtor, including all liability for the vacation, sick and personal time off, termination or severance pay, unemployment benefits and any other benefits to which such employees or independent contractors may be entitled by virtue of their employment or service (or termination thereof) with Debtor prior to the Closing, except as specifically provided for in Section 14 of the Stalking Horse Agreement;
- any Liabilities related to any termination or severance pay of unemployment benefits due to Debtor's respective employees or independent contractors by virtue of their employment or engagement (or termination of their employment or engagement) with Debtor and all Liabilities under the WARN Act or any similar local or state legal requirement;
- all taxes required to be withheld (whether or not actually withheld by Debtor) from amounts paid or payable to any employee or independent contractor of Debtor on or prior to the Closing Date;
- any Liabilities for taxes of Debtor, including income taxes, arising out of or in connection with this Agreement;
- all Liabilities related to any debt of Debtor, including any amounts owed to Xcelerated Investments, Inc. or M1 Data & Analytics, LLC;
- all Liabilities arising with respect to any Excluded Asset or that otherwise does not relate to the Business;
- any and all other Liabilities and obligations of every kind of Debtor incurred in connection with, or by reason of, the ownership and operation of the Business and Purchased Assets prior to the Closing;

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<sup>2</sup> Capitalized terms used in this list and not otherwise defined shall have the meanings given to them in the Stalking Horse Agreement.

- any of the right, title, or interest of Debtor in or to Debtor's cash, bank accounts;
- 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 Debtor or the Business in connection with the ownership of the Purchased Assets and the operation of the Business, and all pending applications related to the Business or their operations; and
- Any insurance policies to which Debtor is a party; and
- any Privilege that relates to any Excluded Asset or any Excluded Liability.

16. Except as otherwise provided in an Asset Purchase Agreement (as defined below), 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.

#### **Sale Hearing**

17. Debtor requests that the Court schedule a hearing within fourteen days of the Petition Date, or as soon thereafter as the Court is available (the "Sale Hearing"), to approve the sale of the Purchased Assets to the highest bidder pursuant to the Bidding Procedures. The Debtor requests that the Court enter an order at the Sale Hearing substantially in the form of the attached to this Motion as **Exhibit D** and incorporated herein by reference (the "Sale Order")

authorizing the Debtor to sell the Purchased Assets free and clear of all liens, claims and encumbrances under section 363 of the Bankruptcy Code, with all liens, claims and encumbrances to attach to the proceeds of the sale with the same validity and in the same order of priority as they attached to the Purchased Assets prior to the Sale, including the assumption by the Debtor and assignment to the Successful Bidder of the assumed Contracts and Leases under section 365 of the Bankruptcy Code. The Debtor will submit and present additional evidence, as necessary, at the Sale Hearing demonstrating that the Sale is fair, reasonable and in the best interest of the Debtor's bankruptcy estate and all interested parties.

### **Proposed Bidding Procedures**

18. 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 in excess of the minimum threshold required by the Bidding Procedures are each a "Qualified Bidder". Only Qualified Bidders will be permitted to participate in the sales process.

19. To be deemed a Qualified Bidder, the Potential Bidder should be required to submit its bid to (i) the Debtor, (ii) the Noteholder, and (iii) DPD no later than 4:00 p.m. Eastern Time on August 14, 2017 (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 September 22, 2017, and also a \$75,000 deposit submitted to the Debtor's counsel to be held in escrow (the "Deposit" and, collectively with the other items described above, the "Bid Package").

20. After reviewing any Bid Packages, the Debtor, in consultation with any committee of unsecured creditors appointed in the Chapter 11 Case, if any, 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 any committee of unsecured creditors appointed in the Chapter 11 Case, if any, determines is reasonably likely to close on a sale of the Purchased Assets on or before September 22, 2017 if selected as the successful bidder. DPD is automatically deemed a Qualified Bidder based on its willingness to act as stalking horse bidder in connection with the auction for the Debtor's assets and the Debtor's prior determination of DPD's financial qualifications.

21. DPD, having already submitted its bid for the Debtor's assets in the form of its entry of the Stalking Horse Agreement, shall not be required to submit any additional bid, but may submit an additional bid in response to the bid of any other Qualified Bidder on or before the Bid Deadline. To the extent DPD submits an additional bid in response to the bid of any other Qualified Bidder, the Debtor shall share the terms of such additional bid of DPD with the other Qualified Bidders. The Debtor may extend the Bid Deadline once or successively, but is not obligated to do so. All initial bids by Qualified Bidders other than DPD must also include the following documents (the "Required Bid Documents"):

- A letter stating that the Bidder's offer is irrevocable until thirty (30) days after the Sale Hearing.
- An executed copy of a purchase and sale agreement in a form substantially the same as the Stalking Horse Agreement (for Qualified Bidders, the "Asset Purchase Agreement"). Any changes to the Purchase and Sale Agreement must be (a) non-material, (b) redlined against the form agreement, and (c) agreed to by the Debtor. The purchase and sale agreement cannot contain any consideration other than cash and assumption of liabilities of the Debtor, and shall not be subject to any financing or other conditions not set forth in the 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.

- Written acknowledgment that the bid is not subject to due diligence review, board approval, obtaining financing, or the receipt of any nongovernmental consents.

22. After all Qualified Bids have been received, the Debtor intends to conduct an auction (the “Auction”) with respect to the Purchased Assets if a Qualified Bid other than that of DPD has been received. Subject to the Court’s approval, the Auction shall take place August 17, 2017 at 10:00 a.m. at the offices of Bingham Greenebaum Doll LLP, 3500 National City Tower, 101 S. 5th Street, Louisville, KY 40202, or such later time or other place as the Debtor shall notify all Qualified Bidders who have submitted Qualified Bids. Only DPD and any other Qualified Bidders who have submitted the Required Bid Documents in form and substance satisfactory to the Debtor by the Bid Deadline 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 Creditors’ Committee, if any, will conduct the Auction in the manner it determines will result in the highest or otherwise best offer for the Debtor’s assets. If there is not a timely Qualified Bidder other than DPD, then DPD shall be deemed the Successful Bidder.

23. Upon the Auction’s conclusion, the Debtor, in consultation with their advisors, and representatives of any committee of unsecured creditors appointed in the Chapter 11 Case, if any, 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.

24. If the Successful Bidder fails to consummate the transactions by the Closing Date, as defined in the Purchase and Sale Agreement, 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.

### **Break-Up Fee**

25. To induce DPD to act as a so-called “Stalking Horse” bidder and thereby set a floor price for the Purchased Assets, the Debtor has agreed to pay to DPD the Break-Up Fee of \$35,000 in the event the Purchase and Sale Agreement is terminated for any reason. DPD has expended, and likely will continue to expend, considerable time, money and attention in pursuit of this sale and have engaged in arm’s length, good faith negotiations with the Debtor. The Purchase and Sale Agreement is a product of those negotiations and benefits the Debtor’s estate by providing a floor price for the Purchased Assets and a form of agreement to be used in negotiations with Potential Bidders.

26. The Debtor’s obligation to pay the Break-Up Fee arises under Section 29(d) of the Purchase and Sale Agreement. DPD’s right to receive payment of the Break-Up Fee shall be treated as an administrative expense claim under the Bankruptcy Code with priority in payment over any and all rights of any successor trustee or any creditor, in the Chapter 11 Case, or any subsequent proceedings under the Bankruptcy Code. The Debtor’s Break-Up obligation survives termination of the Purchase and Sale Agreement.

27. The Break-Up Fee was a material inducement for, and a condition to, DPD’s entry into the Purchase and Sale Agreement. The Debtor believes it is reasonable in light of the comparative size of the proposed transaction and the fact that DPD’s efforts and due diligence

have established a floor price and increased the opportunity for the Debtor's estate to receive the highest and otherwise best price for the Debtor's assets.

**Notice of Sale**

28. Within one (1) business day after entry of the Sale Procedures Order, the Debtor will serve the 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) counsel for any committee appointed in this case, and if a committee is not appointed the Debtor's twenty largest unsecured creditors; (iv) the U.S. Trustee, the United States Attorney's Office, and the Internal Revenue Service; (v) counsel for DPD; (vi) all parties requesting notice pursuant to Bankruptcy Rule 2002; and (vii) 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 E**.

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

29. As noted above, the Debtor will seek to assume and assign certain Contracts and Leases to be identified on schedules to the Stalking Horse Agreement other than those agreements excluded by the Successful Bidder pursuant to such bidder's Asset Purchase Agreement (collectively, the "Assumed Executory Contracts").

30. 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.

31. In the interim, the Debtor will serve the Bid Procedures, the Sale Motion and the Cure Notice, substantially on the form of **Exhibit F**, upon each counterparty to the Assumed Executory Contracts by no later than five (5) 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.

32. 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) August 18, 2017 at 4:00 p.m. eastern standard time, 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.

33. 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.

34. 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.**

35. 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. In particular, the Stalking Horse Agreement is the result of comprehensive, arm's length negotiations for the Sale of the Purchased Assets, and the Sale pursuant to the terms of the Stalking Horse Agreement, subject to higher or otherwise better offers at the Auction, will provide a greater recovery for the Debtor's creditors than would be provided by any other existing alternative.

36. 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).

37. 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.”).

38. 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.

39. 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 also believes that the value of the consideration likely to be received for the Purchased Assets under an Asset Purchase Agreement is fair and reasonable. As further assurance of value, however, 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.

40. 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.

**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.**

41. 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).

42. 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).

43. 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).

44. 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.

45. 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.

46. 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>3</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 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.**

47. 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

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<sup>3</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).

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).

48. 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).

49. 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.”).

50. 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).

51. 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.

52. 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.

53. 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.**

54. 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).

55. 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.**

56. 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.

57. 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.*

58. The Debtors hereby request 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**

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

#### **Conference with the U.S. Trustee and Affected Parties**

60. In compliance with Local Rule 2081-3(c) of the Local Rules of the United States Bankruptcy Court for the Eastern District of Kentucky, prior to the Petition Date, the Debtor's counsel conferred with the U.S. Trustee regarding the Motion and the relief requested therein.

#### **Notice**

61. PLEASE TAKE NOTICE that an expedited first-day hearing shall be held on the Motion on **Thursday, July 6, 2017 at 10:30 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.

*[remainder of page intentionally left blank]*



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, including the Break-Up Fee; (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: June 29, 2017

Respectfully submitted,

/s/ James R. Irving

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awimberg@bgdlegal.com

*Proposed counsel to the proposed debtor,  
Xcelerated, LLC*

**CERTIFICATE OF SERVICE**

I certify that on June 29, 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 June 29, 2017, a copy of the Motion was sent via second-day United States Mail to the Debtor, the Office of the United States Trustee, the Noteholder, the Noteholder’s counsel, DPD, DPD’s counsel, and the Debtor’s largest unsecured creditors, each at the addresses set forth below:

Xcelerated, LLC 2940 Hebron Park Drive, Suite 307 Hebron, KY 41048	Xcelerated Investments, Inc. 400 Main Street, 3 <sup>rd</sup> Street LaCrosse, WI 54601
Andrew Bosshard Bosshard Parke Ltd. 750 3rd St. N., Suite A La Crosse, WI 54602-0966	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
Direct Performance Data, Inc. Attn: Sherry Moore 1800 Oak Park Blvd., Ste. D Pleasant Hill, CA 94523	Steven Winick, Esq. 475 Sansome Street, Suite 1850 San Francisco, CA 94111

/s/ James R. Irving

**EXHIBIT A**

**(Stalking Horse Agreement)**

## ASSET PURCHASE AGREEMENT

**THIS ASSET PURCHASE AGREEMENT** (this "Agreement") is made and entered into as of the \_\_\_\_ day of June, 2017, by and between **XCELERATED LLC**, a Florida limited liability company (referred to herein as "Seller"), and **DIRECT PERFORMANCE DATA, INC.**, a Nevada corporation (referred to herein as "Buyer").

### RECITALS

**WHEREAS**, Seller is in the business of database marketing, data hygiene, analytics, and software development, including but not limited to list rental and the DataVast business (the "Business").

**WHEREAS**, Buyer desires to purchase from Seller, and Seller desires to sell to Buyer, on the terms and subject to the conditions of this Agreement, all of Seller's assets (except as otherwise set forth in this Agreement) in exchange for the consideration to be given by Buyer.

### AGREEMENT

**NOW, THEREFORE**, in consideration of the mutual covenants, agreements, representations, and warranties contained in this Agreement, the adequacy of which is hereby acknowledged, the Parties hereto do mutually agree as follows:

#### **1. Sale of Business and Assets.**

1.1 Seller agrees to sell, convey, transfer, assign and deliver to Buyer, and Buyer agrees to purchase from Seller, free and clear of any and all encumbrances, all of Seller's right, title and interest in and to all of the Purchased Assets (as hereinafter defined). "Purchased Assets" means all of the assets of the Seller other than the Excluded Assets (as defined in Section 1.3), including but not limited to the following: all tangible assets, inventory (including potentially obsolete and non-job specific inventory), scripts, code, procedures, 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 the Contracts, all formulas, business methodology, goodwill, client contact lists, client records and files, names of the Seller used in the Seller's business, including "Xcelerated", "Compliant Auto Resource Solution (C.A.R.S.)", "AutoVINdication", "I Sold It" and "DataVast" and all derivations of such names used by the Seller, all permits, licenses and prepaid expenses relating to the Purchased Assets, all claims of the Seller against third parties relating to the Purchased Assets and the Business, all avoidance claims or causes of action under the Bankruptcy Code or applicable law with respect to the Purchased Assets, all accounts receivable of Seller existing as of the Closing Date, and all other assets or business "know how" used in the operation of the Business, wherever located, and all goodwill associated with the Business and the Purchased Assets.

1.2 All accounts receivable received by Seller on or after the Closing shall be held in trust by Seller for the benefit of Buyer and shall be paid over to Buyer promptly within ten (10)

days of receipt by Seller along with copies of all remittance advices and checks related to such payments.

1.3 The Purchased Assets shall not include any of the right, title, or interest of Seller in or to Seller's cash, bank accounts, corporate minute books or other assets set forth on Schedule 1.3 attached hereto and incorporated herein by reference (collectively, the "Excluded Assets").

1.4 Seller has executed contracts (including the lease for Seller's Hebron, Kentucky offices) as identified in Schedule 1.4 (the "Contracts"). Buyer agrees to assume and undertake to perform and discharge when due, only the post-Closing (as defined below) obligations of Seller under the Contracts that, by their terms, arise after the Closing Date (excluding, for the avoidance of doubt, any Liabilities (as defined below) under the Contracts arising from violations, non-compliance or breaches thereof on or prior to the Closing Date) (the "Assumed Liabilities"). "Liabilities" means all debts, obligations, duties and liabilities of every type and trade, known or unknown, accrued or unaccrued, liquidated or unliquidated, matured or unmatured, assertable or unassertable, fixed, contingent, absolute or otherwise, and all costs related thereto. Buyer does not agree to assume and is not responsible for any fees, penalties, or costs associated with the Contracts in the event the contracting party refuses to assign the contract to Buyer or requires a fee or other payment to effect an assignment. Except for the Contracts, Buyer shall not assume and shall not be responsible for any liabilities or obligations under any of Seller's contracts or leases.

1.5 Except for the Assumed Liabilities, the Buyer will not assume any Liabilities of the Seller, known or unknown, and Seller shall remain solely responsible for and shall retain, pay, perform, and discharge, any and all Liabilities of Seller, known or unknown (the "Excluded Liabilities"), including without limitation, the following:

- (a) any Liabilities related to any employees or independent contractors of Seller, including all liability for the vacation, sick and personal time off, termination or severance pay, unemployment benefits and any other benefits to which such employees or independent contractors may be entitled by virtue of their employment or service (or termination thereof) with Seller prior to the Closing, except as specifically provided for in Section 14 below;
- (b) any Liabilities related to any termination or severance pay of unemployment benefits due to Seller's respective employees or independent contractors by virtue of their employment or engagement (or termination of their employment or engagement) with Seller and all Liabilities under the WARN Act or any similar local or state legal requirement;
- (c) all taxes required to be withheld (whether or not actually withheld by Seller) from amounts paid or payable to any employee or independent contractor of Seller on or prior to the Closing Date;

- (d) any Liabilities for taxes of Seller, including income taxes, arising out of or in connection with this Agreement;
- (e) all Liabilities related to any debt of Seller, including any amounts owed to Xcelerated Investments, Inc. or M1 Data & Analytics, LLC;
- (f) all Liabilities arising with respect to any Excluded Asset or that otherwise does not relate to the Business; and
- (g) any and all other Liabilities and obligations of every kind of Seller incurred in connection with, or by reason of, the ownership and operation of the Business and Purchased Assets prior to the Closing.

**2. Consideration for Purchased Assets.** As consideration for the Purchased Assets, commencing on the twentieth day of the first month immediately following the Closing Date, and continuing on the twentieth day of each succeeding month for a period of three years thereafter, Buyer shall pay an amount to Seller equal to twenty percent of the Net Income (as defined below) attributable to the Purchased Assets from the immediately preceding month. The amount paid by Seller pursuant to this Section 2 shall not exceed \$500,000 in the aggregate. “Net Income” means the amount of good funds received by Buyer from the Purchased Assets during the immediately preceding month minus the accrued costs incurred by the Buyer to operate the business unit associated with the Purchased Assets (“Buyers Accrued Costs”). Buyers Accrued Costs shall include the costs incurred by the Buyer to maintain and satisfy Buyer’s obligations associated with the Purchased Assets, the cost of personnel for the business unit associated with the Purchased Assets (including Pam Lang’s compensation), and related costs attributable to the business unit associated with the Purchased Assets. Buyer shall maintain a separate profit and loss financial statement calculating Buyers Accrued Costs on a monthly basis.

**3. Allocation; Transfer Taxes.** Buyer shall allocate the Purchase Price and the Assumed Liabilities (to the extent required by law) among the Purchased Assets in a manner reasonably acceptable to Seller. Buyer will prepare and deliver IRS Form 8594 to Seller within forty-five (45) days after the Closing Date to be filed with the IRS relating to Buyer’s acquisition of the Purchased Assets. Buyer shall be responsible for sales, use, transfer, recording and similar taxes or fees assessed or payable in connection with the transfer of the Purchased Assets to Buyer.

**4. Prorations.** At the Closing, ad valorem taxes and tangible property taxes on the Purchased Assets shall be apportioned pro rata on a daily basis so that (a) such ad valorem taxes and tangible property taxes on the Purchased Assets for that portion of calendar year 2017 before the Closing Date shall be borne by Seller, and (b) such ad valorem Taxes and tangible property taxes on the Purchased Assets for that portion of calendar year 2017 on and after the Closing Date shall be borne by Buyer. In addition, on the Closing Date, the expenses related to the Purchased Assets, including any prepaid expenses, if any, shall be apportioned pro rata on a daily basis so that (i) such part of the relevant charges and prepaid attributable to the period before the Closing Date shall be borne by Seller, and (ii) such part of the relevant charges and prepaids attributable to the

period on and after the Closing Date shall be borne by Buyer. The net amount of these costs and fees apportioned hereunder shall be paid by Seller or Buyer, as applicable, at the Closing. Buyer and Seller agree that the foregoing calculations shall be based upon the most recently ascertainable tax rates and assessed values, and the most recent information regarding such charges. Seller and Buyer agree that, to the extent the actual taxes or charges differ from the amount so apportioned at Closing, the parties will within thirty (30) days after receipt of a request from Buyer or Seller, as applicable, make all necessary adjustments by appropriate payments between themselves promptly following the Closing.

**5. Competing Bids.** This Agreement is subject to approval by the United States Bankruptcy Court for the Eastern District of Kentucky (“Bankruptcy Court”) and the consideration and possible acceptance by Seller of higher or better competing bids (each a “Competing Bid”) in connection with an auction process to be conducted pursuant to Bankruptcy Code Section 363. Seller agrees to file a “first day motion” for the approval of this Agreement including the Bid Protection provision contained in Section 8. Should the Seller not obtain approval of this Agreement within fourteen days of the filing of Seller’s bankruptcy petition, this Agreement shall terminate. From the date hereof (and any prior time) and until the completion of the auction contemplated hereby or as otherwise directed by the Bankruptcy Court, Seller is permitted to cause its representatives to initiate contact with, solicit or encourage submission of any inquiries, proposals or offers by, any third party (in addition to Buyer) in connection with any sale or other disposition of the Purchased Assets.

**6. Sale Order.** The obligations of Buyer and Seller to proceed to Closing are contingent upon the Bankruptcy Court issuing an order (the “Sale Order”) approving the sale of the Purchased Assets to Buyer. The Sale Order shall, among other things, (i) approve, pursuant to Sections 105, 363 and 365 of the Bankruptcy Code, (A) the execution, delivery and performance by Seller of this Agreement, (B) the sale of the Purchased Assets to Buyer on the terms set forth herein and free and clear of all encumbrances, and (C) the performance by Seller of its obligations under this Agreement; (ii) authorize and empower Seller to assume and assign to Buyer the Assumed Contracts; and (iii) find that Buyer is a “good faith” buyer within the meaning of Section 363(m) of the Bankruptcy Code, not a successor to Seller, and grant Buyer the protections of Section 363(m) of the Bankruptcy Code.

**7. Bid Protection.** In the event the Closing does not occur due to acceptance by Seller of a Competing Bid or as specified in 10A, Seller shall pay, or cause to be paid, a breakup fee in the amount of Thirty-Five Thousand Dollars (\$35,000) (the “Bid Protection Payment”).

**8. Closing Date.** The closing of the transactions contemplated in this Agreement (the “Closing”) shall occur on a date (the “Closing Date”) within 15 days after the date Bankruptcy Court has entered the Sale Order but under no circumstance later than September 22, 2017. The Closing shall take place through escrow by mutual exchange of documents.

**9. Seller's Closing Deliverables.** At the Closing, Seller shall deliver or cause to be delivered to Buyer the following:

- (a) a Bill of Sale, Assignment and Assumption Agreement in the form agreed to by the parties hereto, executed by Seller;
- (b) Seller's Articles of Amendment evidencing a change in Seller's name, which is acceptable to Buyer;
- (c) a copy of the resolutions adopted by the sole member of Seller, approving the transactions contemplated in this Agreement and the agreements contemplated hereunder, certified by an officer or other authorized person of the sole member of Seller as being correct, complete and in full force and effect as of the Closing Date; and
- (d) such other documents and instruments as Buyer may reasonably request in order to accomplish the intents and purposes of this Agreement.

**10. Buyer's Closing Deliverables.** At the Closing, Buyer shall deliver or cause to be delivered to Seller the following:

- (a) a Bill of Sale, Assignment and Assumption Agreement in the form agreed to by the parties hereto, executed by Seller;
- (b) An employment agreement pursuant to which Buyer will employ Pam Lang on terms that are reasonably acceptable to Buyer and Pam Lang.
- (c) a copy of the resolutions adopted by the board of directors of Buyer, approving the transactions contemplated in this Agreement and the agreements contemplated hereunder, certified by an officer or other authorized person of Buyer as being correct, complete and in full force and effect as of the Closing Date; and
- (d) such other documents and instruments as Seller may reasonably request in order to accomplish the intents and purposes of this Agreement.

**10A. Conditions of Buyer's Closing Obligations.** In the event (a) Buyer and Pam Lang are unable to agree on an acceptable employment agreement, (b) Seller is unable to secure the assignment to the Buyer of the Contracts identified in Schedule 10A, or (c) the Closing does not take place by September 22, 2017, through no fault of the Buyer, then the Buyer is under no obligation to close the sale transaction contemplated by this Agreement. In the event the Closing does not occur as specified in subsection (c), then Seller shall pay Buyer the Bid Protection Payment specified in Section 7. At all times after the execution of this Agreement, Buyer may



reasonably request documents and information related to the Purchased Assets or Business, and Seller shall produce or provide such documents within a reasonable time.

**11. Further Assurances.** Each party shall, from time to time, at another party's request, and without further consideration, perform such acts and execute and deliver to the other party or parties such other and further instruments, documents and other considerations as the other party or parties may reasonably request for the more effective consummation of the transactions contemplated hereby and the satisfaction by each party of its obligations under this Agreement.

**12. Warranties and Representations of the Seller.** Seller hereby warrants and represents to Buyer that as of the Closing Date:

- 12.1 Seller is a limited liability company duly organized, validly existing, and in good standing under the laws of the State of Florida. Seller has the power to own all of its assets and to carry on the Business the same as it is now being conducted.
- 12.2 Seller shall transfer, sell and deliver to Buyer all of Purchased Assets free and clear of all liens, encumbrances, and Liabilities.
- 12.3 The execution and delivery of this Agreement do not, and the consummation of this transaction as contemplated herein will not, violate any provisions of, or result in the acceleration of obligations under any agreement, instrument, order, judgment or decree to which Seller may be a party or by which the Seller may be bound and which will affect Buyer, or result in the creation or imposition of any lien upon Seller or its Business, to which Seller has an ownership interest in, and/or under any contract or license to which Seller is a party. Seller has no subsidiaries.
- 12.4 Except as set forth on Schedule 12.4 attached hereto and incorporated herein by reference, there are no actions, litigation, investigations, condemnations, proceedings, suits, judgments or executions, of any kind or nature, pending against the Seller, nor to Seller's knowledge, threatened against, relating to or affecting Seller and/or any of the Purchased Assets.
- 12.5 The execution of this Agreement by Seller has been duly authorized by the sole member of Seller and, other than the Sale Order, no other authorization is required in connection with the performance by Seller of its obligations under this Agreement.
- 12.6 There are no State or Federal tax liens of any kind affecting the Purchased Assets, and there are no unpaid Federal or State income taxes due from Seller for any period on or prior to the Closing Date.

- 12.7 With respect to any of the Seller's employees engaged in the conduct of the Business and who may hereafter become employees of Buyer, Seller is not a party to any oral or written employment contract which is not terminable without liability, premium or penalty at any time upon notice.
- 12.8 Except as set forth on Schedule 12.8, Seller is not in default under or in breach of any terms or conditions of any of the Contracts, express or implied warranties, commitments or other arrangements, which relate to the Business and to which Seller has become a party in the ordinary course of business on or prior to the Closing Date.
- 12.9 Seller is in compliance with all laws, rules and regulations relating to the Business and the Purchased Assets, including privacy laws and regulations.
- 12.10 The personal property being sold hereunder is in good operating condition and repair, subject to ordinary wear and tear. All inventory items shall be of suitable age, quality, and condition for immediate sale.
- 12.11 Buyer shall not be responsible for any business, occupational, social security, unemployment, withholding or similar taxes of any kind related to the Business for any period before execution of this Agreement and the Closing Date.
- 12.12 No representation or warranty by Seller contained in this Agreement or in any Exhibit or Schedule attached hereto or in connection with the transaction contemplated hereby contains or will contain any untrue statement of material fact or will omit to state any fact necessary to make the statements herein or therein not misleading.
- 12.13 The financial statements of Seller furnished to Buyer to review incident to this Agreement have been prepared in accordance with sound accounting principles and are not materially inaccurate.
- 12.14 Seller does not own any real property. With respect to all real property leased by Seller, (a) there are no pending, or to the knowledge of Seller, threatened, condemnation proceedings relating to such real property or other matters affecting the current use, occupancy or value thereof, (b) to the knowledge of Seller, the buildings and improvements and each Seller's current use thereof are not in violation of applicable setback requirements, zoning laws or ordinances, and (c) there are no leases, subleases, licenses, concessions or other agreements, whether written or oral, granting to any other person or entity the right of use or occupancy of any portion of such real property and there are no parties in possession of any of such real property other than Seller.

- 12.15 Seller owns, or has obtained proper licenses for the use of all intellectual property related to the Business. Seller has not received notice of any claim that it is in violation or infringement with any intellectual property related to the Business. Seller's use of such intellectual property in the operation of the Business does not infringe on any rights of any third party and Seller can convey rights to such intellectual property to Buyer without violation of any right of any other party.
- 12.16 Except for express representations and warranties made by Seller in this Agreement, the Buyer and Seller acknowledge and agree that the sale of the Purchased Assets is "AS IS," "WHERE IS," and "WITH ALL FAULTS." SELLER HEREBY DISCLAIMS, AND BUYER HEREBY WAIVES, ANY AND ALL IMPLIED WARRANTIES, INCLUDING BUT NOT LIMITED TO ANY WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, WHICH MIGHT OTHERWISE BE IMPLIED WITH RESPECT TO ANY OF THE PURCHASED ASSETS. WITHOUT LIMITING THE FOREGOING, BUYER ACKNOWLEDGES AND AGREES THAT SELLER AND ITS RESPECTIVE MEMBERS, MANAGERS, OFFICERS, EMPLOYEES, AGENTS, REPRESENTATIVES, SUCCESSORS, ASSIGNS OR AFFILIATES HAVE MADE NO REPRESENTATION OR WARRANTY CONCERNING (A) ANY USE TO WHICH THE PURCHASED ASSETS MAY BE PUT, (B) ANY FUTURE REVENUES, COSTS, EXPENDITURES, CASH FLOW, RESULTS OF OPERATIONS, FINANCIAL CONDITION OR PROSPECTS THAT MAY RESULT FROM THE OWNERSHIP, USE OR SALE OF THE PURCHASED ASSETS, OR (C) ANY OTHER INFORMATION OR DOCUMENTS MADE AVAILABLE TO BUYER OR ITS MEMBERS, MANAGERS, OFFICERS, DIRECTORS, EMPLOYEES, AGENTS, SHAREHOLDERS, REPRESENTATIVES, SUCCESSORS, ASSIGNS OR AFFILIATES.

**13. Warranties and Representations of Buyer.** As of the Closing Date, Buyer represents and warrants to Seller the following:

- 13.1 Buyer is a duly organized corporation, validly existing, and in good standing under the laws of the State of Nevada. Further, Buyer has corporate power to own all of its property and assets and to carry on business together with the necessary power and authority to purchase the Purchased Assets from Seller.
- 13.2 Buyer has obtained all necessary authorizations and approvals for the execution and delivery of this Agreement and performance of its obligations hereunder.
- 13.3 No provisions exist in any agreement, article, document, or instrument to which Buyer is a party or by which it is bound which should be violated by consummation of the transactions contemplated by this Agreement.

14. **Employment Matters.** Seller shall terminate all persons employed by Seller in connection with the Business (“Employees”) effective as of Closing. Schedule 14 attached hereto contains (i) a list of all Employees as of the date hereof, (ii) the then-current annual or hourly compensation and/or commission rate of such Employees, (iii) the expected hours worked per week of such Employees, (iv) the start and end date of the assignments of such Employees, as applicable and (v) each Employee’s accrued vacation, sick and personal time-off. With the prior written consent of Seller, Buyer may, prior to Closing, conduct and take interviews with existing Employees of the Business. Seller shall have the right to be present at all such interviews. Buyer may, at its sole discretion, elect to retain any Employee of Seller. At least five business days prior to Closing, Buyer shall advise Seller, in writing, which (if any) Employees Buyer intends to retain after Closing (such retained Employees the “Hired Employees”). Seller shall update Schedule 14 within three business days prior to Closing to include all vacation, sick and personal time off (PTO) for the Hired Employees as of Closing. Notwithstanding anything in this Agreement to the contrary, Buyer agrees to assume Seller’s Liabilities related to vacation, sick and personal time off (PTO) for all Hired Employees.
15. **Confidentiality.** The parties entered into that certain Mutual Confidentiality and Nondisclosure Agreement, dated May 9, 2017 (the “NDA”), which is incorporated fully in this Agreement by this reference. The parties reaffirm all of their respective obligations under the NDA. Each party agrees to hold in strict confidence any business or other information concerning the other party which is of a non-public nature and of which is not already known by the recipient of the information or its directors, managers, shareholders, members, or officers (as applicable), and which becomes known to the recipient in connection with the consummation of the transactions contemplated in this Agreement. Notwithstanding the foregoing, such information may be revealed to those persons who are advising the recipient with regard to the transactions contemplated hereby, or otherwise have a reasonable and legitimate need to know, provided said persons agree to be bound by these non-disclosure provisions. The parties will mutually agree on how the consummation of the transactions contemplated herein shall be disclosed to outside parties. Seller acknowledges that during the term of its ownership of the Business, Seller acquired information which could include information concerning customers, system documentation, business plans and/or any other confidential or proprietary information belonging to the Business. Seller acknowledges that this confidential information, if used, misappropriated or disclosed, would constitute a breach of trust and could cause irreparable injury to the Business. Therefore, Seller agrees to hold and safeguard the confidential and proprietary information, and not misappropriate or divulge to any person or make available to anyone for use any of the confidential and proprietary information Business, which shall survive the execution of this Agreement.
16. **Non-Disparagement.** The parties agree not to make any statement, written or verbal, to any third party reasonably likely to be harmful or injurious to the goodwill, reputation or business standing of Seller, Buyer and/or the Business at any time in the future.

17. **Finder's or Broker's Fee, Expenses.** Each party shall pay its own legal fees, filing and recording fees and other expenses, incident to the preparation and the closing of the transactions hereunder. Each of the parties represents and warrants that it has not dealt with any broker or finder in connection with any of the transactions contemplated hereunder.
18. **Notices.** All notices, requests, demands and other communications under this Agreement shall be in writing and shall be deemed to have been duly given on the date of service if hand delivered, on the first business day after transmission if sent by nationally recognized overnight courier, or on the date received if sent by confirmed electronic mail transmission, and properly addressed as follows:

Seller: Xcelerated, LLC  
Attn: Pam Lang  
6780 Plantation Pines Blvd.  
Ft. Myers, FL 33966  
Email: [pam.lang@xcelerated.com](mailto:pam.lang@xcelerated.com)

With a copy to: Raja J. Patil, Esq.  
3500 National City Tower  
101 South Fifth Street  
Louisville, KY 40202

Buyer: Direct Performance Data, Inc.  
Attn: Sherry Moore  
1800 Oak Park Blvd., Ste. D  
Pleasant Hill, CA 94523  
Email: [info@dpddata.com](mailto:info@dpddata.com)

With a copy to: Steven Winick, Esq.  
475 Sansome Street, Suite 1850  
San Francisco, CA 94111  
Email: [shwinick@blaxerlaw.com](mailto:shwinick@blaxerlaw.com)

Either party may change the address for purposes of this section by giving the other party written notice of the new address in the manner set forth above.

19. **Venue.** The parties agree that any and all claims arising from or in connection with this Agreement that are brought by Buyer may be brought in the state or federal courts of the State of California, and any and all claims arising from or in connection with this Agreement that are brought by Seller may be brought in the state or federal courts of the Commonwealth of Kentucky and the parties hereby expressly waive any objections to venue or inconvenient forum for any suits brought in such courts.

20. **Severability.** If any term, provision, covenant or condition of this Agreement is held by a court of competent jurisdiction to be invalid, void or unenforceable, the remainder of this Agreement shall remain in full force and effect and shall in no way be affected, impaired or invalidated.
21. **Modification of Agreement.** This Agreement, together with its Exhibits and Schedules, constitutes the entire agreement between the parties pertaining to the subject matter contained herein and supersedes all prior agreements, representations and understandings of the parties. No supplement, modification or amendment of this Agreement shall be binding unless executed in writing by all of the parties. No waiver of any of the provisions hereof shall be deemed a waiver of any other provision, nor shall any waiver constitute a continuing waiver. No waiver shall be binding unless executed in writing by the party making the waiver.
22. **General Provisions.**
- 22.1 Section headings are not considered as part of this Agreement but are included for convenience only.
- 22.2 Words used in the singular shall include the plural and the plural the singular. Words used in the masculine gender shall include the feminine and the neuter.
- 22.3 This Agreement may be executed simultaneously in two or more counterparts, each Agreement shall be deemed to be originals, and all together shall constitute one instrument for legal purposes.
- 22.4 Exhibits and Schedules referred to in this Agreement are an integral part of this Agreement and are hereby incorporated by reference into this Agreement.
- 22.5 The waiver by any party of a breach of any provision hereof shall not operate nor be construed as a waiver of any subsequent breach of the party.
- 22.6 This Agreement is not intended to, and shall not be construed to, confer upon any third party any right, remedy or benefit, nor is it intended to be enforceable by any third party, and shall only be enforceable by the parties hereto, and their respective successors and permitted assigns.
- 22.7 In the event an ambiguity or question of intent or interpretation arises, this Agreement shall be construed as if drafted jointly by the parties and no presumption or burden of proof shall arise favoring or disfavoring any party by virtue of the authorship of any of the provisions of this Agreement.
- 22.8 Unless otherwise expressly provided, the word “including” does not in any manner limit the preceding words, terms or phrases.

23. **Benefit.** This Agreement shall be binding upon and inure to the benefit of the parties and their respective heirs, successors and assigns.
24. **No Public Announcement.** No party shall, without the prior approval of the other, which approval shall not be unreasonably withheld, conditioned or delayed, make any press release or other public announcement concerning the transactions contemplated in this Agreement, except as and to the extent that any such party shall be so obligated by law, in which case the other party shall be advised and the parties shall use their reasonable best efforts to cause a mutually agreeable release or announcement to be issued.

**[The Remainder of This Page Intentionally Left Blank]**

IN WITNESS WHEREOF, the parties hereto have duly executed this Asset Purchase Agreement on the day and year first written above.

**SELLER:**

**XCELERATED LLC**

By: **PENSA LLC**, its sole member

By: \_\_\_\_\_  
Pam Lang, Member

[Seller Signature Page to Asset Purchase Agreement]



**BUYER:**

**DIRECT PERFORMANCE DATA INC.**

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

**Schedule 1.3**

**Additional Excluded Assets**

The definition of Purchased Assets shall not include any of the foregoing:

1. Seller's minute book, membership interest records, company seal and any other records of Seller relating to its limited liability company organization;
2. 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;
3. All governmental authorizations, licenses and permits owned, held or utilized by Seller or the Business in connection with the ownership of the Purchased Assets and the operation of the Business, and all pending applications related to the Business or their operations; and
4. Any insurance policies to which Seller is a party.

**REDACTED**

**Schedule 12.4**

**Litigation**

1. Complaint filed against Seller by M1 Data and Analytics, LLC in the Circuit Court of the Eleventh Judicial Circuit for Broward County, Florida (Case No. 2017CA009064AXXXCE)
2. Chapter 11 Bankruptcy Petition to be filed by Seller in the United States Bankruptcy Court for the Eastern District of Kentucky

**Schedule 12.8**

**Defaults**

1. Unpaid amounts under that certain Promissory Note, dated October 31, 2015, made by Seller in favor of Xcelerated Investments, Inc.
2. Unpaid amounts under that certain Master Services Agreement, dated July 13, 2015, between Authenticom, Inc. (predecessor in interest to Seller) and M1 Data and Analytics, Inc.

**Schedule 14**

**Employees**

(See attached.)

**REDACTED**

**EXHIBIT C**

**(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-tnw  
                           :                    :  
                           : Debtor. : Honorable Tracey N. Wise  
 -----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 of the assets (the "Property") 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 Property 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 their business judgment, and after consultation with their counsel.

**Assets to be Sold**

The Debtor is offering for sale the Property as more fully described in the Asset Purchase Agreement dated (the "Stalking Horse Agreement") with Direct Performance Data, Inc. (the "Stalking Horse").

**Excluded Assets**

The proposed sale includes only the Property as described in the Stalking Horse Agreement. All other assets of the Debtor (collectively, the "Excluded Assets"), will remain part of the bankruptcy estate and in all likelihood be liquidated in accordance with the Bankruptcy Code and Rules, any approved Plan of Reorganization or Liquidation and the further orders of the Court.

**The Bidding Process Participation Requirements**

To participate in the Bidding Process, each person (a "Potential Bidder") must deliver to the Debtor no later than August 7, 2017 an executed Confidentiality and Non-Disclosure Agreement in form and substance reasonably acceptable to the Debtor, which such Confidentiality and Non-Disclosure Agreement shall be substantially the same as the Confidentiality Agreement (as defined in the APA) in all material respects (collectively, the "NDA"). At the same time that the Potential

<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.

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 Property, including, but not limited to, access to any data room set up for Potential Bidders. The Stalking Horse has agreed to make its environmental due diligence materials available for review by Potential Bidders. The Debtor will designate a representative to coordinate all reasonable requests for additional due diligence from such bidders.

Potential Bidders will have the opportunity to review such due diligence at a location designated by the Debtor. Neither the Debtor nor any of its representatives are obligated to furnish any information relating to the Property 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 their 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 August 14, 2017, at 5:00 p.m. eastern time (the "Bid Deadline"). Debtor's counsel shall then distribute copies of the bids to (i) the United States Trustee, (ii) DPD, (iii) counsel to the Creditors' Committee, if appointed, and (iv) counsel for the Stalking Horse. The Stalking Horse, having already submitted a bid in the form of its entry into the Stalking Horse Agreement, shall not be required to submit a bid, but may submit an additional bid in response to the bid of any other Potential Bidder on or before the Bid Deadline. To the extent the Stalking Horse submits an additional bid in response to the bid of any other Potential Bidder, the Debtor shall share the terms of such additional bid of the Stalking Horse with other Potential Bidders. The Debtor may extend the Bid Deadline once or successively, but is not obligated to do so.

### **Bid Requirements**

All qualified bids must include the following documents (the "Required Bid Documents"):

- A letter stating that the bidder's offer is irrevocable until 30 days after the Sale Hearing, and that the Bidder agrees to be bound by such offer if its bid is the Back Up Bid, as defined herein, until such 30-day period has passed;
- An executed copy of an asset purchase agreement in a form substantially the same as the Stalking Horse Agreement. Any changes to the Stalking Horse Agreement or to the proposed structure of the transaction must be (a) made to and marked on such form of agreement or otherwise provided in writing as part of the Required Bid Documents and (b) agreed to by the Debtor. The asset purchase agreement must set forth a cash bid at least \$75,000 in excess of the Purchase Price, as defined in the APA, cannot contain any

consideration other than cash and assumption of liabilities of the Debtor, and shall not be subject to any financing or other conditions not set forth in the APA;

- A good faith deposit (the "Deposit") in the form of a certified check (or other form acceptable to the Debtor in their sole discretion) payable to the order of the Debtor (or such other party as the Debtor may designate) in the amount of \$75,000;
- 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 non-governmental consents.

Notwithstanding anything to the contrary herein, a Potential Bidder may submit a proposal for an alternative transaction that includes economic terms that would enable the Debtor, to make a meaningful comparison of such bid with other Qualified Bids. After reviewing all of the materials required above, the Debtor, shall determine, and shall notify the Potential Bidder whether it is a Qualified Bidder. The Debtor shall notify a Potential Bidder if it is a Qualified Bidder two (2) business days of the Debtor's receipt of a complete Potential Bid Package.

A Qualified Bidder is a Potential Bidder that timely delivers the Required Bid Documents, whose financial information demonstrates the financial capability of the Potential Bidder to consummate the Sale, has submitted a bona fide offer, and that the Debtor, determines (based on availability of financing, experience and other considerations) to be able to consummate the Sale if selected as the Successful Bidder. The Stalking Horse shall automatically be considered as a Qualified Bidder by reason of its willingness to act as a stalking horse bidder in connection with the Bidding Process. If the Debtor wishes to disqualify any Potential Bidder who otherwise timely submits an NDA and the Required Bid Documents.

The Debtor will consider a bid only if the bid is on terms acceptable to the Debtor, and not conditioned on other conditions unacceptable to the Debtor. A bid received from a Qualified Bidder that includes all of the Required Bid Documents and meets all of the above requirements is a "Qualified Bid."

### **Bid Protection and Break-Up Fee**

To induce the Stalking Horse to act as a so-called "stalking horse" bidder and thereby set a floor price for the Property, the Debtor has agreed to provide the Stalking Horse certain bid protections (the "Bid Protections"). The Bid Protections consist of a requirement that any alternative Qualified Bid must be a cash bid of \$75,000 in excess of the Purchase Price as defined in the Stalking Horse Agreement, to account for the Debtor's obligation to pay the Break-Up Fee totaling \$25,000 and reasonable attorney's fees of up to \$50,000 plus provide for a \$50,000 bid increment, with all subsequent bidding in increments of \$50,000. Any alternative bid must also be on no less favorable terms to the Debtor than those offered by the Stalking Horse in the Stalking Horse Agreement. Any Potential Bidder should consider the Bid Protections in making any proposal relating to the Property.

The Stalking Horse has expended, and likely will continue to expend, considerable time, money and attention in pursuit of this sale and has engaged in arm's length, good faith negotiations with the Debtor. The Stalking Horse Agreement is a product of those negotiations and benefits the Debtor's estate by providing a floor price for the Property and a form of agreement to be used.

### **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 Property if a Qualified Bid other than that of the Stalking Horse has been received. The Auction shall take place on August 16, 2016 at 10:00 a.m. eastern time at the office of Bingham Greenebaum Doll LLP, 3500 National City Tower, 101 S. 5th Street, Louisville, KY 40202, or such later time or other place as the Debtor shall notify all Qualified Bidders who have submitted Qualified Bids. The Auction shall be conducted in the presence of a certified court reporter, who shall transcribe the proceedings for purposes of creating and preserving a record of the Auction. Only the Stalking Horse and any other Qualified Bidders who have submitted the Required Bid Documents in form and substance satisfactory to the Debtor by the Bid Deadline will be eligible to participate in the Auction as bidders and all Qualified Bidders must have an authorized representative present at the Auction. However, the Noteholder and the Office of the United States Trustee, or counsel for any of the aforementioned parties are authorized to attend the Auction and participate in the process, if desired.

Based upon the terms of the Qualified Bids received, the level of interest expressed as to the Property, and such other information as the Debtor determines is relevant, the Debtor, will conduct the Auction in the manner they determine will result in the highest or otherwise best offer for the Property. If there is not a timely Qualified Bidder other than the Stalking Horse, the Stalking Horse shall be deemed the Successful Bidder.

All bids at the Auction must satisfy the requirements for a Qualified Bid. In evaluating any bids by the Stalking Horse at the Auction, the Debtor shall treat the Break-Up Fee that would be payable to the Stalking Horse in the event the Stalking Horse is not the winning bidder as cash consideration in comparing the consideration offered by the Stalking Horse with that offered by any other Qualified Bidder.

Upon the Auction's conclusion, the Debtor, in consultation with its counsel, 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.

### **Post Sale Hearing Procedures**

Unsuccessful bidders shall be entitled to return of their earnest money deposit within 30 days of the Sale Hearing. If the Successful Bidder fails to consummate the transactions by the Closing Date, as defined in the Stalking Horse Agreement, the Debtor shall (i) retain such bidder's earnest money deposit; and (ii) be free to consummate the proposed sale of the Property 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 Property 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. The Debtor shall, upon conclusion of the Auction rank the Qualified Bids in order of its determination of the highest and best Qualified Bids. The Successful Bid shall be ranked first, the Back Up Bid shall be ranked second, and any other Qualified Bids shall be ranked in order of preference by the Debtor as the next highest and best Qualified Bids. Additionally, Qualified Bidders, including, but not limited to, the Stalking Horse Bidder, shall be required to keep their offer open until 30 days after the Sale Hearing in the event they are the Back Up Bidder.

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