

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:)	Chapter 11
)	
The SCO GROUP, INC., <u>et al.</u> , ¹)	Case No. 07-11337 (KG)
)	(Jointly Administered)
)	
Debtors.)	

**EMERGENCY MOTION OF THE DEBTORS FOR AN ORDER (A) APPROVING ASSET
PURCHASE AGREEMENT, (B) ESTABLISHING SALE AND BIDDING PROCEDURES,
AND (C) APPROVING THE FORM AND MANNER OF NOTICE OF SALE**

The above referenced debtors in possession (collectively, the “Debtors”), by undersigned counsel, pursuant to 11 U.S.C. §§ 105(a), 363(b), 503 and 507, Rules 2002(a)(2), 6004(a), (b), (e), (f) and (h), 9007 and 9014 of the Federal Rules of Bankruptcy Procedure, seek the approval or establishment of:

- a. bidding procedures (the “Bid Procedures”), to govern the sale (the “Sale”) of the Debtors’ assets relating to its Unix operating system, certain related claims in litigation, as well as certain transfer, cross-license and related agreements pertaining to the Hipcheck product line and Me Inc. Mobile intellectual property owned by Me, Inc., a non-debtor affiliate of the Debtors;
- b. the terms for the Sale provided for in a term sheet (the “Term Sheet”), a copy of which is attached to this Motion as **Exhibit A** hereto, between the Debtors and York Capital Management (the “Proposed Purchaser”);
- c. the form of Asset Purchase Agreement (“APA”) with the Proposed Purchaser, containing the terms provided for in the Term Sheet and other provisions mutually acceptable to the Debtors and Proposed

¹ The Debtors and the last four digits of each of the Debtors’ federal tax identification numbers are as follows: (a) The SCO Group, Inc., a Delaware corporation, Fed. Tax Id. #2823; and (b) SCO Operations, Inc., a Delaware corporation, Fed. Tax ID. #7393.

Purchaser, in substantially the form to be filed with the Bankruptcy Court before the hearing on this Motion;

- d. the Guaranteed Expense Reimbursement,² Alternative Transaction Expense Reimbursement and Breakup Fee payable in certain circumstances under the APA to the Proposed Purchaser;
- e. approving the form and manner of notice of the Sale by auction (the “Auction”) in substantially the form as is attached hereto as **Exhibit B**;
- f. setting the date for a hearing (the “Sale Hearing”) at which the Court will consider approval of the Sale to the Successful Bidder free and clear of all liens, claims, encumbrances and other interests; and
- g. granting such other and further relief as the Court deems necessary.

Jurisdiction and Background

1. This Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A).

2. The statutory predicates for the relief sought herein are 11 U.S.C. §§ 105(a), 363(b), 503 and 507, Rules 2002(a)(2), 6004(a), (b), (e), (f) and (h), 9007 and 9014 of the Federal Rules of Bankruptcy Procedure.

3. On September 14, 2007 (the “Petition Date”), the Debtors filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 101-1532.

4. For greater detail regarding the background of the Debtors’ business and events leading up to the filing of these cases, the Debtors refer the Court and parties to the *Declaration of Darl C. McBride, Chief Executive Officer of the Debtors, in Support of First Day Motions* (the “McBride Declaration”) filed on the Petition Date and incorporated herein.

² Capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Term Sheet.

Preliminary Statement

5. The Debtors seek expedited consideration of this Motion seeking approval of: (i) bidding procedures, (ii) an expense reimbursement and breakup fee, (iii) the form and manner of notice of an auction and sale, and (iv) the sale of substantially all of the Debtors' assets relating to its Unix operating system, and certain related claims in litigation, free and clear of all liens, claims, interests and encumbrances, in order to maximize the value of the Debtors' assets and preserve value for the benefit of the estates. Based upon the Debtors' financial condition, but more importantly the skittishness of existing and prospective customers to continue or to begin, as the case may be, a business relationship with the Debtors, the Debtors must move quickly to realize the highest and best price for their assets. The Debtors' revenues have been declining over the past several years and the Debtors may not have the liquidity to sustain their operations for a prolonged period of time. The Debtors have received an offer to acquire substantially all of the Debtors' assets relating to its Unix operating system, and certain related claims in litigation, as well as certain transfer, cross-license and related agreements pertaining to the Hipcheck product line and Me Inc. Mobile intellectual property owned by Me, Inc., a non-debtor affiliate of the Debtors. The offer is subject to the receipt of higher or better offers through a competitive sale process. The offer requires that an order approving the bid procedures proposed herein be approved on or before November 9, 2007, and that the transactions contemplated by the APA be approved by no later than December 7, 2007. Accordingly, the Debtors respectfully request that the Court schedule a hearing to consider this Motion before November 9, 2007.

Term Sheet with York Capital Management

6. The SCO Group, Inc. (the “Seller”) has executed that certain *Term Sheet*,³ as amended, with JGD Management Corp. d/b/a York Capital Management (the “Proposed Purchaser”) on October 22, 2007. The terms of the Term Sheet, as amended, were ratified by Debtor’s Board of Directors on October 22, 2007. The transactions contemplated by the Term Sheet provide for the Seller to sell all right, title and interest to the assets, properties and rights of Seller used or useful in connection with the operation of the Unix business of Seller (the “Unix Business”) as conducted in the past, present or proposed to be conducted, tangible and intangible, as well as certain transfer, cross-license and related agreements pertaining to the Hipcheck product line and Me Inc. Mobile intellectual property owned by Me, Inc., a non-debtor affiliate of the Debtors (collectively, the “Transferred Assets”), which include, without limitation:

- (a) all tangible personal property, supplies, computers, printers, equipment, furniture, fixtures, goods and other similar assets relating to the Unix Business;
- (b) all rights and benefits under agreements, contracts, leases, licenses, instruments, general intangibles, commitments and understandings, written or oral, relating to the Unix Business and identified in writing by Proposed Purchaser to Seller (the “Designated Contracts”);
- (c) all trade names, trademarks, service marks and service names relating to the Unix Business (including, without limitation, registrations, licenses and applications pertaining thereto), together with all goodwill associated therewith (the “Trademarks”);
- (d) all (i) customer and client lists, vendor lists, catalogues, data relating to vendors, promotion lists and marketing data and other compilations of names and requirements (ii) telephone numbers,

³ The Term Sheet contemplates the negotiation and execution of a definitive asset purchase agreement (“APA”), in substantially the form to be filed with the Bankruptcy Court before the hearing to consider this Motion. Once the APA is substantially completed, the Debtors will file a copy thereof under cover of a notice of filing.

internet addresses and web sites, and (iii) other material information related to the Unix Business;

- (e) all source code, object code, computer programs, designs, processes, drawings, schematics, blueprints, copyrights, copyright applications, inventions, processes, know-how, trade secrets, patents, patent applications and other proprietary information, including, but not limited to, the registered copyrights, patents and copyright and patent applications relating to the Unix Business (collectively with the Trademarks, the “Intangible Property Rights”);
- (f) all inventories and work in process of Seller relating to the Unix Business;
- (g) all accounts, accounts receivable, notes receivable, chattel paper, documents and all other receivables of any type or nature of Seller relating to the Unix Business, including, but not limited to, all accounts receivable arising from bona fide transactions for the sale of licenses or maintenance or services, entered in good faith, involving existing products of Seller entered into in the ordinary course of business that meet agreed upon requirements;
- (h) those certain causes of action, claims, suits, proceedings, judgments or demands, of any nature, of or held by Seller against any third parties pertaining to the Unix Business and/or the Unix software and systems (except to the extent such suit is an Excluded Asset), including, but not limited to, those lawsuits pertaining to the Linux operating system in which Seller is presently engaged and all present and future enforcement rights against third parties (other than IBM and Novell) pertaining to the Linux operating system (the “Linux Litigation”);
- (i) all goodwill associated with the Unix Business and the Transferred Assets, including all of the Intangible Property Rights;
- (j) the intellectual property of the Debtors’ relating to the Unix business; and
- (k) all rights in and to any governmental and private permits, licenses, certificates of occupancy, franchises and authorizations, to the extent assignable, used in or relating to the Unix Business or the Transferred Assets.

The Term Sheet provides that the Proposed Purchaser will post an earnest money deposit in the amount of 5% of the Purchase Price (\$1,800,000) upon the filing of this Bid Procedures Motion, which deposit shall remain fully refundable to the Proposed Purchaser unless and until the Bankruptcy Court enters its order granting this Motion and awarding the Proposed Purchaser the “stalking horse” protections contemplated hereby. Upon entry of such a Bankruptcy Court order, the deposit will become non-refundable subject to the terms of the APA. The Term Sheet also provides that the Debtors and Proposed Purchaser will reach agreement on the terms of a definitive APA prior to the hearing on this Motion, will file the APA with the Bankruptcy Court prior to the hearing on this Motion, and such APA will provide that the Proposed Purchaser’s right to terminate the APA pursuant to its due diligence examinations shall terminate at the hearing on this Motion.

A. Excluded Assets

7. The Term Sheet excludes the following from the Sale:
 - a. All cash and cash equivalents owned by Seller;
 - b. Rights under all contracts (other than Designated Contracts, designated by Proposed Purchaser for assumption and assignment);
 - c. Tax refunds or credits relating to the pre-closing operation of the Seller’s business;
 - d. Any books or records that by law or contract cannot be transferred;
 - e. Rights of Seller under the APA (including with respect to the Purchase Price);
 - f. Seller’s litigation with Novell and IBM, and its claims and choses in action other than the Linux Litigation;
 - g. Any intellectual property rights owned by Me, Inc. other than those related to the Hipcheck product line (which intellectual property, although being sold to the Proposed Purchaser, will remain subject

to certain cross license and related agreements with the Proposed Purchaser) and subject to certain cross license and related agreements with respect to intellectual property to be retained by Me Inc. with respect to its Mobile product line; and

- h. Certain assets and rights, including those relating to employee benefits, to be mutually agreed.

(collectively, the “Excluded Assets”).

B. Assumed Liabilities

8. Pursuant to the Term Sheet, the Proposed Purchaser shall assume the following liabilities:

- a. All liabilities directly related to the Transferred Assets first arising after the Closing Date (including but not limited to litigation fees and expenses relating to the Linux Litigation and first arising after the Closing Date and not arising out of or related to any Excluded Asset); and
- b. All amounts which may be payable on account of obligations first arising after the Closing Date under Designated Contracts and such liabilities in respect of Designated Contracts required to cure defaults under such Designated Contracts.

(collectively, the “Assumed Liabilities”).

C. Excluded Liabilities

9. Pursuant to the Term Sheet, except for Assumed Liabilities, the Proposed Purchaser shall not assume any liabilities of any kind or nature, accrued or contingent, unliquidated or liquidated, including but not limited to:

- a. Liabilities arising out of or related to the Excluded Assets;
- b. Liabilities arising out of or related to Designated Contracts except to the extent the event giving rise to the liability occurred prior to Closing or constituted an amount necessary to cure any outstanding default under such Designated Contract which is specifically identified in nature and amount and agreed in the APA to be assumed and cured by Proposed Purchaser;

- c. Liabilities relating to real property;
- d. Liabilities relating to employees or benefits;
- e. Liabilities relating to Seller's income tax filings or obligations;
- f. Inter-company liabilities;
- g. Any transfer taxes with respect to the transactions contemplated hereby;
- h. Accounts payable and accrued liabilities;
- i. Liabilities relating to the Transferred Assets arising on or before the Closing (other than cure costs under contracts which Purchaser, in its sole discretion, elects to require Seller to assume and assign to Purchaser as part of the Designated Contracts), and
- j. Brokerage or any other fees in connection with the transactions contemplated under the Term Sheet.

(collectively, the "Excluded Liabilities").

D. Consideration

10. The total purchase price for the Transferred Assets consists of both cash and non-cash components in the estimated aggregate amount of up to \$36,000,000 (the "Purchase Price"), determined as follows:

- a. Cash payment of \$10,000,000, subject to a dollar for dollar reduction in an amount equal to the book value at Closing of all liabilities assumed or cured by Purchaser as of Closing, and any difference between reported and Qualifying Accounts Receivable;
- b. Up to \$10,000,000 in the form of a litigation credit facility to fund litigation expenses (the "Litigation Credit Facility"). The Litigation Credit Facility will be in effect from the Closing under the APA, and in consideration thereof, also effective as of the Closing. Proposed Purchaser shall be granted warrants for a 20% interest (up to \$100,000,000) in any and all litigation net proceeds⁴ (after fees and expenses) (including but not limited to any proceeds from the litigation with Novell and any proceeds from the litigation

⁴ The warrants granted to Proposed Purchaser do not include avoidance actions arising under 11 U.S.C. § 542 *et seq.*

with IBM), regardless of whether such litigation proceeds result from litigation funded in whole or in part from the Litigation Credit Facility. The Litigation Credit Facility shall remain available to Seller after emerging from bankruptcy;

- c. Up to \$10,000,000 in the form of a 20% interest, when and as indefeasibly collected by Purchaser as a result of any favorable judgment in any Purchaser litigation or enforcement in the Linux Litigation after first deducting any fees, costs, claims, liabilities, losses, damages and expenses incurred or funded by Purchaser together with a preferred return of the Wall Street Journal prime rate, compounded semi-annually. Seller shall agree to allow Purchaser to create an incentive plan for key members of the Seller management team required by Proposed Purchaser in order to pursue the Linux Litigation; and
- d. Up to \$6,000,000 in the form of a revenue share agreement, technology sale and cross- license, and mutual distribution agreement and/or OEM agreement between Debtors' non-debtor affiliate, Me, Inc., and Proposed Purchaser (the "Revenue Share").

E. Expense Reimbursement and Breakup Fee

11. The APA and Term Sheet provide that Seller will reimburse up to \$50,000 of Proposed Purchaser's fees and expenses (including, without limitation, legal costs and fees) incurred or to be incurred in connection with the consummation of the Transaction (the "Guaranteed Expense Reimbursement").

12. Further, if Purchaser is designated as "stalking horse" under the Bid Procedures Order, but either: (a) Proposed Purchaser is not the successful bidder or (b) any of the Transferred Assets are transferred by Seller to any party other than Proposed Purchaser (whether pursuant to the Auction or otherwise), then Proposed Purchaser shall receive from Seller: (i) a cash breakup fee in the amount of \$780,000 (the "Breakup Fee"), and (b) reimbursement of all expenses incurred by Purchaser, in an amount up to \$300,000 (the "Alternative Transaction Expense Reimbursement"), in both cases payable upon the earlier of consummation of a

subsequent transaction to a party other than Proposed Purchaser or the entry of a final, non-appealable order confirming a Chapter 11 plan (an “Alternative Transaction”). In addition, without duplication, if the APA is terminated other than as a result of a material breach by Purchaser or the failure to be satisfied of a condition precedent to closing that is not caused by the material breach of Seller, and Seller is not obligated to pay the Breakup Fee, then Seller will nevertheless be obligated to pay the Alternative Transaction Expense Reimbursement to Purchaser up to a maximum of \$300,000. The Breakup Fee, Guaranteed Expense Reimbursement and Alternative Transaction Expense Reimbursement⁵ shall be treated as superpriority administrative expenses under 11 U.S.C. §§ 503 and 507(a) and paid in cash immediately when due or through the closing of an Alternative Transaction or when otherwise due and payable under the APA.

Relief Requested and Basis Therefor

13. By this Motion, the Debtors request entry of an order, in the form attached hereto⁶: (a) approving Bidding Procedures, (b) approving the Breakup Fee, Guaranteed Expense Reimbursement and Alternative Transaction Expense Reimbursement, (c) authorizing the Debtors to conduct the Auction, (d) scheduling a Sale Hearing, and (e) granting related relief (the “Bid Procedures Order”).

14. The Debtors propose that upon execution of a confidentiality agreement, any party (other than the Proposed Purchaser) that wishes to conduct due diligence on the

⁵ This amount includes the \$50,000 Guaranteed Expense Reimbursement.

⁶ As provided in the proposed Bid Procedures Order, the Debtors may modify the bid procedures set forth in the proposed order at any time prior to or during the Auction if the Debtors determine, in their judgment, that such modifications will better promote the goals of the auction process and are in the best interest of the bankruptcy estates and the creditors thereof.

Debtors or their assets may be granted access to all material information that has been or will be provided to the Proposed Purchaser and other bidders.

15. The Debtors propose that if one or more Qualified Bids have been received by the Bid Deadline (defined below), the Debtors shall conduct the Auction. To qualify as a qualified bidder (“Qualified Bidder”), each prospective bidder must, no later than five business days before the Sale Hearing (the “Bid Deadline”):

- a. Submit to the Debtors an irrevocable offer in the form of an executed asset purchase agreement (the “Modified Agreement”) without financing or due diligence contingencies, at a price that is greater than or equal to the Minimum Initial Overbid (as defined below), and on terms no less favorable than those contained in the APA. The Qualified Bidder shall also submit a marked Modified Agreement reflecting the variations the Qualified Bidder proposes to make from the APA executed by the Proposed Purchaser.
- b. Make a good faith cash deposit in the form of a cashier's check or wire transfer into an interest bearing escrow account (the “Escrow Account”) maintained by the Debtors' counsel in an amount not less than \$1,800,000 (the same deposit posted by Proposed Purchaser), which deposit shall immediately become non-refundable and credited toward the purchase price if and when the Qualified Bidder making such deposit is declared to be the successful bidder (the “Successful Bid” and “Successful Bidder”) at the Sale Hearing.
- c. Provide reasonably satisfactory evidence of its financial ability to (i) fully and timely perform if it is declared to be the Successful Bidder (including but not limited to adequate financial resources or financing commitments to pay the Purchase Price and fund the Litigation Credit Facility in full), and (ii) provide adequate assurance of future performance of all contracts and leases to be assigned to it.
- d. Disclose any connections or agreements with the Debtors, the Proposed Purchaser, any other potential, prospective bidder or Qualified Bidder, and/or any officer, director or equity security holder of the Debtors or Proposed Purchaser.
- e. Confirm in writing its agreement to accept and abide by the terms, conditions and procedures set forth in the Bid Procedures Order.

f. If one or more Qualified Bidders submits a bid for the Transferred Assets, the following rules (the “Overbid Procedures”) shall apply:

- (1) any competing bid shall be comprised of an aggregate consideration package for the Debtors that exceeds the Proposed Purchaser’s aggregate consideration of up to \$36 million by at least \$1,630,000 in cash, plus: either (A) the assumption (or payment) of the Assumed Liabilities or (B) in the event that not all of the Assumed Liabilities are assumed (or paid), cash that results in a recovery to the estates (x) greater than or (y) equal to the recovery that would have resulted had all of the Assumed Liabilities been assumed (or paid), as may be determined by the Debtors, in their reasonable discretion, in consultation with any official committee (if appointed).

(the foregoing shall be collectively referred to as the “Minimum Initial Overbid”).

- g. Each subsequent bid shall be in increments of at least \$100,000 in cash (“Bid Increments”).
- h. The Qualified Bidder making the bid that is selected as the highest and best bid by the Debtors shall be considered the Successful Bidder and the Qualified Bidder that is selected as the second highest and best bid by the Debtors shall be considered the “Back-Up Bidder.” The Debtors shall inform each of the Qualified Bidders of the decision regarding the identity of the Successful Bidder and the Back-Up Bidder after the conclusion of the Auction.
- i. If a party other than the Proposed Purchaser is the Successful Bidder at the Auction, all counterparties to executory contracts and/or unexpired leases (the “Executory Contracts”) which the Debtors intend to assume and assign to the Successful Bidder will be served no later than five business days after the Auction with a notice of the winning bid, including sufficient information for the counterparty to evaluate the proposed assignee's ability to comply with § 365 of the Bankruptcy Code (the “Post-Auction Notice”). A counterparty to such an executory contract who receives a Post-Action Notice may file and serve an objection to such assumption and assignment of the particular Executory Contract based solely on adequate assurance of future performance grounds until December 17, 2007. If no objection is timely filed, the Court may approve the assumption and assignment of the Executory Contracts without a hearing. If a timely objection is properly filed and served, a hearing shall be held before the Court on December

_____, 2007 at _____.m. The Successful Bidder cannot impose additional costs upon the Debtors (or reduce the Purchase Price on account of) changes in the list of Executory Contracts being assumed and assigned to the Successful Bidder as compared to the list of Designated Contracts selected by the Proposed Purchaser.

- j. The Successful Bidder shall close on the transaction on a date no later than the following: (a) December 31, 2007; (b) the date when the Order approving the Sale of the Transferred Assets becomes a final order, as to which no stay pending appeal has been sought or obtained on or before the Closing; or (c) entry of the Sale Order if such Sale Order contains a waiver of the 10-day stay. All sale proceeds shall be paid in U.S. funds and shall be by cashier's check payable to "Berger Singerman Trust Account." The Debtors are authorized to accept the second highest bid as a back-up bid (the "Backup Bid") to the Successful Bidder's bid and shall be permitted to close on the Backup Bid in the event that the Successful Bidder does not timely close.
- k. Qualified Bids submitted on or before the Bid Deadline, or as increased by a bidder at the Auction, shall remain open and irrevocable until the Debtors provide the Backup Bidder written notice of the Closing with the Successful Bidder. The Backup Bid shall remain open and irrevocable until the Successful Bidder closes on the Sale of the Transferred Assets. If the Successful Bidder does not close on the Sale, the Backup Bidder shall close on the Backup Bid within 5 business days after the Debtors provide written notice of the failure of the Successful Bidder to close. Acceptance of a Qualified Bid shall, in all respects, be subject to the entry of an Order by the Court that, among other things, approves the Sale to the Successful Bidder (or the Backup Bidder if the Successful Bidder fails to close) and authorizes the Debtors to consummate the sale of the Assets to the Successful Bidder (or the Backup Bidder if the Successful Bidder fails to close). The failure of the Successful Bidder or Backup Bidder to close the transaction as required shall result in the forfeiture of the Deposit as liquidated damages.
- l. Within fifteen (15) business days after the entry by the Bankruptcy Court of an order approving the Sale, any deposits submitted by Qualified Bidders who are not the Successful Bidder or the Backup Bidder shall be returned, except those deposits of Qualified Bidders that forfeit their deposit pursuant to these Bidding Procedures.

16. In addition, the Debtors request that the Bid Procedures Order be deemed effective immediately, upon their entry, by ruling that the ten-day stay under Fed. R. Bankr. P. 6004(h) shall not apply.

Authority for Relief

17. In accordance with Bankruptcy Rule 6004, sales of property outside the ordinary course of business may be by private sale or public auction. The Debtors have determined that the sale of the Transferred Assets by public auction will enable them to obtain the highest and best offer for the Transferred Assets (thereby maximizing the value of their estates) and is in the best interests of the Debtors, their estates and creditors.

A. The Proposed Notice of Bidding Procedures and Auction Is Appropriate

18. The Debtors believe that they will obtain the maximum recovery for creditors and equity security holders if the Transferred Assets are sold through an auction sale. Under Bankruptcy Rule 2002(a) and (c), the Debtors are required to notify creditors of the proposed sale of the Transferred Assets, including a disclosure of the time and place of an auction, the terms and conditions of a sale, and the deadline for filing any objections. The Debtors request notice of the Bid Procedures and Auction be deemed adequate and sufficient if:

- a. Within five business days of the entry of the Bid Procedures Order, the Debtors, or their agent, shall serve by first class mail, postage prepaid, copies of the: (i) Bid Procedures Order; and (ii) Sale Notice, including the date, time and place of the Auction, and the time fixed for filing of objections to the Sale, upon the following entities (collectively, the "Notice Parties"):
 - (1) the United States trustee;
 - (2) all creditors entitled to receive notice pursuant to Bankruptcy Rule 2002;

- (3) all taxing authorities who have filed claims or are listed in the Debtors' schedules;
 - (4) counsel to any official committees appointed by the United States trustee;
 - (5) all parties that have requested special notice pursuant to Bankruptcy Rule 2002;
 - (6) all persons or entities known to the Debtors that have asserted a lien on, or security interest in, all or any portion of the Transferred Assets; and
 - (7) all potential bidders known to the Debtors.
- b. Within five business days of the entry of the Bidding Procedures Order, the Debtors or their authorized agent shall cause to be published a notice, substantially in the form of the Sale Notice, in the national editions of the Wall Street Journal and/or the New York Times and such other publications as the Debtors and its advisors determine will promote the marketing and sale of the Assets to other interested parties whose identities are unknown to the Debtors.

19. Prior to the Sale Hearing, the Debtors will file affidavits of service and publication of the Sale Notice.

20. The Debtors submit that the notice procedures herein comply fully with Bankruptcy Rule 2002 and are reasonably calculated to provide timely and adequate notice of the sale by auction to the Debtors' creditors and other parties-in-interest, as well as to those parties who have expressed an interest, or may express an interest, in bidding on the Transferred Assets.

B. The Bid Procedures Are Appropriate and Will Maximize the Value Received for the Assets

21. Courts have made clear that a debtor's business judgment is entitled to substantial deference with respect to the procedures to be used in selling assets from the estate. *See, e.g., In re Integrated Resources, Inc.*, 147 B.R. 650, 656-57 (Bankr. S.D.N.Y. 1992); *In re 995 Fifth Ave. Assocs., L.P.*, 96 B.R. 24, 28 (Bankr. S.D.N.Y. 1989) (same).

22. The paramount goal in any proposed sale of property of the estate is to maximize the proceeds received by the estate. *In re Food Barn Stores, Inc.*, 107 F.3d 558, 564-65 (8th Cir. 1997) (in bankruptcy sales, “a primary objective of the Code [is] to enhance the value of the estate at hand.”); *Integrated Resources*, 147 B.R. at 659 (same); *In re Atlanta Packaging Products, Inc.*, 99 B.R. 124, 130 (Bankr. N.D. Ga. 1988) (same).

23. In that regard, courts uniformly recognize that procedures intended to enhance competitive bidding are consistent with the goal of maximizing the value received by the estate and therefore are appropriate in the context of bankruptcy sales. *See, e.g., In re Montgomery Ward Holding Corp.*, Case No. 97-1409 (PJW) (Bankr. D. Del. Aug. 6, 1997); *In re Fruehauf Trailer Corp.*, Case No. 96-LS63 (PJW) (Bankr. D. Del. Feb. 26, 1997); *Integrated Resources*, 147 B.R. at 659; *In re Financial 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.”).

24. The proposed Bid Procedures will allow the Debtors to conduct the Auction in a controlled, fair and open fashion that will encourage participation by financially capable bidders who demonstrate the ability to close a transaction, thereby increasing the likelihood that the Debtors will receive the best possible consideration for the Transferred Assets by helping ensure a competitive and fair bidding process. They also allow the Debtors to undertake the Auction process in as expeditious a manner as possible, which the Debtors believe is essential to maintaining and maximizing the value of their estates.

25. The Debtors believe that the Bid Procedures will encourage bidding for the Assets and are appropriate under the relevant standards governing auction proceedings and bidding incentives in bankruptcy proceedings. *See Integrated Resources*, 147 B.R. at 659; 995 *Fifth Avenue Assocs.*, 96 B.R. at 28.

26. Moreover, the Debtors submit that the Break Up Fee, Guaranteed Expense Reimbursement and the Alternative Transaction Expense Reimbursement (collectively, the “Buyer Protections”) made in connection with the solicitation of bids will also provide more benefit to the estates by encouraging earlier and higher bidding. The Debtors believe that the Buyer Protections encourage a potential purchaser to act as a “stalking horse,” who invests time, money and effort to negotiate with a debtor despite the risks and uncertainties of the Chapter 11 bankruptcy process.

27. In consideration of the benefits of the Buyer Protections, and the value of the Transferred Assets, the Debtors submit that the Buyer Protections are reasonable and appropriate. Courts have approved breakup fees and expense reimbursements in similar circumstances in this District and elsewhere. *See, e.g., In re Ameriserve*, Case No. 00-0358 (PJW) (Bankr. D. Del., September 27, 2000) (Court approved a break-up fee of 3.64% or \$4,000,000 in connection with \$110,000,000 sale); *In re Fruit of the Loom, Inc.*, Case No. 99-4497 (PJW) (Bankr. D. Del. Dec. 11, 2001) (approving \$25 million termination fee provision which was approximately 3.0% of transaction value); *In re Favorite Brands Int’l Holdings Co.*, Case No. 99-726 (PJW) (Bankr. D. Del. Oct. 8, 1999) (approving \$8.95 million break-up fee provision which was approximately 1.9% of transaction value); *In re Montgomery Ward Holding Corp.*, Case No. 97-1409 (PJW) (Bankr. D. Del. June 15, 1998) (approving \$3 million break-up

fee provision which was approximately 2.7% of transaction value); *In re Medlab. Inc.*, Case No. 97-1893 (PJW) (Bankr. D. Del. Apr. 28, 1998) (approving \$250,000 break-up fee provision which was approximately 3.12% of transaction value); *In re Anchor Container Corp. et al.*, Case Nos. 96-1434 and 96-1516 (PJW) (Bankr. D. Del. Dec. 20, 1996) (Court approved termination fee of 2.43%, or \$8,000,000, in connection with \$327,900,000 sale of substantially all of Debtors' assets); *In re FoxMeyer Corp. et al.*, Case No. 96-1329 (HSB) through 96-1334 (HSB) (Bankr. D. Del., Oct. 9, 1996) (Court approved termination fee of 7.47%, or \$6,500,000, in connection with \$87,000,000 sale of substantially all of Debtors' assets); *In re Edison Bros. Stores. Inc. et al.*, Case No. 95-1354 (PJW) (Bankr. D. Del., Dec. 29, 1995) (Court approved termination fee of 3.5%, or \$600,000, in connection with \$17,000,000 sale of Debtors' entertainment division); *In re Indust. Gen. Corp.*, Case No. 95-895 (PJW) (Bankr. D. Del.) (Court approved termination fee of 3.57%, or \$500,000, in connection with \$14,000,000 sale transaction); *In re Buddy L. Inc.*, Case No. 95-23S (HSB) (Bankr. D. Del.) (Court approved termination fee of 1.6%, or \$800,000, in connection with \$50,000,000 sale of Debtors' toy division); *In re Continental Airlines, Inc.*, Case No. 90-932 (HSB) (Bankr. D. Del.) (Court approved termination fee of 2.4%, or \$1,500,000, in connection with \$61,000,000 sale transaction); *see also Integrated Res.*, 147 B.R. at 648. The Buyer Protections therefore should be approved as reasonable and necessary to maximize the value of the Transferred Assets.

28. Here, the maximum amounts payable by the Debtors as a result of the Buyer Protections is \$1,080,000, which is reasonable, appropriate and within the Debtors' sound business judgment under the circumstances because it will serve to maximize the value that the Debtors will recover through the sale of the Transferred Assets.

Relief Under Bankruptcy Rules 6004(h) Is Appropriate

29. Bankruptcy Rule 6004(h) provides that an “order authorizing the use, sale, or lease of property ... is stayed until the expiration of 10 days after entry of the order, unless the court orders otherwise.” Fed. R. Bankr. P. 6004(h). The Debtors request that any order approving the APA be effective immediately by providing that the 10-day stays under Bankruptcy Rule 6004(h) is not to be applied.

30. The purpose of Bankruptcy Rule 6004(h) is to provide sufficient time for an objecting party to appeal before an order can be implemented. See Advisory Committee Notes to Fed. R. Bankr. P. 6004(h). Although Bankruptcy Rule 6004(h) and the Advisory Committee Notes are silent as to when a court should “order otherwise” and eliminate or reduce the 10-day stay period, *Collier* suggests that the 10-day stay period should be eliminated to allow a sale or other transaction to close immediately “where there has been no objection to the procedure.” 10 Lawrence P. King, *Collier on Bankruptcy*, ¶ 6004.10 (15th rev. ed. 2006). *Collier* further suggests that if an objection is overruled, and the objecting party informs the court of its intent to appeal, the stay may be reduced to the amount of time actually necessary to seek a stay, unless the court determines that the need to proceed sooner outweighs the interests of the objecting party. *Id.*

31. The Debtors request that the Court rule that the ten-day stay period under Bankruptcy Rule 6004(h) not be implemented or, in the alternative, if an objection to the sale is filed, reduce the stay period to the minimum amount of time needed by the objecting party to seek a stay pending appeal.

Notice

32. Notice of this Motion has been or will be given to the following parties or, in lieu thereof, to their counsel, if known: (i) the Office of the United States Trustee; (ii) the creditors holding the 20 largest unsecured claims against the Debtors' estates (on a consolidated basis); and (iii) any party which has filed a request for notices with this Court prior to the date of this Motion. The Debtors submit that, in light of the nature of the relief requested, no other or further notice need be given.

WHEREFORE, the Debtors respectfully request entry of an order in the form attached hereto granting the relief requested herein, as well as granting any other and further relief the Court deems just and proper.

Dated: October 23, 2007

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