

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF GEORGIA  
ROME DIVISION

In re:	)	
	)	Chapter 11
TI ACQUISITION, LLC,	)	
	)	Case No. <u>08-42370</u>
	)	
Debtor and Debtor-in-Possession		<u>JUDGE DIEHL</u>

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**MOTION FOR AUTHORITY TO SELL ASSETS PURSUANT TO 11 U.S.C. §363(f)  
FREE AND CLEAR OF LIENS, CLAIMS, AND ENCUMBRANCES AND TO  
ASSUME AND ASSIGN LEASES PURSUANT TO 11 U. S. C. §365(f)**

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Comes now, TI Acquisition, LLC, the debtor-in-possession (“Debtor” or “TI”), pursuant to Bankruptcy Rules 6004(c) and 6006(a), moves the Court for authority to sell substantially all its assets free and clear of all liens, claims, and encumbrances outside the ordinary course of business pursuant to 11 U.S.C. §363(f) and to assume and assign leases pursuant to 11 U.S.C. § 365(f), and shows the Court as follows:

1. On July 27, 2008, (the “Petition Date”) the Debtor filed with this Court its voluntary petition for relief under Chapter 11 of Title 11 of the United States Code 11 U.S.C. §§ 101 et. seq., ( “Bankruptcy Code”). Pursuant to §§ 1107 and 1108 of the Bankruptcy Code, the Debtor continues to manage its property as a debtor-in-possession. A creditors committee has not yet been appointed in this case.

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

3. Contemporaneously herewith, Debtor has filed a separate motion (the “Bid Procedures Motion”) to request that the Court enter an order (1) Scheduling an Auction for the Sale Of Substantially All Of The Debtor’s Assets Free and Clear of Liens, Claims and Encumbrances, (2) Establishing Deadlines Related to the Sale, Assumption and Assignment Motion (as defined below), (3) Approving a Break-Up Fee and Expense Reimbursement, (4) Approving Auction and Bidding Procedures, and (5) Granting Related Relief. The Debtor also requested that the Bid Procedures Motion be heard on shortened time. This Motion is to be heard on ordinary notice at the time set by the Court pursuant to the Bid Procedures Motion.

**I. BACKGROUND**

4. The predecessors to the business of TI Acquisition, LLC (“Debtor”) began in 1974 when brothers Mike Thomas and Jerry Thomas formed Tuftcraft, Inc. (“Tuftcraft”), a toll manufacturing operation providing tufting services to trade styles in the carpet and rug industry. Mattel Carpet & Rug Co., Inc., a Georgia corporation (“Mattel”) was formed in 1981 and continued and expanded the business of Tuftcraft.

5. In 1992, Mike Thomas and Jerry Thomas formed Templeton Carpet Mills as a separate division and tradestyle of Mattel to provide carpet to the hospitality market. In 1994, Tuftcraft merged into Mattel with Mattel being the surviving entity.

6. In 2001, Mike Thomas and Jerry Thomas began Superior Yarn Technology, LLC (“Superior”), which acquired the assets of Innovative Fibers, Inc.

7. In 2002, Mike Thomas passed away after a battle with cancer.

8. In October, 2004, the assets of Mattel and Superior were sold to Thomas Industries, LLC, a Colorado limited liability company ("Thomas Industries"). Also in 2004, the Monticello Floors brand was purchased from Burlington Industries.

9. Following the acquisition, Thomas Industries fell into serious financial difficulties and by 2006 was on the verge of filing for bankruptcy. The purchase in 2004 was heavily leveraged against the assets of the company severely restricting liquidity. In 2006 and continuing into 2007, Jerry Thomas negotiated with Thomas Industries and the Bank of America, N.A., as Administrative Agent ("B of A"), its Thomas Industries revolving and term loan lender, for Jerry Thomas to purchase the company and try to turn it around.

10. As of May 31, 2007, substantially all of the outstanding ownership interests of Thomas Industries were purchased by Debtor. On June 11, 2007, Thomas Industries and Jerry Thomas entered into a Third Amendment to Loan and Security Agreement with B of A to provide Thomas Industries with additional liquidity.

11. As of June 1, 2007 (by way of documents filed with the Secretary of State of Georgia July 31, 2007), Thomas Industries merged into Debtor with Debtor being the surviving entity. After the merger, all of the ownership interests of Debtor were held by two Georgia limited liability limited partnerships owned and/or controlled by Jerry Thomas. Debtor continued to do business as Thomas Industries at two locations, both in Dalton, Georgia.

12. On August 31, 2007, Debtor and Jerry Thomas entered into an Amended and Restated Loan and Security Agreement with Bank of B of A. At the closing of this Agreement, there were the following loans with B of A as Agent: (i) a term loan with an unpaid principal balance of

\$11,380,000; (ii) Revolving Loans with an unpaid balance of \$19,627,109.93; and (iii) Special Advances of \$430,000.

13. In late 2007, the economy in general and the carpet industry in particular slowed, and the Debtor's raw materials prices continued to rise. In addition to prior advances of \$2,500,000 by Jerry Thomas as loans to the company, further special advances by Jerry Thomas, eventually aggregating \$850,000, and B of A, eventually aggregating \$640,000 in addition to its Term Loan and Revolving Credit Advances, the business of Debtor lacked sufficient liquidity to go forward without substantial investment or asset sale.

14. On November 29, 2007, Debtor and Jerry Thomas entered into a letter of intent with Milliken & Company ("Milliken") for the purchase by Milliken of substantially all of Debtor's assets, as more particularly described in the letter of intent. As negotiations continued, Debtor and Jerry Thomas entered into updated letters of intent with Milliken on April 18, 2008 and June 25, 2008.

15. In January, 2008, one of the Debtor's larger customers, Propex, Inc., filed for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Eastern District of Tennessee. At the time of its Chapter 11 filing, Propex, Inc. owed Debtor in excess of \$2,000,000. The Debtor has filed a proof of claim in the Propex Chapter 11 case, and that case is still pending.

16. This was an immediate and devastating blow to the cash flow of Debtor's business and resulted in an immediate and substantial reduction in the borrowing base for Debtor's revolving line of credit due to the ineligibility of the Propex receivable. This reduction in liquidity and the continuing downturn in the carpet industry further reduced the Debtor's liquidity. Milliken

conducted substantial due diligence which resulted in reductions in its purchase price for the Debtor's assets. In a proposed amendment dated June 9, 2008 to its April 18, 2008 Letter of Intent, Milliken conditioned its offer to purchase the Debtor's assets on a sale through a proceeding under Chapter 11 of the Bankruptcy Code. The Debtor negotiated other aspects of the June 9 proposal and eventually signed the Letter of Intent on June 25, 2008, with the Chapter 11 condition in place. As a result of the Debtor's precarious financial condition and drastically diminished liquidity and in order to sell the business as going concern pursuant to the June 25, 2008 letter of intent, the Debtor filed a voluntary petition for relief under Chapter 11.

17. The primary objective of this Chapter 11 case is to sell the Debtor's business as a going concern. The Debtor seeks to avoid deterioration in asset values, retire secured debt that the Debtor has no other means to satisfy, preserve the jobs of employees, and continue to serve as a viable customer for its trade vendors and supplier to its customers. The alternative, a liquidation of the Debtor's business, would produce far less value for creditors and would harm the interests of employees, suppliers and customers of the Debtor.

18. Absent immediate infusions of cash and a substantial reduction in costs, the Debtor's ability to continue operating, even in the short term, is doubtful. Without the use of post-petition DIP lending facility, the Debtor will be unable to pay wages and other employee benefits at current levels and post-petition trade debt. There is a very real threat of liquidation in this case. Such liquidation would destroy a 34 year old company, eliminate an important supplier of products, cost hundreds of jobs in Dalton, Georgia, and eliminate an important customer for dozens of trade suppliers.

**Summary of Debtor's Efforts to Sell the Assets**

19. Since the Fall of 2006, Jerry Thomas has attempted to sell the Debtor's business operations or locate an equity partner. Through his many years in the industry, Jerry Thomas is well acquainted with the identity of the potential purchasers with any likely interest in the business. Numerous inquiries were made that resulted in discussions and meetings with no less than 21 separate entities and individuals. Since these discussions were private and may have been viewed by the other parties as confidential, the parties to these discussions are not be revealed herein; however, the group consisted of competitors, customers, suppliers, equity partners, and individual business inventors.

20. After his repurchase of the Debtor's business on May 31, 2007, Jerry Thomas has continued this search. His efforts resulted in meetings and discussions with no less than 8 additional potential buyers or equity partners. On November 29, 2007, Debtor and Jerry Thomas entered into a letter of intent with Milliken for the purchase by Milliken of substantially all of Debtor's assets, as more particularly described in the letter of intent. While this letter of intent was in force, the Debtor was precluded from seeking other purchasers.

21. During the hiatus period between the effective dates of letters of intent with Milliken, June 4, 2008, through June 25, 2008, the Debtor again sought buyers. During this period an intense effort was made to market the Debtor's business operations. New contacts were made and many of the most serious parties with whom there were previous discussions were again contacted and offered the opportunity to purchase the Debtor's operations. Comprehensive due diligence materials were provided to a prospective purchaser who was brought to the Debtor's

attention by B of A, but its expression of interest was subject to additional due diligence, and was for less consideration than Milliken's June 25, 2008 letter of intent.

22. Debtor chose to proceed with the offer from Milliken, and in the interval between the June 25, 2008 letter of intent and the present, the parties documented an Asset Purchase Agreement attached hereto as Exhibit A and certain Ancillary Agreements (the "Milliken APA"). The Milliken APA will be filed and served on the Secured Parties (as defined below), the U.S. Trustee, and counsel to any unsecured creditors' committee appointed in this case, but will not be mailed to other creditors and parties in interest because of its volume. Such creditors can obtain a copy by contacting the Debtor's undersigned counsel.

23. None of the current "insiders" of the Debtor have an ownership interest in Milliken and Milliken is not connected with the Debtor in any manner.

## **II. PRE-PETITION SECURED CREDITORS**

24. As of the Petition Date, the Debtor was indebted to B of A pursuant to an Amended and Restated Loan and Security Agreement dated as of August 31, 2007, as amended in writing prior to the Petition Date (the "B of A Pre-Petition Loan Agreement"), and certain related agreements, documents, instruments and other ancillary agreements executed in connection therewith (collectively with the Pre-Petition Loan Agreement, the "B of A Pre-Petition Loan Documents"), in the principal sum as disclosed by both of B of A's and the Debtor's books of \$27,830,178 (the "B of A Pre-Petition Obligations") plus any accrued and unpaid interest, fees, costs or expenses and any other unpaid amounts, whether or not charged to the B of A Pre-Petition Obligations that had been incurred by B of A as of the Petition Date.

25. The B of A Pre-Petition Obligations of the Debtor are secured by a continuing, first priority security interest in and lien on substantially all of the personal property and other assets of the Debtor owned or acquired before the Petition Date, including, without limitation, (a) accounts receivable; (b) inventory; (c) contract rights, including assigned contracts and rights under leases of real and personal property whether as lessor or lessee (including any option to purchase thereunder); (d) chattel paper; (e) documents; (f) instruments; (g) supporting obligations and letter-of-credit rights; (h) general intangibles (including payment intangibles and software); (i) goods; (j) equipment; (k) investment property; (l) money, cash, and cash equivalents; (m) deposit accounts, credits, and balances with and other claims against any financial institution with which the Debtor maintains deposits, including any clearing accounts; (n) books, records, and other property related to or referring to any of the foregoing, including books, records, account ledgers, data processing records, computer software, and other property and general intangibles at any time evidencing or relating to any of the foregoing; (o) commercial tort claims (p) any and all accessions and additions to, substitutions for, and replacements, products, and proceeds of any of the foregoing, including, but not limited to, proceeds of any insurance policies, claims against third parties, and condemnation or requisition payments with respect to all or any of the foregoing, all as further set forth in the B of A Pre-Petition Loan Documents (the “B of A Pre-Petition Collateral”).

26. The Debtor also factors portions of its receivables to CIT Commercial Services (“CIT”) pursuant to a Factoring Agreement dated October 2, 2004 between Debtor’s predecessor in interest, Thomas Industries LLC and CIT (the “Factoring Agreement”). B of A finances as receivables the “due from factor” amount payable to Debtor under the Factoring Agreement.

27. In addition to the factoring arrangement previously discussed, the Debtor is obligated to The CIT Group/Equipment Financing, Inc. on a separate obligation in the approximate amount of \$2,824,490 as of the Petition Date secured by a first position security interest in certain specific pieces of equipment.

28. As of the Petition Date, the Debtor was indebted to FR Private Equities, LLC (“FRPE”) in the approximate amount of \$587,500 on a Junior Note secured by virtually all the tangible and intangible assets of the Debtor, which security interest is junior to the security interests of B of A.

29. As of the Petition Date, the Debtor was indebted to Jerry Thomas (“Thomas”) in the approximate amount of \$1,500,000 on a Junior Note secured by virtually all the tangible and intangible assets of the Debtor, which security interest is junior to the security interests of B of A.

30. As of the Petition Date, Debtor was indebted to Jerry Thomas on a Special Advance (“Thomas Special Advance”) in the approximate amount of \$850,000 secured by virtually all the tangible and intangible assets of the Debtor, which security interest is junior to the security interests of B of A.

31. As of the Petition Date, the Debtor was indebted to Jerry Thomas (“Thomas 2<sup>nd</sup>”) in the amount of \$1,800,000 secured by virtually all the tangible and intangible assets of the Debtor, which security interest is junior to the security interests of B of A.

32. As of the Petition Date, the Debtor was indebted to April Caldwell, Carmen Kittle, and Teresa Thomas (“CKT”) in the amount of \$1,800,000 secured by virtually all the tangible and

intangible assets of the Debtor, which security interest is junior to the security interests of B of A.

33. Each of CKT, FRPE, and FR entered into Intercreditor Agreements, true and correct copies of which are attached to the Thomas Declaration, which prohibit the subordinating creditor from objecting to a sale of assets by the Debtor to which B of A consents. The amount of the sale proceeds exceeds the amount of CIT Group Equipment Financing, Inc.'s indebtedness against specific equipment. The sale does not include the Debtor's accounts receivable, including the accounts factored by the Debtor to CIT Group/Commercial Services, Inc.

34. As of the Petition Date, Whitfield County, Georgia, was owed personal property taxes as a lien on the Debtor's personal property for the year of 2007 in the amount of \$670,599.44, plus the pro rata portion of the 2008 personal property taxes.

35. As of the Petition Date, the Debtor is indebted to a group of product processors who are identified on Exhibit B attached hereto ("Processors"). Processors are supplied work in process inventory belonging to the Debtor for further processing, after which processing the product is complete and held by the Processors for shipping instructions from Debtor for shipment to Debtor's customers. The Processors are paid a fee for the work performed which is paid on open account. At any point in time, the Processors may be owed for work performed on open account. The Processors claim a statutory lien upon the Debtor's inventory in their possession to secure the outstanding balance owed on account from the Debtor. The extent, validity, and priority of some of these liens are in dispute. Moreover, the principal processors used by the Debtor entered into subordination agreements with B of A, as follows:

- (a) Rogers Finishing – 600 5th Avenue, Dalton, Georgia;

- (b) Rogers Finishing – 414 West Hawthorne Street, Dalton, Georgia;
- (c) Rogers Finishing – 1001 Riverbend Road;
- (d) Quality Finishers – 355 Old Dalton Road, Calhoun, Georgia;
- (e) Dug Gap Distribution – 3343 Dug Gap Road, Dalton, Georgia;
- (f) Graphic Tufting Center, Inc. – 1694 Waring Road, Dalton, Georgia;
- (g) Textile Rubber & Chemical Company – 1400 Tiarco Drive, Dalton, Georgia;
- (h) Universal Textile Technology – 204 West Industrial Blvd., Dalton, Georgia; and
- (i) Better Backers, Inc. – 1650 Hwy. 76.

(collectively, the “Processor Agreements”).

36. The Processor Agreements are attached hereto as Exhibit C. With one exception, Universal Textile, the paragraph 4 of the Processor Agreements each expressly prohibits the Processor from asserting liens against property of the Debtor.

37. Additionally, each Processor Agreement, including that with Universal Textile, provides at paragraph 3 that, “Upon receipt of a Notice from the Administrative Agent to the Processor, the Processor shall . . . release Materials only in accordance with the Administrative Agent’s instructions, until the Administrative Agent advises the Processor to the contrary.” B of A can, in other words, direct each Processor with whom it has an agreement to deliver the Materials, including, inter alia, to Milliken or Successful Bidder (as defined below) in connection with the closing of a sale.

38. Moreover, paragraph 7 of each Processor Agreement (paragraph 6 of the Universal Textiles Processor Agreement) provides that, “Section 7 of the PA provides “Upon giving the notice called for under Section 5 hereof, and provided that the Company has not cured such default to the reasonable satisfaction of Administrative Agent and Processor within 10 days of

such notice, Processor agrees that Administrative Agent, at its option, may (a) keep the Materials in the Facility for a period of up to one hundred twenty (120) days following receipt by the Administrative Agent of notice from the Processor requesting removal therefrom, without charge other than reasonable storage and handling charges accruing during such period as mutually agreed to by the Processor and the Administrative Agent and (b) enter the Facility during normal business hours and at times mutually acceptable to the Administrative Agent and the Processor in order to remove the Materials therefrom, without charge.”

39. Thus, each Processor which signed a Processor Agreement is obligated to cooperate with the sale by allowing inspection of the inventory and other property of the Debtor in their possession and by delivering such property to Milliken or the successful overbidder at closing. Since a Processor's lien is dependent on possession, and each Processor, including Universal Textile, relinquished in favor of B of A the right to retain possession over the contrary direction of B of A, any lien claimed by a Processor is subject to nullification at the direction of B of A.

40. On or about August 9, 2007, a UCC-1 Financing Statement was filed against the Debtor on behalf of Rogers Finishing, LLC ("Rogers"), giving notice that Rogers is purportedly secured by inventory in the Debtor's possession. The Debtor has never granted Rogers a security interest in any of its assets, and the Processor Agreement to which Rogers is a party prohibits Rogers from asserting this lien. Furthermore, the Debtor strongly disputes that Rogers has, or can lawfully assert a lien or security interest in any inventory in the Debtor's possession.

41. B of A, CIT, CIT Group, FRPE, FR, Thomas, Thomas Special Advance, Thomas 2, CKT, Whitfield County, the Processors, and Rogers Finishing, LLC, are collectively referred to herein as the “Secured Parties”.

### III. THE MILLIKEN APA

42. The terms of the Milliken APA, as attached hereto, were negotiated in good faith and at arm's length. The purchase price (the "Purchase Price") set forth in the Milliken APA for the purchase of the Purchased Assets (as defined below) is as follows:

i. The consideration for the Assets (the "Purchase Price") will be (i) (A) Twenty-Four Million Dollars (\$24,000,000.00) ,plus an amount that is the lesser of (x) \$500,000.00 and (y) the cost acquiring and restoring to Good Working Order of two Filteco yarn extrusion lines that are currently leased by Seller from O.B. Trading Company, LLC and which will be acquired by Seller prior to and sold to Milliken at the Closing; plus or minus (B) the Final Adjustment Amount, and (ii) the assumption of the Assumed Liabilities. The "Final Adjustment Amount" (which may be a positive or negative number) will be equal to the amount determined by subtracting the Closing Net Inventory from the Target Net Inventory.

ii. The Purchase Price, prior to adjustment on account of the Final Adjustment Amount, shall be payable at the Closing as follows: (i) (A) Twenty-Four Million Dollars (\$24,000,000.00), plus an amount that is the lesser of (x) \$500,000.00 and (y) the cost acquiring and restoring to Good Working Order of two Filteco yarn extrusion lines that are currently leased by Seller from O.B. Trading Company, LLC and which will be acquired by Seller prior to and sold to Milliken at the Closing; plus or minus (B) the Estimated Adjustment Amount, less (C) the Inventory Holdback Amount (the result of such additions and subtractions, the "Estimated Cash Amount"), by wire transfer to Seller. The balance of the Purchase Price not paid at the Closing shall be paid or otherwise adjusted pursuant to the methodology described in the Agreement.

43. Subject to the terms and conditions contained in the Milliken APA, Milliken will purchase the following assets (the "Purchased Assets"):

- a. all Real Property, including all leasehold improvements or fixtures owned by Seller located on the Real Property;
- b. all Tangible Personal Property, including those items described in Schedule 2.1(b) to the Milliken APA;

- c. subject to the provisions of Section 6.3, all Seller Contracts, including those listed in Schedule 18(a) to the Milliken APA, and all outstanding offers or solicitations made by or to Seller to enter into any Contract;
  - d. all Governmental Authorizations and all pending applications therefore or renewals thereof, in each case to the extent transferable to Buyer, including those listed in Schedule 3.15(b) to the Milliken APA;
  - e. all software, data and Records related to the operations of Seller, including client and customer lists and Records, referral sources, product specifications, design information, color information, research and development reports and Records, production reports and Records, service and warranty Records, equipment logs, operating guides and manuals, financial and accounting Records, creative materials, advertising materials, promotional materials, studies, reports, correspondence and other similar documents and Records and, subject to Legal Requirements, copies of all personnel Records and other Records described in Section 2.2(g) to the Milliken APA;
  - f. all of the intangible rights and property of Seller, including Intellectual Property Assets, going concern value, goodwill, telephone, telecopy, website and e-mail addresses and listings and those items listed in Schedules 3.23(d), 3.23(e), 3.23(f) and 3.23(h) to the Milliken APA;
  - g. all insurance benefits, including rights and proceeds, arising from or relating to the Assets or the Assumed Liabilities prior to the Effective Time;
  - h. all claims of Seller against third parties relating to the Assets, whether choate or inchoate, known or unknown, contingent or noncontingent, including all such claims listed in Schedule 2.1(I) to the Milliken APA;
  - i. all rights of Seller relating to deposits and prepaid expenses, claims for refunds and rights to offset in respect thereof that are not listed in Schedule 2.2(d) to the Milliken APA and that are not excluded under Section 2.2(h) to the Milliken APA; and
  - j. valid and existing leasehold, contractual or license interests in the foregoing.
44. The Milliken APA expressly excludes the following assets from the Purchased Assets (the "Excluded Assets"):
- k. all cash, cash equivalents and short-term investments;

- l. all accounts and notes receivable and claims, proofs of claim, choices of action, and rights of offset in regard thereto;
  - m. all minute books, stock Records and corporate seals;
  - n. those rights relating to deposits and prepaid expenses and claims for refunds and rights to offset in respect thereof listed in Schedule 2.2(d) to the Milliken APA;
  - o. all insurance policies and rights thereunder (except to the extent specified in Section 2.1(h) and 2.1(I)) to the Milliken APA;
  - p. all of the Seller Contracts listed in Schedule 2.2(f) to the Milliken APA;
  - q. all personnel Records and other Records that Seller is required by law to retain in its possession and accounts receivable records in respect to accounts created before the Closing;
  - r. all claims for refund of Taxes and other governmental charges of whatever nature;
  - s. all rights in connection with and assets of the Employee Plans;
  - t. all rights of Seller under this Agreement, the Bill of Sale, and the Assignment and Assumption Agreement;
  - u. all Hazardous Materials present at the Real Property except those Hazardous Materials used in the Ordinary Course of Business;
  - v. all Chapter 5 Causes of Action and other rights and powers arising under the Bankruptcy Code or case law; and
  - w. the property and assets expressly designated in Schedule 2.2(m) to the Milliken APA.
45. Pursuant to the Milliken APA, Milliken assumes the following liabilities (the "Assumed Liabilities"):
- x. Customer Deposits<sup>1</sup>; and

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<sup>1</sup> "Customer Deposits" are defined in the Milliken APA as the deposits of Seller's customers that are related to bona fide orders that are being assigned to Buyer. A list of deposits that the parties intend to assign is set forth on Schedule 2.4(a)(I) to the Milliken APA.

- y. any Liability arising after the Effective Time under the Identified Seller Contracts assumed by Buyer pursuant to Section 6.3 of the Milliken APA (other than any Liability arising out of or relating to a Breach that occurred prior to the Effective Time).

46. Upon closing of the sale approved by this Court, valid, perfected, and unavoidable liens, claims and encumbrances shall attach to the sale proceeds to the same extent, and in the same priority, as the pre-petition liens, claims and encumbrances.

47. The consideration provided by Milliken to Jerry Thomas, who is an insider of the Debtor, is fully disclosed in the Ancillary Agreements. Some of these Ancillary Agreements involve current insiders of the Debtor or affiliates of insiders. These Ancillary Agreements include:

- (a) the Transition Assistance Agreement;
- (b) a Consulting Agreement, and
- (c) a Nondisclosure and Noncompetition Agreement.

Each of the Ancillary Agreements is attached as an Exhibit to the Milliken APA. In the aggregate, they call for consideration to Jerry Thomas of \$1,300,000, but this amount covers both substantial services to be rendered by Jerry Thomas to Milliken after the Closing and for a five year non-competition agreement that will bar him from working for a competitor in the only business that he has ever been in. Mr. Thomas is currently 64 years old, and will be out of the business in his relatively few remaining productive years. In light thereof, the compensation to Jerry Thomas is reasonable. In addition, Milliken proposes to assume two real property leases, which will be amended and restated concurrently with the assumption, with Larue Properties, LLLP, a limited liability limited partnership that is partly owned by Jerry Thomas.

**IV. REQUESTED SALE PROCEDURES**

48. By separate motion filed contemporaneously herewith, Debtor has asked the Court to enter an order establishing bidding procedures for the sale of the Purchased Assets (“Bidding Procedures Motion”). The terms of the Bidding Procedures Motion are only summarized here.

49. The Bidding Procedures Motion requests that the Bankruptcy Court authorize an auction to be held on September 15, 2008 at the offices of, McGuireWoods LLP, The Proscenium, 1170 Peachtree Street, N.E., Suite 2100, Atlanta, Georgia 30309, where substantially all of the assets of Debtor shall be offered for sale. Debtor, in consultation with B of As shall select the Qualified Bidder (as defined in the Bidding Procedures Motion) submitting the highest or otherwise best bid according to the Bidding Procedures. Such Qualified Bidder shall be designated as the “Successful Bidder.”

50. In accordance with the Bidding Procedures, any person wishing to bid at the auction shall execute and serve its bid no later than 4:00 p.m. Eastern Daylight Time on September 11, 2008 (the “Bid Deadline”).

51. The Purchased Assets shall be sold, free and clear of all liens, claims, interests, and encumbrances existing as of the date of the Milliken APA, including without limitation any taxes or successor liability, subject only to title exceptions and other assumed liens, claims, interests and encumbrances that are mutually agreed to by the parties.

52. Closing shall take place as soon as practicable after all closing conditions are satisfied or waived or on such other date as is mutually agreed to by the parties but in no event later than September 30, 2008.

53. Closing shall be conditioned upon entry of the Bankruptcy Court approving the sale in form acceptable to Debtor, the Successful Bidder, and the Secured Lenders.

**V. EXECUTORY CONTRACTS AND UNEXPIRED LEASES**

54. Debtor has certain executory contracts and leases that are listed in the attached Exhibit D.

55. Bidders may wish to undertake some or all of the contracts and leases.

56. Debtor seeks authority to assume and assign the contracts and leases in conjunction with the proposed sale of Assets. Pursuant to 11 U.S.C. §365(k), the Debtor's estate will be released from any liability for any breach of contract or lease occurring after assignment of the contract or lease. By this request, Debtor does not waive its rights under 11 U.S.C. § 365 or otherwise. The assumption and assignment of any executory contract or lease shall be contingent upon closing of the sale of the Purchased Assets. In the event a sale of the Purchased Assets does not close, the executory contracts and unexpired leases shall be neither assumed, rejected, nor otherwise affected absent a separate motion and order.

57. The counterparties to the Assumed Contracts shall be adequately assured of future performance by the Successful Bidder. Each prospective bidder must show that it is financially able to perform Debtor's obligations under the Assumed Contracts. In its evaluation of offers submitted for the Purchased Assets, the Debtor and B of A shall review and consider the financial ability of the bidders to perform Debtor's obligations under the assumed contracts.

58. Assignment of the assumed contracts as set forth herein is in the best interests of Debtor, Debtor's estate and the creditors and is due to be approved under §365 of the Bankruptcy Code.

59. Section 365 of the Bankruptcy Code requires the Debtor to cure defaults prior to the assumption and assignment of the assumed contracts to the Successful Bidder. The Debtor shall

send written notice (the “Cure Notice”) to each counterparty to an executory contract and unexpired lease within three (3) days following the entry of an order granting the Bidding Procedures Motion, which notice shall provide (a) that the Debtor may be requested to assign such contract or lease to the Successful Bidder, subject to Bankruptcy Court approval, (b) the Debtor has determined that there is either no default under the relevant contract or lease and that a cure amount is owed thereunder, (c) each counterparty has the right to file with the Bankruptcy Court and serve on counsel for the Debtor, Creditors Committee and B of A no later than September 11, 2008 an objection (a “Cure Objection”) to the Debtor’s determination of the cure amount owed with respect to the relevant contract or lease, (d) that, in the event of a timely filed Cure Objection, the Bankruptcy Court shall resolve such objection at the Final Sale Hearing on September 16, 2008, and (e) that, in the event that a counterparty fails to timely file and serve Cure Objection, such counterparty shall be forever barred and estopped from asserting that the Debtor has any cure obligation with respect to the relevant contract or lease.

## **VI. AUTHORITIES**

60. Section 363(b)(1) of the Bankruptcy Code provides that a debtor, after notice and 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). The factor to be considered in this type of sale include (1) sound business reason; (2) accurate and reasonable notice; (3) adequate price; and (4) debtor’s good faith. *Titusville Country Club v. Penn Bank (In re Titusville Country Club)*, 128 B.R. 396, 396 (Bankr. W.D. Pa. 1991); *In re Plabell Rubber Products, Inc.*, 149 B.R. 475, 479 (Bankr. N.D. Ohio 1992); *In re Weatherly Frozen Food Group, Inc.*, 149 B.R. 480, 483 (Bankr. N.D. Ohio 1992); *In re Delaware & Hudson Ry. Co.*, 124 B.R. 169 (Bankr. D. Del. 1991);

61. The Court should consider authorizing a sale other than in ordinary course of business of all of a Chapter 11 debtor's assets under Section 363(b)(1) when a sound business purpose dictates such action. *Stephens Indus., Inc. v. McClung*, 789 F.2d 386, 390 (6th Cir. 1986) (approving sale of radio station's assets where debtor could not meet its payroll and other operating expenses); *In re New Era Resorts, LLC*, 238 B.R. 381, 387 (Bankr. E.D. Tenn. 1999); *In re Allison*, 39 B.R. 300, 301-302 (Bankr. D.N.M. 1984) ("The clear weight of authority authorizes the sale of all or substantially all of the debtor's assets pursuant to § 363(b) in a Chapter 11 proceeding even absent a disclosure statement, plan and vote of the creditors."). In addition, whether the asset is decreasing or increasing in value should be an important consideration of the court. *In re Lionel Corp.*, 722 F.2d 1063, 1071 (2d Cir. 1983).

62. The Debtor believes a sale of all of Debtor's assets to a single buyer will produce the highest value. This sale and the sale process preserve the remaining going concern value of the business. Further, the Debtor believes the purchase price of all the assets as an aggregate is greater than the combined values of specific assets. The Debtor believes attempting to sell specific assets to different buyers will undoubtedly leave some assets unsold or severely undervalued. *In re Integrated Resources, Inc.*, 135 B.R. 746, 750 (Bankr. S.D.N.Y. 1992) ("[W]hen a debtor desires to sell an asset, its main responsibility, and the primary concern of the Bankruptcy Court, is the maximization of the value of the asset sold . . . In general, to receive approval of a proposed sale of assets, the debtor will need to demonstrate to the Bankruptcy Court that proffered purchase price is the highest and best offer. These tenets also apply to the outright purchase of a debtor or its primary assets, as well as the effective acquisition of a debtor through the funding of a plan of reorganization."). As previously set forth, the Debtor has met

with numerous potential buyers in addition to Milliken, and the offer by Milliken is the highest and best offer received to date.

63. Before the sale of an important asset of the Debtor's estate outside of the ordinary course of business, a business justification is necessary. *In re Lionel Corp.*, 722 F.2d at 1069. Debtor believes it will satisfy its fiduciary duty to creditors and equity holders by maximizing the value of the assets to be sold.

64. In order to maximize the value of the assets sold, the Processors should not be allowed to assert any liens on any of the Debtor's inventory. The assertion of liens by the Processors not only violates the automatic stay, but interferes with the Court's discretion to approve the sale. Furthermore, many of the Processors are bound by the terms of the Processor Agreements and any attempt to assert a lien would be a violation of paragraph 4 of the Processor Agreements and other obligations under the Processor Agreements.

65. Under 11 U.S.C. §363(f), the trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate only if (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. Under the obligations created by the Processor Agreements there would clearly be a bona fide dispute should the Processors assert any interest or lien and the assertion of any interest or lien would be a violation of the Processor Agreements. Consequently, with respect to these Processors, section 363(f)(4) of the Bankruptcy Code would

be satisfied. Moreover, because many of these Processors have junior liens to the B of A liens, a sale of the Purchased Assets free and clear of such liens is appropriate under section 363(f)(1) of the Bankruptcy Code.

66. Moreover, with respect to those Processors that have not executed Processor Agreements, and that hold prepetition liens senior to the prepetition liens of B of A under applicable state law, such Processors will have their claims against the Debtor paid out of the proceeds of the sale of the Purchased Assets before any proceeds are paid to B of A on account of its pre – or post-petition secured claims, as provided for in the Debtor's debtor-in-possession financing agreement with B of A.<sup>2</sup> Because the Purchase Price would be significantly greater than the aggregate claims of these Processors, the proposed sale of the Purchased Assets to Milliken free and clear of such Processors' valid prepetition liens, if any, would be appropriate under section 363(f)(3) of the Bankruptcy Code.

67. B of A supports the sale of the Purchased Assets as contemplated in this Motion, thus satisfying section 363(f)(2) of the Bankruptcy Code.

68. With respect to all other Secured Parties, which hold liens junior to B of A's liens, a sale of the Purchased Assets free and clear of such liens is appropriate pursuant to section 363(f)(1) of the Bankruptcy Code.

## **VII. NOTICE AND OBJECTIONS**

69. This Sale Motion, and the Sale Procedures Order shall be provided by the Debtor to all creditors and parties in interest in these proceedings and shall be served on all persons pursuant

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<sup>2</sup> The Debtor's postpetition financing agreement with B of A expressly provides that B of A's post-petition liens are subject to (i) the claims of Milliken for any Breakup Fee or Expense Reimbursement, if payable, (ii) the valid prepetition claims of senior lienholders, and (iii) CIT's lien in the Post-Petition Factor Collateral (as defined in the Interim DIP Order).

to Bankruptcy Rule 6004(c) and by the Sale Procedures Order by first class mail addressed to the business address of such persons notwithstanding Bankruptcy Rule 9014 and deposited as soon as practicable after the date of the entry of the Order approving these procedures. Pursuant to Bankruptcy Rule 2002, the notice required by the Sale Procedures Order shall constitute good and sufficient notice of the Sale Procedures Order, the Sale Motion, the sale hearing, the Auction and the Bid Procedures and all proceedings to be held thereon on all known and unknown creditors and parties in interest, including on all persons entitled to service pursuant to Bankruptcy Rule 6004(c).

70. Objections, if any, to the Sale Motion shall be in writing, shall conform to the Federal Rules of Bankruptcy Procedure and local rules and orders of the Court, shall set forth (i) the nature of the objector's claims against or interests in the Debtor' estates, (ii) the basis for the objection, and (iii) the specific grounds therefore, and shall be filed so as to be received on or before 4:00 p.m. prevailing Eastern Daylight Time on September 11, 2008, and served on the Debtor's counsel, counsel for the Secured Lenders, and counsel for Milliken. Any entity objecting to the Sale Motion that has not complied with the requirements of this paragraph shall not be heard at the sale hearing.

71. Except as set forth above, nothing otherwise contained in the Sale Procedures Order shall be deemed to deprive any party of the right to object timely to the Sale Motion, all of which rights are expressly reserved by the Sale Procedures Order.

72. The proposed Sale Order is attached hereto as Exhibit E.

73. Nothing herein creates any rights in any bidder. These procedures are for the benefit of the Debtor and their estates.

**VIII. REQUEST FOR WAIVER OF STAY**

74. Pursuant to Rule 6004(h) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), the Debtor seeks a waiver of any stay of the effectiveness of the Sale Order. Bankruptcy Rule 6004(h) provides that "[a]n order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of 10 days after entry of the order, unless the court orders otherwise."

75. As set forth above, approval of the sale of the Purchased Assets to the Successful Bidder on an expedited basis is necessary to preserve the going concern value of the Debtor's business. Accordingly, the Debtor submits that ample cause exists to justify a waiver of the ten-day stay imposed by Bankruptcy Rule 6004(h), to the extent that it applies.

WHEREFORE, Debtor moves the Court for an entry of an Order:

- a. Approving the sale of the Purchased Assets free and clear of all liens, claims, encumbrances, interests, conditions to transfer or assignment of any kind, and the assumption and assignment of the Identified Seller Contracts or Overbidder Contracts and Leases, as applicable;
- b. Ordering third parties in possession or control of any of the Purchased Assets, including, without limitation, any Processors, to turnover such Purchased Assets to the Successful Bidder;
- c. Waiving the ten-day stay of the order approving this Motion imposed by Bankruptcy Rule 6004(h); and
- d. Granting such other and further relief as is appropriate.

This 28 day of July, 2008.

Respectfully submitted,

/s/ Richard T. Klingler  
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