

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MASSACHUSETTS
CENTRAL DIVISION

In re:

LAVIGNE, INC.,

Debtor.

Chapter 11

Case No. _____ (___)

DEBTOR’S MOTION FOR (I) AN ORDER (A) APPROVING SALE PROCEDURES IN CONNECTION WITH SALE OF SUBSTANTIALLY ALL OF THE DEBTOR’S ASSETS, (B) APPROVING THE BREAK-UP FEE AND EXPENSE REIMBURSEMENT, (C) SCHEDULING AN AUCTION AND HEARING TO APPROVE THE TRANSACTION AND APPROVING THE FORM AND MANNER OF NOTICE THEREOF, AND (D) ESTABLISHING PROCEDURES RELATING TO THE ASSUMPTION AND ASSIGNMENT OF EXECUTORY CONTRACTS; AND (II) AN ORDER (A) APPROVING THE PROPOSED SALE, (B) AUTHORIZING THE ASSUMPTION AND ASSIGNMENT OF CERTAIN EXECUTORY CONTACTS AND UNEXPIRED LEASES, AND (C) GRANTING CERTAIN RELATED RELIEF

LaVigne, Inc., which operates under the trade name LVI Print Optimization (“LVI”) or the “Debtor”), hereby moves pursuant to sections 105, 363 and 365 of title 11 of the United States Code (the “Bankruptcy Code”) and Rules 2002, 6003 and 6004 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”) for entry of (I) an order (a) approving sale procedures in connection with sale of substantially all of the Debtor’s assets (the “Bidding Procedures”), (b) approving the break-up fee, (c) scheduling an auction and hearing to approve the transaction and approving the form and manner of notice thereof, and (d) establishing procedures relating to the assumption and assignment of executory contracts; and (II) an order (a) approving the proposed sale, (b) authorizing the assumption and assignment of certain executory contacts and unexpired leases, and (c) granting certain related relief (the “Motion”).

In support of this Motion, the Debtor respectfully represents as follows:

JURISDICTION

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (M), (N) and (O). Venue of this case and this Motion in this District is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

2. The statutory predicates for the relief requested herein are sections 105(a), 363(b), 363(f), 365, 503 and 507 of the Bankruptcy Code, and Bankruptcy Rules 2002(a)(2), 6003, 6004, 6006(a), 9007 and 9014.

BACKGROUND

3. On the date hereof (the "Petition Date"), the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. Pursuant to sections 1107(a) and 1108 of the Bankruptcy Code, the Debtor is operating its businesses and managing its affairs as a debtor in possession. As of the date hereof, no creditors' committee, trustee or examiner has been appointed in this chapter 11 case.

RELIEF REQUESTED

4. By this Motion, the Debtor seeks entry of an order (a) approving sale procedures in connection with sale of substantially all of the Debtor's assets subject to higher or better offers, (b) approving an expense reimbursement for the Proposed Purchaser (defined below), (c) scheduling an auction and hearing to approve the transaction and approving the form and manner of notice thereof, and (d) establishing procedures relating to the assumption and assignment of executory contracts (such order is referred to as the "Bid Procedures Order"). In addition, the Debtor also seeks, at the conclusion of the Sale Hearing (defined below), entry of an order (a) authorizing the sale of substantially all of the Debtor's assets to HubCast, Inc. (the "Proposed Purchaser"), in accordance with the terms of the Asset Purchase Agreement attached hereto as

Exhibit A (the "Asset Purchase Agreement"), or such other person or entity who is the Prevailing Bidder (defined below), (b) authorizing the assumption and assignment of certain executory contacts and unexpired leases, and (c) granting certain related relief (such order is referred to as the "Sale Order").

PROPOSED SALE AND PROPOSED PURCHASER

5. The assets to be sold consist of substantially all assets, other than those defined in the Asset Purchase Agreement as "Excluded Assets," owned and utilized by LVI in its print operations. In order to better identify those assets, a balance sheet as of May 30, 2009 is attached as Exhibit B, and an Equipment List is attached as Exhibit C. The assets are used in full service offset and digital print operations, including fully automated "web-to-print" or "remote publishing" solutions.

6. Under the terms of the Asset Purchase Agreement, HubCast will purchase, subject to solicitation of higher and better offers and entry of an order of this court approving the transaction, all assets of LVI with the exception of those expressly excluded. Those assets to be purchased include accounts receivable, intellectual property, certain equipment, and shareholder notes due to LVI from insiders. HubCast also has required that LVI assume, and assign to HubCast, certain executory contracts and unexpired leases, including the lease for LVI's location in Worcester, Massachusetts. The assets that are excluded from the scope to be acquired by HubCast include cash on hand and on deposit as of the closing date, as well as all Chapter 5 avoidance actions.

7. In consideration of the acquisition of the Acquired Assets, HubCast has offered to pay cash consideration of \$1,385,0000, subject to offset by any amounts outstanding as of the closing date under certain debtor-in-possession financing being provided by HubCast, and to

assume certain liabilities, including any liability for cure payments due to contract and lease counterparties upon assumption and assignment.

8. HubCast, the proposed purchaser, is a Delaware corporation with a principal place of business in Massachusetts that conducts a worldwide digital print delivery network. Its founder and CEO, as well as a minority shareholder of HubCast, is Toby LaVigne.

9. Mr. LaVigne is also an insider of LVI. Mr. LaVigne is LVI's majority shareholder and is chairman of the board of directors. Mr. LaVigne is also the sole shareholder of INS LLC, which owns the building in which LVI's headquarters are located and which LVI leases under the terms of a triple net lease calling for rent in the amount of \$20,000 per month. Finally, Mr. LaVigne is an obligor under one of the shareholder notes due to LVI, and being acquired by HubCast in the proposed purchase.

10. LVI anticipates that, if HubCast is ultimately determined to be the winning bidder, Christopher Wells, the president and CEO of LVI, will be offered employment in the post-closing acquisition entity. Upon information and belief, terms of employment have not yet been finalized.

BASIS FOR RELIEF

A. Approval Of Bid Procedures

11. The Motion seeks, among other things, approval of the Bidding Procedures to be used in connection with soliciting higher and better offers for the sale of all or substantially all of the Debtor's assets, to establish procedures for the assumption and assignment of executory contracts and unexpired leases, and to approve certain "stalking horse" protections to the Proposed Purchaser.

12. The Bidding Procedures are designed to maximize value for the Debtor's estate and ensure that a marketing and sales process is undertaken by the Debtor in accordance with the timeline required by the Proposed Purchaser and to afford the maximum possible return to creditors, by providing for a closing before the Debtor's projected performance depletes its cash position. The Bidding Procedures are the result of negotiations between the Debtor and the Proposed Purchaser and are summarized as follows:

- Assets to be Sold: The Debtor shall offer for sale all or substantially all of the property and assets (the "Asset Sale") of the Debtor's business as identified in further detail in the Asset Purchase Agreement (collectively, the "Acquired Assets").
- Purchase Price: The consideration to be paid by the Proposed Purchaser for the Acquired Assets under the Asset Purchase Agreement is \$1,385,0000 plus assumption of certain liabilities as set forth in the Asset Purchase Agreement and satisfaction of any cure amounts due upon assumption and assignment of executory contracts, less any amounts advanced by Hubcast in connection with a DIP loan.
- Participation Requirements: Any person who wishes to participate in the bidding process (each, a "Potential Bidder") must become a "Qualifying Bidder." As a prerequisite to becoming a Qualifying Bidder (and, thus, being able to conduct due diligence), a Potential Bidder: (a) must deliver an executed confidentiality agreement in form and substance acceptable to the Debtor no later than thirty (30) calendar days subsequent to the Petition Date; and (b) must be able, as determined by the Debtor, to consummate a transaction based upon the Asset Sale.
- Due Diligence: The Debtor shall afford to any Qualifying Bidder the time and opportunity to conduct reasonable due diligence, subject to parameters that the Debtor, in consultation with its advisors, deem appropriate for certain strategic bidders. The due diligence period shall extend through and include the Bid Deadline (defined below).
- Bid Requirements: To be deemed a "Qualifying Bid," a bid must be received from a Qualifying Bidder by a date no later than the Bid Deadline that:
 - (a) states such Qualifying Bidder offers to purchase all or substantially all of the Acquired Assets upon the terms and conditions substantially as set forth in the Asset Purchase Agreement or pursuant to an alternative structure that the Debtor determines is no less favorable than the terms and conditions of the 7 Asset Purchase Agreement;

- (b) is accompanied by a clean and duly executed asset purchase agreement (the “Modified Asset Purchase Agreement”) and a marked Modified Asset Purchase Agreement reflecting any variations from the Asset Purchase Agreement executed by the Proposed Purchaser;
- (c) states such Qualifying Bidder is financially capable of consummating the transactions contemplated by the Modified Asset Purchase Agreement and provides written evidence in support thereof;
- (d) states such Qualifying Bidder’s offer is irrevocable until the closing of the Asset Sale if such Qualifying Bidder is the Prevailing Bidder;
- (e) contains such financial and other information to allow the Debtor to make a reasonable determination as to the Qualifying Bidder’s financial and other capabilities to consummate the transactions contemplated by the Modified Asset Purchase Agreement, including, without limitation, such financial and other information setting forth adequate assurance of future performance under contracts and leases to be assumed pursuant to section 365 of the Bankruptcy Code in a form requested by the Debtor to allow the Debtor to serve, within one (1) business day after such receipt, such information on counterparties to any contracts or leases being assumed and assigned in connection with the proposed sale that have requested, in writing, such information;
- (f) identifies with particularity each and every executory contract and unexpired lease, the assumption and, as applicable, assignment of which is a condition to closing;
- (g) does not request or entitle such Qualifying Bidder to any break-up fee, expense reimbursement or similar type of payment;
- (h) fully discloses the identity of each entity that will be bidding in the Asset Sale or otherwise participating in connection with such bid, and the complete terms of any such participation;
- (i) is likely to result in a value to the Debtor’s estate, in the Debtor’s reasonable judgment, that is more than the aggregate of the value of the sum of; (i) the Purchase Price; plus (ii) the assumed liabilities, as identified in the Asset Purchase Agreement; plus (iii) the amount of the Expense Reimbursement (as defined in the Asset Purchase Agreement; plus (v) \$25,000;
- (j) does not contain any financing contingencies of any kind; (ii) provides for expiration of any due diligence contingency on or before the Auction Date; and (iii) contains evidence that the Qualifying Bidder has received debt and/or equity funding commitments or has financial resources readily available sufficient in the aggregate to consummate the Sale Transaction, which evidence is reasonably satisfactory to the Debtor;

- (k) includes evidence of authorization and approval from the Qualifying Bidder's board of directors (or comparable governing body) with respect to the submission, execution, and delivery of the Modified Asset Purchase Agreement; and
- (l) provides a cash purchase deposit equal to five percent (5%) of the purchase price contained in the Modified Asset Purchase Agreement.

A competing bid satisfying all the above requirements shall constitute a Qualifying Bid.

- Bid Deadline: A Qualifying Bidder that desires to make a bid shall deliver a written or electronic copy of its bid by a date no later than thirty-five (35) calendar days subsequent to the entry of the Bid Procedures Order.
- Evaluation of Qualifying Bids: The Debtor shall make a determination regarding whether a bid is a Qualifying Bid and shall notify bidders whether their bids have been determined to be qualified by a date no later two (2) days prior to the Auction Date (defined below). Prior to the Auction, the Debtor shall determine, in their reasonable judgment, which of the Qualifying Bids is the highest or best value to the Debtor. If no timely, conforming Qualifying Bids other than the Asset Purchase Agreement submitted by the Proposed Purchaser are submitted by the Bid Deadline, the Debtor shall not hold an Auction and instead shall request at the Sale Hearing that this Court approve the Asset Purchase Agreement with the Proposed Purchaser.
- Auction: In the event that the Debtor timely receives one or more Qualifying Bids other than the Asset Purchase Agreement, the Debtor shall, on a date to be determined by the Debtor, conduct the Auction no later than the date that is five (5) business days after the Bid Deadline (the "Auction Date").
- Auction Procedures: The Auction shall be governed by the following procedures:
 - (a) only the Proposed Purchaser, who shall be deemed a Qualifying Bidder, and the other Qualifying Bidders shall be entitled to make any subsequent bids at the Auction;
 - (b) the Qualifying Bidders shall appear in person at the Auction or through a duly authorized representative;
 - (c) bidding shall commence at the amount of the highest Qualifying Bid submitted by the Qualifying Bidders prior to the Auction;
 - (d) Qualifying Bidders may then submit successive bids in increments of at least \$25,000 higher than the bid at which the Auction commenced and then continue in minimum increments of at least \$25,000 higher than the previous bid; provided that the Debtor shall retain the right to modify the bid increment requirements at the Auction;

- (e) Qualifying Bidders may make one or more credit bids of some or all of their claims to the full extent permitted by section 363(k) of the Bankruptcy Code, and the Proposed Purchaser shall be entitled to include as part of any and all of its subsequent bids a credit for the Expense Reimbursement and the amount advanced as DIP financing;
 - (f) all Qualifying Bidders shall have the right to submit additional bids and make additional modifications to the Asset Purchase Agreement or Modified Asset Purchase Agreement at the Auction, provided that any such modifications to the Asset Purchase Agreement or Modified Asset Purchase Agreement on an aggregate basis and viewed in whole, shall not be less favorable to the Debtor than the terms of the Asset Purchase Agreement;
 - (g) the Auction shall continue until there is only one offer that the Debtor determines, subject to this Court's approval, is the highest or best from among the Qualifying Bids submitted at the Auction (the "Prevailing Bid"). In making this decision, the Debtor shall consider, without limitation, the amount of the purchase price, the form of consideration being offered, the likelihood of the bidder's ability to close a transaction and the timing thereof, the number, type and nature of any changes to the Asset Purchase Agreement requested by each bidder, and the net benefit to the Debtor's estate. The bidder submitting such Prevailing Bid shall become the "Prevailing Bidder," and shall have such rights and responsibilities of the purchaser, as set forth in the applicable Asset Purchase Agreement or Modified Asset Purchase Agreement; and
 - (h) within one (1) day after adjournment of the Auction, the Prevailing Bidder shall complete and execute all agreements, contracts, instruments and other documents evidencing and containing the terms and conditions upon which the Prevailing Bid was made.
- Sale Hearing: The Prevailing Bid (or the Asset Purchase Agreement if no Qualifying Bid other than that of the Proposed Purchaser is received) will be subject to approval by this Court. The hearing to approve the Prevailing Bid (or the Asset Purchase Agreement if no Qualifying Bid other than that of the Proposed Purchaser is received) (the "Sale Hearing") shall take place no later than two (2) business days following the conclusion of the Auction. The Debtor will seek the entry of an order of this Court at the Sale Hearing approving and authorizing the Asset Sale to the Proposed Purchaser or to the Qualified Bidder Submitting the highest and best offer at the Auction, as applicable, on terms and conditions consistent with the Asset Purchase Agreement, as may be amended and modified.

B. Approval of Notice Procedures

13. Not later than two (2) business days after entry of the Bid Procedures Order, the Debtor will serve a copy of the Notice of Auction and Sale Hearing, substantially in the form attached hereto as Exhibit D (the “Sale Notice”), as well as a copy of this Motion and the Bid Procedures Order by first-class mail postage prepaid upon (i) counsel to all parties holding liens in the Acquired Asset, if known, and otherwise, directly upon such lienholders; (iii) the United States Trustee for the District of Massachusetts; (iv) the Internal Revenue Service; (v) the Massachusetts Department of Revenue; (vi) the counterparties to each of the Assumed and Assigned Contracts; (vii) the Debtor’s twenty (20) largest unsecured creditors; (viii) all parties that have requested special notice pursuant to Bankruptcy Rule 2002; and (ix) all other entities known to have expressed an interest in a transaction with respect to all or part of the Acquired Assets.

C. Approval of Procedures for Assumption and Assignment of Executory Contracts and Unexpired Leases

14. To facilitate and effect an Asset Sale, the Debtor will be required to assume and assign to the Prevailing Bidder certain executory contracts and unexpired leases (the “Assumed and Assigned Contracts”). No later than twenty (20) days prior to the Sale Hearing, the Debtor shall cause notice to be provided to all counterparties to executory contracts and unexpired leases that may be Assumed and Assigned Contracts, substantially in the form attached hereto as Exhibit E (the “Cure Notice”). The Cure Notice shall provide the counterparties to the possible Assumed and Assigned Contracts notice of the amount that the Debtor believes must be cured upon the assumption and assignment as required under section 365 of the Bankruptcy Code (the “Cure Amount”).

15. Except as may otherwise be agreed to by the parties to an Assumed and Assigned Contract (with the consent of the Prevailing Bidder), on the Effective Date, the Prevailing Bidder shall cure those defaults under the Assumed and Assigned Contracts that need to be cured in accordance with section 365(b) of the Bankruptcy Code by (a) payment of the undisputed Cure Amounts, and/or (b) reserving amounts with respect to the disputed Cure Amounts. In the event of a dispute regarding the Cure Amount, any payments required, following entry of a Final Order resolving such dispute, shall be made as soon as practicable thereafter. If no objection is timely received, the Cure Amount set forth in the Cure Notice shall be controlling notwithstanding anything to the contrary in any Assumed Contract or other documents as of the date of the Cure Notice.

16. Objections, if any, to the proposed assumption and assignment of the Assumed Contracts, including, but not limited to, objections relating to the Cure Amount and/or adequate assurances of future performance, must be filed on or before 4:00 p.m. (prevailing Eastern Time) at least five (5) business days prior to the Sale Hearing (the “Objection Deadline”).

D. Approval of Buyer Protections

17. To induce the Proposed Purchaser to expend the time, energy and resources necessary to submit a stalking horse bid, the Debtor has agreed to provide the Proposed Purchaser, and seek this Court’s approval of, certain bid protections to the Proposed Purchaser pursuant to the terms of the Asset Purchase Agreement. As set more specifically below, the Debtor has agreed to provide the Proposed Purchaser with a right to expense reimbursement of \$75,000 to reimburse the Proposed Purchaser for out-of-pocket expenses in connection with the sale transaction.

18. By this Motion, the Debtor seeks authorization to pay the Proposed Purchaser expense reimbursement (the “Expense Reimbursement”) in the amount of \$75,000 if the Debtor accepts an alternative transaction for the sale of all or substantially all of the assets of the Debtor to any party other than the Proposed Purchaser, payoff exclusively from sale proceeds.

19. The Expense Reimbursement has been calculated as an estimate of the amount necessary to reimburse the Proposed Purchaser for its reasonable out-of-pocket costs and expenses (including legal fees and expenses) incurred in connection with the formation, negotiation and documentation of the Asset Purchase Agreement and to fund reasonable expenses the Proposed Purchaser incurs with respect to obtaining financing and its participation in the sale process. The amount has been established through this estimation process, rather than left for determination, in order to afford potential bidders the certainty of a fixed minimum overbid requirement, and capped so as not to chill the submission of such overbids.

20. It is understood by the Debtor, that in entering into the Asset Purchase Agreement, the Proposed Purchaser has provided a material benefit to the Debtor and its creditors by increasing the likelihood that the best possible price for the Debtor’s assets will be received. The Expense Reimbursement induced the Proposed Purchaser to submit a bid that will serve as a minimum floor bid on which the Debtor, its creditors and other bidders may rely. Accordingly, the Debtor represents that the Expense Reimbursement is reasonable and appropriate and represent the best method for maximizing value for the benefit of the Debtor’s estate.

E. Disposition of Proceeds

21. Finally, the Debtor seeks authority to make certain disbursements of proceeds at the closing of the sale.

22. The Debtor's assets are subject to a first priority, properly perfected, all asset lien held by TD BankNorth securing a claim of approximately \$1,145,379. In an executed Memorandum of Understanding, TD BankNorth has agreed that, in the event that it receives payment of \$850,000 at closing, it will allow the remainder of the funds to which it would otherwise be entitled to be held in escrow subject to its lien, and to allow carveouts against any amount above the \$850,000 to be used to fund certain obligations under a confirmed plan of reorganization. Because TD BankNorth has a properly perfected secured claim in the proceeds, and because making the payment at closing enables the estate to realize the benefit of the carveouts, the Debtor seeks authority to make payment to TD BankNorth at closing.

23. The Debtor also seeks leave to make payments at closing to John Ippolito of Axia Advisors, the proposed investment banker, and to Scott McDermott, the proposed financial consultant. The Debtor has filed motions to engage both pursuant to §328 of the Bankruptcy Code.

24. Mr. Ippolito's proposed engagement as an investment banker will require that he continue efforts commenced prepetition in an effort to maximize value through market to potential overbidders, oversee the bid process and participate in the auction process. Mr. Ippolito's services will both improve the chances of increasing the consideration received through conduct of a robust sale process, and will provide a market check that will give comfort to the Debtor, the creditors and the Court that market value for the Assets has been received.

25. Under the terms of Mr. Ippolito's proposed engagement, a success fee of \$125,000 will come due to Mr. Ippolito at closing, less prepayments made in periodic installments for which authority has also been sought.

26. Mr. McDermott's employment as a financial advisor has also been brought before the Court for approval. Prepetition, prior to Mr. McDermott's engagement, the Debtor suffered from less than optimal financial controls and financial reporting deficiencies. The Debtor also had insufficient experience to chart a course out of its financial challenges. Mr. McDermott remedied those deficiencies. Mr. McDermott also provides the ability to produce financial reports in the form, and with the credibility, necessary to run an appropriate sale process. Finally, and perhaps most importantly, given the previously outlined interrelationship between LVI and the proposed purchaser, HubCast, Mr. McDermott provides the degree of independence necessary to ensure that the Debtor's participation in the sale process is in no way influenced by insider relationships.

27. Due to liquidity constraints, Mr. McDermott has agreed to defer a portion of his normal and customary fee until closing. Therefore, although it is anticipated that Mr. McDermott will devote forty (40) hours per week to the Debtor's operations and sale efforts during the post-petition period, which at his normal and customary rate would yield a fee of \$12,000 per week, Mr. McDermott has agreed to accept a flat rate of \$6000 per week provided that he receive a payment of \$50,000 from the closing proceeds.

28. The Debtor, therefore, seeks authority to make the payments to TD BankNorth, Mr. Ippolito and Mr. McDermott from the closing proceeds as indicated.

APPLICABLE AUTHORITY

A. Bidding Procedures

- (i) The Bidding Procedures are Fair and are Designed to Maximize the Value Received for the Assets Given the Financial Exigencies Facing The Debtor**

29. The Bidding Procedures proposed herein are designed to maximize the value received for the Debtor's business by facilitating a competitive bidding process in which all

Potential Bidders are encouraged to participate and submit competing bids, taking into account the financial exigencies facing the Debtor.

30. The Bidding Procedures provide Potential Bidders with more than the twenty day notice envisioned by Rule 2002 of the Federal Rules of Bankruptcy Procedures, which, given the Debtor's projected cash flow constraints, effectively rendering the Debtor unable to operate past Mid-August, is sufficient notice and an opportunity to acquire the information necessary to submit a timely and informed bid. While the liquidity crisis facing the Debtor precludes a more extended process, the Debtor has already undertaken substantial marketing efforts through its proposed investment banker, Axia Partners, has been in contact and has already executed non-disclosure agreements with at least one potentially interested party, and, therefore, believes that the thirty-five day period between entry of an order allowing this motion and the deadline for submission of bids provides a reasonable means for maximizing the return from sale of the Debtor's assets within the financial constraints faced.

31. At the same time, the Bidding Procedures provide the Debtor with the opportunity to consider all competing offers and to select the highest or best offer for the completion of an Asset Sale. Entering into the Sale Term Sheet and the Asset Purchase Agreement with the Proposed Purchaser insures fair value by setting a minimum purchase price and testing the price in the marketplace. Accordingly, the Debtor and all parties in interest can be assured that, taking into account the financial condition of the Debtor, the consideration paid for the Debtor's business will be fair, reasonable, and in the best interest of the Debtor's estate and creditors, and there are sound business reasons to approve the Bidding Procedures.

(ii) The Expense Reimbursement is Reasonable and Appropriate

32. Approval of the Expense Reimbursement is addressed in the Local Rules of this Court, pursuant to Local Rule 6004-1(a)(1)(B)(1) prior approval of a breakup or similar fee is only required if the proposed bid protector exceeds five percent (5%) of the purpose price.

33. The sole bid protection being provided to the Purchaser is a \$75,000 expense reimbursement. While that marginally exceeds five percent of the cash consideration, being approximately 5.7% of the cash consideration and 5.5% when cure amounts are factored into the consideration, due to the complexity of the deal and the speed with which it has proceeded, the \$75,000 expense reimbursement is reasonable.

34. After considering the reasonableness of bidding incentives, courts have approved a range of break-up fees as a percentage of the purchase price in the range provided here as being appropriate under the facts and circumstances of the case. See In re Chi-Chi's Inc., Case No. 03-13063 (Bankr. D. Del. November 4, 2003) (fee of 5.1% permitted); In re Great Northern Paper Inc., Case No. 03-10048 (Bankr. D. Me. February 18, 2003) (fee of 5.4% plus reimbursement of expenses upheld); In re FSC Corp., Case No. 00-b-04659 (Bankr. N.D. Ill. February 28, 2000) (break-up fee of 3.4% plus reimbursement of expenses is reasonable).

35. The Expense Reimbursement should be approved because it is reasonable, will not chill bidding and is necessary to further this process of selecting additional bids. The Proposed Purchaser has made clear that it will not proceed as a stalking horse without the protection of ensuring that its expenses are reimbursed if the process it served to put into motion results in some other party owning the Debtor's assets. The Debtor's ability to continue to shop its business for a higher or better offer, or even to market test the Proposed Purchaser's offer, would be eliminated if the Debtor could not secure the Asset Purchase Agreement, inclusive of the Break-Up Fee provision.

36. The Asset Purchase Agreement will form the basis upon which other bids will be submitted and evaluated. The minimum-required overbid exceeds the Expense Reimbursement, and, therefore, the Expense Reimbursement both establishes a threshold for overbids and will not result in a less beneficial net return from the sale.

37. Payment of the Expense Reimbursement will not harm creditors. Pursuant to the Asset Purchase Agreement, the Debtor will incur the obligation to pay the Expense Reimbursement only if the Debtor accepts an alternative transaction for the sale of all or substantially all of the assets of the Debtor to any party other than the Proposed Purchaser and that sale closes. The Expense Reimbursement will be paid from the proceeds of an alternative transaction in which the Prevailing Bidder is not the Proposed Purchaser, and the minimum overbid will exceed the Expense Reimbursement. In light of the benefit to the Debtor's estate that is realized by having an agreed-upon Asset Purchase Agreement, which thereby enables the Debtor to preserve the value of its estate and promote more competitive bidding, approval of the Expense Reimbursement is warranted.

B. The Assumption, Assignment and Cure Procedures Provide Adequate Notice and Opportunity to Object and Should be Approved

38. Section 365(a) of the Bankruptcy Code provides, in pertinent part, that a debtor in possession "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).

39. The standard governing bankruptcy court approval of a debtor's decision to assume or reject an executory contract or unexpired lease is whether the debtor's reasonable business judgment supports assumption or rejection. See e.g., In re Stable Mews Assoc., Inc., 41 B.R. 594, 596 (Bankr. S.D.N.Y. 1984). If the debtor's business judgment has been reasonably exercised, a court should approve the assumption or rejection of an unexpired lease or executory

contract. See In v: BankVest Capital Corp., 360 F.3d 291, 301 (1st cir. 2004), quoting In v. BankVest Capital Corp., 290 B.A. 443, 448 (1st Cir. B.A.P. 2003) See also, Group of Institutional Investors v. Chicago M. St. P. & P.R.R. Co., 318 U.S. 523 (1943); Sharon Steel Corp., 872 F.2d 36, 39-40 (3d Cir. 1989). The business judgment test “requires only that the trustee [or debtor in possession] demonstrate that [assumption or] rejection of the contract will benefit the estate.” Wheeling-Pittsburgh Steel Corp. v. West Penn Power Co. (In re Wheeling-Pittsburgh Steel Corp.), 72 B.R. 845, 846 (Bankr. W.D. PD 1987) (quoting Stable Mews Assoc., 41 B.R. at 596). Any more exacting scrutiny would slow the administration of a debtor’s estate and increase costs, interfere with the Bankruptcy Code’s provision for private control of administration of the estate, and threaten the court’s ability to control a case impartially. See Richmond Leasing Co. v. Capital Bank. N.A., 762 F.2d 1303, 1311 (5th Cir. 1985).

40. Two conditions are imposed upon a debtor's ability to assume and assign an executory contract. First, in order to assume an agreement, pursuant to section 365(b)(1) of the Bankruptcy Code, a debtor must “cure, or provide adequate assurance that the Debtor will promptly cure,” any default, including compensation for any “actual pecuniary loss” relating to such default. 11 U.S.C. § 365(b)(1).

41. Once an executory contract is assumed, the trustee or debtor in possession may elect to assign such contract. See In re Rickel Home Centers, Inc., 209 F.3d 291, 299 (3d Cir. 2000) (“[t]he code generally favors free assignability as a means to maximize the value of the Debtor’s estate”); see also In Re Headquarters Dodge, Inc., 13 F.3d 674, 682 (3d Cir. 1994) (noting purpose of section 365(f) is to assist trustee in realizing the full value of the Debtor’s assets).

42. Pursuant to Section 365(a) of the Bankruptcy Code, assignment is conditioned on "adequate assurance of future performance [being] provided." 11 U.S.C. § 365(f)(2). The meaning of "adequate assurance of future performance" depends on the facts and circumstances of each case, but should be given "practical, pragmatic construction." See Carlisle Homes, Inc. v. Arrari (In re Carlisle Homes, Inc.), 103 B.R. 524, 538 (Bankr. D.N.J. 1989); see also In re Natco Indus., Inc., 54 B.R. 436, 440 (Bankr. S.D.N.Y. 1985) (adequate assurance of future performance does not mean absolute assurance that the debtor will thrive and pay rent). Among other things, adequate assurance may be given by demonstrating the assignee's financial health and experience in managing the type of enterprise or property assigned. Accord In re Bygaph, Inc., 56 B.R. 596, 605-06 (Bankr. S.D.N.Y. 1986) (adequate assurance of future performance is present when prospective assignee of lease from the debtor has financial resources and has expressed willingness to devote sufficient funding to business in order to give it strong likelihood of succeeding).

43. Here, the Prospective Purchaser is a thriving digital print delivery network owned and controlled largely by a financially stable domestic investment company. The entity has committed to funding both default cures and post-closing operations.

44. Finally, the mechanism for establishing the amount of the cure obligations is reasonable and appropriate. The requirement of notice of a proposed assumption and assignment and cure established in the Bid Procedures of 20 days prior to the Sale Hearing comports with Rule 2002(a) of the Federal Rules of Bankruptcy Procedure.

45. Section 105(a) of the Bankruptcy Code provides a bankruptcy court with broad powers in the administration of a case under chapter 11. Section 105(a) provides that "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the

provisions of [chapter 11].” 11 U.S.C. § 105(a). Provided that a bankruptcy court does not employ its equitable powers to achieve a result not contemplated by the Bankruptcy Code, the exercise of its section 105(a) power is proper. See In re Fesco Plastics Corp., 996 F.2d 152, 154 (7th Cir. 1993); Pincus v. Graduate Loan Ctr. (In re Pincus), 280 B.R. 303, 312 (Bankr. S.D.N.Y. 2002). Pursuant to section 105(a), a court may fashion an order or decree that helps preserve or protect the value of a debtor’s assets. See e.g., In re Chinichian, 784 F.2d 1440, 1443 (9th Cir. 1986) (“Section 105 sets out the power of the bankruptcy court to fashion orders as necessary pursuant to the purposes of the Bankruptcy Code”); In re Cooper Props. Liquidating Trust, Inc., 61 B.R. 531, 537 (Bankr. W.D. Tenn. 1986) (noting that a bankruptcy court is “one of equity and as such it has a duty to protect whatever equities a debtor may have in property for the benefit of their creditors as long as that protection is implemented in a manner consistent with the bankruptcy laws”).

46. The Debtor respectfully submits that the proposed cure procedures for the identification and payment of Cure Amounts (the “Cure Procedures”) are appropriate and reasonably tailored to provide non-Debtor counter-parties to potential Assumed and Assigned Contracts with adequate notice of the proposed assumption and assignment of their applicable contract, as well as the proposed Cure Amounts related thereto, if any. Such non-Debtor parties to the potential Assumed and Assigned Contracts will then be given an opportunity to object to such notice. The Cure Procedures further provide that, in the event an objection is not resolved, this Court will determine related disputed issues, including any adequate assurance of future performance issues. Accordingly, the Debtor submits that implementation of the proposed Cure Procedures is appropriate in these cases.

C. The Sale of Assets Is Authorized under Bankruptcy Code Section 363(b)

47. At the conclusion of the Sale Hearing, the Debtor will also request that the Court approve the sale of the Acquired Assets to the Proposed Purchaser or such other Qualifying Bidder who submits the Prevailing Bid.¹ The Debtor submits that the sale of the Acquired Assets to the Proposed Purchaser pursuant to the Asset Purchase Agreement, or such as the agreement as the Debtor may reach with the party submitting the Prevailing Bid, is in the best interest of the Debtor's estate and its creditors.

48. Section 363(b)(1) of the Bankruptcy Code provides that a debtor, "after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b)(1). Although section 363 of the Bankruptcy Code does not specify a standard for determining when it is appropriate for a court to authorize the use, sale or lease of property of the estate, courts have required that such use, sale or lease be based upon a debtor's sound business judgment. See, e.g., In re Decora Indus., Inc., 2002 WL 32332749, *2 (D.Del. 2002); In re Delaware & Hudson Ry. Co., 124 B.R. 169, 176 (D. Del. 1991); In re Eagle Picher Holdings, Inc., 2005 Bankr. LEXIS 2894, at ¶ 3 (Bankr. S.D. Ohio 2005); In re Lionel Corp., 722 F.2d 1063, 1071 (2d Cir. 1983).

49. The business judgment rule shields a debtor's management from judicial second-guessing. See In re Johns-Manville Corp., 60 B.R. 612, 615-16 (Bankr. S.D.N.Y. 1986) ("a presumption of reasonableness attaches to a debtor's management decisions"). Once a debtor articulates a valid business justification, "[t]he business judgment rule 'is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good

¹ To be clear, this portion of the relief is requested to be entered after the Sale Hearing in the form of the Sale Order. The Debtor hereby reserves the right to file supplemental pleadings in support of its request for entry of the Sale Order.

faith and in the honest belief that the action was in the best interests of the company.’” In re Integrated Resources, Inc. 147 B.R. 650, 656 (Bankr. S.D.N.Y. 1992) (quoting Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985)).

50. Thus, if a debtor’s actions satisfy the business judgment rule, then the transaction in question should be approved under section 363(b)(1). When applying the ‘business judgment’ standard, courts show great deference to a debtor’s business decisions. See In re Trans World Airlines., 2001 Bankr. LEXIS 267 at *45-50 (Bankr. D. Del. 2001) (describing business judgment rule as “very deferential standard”); In re First Wellington Canyon Assocs., 1989 U.S. Dist. LEXIS 10687 at *8-9 (N.D. Ill. 1989) (“Under this test, the debtor’s business judgment . . . must be accorded deference unless shown that the bankruptcy’s decision was taken in bad faith or in gross abuse of the bankrupt’s retained discretion.”).

51. The Debtor has insufficient liquidity to continue operations beyond mid to late August. Faced with the prospect of laying off all employees and ceasing operations of a century-old business, the Debtor engaged an investment banker for the purpose of seeking a purchaser of the Company’s assets. Two parties submitted offers and the offer submitted by the Prospective Purchaser was the highest and best. Negotiations were conducted with the Prospective Purchaser resulting in an agreement under which Hubcast agreed to provide DIP financing in an amount of up to \$125,000 should cash flow prove insufficient to the Debtor’s assets, and would subject their offer to a sales process for a period of time that is reasonable under the circumstances in which overbids will be solicited. A sale will occur to the party submitting the highest and best offer.

52. Particularly in light of the financial exigencies facing the Debtor, the proposed process of subjecting a stalking horse bid from a party that has agreed to fund operations in the interim, without which funding the Debtor would cease operations with an attendant loss of jobs

and the Closing of a century old business, the Debtor's decision to proceed with the sale process is consistent with sound business judgment. Under the circumstances, the Bidding Procedures and Auction process represent the best way to achieve substantial consideration for the Debtor's businesses, and offer the best resolution to the Debtor's current financial situation in the manner that will maximize the value available to the Debtor's estate and its creditors.

53. The decision to sell all of the Debtor's assets pursuant to section 363 of the Bankruptcy Code is an exercise of sound business judgment under the circumstances. Courts repeatedly have concluded that the sale of a debtor's assets is appropriate where there are sound business reasons and no evidence of fraud or collusion. See In re Abbotts Dairies of Penn., Inc., 788 F.2d 143 (3rd. Cir. 1986) (sale of all assets appropriate where purchaser acted in good faith, and there was no fraud, collusion between the purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders); In re Delaware & Hudson Ry. Co., 124 B.R. 169, 178-79 (D. Del. 1991); Stephens Industries, Inc. v. McClung, 789 F.2d 386 (6th Cir. 1986) (sale of substantially all assets of estate authorized where "a sound business purpose dictates such action"); In re Coastal Industries, Inc., 63 B.R. 361 (Bankr. N.D. Ohio 1986). As discussed, there is business justification for the proposed transaction, evidence that the Bidding Procedures have been pursued in good faith, and there is no fraud or collusion between the Debtor and any Potential Bidder.

D. The Sale of Assets Free and Clear of Liens, Claims, and Interests Is Authorized Under Bankruptcy Code Section 363(f).

54. The Debtor respectfully submits that it is appropriate to sell the Acquired Assets free and clear of all interests, pursuant to section 363(f) of the Bankruptcy Code, with all such interests attaching to the net sale proceeds of the Acquired Assets to the extent applicable.

Section 363(f) of the Bankruptcy Code authorizes a debtor to sell assets free and clear of liens, claims, interests and encumbrances if:

- a. applicable nonbankruptcy law permits sale of such property free and clear of such interests;
- b. such entity consents;
- c. such interest is a lien and the price at which such property is to be sold is greater than the value of all liens on such property;
- d. such interest is in bona fide dispute; or
- e. 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). This provision is supplemented by section 105(a) of the Bankruptcy Code, which provides that “[t]he Court may issue any order, process or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code].” 11 U.S.C. § 105(a).

55. Because section 363(f) of the Bankruptcy Code is drafted in the disjunctive, satisfaction of any one of its five requirements will suffice to permit the sale of the Acquired Assets free and clear of the interests. In re Dundee Equity Corp., 1992 Bankr. LEXIS 436, *12 (Bankr. S.D.N.Y. 1992) (“Section 363(f) is in the disjunctive, such that the sale free of interest concerned may occur if any one of the conditions of § 363(f) have been met.”); In re Wolverine Radio Co., 930 F.2d 1132, 1147 n.24 (6th Cir. 1991) (stating that Bankruptcy Code section 363(f) is written in the disjunctive; holding that the court may approve the sale 'free and clear' provided at least one of the subsections of section 363(f) is met).

56. The Debtor believes that one or more of the tests under section 363(f) will be satisfied with respect to the transfer of the Assets pursuant to a Sale Order. In particular, the

Debtor believes only one lienholder, T.D. Bank North, has an interest in the Assets, and it was, or will, consent to the proposed sale, therefore, section 363(f)(2) will be satisfied.²

NOTICE

57. Notice of this Motion has been given to (i) the United States Trustee for the District of Massachusetts; (ii) the Internal Revenue Service; (iii) the Massachusetts Department of Revenue; (iv) the counterparties to each of the Assumed and Assigned Contracts; (v) all parties known to Debtor who have or may have asserted liens against any of the Debtor's assets; (vi) the Debtor's twenty (20) largest unsecured creditors; (vii) all parties that have requested special notice pursuant to Bankruptcy Rule 2002; and (viii) all other entities known to have expressed an interest in a transaction with respect to all or part of the Acquired Assets. The Debtor submits that no further notice is required.

NO PRIOR REQUEST

58. No previous motion for the relief requested herein has been made to this or any other court.

CONCLUSION

Wherefore, the Debtor respectfully requests that the Court enter orders as follows:

1. Approving the Bid Procedures, including, but not limited to, approval and payment of the Expense Reimbursement as a super-priority administrative claim free and clear of all liens, claims and encumbrances from the sale proceeds, the notice procedures, the contract assumption and cure provisions and such other relief as is set forth in the Bid Procedures Order attached hereto as Exhibit F.

2. At the conclusion of the sale process as set forth in the Bid Procedures Order, conduct a final hearing regarding the proposed sale, and, at the conclusion of that hearing, enter an order approving the sale of substantially all assets of the Debtor, other than the Excluded Assets, free and clear of all liens, claims and encumbrances with such liens claims and

² Two other creditors hold liens on certain assets of the Debtor. G.E. Capital and TCF each hold a lien on a particular press. Neither press is being sold to the Proposed Purchaser, and each press will be surrendered to the appropriate lienholder on the Effective Date of the Debtor's plan of reorganization.

encumbrances to attach to the proceeds of sale, determining the purchaser to be a good faith purchaser entitled to the protections of §363(m) of the Bankruptcy Code, authorizing the assumption and assignment of the Assigned Contracts and authorizing the provisions for determining and resolving cure claims arising upon such assumption and assignment and containing such other provisions as the Court deems appropriate and as may be reasonably required by the purchaser;

3. Authorizing the payments as set forth above to T.D. BankNorth, John Ippolito of Axia, and Scott McDermott; and

4. Granting the relief requested herein and such other and further relief as the Court deems just and proper.

Respectfully submitted,

LAVIGNE, INC.

By its proposed counsel,

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Dated: July 9, 2009