

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

In re	§	
XTREME POWER INC.,	§	CASE NO. 14-10096
XTREME POWER SYSTEMS, LLC, and	§	CASE NO. 14-10095
XTREME POWER GROVE, LLC	§	CASE NO. 14-10097
Jointly Administered Debtors.	§	CHAPTER 11
	§	(Jointly Administered Under
	§	CASE NO. 14-10096)

**DEBTORS' EXPEDITED MOTION FOR ORDERS (A)(I) APPROVING BIDDING
PROCEDURES IN CONNECTION WITH THE SALE BY PUBLIC AUCTION OF
EQUIPMENT OF XTREME POWER GROVE, LLC, LOCATED IN GROVE,
OKLAHOMA; (II) SCHEDULING A HEARING TO CONSIDER THE SALE OF XP
OWNED EQUIPMENT; AND (III) APPROVING FORM AND MANNER OF NOTICE
THEREOF; (B) AUTHORIZING AND APPROVING THE SALE OF THE XP OWNED
EQUIPMENT FREE AND CLEAR OF LIENS, CLAIMS, ENCUMBRANCES AND
INTERESTS**

Xtreme Power Inc. ("**XPI**"), Xtreme Power Systems, LLC ("**XPS**"), and Xtreme Power Grove, LLC ("**XPG**") (collectively, the "**Debtors**" or the "**Company**"), hereby submit this motion (the "**Motion**") requesting entry of an order pursuant to sections 105 and 363 of the United States Bankruptcy Code, 11 U.S.C. §§ 101 *et seq.* (the "**Bankruptcy Code**"), Rules 2002, 6004, and 9014 of the Federal Rules of Bankruptcy Procedure (the "**Bankruptcy Rules**") and Rule 6004(b) of the Local Bankruptcy Rules of the United States Bankruptcy Court for the Western District of Texas (the "**Local Rules**") (a)(i) Approving Bidding Procedures in Connection with the Sale by Public Auction of Equipment Of Xtreme Power Grove, LLC, Located In Grove, Oklahoma; (ii) scheduling a hearing to consider the sale of the XP Owned Equipment; and (iii) approving the form and manner of notice thereof; and (b) authorizing and approving the sale of the XP Owned Equipment free and clear of liens, claims, encumbrances and interests. In further support of this Motion, the Debtors represent as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding within the meaning of 28 U.S.C. § 157(b)(1). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

BACKGROUND

2. On January 22, 2014, the Debtors commenced the above-captioned chapter 11 cases (the “**Chapter 11 Cases**”) by each filing a voluntary petition for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Western District of Texas (the “**Court**”).

3. The Debtors are no longer operating any business but continue to manage their assets as debtors-in-possession, pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. An official Committee of Unsecured Creditors of XPS was formed and has retained counsel who are active in these cases. No trustee or examiner has been appointed in these Chapter 11 Cases.

4. A detailed description of the Debtors’ business and the reasons for filing these Chapter 11 Cases is set forth in the Declaration of Ken Hashman in Support of Chapter 11 Petitions and First Day Motions and Applications (the “**Hashman Declaration**”), which is incorporated herein by reference.

CASE HISTORY

5. By order dated April 11, 2014, the Court approved a sale of substantially of the assets of XPI and XPS, and the assignment of certain contracts, to Younicos Inc., for \$14 million in cash. The transaction closed effective April 14, 2014. Subsequently the Debtors have rejected most of their non assigned contracts. Debtor XPG has been involved in extended negotiations and a mediation with Horizon Battery over their contract for sale of XPG’s assets located in Grove, Oklahoma. The Debtors, the Committee, and several significant creditors engaged in a

mediation to try and resolve the allocation of the Younicos sale proceeds among the estates, and other related issues, and have made substantial progress. The Debtor filed a plan that was premised on reaching agreement with its major creditors on the allocation, but has not pursued the plan because the mediation has not been completed and, while a number of issues have been tentatively resolved, no final agreement has been reached.

THE DEBTORS' BATTERY BUSINESS AND ITS FAILED ATTEMPTS TO CLOSE CONTRACT FOR SALE OF XP OWNED EQUIPMENT TO HORIZON BATTERY

6. Affiliate Debtor Xtreme Power Grove, LLC (“XPG”), had a license from Horizon Batteries, LLC, to manufacture an advanced lead acid battery that XPS used in some of its energy storage systems and also sold to third parties. XPS purchased the batteries from XPG and held them in inventory or sold them to customers. However, XPG shut down its battery manufacturing operations in early 2013 and no longer manufactured or sold them after that date. XPG had manufactured the batteries at a leased facility near the city of Grove, Oklahoma.

7. The Grove facility was surrendered as part of a global compromise between the Debtors and Horizon Batteries that is memorialized by [Doc #419] Agreed Order Approving Settlement Of Debtors’ Motion To Determine The Existence Of A “Bona Fide” Dispute Pursuant To 11 U.S.C. § 363(F)(4) By And Among Debtors And The HB Parties, dated March 19, 2014. (“**Horizon Settlement Order**”).

8. One of the provisions of the Horizon Settlement Order calls for an inventory of the XP Owned Equipment and subsequent Disposition of the XP Owned Equipment.¹ After investigation, Horizon and XP agreed that the list of the XP Owned Equipment that was attached to the XPG Bankruptcy Schedules as Exhibit B-29 is substantially accurate. Under these provisions, Horizon Battery made an offer of \$1.5 million to purchase the XP Owned

¹ Capitalized terms are defined in the Settlement Order.

Equipment; XP countered by adding a condition for an earnest money deposit; and Horizon accepted the counteroffer on April 23, 2014. However, after several months, the parties had not been able to agree on the form of the transaction documents to memorialize their contract, and so the sale was not presented to this Court for approval and has not closed.²

9. The Horizon Settlement Order allowed the Bankruptcy Court to order mandatory, non-binding mediation with respect thereto on motion of any party, which Debtors subsequently requested, and the Court ordered on July 14, 2014 (Order, Doc #731). The mediation commenced on July 24, 2014, and was continued by agreement of the parties; however, an impasse was reached when Horizon Battery unequivocally and materially breached the parties contract, and on September 4, 2014, the mediation was concluded.

GORDIAN GROUP'S MARKETING EFFORTS

10. Gordian Group is the Debtors' investment banker and has spent substantial time and effort marketing the XP Owned Equipment from the very beginning of this case. Gordian Group's efforts with respect to the XP Owned Equipment have spanned the time prior to the Horizon Settlement Order, the subsequent period leading up to the Debtor's contract with Horizon Battery, and during the extended negotiations with Horizon since that time. Gordian Group has engaged in extensive solicitation and marketing of the XP Owned Equipment, including multiple tours of the Grove facility with potential purchasers. Gordian Group's efforts were a critical part of the Debtor reaching its agreement with Horizon, and were invaluable in assisting the Debtor and its other professionals during the long negotiations since that time. Now

² An additional provision of the Horizon Settlement Order called for XP to deliver to Horizon Battery the Resolution License. The parties were unable to agree on the form of the Resolution License, and so it has not yet been delivered. On April 14, XP sold the patents that were subject to the Resolution License to Younicos, so that, currently, Younicos is the record owner of those patents, not XP. XP remains willing to issue the Resolution License if agreement on the form can be reached (or on whatever form the Court orders, as provided for in the Horizon Settlement Order); however, XP understands that Younicos is also willing to issue the Resolution License under certain conditions.

that Horizon has breached the contract, Gordian will take the lead in running the auction contemplated by this Motion. The Debtors expect that Gordian's fees and reasonable expenses will be paid from proceeds at closing, and a fee application will be filed and hearing requested to occur at the same date as the Prevailing Bidder Sale Hearing (defined below).

THE PROPOSED SALE OF THE ASSETS

11. The Debtors have determined in the sound exercise of their business judgment to sell by Public Auction all the equipment (the "**XP Owned Equipment**") of Xtreme Power Grove, LLC, that is located In Grove, Oklahoma. The Debtors aver that the process for the marketing and sale of the XP Owned Equipment in accordance with the Bidding Procedures set forth in Annex 1 hereto (1) provides an appropriate process and timetable for the Debtors to utilize in pursuing sales of the XP Owned Equipment, (2) will promote the Debtors' efforts to maximize the value of their estates, and (3) are in the best interests of the Debtors' and their estates, creditors and other stakeholders.

12. A prompt public auction sale of the XP Owned Equipment, as requested in this Motion and as conducted according to the Bidding Procedures set forth in Annex 1, will maximize the value of the Debtors' estates and is in the best interests of creditors. The Bidding Procedures are reasonably designed to maximize the value to be obtained from a sale of the XP Owned Equipment.

1. Good and sufficient reasons exist and the best interests of their estates will be served by, this Court's approval of (1) a sale of the XP Owned Equipment to the highest cash bidder(s); (2) the Bidding Procedures; and (3) the form and manner of serving the Bid Procedures Order and publication notice of the auction and the Bidding Procedures in a form and manner to be determined by the Debtors (the "**Publication Notice**.")

2. The Debtors have articulated good and sufficient reasons for, and the best interests of their estates will be served by, this Court scheduling one or more Sale Hearings to consider granting the other relief requested in the Motion, including approval of the sale and the transfer of the XP Owned Equipment, either in individual units or in lots, to the Prevailing Bidder(s) free and clear of all liens, claims, interests and encumbrances pursuant to section 363(f) of the Bankruptcy Code.

SUMMARY OF RELIEF REQUESTED

13. The Debtors seek, pursuant to sections 105 and 363 of the Bankruptcy Code, Bankruptcy Rules 2002, 6004, and 9014 and Local Bankruptcy Rule 6004(b), the Court's approval of: (a) the institution of certain bidding, auction and notice procedures for the solicitation and consideration of competing offers for the XP Owned Equipment (collectively, the "**Bidding Procedures**," attached as Annex 1 to the Bidding Procedures Order (as defined below)); and (b) the sale of the XP Owned Equipment free and clear of Claims (as defined below) to the Prevailing Bidder(s) (as defined in the Bidding Procedures).

14. More specifically, through this Motion, the Debtors request that the Court enter two orders: (i) a Bidding Procedures Order (as defined below) and (ii) the Prevailing Bidder(s) Sale Order (defined below).

15. First, at a hearing (the "**Bidding Procedures Hearing**") to be held on September 25, 2014 at 1:30 pm or as soon thereafter as the Court may take up the matter, the Debtors request entry of an order in substantially the form attached hereto as Exhibit A (the "**Bidding Procedures Order**"), which authorizes and approves (i) the Debtors' proposed procedures for the submission and consideration of bids for the XP Owned Equipment pursuant to the Bidding Procedures set forth in Annex 1 attached to the proposed Bidding Procedures Order and incorporated herein in its entirety by reference; (ii) the form and manner of notice of these

matters to be served on parties in interest; (iii) the date of a hearing to approve the Sale, and (iv) the deadline for objections to the Sale.

PROPOSED NOTICE, BIDDING AND OTHER PROCEDURES

A. Proposed Bidding Procedures

16. The Debtors believe the proposed Bidding Procedures will maximize the realizable value of the XP Owned Equipment for the benefit of the Debtor's estate, creditors, and other interested parties. The Bidding Procedures contemplate an auction process pursuant to which sealed bids for the XP Owned Equipment may be subject to higher or otherwise better offers if the Debtors believes continuation of the auction is appropriate. The Bidding Procedures primarily benefit the Debtors by creating a bidding process that ensures, among other things: (a) structure and logistical certainty to the process; (b) the Debtors' ability to compare the value of competing offers; (c) that potential purchasers have the financial wherewithal to timely consummate a purchase of the XP Owned Equipment.

17. The Bidding Procedures are set forth in detail in Annex 1 to the Bidding Procedures Order. The Bidding Procedures describe, among other things, the requirements for prospective purchasers to participate in the bidding process, the availability and conduct of due diligence by prospective bidders, the deadline and requirements for submitting a bid, the method and criteria for bids to become "qualified," the manner in which qualified bids may be improved, and the criteria for selecting the Prevailing Bidder(s), including if deemed appropriate by the Debtors in their sole discretion, additional rounds of auction bidding.

18. As described more fully in the Bidding Procedures, only Qualified Bidders who timely submit Qualified Bids will be eligible to participate in the Auction. The specific terms of the Bidding Procedures are set forth on Annex 1 to the attached proposed Bidding Procedures Order.

19. The Debtors will consider all proposals that are deemed qualified in accordance with the Bidding Procedures. The Bidding Procedures establish the terms and conditions the Prevailing Bidder(s) must satisfy to acquire the XP Owned Equipment.

20. The Debtors reserve the right to modify the Bidding Procedures as necessary, including, without limitation, any deadlines thereunder, if such modification is determined by the Debtors in their sole discretion, after or as they deem appropriate to maximize value for the Debtors' estates and creditors. In addition, the Debtors reserve their right to withdraw any or all of the XP Owned Equipment from the sale at any time prior to the Court's approval of such sale.

21. The Debtors will present the results of the Auction to the Court at a hearing to be held after the Auction (the "**Prevailing Bidder Sale Hearing**"), at which time certain findings will be sought from the Court regarding the Auction, including, among other things, that: (a) the Auction was conducted and the Prevailing Bidder(s) were properly selected in accordance with these Bidding Procedures; (b) the Auction was fair in substance and procedure; and (c) consummation of the purchase of the XP Owned Equipment by the Prevailing Bidder(s) will provide the highest or otherwise best value for the XP Owned Equipment and is in the best interests of the Debtors, their estates and creditors.

22. The Debtors believe that the Bidding Procedures are fair and reasonable, and are not likely to dissuade any serious potential purchaser from bidding for the XP Owned Equipment.

BASIS FOR RELIEF

A. Approval of the Bidding Procedures Is Appropriate and in the Best Interests of the Debtors' Estates and Their Creditors

(1) The Bidding Procedures Are Appropriate under the Circumstances

23. Maximization of proceeds received by the estate is one of the dominant goals of any proposed sale of estate property. In the hope of maximizing the value received by the estate, courts typically establish procedures that are intended to enhance competitive bidding by, among other things, setting forth the rules that will govern the auction process. *See, e.g., In re Fin. News Network, Inc.*, 126 B.R. 152, 156 (Bankr. S.D.N.Y. 1991) (“court-imposed rules for the disposition of assets . . . [should] provide an adequate basis for comparison of offers, and [should] provide for a fair and efficient resolution of bankrupt estates”); *In re Edwards*, 228 B.R. 552, 561 (Bankr. E.D. Pa. 1998) (bid procedures should allow for “an open and fair public sale designed to maximize value for the estate”).

24. Although the Debtors and Gordian Group commenced efforts to market the XP Owned Equipment for sale prior to the filing of this Motion, other than the contract with Horizon Battery, no other binding offers have been received. Notwithstanding that, the Debtors believe that the Bidding Procedures will help the Debtors receive the maximum value for the Assets by establishing a competitive bidding process where potentially interested parties can step forward and bid, knowing, among other things, the quality of the title they will receive if they are the Prevailing Bidder. The Debtors believe that the Bidding Procedures will encourage active bidding from seriously interested parties who possess the financial and operational capacity to purchase the XP Owned Equipment. Furthermore, the proposed Bidding Procedures will allow the Debtors to conduct an auction in a controlled, fair and competitive fashion that will serve to dispel any doubt as to the best and highest offer reasonably available for the XP Owned Equipment. Therefore, the Debtors believe the Bidding Procedures will confirm that they are receiving the greatest possible consideration for the XP Owned Equipment.

25. Procedures to dispose of assets, similar to the proposed Bidding Procedures, have been approved in this case and in other large, complex chapter 11 cases in this and nearby Districts. *See, .e.g., In re VPR Operating, LLC*, Case No. 13-10599 (Bankr. W.D. Tex. 2013) (Dkt 256); *In re ATP Oil & Gas Corporation*, Case No. 12-36187 (Bankr. S.D. Tex. 2013) (Dkt 1419); *In re ASARCO LLC*, Case No. 05-21207 (Bankr. S.D. Tex. July 1, 2008) (Dkt 8262). In sum, the Debtors believe that the proposed Bidding Procedures provide an appropriate framework for expeditiously establishing that the Debtors are receiving the best and highest offer for the XP Owned Equipment. Accordingly, the proposed Bidding Procedures are reasonable, appropriate and within the Debtors' sound business judgment under the circumstances.

(2) *The Proposed Notice, the Proposed Date for the Sale Objection Deadline, and the Proposed Date for the Prevailing Bidder Sale Hearing Are Appropriate*

26. Under Bankruptcy Rules 2002(a) and (c), the Debtors are required to notify their creditors of any proposed sale of their assets, including a disclosure of the time and place of the Prevailing Bidder Sale Hearing, the terms and conditions of the sale and the deadline for filing any objections related thereto. The Debtors submit that notice of the sale by service of the Bidding Procedures Order on or before September 26, 2014, fully complies with Bankruptcy Rules 2002(a) and (l) and includes adequate information to (a) enable interested parties to bid on the XP Owned Equipment pursuant to the Bidding Procedures and by the Bid Deadline, and (b) inform such parties of the Prevailing Bidder Sale Hearing and the relevant Sale Objection Deadline related thereto (collectively, the "**Notice Objectives**").

27. The Debtors submit that the proposed Sale Objection Deadline is reasonable and appropriate under the circumstances. Parties in interest are provided adequate notice in accordance with the Bankruptcy Rules and the Local Rules.

28. The Debtors submit that the notice to be provided through service of the Bidding Procedures Order and the method of service proposed herein fully complies with the requirements set forth in Bankruptcy Rule 2002 and constitutes good and adequate notice of the Bidding Procedures and the subsequent proceedings related thereto, including the proposed dates for (a) the Bid Deadline; (b) the Sale Objection Deadline; and (c) the Prevailing Bidder Sale Hearing. Therefore, the Debtors respectfully request this Court to approve the proposed notice procedures.

B. Approval of the Proposed Sale Is Appropriate and In the Best Interests of the Debtors' Estates and Creditors

(1) *The Sale of the XP Owned Equipment is Within the Sound Business Judgment of the Debtors and Should be Approved*

29. Section 363(b)(1) of the Bankruptcy Code provides that “[t]he trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.” *See* 11 U.S.C. § 363(b)(1); *see also* *Cajun Elec. Power Coop., Inc. v. Official Comm. of Unsecured Creditors (In re Cajun Elec. Power Coop., Inc.)*, 119 F.3d 349, 354 (5th Cir. 1997). A debtor must demonstrate sound business judgment for a sale of assets outside the ordinary course of business. *See, e.g., Institutional Creditors of Cont’l Airlines, Inc. v. Cont’l Air Lines, Inc. (In re Cont’l Air Lines, Inc.)*, 780 F.2d 1223, 1226 (5th Cir. 1986). Pursuant to section 105(a), a bankruptcy court “may issue any order, process or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code].” *See* 11 U.S.C. § 105(a).

30. The “sound business judgment” test requires a debtor to establish four elements in order to justify the sale or lease of property outside the ordinary course of business, namely, (a) that a “sound business purpose” justifies the sale of assets outside the ordinary course of business, (b) that adequate and reasonable notice has been provided to interested persons, (c) that the debtors have obtained a fair and reasonable price, and (d) that the sale was negotiated

in good faith. *In re Abbotts Dairies of Pennsylvania, Inc.*, 788 F.2d 143 (3d Cir. 1986); *Titusville Country Club v. Pennbank (In re Titusville Country Club)*, 128 B.R. 396, 399 (Bankr. W.D. Pa. 1991); *In re Sovereign Estates, Ltd.*, 104 B.R. 702, 704 (Bankr. E.D. Pa. 1989). In this case, as set forth more fully herein, the Debtors submit that the decision to proceed with a sale of the XP Owned Equipment to the Prevailing Bidder(s), if any, is based upon sound business judgment and should be approved. A debtor's showing of a sound business purpose need not be unduly exhaustive but, rather, a debtor is "simply required to justify the proposed disposition with sound business reasons." *In re Baldwin United Corp.*, 43 B.R. 888, 906 (Bankr. S.D. Ohio 1984). Whether or not there are sufficient business reasons to justify a transaction depends upon the facts and circumstances of each case. *In re Lionel Corp.*, 722 F.2d 1063, 1071 (2d Cir. 1983).

31. Additionally, section 105(a) of the Bankruptcy Code provides a bankruptcy court with broad powers in the administration of a case under the Bankruptcy Code. 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 [the Bankruptcy Code]." 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. *In re Fesco Plastics Corp.*, 996 F.2d 152,154 (7th Cir. 1993); *Pincus v. Graduate Loan Ctrs. (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 Chinichian v. Campolongo (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 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 its creditors as long as that protection is implemented in a manner consistent with the bankruptcy laws.”).

32. The Debtors submit that more than ample business justification exists to sell the XP Owned Equipment to the Prevailing Bidder(s) pursuant to the Bidding Procedures, thereby satisfying the first prong of *Abbotts Dairies* and that further justification for the sale of the XP Owned Equipment will be demonstrated at the Prevailing Bidder Sale Hearing. In addition, the Debtors believe that the Bidding Procedures are the best method by which they can obtain the most value for the XP Owned Equipment and provide interested parties with accurate and reasonable notice of the XP Owned Equipment sale. The Bidding Procedures will allow the Debtors to conduct the Auction in a controlled, fair and competitive fashion that will encourage participation by financially capable bidders who demonstrate the ability to close a transaction, thereby increasing the likelihood that the Debtors will receive the best possible consideration for the XP Owned Equipment by helping ensure a competitive and fair bidding process.

33. The Debtors believe the sale of the XP Owned Equipment must occur quickly in order to maximize the value of their estates, and that significant time spent in Chapter 11 increases the risk of value deterioration. The Debtors’ have no use for the XP Owned Equipment other than to maximize its cash value in a sale for the highest prices obtainable. Absent a prompt sale of the XP Owned Equipment pursuant to the procedures and timelines proposed, the Debtors believe that the value of the XP Owned Equipment will continue to deteriorate and that administrative costs of dealing with the XP Owned Equipment will continue to increase.

34. Finally, while there is no hard deadline for disposal of the XP Owned Equipment, each day that passes without a sale is another day in which administrative expenses can occur,

and a delay of the final date for plan confirmation and the commencement of distributions to creditors. Therefore, it is imperative that the Debtors complete a sale of the Assets as quickly as possible. The Debtors respectfully submit that the relief sought by this Motion is not only reasonable, but necessary, to maximize the value of their estates for the benefit of the Debtors and their stakeholders.

35. In addition, the notice described herein and in the Bidding Procedures Order is designed to provide adequate notice to all potentially interested parties, including those who have previously expressed an interest in purchasing the XP Owned Equipment in the past year. Accordingly, the proposed sale of the XP Owned Equipment satisfies the second prong of the *Abbotts Dairies* standard.

36. The Bidding Procedures are also designed to maximize the value received for the XP Owned Equipment. The process proposed by the Debtors provides bidders ample time and information to submit a timely bid, while maximizing the sale price of the XP Owned Equipment. Along with the Debtors' marketing process, the Bidding Procedures are designed to ensure that the XP Owned Equipment will be sold for the highest or otherwise best possible purchase price. The Debtors are subjecting the value of the XP Owned Equipment to market testing and permitting Qualified Bidders to bid on the XP Owned Equipment at the Auction, thereby subjecting the proposed sale to a market check through the solicitation of competing bids in a court-supervised process. Accordingly, the Debtors and all parties in interest can be assured that the consideration received for the XP Owned Equipment will be fair and reasonable thereby satisfying the third prong of the *Abbotts Dairies* standard.

(2) *The Prevailing Bidder Should Be Entitled to “Good Faith” Purchaser Protection Under Section 363(m) of the Bankruptcy Code*

37. The Debtors request that the Court find that the Prevailing Bidder(s) are entitled to the benefits and protections provided by section 363(m) of the Bankruptcy Code in connection with the sale of the Assets.

38. Section 363(m) of the Bankruptcy Code provides, in pertinent part:

The reversal or modification on appeal of an authorization under subsection (b) . . . of this section of a sale . . . of property does not affect the validity of a sale . . . under such authorization to an entity that purchased . . . such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale . . . were stayed pending appeal.

11 U.S.C. § 363(m).

39. Section 363(m) of the Bankruptcy Code thus protects the purchaser of assets sold pursuant to section 363 from the risk that it will lose its interest in the purchased assets if the order allowing the sale is reversed on appeal. As required by section 363(m) of the Bankruptcy Code, the Bidding Procedures have been proposed in good faith and provide for both the Debtors and the potential purchaser(s) to act in good faith in bidding at the auction of the XP Owned Equipment.

40. Although the Bankruptcy Code does not define “good faith,” “[t]he requirement that a purchaser act in good faith . . . speaks to the integrity of his conduct in the course of the sale proceedings. Typically, the misconduct that would destroy a purchaser’s good faith status at a judicial sale involves fraud, collusion between the purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders.” *Abbotts Dairies*, 788 F.2d at 147; *In re Sasson Jeans, Inc.*, 90 B.R. 608, 610 (S.D.N.Y. 1988); *In re Pisces Leasing Corp.*, 66 B.R. 671, 673 (E.D.N.Y. 1986) (examining facts of each case, concentrating on “integrity of [an

actor's] conduct in the course of the sale proceedings") (citing *In re Rock Indus. Mach. Corp.*, 572 F.2d 1195, 1198 (7th Cir. 1978)).

41. Here, the sale of the XP Owned Equipment will be in good faith. As discussed throughout this Motion, and as will be further demonstrated at the Prevailing Bidder Sale Hearing, any sale agreement will be the culmination of an auction process in which all parties will have conducted themselves on an arm's-length, good faith basis.

42. Moreover, the Debtors will not choose a Prevailing Bidder(s) whose good faith under section 363(m) of the Bankruptcy Code can reasonably be doubted, and would be prepared to present the Court with sufficient evidence to allow the Court to find that the "good faith" standard of section 363(m) of the Bankruptcy Code has been satisfied. Finally, the Bidding Procedures are designed to ensure that no party is able to exert undue influence over the process. Under the circumstances, the Prevailing Bidder(s) should be afforded the protections that section 363(m) of the Bankruptcy Code provides to a good faith purchaser.

43. All parties in interest will receive notice of the XP Owned Equipment sale pursuant to service of the Bidding Procedures Order and will be provided with an opportunity to be heard. The Debtors submit that such notice is adequate for entry of the Prevailing Bidder Sale Order and satisfies the requisite notice provisions required under sections 363(b) and 365 of the Bankruptcy Code.

(3) *The Proposed Asset Sale Satisfies the Requirements of Section 363(f) of the Bankruptcy Code*

44. Under section 363(f) of the Bankruptcy Code, a debtor in possession may sell all or any part of its property free and clear of any and all liens, claims, or interests in such property if: (a) such a sale is permitted under applicable non-bankruptcy law; (b) the party asserting such a lien, claim, or interest consents to such sale; (c) the interest is a lien and the purchase price for

the property is greater than the aggregate amount of all liens on the property; (d) the interest is the subject of a bona fide dispute; or (e) the party asserting the lien, claim, or interest could be compelled, in a legal or equitable proceeding, to accept a money satisfaction for such interest. 11 U.S.C. § 363(f); *Citicorp Homeowners Serv., Inc. v. Elliot (In re Elliot)*, 94 B.R. 343, 345 (E.D. Pa. 1988) (noting that section 363(f) of the Bankruptcy Code is written in the disjunctive; therefore, a court may approve a sale “free and clear” provided at least one of the subsections is met). Furthermore, courts have held that they have the equitable power to authorize sales free and clear of interests that are not specifically covered by section 363(f). *See In re Trans World Airlines, Inc.*, 2001 WL 1820325, at *3, 6 (Bankr. D. Del. Mar. 27, 2001); *Volvo White Truck Corp. v. Chambersburg Beverage, Inc. (In re White Motor Credit Corp.)*, 75 B.R. 944, 948 (Bankr. N.D. Ohio 1987).

45. The Debtors submit that the sale of the XP Owned Equipment will satisfy the requirements of section 363(f) of the Bankruptcy Code. For example, the Debtors will provide all parties asserting Claims against the Assets, including, but not limited to, all creditors and interest holders of the Debtors, with notice of, and an opportunity to object to, the sale of such XP Owned Equipment. Absent objection, each such party will be deemed to have consented to the sale of the XP Owned Equipment. In addition, the Debtors believe that certain of the parties asserting Claims against the Assets could be compelled to accept a monetary satisfaction of such interests. Finally, any Claim against the XP Owned Equipment will attach to the net proceeds of the XP Owned Equipment sale with the same validity and in the relative priorities that currently exist under applicable nonbankruptcy law. Accordingly, approval of the sale of the XP Owned Equipment free and clear of all Claims is warranted.

REQUEST FOR RELIEF UNDER BANKRUPTCY RULE 6004(h)

46. Bankruptcy Rule 6004(h) provides that an “order authorizing the use, sale, or lease of property . . . is stayed until the expiration of 14 days after entry of the order, unless the court orders otherwise.” The Debtors request that the Bidding Procedures Order and the Prevailing Bidder Sale Order be effective immediately by providing that the fourteen (14) day stays under Bankruptcy Rules 6004(h).

47. The purpose of Bankruptcy Rule 6004(h) is to provide sufficient time for an objecting party to appeal before an order can be implemented. *See* Advisory Committee Notes to Fed. R. Banks. P. 6004(h). Although Bankruptcy Rule 6004(h) and the Advisory Committee Notes are silent as to when a court should “order otherwise” and eliminate or reduce the fourteen-day stay period, Collier on Bankruptcy suggests that the fourteen (14) day stay period should be eliminated to allow a sale or other transaction to close immediately “where there has been no objection to the procedure.” 10 Collier on Bankruptcy ¶ 6064.09 (L. King, 15th rev. ed. 1988). Furthermore, Collier’s provides that if an objection is filed and overruled, and the objecting party informs the Court of its intent to appeal, the stay may be reduced to the amount of time actually necessary to file such appeal.

NOTICE

48. As of the date hereof, no trustee or examiner has been appointed in the Debtors’ Chapter 11 Cases. Notice of this Motion has been given to the following parties or, in lieu thereof, to their counsel, if known: (a) the U.S. Trustee; (b) counsel to the official committee appointed in these Chapter 11 Cases; (c) all parties that have filed a request for notice pursuant to Bankruptcy Rule 2002; (d) all parties who are known by the Debtors to assert Claims with respect to the XP Owned Equipment; (e) the Internal Revenue Service; (i) for each state in which

the Assets are located, the applicable taxing authorities; and (f) the U.S. Environmental Protection Agency and similar state agencies. In light of the nature of the relief requested, the Debtors submit that no other or further notice need be provided.

WHEREFORE, the Debtors respectfully request that the Court: (a) enter the Bidding Procedures Order in substantially the form attached hereto as Exhibit A, (i) approving bidding procedures in connection with the sale of the XP Owned Equipment by public auction; (ii) scheduling a hearing to consider the sale of assets and a deadline for objections; and (iii) approving the form and manner of notice thereof; (b) enter the Prevailing Bidder Sale Order in a form to be determined, (i) authorizing and approving the sale of XP Owned Equipment free and clear of Claims, and (c) grant such other and further relief to the Debtors as the Court may deem proper.

Dated: September 12, 2014
Austin, Texas

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing has been served electronically upon those parties registered to receive electronic notice via the Court's CM/ECF system or by US First Class Mail, postage prepaid, as shown on the attached service list, on September 12, 2014.

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