

# **Exhibit C**

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

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In re: :  
POLAROID CORPORATION, : Chapter 11  
et al., :  
Debtors. : Case No. 01-10864 (PJW)  
: Jointly Administered  
: Hrg. Date (Bid Procedures): 5/6/02 @ 2:00 p.m.  
: Obj. Due (Bid Procedures): 4/29/02 @ 4:00 p.m.  
: Hrg. Date (Sale): 6/11/02 @ 4:00 p.m.  
: Obj. Due (Sale): 6/4/02 @ 4:00 p.m.  
- - - - - X

**NOTICE OF FILING**

PLEASE TAKE NOTICE that on April 18, 2002, the above-captioned debtors and debtors-in-possession (the "Debtors") filed the attached **Debtors' Motion for Order (I) Authorizing and Approving (A) Sale of Substantially All of the Debtors' Assets to OEP Imaging Corporation, Or a Party Making a Higher or Better Offer, Free and Clear of Liens, Claims, Encumbrances and Interests, and (B) Assumption and Assignment of Certain Related Executory Contracts and Unexpired Leases, and (II) (A) Establishing Competitive Bidding Procedures in Connection with the Sale, (B) Approving Bid Protections, Including Expense Reimbursement and Termination Payment, (C) Set-**

ting Sale Hearing and Objection Deadline, (D) Authorizing and Approving Form and Manner of Notice of Bidding Procedures and Sale Hearing, (E) Determining That Such Sale Is Exempt from Any Stamp, Transfer, Recording, or Similar Tax, and (F) Deeming the Purchaser a "Successor" to the Debtors under Section 1145(a) of the Bankruptcy Code and (III) Granting Related Relief (the "Motion").

PLEASE TAKE FURTHER NOTICE that objections, if any, to granting certain relief relating to the Bidding Procedures, the Bidding Protections and/or the proposed form and manner of notice for the Auction and Sale Hearing (the "Procedures Order"), which Procedures Order is attached to the Asset Purchase Agreement as Exhibit B must be made in writing, filed with the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court"), 824 Market Street, Wilmington, Delaware 19801, and served so as to be received by: (i) the undersigned counsel to the Debtors; (ii) counsel for the Agent for the Debtors' prepetition lenders, Davis, Polk & Wardwell, 450 Lexington Avenue, New York, New York 10017 (Attn: John Fouhey, Esq.); (iii) counsel for the Agent for the Debtors' postpetition lenders, Morgan, Lewis & Brockius, 101 Park Avenue, New York, NY 10178

(Attn: Robert Scheibe, Esq.); (iv) counsel to the Committee, Young Conaway Stargatt & Taylor LLP, The Brandywine Building, 17<sup>th</sup> Floor, 1000 West Street, P.O. Box 391, Wilmington, DE 19899 (Attn: Brendan Linehan Shannon, Esq.) and Akin, Gump, Strauss, Hauer & Feld, L.L.P., 590 Madison Avenue, New York, NY 10022 (Attn: Fred Hodara, Esq.); and (v) the Office of the United States Trustee, J. Caleb Boggs Federal Office Building, 844 King Street, Suite 2313, Wilmington, DE 19801 (Attn: Mark S. Kenney, Esq.) (collectively, the "Notice Parties") no later than 4:00 p.m. Eastern time on April 29, 2002.

PLEASE TAKE FURTHER NOTICE that a hearing with respect to entry of the Procedures Order will be held on **May 6, 2002 at 2:00 p.m.** Eastern time before the Honorable Peter J. Walsh in the United States Bankruptcy Court, 824 Market Street, Wilmington, Delaware 19801. Only those objections made in writing and timely filed and received will be considered by the Bankruptcy Court at such hearing.

PLEASE TAKE FURTHER NOTICE that objections, if any, to entry of a proposed order seeking, among other things, approval of the Purchase Agreement, authorization of the sale of substantially all of the assets of

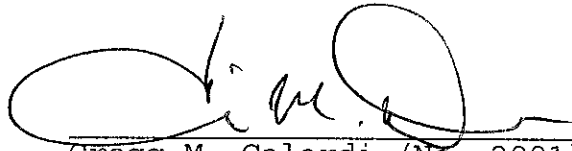
the Debtors' businesses, authorization of the assumption and assignment of certain executory contracts and unexpired leases and authorization of the assumption of certain liabilities (the "Sale Order"), which Sale Order is attached to the Asset Purchase Agreement as Exhibit C, must be made in writing, filed with the United States Bankruptcy Court for the District of Delaware, 824 Market Street, Wilmington, Delaware 19801, and served so as to be received by the undersigned counsel to the Debtors no later than 4:00 p.m. Eastern time on June 4, 2002. Any objection to the Auction and/or Asset Sale must set forth the name of the objector, the nature and amount of the objector's claims against or interests in the Debtors' estates, and the basis for the objection.

PLEASE TAKE FURTHER NOTICE that if no objections to the entry of the Sale Order are timely filed and received in accordance with the above procedures, the Sale Order may be entered without further notice or a hearing. If an objection is properly filed and received in accordance with the above procedures, a hearing with respect to the relief sought in the Sale Order will be held on June 11, 2002, at 4:00 p.m. Eastern time before the Honorable Peter J. Walsh in the United States Bankruptcy Court, 824 Market Street, Wilmington, Delaware 19801. Only those objections made in writing and

timely filed and received will be considered by the  
Bankruptcy Court at such hearing.

IF YOU FAIL TO RESPOND IN ACCORDANCE WITH THIS  
NOTICE, THE COURT MAY GRANT THE RELIEF REQUESTED IN THE  
MOTION WITHOUT FURTHER NOTICE OR HEARING.

Dated: Wilmington, Delaware  
April 18, 2002



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Attorneys for Debtors and  
Debtors-in-Possession

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

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In re:	:	Chapter 11
POLAROID CORPORATION,	:	
<u>et al.</u> ,	:	Case No. 01-10864 (PJW)
Debtors.	:	Jointly Administered
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	:	Hrg. Date (Bid Procedures): 5/6/02 @ 2:00 p.m.
	:	Obj. Due (Bid Procedures): 4/29/02 @ 4:00 p.m.
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	:	
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MOTION FOR ORDER (I) AUTHORIZING AND APPROVING  
(A) SALE OF SUBSTANTIALLY ALL OF THE DEBTORS'  
ASSETS TO OEP IMAGING CORPORATION, OR A PARTY  
MAKING A HIGHER OR BETTER OFFER, FREE AND CLEAR  
OF LIENS, CLAIMS, ENCUMBRANCES AND INTERESTS,  
AND (B) ASSUMPTION AND ASSIGNMENT OF CERTAIN  
RELATED EXECUTORY CONTRACTS AND UNEXPIRED  
LEASES, AND (II) (A) ESTABLISHING COMPETITIVE  
BIDDING PROCEDURES IN CONNECTION WITH THE SALE,  
(B) APPROVING BID PROTECTIONS, INCLUDING EXPENSE  
REIMBURSEMENT AND TERMINATION PAYMENT, (C) SETTING  
SALE HEARING AND OBJECTION DEADLINE, (D) AUTHORIZING  
AND APPROVING FORM AND MANNER OF NOTICE OF BIDDING  
PROCEDURES AND SALE HEARING, (E) DETERMINING THAT  
SUCH SALE IS EXEMPT FROM ANY STAMP, TRANSFER, RECORDING,  
OR SIMILAR TAX, AND (F) DEEMING THE PURCHASER A  
"SUCCESSOR" TO THE DEBTORS UNDER SECTION 1145(A) OF THE  
BANKRUPTCY CODE AND (III) GRANTING RELATED RELIEF

Polaroid Corporation ("Polaroid") and certain  
of its subsidiaries and affiliates, debtors and debtors-

in-possession (collectively, the "Debtors"), submit this motion (the "Motion") for entry of an order (I) (a) authorizing and approving (i) the agreement (the "Purchase Agreement")<sup>1</sup> to sell (the "Sale") substantially all of the assets (the "Acquired Assets") and certain liabilities (the "Acquired Liabilities") of the Debtors' businesses (as more particularly described in the Purchase Agreement)<sup>2</sup>, to OEP Imaging Corporation and/or its designee(s) ("OEP" or the "Purchaser"), (ii) the sale of the Acquired Assets to OEP pursuant to the Purchase Agreement, or to another qualified bidder submitting a higher or otherwise better offer (the "Successful Bidder") free and clear of all liens, claims, encumbrances and interests, and exempt from any stamp, transfer, recording or similar tax, and (iii) the assumption and assignment of certain executory contracts and unexpired leases and certain liabilities to OEP or the Successful Bidder, and (b) determining that the Purchaser shall be

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<sup>1</sup> A copy of the Purchase Agreement is annexed as Exhibit A hereto. To the extent not attached, any non-confidential schedules to the Purchase Agreement will be provided upon request by the undersigned counsel when such schedules are available.

<sup>2</sup> Capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Purchase Agreement.



deemed to be a "successor" to the Debtors under section 1145(a) of the Bankruptcy Code solely with respect to Warrants and any common stock of the Purchaser issued in accordance with the Purchase Agreement, (II) (a) approving competitive bidding procedures (the "Bidding Procedures") and the form and manner of notice thereof, (b) approving bidding protections (the "Bidding Protections"), including expense reimbursement (the "Expense Reimbursement") and termination payment (the "Termination Payment"), (c) establishing a sale hearing (the "Sale Hearing") and objection deadline (the "Objection Deadline"), (d) approving the form and manner of notice thereof and (e) determining that such sale is exempt from any stamp, transfer, recording or similar tax, and (III) granting related relief. In support of the Motion, the Debtors respectfully represent as follows:

#### **BACKGROUND**

1. On October 12, 2001 (the "Petition Date"), the Debtors each filed a voluntary petition in this Court for reorganization relief under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101-1330, as amended (the "Bankruptcy Code"). The Debtors continue to manage and operate their businesses as debt-

ors-in-possession pursuant to Bankruptcy Code sections 1107 and 1108.

2. No trustee or examiner has been appointed in the Debtors' chapter 11 cases. On October 23, 2001, an official committee of unsecured creditors (the "Committee") was appointed. On January 15, 2002, an official committee of retirees was appointed.

#### **JURISDICTION AND VENUE**

3. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).

#### **STATUTORY PREDICATES FOR RELIEF REQUESTED**

4. The statutory predicates for the relief requested herein are Bankruptcy Code sections 105, 363, 365, 1145 and 1146.

#### **RELIEF REQUESTED**

5. By this Motion, the Debtors initially request that the Court enter an order (the "Procedures Order") approving (i) the Bidding Procedures for the auction (the "Auction"), (ii) the Bidding Protections, including the Expense Reimbursement and Termination Payment, and (iii) the forms and manner of notice of the

Auction and Sale Hearing (the "Notice of Auction and Sale Hearing"), substantially in the form attached as Exhibit B to the proposed Procedures Order.

6. In addition, assuming the Court enters the Procedures Order, the Debtors' request that at the Sale Hearing the Court enter an order (the "Sale Order") that, among other things, (i) authorizes the Debtors to sell the Acquired Assets, free and clear of all liens, claims, encumbrances and interests (other than certain specified assumed liabilities (the "Assumed Liabilities")), on substantially the terms and conditions set forth in the Purchase Agreement, (ii) determines that such sale is exempt from any stamp, transfer, recording, or similar tax, (iii) authorizes the assumption of certain identified executory contracts and unexpired leases associated with the Debtors' businesses (the "Designated Contracts") and the assignment of the Designated Contracts to OEP or the Successful Bidder, and (iv) deems the Purchaser shall to be a "successor" to the Debtors under section 1145(a) of the Bankruptcy Code solely with respect to Warrants and any common stock of the Purchaser issued in accordance with the Purchase Agreement.

## BASIS FOR RELIEF

7. Throughout 2001, the Debtors experienced deterioration in revenues from their core businesses at a rate greater than expected. This was due to the general overall economic downturn in that year, inventory reductions by the Debtors' major retail customers and greater competition from digital cameras.

8. In light of the foregoing, the Debtors initiated major global restructuring plans in February and June 2001 designed to reduce debt and return the Debtors to profitability. These plans included a reduction of more than 30 percent of the Debtors' global workforce over 18 months. Despite such efforts, however, the Debtors' financial position continued to deteriorate. As a result, the Debtors were unable to secure refinancing of their principal obligations under their prepetition credit facilities, each scheduled to mature on December 31, 2001, or their 6 3/4% Notes due January 15, 2002. Moreover, although the Debtors actively pursued asset divestitures and alternative transactions, as of the Petition Date, such efforts failed to produce an acceptable transaction or sufficient liquidity. Accordingly, the Debtors commenced these chapter 11 cases.

9. The Debtors' financial woes have continued subsequent to the Petition Date. Between the Petition Date and December 31, 2001, for example, the Debtors incurred over \$58 million of operating losses. The Debtors' 2002 projections reflect additional projected operating losses of \$125 million by year-end. Coupled with the post-petition 2001 losses, the projected total losses may exceed \$180 million by the end of this year. Moreover, the Debtors' projections reflect that during 2002, the Debtors expect to convert \$113 million of assets but produce less than \$4 million of cash flow (excluding extraordinary asset sales).

10. Following the filing of these chapter 11 cases, the Debtors continued to pursue asset divestitures and/or alternative transactions, including the sale of all of the Debtors' assets. To this end, the Debtors retained Dresdner Kleinwort Wasserstein, Inc. ("DKW"). Since the Petition Date, DKW has assisted the Debtors in connection with various sales of the Debtors' assets, including the sale of substantially all of the Debtors' assets, the approval of which is sought herein.

11. In connection with this Sale, DKW contacted or was contacted by approximately 80 potential strategic partners and/or potential financial buyers of

the Acquired Assets. Of the potential buyers, approximately 44 signed confidentiality agreements and, in turn, received a confidential offering memorandum and/or other additional confidential materials. DKW subsequently distributed bid proposals to 5 of these parties that expressed interest in submitting a bid proposal. Thereafter, OEP indicated substantial interest in purchasing the Acquired Assets and assuming the Assumed Liabilities.

12. OEP already has initiated substantial due diligence in connection with this proposed transaction. Significant amounts of financial records and documents have been provided and are being reviewed. Through such efforts, OEP elected to make an offer for the Acquired Assets. Thereafter, the parties negotiated the terms of the Purchase Agreement, which contemplates a sale of substantially all of the assets of the Debtors' business and all of the shares of the companies that operate the businesses held by the Debtors.

## THE PURCHASE AGREEMENT

13. The principal terms of the Purchase Agreement are summarized as follows<sup>3</sup>:

- (a) Purchase Price. In addition to the Warrants<sup>4</sup> and the assumption of the Assumed Liabilities, the consideration for the Acquired Assets (including the Acquired Stock) shall be \$264.5 million, (i) minus the amount, if any, by which the Net Worth of Sellers at Closing is less than \$747.3 million, the Net Worth of Sellers set forth in the Sellers' projected balance sheet as of June 30, 2002 (the "Projected Balance Sheet") or plus the amount, if any, up to the Net Worth Increase Cap, by which the Net Worth of Sellers at Closing is greater than the Net Worth of Sellers set forth in the Projected Balance Sheet; and (ii) minus the amount, if any, by which the net income of Polaroid and its Subsidiaries on a consolidated basis, calculated in accordance with the GAAP Principles, for the period between January 1, 2002 and the Closing Date exceeds the projected net income of Polaroid and its Subsidiaries on a consolidated basis under the 2002 Financial Plan for the same period by more than \$30 million (the "Cash Consideration").
- (b) Purchase Price Adjustment. The Cash Consideration is subject to a purchase price adjustment as set forth specifically in Section 2.06 of the Purchase Agreement.

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<sup>3</sup> The summary of terms of the Purchase Agreement set forth in this Motion is provided as a convenience only. To the extent the summary differs in any way with the terms of the Purchase Agreement, the actual terms of the Purchase Agreement control.

<sup>4</sup> As set forth in the Purchase Agreement the Warrants entitle the Debtors to purchase up to 6% of the Common Stock of the Purchaser.

- (c) Holdback Escrow. The Purchase Agreement provides for the creation of an escrow (the "Holdback Escrow") into which, as part of the Cash Consideration, the Purchaser will at the closing cause to be deposited \$15 million. The Holdback Escrow serves as the sole source of recovery by the Purchaser in connection with any Purchase Price Adjustment.
- (d) Deposit Amount. Following execution of the Purchase Agreement, the Purchaser is required to deliver \$10 million to the Escrow Agent as a deposit. The terms and conditions governing the payment or return of of the Deposit, in whole or in part, is controlled by Section 2.07 of the Purchase Agreement.
- (e) Acquired Assets. The Acquired Assets consist of (i) all of the Sellers' rights, title and interest in and to all of the outstanding capital stock of the Acquired Subsidiaries (the "Acquired Stock") and (ii) all of each of the Sellers' rights, title and interests in and to all of such Seller's properties, assets and rights of every nature, kind and description, tangible and intangible (including goodwill), wherever such properties, assets and rights are located and whether real, personal or mixed, whether accrued, contingent or otherwise, other than the Excluded Assets (such rights, title and interests in and to all such assets, properties and claims collectively together with the Acquired Stock, the "Acquired Assets"), free and clear of any and all Encumbrances (other than Permitted Encumbrances) in accordance with, and with all of the protections afforded by, Bankruptcy Code sections 363 and 365. A specific listing of the Acquired Assets is set forth at Section 2.01 of the Purchase Agreement.
- (f) Excluded Assets. Certain assets, properties, and rights (the "Excluded Assets") are not included in the Acquired Assets and shall be retained by the Sellers. The list of Excluded Assets is set forth in Section 2.02 of the Purchase Agreement.



- (g) Sale Free and Clear. The Acquired Assets are to be transferred free and clear of all liens, claims, encumbrances and interests other than the Permitted Encumbrances and the Assumed Liabilities referenced in the Purchase Agreement.
- (h) Executory Contracts and Leases.
- (i) As soon as practicable after the date of the Purchase Agreement, the Sellers shall move to assume and assign to the Purchaser the Assumed Contracts. The process for identifying, noticing and curing the Assumed Contracts and/or the non-debtor parties thereto is set forth more particularly at Section 6.13 of the Purchase Agreement and in this Motion at 25-28.
- (ii) In addition, subsequent to the date of the Auction but prior to the Closing, Purchaser may notify the Sellers of its intention to assume any other or additional Contract(s) of the Sellers relating to the Business that (x) has not otherwise been rejected, assumed, or assigned by the Sellers or (y) is not the subject of a pending Bankruptcy Court motion of the Sellers to reject, assume, or assign, as of the date of such notice. The process of identifying, noticing and curing Additional Assumed Contracts is set forth more particularly at Section 6.13(b) of the Purchase Agreement.
- (iii) In connection with any such assumption and assignment of the Assumed Contracts, the Purchaser shall be responsible for any Cure Amounts.
- (i) Assumed Liabilities. The Purchaser shall assume no liability or obligation of the Sellers except specific liabilities and obligations of the Sellers (the "Assumed Liabilities"), which the Purchaser shall pay, perform, or discharge

in accordance with their terms, subject to any defenses or claimed offsets asserted in good faith against the obligee to whom such liabilities or obligations are owed. A specific description of the Assumed Liabilities is set forth in Section 2.03 of the Purchase Agreement.

(j) Excluded Liabilities. The Purchaser shall not assume or in any manner whatsoever be liable or responsible for any Liability of any Seller, or any predecessors or Affiliate of any Seller, and any of their respective Representatives or any claim against any and all of the foregoing, whether matured or unmatured, known or unknown, contingent or absolute, direct or indirect, whensoever incurred, whether or not related to the Business, other than the Assumed Liabilities. A general description of the Excluded Liabilities is set forth in Section 2.04 of the Purchase Agreement.

(k) No Solicitation. The Purchase Agreement contains a no solicitation clause pursuant to which the Sellers are prohibited from soliciting a higher and better offer until the date the Bankruptcy Court enters the Sale Procedures Order.

(l) Bidding Protections. Under the terms of the Purchase Agreement, the Purchaser is entitled to certain Bidding Protections.

(x) Termination Payment. In the event the Purchase Agreement is terminated because (i) the Bankruptcy Court approves a Competing Transaction; (ii) the Sellers dispose of, directly or indirectly all or a material portion of the Business or the Acquired Assets or file a plan of reorganization or liquidation for any of the Sellers which does not provide for the sale of the Acquired Assets to the Purchaser under this Agreement, or upon the confirmation of any such plan, whether or not filed by Sellers; (iii) any Seller shall default or Breach any of such Seller's representations and warranties, covenants, agreements, terms or condi-

tions in the Purchase Agreement, the Ancillary Agreements or in any exhibit, schedule, writing, document, instrument or certificate delivered pursuant to the Purchase Agreement or in connection with the transactions contemplated hereby, which default or Breach shall be incapable of being cured or, if capable of being cured, shall not have been cured within 30 Business Days following receipt by the Sellers of written notice of such default or Breach from the Purchaser and which default or Breach would entitle the Purchaser not to consummate the Closing under Section 8.03(a) of the Purchase Agreement; (iv) there shall have been any event, development or change of circumstance that has had, individually or in the aggregate, a Material Adverse Effect; or (v) the Purchaser is ready, willing and able to consummate the Closing and the Sellers have willfully failed or refuse to consummate the Closing within five (5) days after the satisfaction of all conditions precedent to Closing set forth in Sections 8.01 and 8.02 of the Purchase Agreement and provided that, in the case of sub-sections (iii), (iv) and (v) set forth above, the Purchaser is not then in material breach of the Purchase Agreement for which the Sellers had previously notified Purchaser, and provided further that, in the case of sub-section (iii), the Bankruptcy Court enters a final and non-appealable order stating that the Purchaser had the right to terminate this Agreement, then the Sellers shall be obligated to pay the Purchaser an amount equal to \$6,000,000 (the "Termination Payment").

(y) Expense Reimbursement. In the event this Agreement is terminated because (i) a Governmental Authority shall have issued an order, decree or ruling (which order, decree or ruling the parties hereto shall have used their reasonable best efforts to lift), in each case, which has the effect of permanently restraining, enjoining or otherwise prohibiting the Contemplated Transactions and such order, decree, ruling or other action shall have become final and nonappealable or (ii) the Sales Order

shall not have been entered by the Bankruptcy Court and become final and non-appealable on or before June 25, 2002; (iii) the Closing shall not have occurred on or before July 31, 2002; or (iv) pursuant to Section 9.01 (e)(iii) of the Purchase Agreement, the Closing shall not have occurred on or before August 31, 2002, then Polaroid shall be obligated to pay the Purchaser an amount equal to the Purchaser's reasonable fees and expenses (including, without limitation, reasonable attorneys' fees, expenses of its financial advisors, and expenses of other consultants) incurred in connection with the transactions contemplated by this Agreement (the "Expense Reimbursement").

#### **THE BIDDING PROCEDURES**

14. Pursuant to Bankruptcy Rule 6004(f)(1), sales of property outside the ordinary course of business may be by private sale or by public auction. Consistent with Section 6.06 of the Purchase Agreement and bankruptcy auction procedures approved routinely in this District, the Debtors are proposing the Bidding Procedures as procedures most likely to maximize the realizable value of the Acquired Assets for the benefit of the Debtors' estates, creditors and other interested parties. Pursuant to Section 6.06(a) of the Purchase Agreement the Debtors are required to file a motion seeking approval of the Procedures Order as a means of implementing the Sale to the Purchaser. Accordingly, the Debtors seek approval

of the proposed Bidding Procedures, which provide in relevant part as follows:<sup>5</sup>

A. Qualified Bidders. Under the Bidding Procedures, only qualified bidders (the "Qualified Bidders") may submit bids for the Acquired Assets or otherwise participate in the Auction. In order to be deemed a Qualified Bidder, each person other than the Purchaser (a "Potential Bidder") must deliver to the Sellers: (i) an executed confidentiality agreement in form and substance satisfactory to Polaroid; and (ii) current audited financial statements of the Potential Bidder, or, if the Potential Bidder is an entity formed for the purpose of acquiring the Acquired Assets, current audited financial statements of the equity holder(s) of the Potential Bidder, or such other form of financial disclosure acceptable to the Sellers and their advisors, the Committee and the Lenders demonstrating such Potential Bidder's ability to close a proposed transaction. A Qualified Bidder must further produce financial information that demonstrates the financial capability of the Potential Bidder to consummate the Sale, and be deemed by the Sellers, in consultation with counsel to the Committee and the Lenders, reasonably likely (based on availability of financing, experience and other considerations) to submit a bona fide offer and to be able to consummate the Sale if selected as the Successful Bidder.

B. Access to Diligence Materials. The Sellers may afford any Qualified Bidder the opportunity to conduct a due diligence review. The Sellers will designate an employee or other representative to coordinate all reasonable requests for additional information and due diligence access

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<sup>5</sup> In the event of any conflict between this summary of the Bidding Procedures and the terms of the Bidding Procedures set forth in Exhibit M to the Purchase Agreement, the actual terms of the Purchase Agreement will control.

from Qualified Bidders. The Sellers shall not be obligated to furnish any due diligence information after the Bid Deadline. Neither the Sellers nor any of their respective representatives are obligated to furnish any information to any person.

C. Bid Deadline. A Qualified Bidder who desires to make a bid shall deliver a written copy of its bid to (1) Gregg M. Galardi, Skadden, Arps, Slate, Meagher & Flom LLP, One Rodney Square, Wilmington, Delaware 19801; and (2) Kenneth Tuchman, Dresdner Kleinwort Wasserstein Inc. ("Wasserstein"), 1301 Avenue of the Americas, 43rd Floor, New York, NY 10019, not later than 12:00 p.m. (prevailing eastern time) on June 4, 2002 (the "Bid Deadline"). Wasserstein shall then distribute copies of the bids to (i) counsel for the Sellers, (ii) counsel for the Agent for the Lenders, (iii) counsel for the Committee, and (iv) counsel for the Proposed Purchaser. The Sellers shall announce the terms of the highest and best Qualified Bids received by the Bid Deadline, after consultation with the Lenders and the Committee, by 5:00 p.m. (Prevailing eastern time) on June 5, 2002.

D. Bid Requirements. All bids must include the following documents (the "Required Bid Documents"): (i) a letter stating that the bidder's offer is irrevocable until the later of (x) 2 business days after the Acquired Assets have been disposed of pursuant to these Bidding Procedures, or (y) 30 days after the Sale Hearing; (ii) an executed copy of the Purchase Agreement marked and initialed to show those amendments and modifications to such agreement that the Qualified Bidder proposes, including the Consideration (as defined in the Purchase Agreement); (iii) a good faith deposit (the "Good Faith Deposit") in the form of a certified check (or other form acceptable to the Sellers in their sole discretion) payable to the order of the Sellers (or such other party as the Sellers may determine) in an amount equal to ten million dollars

(\$10,000,000) plus 5% of the amount by which the consideration offered by the bidder exceeds the Consideration provided for in the Purchase Agreement with the Purchaser); (iv) written evidence of a commitment for financing or other evidence of ability to consummate the proposed transaction satisfactory to Polaroid, the Committee and the Lenders; and (v) a statement by each Qualified Bidder as to whether such Bidder intends to assume any liabilities associated with any defined benefit plan sponsored by Polaroid.

E. Qualified Bids. A bid will be considered only if the bid (i) is on terms and conditions (other than the amount of the consideration and the particular liabilities being assumed) that are substantially similar to, and are not materially more burdensome or conditional than, those contained in the Purchase Agreement; (ii) is not conditioned on obtaining financing or on the outcome of unperformed due diligence by the bidder; (iii) offers consideration of a value at least \$7,000,000 in excess of the Consideration proposed by the Proposed Purchaser in the Purchase Agreement; (iv) includes a commitment to consummate the sale of some or all of the Acquired Assets within not more than fifteen (15) days after entry of an order by the Bankruptcy Court approving such sale; (v) does not request or entitle the bidder to any break-up fee, termination fee, expense reimbursement, or similar type of payment; (vi) acknowledges and represents that the bidder (x) has had an opportunity to conduct any and all due diligence regarding the Acquired Assets prior to making its offer, (y) has relied solely upon its own independent review, investigation, and/or inspection of any documents and/or the Acquired Assets in making its bid, and (z) did not rely upon any written or oral statements, representations, promises, warranties, or guaranties whatsoever, whether express, implied, by operation of law or otherwise, regarding the Acquired Assets, or the completeness of any information provided in connection therewith or the Auction, except as expressly stated in

these Bidding Procedures; and (vii) is received by the Bid Deadline. A bid received from a Qualified Bidder will constitute a "Qualified Bid" only if it includes all of the Required Bid Documents and meets all of the above requirements. Notwithstanding the foregoing, the Proposed Purchaser shall be deemed a Qualified Bidder, and the Purchase Agreement shall be deemed a Qualified Bid, for all purposes in connection with the bidding process.

F. Auction. If the Sellers receive at least one Qualified Bid or combination of Qualified Bids which the Sellers determine is higher or otherwise better than the bid of the Purchaser set forth in the Purchase Agreement, the Sellers shall conduct an auction of the Acquired Assets, upon notice to all Qualified Bidders who have submitted Qualified Bids, at 9:00 a.m. (Prevailing Eastern Time) on June 7, 2002, at the New York office of Skadden, Arps, Slate, Meagher & Flom LLP, or such later time or other place as agreed by the Proposed Purchaser and Polaroid, after consultation with counsel to the Committee and the Lenders, and which Polaroid shall notify all Qualified Bidders who have submitted Qualified Bids. Only a Qualified Bidder who has submitted a Qualified Bid as determined by Polaroid after consultation with the Committee and the Lenders or as determined by the Court after a disagreement between Polaroid and the Committee or the Lenders is eligible to participate at the Auction. Prior to the Auction, the Sellers will give the Purchaser and all other Qualified Bidders a copy of the highest and best Qualified Bid received. The Purchaser and other parties in interest may seek review by the Bankruptcy Court of the determination by the Sellers whether a bidder is a Qualified Bidder.

During the Auction, bidding shall begin initially with the highest Qualified Bid (taking into account the Termination Payment) and subsequently continue in minimum increments of at least \$1,000,000 higher than the previous bid. Upon conclusion of the Auction, Polaroid, in



consultation with its financial and business advisors and with the agreement of representatives of the Lenders and the Committee, shall (i) review each Qualified Bid or Bids on the basis of financial and contractual terms and the factors relevant to the sale process, including those factors affecting the speed and certainty of consummating the Sale, and (ii) identify the highest and otherwise best offer for the Acquired Assets (the "Successful Bid"), which highest and best offer will provide the largest amount of net value to the Sellers after payment of, among other things, the Termination Payment, if necessary.

G. Court Approval. The Sale Hearing will be held before the Honorable Peter J. Walsh on June 11, 2002 at 4:00 p.m. (prevailing eastern time) at the United States Bankruptcy Court for the District of Delaware, located in Wilmington, Delaware, but may be adjourned or rescheduled without further notice by an announcement of the adjourned date at the Sale Hearing. At the Sale Hearing, the Sellers shall seek entry of the Sale Order authorizing and approving, inter alia, the Sale (i) if no other Qualified Bid is received, to the Purchaser pursuant to the terms and conditions set forth in the Purchase Agreement or (ii) if a Qualified Bidder other than the Purchaser submits the Successful Bid, to the maker of such Successful Bid. Following the Sale Hearing approving the sale of the Acquired Assets to the Successful Bidder, if such Successful Bidder fails to consummate an approved sale because of a breach or failure to perform on the part of such Successful Bidder, the next highest or otherwise best Qualified Bid, as disclosed at the Sale Hearing, shall be deemed to be the Successful Bid and the Sellers shall be authorized, but not required, to consummate the sale with the Qualified Bidder submitting such

bid without further order of the Bankruptcy Court.

#### **BIDDING PROTECTIONS**

15. Pursuant to this Motion, the Debtors seek immediate approval of payment in certain circumstances of a Termination Payment or Expense Reimbursement as set forth in Section 9.02 of the Purchase Agreement.

16. The Purchaser has expended, and likely will continue to expend, considerable time, money and energy pursuing the Sale and has engaged in extended and lengthy, good faith negotiations. The Purchase Agreement is the culmination of these efforts.

17. In recognition of this expenditure of time, energy and resources, and the benefits of securing a "stalking horse" or minimum bid, the Seller has agreed to provide the Bidding Protections to the Purchaser. Specifically, among other things, as set forth more fully in section 9.02(a) of the Purchase Agreement, in the event that the Sellers consummate a Competing Transaction, the Sellers shall pay to the Purchaser a Termination Payment of \$6 million.

18. The Bidding Protections set forth within the Purchase Agreement also provide for an Expense Reimbursement. In the event the Purchase Agreement is termi-

nated because (i) a Governmental Authority shall have issued an order, decree or ruling that has the effect of permanently restraining, enjoining or otherwise prohibiting the Contemplated Transactions and such order, decree, ruling or other action shall have become final and nonappealable, (ii) the Sales Procedures Order shall not have been entered by the Bankruptcy Court and become final and non-appealable on or before May 20, 2002, (iii) the Sale Order shall shall not have been entered by the Bankruptcy Court and become final and non-appealable on or before June 25, 2002, or the Closing shall not occurred within the periods set forth in Section 9.01 of the Purchase Agreement be obligated to pay the Purchaser for the Purchaser's reasonable fees and expenses (including, without limitation, reasonable attorneys' fees, expenses of its financial advisors, and expenses of other consultants) incurred in connection with the transactions contemplated by the Purchase Agreement.

19. The Bidding Protections were a material inducement for, and a condition of, the Purchaser's entry into the Purchase Agreement. The Debtors believe that they are fair and reasonable in view of, among other things, (a) the intensive analysis, due diligence investigation, and negotiation undertaken by the Purchaser in

connection with the Sale and (b) the fact that the efforts of the Purchaser have increased the chances that the Debtors will receive the highest and best offer for the Acquired Assets, by establishing a bid standard or minimum for other bidders, placing the property of the Sellers' estates in a sales configuration mode attracting other bidders to the Auction, and serving as a catalyst for other potential or actual bidders, to the benefit of the Debtors, their estates, their creditors, and all other parties in interest.

20. The Purchaser is unwilling to commit to hold open its offer to purchase the Acquired Assets under the terms of the Purchase Agreement unless the Procedures Order approves the Bidding Protections and authorizes payment of the Expense Reimbursement and the Termination Payment. The Debtors thus request that the Court approve the Bidding Protections and authorize payment of the Expense Reimbursement and the Termination Payment pursuant to the terms and conditions of the Purchase Agreement.

#### **NOTICE OF BIDDING PROCEDURES AND AUCTION**

21. The Debtor shall serve a copy of this Motion on the following parties by first-class mail,

postage prepaid: (i) the Office of the United States Trustee for the District of Delaware; (ii) counsel for the Committee; (iii) counsel for the Agent for the Lenders; (iv) all entities known to have expressed an interest in a Transaction with respect to the Acquired Assets since the Petition Date; (v) the United States Attorney's office; (vi) the Securities and Exchange Commission; (vii) counsel for any other official committee appointed in these cases; and (viii) all other parties that have filed a notice of appearance and demand for service of papers in these bankruptcy cases under Bankruptcy Rule 2002 (the "Bidding Procedures Parties").

22. Assuming the Court enters the proposed Procedures Order, the Debtors (or their agents) no later than five business days after entry of the Procedures Order by the Bankruptcy Court, shall serve a copy of this Motion and the Procedures Order upon the following by first-class mail, postage prepaid: (i) the Office of the United States Trustee for the District of Delaware; (ii) counsel for the Committee (iii) counsel for the Agent for the Lenders; (iv) all entities known to have expressed an interest in a Transaction with respect to the Acquired Assets since the Petition Date; (v) all entities known to have expressed or asserted any liens, claims or encum-

branches in or upon any of the Acquired Assets or the Assumed Contracts; (vi) the United States Attorney's office; (vii) the Securities and Exchange Commission; (viii) the Internal Revenue Service and any other taxing authority known to the Debtors as having a potential lien, claim, encumbrance or other interest in all or any part of the Acquired Assets, if any; (ix) counsel for any other official committee appointed in these cases; (x) parties to governmental approvals or permits; (xi) parties to the Assumed Contracts; (xii) all federal, state and local regulatory or taxing authorities or recording offices which have a reasonably known interest in the relief requested in this Motion; (xiii) the Environmental Protection Agency; and (xiv) all other parties that have filed a notice of appearance and demand for service of papers in these bankruptcy cases under Bankruptcy Rule 2002 (collectively, the "Auction Notice Parties"). In addition, the Debtors may, in their sole discretion, disseminate the Notice of Auction and Sale Hearing by publication in one or more newspapers or trade journals.

23. The Debtors believe that the foregoing notice procedure to the Bidding Procedures Parties and the Auction Notice Parties is sufficient to provide effective notice of the Bidding Procedures and the Auc-

tion to potentially interested parties in a manner designed to maximize the chance of obtaining the broadest possible participation while minimizing the costs to the estates. Accordingly, the Debtors request that the Court find that notice in this manner is sufficient and that no further notice of the Auction or the Bidding Procedures is required.

#### **ASSUMPTION OF LIABILITIES**

24. An essential term of the Purchase Agreement is the Purchaser's assumption of certain Assumed Liabilities. Accordingly, the Sale Order will provide that upon the Closing, the Purchaser will assume and indemnify the Debtors from the Assumed Liabilities and all parties will be enjoined from initiating or continuing any action or any proceeding, enforcement, attachment, collection, or recovery by any manner or means of any claim, obligation, liability, judgment, award, decree or order against the Debtors, or reorganized Debtors relating to the Assumed Liabilities.

#### **ASSUMPTION/ASSIGNMENT OF CONTRACTS AND LEASES**

25. As part of the Motion, the Debtors seek authority to assume and assign the Assumed Contracts to the Purchaser or the Successful Bidder. In connection

with any such assumption and assignment of the Assumed Contracts, the Purchaser shall be responsible for any Cure Amounts.

26. On or before May 15, 2002, the Sellers shall provide notice (the "Assignment Notice") to the non-Seller parties to the contracts on the Preliminary Assumed Contracts List (A) of the Sellers' intention to assume, assign, and transfer such designated Contracts to the Purchaser, (B) of the amount, if any, required to be paid to cure any monetary default related to each such Contract, (C) of the Purchaser's right to amend or modify the list of Assumed Contracts as provided in the Sale Procedures Order and in the Purchase Agreement and (D) of such other matters as requested by the Purchaser.

27. The non-debtor party to the Assumed Contract shall have until June 4, 2002 to object to the assumption and assignment of the Assumed Contract or Cure Amount and must state in its objection with specificity what cure it believes is required (with appropriate documentation in support thereof).

28. If no objection is timely received, the Assumed Contract will be deemed assumed and assigned to the Purchaser, or the Successful Bidder, on the Closing Date (as defined in the Purchase Agreement). Moreover,



the Cure Amount shall be fixed at the amount set forth in the Debtors' Cure Notice, notwithstanding anything to the contrary in any Designated Contract or other document. Thereafter, the non-debtor party to the Designated Contract will (i) be forever barred from asserting (a) any other claim against the Debtors, the Purchaser (or other Successful Bidder, as the case may be) with respect to the Designated Contract arising prior to the assignment and (b) that any additional amounts are due or defaults exist, or conditions to assignment must be satisfied under such Assumed Contract; and (ii) be deemed to have waived and released any right to assert an objection to the proposed assignment of the Assumed Contract or the Cure Amount, including on the basis of lack of consent to the assumption and assignment.

29. If an objection is timely received, a hearing with respect to any such objection may be held (a) at the Sale Hearing or (b) at such other date as the Bankruptcy Court may designate. If the Assumed Contract subject to any such objection is assumed and assigned, the Cure Amount asserted by the objecting party (or such lower amount as may be fixed by the Bankruptcy Court) shall be deposited with and held in a segregated account by the Purchaser or such other person as the Court may

direct pending further order of the Court or mutual agreement of the parties.

30. The Debtors further request that the Debtors and the Purchaser be authorized to settle, compromise, or otherwise resolve any disputed Cure Amounts with the relevant non-debtor party to an Assumed Contract without Bankruptcy Court approval or the need for any other or further (i) order of this Court or (ii) notice to any party.

**EXEMPTION FROM SECURITIES LAWS UNDER 11 U.S.C. § 1145**

31. The Debtors also seek through the Motion to have the Purchaser deemed to be a "successor" to the Debtors under Bankruptcy Code section 1145(a) solely with respect to any such Warrants and any common stock of the Purchaser issued upon the exercise of the Warrants, but not for any other purpose or in any other context. Accordingly, pursuant to Bankruptcy Code section 1145(a)(1), the issuance of the Warrants or any common stock of the Purchaser issued upon the exercise of the Warrants, to the extent either of the foregoing constitutes "securities" under applicable law, would be exempt from the registration requirements of the Securities Act of 1933, as amended, and any other federal, state, or local laws requiring registration for the offer or sale

of securities. Upon the establishment of a mechanism satisfactory to the Purchaser that ensures that the warrants and any common stock of the Purchaser issued upon the exercise of the Warrants, to the extent either of the foregoing constitutes "securities" under applicable law, (i) shall be exempt from the registration requirements of the Securities Act of 1933, as amended, and any other federal, state, or local laws requiring registration for the offer or sale of securities and (ii) shall not cause the Purchaser to have any public reporting obligations under the Securities Exchange Act of 1934, as amended, or otherwise under any federal, state, or local securities laws, the Purchaser shall deliver the Warrants.

#### **NOTICE OF SALE HEARING**

32. Assuming the Court approves the Procedures Order, as soon as practicable after entry of the Procedures Order, but in no event later than May 22, 2002, the Debtors (or their agents) shall cause the Notice of Auction and Sale Hearing, substantially in the form of Exhibit B to the Procedures Order, to be served upon (i) the Auction Notice Parties, (ii) all parties to Assumed Contracts to be assumed and assigned, (iii) all creditors listed in the schedules of assets and liabilities filed

in the Debtors' Chapter 11 cases, and (iv) all creditors who have filed proofs of claim in these cases as of the date of entry of the Procedures Order.

33. In addition, the Debtors shall cause the Notice of Auction and Sale Hearing to be published once in the national editions of the Wall Street Journal and The New York Times as soon as practicable after entry of the Procedures Order, but in no event later than May 22, 2002.

#### **APPLICABLE AUTHORITY**

##### **A. The Sale Is Within The Debtors' Sound Business Judgment**

34. Bankruptcy Code section 363(b)(1) of the Bankruptcy Code provides: "The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate." Section 105(a) of the Bankruptcy Code provides in relevant part: "The Court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."

35. A debtor should be authorized to sell assets out of the ordinary course of business pursuant to Section 363 of the Bankruptcy Code and prior to obtaining a confirmed plan or reorganization if it demonstrates a

sound business purpose for doing so. See In re Delaware & Hudson Ry. Co., 124 B.R. 169 (D. Del. 1991) (sale of substantially all of debtor's assets outside of reorganization plan is appropriate when a sound business reason justifies such a sale); see also Committee of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.), 722 F.2d 1063,1070 (2d Cir. 1983); Titusville Country Club v. Pennbank (In re Titusville Country Club), 128 B.R. 396, 399 (Bankr. W.D. Pa. 1991) (stating that the "sound business purpose test" is appropriate); In re United Healthcare System, Inc., Civil Action No. 97-1159, 1997 WL 176574, at \*7 (D.N.J. Mar. 26, 1997); In re Mid-American Waste System, Case No. 97-104 (PJW) (Bankr. D. Del. Mar. 7, 1997).

36. Courts have applied four factors in determining whether a sound business justification exists:

- (i) whether a sound business reason exists for the proposed transaction;
- (ii) whether fair and reasonable consideration is provided;
- (iii) whether the transaction has been proposed and negotiated in good faith; and
- (iv) whether adequate and reasonable notice is provided.

See In re Delaware & Hudson Ry. Co., 124 B.R. at 175 (adopting Lionel factors to consider in determining whether sound business purpose exists for sale outside

ordinary course of business in this District); see also In re Lionel Corp., 722 F.2d at 1071 (setting forth the "sound business" purpose test); In re Abbotts Dairies of Pennsylvania, Inc., 788 F.2d 143, 147-49 (3d Cir. 1986) (implicitly adopting the articulated business justification test of Lionel standard and adding the "good faith" requirement).

37. There is more than adequate business justification to sell the Acquired Assets to the Purchaser or the Successful Bidder. As set forth above, the Debtors' businesses are deteriorating rapidly. From the Petition Date through the end of 2001, the Debtors incurred over \$58 million of operating losses. In addition, the Debtors' 2002 projections reflect additional projected operating losses of \$125 million by year-end. Coupled with the post-petition 2001 losses, the projected total losses may exceed \$180 million by the end of this year. The Debtors' projections also reflect that during 2002, the Debtors expect to convert \$113 million of assets but produce less than \$4 million of cash flow (excluding extraordinary asset sales).

38. Based upon the results of their exhaustive analysis of the Debtors' ongoing and future business prospects, the Debtors' management and team of financial

advisors have concluded that the best way to maximize the value of their estates is to sell the Debtors' businesses as going business concerns, thereby preserving the substantial goodwill of the businesses, maintaining customer relationships and avoiding a liquidation sale or sales at depressed prices. The Debtors believe that the proposed Sale in accordance with the procedures set forth in the Bidding Procedures is the best method to enhance recoveries to the estates.

39. Moreover, the Purchaser has offered substantial value for the Acquired Assets and is anxious to consummate the transaction. Indeed, as set forth above, the Purchase Agreement requires the Purchaser or the Successful Bidder, respectively, to pay a minimum of \$264.5 million for the Acquired Assets. The Debtors respectfully submit that such consideration is both fair and reasonable. Furthermore, to dispel any doubt, the sale of the Acquired Assets to the Purchaser is subject to competing bids, thereby enhancing the Debtors' ability to receive the highest and best value for their businesses. Consequently, the fairness and reasonableness of the consideration to be received by the Debtors will ultimately be demonstrated by a "market check" through the auction process, which is the best means for estab-

lishing whether a fair and reasonable price is being paid.

40. Moreover, the Purchase Agreement is the product of extensive arm's-length negotiations between Debtors and the Purchaser. These negotiations have involved substantial time and energy by the parties and their professionals, and the Purchase Agreement reflects give-and-take and compromises by both sides.

41. Additionally, the Bidding Procedures ensure that a prospective purchaser will not be able to exert any undue influence over the Debtors. Under the circumstances, this Court should therefore find that (i) the sale of the Acquired Assets is the result of good faith arm's-length negotiations and (ii) the Purchaser or the Successful Bidder is entitled to all of the protections of Bankruptcy Code section 363(m).

42. Finally, all creditors and parties in interest will receive adequate notice of the Bidding Procedures and the Sale Hearing pursuant to the procedures proposed above. Such notice is reasonably calculated to provide timely and adequate notice to the Debtors' major creditor constituencies, those parties most interested in these cases, those parties potentially interested in bidding on the Acquired Assets and others



whose interests are potentially implicated by the proposed Sale. The Debtors submit that such proposed notice is sufficient for entry of the Sale Order and satisfies requisite notice conditions for approval of the Sale under Section 363(b) of the Bankruptcy Code.

43. Under these circumstances, therefore, sound business reasons exist which justify the sale of the Acquired Assets outside the ordinary course of business and prior to the confirmation of a reorganization plan. Accordingly, this Court should approve the Sale.

**B. The Bidding Protections are Warranted**

44. To compensate the Purchaser for serving as a "stalking horse" whose bid will be subject to higher or better offers, the Debtors seek authority to provide the Purchaser with the Bidding Protections in the event they are not the Successful Bidder. The Debtors and the Purchaser believe (i) that the Bidding Protections are reasonable, given the benefits to the estates of having a definitive agreement and the risk to the Purchaser that a third-party offer ultimately may be accepted, and (ii) that the Bidding Protections are necessary to preserve and enhance the value of the Debtors' estates.

45. Bidding incentives encourage a potential purchaser to invest the requisite time, money and effort

to negotiate with a debtor and perform the necessary due diligence attendant to the acquisition of a debtor's assets, despite the inherent risks and uncertainties of the chapter 11 process. Historically, bankruptcy courts have approved bidding incentives similar to the Bidding Protections under the "business judgment rule," which proscribes judicial second-guessing of the actions of a corporation's board of directors taken in good faith and in the exercise of honest judgment. See, e.g., In re 995 Fifth Ave. Assocs., L.P., 96 B.R. 24, 28 (Bankr. S.D.N.Y. 1989) (bidding incentives may "'be legitimately necessary to convince a "white knight" to enter the bidding by providing some form of compensation for the risks it is undertaking'") (citation omitted); In re Marrose Corp., Nos. 89 B 12171 (CB) to 89 B 12179 (CB), 1992 WL 33848, at \*5 (Bankr. S.D.N.Y. Feb. 15, 1992) (stating that "agreements to provide breakup fees or reimbursement of fees and expenses are meant to compensate the potential acquirer who serves as a catalyst or 'stalking horse' which attracts more favorable offers.");<sup>6</sup> see also Official Committee of Subordinated Bondholders v. Integrated

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<sup>6</sup> See also In re Anchor Glass Container Corp., Case No. 96-1434 (PJW) (Bankr. D. Del. Oct. 15, 1996) (unreported order authorizing break-up fee).

Resources, Inc. (In re Integrated Resources, Inc.), 147 B.R. 650, 657-58 (S.D.N.Y. 1992) (establishing three basic factors for determining whether to permit breakup fees in bankruptcy: whether "the relationship of the parties who negotiated the break-up fee [is] tainted by self-dealing or manipulation", whether the "fee hamper[s], rather than encourage[s], bidding", and whether "the amount of the fee [is] unreasonable relative to purchase price"), appeal dismissed, 3 F.3d 49 (2d Cir. 1993).

46. The Third Circuit Court of Appeals has established standards for determining the appropriateness of bidding incentives in the bankruptcy context. In Calpine Corp. v. O'Brien Env'tl. Energy, Inc. (In re O'Brien Env'tl. Energy, Inc.), 181 F.3d 527 (3d Cir. 1999), the Court held that even though bidding incentives are measured against a business judgment standard in nonbankruptcy transactions, the administrative expense provisions of Bankruptcy Code section 503(b) govern in the bankruptcy context. Accordingly, to be approved, bidding incentives must provide some benefit to the debtor's estate. Id. at 533.

47. The O'Brien Court identified at least two instances in which bidding incentives may provide benefit

to the estate. First, benefit to the estate may be found if "assurance of a break-up fee promoted more competitive bidding, such as by inducing a bid that otherwise would not have been made and without which bidding would have been limited." Id. at 537. Second, where the availability of bidding incentives induce a bidder to research the value of the debtor and submit a bid that serves as a minimum or floor bid on which other bidders can rely, "the bidder may 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." Id.

48. Whether evaluated under the "business judgment rule" or the Third Circuit's "administrative expense" standard, the Bidding Protections contemplated by the Purchase Agreement are appropriate. The Purchase Agreement and the Bidding Protections are the product of extensive good faith, arm's-length negotiations between the Debtors and the Purchaser. The Bidding Protections are fair and reasonable in amount, particularly in view of the Purchaser's efforts to date, and the risk to the Purchaser of being used as a "stalking horse."

49. In addition, the amount of the proposed Termination Payment, which is at most approximately 2.27% of the Purchase Price (even without accounting for the

value of the Assumed Liabilities and the Warrants), clearly is within the range of break-up fees typically approved by this Court. See, e.g., Safety-Kleen Corporation, Case No. 00-2303 (PJW) (Bankr. D. Del. March 8, 2002) (approving break up fee of 2.25% of proposed purchase price, including assumed liabilities); The IT Group, Inc., Case No. 02-10118 (MFW) (Bankr. D. Del. Feb. 12, 2002) (approving break up fee of 3.0% of transaction value); Exodus Communications, Inc., Case No. 01-10539 (SLR) (Bankr. D. Del. Feb. 6, 2002) (approving break up fee of 2.2% of proposed purchase price); Fruit of the Loom, Inc., Case No. 99-04497 (PJW) (Bankr. D. Del. Dec. 11, 2001) (approving fixed termination fee of 2.99% and increasing termination fee of at least 2.69% of proposed purchase price, the higher of the two payable upon termination); Polaroid Corp., Case No. 01-10864 (PJW) (Bankr. D. Del. November 19, 2001) (approving break up fee of 3.0% of proposed purchase price); In re Worldwide Direct, Inc., Case No. 99-108 (MFW) (Bankr. D. Del. Feb. 26, 1999) (approving break-up fee of 3.1% of proposed purchase price (and 4% of actual purchase price)); In re Montgomery Ward Holding Corp., Case No. 97-1409 (PJW) (Bankr. D. Del. June 15, 1998) (approving 2.7% break-up

fee); In re Medlab, Inc., Case No. 97-1893 (PJW) (Bankr. D. Del. April 28, 1998) (break-up fee of 3.12% approved); In re US One Communications Corp., Case No. 97-1196 (PJW) (Bankr. D. Del. Oct. 17, 1997) (approving break-up fee of 3%); In re Edison Bros. Stores, Inc., Case No. 95-1354 (PJW) (Bankr. D. Del. Dec. 29, 1995) (approving break-up fee of 3.5%).

50. Further, the Bidding Protections already have encouraged competitive bidding, in that the Purchaser would not have entered into the Purchase Agreement without these provisions. The Bidding Protections thus have "induc[ed] a bid that otherwise would not have been made and without which bidding would [be] limited." See In re O'Brien Env'tl. Energy, Inc., 181 F.3d at 537. Similarly, OEP's offer provides a minimum bid on which other bidders can rely, thereby "increasing the likelihood that the price at which the [Assets will be] sold will reflect [their] true worth." Id. Finally, the mere existence of the Bidding Protections permits the Debtors to insist that competing bids for the Acquired Assets be materially higher or otherwise better than the Purchase Agreement, a clear benefit to the Debtors' estates.

51. In sum, the Debtors' ability to offer the Bidding Protections enables them to ensure the Sale of

the Acquired Assets to a contractually-committed bidder at a price they believe to be fair while, at the same time, providing them with the potential of even greater benefit to the estates. Thus, the Bidding Protections should be approved.

**C. The Sale Satisfies the Requirements of Bankruptcy Code Section 363(f) for a Sale Free and Clear of Liens, Claims, Encumbrances and Interests**

52. Under Bankruptcy Code section 363(f), a debtor-in-possession may sell property free and clear of any interest in such property of an entity other than the estate only if, among other things:

- (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
- (2) such entity consents;
- (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
- (4) such interest is in bona fide dispute; or
- (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

11 U.S.C. § 363(f). Because Bankruptcy Code section 363(f) is drafted in the disjunctive, satisfaction of any one of its five requirements will suffice to approve the

sale of the Acquired Assets "free and clear" of liens, claims, encumbrances and interests (collectively, the "Encumbrances"). See 11 U.S.C. § 363(f); Michigan Employment Security Comm'n v. Wolverine Radio Co. (In re Wolverine Radio Co.), 930 F.2d 1132, 1147 n.24 (6th Cir. 1991) (stating Code section 363(f) written in disjunctive; holding that court may approve sale "free and clear" provided at least one of subsections of Code section 363(f) is met), cert. dismissed 503 U.S. 978 (1992); Citicorp Homeowners Servs., Inc. v. Elliot (In re Elliot), 94 B.R. 343, 345 (E.D. Pa. 1988) (same).

53. The Debtors believe that the only entities holding a lien on the Acquired Assets are the Lenders. The Lenders are aware of the proposed sale and, thus, the Debtors are confident that they will obtain any necessary consent on or before the Sale Hearing, thereby satisfying Bankruptcy Code section 363(f)(2). Moreover, to the extent there exist other possible holders of Encumbrances, the Debtors submit that one of the subsections of Bankruptcy Code section 363(f) applies, and that any such Encumbrance will be adequately protected by having it attach to the net proceeds of the sale, subject to any claims and defenses the Debtors may possess with respect



thereto. Accordingly, the sale should be approved under Bankruptcy Code section 363(f).

**D. The Debtors' Request for Relief from Transfer Taxes under Bankruptcy Code Section 1146(c) Should Be Granted**

54. Bankruptcy Code section 1146(c) provides that "the making or delivery of an instrument of transfer under a plan confirmed under section 1129 of this title, may not be taxed under any law imposing a stamp tax or similar tax." This language has been construed to include transfers pursuant to a sale outside of, but in furtherance of effectuating, a reorganization plan. See City of New York v. Jacoby-Bender, Inc. (In re Jacoby-Bender, Inc.), 758 F.2d 840, 842 (2d Cir. 1985) (stating that where "a transfer . . . is necessary to the consummation of a plan," transfer is "under a plan" within meaning of Code section 1146(c)); In re United Press Int'l, Inc., Case No. 91 B 13955 (FGC), 1992 Bankr. LEXIS 842, at \*4 (Bankr. S.D.N.Y. May 18, 1992) (holding that Code section 1146(c) exemption applied to section 363 sale where "value of Debtor's assets ... likely to deteriorate [during] time necessary to ... confirm a plan."); In re Permar Provisions, Inc., 79 B.R. 530, 533-34 (Bankr. E.D.N.Y. 1987) (stating that determination of

applicability of Code section 1146(c) exemption is same for pre- and post-confirmation dispositions of property, namely "whether the sale of property is essential to confirmation of the plan"); City of New York v. Smoss Enters. Corp. (In re Smoss Enters. Corp.), 54 B.R. 950, 951 (E.D.N.Y. 1985) (stating that 1146(c) was designed to reach transfer on which "plan hinged and which the court had to approve prior to the confirmation").

55. The Debtors seek this Court's approval of the sale of substantially all of the Debtors' businesses operations, thereby facilitating the formulation and ultimate confirmation of a reorganization plan that will yield the highest possible returns to the Debtors' creditors. The Sale is in furtherance of the Debtors' plan of reorganization and, in light of the foregoing, the Debtors respectfully submit that the Sale is a necessary step toward a reorganization plan and, accordingly, should be exempt, under Bankruptcy Code section 1146(c), from any stamp taxes or similar taxes.

**E. The Assumption and Assignment of Executory Contracts and Unexpired Leases Should Be Authorized**

56. Bankruptcy Code section 365(f)(2) provides, in pertinent part, that:

The trustee may assign an executory contract or unexpired lease of the debtor only if --

(A) the trustee assumes such contract or lease in accordance with the provisions of this section; and

(B) adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease.

11 U.S.C. § 365(f)(2). Under Bankruptcy Code section 365(a), a debtor, "subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor." 11 U.S.C. § 365(a). Bankruptcy Code section 365(b)(1), in turn, codifies the requirements for assuming an unexpired lease or executory contract of a debtor. This subsection provides:

(b)(1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee -

(A) cures, or provides adequate assurance that the trustee will promptly cure, such default;

(B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and

(C) provides adequate assurance of future performance under such contract or lease.

11 U.S.C. § 365(b)(1).

57. The meaning of "adequate assurance of future performance" depends on the facts and circumstances of each case, but should be given "'practical pragmatic construction.'" EBG Midtown South Corp. v. McLaren/Hart Env'tl. Engineering Corp. (In re Sanshoe Worldwide Corp.), 139 B.R. 585, 592 (S.D.N.Y. 1992) (citations omitted), aff'd, 993 F.2d 300 (2d Cir. 1993); see Carlisle Homes, Inc. v. Azzari (In re Carlisle Homes, Inc.), 103 B.R. 524, 538 (Bankr. D.N.J. 1988) ("[a]lthough no single solution will satisfy every case, the required assurance will fall considerably short of an absolute guarantee of performance").

58. Among other things, adequate assurance may be provided by demonstrating the assignee's financial health and experience in managing the type of enterprise or property assigned. See, e.g., In re Bygaph, Inc., 56 B.R. 596, 605-06 (Bankr. S.D.N.Y. 1986) (stating that adequate assurance of future performance is present when prospective assignee of lease from debtor has financial resources and has expressed willingness to devote sufficient funding to business in order to give it strong likelihood of succeeding).

59. As set forth in section 2.03 of the Purchase Agreement, to the extent any defaults exist under any executory contract or unexpired lease that is assumed and assigned, the Purchaser or Successful Bidder will cure any such default prior to the assumption and assignment.

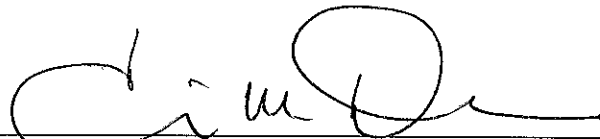
60. Moreover, the Debtors will adduce facts at the Sale Hearing to show the financial credibility, experience in the industry, and willingness and ability to perform under the Assumed Contracts of either the Purchaser or the Successful Bidder.

61. The Sale Hearing will therefore provide the Court and other interested parties the opportunity to evaluate and, if necessary, challenge the ability of the Purchaser or the Successful Bidder to provide adequate assurance of future performance under the contracts to be assumed, as required under Bankruptcy Code section 365(b)(1)(C). The Court should therefore authorize the Debtors to assume and assign contracts as set forth herein.

WHEREFORE, the Debtors respectfully request that this Court enter an order approving (a) the Bidding Procedures; (b) the Bidding Protections, including the Expense Reimbursement and Termination Payment; and (c)

the form and manner of notice of the Notice of Auction and Sale Hearing. In addition, at the Sale Hearing, the Debtors respectfully request that this Court enter an order (i) approving the Purchase Agreement and authorizing the Debtors to (x) sell the Acquired Assets free and clear of all liens, claims, encumbrances and interests, and exempt from any stamp, transfer, recording or similar tax and (y) assume and assign the Assumed Contracts; and (ii) granting such other and further relief as is just and proper.

Dated: Wilmington, Delaware  
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