

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION**

In re:

hhgregg, Inc., *et al.*,¹

Debtors.

Chapter 11

Case No. 17-01302-RLM-11

(Jointly Administered)

**DEBTORS' MOTION FOR ENTRY OF AN ORDER, PURSUANT TO
SECTIONS 105 AND 363 OF THE BANKRUPTCY CODE, (I) AUTHORIZING
THE SALE OF CERTAIN INTELLECTUAL PROPERTY FREE
AND CLEAR OF LIENS, CLAIMS, ENCUMBRANCES,
AND OTHER INTERESTS, AND (II) GRANTING RELATED RELIEF**

hhgregg, Inc. and its affiliated debtors and debtors in possession (each a "Debtor" and collectively, the "Debtors") hereby submit this motion (the "Motion") for the entry of an order, substantially in the form attached as Exhibit A, pursuant to sections 105(a) and 363 of title 11 of the United States Code (the "Bankruptcy Code"), Rules 2002 and 6004 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), and Rules B-6004-1 and B-6004-4 of the Local Rules for the United States Bankruptcy Court for the Southern District of Indiana (the "Local Rules"), (i) authorizing the sale (the "Sale") of certain intellectual property (the "Intellectual Property")², on an "as is, where is" basis, free and clear of all liens, claims, encumbrances, and interests, to the entity or entities (each, a "Purchaser") that submit the highest or otherwise best offer for the Intellectual Property as determined by the Debtors in their business judgment

¹ The Debtors in these cases, along with the last four digits of each Debtor's federal tax identification number, are: hhgregg, Inc. (0538); Gregg Appliances, Inc. (9508); and HHG Distributing LLC (5875). The location of the Debtors' corporate headquarters is 4151 East 96th Street, Indianapolis, Indiana 46240.

² A list of the Debtors' Intellectual Property is attached as Exhibit C.

pursuant to the solicitation and auction process described below, and (ii) granting related relief. In support of this Motion, the Debtors respectfully represent as follows:

JURISDICTION AND VENUE

1. The Court has jurisdiction over these Chapter 11 Cases and this Motion pursuant to 28 U.S.C. §§ 157 and 1334, and the Standing Order of Reference from the United States District Court for the Southern District of Indiana dated July 11, 1984. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Venue of the Chapter 11 Cases and this Motion in this district is proper under 28 U.S.C. §§ 1408 and 1409.

2. The statutory bases for the relief requested herein are sections 105(a) and 363 of the Bankruptcy Code, with Bankruptcy Rules 2002 and 6004, and Local Rules B-6004-1 and B-6004-4.

BACKGROUND

I. General

3. On March 6, 2017 (the "Petition Date"), each of the Debtors commenced a voluntary case under chapter 11 of the Bankruptcy Code. The Debtors are authorized to continue to operate their business and manage their property as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

4. Pursuant to section 1102(a) of the Bankruptcy Code, an Official Committee of Unsecured Creditors (the "Committee") was appointed in the case of Gregg Appliances, Inc., Case No. 17-01303-RLM-11 by the United States Trustee. No official committee has been appointed in hhgregg, Inc., Case No. 17-01302-RLM-11 or HHG Distributing, LLC, Case No. 17-01304-RLM-11.

5. Additional factual background relating to the Debtors' business, capital structure, and the commencement of these Chapter 11 Cases is set forth in detail in the *Declaration of Kevin J. Kovacs in Support of Chapter 11 Petitions and Requests for First Day Relief* (Doc. No. 19) (the "First Day Declaration"), which is incorporated herein by reference.

6. As of the Petition Date, the Debtors owned and operated 220 brick-and-mortar stores offering furniture, appliances, and electronics in 19 states under the names hhgregg and Fine Lines. The Debtors' stores carried approximately 350 models of major appliances in stock and a large selection of consumer electronics, computing and wireless products, home furniture, mattresses, and fitness equipment.

7. As discussed at length in the First Day Declaration, prior to the Petition Date, the Debtors experienced declining sales, pressure from vendors, some of whom required that the Debtors provide additional letters of credit, and, as a result, increasing cash flow pressure. The Debtors' entire industry and brick and mortar-focused retail, in general, have also faced substantial pressures and declines. In light of these financial and industry pressures, the Debtors determined that the best way to maximize value for the benefit of all interested parties was the implementation of store closing sales that began prior to the Petition Date (collectively, the "Phase I Store Closing Sales") while simultaneously looking for a going-concern buyer for its remaining locations.

8. Despite the best efforts of the Debtors and their professionals, the Debtors were unable to obtain a buyer for their business as a going concern. Accordingly, the Debtor determined that the best way to continue maximizing value for the benefit of all interested parties was to conduct an orderly wind-down of their business operations. On April 8, 2017, the

Debtors began liquidating the assets at its remaining stores through store closing sales, which commenced on April 8, 2017 (the “Phase II Store Closing Sales”).

9. As of the date of this Motion, the Debtors have completed both the Phase I Store Closing Sales and the Phase II Store Closing Sales.

II. The Sale of Intellectual Property

10. In connection with their retail operations, the Debtors have developed and utilized the Intellectual Property, which consists of trademarks, domain names, customer files, and related data, including, among other things, the digital assets associated with the e-commerce website operated by the Debtors at www.hhgregg.com.

11. In furtherance of the orderly and expeditious wind-down of their business operations, the Debtors filed an application (Doc. No. 987) seeking Court authority to retain and employ Hilco IP Services, LLC d/b/a Hilco Streambank (“Hilco Streambank”), an expert in the marketing and sale of intellectual property assets, as their intellectual property advisors *nunc pro tunc* to the April 13, 2017. Hilco Streambank’s employment was approved by the *Order Authorizing the Retention and Employment of Hilco IP Services, LLC d/b/a Hilco Streambank as Intellectual Property Advisors for the Debtors, Effective as of April 13, 2017* on June 1, 2017. (Doc. No. 1124).

12. Hilco Streambank, with the assistance and oversight of the Debtors’ management and advisors, is actively engaged in the process of marketing the Debtors’ Intellectual Property assets for sale.

13. After consultation with Hilco Streambank and their other advisors, the Debtors have determined that in order to maximize value, the Debtors need to sell their Intellectual Property and such Sale needs to occur on an expedited timeline.

14. Accordingly, the Debtors believe it is prudent at this time and in the best interests of their estates and creditors to implement the sale procedures (the “Sale Procedures”) summarized below and, accordingly, intend to employ the Sale Procedures prior to a hearing on this Motion.

III. The Proposed Sale Procedures

15. The Debtors propose to sell the Intellectual Property assets either in whole or part through one or more sale transactions pursuant to the terms of a purchase agreement (or agreements) to be negotiated by and between the Debtors and proposed purchaser(s) and executed upon completion of one or more auctions for the Intellectual Property (each, an “Auction”). In conjunction with the Auction(s), the Debtors propose to implement the Sale Procedures described below in an effort to maximize the realizable value of the Intellectual Property for the benefit of the Debtors’ estates, creditors, and other interested parties. The Sale Procedures contemplate an Auction process pursuant to which bids for the Intellectual Property will be subject to higher or better offers. The Debtors are not seeking approval of Court-sanctioned bidding procedures in advance but, rather, propose conducting the Auction(s) in connection with the proposed Sale Procedures prior to the hearing on this Motion (the “Sale Hearing”), so as to derive maximum value for such assets, and then presenting evidence with respect to the sale process and the winning bid(s) at the Sale Hearing. As described more fully below, only bidders who timely submit Qualified Bids (as defined below) may be eligible to participate in the Auction(s).

16. Specifically, the Debtors will implement the following Sale Procedures, on substantially the terms set forth below, for the Sale of the Intellectual Property and conduct the Auction(s) in accordance therewith:

- a) **Bid Deadline: June 22, 2017 at 5:00 p.m. (prevailing Eastern Time).**³
- b) **Qualified Bid:** The Debtors will require a qualified bid (a “Qualified Bid”) to meet the following requirements: (i) enclose a proposed purchase agreement (the “Purchase Agreement”) that specifically identifies the Intellectual Property proposed to be purchased, which may be all or a portion of the Intellectual Property, and the proposed consideration, and a blackline against the form purchase agreement attached as Exhibit B; (ii) confirm that the offer shall remain open and irrevocable until the closing of a Sale to the Successful Bidder or the Next Highest Bidder (as defined herein); (iii) be accompanied by a certified or bank check or wire transfer in an amount equal to 10% of the purchase price identified in the Purchase Agreement as a minimum good faith deposit (the “Minimum Deposit”), which Minimum Deposit shall be used to fund a portion of the purchase price provided for in the bid; (iv) not be conditioned on obtaining financing or the outcome of any due diligence by the bidder; (v) not request or entitle the bidder to any break-up fee, expense reimbursement, or similar type of payment; and (vi) fully disclose the identity of each entity that will be bidding for the Intellectual Property or otherwise participating in connection with such bid, and the complete terms of any such participation.
- c) **Auction(s).** If the Debtors receive more than one Qualified Bid for the Intellectual Property (or certain subset of the Intellectual Property), the Auction(s) with respect to the Sale will commence at the office of Debtors’ counsel, Ice Miller LLP, One American Square, Suite 2900, Indianapolis, Indiana 46282, on June 26, 2017 at 10:00 a.m. (prevailing Eastern Time), or such later time and place as the Debtors may provide so long as such change is communicated reasonably in advance by the Debtors to all bidders and other invitees.
- d) **Auction Rules.** If or more Auctions are held, the following rules for its conduct will be observed: (i) only a bidder who has submitted a Qualified Bid by the Bid Deadline (a “Qualified Bidder”) will be eligible to participate at the Auction; (ii) a minimum Qualified Bid amount for the Intellectual Property may be announced and/or posted prior to the Auction. Such minimum Qualified Bid amounts may be established based upon a variety of factors, including, but not limited to, the highest bids received prior to the Auction; (iii) at the Auction, Qualified Bidders will be permitted to increase their bids, and bidding at the Auction will continue until such time as the highest or otherwise best offer is determined in accordance with these Sale Procedures or until such Auction is adjourned by the Debtors. Reasonable notice of the time and place for

³ Interested parties wishing to bid on the Intellectual Property should contact David Peress and Benjamin Kaplan at Hilco Streambank: dperess@hilcoglobal.com and bkaplan@hilcoglobal.com.

the resumption of the Auction will be given to all Qualified Bidders and counsel to any statutory committee appointed in these Chapter 11 Cases; (iv) immediately prior to concluding the Auction, the Debtors shall (a) review each Qualified Bid on the basis of its financial and contractual terms and the factors relevant to the Sale process and the best interests of the Debtors' estates and creditors; (b) determine and identify the highest or otherwise best Qualified Bid (the "Successful Bid") and the Qualified Bidder submitting such bid (the "Successful Bidder"); (c) determine and identify the next highest or otherwise best Qualified Bid after the Successful Bid (the "Next Highest Bid") and the Qualified Bidder submitting such bid (the "Next Highest Bidder"); and (d) have the right to reject any and all bids; and (v) within one business day of the completion of the Auction, the Successful Bidder shall complete and execute all agreements, instruments, or other documents evidencing and containing the terms and conditions upon which the Successful Bid was made.

- e) Acceptance of Successful Bid. If an Auction is held, the Debtors shall be deemed to have accepted a Qualified Bid only when (i) such bid is declared the Successful Bid on the record at the Auction and (ii) definitive documentation has been executed in respect thereof. Such acceptance is conditioned upon approval by the Court of the Successful Bid and the entry of an Order approving the Sale and such Successful Bid.
- f) Notice of Successful Bid(s). As soon as reasonably practicable following the conclusion of the Auction(s), the Debtors shall file a Notice of Successful Bid(s). The Notice of Successful Bid(s) shall identify the identity of the Successful Bidder(s), the amount of the Successful Bid(s), and shall include a substantially final version of the Purchase Agreement.
- g) **Sale Hearing. June 27, 2017 at 1:30 p.m. (prevailing Eastern Time).**
- h) Reservation of Rights. The Debtors reserve the right to seek approval of the Sale of portions of the Intellectual Property through separate Purchase Agreements with different purchasers in the event that the combination of such Sales is determined by the Debtors to obtain the highest value for the Intellectual Property. The Debtors further reserve the right as they may reasonably determine to be in the best interests of their estates to: (i) determine which bidders are Qualified Bidders; (ii) determine which bids are Qualified Bids; (iii) determine which Qualified Bid is the highest and best proposal and which is the next highest and best proposal, (iv) reject any bid that is (a) inadequate or insufficient, (b) not in conformity with the requirements of the Sale Procedures or the requirements of the Bankruptcy Code or (c) contrary to the best interests of the Debtors and their estates; (v) remove some or all of the Intellectual Property from the Auction(s); (vi) enter into one or more stalking horse agreements; (vii) waive terms and conditions set forth in these Sale Procedures with respect to all

potential bidders; (viii) impose additional terms and conditions with respect to all potential bidders; (ix) extend the deadlines set forth herein; (x) adjourn or cancel the Auction(s) and/or Sale Hearing in open court without further notice; and (xi) modify the Sale Procedures as they may determine to be in the best interests of their estates or to withdraw this Motion at any time with or without prejudice.

- i) The Debtors shall consult with the Committee and the Debtors' secured lenders with respect to all matters pertaining to the Sale of the Intellectual Property, including each of the foregoing matters.

17. The Debtors believe that the process contemplated herein will foster a competitive bidding atmosphere that will generate significant value for their estates.

IV. Consumer Privacy Ombudsman

18. The Debtors' written privacy policy in effect on the date of the commencement of the Debtors' bankruptcy cases permits the sale of personally identifiable information by the Debtors. The proposed sale is therefore permissible pursuant to 11 U.S.C. § 363(b)(1)(A) without the need to appoint a consumer privacy ombudsman. The Debtors have consulted with the Office of the United States Trustee for the Southern District of Indiana (the "U.S. Trustee") regarding the proposed Sale of the Intellectual Property and the potential implications such Sale has with respect to the Debtors' privacy policy. Based on that consultation, the U.S. Trustee has indicated she does not intend to seek the appointment of a consumer privacy ombudsman at this time.

RELIEF REQUESTED

19. By this Motion, the Debtors seek entry of an order (i) authorizing the Sale of the Debtors' Intellectual Property free and clear of liens, claims, encumbrances, and interests, pursuant to one or more Purchase Agreements executed by and between the Debtors and the Purchaser(s), and (ii) granting related relief.

BASIS FOR RELIEF REQUESTED

20. For the reasons explained below and throughout this Motion, the Debtors' decision to sell the Intellectual Property is a sound exercise of the Debtors' business judgment. Indeed, the Debtors are confident that the aforementioned process will generate the highest value for the Intellectual Property because (i) the Debtors and Hilco Streambank are actively marketing, and will continue to market, the Intellectual Property to all known and likely potential purchasers, (ii) the Auction(s) will foster a competitive bidding process through which the highest and best offer will be generated, and (iii) the Sale Procedures offer maximum flexibility and security to the Debtors in conjunction with selling the Intellectual Property in an expeditious and value-maximizing manner.

I. Sales of the Intellectual Property Should Be Approved.

21. Section 363(b)(1) of the Bankruptcy Code provides, in relevant part, that debtor "after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b)(1). Relatedly, Bankruptcy Rule 6004 states that, "all sales not in the ordinary course of business may be by private sale or by public auction." Fed. R. Bankr. P. 6004(f)(1). With respect to the notice required in connection with a sale, Bankruptcy Rule 2002(c)(1) states, in pertinent part, that,

the notice of a proposed use, sale or lease of property . . . shall include the time and place of any public sale, the terms and conditions of any private sale and the deadline for filing objections. The notice of a proposed use, sale or lease of property, including real estate, is sufficient if it generally describes the property.

Fed. R. Bankr. P. 2002(c)(1).

22. To approve the use, sale, or lease of property outside the ordinary course of business, the Court must find some articulated business justification for the proposed action. *See Fulton State Bank v. Schipper (In re Schipper)*, 933 F.2d 513, 515 (7th Cir. 1991) (citing *The*

Inst.'l Creditors of Cont'l Airlines v. Cont'l Air Lines, Inc., 780 F.2d 1223, 1225 (5th Cir. 1986)) (noting that the criterion for approval of a transaction under section 363(b) is whether debtor has “an articulated business justification”); *In re Abbotts Dairies of Pa., Inc.*, 788 F.2d 143, 145-47 (3d Cir. 1986) (implicitly adopting the “articulated business justification” and good-faith tests of *Committee of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1070 (2d Cir. 1983)); *see also In re Efoora, Inc.*, 472 B.R. 481, 488 (Bankr. N.D. Ill. 2012).

23. Generally, courts have applied four factors in determining whether a sale of a debtor’s assets should be approved: (a) whether there is a sound business purpose for the sale; (b) whether the debtor has provided interested parties with adequate and reasonable notice; (c) whether the proposed sale price is fair and reasonable; and (d) whether the purchaser has acted in good faith. *See, e.g., In re Schipper*, 933 F.2d at 515; *In re Abbotts Dairies*, 788 F.2d at 145-57; *In re Exaeris, Inc.*, 380 B.R. 741, 744 (Bankr. D. Del. 2008); *Titusville Country Club v. Pennbank (In re Titusville Country Club)*, 128 B.R. 396, 399 (Bankr. W.D. Pa. 1991). *See also Lionel*, 722 F.2d at 1071 (setting forth the “sound business purpose” test); *Abbotts Dairies*, 788 F.2d at 145–57 (implicitly adopting the articulated business justification test and adding the “good faith” requirement).⁴

24. Here, the Sale of the Intellectual Property meets these requirements and, accordingly, the Debtors submit it should be approved. Moreover, it is essential that the Intellectual Property be sold promptly in order to avoid deterioration in its value and the incurrence of additional administrative expenses. The Debtors submit that implementation of the

⁴ Even if the proposed Sale is deemed to be private, rather than public, this fundamental analysis does not change. *See, e.g., In re Ancor Exploration Co.*, 30 B.R. 802, 808 (Bankr. N.D. Okla. 1983) (“[T]he bankruptcy court should have wide latitude in approving even a private sale of all or substantially all of the estate assets not in the ordinary course of business under § 363(b).”). The bankruptcy court “has ample discretion to administer the estate, including authority to conduct public or private sales of estate property.” *In re WPRV-TV, Inc.*, 143 B.R. 315, 319 (D.P.R. 1991), *vacated on other grounds*, 165 B.R. 1 (D.P.R. 1992); *accord In re Canyon Partnership*, 55 B.R. 520, 524 (Bankr. S.D. Cal. 1985).

Sale Procedures and Auction process as outlined herein will generate maximum interest in the Intellectual Property, thereby yielding the highest and best bids for such assets. Accordingly, the Debtors submit that the proposed Sale will be the culmination of a thorough and exhaustive marketing process, and that the decision to sell the Intellectual Property to the Purchaser(s) is adequately informed, reasonable, and in the best interests of the Debtors, their estates, and other stakeholders.

A. There is a Sound Business Purpose for the Sale.

25. There is more than ample business justification to sell the Intellectual Property as set forth herein, and as such, an order granting the relief requested is a matter within the discretion of the Court and would be consistent with the provisions of the Bankruptcy Code. *See* 11 U.S.C. § 105(a). Subject to the Purchaser's willingness to provide fair and reasonable consideration, the Debtors' estates and creditors will benefit from the approval of the Sale without the added costs in terms of time and expenses associated with a Court-approved sale process.

26. Given the timeline for the Store Closing Sales, the Debtors are no longer selling product to consumers either through their stores or their e-commerce website www.hhgregg.com. As the time between the cessation of sales and the Sale of the Intellectual Property grows longer, intangible value is lost. Maintaining customer engagement when stores are dark and the e-commerce site is disabled is costly. It is imperative that interested parties have an opportunity to evaluate the Intellectual Property while customer engagement with the brand is still fairly recent because a key component of the value to be derived at the Auction will necessarily reflect the assessment of these potential purchasers of the go-forward utility of the Debtors' Intellectual Property as a conduit to those customers. The actual transfer of title to certain Intellectual

Property such as trademarks, copyrights, and domain names, as well as the transmission of customer lists and related data, will occur upon Court approval of the Sale, and the value of the Intellectual Property will be substantially diminished if the Purchaser(s) are unable to take possession of the Intellectual Property until long after it is no longer in commercial use. Thus, the Debtors believe that the proposed Sale process is in the best interests of the Debtors, their estates, and creditors and should go forward as soon as is practicable.

27. Simply put, in the Debtors' business judgment, selling the Intellectual Property through the aforementioned Sale process is the best option for maximizing the overall value of these assets for the benefit of all stakeholders.

B. Interested Parties Will Be Provided Adequate and Reasonable Notice of the Sale.

28. The Debtors will provide adequate notice of this Motion to parties in interest, as required by the applicable procedural rules. See Fed. R. Bankr. P. 2002(c)(1) (notice must contain "the time and place of any public sale, the terms and conditions of any private sale and the time fixed for filing objections."); L.R. B-6004-4(c) (notice must provide 21 days after the date of service for objections to be filed and shall contain (1) the property to be sold; (2) the name and contact information for the entity conducting the auction; (3) the date, time, and place of the sale, if known, or instructions on how that information can be obtained; (4) any bid procedures proposed for the sale; (5) a disclosure of the property to be sold contains personally identifiable information and, if so, the measures that will be taken to comply with 11 U.S.C. § 363(b)(1); and (6) the names of the lien or interest holds to the extent such names are know, if the proposed sale seeks to sell property free and clear of liens or other interests pursuant to 11 U.S.C. § 363(f)).

29. The Debtors proposed Notice of this Motion is attached as Exhibit D and meets the foregoing requirements. A copy of this Motion along with the Notice shall be served on all parties identified in this Motion.

30. Additionally, numerous potential Qualified Bidders have already received information regarding the Intellectual Property and the Sale from Hilco Streambank. In addition, the Debtors will serve this Motion on all parties that have expressed interest, or the Debtors believe may have an interest, in purchasing the Intellectual Property. Those parties will be alerted to the Auction and have an opportunity to participate in the Auction pursuant to the bid procedures set forth herein. Consistent with their fiduciary duties to their estates, the Debtors will consider all such offers.

C. The Sale Price Will Be Fair and Reasonable.

31. The Debtors will implement the Sale Procedures because the Sale Procedures are designed to maximize the value received for the Intellectual Property. The procedures the Debtors will follow allow for a timely Auction process while providing bidders and consultants with ample time and information to submit a timely Qualified Bid. The Sale Procedures are designed to ensure that the Intellectual Property will be sold for the highest or otherwise best possible purchase price under the circumstances of these Chapter 11 Cases. The Debtors shall continue to subject the value of the Intellectual Property to market testing, and by permitting prospective purchasers to bid on the Intellectual Property, the Debtors shall ensure that the ultimate Sale price is an accurate reflection of the Intellectual Property's true value. Accordingly, the Debtors and all parties in interest can be assured that the consideration received for the Intellectual Property will be fair and reasonable.

32. The Debtors will analyze the Qualified Bids and pursue the Sale at the Sale Hearing only if the Debtors conclude that such Sale will maximize the value of the Intellectual Property. As explained above, the Debtors and Hilco Streambank have marketed, and continue to market, the Intellectual Property in an appropriate and cost-efficient manner given the value of the Intellectual Property and the associated exigencies. In light of the marketing efforts and the nature of the assets, the Debtors believe that the Sale will provide fair and reasonable value for the Intellectual Property.

D. The Sale is Proposed in Good Faith.

33. The Sale is being proposed in good faith. The Sale will be the product of good-faith, arms'-length negotiations between the Debtors, on the one hand, and the Purchaser(s), on the other. The Debtors believe that the Sale of the Intellectual Property to the Purchaser(s) will not be the product of collusion or bad faith. No evidence exists to suggest that the Sale will be anything but the product of arms'-length negotiations between the Debtors and the Purchaser(s), conducted under the purview of one or more Auction(s).

34. The Purchase Agreement(s) ultimately executed by and between the Debtors and the Purchaser(s) and subject to Court approval will be the culmination of a fair and open solicitation and negotiation process. The Sale Procedures are designed to ensure that no party is able to exert undue influence over the process. Under the circumstances, the Debtors intend to ask the Court to find that the Successful Bidder (or Next Highest Bidder) be afforded the protections that section 363(m) of the Bankruptcy Code provides to a good-faith purchaser. Furthermore, the Sale Procedures are designed to prevent the Debtors or the Successful Bidder (or Next Highest Bidder) from engaging in any conduct that would cause or permit the Purchase

Agreement(s), or the Sale of the Intellectual Property to the Successful Bidder (or Next Highest Bidder), to be avoided under section 363(n) of the Bankruptcy Code.

35. To summarize, in the Debtors' informed business judgment, the Debtors will continue to market the Intellectual Property, conduct one or more Auctions prior to the Sale Hearing with respect thereto, and complete the disposition of the Intellectual Property in a manner best-tailored to generate value for the Debtors' estates while simultaneously limiting the deterioration in value of the Intellectual Property and the Debtors' exposure to burdensome and unnecessary administrative expenses. For these reasons, the Debtors' submit that the Court should approve the sale of the Intellectual Property to the Purchaser(s) selected by the Debtors pursuant to the Sale Procedures.

II. The Sales Satisfies the Requirements of Section 363(f) of the Bankruptcy Code.

36. Under section 363(f) of the Bankruptcy Code, a debtor in possession may sell all or any part of its property free and clear of any and all liens, claims, or interests in such property if (i) such a sale is permitted under applicable non-bankruptcy law; (ii) the party asserting such a lien, claim, or interest consents to such sale; (iii) the interest is a lien and the purchase price for the property is greater than the aggregate amount of all liens on the property; (iv) the interest is the subject of a *bona fide* dispute; or (v) the party asserting the lien, claim, or interest could be compelled, in a legal or equitable proceeding, to accept a money satisfaction for such interest. 11 U.S.C. § 363(f); *In re Terrace Chalet Apartments, Ltd.*, 159 B.R. 821, 827 (Bankr. N.D. Ill. 1993) (“Section 363(f) authorizes a sale free and clear of a lien if one of the five exceptions applies.”); *Citicorp Homeowners Serv., Inc. v. Elliot (In re Elliot)*, 94 B.R. 343, 345 (E.D. Pa. 1988) (noting that section 363(f) of the Bankruptcy Code is written in the disjunctive; therefore, a court may approve a sale “free and clear” provided at least one of the subsections is met).

37. Because the Debtors expect that they will satisfy the second and fifth of these requirements, if not others as well, approving the sale of the Intellectual Property free and clear of all adverse interests is warranted. Furthermore, courts have held that they have the equitable power to authorize sales free and clear of interests that are not specifically covered by section 363(f). *See, e.g., In re Trans World Airlines, Inc.*, 2001 WL 1820325 at *3, 6 (Bankr. D. Del. March 27, 2001); *Volvo White Truck Corp. v. Chambersburg Beverage, Inc. (In re White Motor Credit Corp.)*, 75 B.R. 944, 948 (Bankr. N.D. Ohio 1987).

WAIVER OF STAY UNDER BANKRUPTCY RULE 6004(h)

38. Pursuant to Bankruptcy Rule 6004(h), “[a]n order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of 14 days after entry of the order, unless the court orders otherwise.” Fed. R. Bankr. P. 6004(h). As set forth throughout this Motion, an inability to sell the Intellectual Property in an expedited fashion would impair the Debtors’ ability to maximize the value received for their Intellectual Property, to the detriment of the Debtors, their creditors, and estates.

39. For this reason and those set forth above, the Debtors submit that ample cause exists to justify a waiver of the 14-day stay imposed by Bankruptcy Rule 6004(h), to the extent applicable.

NOTICE

40. Notice of this Motion will be provided to (i) the U.S. Trustee; (ii) the Debtors’ thirty (30) largest unsecured creditors; (iii) the Prepetition Secured Parties; (iv) counsel to the Agent for the Debtors’ prepetition secured lenders and the DIP Agent, c/o Sean M. Monahan, Choate, Hall & Stewart LLP, Two International Place, Boston, MA 02110 (smonahan@choate.com) and Jay Jaffe, Faegre Baker Daniels, LLP, 600 E. 96th Street, Suite

600, Indianapolis, IN 46240 (jay.jaffe@faegrebd.com); (v) counsel for the Official Committee of Unsecured Creditors, c/o Cathy Hershkopf, Cooley LLP, 1114 Avenue of the Americas, New York, NY 10036 (chershkopf@cooley.com) and Thomas C. Scherer, Bingham Greenebaum Doll LLP, 10 West Market Street, #2700, Indianapolis, IN 46204 (tscherer@bgdlegal.com); (vi) all parties that, as of the filing of this Motion, have requested notice in these chapter 11 cases pursuant to Bankruptcy Rule 2002; and (vii) all creditors of the Debtors, all in accordance with Local Rule B-9006-1. In light of the nature of the relief requested herein, the Debtors submit that no other or further notice is required.

CONCLUSION

WHEREFORE, the Debtors respectfully request that the Court enter an order, substantially in the form attached hereto as Exhibit A, granting the relief requested herein and such other and further relief as is just and proper.

Respectfully submitted,

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