IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	:	Chapter 11
	:	Case No. 12-13998 (MFW)
THQ, INC., *et al.*,	:	
	:	Jointly Administered
Debtors.	:	
	:	**Hearing Date and Time: January 4, 2013 at 10:30 a.m. ET**
	:	**Objection Deadline: January 2, 2013 at 4:00 p.m. ET**

OBJECTION TO DEBTORS' MOTION FOR ORDER APPROVING AND AUTHORIZING (A) BIDDING PROCEDURES IN CONNECTION WITH THE SALE OF SUBSTANTIALLY ALL OF THE DEBTORS' ASSETS, (B) STALKING HORSE BID PROTECTIONS, (C) FORM AND MANNER OF NOTICE OF THE SALE HEARING AND (D) RELATED RELIEF

The Ad Hoc Committee of Convertible Noteholders (the "Convertible Committee"),[1] consisting of certain holders of 5.00% Convertible Senior Notes Due 2014 (the "Convertible Notes") issued by THQ Inc. ("THQ" and, together with its affiliated debtors, the "Debtors"),[2] for its Objection to Debtors' Motion for Order Approving and Authorizing (A) Bidding Procedures in Connection with the Sale of Substantially All of the Assets of the Debtors, (B) Stalking Horse Bid Protections, (C) Form and Manner of Notice of the Sale Hearing and (D) Related Relief [Docket No. 19] (the "Bidding Procedures Motion"), respectfully represent:

[1] The undersigned represented a pre-petition ad hoc committee of holders of Convertible Notes. The post-petition Convertible Committee is in "formation" given that a significant portion of the Convertible Notes have traded since the Petition Date. The current members of the Convertible Committee are: (i) Silverback Asset Management, LLC; (ii) Third Avenue Focused Credit Fund; and (iii) Wolverine Flagship Fund Trading Limited. The present members of the Convertible Committee collectively hold, in the aggregate, approximately $41 million, or 41%, of original principal amount of the Convertible Notes. Holders of Convertible Notes are *pari passu* with general unsecured trade claims. Certain holders of Convertible Notes will also seek membership on the official committee of unsecured creditors (the "Official Committee") in these cases, which is scheduled to be appointed on January 3, 2013. Andrews Kurth LLP intends on seeking to be selected as counsel to the Official Committee, given that the Convertible Notes and other general unsecured claims are *pari passu* and aligned.

[2] The Debtors in these chapter 11 cases are: (i) THQ Inc.; (ii) THQ Digital Studios Phoenix, Inc.; (iii) THQ Wireless, Inc.; (iv) Volition, Inc.; and (v) Vigil Games, Inc.

INTRODUCTION

1. In the Bidding Procedures Motion, the Debtors seek approval of the terms that will govern the timing and substance of an expedited sale of what is referred to in the sale documents as "all or substantially all" of the Debtors' assets to Clearlake Capital Group, L.P. ("Clearlake").[3] If a sale or liquidation of the Debtors' assets is the best means by which to maximize and realize value for the Debtors' unsecured creditors, so be it. Nonetheless, the bidding procedures must be fair and reasonable and provide for a bona fide and robust bidding process.

2. Approval of the bidding procedures (the "Bidding Procedures") proposed by the Debtors and Clearlake would have the opposite effect. The Bidding Procedures appear to have been designed specifically to thwart any potential bidders from stepping forward to compete with Clearlake's bid. The Bidding Procedures contain numerous provisions that would limit bidding, including, among other things, (i) an unjustifiably accelerated sale timeline that will prevent prospective bidders from having an opportunity to "diligence" the Debtors' assets prior to submitting a bid, (ii) a requirement that prospective purchasers bid on the Debtors "as a whole" rather than on a "piecemeal" or "title-by-title" basis, (iii) various provisions that would allow the Debtors to unreasonably reject bids and/or bidders regardless of the impact to the Debtors' unsecured creditors, and (iv) provisions that grant Clearlake unreasonable amounts of control over the bidding process. Rather than being designed to maximize the value of the Debtors' estates, the Bidding Procedures, by design or otherwise, render the "auction process" meaningless and virtually guarantee that Clearlake will be the ultimate buyer, thereby ensuring

[3] In fact, Clearlake can "pick and choose" the assets and contracts it wants to acquire.

that the Debtors' management retain their positions within, and operating control over, the Debtors' organization.

3. Because the Bidding Procedures are neither fair and reasonable nor designed to maximize the value of the Debtors' estates, they should not be approved.

BACKGROUND

I. COMPANY OVERVIEW

4. The Debtors develop and publish "video games" for various game consoles, personal computers, wireless devices and the internet. The Debtors' game portfolio includes action, adventure, fighting, role-playing, simulation, sports and strategy games. The Debtors market and distribute these games to mass merchandisers, consumer stores, discount warehouses and other national retail stores, as well as through the internet, throughout the United States and internationally.

5. Although these cases were just commenced and no discovery has taken place, it appears that the Debtors' most valuable asset is its intellectual property and the goodwill related thereto. Several of the Debtors' most popular games, including such critically acclaimed and extremely popular titles as *Saints Row*, *Darksiders* and *Company of Heroes*, are based on intellectual property that is wholly-owned by the Debtors and developed by their internal studios. The Debtors also have a number of game titles, including the *Metro* and *Homefront* titles, that are original to the Debtors but are developed by third party, external developers. Finally, the Debtors also develop and distribute several games pursuant to exclusive intellectual property licenses from third parties, such as *World Wrestling Entertainment* and *South Park*.

6. The Debtors operate their business globally through various domestic and foreign subsidiaries and studios. Generally speaking, upon information and belief, THQ, Inc. and/or its

domestic subsidiaries own THQ's intellectual property and are party to THQ's valuable intellectual property licenses. THQ's foreign subsidiaries market and distribute THQ's games to direct-to-retail customers and through distributors to over 80 territories outside of the U.S. Upon information and belief, cash generated by THQ's foreign operations is held by THQ's foreign subsidiaries and "upstreamed" to THQ, Inc. (such subsidiaries' ultimate parent entity) (by means of intercompany loans rather than corporate dividends).

II. CHANGE IN DEBTORS' MANAGEMENT AND THE CENTERVIEW SALE "PROCESS"

7. In late May/early June 2012, Jason Rubin ("Rubin") and Jason Kay ("Kay" and, together with Rubin, the "Jasons") began a process orchestrated to take over the Debtors and capture, for themselves, the significant "upside" value in the Debtors' business. The Jasons are two highly experienced and successful "gaming" industry entrepreneurs and understand the value that can be achieved from successful game and entertainment franchises, particularly where there exists the potential for significant "hits" or successful games, which plainly exists here.

8. Promptly after the Jasons "took over," they immediately began to bring in their own "team" and phase out key members of former management. On June 11, 2012, less than two (2) weeks after the Debtors hired Rubin, the Debtors engaged Centerview Partners, LLC ("Centerview") "with the primary goal of finding an investor that would provide new liquidity to fund the Debtors' business plan, or a buyer for substantially all of the Debtors' assets…." *See Declaration of Brian Farrell in Support of the Debtors' Chapter 11 Petitions and Requests for First Day Relief* [Docket No. 2], ¶ 41. Upon information and belief, Centerview had a pre-existing relationship with Rubin, apparently having "backed" him in prior transactions. In June

2012, the Debtors did not publicly announce their retention of Centerview or that they were seeking financing and/or a third party purchaser for any of the Debtors' assets.

9. During August and September, 2012, Centerview and the Debtors' management began a so-called marketing "process" focused on finding an investor to either: (i) fund the Debtors' business plan or (ii) acquire the Debtors' entire business (as a whole). During this "process," the Debtors and their advisors focused their attention on contacting "growth-oriented" financial investors (i.e., venture capital and private equity firms) and, by marketing the company as a whole, effectively precluded strategic investors from participating in a sale process. The financial investors that the Debtors and their advisors did approach included only a few firms known for "distressed" investing, which likely further hindered the process.[4]

10. In addition, the Debtors limited the process to exclude "title-by-title" sales and informed potential investors that any transaction the Debtors would consider would (i) trigger a "fundamental change" (i.e., a sale of the entire business) and (ii) require that the Debtors' management retain their positions with the Debtors. These conditions were imposed by the Debtors notwithstanding that purchasing individual game titles is known to be attractive to strategic buyers in the Debtors' industry. Among other things, "piecemeal" sales (i) avoid the need for purchasers to acquire duplicative functions and incur related corporate overhead and (ii) allow buyers to acquire complementary titles while leaving behind undesirable ones. In fact what the Debtors' "sale process" did accomplish was to simply confirm that no strategic parties would be interested in the company in its existing configuration. As a result, the only way to run a value

[4] Houlihan Lokey Capital, Inc. ("Houlihan"), the Convertible Committee's pre-petition financial advisor, understands that, of the financial investors the Debtors and their advisors approached, only a few were "distress-oriented" funds (one of which was Clearlake).

maximizing sale process would be to allow marketing of the company on a "title-by-title" basis. The Debtors' refusal to consider any "title-by-title" transactions is particularly telling because it is Houlihan's understanding that the Debtors have received unsolicited interest in certain titles and franchises in the past, including after the announcement of the bankruptcy proceeding.[5]

11. On October 26, 2012, the Debtors and Clearlake agreed to the terms of a deal. As soon as it became clear that Clearlake was interested in purchasing the Debtors "as a whole," as described below, it appears that THQ's management and Centerview set the wheels in motion to manufacture a liquidity "crisis" which culminated in the Debtors' chapter 11 filing and the expedited Bidding Procedures Motion.

12. First, during October 2012, the Debtors promptly revised their financial projections to reflect that the Debtors required more cash than they had previously projected.[6] Next, in early November 2012, THQ announced that the Debtors intended to defer three (3) critical game releases that were integral to the Debtors' ability to meet their revenue requirements. THQ also, at this time, first announced that it had engaged Centerview to explore financing and restructuring alternatives. THQ, however, did not disclose that it had signed a deal with Clearlake.

13. On November 7, 2012, the Debtors' secured lenders, Wells Fargo, sent a letter to the Debtors alleging that the Debtors were in default under their secured credit facility as a result of the Debtors' purported failure to comply with certain covenants under the governing Wells

[5] That strategic investors may be interested in purchasing individual titles is supported by the fact that Houlihan has received significant interest in individual assets and titles from various strategic investors.

[6] The timing of this revision is important. It occurred well before any of the various purposed "liquidity problems" the Debtors now claim caused their bankruptcy filing and thus belies the Debtors' claims that these problems "forced their hand."

Fargo loan documents. Although the Debtors announced that Wells Fargo had sent the default letter, it is unclear what exactly caused the Debtors to, at that time, allegedly default under the Wells Fargo loan and what the basis of such alleged default is.

14. On November 13, 2012, the Debtors filed a Form 10-Q for the second fiscal quarter of 2012. In the Form 10-Q, the Debtors stated, for the first time, that "the repatriation of foreign cash may be subject to certain restrictions and/or limitations which may hinder our ability to repatriate such cash to the U.S." Prior to such disclosure, THQ had never publicly disclosed that there was a risk that foreign cash held by its subsidiaries but generated by THQ could be "frozen" outside of the U.S. Later that week, the boards of directors of certain of the Debtors' wholly-owned foreign subsidiaries apparently informed the Debtors that they refused to pay THQ approximately $20 million in cash that they had collected in the course of distributing the Debtors' games internationally.

15. On November 19, 2012, the Debtors and Wells Fargo entered into a forbearance agreement relating to the November 7, 2012 "default" letter. Under the terms of the forbearance agreement, Wells Fargo agreed not to call a default under or otherwise exercise rights with respect to the Debtors' secured credit facility until January 15, 2013, in exchange for certain consideration, including weekly financial reporting by the Debtors. Such weekly reporting requirements included cash flow forecasts covering the period from December 17, 2012 through January 7, 2013.

16. Between late November and mid-December, 2012, the Debtors repeatedly revised their cash flow budget to reflect significantly higher disbursements and lower receipts. During this period, Debtors' management continued to refuse to engage (or even seriously consider to engage) in substantive discussions with respect to any alternatives to a sale of the Debtors'

business as a whole, including, among other things, slimming down the business to reduce cash "burn" and/or a sale of individual assets of the Company.

17. During early December, upon information and belief, the Debtors "pre-funded," out of amounts that would otherwise be in the Debtors' estates and available for the Debtors' unsecured creditors, certain amounts to cover future costs the Debtors had yet to incur (including costs of certain foreign operations).

18. On December 19, 2012, Jason Rubin wrote a letter addressed to THQ's gaming customers in which he stated that "the goal throughout the sale process has been to preserve our teams and our products" and that "no matter what the outcome in 30 days, as long as we have accomplished this goal, I will be satisfied."[7] Satisfaction of unsecured creditor claims appears not to have been one of Debtors' management's priorities.

III. THE DEBTORS' BANKRUPTCY CASES AND THE PROPOSED CLEARLAKE SALE

19. On December 19, 2012 (the "Petition Date"), each of the Debtors filed with this Court a petition for relief under Chapter 11 of the Bankruptcy Code. On the Petition Date, among other things, the Debtors also filed (i) the Bidding Procedures Motion, (ii) a motion seeking approval of a debtor-in-possession credit facility providing, among other things, new liquidity in an amount of up to $10 million [Docket No. 13] (the "DIP Motion"), (iii) a motion seeking authority to pay approximately $6 million to certain unnamed "critical" vendors [Docket No. 12] (the "Critical Vendor Motion"), (iv) a motion seeking, among other things, authority to pay approximately $1.4 million to the Debtors' employees pursuant to pre-petition retention plans and provide employees with vacation and paid time off benefits in an amount of

[7] *See* "THQ Community Message from Jason Rubin: To Our Global Gaming Community," December 19, 2012 (available at http://www.thq.com/us/go/article/view/homepage_article/261277/thq_community_message_from_jason_rubin).

approximately $2.6 million [Docket No. 9] (the "Employee Motion"), and (v) a motion seeking approval of a key employee retention plan that would, among other things, provide for payments to be made to employees of THQ's non-debtor foreign subsidiaries [Docket No. 18] (the "KERP Motion"). In the Bidding Procedures Motion, the Debtors incorrectly claimed that the Clearlake sale (and the other relief requested by the Debtors) was supported by holders of a majority of the Convertible Notes.

20. Attached to the Debtors' Bidding Procedures Motion was the Debtors' proposed asset purchase agreement with Clearlake (the "Clearlake APA"). Under the terms of the Clearlake APA, Clearlake would purchase the Debtors' assets (including the Debtors' cash that is purportedly "frozen" in Europe, but excluding any assets or contracts that Clearlake does not want to acquire) for an aggregate purchase price valued, by the Debtors, at approximately $60,650,000, payable in the form of: (i) cash in the amount required to satisfy all outstanding secured debt at closing (estimated to be $29,000,000); (ii) cash in the amount of $6,650,000; (iii) the assumption of the Assumed Liabilities set forth in the Clearlake APA (estimated to be $15,000,000); and (iv) an unsecured promissory note in the original principal amount of $10 million, due 2020 and with an interest rate of 2%, to be issued to the Debtors' unsecured creditors. Based upon a net present value calculation, the unsecured note would provide an estimated range of 1-3% recovery to the Debtors' unsecured creditors.

21. Under the Clearlake APA, Clearlake is not required to close the sale unless the Court approves the Bidding Procedures. The Bidding Procedures, however, contain numerous provisions that would "chill" competitive bidding and appear intended to ensure that the Debtors' deal with Clearlake is consummated on the "fast track," including, among other things, (i) an expedited timeline that would require bidders to submit bids and attend an Auction within

five (5) days following the hearing on the Bidding Procedures Motion, (ii) a requirement that all bids must be for "all or substantially all" of the Debtors' assets (and that the Debtors may refuse to entertain any bids on a "title-by-title" or "piecemeal" basis), and (iii) procedures that allow the Debtors to withhold information from potential bidders and otherwise determine which bidders may submit bids and attend the auction.

22. On the Petition Date, the Debtors also filed the Declaration of Brian Farrell in Support of the Debtors' Chapter 11 Petitions and Requests for First Day Relief [Docket No. 2] (the "First Day Declaration"). Attached as an exhibit to the First Day Declaration was a "short-form" DIP budget for the four week period from December 17, 2012 through January 7, 2013. The revised DIP budget reflects an even greater reduction in cash flow receipts, and increase in cash disbursements, than those set forth in the weekly budgets prepared prior to the Petition Date. Indeed, under the revised DIP Budget, the Debtors are now (conveniently) forecasted to run out of money promptly on or about January 15, 2013 (the same date that the Wells Fargo forbearance period expires and the deadline for closing of the Clearlake sale under the Clearlake APA).

23. On December 20, 2012, the Court held a hearing on the Debtors' first day motions. At the first day hearing, the Debtors and Clearlake asked this Court to schedule a final hearing on the DIP Motion and the Bidding Procedures during the holiday week of December 24, 2012. Notwithstanding the Debtors' and Clearlake's requests, this Court scheduled a hearing on the DIP Motion and the Bidding Procedures for January 4, 2013. At the first day hearing, the United States Trustee announced that the formation meeting for the Official Committee of Unsecured Creditors would take place on January 3, 2013.

ARGUMENT AND AUTHORITY

I. Governing Law with Respect to Approval of Bidding Procedures

24. Contrary to the Debtors' assertion in the Bidding Procedures Motion, in the Third Circuit, the standard for determining whether bidding procedures are appropriate is not the "business judgment" rule. Bankruptcy courts in the Third Circuit will only approve bidding procedures when they are designed to maximize the value of the estate. *See, e.g., In re Dura Automotive Systems, Inc.*, 2007 WL 7728109, at *90 (Bankr. D. Del. 2007) (citing *Calpine Corp. v. O'Brien Envtl. Energy, Inc. (In re O'Brien Envtl. Energy)*, 181 F. 3d 527, 535-37 (3rd Cir. 1999); *see also In re Edwards*, 28 B.R. 552, 561 (Bankr. E.D. Pa. 1998)); *see also In re John Joseph Edwards*, 228 B.R. 552, 561 (Bankr. E.D. Pa. 1998) ("[t]he purpose of procedural bidding orders is to facilitate an open and fair public sale designed to maximize value for the estate.").

25. Bidding procedures must also be fair and reasonable for all of the parties. *See In re American Safety Razor Company, LLC* (Bankr. D. Del. September 30, 2010) (Bankr. Case. No. 10-12351), at *132.[8] Among other things, approval of bidding procedures may be withheld if the stalking horse bidder has too much control over the auction process. *See In re Thompson Publishing Holding Co., Inc.*, No. 10-13070 (Bankr. D. Del. Oct. 13, 2010)). Generally stated, bidding procedures in the context of bankruptcy sales should enhance competitive bidding. *See, e.g., In re Dura*, 2007 WL 7728109, at *90 (internal citations omitted).

[8] "I don't think, as the debtors suggest, that my consideration of Bidding Procedures is based on the business judgment rule. I need not accept the debtors' business judgment with respect to process. The Bankruptcy Code and Rules and the process under the Bankruptcy Code are all matters for the debtor -- for the Court's determination as to what is fair and reasonable. In fact, I think that is my only role in this case: to determine what is fair for all the parties." *In re American Safety Razor Company, LLC*, at *132.

26. In addition to the foregoing, Local Bankruptcy Rule 6004 contains various additional requirements for any motion seeking approval of bidding procedures. Among other things, Local Rule 6004-1(b)(iv)(B) states that "[i]f a proposed buyer has discussed or entered into any agreements with management or key employees regarding compensation or future employment, the Bidding Procedures Motion must disclose (a) the material terms of any such agreements, and (b) what measures have been taken to ensure the fairness of the sale and the proposed transaction in light of any such agreements." *See* Local Rule 6004.

II. The Debtors' Proposed Bidding Procedures Should Not Be Approved

27. The Bidding Procedures proposed by the Debtors should not be approved because they are not fair and reasonable and were not designed to (and, in fact, will not) maximize the value of the Debtors' estates. Rather than facilitating "an open and fair public sale" and "enhancing competitive bidding," the Debtors' proposed Bidding Procedures appear to have been expressly designed to chill bidding and ensure that the Debtors consummate the sale of their business "as a whole" to Clearlake, regardless of whether such a sale is in the best interests of the Debtors' unsecured creditors.

A. The Sale Timeline Proposed by the Debtors Is Unfair and Unreasonable and Will Limit Competitive Bidding

28. The Debtors filed the Bidding Procedures Motion on December 19, 2012, the same date they filed for bankruptcy relief. The hearing on the Bidding Procedures Motion is set to occur on January 4, 2013. Under the Debtors' proposed Bidding Procedures, however, prospective bidders would be required to submit bids by January 8, 2013, with an auction to take place on January 9, 2013 and a final sale hearing to take place on January 10, 2013. Under any

circumstances, the Debtors' proposed timeline would be extremely aggressive - - under the present circumstances, they are unfair and unreasonable and should not be approved.

29. Simply put, the timeframe during which the Debtors seek to consummate the sale is too short a period for prospective bidders to be in a position to bid on the Debtors' assets. In order to comply with the Bidding Procedures' accelerated timeline, prospective bidders would be required to, among other things, conduct comprehensive due diligence and obtain financing (if necessary) within four (4) days of the hearing on the Bidding Procedures Motion. This difficulty is compounded by the fact that the Debtors have proposed that this expedited process be conducted during the holiday season, a time during which the Debtors and their professionals know most people in the Debtors' industry - - i.e., the parties that might be most willing to bid on the Debtors' assets - - are "shut down" or not available.

B. The Bidding Procedures Contain Numerous Provisions That Are Designed to and Will Thwart the Bidding Process

30. In addition to the accelerated timeline proposed by the Debtors, the Bidding Procedures contain various other provisions that are objectionable and would limit the possibility that the value of the Debtors' estates is maximized through the sale process. Among others, the Bidding Procedures contain the following objectionable provisions:

- Assets Being Sold: In order for a Bid to constitute a "Qualified Bid," the Bid must provide for the purchase of all or a substantial portion of the Debtors' assets, and payment or assumption of all or a substantial portion of the Debtors' liabilities. *See* "Bid Requirements," ¶(i), at p. 6.

- Break-up Fee and Expense Reimbursement: Clearlake shall be entitled to receive a $1.75 million "break-up fee" and $500,000 expense reimbursement if Clearlake is not the Successful Bidder. *See* "Asset Purchase Agreement," at p. 2.

- Deposit: In order for a Bid to constitute a "Qualified Bid," such Bid must be accompanied by a cash deposit of at least ten percent (10%) of the stated cash purchase price in the Bid. *See* "Bid Requirements," ¶(g), at p. 5.

- Minimum Initial Overbid: The Minimum Initial Overbid must provide for (i) cash consideration of at least $2.75 million more than the cash component of the "Purchase Price" offered by Clearlake in the Clearlake APA, (ii) satisfaction or waiver of all claims under the DIP Credit Facility, and (iii) at least $2.75 million greater aggregate value than the aggregate Clearlake Bid (including Assumed Liabilities and the $10 million note);

- Access to Diligence Materials: The Debtors may withhold due diligence materials from parties they deem unlikely to become Qualified Bidders, or where disclosure would put the Debtors at a "competitive disadvantage." *See* "Access to Due Diligence Materials," at p. 4.

- Executory Contracts and Leases: Notwithstanding the exceptionally short diligence period, in order for a Bid to constitute a "Qualified Bid," the Bid must include a "comprehensive list" of executory contracts the Bidder seeks the Debtor to assume and assign. *See* "Bid Requirements," ¶(b), at p. 5.

- Due Diligence from Bidders: Bidders must comply with "all" reasonable requests for information by the Debtors and failure by a Bidder to provide such information would allow the Debtors to prohibit that Bidder from participating in the Auction. *See* "Due Diligence from Bidders," at p. 5.

- No Fees to Qualified Bidders: The Debtors may deny any Bids that contain expense reimbursements, break-up fees or other similar fees. *See* "Bid Requirements," ¶(f), at p. 5.

- Overbid Threshold: Each Bid must (i) offer $2.75 million more in cash consideration than the cash consideration included in Clearlake's proposed purchase price, and (ii) offer $2.75 more in overall aggregate value than Clearlake's proposed purchase price. *See* "Bid Requirements," ¶(h), at p. 5.

- Auction Bid Increments: At the Auction, Bids must be submitted in minimum increments of $500,000, "or such other amount as the Debtors determine appropriate to facilitate the Auction." *See* "Participation at the Auction," at p. 6.

- Debtors' Reservation of Rights: The Debtors reserve the unilateral right to impose additional terms and conditions with respect to any or all Bidders and Bids other than Clearlake. *See* "Reservation of Rights," at p. 11.

31. Taken as a whole, the Bidding Procedures are designed specifically to ensure that Clearlake is the successful bidder and that the Debtors' business will continue as a "going concern," whether or not such outcome would be in the best interests of the Debtors' unsecured

creditors and/or maximize the value of the Debtors' estates. Among other things, if approved, the provisions above would (i) allow the Debtors to reject any Bid for less than all of the Debtors' assets, notwithstanding that there is reason to believe that more value may be generated by a sale of the Debtors' assets on a "piecemeal" basis, (ii) give the Debtors the ability to withhold diligence materials from effectively any prospective purchaser, including those that "compete" in the Debtors' market and are most likely to bid for the Debtors' assets, (iii) impose arbitrary and unnecessary minimum bid and overbid amounts for which the Debtors have not provided any support, (iv) allow the Debtors to discriminate against any prospective bidder other than the stalking horse bidder, and (v) prohibit bidders (other than Clearlake) from seeking expense reimbursement, regardless of whether the value generated by any such bidders would benefit the Debtors' estate, and (vi) require prospective Bidders to compile a "comprehensive" list of contracts to be assumed in a matter of days.

C. The Stalking Horse Bidder Would Retain Too Much Control Over the Bidding Process

32. As described above, bidding procedures should not be approved if the stalking horse bidder has too much control over the auction process. *See In re Thompson Publishing Holding Co., Inc.*, No. 10-13070 (Bankr. D. Del. Oct. 13, 2010)). Here, the Bidding Procedures provide Clearlake with an express "blocking" right over any sales of less than all of the Debtors' assets. *See* Bidding Procedures, "Reservation of Rights," at p. 11. This consent right gives Clearlake the ability to "force" the Debtors to sell their business "as a whole" and is completely inappropriate under the present circumstances.

D. The Debtors Have Failed to Disclose Information in Violation of the Local Rules

33. Under Local Bankruptcy Rule 6004, "[i]f a proposed buyer has discussed or entered into any agreements with management or key employees regarding compensation or future employment, the Bidding Procedures Motion must disclose (a) the material terms of any such agreements, and (b) what measures have been taken to ensure the fairness of the sale and the proposed transaction in light of any such agreements." This provision serves to ensure that any conflicts of interest on the part of the Debtors' insiders are adequately disclosed to parties in interest and the court.

34. As described at length above, it appears that the Debtors and Clearlake have engineered the pre- and post-petition sale process to ensure that the Debtors' business continues "as a whole" following the sale, with the Debtors' management retaining their positions. If the members of Debtors' management are concerned more with retaining "control" over the Debtors than maximizing the value of the Debtors' estates, their interests clearly conflict with those of the Debtors' unsecured creditors. The Bidding Procedures Motion, however, contains scant reference to the discussions and/or agreements between the Debtors and Clearlake with respect to employment of the Debtors' management and employees following the sale, as well as the steps the Debtors took to ensure that the sale process is fair in light of such agreements. The Bidding Procedures Motion, therefore, violates Local Rule 6004 and, for such reason, should not be approved.[9]

[9] If the Court approves the Bidding Procedures, at the very least, the Debtors and Clearlake should be required to provide additional information required under Local Rule 6004 so that the Court and parties in interest can understand and evaluate how any conflicts of interest have impacted or "tainted" the Debtors' sale process.

CONCLUSION

35. When viewed in combination with the truncated timeline proposed by the Debtors and the Debtors' and their advisors' pre- and post-petition conduct, the terms set forth in the Debtors' proposed Bidding Procedures make clear that, rather than providing for a robust sale process that will maximize value for creditors, the Bidding Procedures are intended to "chill" the bidding process and assure that Clearlake is the successful bidder. Given the potential significance to the Debtors' unsecured creditors of a sale of potentially all of the Debtors' assets, the Bidding Procedures proposed by the Debtors are patently improper. The Bidding Procedures cannot, and should not, be approved by this Court.

WHEREFORE, the Convertible Committee respectfully requests that the Court (i) deny the Debtors' request for approval of the Bidding Procedures, and (ii) grant such other and further relief as may be just and proper.

Dated: January 2, 2013
Wilmington, Delaware

ANDREWS KURTH LLP

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