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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: **ATOPTECH, INC.,** Debtor.[1]	Chapter 11 Case No. 17-10111 (MFW) **Re: Docket No. 32, 66, 58, 126, 129, 131 – 134, 136, 137 and 145**

DEBTOR'S OMNIBUS RESPONSE TO OBJECTIONS TO (I) BID PROCEDURES MOTION, (II) KERP/KEIP MOTION, AND (III) COWEN AND COMPANY, LLC RETENTION APPLICATION[2]

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Dated: February 16, 2017

[1] The last four digits of the Debtor's federal tax identification number are 1945. The Debtor's headquarters and mailing address is 2111 Tasman Avenue, Santa Clara, California 95054.

[2] As these Motions are defined below.

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The above-captioned debtor and debtor-in-possession (the "Debtor" or the "Company"),[3] by its undersigned counsel, submits this omnibus response (the "Response") to the objections (the "Objections") filed by the Office of the United States Trustee (the "U.S. Trustee") and Synopsys, Inc. ("Synopsys") in opposition to the:

- *Motion of the Debtor for Orders (I) Authorizing and Approving (A) Bidding Procedures, (B) Buyer Protections for Stalking Horse, (C) Procedures Related to the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases, (D) the Form and Manner of Notice; (II) Scheduling the Bid Deadline and Auction; (III) Authorizing and Approving (A) the Sale of Certain Assets Free and Clear of All Liens, Claims, Encumbrances and Interests and (B) the Assumption and Assignment of Certain Contracts and (IV) Granting Related Relief* [Docket No. 32] (the "Bid Procedures Motion").

- *Debtor's Motion for Entry of an Order Approving Debtor's Key Employee Retention Program and Key Employee Incentive Program Pursuant to Sections 105, 363(b) and 503(c) of the Bankruptcy Code* [Docket No. 66] (the "KERP/KEIP Motion"); and

- *Debtor's Application For An Order Authorizing Debtor To Retain And Employ Cowen And Company, LLC* ("Cowen") *As Investment Banker, Nunc Pro Tunc To The Petition Date* [Docket No. 58] (the "Cowen Application").

In support of this Response and each of the Bid Procedures Motion, the KERP/KEIP Motion and the Cowen Application, the Debtor respectfully represents as follows:

I. PRELIMINARY STATEMENT

1. Synopsys wears three fundamentally different hats in this Chapter 11 Case and must be viewed through the appropriate corresponding lens: First, Synopsys is a competitor of the Debtor whose sole interest is to eliminate the Debtor through any and all anticompetitive means.[4] Second, Synopsys is a bidder for the Debtor's assets whose interest is to eliminate all

[3] Unless otherwise defined, capitalized terms used herein shall have the meaning ascribed to them in the respective Motions.

[4] As shown in the Schedules and mentioned in the Synopsys Bid Procedures Objection, the Debtor has asserted an antitrust counterclaim against Synopsys in the District Court Action. Trial on the Debtor's antitrust claim was set to commence following the patent trial.

other potential bidders in an unflinching goal to stifle competition for the Debtor's assets. Last, Synopsys is a multi-year litigant and disputed claim holder whose intent is to utilize all available means to eliminate any legitimate objection to their disputed claim. Anything Synopsys says or does in this Chapter 11 Case, and including the Synopsys Objections at hand, must be viewed through the appropriate lens by what actions it takes and not the self-identified labels Synopsys might apply to further its own self-interests.

II. THE OBJECTIONS

2. The general objection deadline for each of the Bid Procedures Motion, the KERP/KEIP Motion and the Cowen Application was February 6, 2017, at 5:00 p.m. (EDT). Such deadline was extended by agreement to February 13, 2017, at 5:00 p.m. (EDT) for Synopsys. The U.S. Trustee also obtained an agreed extension of the objection deadline for the Bid Procedures Motion to February 13, 2017, at 5:00 p.m. (EDT) and to February 14, 2017, at 5:00 p.m. (EDT) for the KERP/KEIP Motion. The Debtor received no objections from other parties by the February 6, 2017 objection deadline. The Debtor received Objections from the U.S. Trustee to the Bid Procedures (DN 136) and KERP/KEIP Motions (DN 141), and from Synopsys to each of the Bid Procedures Motion (DNs 126 & 129, 133, 134, and 137), the KERP/KEIP Motion (DN 131) and the Cowen Application (DN 132) by their respective continued objection deadlines.

3. The Debtor files this omnibus Response to each of the Objections for the convenience of the Court and the parties even though such Objections involve three different requests for relief because each Objection involves similar arguments, are based on substantially the same set of facts or are otherwise interrelated. This Response will address first the Bid Procedures Objections, second the KERP/KEIP Objections, and the finally the Synopsys

Objection to the Cowen Application.[5] Each of the Objections should be overruled.

III. RESPONSE TO THE BID PROCEDURES OBJECTIONS

4. With the assistance of the Debtor's advisors, and specifically the Debtor's proposed investment banker Cowen, the Debtor designed and is implementing a fair, inclusive and transparent sale process that will promote competitive bidding to maximize the value of its assets for the benefit of its stakeholders (the "Sale"). Approving the relief requested in the Bid Procedures Motion, including the Break-Up Fee and Expense Reimbursement (the "Bid Protections"), and the Sale process is appropriate and necessary to the Debtor's continued efforts to maximize the value of the Debtor's assets.

5. Failure to receive Court approval of either the Bid Protections or the proposed Bid Procedures may result in the Stalking Horse terminating the Agreement to the detriment of the Debtor's estate and stakeholders. The Agreement with the Stalking Horse constitutes the best offer received by the Debtor – after a very extensive pre-petition marketing process under the cloud of the Synopsys litigation – and will enhance the Debtor's Sale process. The Bid Procedures provide a fair process that allows Potential Bidders sufficient time to complete their diligence and obtain governmental regulatory approvals balanced against the Debtor's liquidity needs and cash burn.

6. In response to the Bid Procedures Objections, the Debtor makes three primary arguments. First, Synopsys' Objection regarding the Permanent Injunction and alleged continued copyright infringement is premature and need not be resolved at this stage of the proceedings. However, even if these issues were adjudicated now such Objection is without

[5] Prior to the February 6, 2017, objection deadline the U.S. Trustee provided the Debtor with informal comments regarding the Cowen Application. The Debtor has revised the form of proposed order granting the Cowen Application to incorporate the U.S. Trustee's comments.

merit. Second, the Sale process established by the Bid Procedures is reasonable and in the best interests of the Debtor's estate given the circumstances of this Chapter 11 Case. Finally, the Agreement with the Stalking Horse constitutes the best offer received by the Debtor for its extensive marketing efforts, and especially under the cloud of the Synopsys litigation. The Bid Protections are fair and reasonable under these circumstances, and without them the Stalking Horse would not have entered the Agreement designed to maximize the value received for the assets at the Auction.

A. The Issues Raised in Synopsys' Objection Do Not Prevent Entry of an Order Approving the Bid Procedures Nor Do They Prevent Implementation of the Sale.

7. Synopsys' Bid Procedures Objection is rife with conjecture, innuendo, and vitriol designed to further its goal of eliminating all other potential bidders and stifle competition for the Debtor's assets. Pages of its Objection include a one-sided, and hotly disputed, history of the Synopsys Litigation that must be viewed through the lenses of Synopsys' role as a litigant, disputed claim holder and competitor of the Debtor. So viewed, Synopsys' Objection rests on two false premises: first, that the Debtor cannot even proceed with its Bid Procedures because of the Permanent Injunction, and second, if the Debtor sells its assets, they can only be sold to Synopsys.

8. The Synopsys Objection should be overruled, first, because the Sale will not have an effect on Synopsys' right to protect its intellectual property rights post-closing. Second, Synopsys' Objection is premature and not appropriate at this stage of the proceedings when the Debtor is merely seeking approval of Bid Procedures. Finally, the Permanent Injunction issue raised by Synopsys is a red herring and will not prevent the Court from approving the ultimate Sale Transaction under Section 363(f) of the Bankruptcy Code or otherwise.

(i) The Agreement Expressly Preserves Synopsys' Ability to Protect Its Intellectual Property Rights.

9. One of the main fallacies argued in Synopsys' Objection is the Debtor cannot even proceed with its Bid Procedures because the Debtor cannot sell the Purchased Assets free and clear of Synopsys' intellectual property rights. Synopsys alleges, with no basis, that the Debtor's whole intent is to "'cleanse' [both] itself and [the] infringing assets of the Debtor's obligations under the Permanent Injunction." (See DN 129, ¶ 3). This could not be further from the truth.

10. The Agreement's definition of Assumed Liability expressly provides that the Buyer "assumes any obligations related to the continued use of Intellectual Property Rights after the Closing as determined in a final judgment in connection with the Synopsys Patent Litigation." (Agreement, § 2.1(d) (emphasis added)). This language means what it says: to wit, the Buyer assumes any and all liability on account of post-closing conduct with respect to Intellectual Property Rights to be determined by a final judgment at the end of the Synopsys litigation. As a result of this Assumed Liability. the Sale is neutral with respect to Synopsys' rights (and the Buyer's defenses thereto) on account of any post-closing conduct relating to issues in to the District Court's litigation. Accordingly, Synopsys simply does not understand the Transaction and their claims that the Sale will infringe their rights are absolutely untrue.

(ii) The Synopsys Objection is Premature and Does Not Need to be Resolved at this Stage of the Sale Process or Chapter 11 Case.

11. Synopsys raises multiple issues regarding alleged violations of its copyright by the Debtor and that the Sale to the Stalking Horse or another Successful Bidder of the Purchased Assets is prohibited by the Permanent Injunction, unless the Sale is encumbered by the Permanent Injunction. These arguments, however, are premature because the Bid Procedures are merely procedural steps designed to ensure a fair process and maximize benefit for the Debtor's

estate, creditors and other parties in interest. The Court can approve the Bid Procedures and allow the Sale process to move forward without prejudice to the parties' ability to resolve these issues during the Sale process or Synopsys' rights to raise unresolved issues prior to or at a Sale hearing.[6]

12. As with any bankruptcy court-approved bid procedures, the Bidding Procedures Order is procedural. The Debtor, under its business judgment and duties to maximize value, seeks to merely establish a process whereby interested parties may examine what the Debtor offers for sale, conduct the necessary due diligence, and participate in a public auction process. *See, e.g., In re Fin'l News Network, Inc.*, 126 B.R. 152, 156 (Bankr. S.D.N.Y. 1991) ("court-imposed rules for the disposition of assets . . . [should] provide an adequate basis for comparison of offers, and [should] provide for a fair and efficient resolution of bankrupt estates"). The Court need not make a determination at this point in the proceedings to determine whether the ultimate Sale is subject to an interest, *i.e.*, the Permanent Injunction, or resolve issues that Synopsys may have with the language of the Stalking Horse Agreement. *See D'Antonio v. Bella Vista Assocs., LLC (In re Bella Vista Assocs., LLC)*, Nos. 07-18134/JHW, 07-2241, 2007 Bankr. LEXIS 4348, at *12 (U.S. Bankr. D.N.J. Dec. 18, 2007) (A court need not resolve disputes as to a debtor's interest in property prior to a sale); *In re Durango Ga. Paper Co.*, 336 B.R. 594, 597 (Bankr. S.D. Ga. 2005) (holding that an objection to bidding procedures was not the proper vehicle to have the court make a "final determination of the full extent or the value of any interest" the debtor had in property at issue).

13. At this stage of the proceedings, the Debtor does not know who will ultimately purchase its assets at the Auction. The Debtor has received interest from multiple parties,

[6] As discussed above, the Agreement already resolves this issue but to the extent Synopsys requires greater clarity, that can be accomplished through the Sale hearing process.

including 8 parties who have already signed NDAs and are conducting diligence in the data room, and hopes to conduct a robust Auction and, in spite of Synopsys' efforts to chill the bidding process, to achieve a purchase price that exceeds the Stalking Horse initial bid.

14. Synopsys' own arguments work against it. After review of the Bid Procedures Motion, including information about the Stalking Horse Bid, Synopsys submitted its own non-binding term sheet for the purchase of the Debtor's assets (the "Term Sheet"). (*See* Wynne Declaration, Ex. 1 at DN 134). Synopsys also, subsequent to submission of the proposed Term Sheet, requested and has worked with the Debtor and Cowen to obtain access to the data room for purposes of conducting its own diligence in connection with placing a bid.

15. Synopsys also ignores, intentionally or otherwise, that the dynamics of the Sale can and most likely will change over the course of the proposed Auction process. The Debtor may receive a bid that will enable it to pay the Synopsys claim in full (assuming such claim is ultimately allowed by either an agreement by the parties or if Synopsys receives a final order liquidating the highly disputed claim, either one of which could include a significant setoff against the Debtor's antitrust counterclaim). Synopsys could enter into an agreement with either the Debtor or a Successful Bidder to pay a reasonable royalty rate on account of its infringement claims. Alternatively, Synopsys may, if it becomes a Qualified Bidder, end up participating in the auction and offer the final Successful Bid. A myriad of potential different outcomes is evidence that Synopsys' Objection is premature and warrant allowing the Debtor to proceed with the Bid Procedures.

16. Accordingly, Synopsys' arguments about the Permanent Injunction and the Debtor's alleged continuing infringement − notwithstanding the highly inflammatory and

disparaging language Synopsys relies on − does not prevent the Court from approving the Bid Procedures. Therefore, Synopsys' Bid Procedures Objection should be denied.

(iii) The Permanent Injunction Does Not Prevent Implementation of the Sale.

17. As first set forth below, the Debtor complies with the Permanent Injunction, and has taken numerous steps and precautions to ensure the version of Aprisa subject to the Sale complies with the Permanent Injunction, including the prohibitions in paragraph 1 and the requirements in paragraph 2 thereof. (*See* §(A)(ii)(b) below). In addition, the Debtor has until March 18, 2017 to certify compliance with the requirements of paragraphs 3 and 4 of the Permanent Injunction. (*See* Permanent Injunction, DN 133-1). Second, any complaints that Synopsys has about delays in conducting its diligence and review of the Aprisa executable and source code were its own fault. Finally, Synopsys would have this Court believe that it does not have the power to approve the Bid Procedures and Sale, and to administer this Chapter 11 Case until the District Court Action is fully adjudicated. This allegation is not true because the Permanent Injunction is a red herring and the Purchased Assets can be sold under section 363(f).

(a) The Debtor Complies with the Permanent Injunction.

18. The Permanent Injunction applies to a "product, " *i.e*, the software the customer uses, that the Debtor supports or sells that contains various infringing elements identified in Trial Exhibits 1439 – 1441. Permanent Injunction, ¶ 1. Beginning in May 2016, with the release of Aprisa version 16.05, rel.1, the Debtor instituted a process to modify the command terminology and syntax in order to eliminate the similarity between the alleged infringing terminology in Aprisa with the set of syntax and commands in PrimeTime contained in Trial Exhibits 1439-1441, which are the same exhibits called out in the Permanent Injunction. These changes were continued through and including Aprisa version 16.12.rel.1, including the related executable

code, source code, the user manuals and disabling the translation table previously provided to customers.

19. Notwithstanding the Debtor's belief that the then current Aprisa versions did not contain any of the alleged infringing terms, the Debtor agreed to entry of the Permanent Injunction in order to make Synopsys identify what it considered potentially infringing activity. The Debtor then continued its significant ongoing steps to remove any additional alleged remaining infringing terms from Aprisa version 16.12.rel.2 which is the only version of the Debtor's Aprisa product it currently sells to customers. The work to remove alleged infringing terms in summarized as follows:

- [redacted]. Chang Decl. ¶ 4.
- [redacted] Chang Decl. ¶ 5.
- [redacted] Chang Decl. ¶ 6.
- [redacted]. Chang Decl. ¶ 7.
- [redacted]. Chang Decl. ¶ 7.

The Debtor has gone to enormous effort and expense to [redacted] identified in the Permanent Injunction. Further, [redacted] is permanent. Chang Decl. ¶ 7, and ¶¶ 8-20 (which provide more detail on a point by point basis on why Dr. Guthaus' assertions are incorrect or misleading).

20. It is very important to note that Aprisa version16.05 was developed prior to entry of the Permanent Injunction and is not a product the Debtor currently sells to its customers. Synopsys' arguments regarding how Aprisa version16.05 continues to infringe and may violate the Permanent Injunction are wholly without merit. Again, version 16.05 is not the current version of the Aprisa product being sold to the Debtor's customers and thus, it cannot violate the Permanent Injunction. There is also no claim advanced by Synopsys that there is any infringement of any of the claims in the remaining two patents it has previously raised in the District Court, and Dr. Guthaus identifies nothing that has not already been removed from Aprisa that would infringe any patent claim asserted by Synopsys.

21. Synopsys relies on the Guthaus Declaration (D.I. 137) in support of its contention that the Aprisa versions included in the Sale continue to violate the Permanent Injunction. Synopsys Bid Procedures Objection, ¶¶ 25-34. Synopsys' reliance on the Guthaus Declaration is misplaced, and the Debtor objects to his Declaration as irrelevant to the issues of whether the Bid Procedures should be approved. Additionally, not only are there just seven identified examples of alleged infringement, his assertions are incorrect, and in some cases, misleading. See Guthaus Decl., ¶¶ 17, 18-19, 24, 26-27, 33-36, 37, and 39-45). Henry Chang, the Debtor's Vice President, Product Management has provided a declaration (the "Chang Declaration") filed contemporaneously with this Response that responds to and rebuts Dr. Guthaus' analysis.

Although the Court does not need to get into the technical "weeds," the salient points of the Chang Declaration are set forth as follows:

i. [redacted] Chang Decl. ¶ 4.

ii. [redacted]. Chang Decl. ¶ 5.

iii. [redacted]. Chang Decl. ¶ 6.

iv. [redacted] Chang Decl. ¶ 20.

22. Throughout this process, the Debtor has continually gone back to Synopsys to ask it to identify any alleged infringing terms and the Debtor has stated that it will voluntarily remove such terms from its current version. Since the Petition Date, the Debtor has been working with Synopsys to provide it with documents and information, including the ability to review the source and executable code for Aprisa versions 16.05 and 16.12. This has resulted in the Debtor discovering and promptly removing remnants missed in prior releases. The endeavor has been like trying to hit a moving target for the Debtor because at every step in the process Synopsys moves the bar and demands additional changes.

23. During the hearing on the language of the Permanent Injunction, Synopsys tried to have the District Court include language that forced the Debtor to remove all prior versions of Aprisa, the source code and documentation, and failed. Injunction Transcript (attached to Declaration of Robert Mallard filed contemporaneously herewith), 104:2-111. The District Court acknowledged the Debtor may have a business reason to retain the prior versions (90% of which had nothing to do with the Synopsys copyright issue), including if the Debtor needed to review prior versions to fix a bug in a current version. *Id.*. It is also the Debtor's position that the current version of Aprisa does not violate Synopsys' copyright and if Synopsys finds and identifies an infringing element the Debtor will promptly remove the same. In addition, as discussed above (*see supra*, § I.A.(i)) Synopsys' rights on account of any post-closing conduct relating to issues in to the District Court's litigation are protected.

(b) Synopsys' Complaints About Delay in Conducting Its Diligence Are Its Own Fault.

24. As previously discussed, Synopsys could only point to seven examples of alleged copyright infringement using old versions of Aprisa. Contrary to the numerous aspersions cast on the Debtor's veracity, the Debtor has been working with Synopsys to resolve its concerns about the potential for continuing violations and the language in the Stalking Horse Agreement (which itself is a Sale objection issue). The Debtor has provided Synopsys with copies of the executable and source code for review, and provided copies of current documentation. Consistent with past experience, Synopsys and its expert Dr. Guthaus complaint about opportunities to review the executable and source code; however, these issues result from Synopsys dropping the ball.

25. On Wednesday, February 1, 2017, the Debtor provided Synopsys' counsel with copies of Aprisa executable code, which it turned out could not be loaded and would not

properly run. Rather than promptly inform the Debtor so another copy could be provided, Synopsys chose to sit on this issue until the following Tuesday, February 7, thus, causing its own delay. The Debtor also arranged with Dr. Guthaus to review a copy of the Aprisa version 16.12 source code at the offices of the Debtor's litigation counsel Arnold & Porter Kaye Scholer LLP ("APKS") on Wednesday, February 1, 2017. Dr. Guthaus then spend half a day on Friday, February 3, 2017 reviewing the source code and left. Rather than contacting APKS to schedule another visit, in an email sent the following Monday evening and read by APKS on Tuesday, counsel for Synopsys said Dr. Guthaus wanted to return the next morning, February 8, 2017. APKS quickly informed Synopsys counsel that the source code could not be available on such short notice but offered to make it available on Thursday, February 10 and Friday, February 11. Synopsys counsel responded that Dr. Guthaus could not make himself available on Thursday, but would arrive Friday for further source code review. He did so and had access to source code for as long as he wanted to review it.

26. APKS has since made the source code available to Dr. Guthaus all day every Wednesday and Friday for the rest of the month – apparently Dr. Guthaus' work weeks are limited to two days. There is no meaningful "delay" in providing source code to Dr. Guthaus. To the contrary, the only real problem is that Dr. Guthaus does not want to review the source code on any days other than Wednesdays and Fridays. Any delay lies at the feet of Synopsys, not the Debtor. The Debtor provided Synopsys access to a data room for due diligence in connection with a potential bid and made representatives available for Synopsys to conduct Rule 30(b)(6) depositions relating to this contested matter.

27. Furthermore, nowhere in its Objection does Synopsys state that the Debtor is affirmatively violating its copyrights or the Permanent Injunction. Synopsys only speculates that

Aprisa versions 16.12 (and 16.05) violate its copyright, using language such as current versions are "likely to infringe" (¶¶ 29, 30), "appears to continue to provide" (¶ 31), "apparent inclusion of assets already been found to infringe" (¶ 35), or "appear to be building" (¶ 34). Synopsys is basically speculating at this point and such speculation is not grounded in fact.

28. Synopsys' main argument is another fallacy, wherein it argues that since the Debtor told the District Court there was no violation in its prior revised versions but then the District Court subsequently found that the new code continued to violate, therefore the redesigned Aprisa version 16.12 (designed after the injunction) must continue to violate the copyright. However, as pointed out above, Synopsys refuses to affirmatively state there is an infringement because they supposedly do not even know if the current Aprisa version (version 16.12) sold to customers violates its copyright.

(iv) This Court has the Authority to Approve the Sale Including Pursuant to Section 363(f).

29. Synopsys reiterates throughout its Objection that the Permanent Injunction applies to a potential purchaser of the Debtor's assets, and that the Court cannot approve a sale under section 363(f) without Synopsys' consent. (*See* DN 129, ¶ 40). Synopsys cites *Fujifilm Corp. v. Benun*, No. CIV.A. 05-1863(KSH), 2008 WL 2676596, at *8 (D.N.J. June 30, 2008) and *In re Portrait Corp. of Am., Inc.*, 406 B.R. 637, 642 (Bankr. S.D.N.Y. 2009) to assert that the Debtor cannot sell the assets without free and clear of the Permanent Injunction without consent by Synopsys. Synopsys' reliance on these cases is faulty. These cases are inapplicable because the Debtor seeks to sell assets as a going concern, which does not violate the Permanent Injunction (*see supra*, ¶ 21) and the Debtor's current product, Aprisa 16.12, does not infringe on Synopsys' copyrights. The Permanent Injunction is a red herring.

30. Synopsys' argument that the Debtor is trying to shield its assets from the

injunction through the Sale under section 363(f), which it could not do outside bankruptcy, is without merit. The cases cited by Synopsys to support this proposition are inapplicable because they each deal with property interests and restrictions on the same. *See Integrated Sols., Inc. v. Serv. Support Specialties, Inc.*, 124 F.3d 487 (3d Cir. 1997) (addressing whether Section 541 of the Bankruptcy Code preempted New Jersey law prohibiting assignment of tort claims before judgment where a plaintiff purchased claims from a bankruptcy estate and sought to assert them against defendants); *Calvert v. Bongards Creameries (In re Schauer)*, 835 F.2d 1222 (8th Cir. 1987) (a chapter 7 bankruptcy trustee could not transfer a debtor's patronage margin certificates without consent of the issuer, as required by the issuer's bylaws and recognized under state law); *Universal Cooperatives, Inc. v. FCX, Inc. (In re FCX, Inc.)*, 853 F.2d 1149 (4th Cir. 1988) (the bankruptcy court permitted the debtor under § 1123, not § 363, to surrender patronage certificates to a creditor co-op in satisfaction of its claim although the co-op's articles of incorporation rejected the right of a member to exercise setoff). Synopsys is trying to convince this Court that it is powerless to approve the Sale either without Synopsys' consent or until the District Court Action is litigated to final judgments. The language in a pre-petition, District Court injunction referencing section 363 is unenforceable in bankruptcy and is an impermissible infringement on this Court's jurisdiction. Synopsys' argument should also be disregarded for the reasons that follow.

(a) Synopsys has not established an interest in the assets protectable under Section 363(f) of the Bankruptcy Code, and the Debtor does not seek to sell the assets free and clear of any interest Synopsys could purport to have.

31. As an initial matter, Synopsys argues that Section 363(f) of the Bankruptcy Code does not permit the Debtor to sell the assets free and clear of the Permanent Injunction, yet Synopsys is ambivalent about whether Section 363(f) is applicable. *See* Obj. ¶ 51. Moreover,

Synopsys has failed to establish that the Permanent Injunction is an "interest" in the assets for the purposes of Section 363(f). The Synopsys Objection cites neither statute nor case law to support that the Permanent Injunction is an "interest" for the purposes of the statute.

32. Synopsys' reliance on Section 363(f) is misplaced. The Debtor does not seek to extinguish any potential claims Synopsys may assert against the Successful Bidder for infringement. *See In re TWA*, 322 F.3d 283, 289 (3d Cir. 2003). Rather, the Stalking Horse has accounted for the risk and has expressly assumed the liability that Synopsys will assert the same or similar claims against the Stalking Horse, as the purchaser, as it has asserted against the Debtor. Synopsys ignores this reality, asserting instead that the Debtor cannot satisfy any of the criteria set forth in Section 363(f) to sell property free and clear of an interest such as the Permanent Injunction. In this regard, too, Synopsys is incorrect.

(b) Even if the Permanent Injunction is an interest in property within the meaning of Section 363(f), at least one criterion set forth in Section 363(f) permits the Debtor to sell the assets free and clear of that interest.

33. Section 363(f) permits a debtor to sell property "free and clear of interest in such property" if the Debtor can meet certain criteria. 11 U.S.C. § 363(f). While the Bankruptcy Code is silent as to the meaning of "interest in such property," courts, including the Third Circuit, consider the term to "refer to obligations that are connected to, or arise from, the property being sold." *In re TWA*, 322 F.3d 283, 289 (3d Cir. 2003). Courts consider the definition on a case-by-case basis, *see Elliott v. GM LLC (In re Motors Liquidation Co.)*, 829 F.3d 135, 155 (2d Cir. 2016), however the trend is to construe it liberally. *See TWA*, 322 F.3d at 288 ("the phrase should be broadly read to authorize a bankruptcy court to bar any interest that could potentially travel with the property being sold, even if the asserted interest is unsecured.").

34. The Debtor can meet the requirement of section 363(f)(4) because the Synopsys

claim is subject to a bona fide dispute. Section 363(f)(4) permits a debtor to sell property free and clear of interests if "such interest is in bona fide dispute." 11 U.S.C. § 363(f)(4). To satisfy the standard, the debtor must demonstrate "a factual or legal dispute as to the validity of the debt." 3-363 Collier on Bankruptcy P 363.06 (16th 2016). A bankruptcy court need not decide the underlying dispute. *Id.*; *In re DVI, Inc.*, 306 B.R. 496, 504 (Bankr. D. Del. 2004) (citing *In re Collins*, 180 B.R. 447, 452 (Bankr. E.D. Va. 1995)). Synopsys implies that the District Court already made a finding that Aprisa version 16.12 violates its copyright. This cannot be the case because the Debtor did not develop Aprisa version 16.12 until after the District Court trial and after the Permanent Injunction was issued. Further, Synopsys admits that it does not know if this current version violates its copyrights. This all means the Purchased Assets can be sold under section 363(f). The Sale proceeds will remain with the Debtor's estate and Synopsys receive its pro rata share on account of its unsecured claim once such claim is reduced to an allowed general unsecured claim in this Chapter 11 Case.

35. Finally, the Debtor can sell the Purchased Assets under section 363(f)(5). Section 363(f)(5 is satisfied if a claimed interest is "subject to monetary valuation" and "can be reduced to a specific monetary value," even if "the relief sought is injunctive in nature." *In re TWA*, 322 F.3d at 291. Any claim arising from the Debtor's alleged continuing infringement is readily reduced to a money judgment. Prior violations were already reduced to money judgment, albeit a non-final, disputed judgment, so the allegation that the Debtor cannot meet section 363(f)(5) is nonsense. As Synopsys noted in footnote 4 of its Bid Procedures Objection, the injunction was meant to account for the possibility of future violations which at the time of the District Court hearing would have been difficult to value. Again as discussed above, the proposed Sale provides that Synopsys' post-closing rights with respect to issues in the District Court litigation

are preserved.

B. The Sale Process Established by the Bid Procedures is Reasonable and in the Best Interests of the Debtor's Estate.

36. Synopsys argues that entering into the Stalking Horse Agreement is not a valid exercise of the Debtor's business judgment. (DN 129, ¶57-59). In support, Synopsys complains that the Debtor is incurring administrative expenses and depleting the Debtor's estate by pursuing a faulty transaction, especially because of issues that Synopsys has with the language of the Stalking Horse Agreement (which is a Sale objection), the other issues described in this Response regarding alleged infringement and the Permanent Injunction, Synopsys' own proposed transaction and the current administration's "hostility" towards U.S. companies moving overseas which may prevent CFIUS clearance. *Id*. These arguments are without any factual support and without any merit.

37. As set forth in the Bid Procedures Motion (DN 32, ¶¶ 8-13; Lederman Declaration, DN 32-7, ¶¶ 9-16) beginning in July 2016, the Debtor and Cowen engaged in an exhaustive Sale process. During this pre-petition process, Cowen contacted over 140 potentially interested parties, scheduled introductory conferences with over 50 entities, and 29 parties subsequently executed non-disclosure agreements. Subsequent to the October 31, 2016 bid deadline, three parties submitted bids and other parties expressed interest but were not prepared to submit bids. The Debtor entered into the Agreement with the Stalking Horse after first negotiating with other parties all of which other than the Stalking Horse certain demands and pre-conditions that the Debtor determined were not in the best interest of the Debtor and its stakeholders.

38. The Stalking Horse required certain conditions to be satisfied by the Debtor to move forward in making a bid. Amongst these conditions were for the Debtor to obtain Court

approval of the Bid Protections, which comprise: (a) a Break-Up fee in the amount of $400,000, which is approximately 5.0% of the purchase price for the Purchased Assets; and (b) the Expense Reimbursement in the maximum amount of $600,000, in the event the Stalking Horse Bid is not approved. The Stalking Horse also required approval of the Bid Procedures and a closing of a transaction by the end of May 2017 to provide sufficient time to obtain the CFIUS clearance. After four weeks of arms-length, good faith negotiations the Debtor and the Stalking Horse entered into the Agreement culminating an over 6 month Sale process. Under the Agreement, the Stalking Horse has agreed to purchase the Purchased Assets for $8 million in immediately available funds, less certain adjustments based on deferred revenue, plus the assumption of certain post-petition liabilities as specifically set forth in the Agreement.

39. As discussed in this Response, the Bid Procedures and Sale can proceed and close even in the face of Synopsys' infringement allegations. Incurring administrative expenses to pursue the Sale is a valid exercise of business judgment and not the waste that Synopsys would have the Court believe. Currently, in addition to the Stalking Horse Bidder and Synopsys, there are eight different potential bidders in the Debtor's data room viewing the due diligence materials for the Sale process. As evidence of the multiple hats it wears in this Case, Synopsys also refers to its own Term Sheet and proposed transaction, and the Debtor's failure to respond as evidence that the Debtor is not exercising valid business judgment. The Court should disregard these arguments.

40. First, the Debtor acknowledged the Synopsys Term Sheet and has provided Synopsys with access to the data room so Synopsys can perform its own diligence. The Debtor is treating Synopsys just like it would treat any other potential bidder. To do otherwise would be a violation of the Debtor's business judgment and duties towards its stakeholders. Second,

Synopsys' claim is a hotly disputed claim, subject to the Debtor's appeal rights with a high probability that the claim amount will be significantly reduced, if not set aside altogether. Synopsys' claim is also subject to set-off on account of the Debtor's antitrust counterclaim. If the Debtor were to forgo the Bid Procedures and Sale process and blindly accept Synopsys' Term Sheet, it will be accepting the validity of the $30.4 million disputed claim, and allowing Synopsys to buy the Assets for approximately $3 million. If Synopsys truly wants to purchase the Debtor's assets, rather than the more apparent desire to kill the Debtor's business, then it can participate in the Bid Procedures, attend the Auction and submit a higher and better bid.

41. Finally, Synopsys' argument that the Stalking Horse may not obtain the CFIUS clearance because of the new administration's feelings about U.S. companies moving overseas should be disregarded because it is pure speculation not supported by one shred of evidence. In addition, the Bid Procedures provide for a Back-Up Bidder in the event the Successful Bidder cannot close the Transaction.

42. Because the proposed Transaction will permit the business to be sold as a going concern and given the extensive marketing efforts undertaken by Cowen and analysis of the offers received thus far, the Debtor has determined that the Stalking Horse Bid represents the best opportunity for the Debtor to maximize the value of its estate and serve as a basis for conducting an auction to seek higher or otherwise better offers.

C. The Agreement is the Best Offer Received by the Debtor and the Bid Protections are Fair and Reasonable and Should be Approved.

43. The Debtor can demonstrate that the Bid Protections are fair and reasonable under the circumstances and will maximize the value of the assets sold for the benefit of the Debtor's estate, creditors and other parties-in-interest. *See, e.g., Myers v. Martin (In re Martin)*, 91 F.3d 389, 395 (3d. Cir. 1996) (noting that the sale of a debtor's assets is appropriate where there are

sound business reasons behind such determination). Here, the Debtor (a) initiated an extensive Sale process which aggressively marketed the transaction for over 6 months, and (b) engaged in significant negotiations with numerous likely buyers of the Debtor's assets.

44. Regarding the Bid Protections, the Third Circuit has identified at least two situations in which bid protections are permissible in the bankruptcy context. *See Calpine Corp. v. O'Brien Envtl. Energy, Inc. (In re O'Brien Envtl. Energy, Inc.)*, 181 F.3d 527, 537 (3d Cir. 1999). First, the Third Circuit has held that a break-up fee or expense reimbursement may be necessary to preserve the value of the estate if assurance of the fee "promotes more competitive bidding, such as by inducing a bid that otherwise would not have been made and without which bidding would have been limited." *In re O'Brien Envtl. Energy, Inc*., at 537; *see also In re Reliant Energy Channelview LP*, 594 F.3d 200, 206 (3d Cir. 2010) (noting that, under the *O'Brien* test, "it [is] permissible to offer a break-up fee and reimbursement for expenses to induce an initial bid"). Second, if the availability of break-up fees and expense reimbursements induces a bidder to research the value of the debtor and convert the value to a dollar figure on which other bidders can rely, the bidder will have provided a benefit to the estate by increasing the likelihood that the price at which the debtor is sold will reflect its true worth. *See O'Brien*, 181 F.3d at 537; *see also In re Reliant Energy Channelview LP*, 594 F.3d at 206-08 (reasoning that a break-up fee should be approved if it is necessary to entice a party to make the first bid or if it would induce a stalking horse bidder to remain committed to a purchase). Under the facts and circumstances of this Chapter 11 Case, both rationales apply and support approval of the Bid Protections.

45. As stated in the Bid Procedures Motion, the Debtor does recognize that the percentage of the Bid Protections, which includes both the Break-Up Fee and Expense

Reimbursement, is higher than what Delaware Bankruptcy Courts usually approve. However, the Debtor analyzed the facts and circumstances of this case, including the very lengthy pre-bankruptcy marketing process and the difficulty with obtaining a suitable stalking horse bid, and decided in its business judgment that the amount of the Bid Protections requested by the Stalking Horse was warranted. The Synopsys litigation and claims mean that the amount of diligence and potential for ongoing costs go well beyond what could be expected in a typical transaction of this size. (DN 23, ¶ 59). The Bid Protections are necessary to induce the Stalking Horse to agree to serve as the Stalking Horse, and the Stalking Horse would not have proceeded with the Agreement without these protections. Thus, under Third Circuit law, the Bid Protections will promote more competitive bidding because the Stalking Horse will provide a floor for the bidding process. In the event no other party submits a bid, the Debtor has a safeguard with the Stalking Horse and will be able to sell its assets under the Agreement.

46. The Stalking Horse would not have made the initial bid without an agreement by the Debtor to provide the Bid Protections. Unlike the facts in *Reliant,* where the purchaser did not condition the effectiveness of the asset purchase agreement on obtaining a procedure order[7] the Stalking Horse here has required the entry of the Sale Order as a condition to closing the Sale. The Sale Order at Recital J provides, among other things, that the Court in entering the Bidding Procedures Order has "approv[ed] proposed bid protections to the Purchaser in accordance with the Purchase Agreement…"]. The Bid Protections were clearly necessary to induce the Stalking Horse to participate in the auction as the Stalking Horse.

47. The Bid Protections have already enticed Synopsys to submit the non-binding Term Sheet under which it would agree, among other things, to subordinate its unsecured claim

[7] *In re Reliant, supra*, 594 F.3d at 207

of over $30 million to those of other unsecured creditors and waive its other litigation claims in exchange for the assets. Indeed, the Synopsys Term Sheet confirms that if not for the continued unspecified allegations of infringement made by Synopsys wearing its competitor hat, the valuation of the Debtor's assets is well over $30 million.[8]

48. Both the U.S. Trustee and Synopsys also argue that the Bid Protections should not be approved because the Synopsys Term Sheet does not require a break-up fee or expense reimbursement. Synopsys further argues their Term Sheet will save the estate a $1 million administrative expense because the propose Sale is doomed to failure, except, of course, unless Synopsys is the buyer. These arguments ignore the reality of the facts on the ground and the multiple competing hats that Synopsys wears in this case.

49. In the years leading up to the Petition Date, Synopsys had multiple opportunities to try to resolve the litigation, yet did not present a supposed "settlement" term sheet until after the Bid Procedures Motion was filed. The Term Sheet will require the Debtor to acknowledge as valid the $30 million, highly disputed claim that is not yet final and is subject to the Debtor's appeal rights, as well as potential set-off against the Debtor's antitrust counterclaim. The Debtor would have abrogated its duties to all of its creditors and other stakeholders by accepting the Term Sheet under these circumstances. As fully set forth above, the Sale can proceed and close, notwithstanding Synopsys' arguments regarding the Permanent Injunction and unsupported allegations of continued infringement in Aprisa version 16.12. Given these facts, the Bid Protections are reasonable and should be approved.

50. In addition to the above arguments, the U.S. Trustee asserts in its Objection that the Court must take a "backward-looking, not forward-looking" review and that it must take

[8] The Bid Protections provide for a 3% break-up fee and expense reimbursement in this context.

"place after a sale is consummated". This is incorrect. In *Reliant*, the court of appeal acknowledged that the analysis should be based on the facts known at the time the approval was initially sought. While the panel thought that there was no escaping the benefit of 20/20 hindsight, it did not hold that the analysis should be deferred until the outcome of the auction and closing of the sale. Such an approach would chill any bidder from becoming a stalking horse and should not be adopted.

IV. RESPONSE TO OBJECTIONS TO THE KERP/KEIP MOTION

51. In its Objection to the KERP/KEIP Motion, Synopsys contends that the Compensation Programs[9] both fail to satisfy section 501(c)(3) of the Bankruptcy Code because (i) the relationship between the Compensation Programs and results sought is not reasonable; (ii) the cost and scope of the Compensation Programs; and (iii) evidence of appropriate diligence and industry standards in developing the Compensation Programs is insufficient. Each of these arguments is addressed below as they apply to the proposed KERP.[10] However, there are overarching considerations which must color this analysis.

52. First, as described above, Synopsys' multifaceted and adversarial roles in this bankruptcy case must not be understated. It is entirely in its foremost interest that the Debtor fails in its attempt to consummate a section 363 sale to a third party, and the most expedient and effective way to cause that failure is to torpedo the Debtor's workforce. Synopsys' motivation behind its myriad objections to the Debtor's proposed courses of action in this bankruptcy case is suspect at best. As one example, Synopsys has stated that it wishes to "maximize creditor

[9] Capitalized terms used in this section (¶¶ 51 to 69 of this Response) have the meanings ascribed to them in the KERP/KEIP Motion.

[10] As discussed below, the Debtor has continued the hearing on the KERP/KEIP Motion as it applies to the proposed KEIP to the March 8, 2017 at 10:30 a.m. hearing date, and therefore addresses only Synopsys' objections to the proposed KERP in this Response.

recoveries" and that it proposed to acquire certain of the Debtor's assets and subordinate a portion of its $30.4 million claim to provide "significantly increased recoveries" to creditors. Synopsys Objection to Bid Procedures Motion at ¶37. Yet, Synopsys objects to the KERP/KEIP Motion to deny payments to employees, almost all of whom are rank-and-file employees, which were promised almost a year ago and necessitated by the Synopsys Verdict. Notably, if the KERP/KEIP Motion is denied, the participants of the Compensation Programs would have claims in the bankruptcy case for their bonus amounts. Clearly, Synopsys' purported altruistic goal of maximizing recoveries for these creditors is dubious.

53. Second, Synopsys' self-serving conclusion that the Debtor's single possible means of selling its assets is in a sale to Synopsys itself (Synopsys Objection to KERP/KEIP Motion ¶ 4) is patently wrong for the reasons discussed above. The Debtor, in its reasoned business judgment, determined that the Stalking Horse bid represents the highest and best bid and that the Auction will create a competitive bidding process among potential purchasers, including Synopsys if it chooses to qualify and bid, to maximize value for the estate. Indeed, there are currently eight different potential bidders in the data room conducting due diligence, in addition to the Stalking Horse and Synopsys.

54. Third, Synopsys conveniently fails to take into account the numerous onerous facts and circumstances of this particular case,[11] almost all of which were caused by Synopsys. The Debtor endured years of expensive and draining litigation against Synopsys before the Synopsys Verdict was returned. Thereafter, while litigation remained pending, it became evident to the Company that it could not continue to dissipate assets litigating with Synopsys, a much larger company with considerably more substantial resources. The Company almost

[11] *See In re Pilgrim's Pride Corp.*, 401 B.R. 229, 236-37 (Bankr. N.D. Tex. 2009), as cited in the Objection to KERP/KEIP Motion, ¶21.

immediately attempted to preclude the loss of one of its most – if not the single most – valuable assets, its employee workforce, to ensure that the Company could continue operations and maintain its value while considering its best course of action. The fact that the Company has been able to retain much of workforce with the backdrop of the Synopsys Verdict and ongoing litigation and then the bankruptcy case in which Synopsys remains heavily involved, is nothing short of remarkable and is a credit to the efficacy and necessity of the Compensation Programs. With the foregoing in mind, the Debtor turns to Synopsys' arguments.

A. The KERP

55. The U.S. Trustee filed an objection to the KEIP motion which focuses solely on the proposed KEIP and does not object to the KERP. Accordingly, the Debtor addresses Synopsys' objections to the KERP herein.[12]

(i) The KERP Is Reasonably Designed to Meet Its Purpose.

56. Synopsys concludes that the KERP's purpose is to retain employees through a sale. Synopsys Objection to KERP/KEIP Motion ¶ 25. This is not entirely correct. As stated on numerous occasions, the KERP's purpose has always been to retain employees, which retention is necessary to preserve value of the Company. Synopsys purposefully clouds this distinction to enable its baseless contention that payments under the KERP cannot be paid if the Sale does not close because the KERP Participants will not have returned value to the Company prior to payment. This reasoning is flawed for various reasons.

57. First, Synopsys is the main, if not only, impediment to the auction and Sale process proceeding. Second, while it is true that the Debtor has determined that selling its assets

[12] Pursuant to the request of Synopsys' counsel, the Debtor will provide evidentiary support for the facts set forth herein, including the testimony of Claudia Chen, the Debtor's Vice President of Finance.

is its best course of action, denying payment under the KERP at this time will damage morale of the employees, will cause them to lose confidence or even mistrust management and the bankruptcy process, and ultimately will cause the deterioration of the workforce, prior to any sale. Third, even if the Debtor is unable to consummate the presently contemplated sale, it will still require its workforce while it determines its next best course of action to maximize a return to the estate.

58. It is unquestionable that the KERP is imperative to retain employees. The unemployment rate for high tech professionals in Silicon Valley is the lowest it has been in fifteen years. The EDA industry is a unique industry comprised of a small number of competitor companies. The talent pool of available workers is limited and the demand is high. The threat of losing talent to poaching competitors is very tangible and is magnified by the circumstances faced by the Debtor. After the Synopsys Verdict was rendered, employees immediately started receiving employment offers from competitors. Since then, sixteen employees have left the Company, four of whom left directly for competitors. At least another five employees were recruited by competitors, of which three engaged in the recruitment process and ultimately received offers. The Company was able to retain these and all other employees due in large part to the promise now represented by the KERP.

59. As discussed in the Wang Declaration (DN 66-6)and the Chen Declaration (DN 66-5), almost immediately after the Synopsys Verdict was rendered and then after the decision to pursue a Transaction in bankruptcy, the independent Compensation Committee, conferring with the Company's executives and the Board, developed the Pre-Petition Bonus Plan and the KERP in order to assuage employee unease to ensure their retention. There simply is no question that the KERP is designed to achieve its purpose.

(ii) The Cost and Scope of the KERP Are Reasonable and Necessary

60. Synopsys contends that the cost of the KERP is dramatically oversized in relation to the Debtor's assets. In support, Synopsys' calculations include pre-petition payments which are not part of the proposed KERP – a blatant attempt to manipulate numbers to square with its calculations. Synopsys Objection to KERP/KEIP Motion ¶ 27. Most significantly, Synopsys fails to acknowledge the specific facts and circumstances of this case that necessitated the Pre-Petition Bonus Plan and the KERP, *i.e.*, the hostile, uncertain environment created by Synopsys itself. Synopsys offers up a chart of purportedly comparable cases; but they do not square with the facts and circumstances here, nor can they be given Synopsys' immeasurable influence.

61. For example, the *AmCad Holdings* case,[13] which Synopsys analogizes as "most comparable" to this case (Synopsys Objection to KERP/KEIP Motion ¶ 28), is easily distinguishable. In that case, the proposed sale involved only one-quarter of the debtor's software business. The acquisition of the debtor's workforce was not a closing condition, and in fact, not a single participant under its employee retention program was required to continue employment with the stalking horse. There was no attenuated litigation coloring the company and precipitating its bankruptcy case. The company operated four software businesses in Virginia, targeted at governmental organizations. Unlike the Debtor, AmCad Holdings did not operate within the highly competitive, limited market, niche EDA industry, providing specialized software and services to large-scale corporations, nor did the majority of their employees reside in California's Silicon Valley, where the cost of living may be one of the highest on the planet.

62. Furthermore, Synopsys purposefully employs an apples-to-oranges comparison to fit its narrative, applying the ultimate, post-auction purchase price of $7.7 million in *AmCad*

[13] *In re AmCad Holdings, LLC*, Case No. 14-12168 (MFW).

Holdings as opposed to the $4.7 million stalking horse purchase price offered there. Moreover, Synopsys' reference to the Stalking Horse bid as a marker for the value of the Debtor's assets is disingenuous. As discussed in this section II and section III below, the Debtor believes that its value is multiple times – even five times EBITDA – greater than reported but depressed due to the litigation with Synopsys. If the Debtor is permitted to proceed with the auction and Sale on the terms it has proposed, it believes that it will receive significantly higher bids. Synopsys' offer to credit bid its entire $30.4 million claim demonstrates that even Synopsys agrees that the value of the Debtor's assets is far in excess of the Stalking Horse bid.

63. Even with the foregoing numerous disparate factors in play, the average payment under the KERP (approximating $18,100 per participant) is not "dramatically oversized" in comparison to AmCad Holdings' approved retention program (approximating $10,900 per employee).

64. In fact, the KERP is tailored in excruciating detail to accomplish the retention of each participant. As discussed in the Wang Declaration, the KERP was developed primarily by the independent Compensation Committee. As part of that process, amounts required to retain each employee were considered, ultimately resulting in the Bonus Plan Payments corresponding to each KERP Participant. As discussed above, in certain instances, the Debtor became aware of several employees who were offered employment by competitors and also became aware of offers received by employees, including signing bonuses and salaries. In developing the KERP, the Compensation Committee members, conferring with the Debtor's executives, advisors and the Board, applied this data along with their vast knowledge of the industry – including compensation structures of comparable companies – to develop the payments proposed under the KERP. In fact, in some instances, the amounts were directly tied to counteroffers for signing

bonuses from competitors.

65. Moreover, the departure of a KERP Participant could be more costly to the Debtor than paying a particular bonus under the KERP. Most new employees require a substantial signing bonus. The Company may need to hire a recruiter to locate new employees. Replacing any employee, in the current environment clouded by Synopsys, the bankruptcy case and the pending Sale, will be exceedingly difficult and will require a substantial compensation package far in excess of that received by a departing employee, even accounting for the proposed payment under the KERP.

66. The cost of the KERP therefore is not "oversized" but is both reasonable and necessary in view of the facts and circumstances of this case.

67. The scope of the KERP, including substantially all of the Debtor's remaining rank-and-file employees, also is necessary. After the Debtor started to market its assets for a potential Transaction, it became clear that any potential bidder will want to include the Debtor's workforce. All three qualified bids received by the Debtor in the pre-petition marketing process required that a large majority of employees remain with the buyer. The Stalking Horse bid requires as a closing condition that two-thirds of the Debtor's employees remain after the proposed Transaction. Lederman Declaration ¶¶ 6-7. Therefore, in order to maximize value for the estate in any sale, the Debtor must retain as many of its employees as possible. The KERP is finely tailored to achieve this goal.

(iii) The KERP Aligns With Industry Standards.

68. Synopsys simply ignores numerous facts outlined by in the KERP/KEIP Motion while decrying the Debtor's purported "lack of appropriate diligence" and "industry standards" in developing the KERP. In fact, the KERP was developed by the Compensation Committee comprised of three independent Board members with extensive industry experience, including

experience founding and developing numerous companies. It should be emphasized that the Compensation Committee is commissioned with determining fair compensation for the Company on all compensation matters and, historically, has accomplished this in a number of instances. With respect to the Pre-Petition Bonus Plan and the KERP, the Compensation Committee engaged in a comprehensive process over several weeks, meeting with the Company's Board, advisors and executives in doing so. Wang Declaration ¶ 5. It drew directly from its members' considerable experience with comparable compensation plans within the industry. *Id.* ¶ 7.

69. Ms. Beers, a professional with numerous years of restructuring experience, including experience with retention bonus plans of distressed companies, confirmed that the KERP is both fair and reasonable, and aligned with retention programs of other technology companies. Beers Declaration (DN 66-7) ¶¶ 5-6.

70. The KERP also aligns with what Ms. Chen, the Debtor's Vice President of Finance, believes to be standard for the industry, based on her personal knowledge of competitor companies and their compensation structures, in addition to actual offers received by certain KERP Participants.

71. Accordingly, Synopsys' contention that industry standards and appropriate diligence are lacking is manifestly unfounded.

B. The KEIP

72. Both Synopsys and the U.S. Trustee filed Objections addressing the Debtor's proposed KEIP. The Debtor has responded to the U.S. Trustee's requests for additional information regarding the KEIP. The Debtor continues to engage the U.S. Trustee in discussions, and the Debtor is hopeful of resolving its concerns. As such, the Debtor has continued the hearing on the KERP/KEIP Motion solely as it applies to the proposed KEIP, and will file a further response prior to such hearing.

V. RESPONSE TO OBJECTION TO THE COWEN APPLICATION

73. Synopsys' objection to Cowen's employment application is at best overzealous advocacy. The Debtor has a right to exercise its sound business judgment to decide on a sale process and then it has a right to retain appropriate professionals to aid it in running such process. Synopsys' objection to this retention is a back-door attempt to chill bidding and the Court should not hear a potential bidder on such a blatant self-serving gamesmanship.

74. Synopsys objects based on two main arguments. First, Synopsys argues that Cowen's fees are not reasonable because they are too high. Second, Synopsys argues that because Cowen did not solicit Synopsys as a bidder for the Debtor's assets, it must not have done a thorough enough job. Both of these objections are factually inaccurate, and the Cowen Application should be granted.

75. As discussed above in the Response to the Bid Procedures Objection, Cowen has provided for several months significant value to the Debtor by locating potential buyers for the Debtor and marketing the Debtor's business to more than one-hundred and forty potential buyers. Cowen spearheaded the negotiations with several interested parties which ultimately resulted in the Stalking Horse Agreement. Currently, Cowen continues to keep other bidders engaged with at least 8 parties in the data room, now including Synopsys.

76. When ATopTech first considered retaining an investment banker, it realized that it needed an investment banker with experience in the software industry, and that also had a restructuring practice. One issue is that not all firms possess both software industry expertise and restructuring expertise. Rather than hire both a financial advisor and an industry specialist banker, the Debtor was able to find one firm to serve both needs: Cowen.

77. The Debtor, however, did consider several firms, with the help of its other professionals. The Debtor interviewed Cowen and two other firms and determined in its

business judgment that Cowen was the most qualified because Cowen had the required expertise and after extensive negotiations offered the most cost effective compensation structure. Accordingly, Cowen's retention is the exercise of the Debtor's sound business judgment.

78. Synopsys also objects to Cowen's employment on the basis that Cowen did not solicit an offer from Synopsys and therefore must not have done a thorough enough job with its marketing of ATopTech. This statement is inaccurate and, frankly, laughable.

79. Before Cowen was hired as an investment banker, ATopTech had extensive discussions with Synopsys regarding the resolution of all of the pending litigation between the companies. ATopTech was led to believe that it had reached an agreement with Synopsys, but Synopsys refused to memorialize the agreement or to honor the verbal agreement.

80. When Cowen became involved, Synopsys was excluded from the stalking horse solicitation process for two reasons. First, ATopTech believed based on past experience that it was futile to involve Synopsys, because Synopsys would never agree to a deal unless there was outside pressure created by another offer. Second, ATopTech was concerned that if Synopsys were a bidder for the assets, it would create a chilling effect for other bidders. Both of these concerns have been justified. Synopsys has objected to any sort of auction process and is doing everything it can to stop the Sale of the Debtor's assets.

81. Based on Synopsys' behavior throughout the litigation between the parties, the Debtor believes that Synopsys' goal is to eliminate ATopTech as a source of competition and that Synopsys is only interested in acquiring the business in a manner that reduces competition for the business. Synopsys' term sheet calls for no auction so Synopsys' intent is to chill the bidding process. Eliminating the Auction is not in the best interest of the estate as it thwarts the estate's ability to realize value from the Sale of its assets.

82. Synopsys' objection that Cowen's fees are too large is likewise inaccurate.[14] Based on public comps and precedent transactions, a sale transaction in a similar sector will have a sales price between three to five times a company's revenue. Thus without the overhang of the Synopsys Litigation the Debtor would expect to sell its assets in a price range of approximately a range of $75,000,000 (three times revenue) to $125,000,000 (five times revenue). The Stalking Horse has provided a floor for the Sale of the Debtor's assets for $8,000,000 with a clean asset purchase agreement which the Debtor expects to result in higher and better bids.

83. Cowen's work in identifying and assisting with negotiations for a stalking horse bidder provides ATopTech with the best chance of maximizing the Sale price through an auction. The Debtor and Cowen had a lengthy negotiation to determine Cowen's compensation, taking into account the value of the Debtor's asset, the risk associated with the Sale, and the length of time for this engagement. Cowen's fees are reasonable based on industry standards for a company of the Debtor's earnings and revenue potential.

84. For these reasons the Synopsys Objection to the Cowen Application should be overruled and the Debtor's request granted.

VI. CONCLUSION

WHEREFORE, the Debtor respectfully requests that the Court deny the Objections to the Bid Procedure Motion and (a) grant the Bid Procedures Order attached to the Bid Procedures Motion as **Exhibit B**; (b) grant the Debtor's request for an order approving the KERP portion of the KERP/KEIP Motion and continuing the KEIP portion of the request to the

[14] Synopsys misstates Cowen's monthly earnings, alleging that Cowen is being paid $300,000 a month in fees. Cowen has been paid $75,000 for four months, per the fee agreement, which totals to $300,000. Cowen is not receiving $300,000 a month, as Synopsys alleges.

March 8, 2017 at 10:30 a.m. hearing date, and (c) grant the Debtor's request to retain Cowen as investment banker by entering the revised form of order to be provided at the February 21, 2017 at 10:30 a.m. hearing.

Dated: February 16, 2017

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