

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

In re: § Chapter 11
CROSSROADS SYSTEMS, INC. § Case No. 17-51926
Debtor. §
§
§

**DEBTOR’S EMERGENCY MOTION FOR ENTRY OF INTERIM AND FINAL
ORDERS ESTABLISHING NOTIFICATION AND HEARING PROCEDURES FOR
TRANSFERS OF CERTAIN EQUITY SECURITIES AND FOR RELATED RELIEF**

Crossroads Systems, Inc., a Delaware corporation, as debtor-in-possession in the above-captioned chapter 11 case (the “Debtor”), files this *Debtor’s Emergency Motion for Entry of Interim and Final Orders Establishing Notification and Hearing Procedures for Transfers of, or Claims of Worthlessness with Respect to, Certain Equity Securities and for Related Relief* (this “Motion”), and respectfully represents:

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 pursuant to 28 U.S.C. § 157(b). Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

Background

2. To preserve the value of its assets and restructure its financial affairs, on August 13, 2017 (the “Petition Date”), the Debtor commenced the above captioned case (the “Chapter 11 Case”) by filing a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”). The Debtor continues to manage and operate its business as a debtor-in-possession pursuant to Bankruptcy Code §§ 1107 and 1108. No request for the

appointment of a trustee or examiner has been made in the Chapter 11 Case, and no committees have been appointed or designated.

3. A detailed description of the Debtor and its business, and the facts and circumstances supporting the Motion and the Debtor's Chapter 11 Case is set forth in greater detail in the *Declaration of Jennifer Crane, Chief Financial Officer of Crossroads Systems, Inc., in Support of First Day Motions* (the "First Day Declaration"), filed contemporaneously herewith and incorporated herein by reference.

Relief Requested

4. By this Motion, the Debtor requests that this Court enter interim and final orders, substantially in the forms attached hereto as **Exhibit A** and **Exhibit B** (the "Interim Order" and the "Final Order," respectively), (a) establishing notification and hearing procedures regarding the trading of, or declarations of worthlessness for federal or state tax purposes with respect to, equity securities in the Debtor or of any beneficial interest therein (the common stock of Debtor and any beneficial interest therein, including Options and the convertible preferred stock of Debtor and any beneficial interest therein, including Options (as defined in Paragraph 11(e) hereof) to acquire such stock, the "Stock" or the "Equity Securities") that must be complied with before trades or transfers of such securities or declarations of worthlessness become effective, (b) ordering that any purchase, sale, or other transfer of, or declaration of worthlessness with respect to, Equity Securities in violation of the procedures set forth below shall be void *ab initio*, and (c) scheduling a final hearing (the "Final Hearing") on this Motion.

The Debtor's Net Operating Losses and Other Tax Attributes

5. As further explained in the First Day Declaration, the Debtor has incurred, and may continue to incur, significant net operating losses ("NOLs"), translating to potentially material tax

savings. The Debtor's NOLs consist of losses generated in any given or prior tax year and can be "carried forward" to up to 20 subsequent tax years to offset the Debtor's future taxable income, thereby reducing future aggregate tax obligations. *See* 26 U.S.C. § 172. NOLs also may be utilized to offset taxable income generated by transactions completed during the Chapter 11 Case. The relief sought in this Motion will protect and preserve the Debtor's valuable tax attributes, including the NOLs, as well as certain other development credit carry-forwards (the "Development Credits") and together with the NOLs, the "Tax Attributes") ultimately benefitting all stakeholders.

6. Failure to obtain the relief sought in this motion will greatly increase the risk that the Debtor will be unable to make use of its Tax Attributes upon emergence from bankruptcy. The loss of the Debtor's Tax Attributes could cause substantial deterioration of value, harming the estate and significantly reducing value for stakeholders.

7. In particular, unrestricted trading of Equity Securities could adversely affect the Debtor's NOLs if (a) too many 5% or greater blocks of Equity Securities are created or (b) too many shares are added to or sold from such blocks such that, together with previous trading by 5% shareholders during the preceding three-year period, an ownership change within the meaning of section 382 of the Internal Revenue Code (the "IRC") is triggered prior to emergence and outside the context of a confirmed Chapter 11 plan.

8. The Debtor's NOLs are substantial, and any loss of the Debtor's Tax Attributes, including during the first month of the Chapter 11 Case, as set forth in the First Day Declaration, could cause significant and irreparable damage to the estate and stakeholders. Indeed, the relief requested herein is critical for maximizing estate value and will help to ensure a meaningful recovery for stakeholders. If no restrictions on trading are imposed by this Court, such trading could severely limit or even eliminate the Debtor's ability to use the NOLs— a valuable asset of

the Debtor's estate — which could lead to significant negative consequences for the Debtor, its estate, the Debtor's stakeholders and the overall reorganization process.

9. Notably, the Debtor has limited the relief requested herein to the extent necessary to preserve estate value. Specifically, the proposed Interim and Final Orders will affect only holders of the equivalent of 4.5% or more of the combined aggregate value of the Debtor's outstanding Common Stock and Convertible Preferred Stock and parties who are interested in purchasing sufficient Equity Securities to result in such party's becoming a holder of the equivalent of at least 4.5% of the combined aggregate value of the Debtor's outstanding Common Stock and Convertible Preferred Stock.

10. To preserve to the fullest extent possible the flexibility to craft a Chapter 11 plan that maximizes the use of its NOLs and enhanced recoveries for the Debtor's stakeholders, the Debtor seeks limited relief that will enable it to closely monitor certain transfers of Equity Securities so as to be in a position to act expeditiously to prevent such transfers or declarations, if necessary, with the purpose of preserving the NOLs.

Proposed Procedures for Trading in Equity Securities

11. By establishing procedures for continuously monitoring the trading of Equity Securities, the Debtor can preserve its ability to seek substantive relief at the appropriate time, particularly if it appears that additional trading may jeopardize the use of its Tax Attributes. Accordingly, the Debtor requests that this Court enter an order establishing the following procedures (collectively, the "Procedures for Trading in Equity Securities"):

- a. Any person or entity (as defined in Bankruptcy Code § 101(15)) who currently is or becomes a Substantial Shareholder (as such term is defined in paragraph e below) must file with the Court, and serve upon counsel to the Debtor, a declaration of such status, substantially in the form of **Exhibit 1** annexed to **Exhibit A** and **Exhibit B** attached hereto, on or before the later of (i) 20 days after the date of the Notice of Order (as defined herein) and (ii) ten days after becoming a Substantial

Shareholder; *provided, however*, that compliance with this provision shall not be required of any Substantial Shareholder that has entered into a written agreement with the Debtor to suspend trading of all Common Stock and Preferred Stock.

- b. Prior to effectuating any transfer of Equity Securities that would result in an increase in the amount of Equity Securities of which a Substantial Shareholder has Beneficial Ownership (as such term is defined in paragraph e below) or would result in a person or an entity becoming a Substantial Shareholder, such person or entity must file with the Court, and serve upon counsel to (i) the Debtor and (ii) 210/CRDS Investment LLC (“210”), an advance written declaration of the intended transfer of Equity Securities in the form of **Exhibit 2** annexed to **Exhibit A** and **Exhibit B** attached hereto (each, a “Declaration of Intent to Purchase, Acquire or Otherwise Accumulate Equity Securities”).
- c. Unless otherwise agreed by the Debtor and 210 in writing, prior to effectuating any transfer of Equity Securities that would result in a decrease in the amount of Equity Securities of which a Substantial Shareholder has Beneficial Ownership or would result in a person or an entity ceasing to be a Substantial Shareholder, such Substantial Shareholder must file with the Court, and serve upon counsel to (i) the Debtor and (ii) 210, an advance written declaration of the intended transfer of Equity Securities in the form of **Exhibit 3** annexed to **Exhibit A** and **Exhibit B** attached hereto (each, a “Declaration of Intent to Sell, Trade, or Otherwise Transfer Equity Securities” and with a Declaration of Intent to Purchase, Acquire or Accumulate Equity Securities, each, a “Declaration of Proposed Transfer”).
- d. The (i) Debtor and (ii) 210 shall have 20 calendar days after receipt of a Declaration of Proposed Transfer to file with the Court and serve on such Substantial Shareholder an objection to any proposed transfer of Equity Securities described in the Declaration of Proposed Transfer on the grounds that such transfer might adversely affect the Debtor’s ability to utilize its Tax Attributes. If the Debtor or 210 file an objection, such transaction would not be effective unless such objection is withdrawn by the Debtor or 210, as applicable, or such transaction is approved by a final order of the Court that becomes non-appealable. If the Debtor and 210 do not object within such 20-day period, such transaction could proceed solely as set forth in the Declaration of Proposed Transfer. Further transactions within the scope of this paragraph must be the subject of additional notices in accordance with the procedures set forth herein, with an additional 20-day waiting period for each Declaration of Proposed Transfer.
- e. For purposes of these procedures, (i) a “Substantial Shareholder” on any particular date is any person or entity that has Beneficial Ownership of at least 4.5% of the combined aggregate value of the Debtor’s outstanding Common Stock and Convertible Preferred Stock on that date, and it shall be assumed that (x) the value of one share of Common Stock on that date is its closing trading price on NASDAQ on that date and the value of one share of Convertible Preferred Stock on that date is the greater of its liquidation preference of \$2.0625 and such Common Stock closing price, and (y) there are outstanding 1,225,472 shares of Common Stock and

2,591,257 shares of Convertible Preferred Stock; (ii) “Beneficial Ownership” of Equity Securities includes direct and indirect ownership (*e.g.*, a holding company would be considered to beneficially own all shares owned or acquired by its subsidiaries; and a person or entity would be considered to beneficially own all shares owned or acquired by any entities it controls), ownership by such holder’s family members and entities acting in concert with such holder to make a coordinated acquisition of stock and ownership of shares that such holder has an option to acquire (as defined immediately hereafter), and includes all shares that would be treated as beneficially owned by such person or entity for purposes of Section 382 of the Internal Revenue Code (26 U.S.C. §382); and (iii) an “Option” to acquire stock includes any contingent purchase, warrant, convertible debt, put, stock subject to risk of forfeiture, contract to acquire stock or similar interest, regardless of whether it is contingent or otherwise not currently exercisable.

Notice Provisions of the Proposed Interim and Final Orders

12. No later than two business days following entry of the Interim Order, the Debtor shall serve by first class mail, postage prepaid a notice in substantially the form of **Exhibit 4** annexed to **Exhibit A** and **Exhibit B** attached hereto (the “Notice of Order”) to (i) the Office of the United States Trustee; (ii) the holders of the 20 largest unsecured claims against the Debtor; (iii) Gibson, Dunn & Crutcher LLP, Attn: Michael A. Rosenthal and Matthew G. Bouslog, 200 Park Avenue, New York, New York 10166-0193, counsel to 210; (iv) the Securities and Exchange Commission; (v) counsel to any statutory committee appointed in the Chapter 11 Case; (vi) all holders of Convertible Preferred Stock in the Debtor (vii) all registered holders of Common Stock; (viii) the Internal Revenue Service; and (ix) all brokers or transfer agents for any Equity Securities through its noticing agent, Broadridge. Additionally, no later than two business days following entry of the Final Order, the Debtor shall serve a Notice of Order modified to reflect that the Final Order has been entered (as modified, the “Notice of Final Order”) to the same entities that received the interim Notice of Order.

13. All brokers or transfer agents for any Equity Securities shall be required to serve the Notice of Order on all holders of Common Stock or Convertible Preferred Stock in the Debtor

registered with such broker or transfer agent no later than five business days after being served with the Notice of Order

14. Any entity or broker or agent acting on such entity's behalf who sells in excess of 1% of outstanding Common Stock or 1% of outstanding Convertible Preferred Stock to another entity shall be required to serve a copy of the Notice of Order or Notice of Final Order, as applicable, on such purchaser of such Equity Securities or any broker or agent acting on such purchaser's behalf.

15. The Interim Order may be granted on an interim basis pending this Court's entry of a Final Order. This will allow parties in interest to file an objection pursuant to the procedures set forth in the Interim Order and seek to be heard with respect to this Motion, if necessary. If no objections are timely filed (or if any such timely filed objections are withdrawn before a hearing), the Debtor requests that the Court enter the Final Order at the Final Hearing. If the Court enters the Final Order, the Debtor shall serve the Notice of Final Order on the same entities that received the Notice of Order.

The Debtor's Right to Waive

16. With respect to the procedures set forth above, the Debtor requests that the Court permit the Debtor to waive, in writing and with the consent of 210, any and all restrictions, stays and notification procedures contained in this motion or in any order entered with respect hereto.

Basis for Relief

I. The Debtor's Tax Attributes are Significant and Valuable

17. As of April, 2017, the Debtor had NOLs of approximately \$139.7 million, which could translate into a potential future tax savings of approximately \$51 million, based on a combined federal and state income tax rate of approximately 36.5%. The Debtor also has

Development Credits of approximately \$5.3 million. Failure to preserve the Debtor's Tax Attributes, as further described in the First Day Declaration, could cause the Debtor's estate to suffer a significant tax liability to the detriment of stakeholder interests.

18. Sections 39(a), 59(e), 172(b), and 904(c) of the IRC permit corporations to carry forward Tax Attributes to offset future taxable income and tax liability, thereby significantly improving such corporations' liquidity in the future. Thus, the Debtor's Tax Attributes are a valuable asset of the Debtor's estate and may improve value to all stakeholders.

19. The Debtor's ability to use the Tax Attributes, however, could be limited severely under Sections 382 and 383 of the IRC (without the relief requested herein) as a result of the trading and accumulation of Equity Securities prior to the consummation of a Chapter 11 plan. Given the significant benefit to the estate of preserving the Tax Attributes, the Debtor believes that cause exists to grant the relief requested immediately, *on an interim basis pending this Court's entry of a Final Order*, and that such relief is in the best interests of the estate.

II. The Debtor's NOLs and Tax Attributes Are Property of a Debtor's Estate and Are Entitled to Court Protection

A. The Debtor's NOLs are Valuable Estate Property

20. Courts have uniformly held that a debtor's NOLs constitute property of the estate under Bankruptcy Code § 541 and, as such, courts have the authority to implement certain protective measures to preserve the NOLs. The seminal case articulating this rule is *In re Prudential Lines, Inc.*, 107 B.R. 832 (Bankr. S.D.N.Y. 1989), *aff'd*, 119 B.R. 430 (S.D.N.Y. 1990), *aff'd*, 928 F.2d 565 (2d Cir. 1991), *cert. denied* 502 U.S. 821 (1991). In *Prudential Lines*, the Bankruptcy Court for the Southern District of New York enjoined a parent corporation from taking a worthless stock deduction with respect to its wholly-owned debtor subsidiary on the grounds that allowing the parent to do so would destroy its debtor subsidiary's NOLs.

21. In issuing the injunction, the court held that the “debtor’s potential ability to utilize NOLs is property of an estate,” 107 B.R. at 839, and that “the taking of a worthless stock deduction is an exercise of control over a debtor’s NOLs,” 107 B.R. at 842, and thus was properly subject to the automatic stay provisions of Bankruptcy Code § 362. *See also In re White Metal Rolling & Stamping Corp.*, 222 B.R. 417, 424 (Bankr. S.D.N.Y. 1998) (“It is beyond peradventure that NOL carrybacks and carryovers are property of the estate of the loss corporation that generated them”); *In re Southeast Banking Corp.*, Case No. 91-14561-BKC (Bankr. S.D. Fla. July 21, 1994) (debtor’s interest in its NOLs “constitutes property of the estate within the scope of 11 U.S.C. Section 541(a)(i) and is entitled to the protection of the automatic stay”); *In re Phar-Mor, Inc.*, 152 B.R. 924, 927 (Bankr. N.D. Ohio 1993) (“the sale of stock is prohibited by § 362(a)(3) as an exercise of control over the NOL, which is property of the estate”); *In re Grossman’s, Inc.*, Case No. 97-695 (Bankr. D. Del. Oct. 9, 1997) (debtors’ NOL carry forwards are property of debtors’ estates protected by the automatic stay provisions of the Bankruptcy Code).

22. Because the Debtor’s NOLs are property of the estate, this Court has the authority under Bankruptcy Code § 362 to enforce the automatic stay by restricting the transfer of Equity Securities that could jeopardize the existence of this valuable asset.

B. *The Debtor’s Other Tax Attributes Likewise Constitute Valuable Estate Property*

23. Similar to NOLs, the Development Credits are valuable assets of the Debtor’s estate. As also explained in the First Day Declaration, the Development Credits, like NOLs, may be used by the Debtor to reduce future federal income taxes. Accordingly, the Development Credits constitute property of the Debtor’s estate under Bankruptcy Code § 541 and should be given the same protective treatment as NOLs. Thus, as with NOLs, this Court has the authority under Bankruptcy Code § 362 to enforce the automatic stay by restricting the transfer of Equity Securities, which transfers could reduce this valuable asset.

24. Indeed, courts have granted relief similar to that sought herein with respect to non-NOL tax credits in other cases. *See, e.g., In re CJ Holding Co., et al*, Case No. 16-33590 (DRJ) (Bankr. S.D. Tex. July 21, 2016); *In re Delta Air Lines, Inc.*, Case No. 05-17923 (Bankr. S.D.N.Y. Sept. 16, 2005) (finding that NOL and tax credit carryforwards are property of the debtors' estate and approving notification procedures and restrictions on certain transfers of claims against and interests in the debtors to protect, among other things, \$346 million in non-NOL tax credits). In addition, even with respect to non-tax credit tax attributes, courts have found that attempts to deprive a Chapter 11 debtor of their use constitute a violation of Bankruptcy Code principles. *See, e.g. Memorandum Opinion, The Majestic Star Casino, LLC*, Case No. 09-14136 Adv. Pro. No. 10-56238 (Bankr. D. Del. Jan. 24, 2012) (ruling that termination of the debtor's status as a "qualified subchapter S subsidiary" for IRC purposes was an avoidable transfer of estate property in violation of Bankruptcy Code § 549). Accordingly, similar to the NOLs, the Court has authority under Bankruptcy Code § 362 to grant the relief sought herein with respect to Development Credits.

III. An "Ownership Change" under Section 382 of the IRC Would Negatively Impact the Estate

25. Section 382 of the IRC limits the amount of taxable income that can be offset by a corporation's NOLs in taxable years (or a portion thereof) following an ownership change. Generally, an "ownership change" occurs if the percentage (by value) of the stock of a corporation owned by one or more 5% shareholders has increased by more than 50 percentage points over the lowest percentage of stock owned by such shareholders at any time during the three-year testing

period ending on the date of the ownership change.¹ For example, an ownership change would occur in the following situation:

An individual (“U”) owns 50.1% of the stock of corporation XYZ. U sells her 50.1% interest to another individual (“B”), who owns 5% of XYZ’s stock. Under Section 382, an ownership change has occurred because B’s interest in XYZ has increased more than 50 percentage points (from 5% to 55.1%) during the testing period. The same result would follow even if B owned no XYZ stock prior to the transaction with U because B both becomes a 5% shareholder and increases his ownership by more than 50% percentage points during the testing period.

26. If an ownership change occurs, Section 382 limits the amount of a corporation’s future income that may be offset by its “pre-change losses” to an annual amount equal to the value of the corporation prior to the ownership change multiplied by the long-term tax exempt rate. *See* 26 U.S.C. § 382(b). “Pre-change losses” would include (a) NOLs and (b) any net unrealized built-in loss (as defined in Section 382(h)(3)). Similarly, in the event of an ownership change a corporation’s tax credit carryforwards would be limited under Section 383 of the IRC.

27. The formulaic limitations under Sections 382 and 383 of the IRC can severely restrict the ability to use “pre-change losses” and tax credits because the value of the stock of a distressed company may be quite low. Accordingly, if, prior to the effective date of the Debtor’s Chapter 11 plan, too many substantial equity holders increase their equity interests, such transfers may trigger an “ownership change” for IRC purposes, severely endangering the Debtor’s ability to utilize its Tax Attributes and thus causing considerable damage to estate interests.

28. The risk of losing the ability to use even a portion of the Tax Attributes justifies granting the Debtor, *from the first day of the Chapter 11 Case*, the ability to monitor, and possibly

¹ In general, under Section 382(g)(4)(A), all stockholders who individually hold less than 5% of the stock of a company are deemed to be a single 5% stockholder throughout the three-year testing period and transfers between such shareholders are disregarded for purposes of determining whether an ownership change has occurred. Thus, so long as 50% or more of the stock is owned by less than 5% stockholders throughout the three-year testing period, there will be no change of control under Section 382.

object to, changes in ownership of Equity Securities. Granting the relief requested herein will preserve the Debtor's flexibility in operating the Debtor's business during the pendency of the Chapter 11 Case and proposing a confirmable plan of reorganization that makes full and efficient use of the Debtor's Tax Attributes.

IV. The Requested Relief is Narrowly Tailored to Protect Estate Value

29. The requested relief does not bar all trading of Equity Securities. Moreover, the requested relief does not prohibit the trading in the Debtor's claims. At this early juncture, the Debtor seeks to establish procedures only to monitor those types of stock trading and restrict those types of worthlessness deductions that would pose a serious risk under the Section 382 ownership change test to preserve the Debtor's ability to seek substantive relief if it appears that a proposed trade will jeopardize the use of its Tax Attributes.

30. Notably, the procedures requested by the Debtor in this motion would permit most stock and all claims trading to continue, subject to applicable law. As noted in the First Day Declaration, based on current SEC filings, there is only one holder of Equity Securities who currently holds more than 4.5% of the Debtor's outstanding Common Stock and three holders of Equity Securities who currently hold more than 4.5% of the Debtor's outstanding Convertible Preferred Stock, and in each such case their holdings are sufficient for them to own, at the Common Stock trading price as of the Petition Date, more than 4.5% of the combined aggregate value of the Debtor's outstanding Common Stock and Convertible Preferred Stock. Moreover, each of these holders has already agreed to suspend trading of any Common Stock and Preferred Stock.

31. Given the narrow nature of the injunction, the Debtor submits that the Court is justified in entering the Interim and Final Orders in the interests of protecting the Debtor's important estate assets.

V. Bankruptcy Courts Routinely Grant the Relief Requested in this Motion

32. Courts have routinely restricted or enjoined transfers of common stock or claims, or issued other injunctive relief to protect a debtor against the possible loss of its NOL carryforwards. *See e.g., In re Erickson Inc.*, Case No. 16-34393 (Bankr. N.D. Tex., Dec. 2, 2016); *In re Energy & Exploration Partners, Inc.*, Case No. 15-44931 (Bankr. N.D. Tex. Mar. 18, 2016); *In re Sandridge Energy, Inc.*, Case No. 16-32488 (Bankr. S.D. Tex. May 18, 2016); *In re Energy XXI Ltd.*, Case No. 16-31928 (Bankr. S.D. Tex. May 19, 2016); *In re The Great Atlantic & Pacific Tea Company, Inc.*, Case No. 10- 24549 (Bankr. S.D.N.Y. Jan. 13, 2011); *In re NR Liquidation III Co. Inc.*, Case No. 10-12610 (Bankr. S.D.N.Y. June 9, 2010); *In re Citadel Broad. Corp.*, Case No. 09-17442 (Bankr. S.D.N.Y. Apr. 12, 2010); *In re Charter Commc'ns, Inc.*, Case No. 09-11435 (Bankr. S.D.N.Y. Apr. 15, 2009); *In re Star Tribune Holdings Corp.*, Case No. 09-10244 (Bankr. S.D.N.Y. Feb. 6, 2009); *In re Tronox Inc.*, Case No. 09-10156 (Bankr. S.D.N.Y. Feb. 6, 2009); *In re Frontier Airlines Holdings, Inc.*, Case No. 08-11298 (Bankr. S.D.N.Y. June 3, 2008); *In re Portola Packaging, Inc.*, Case No. 08-12001 (Bankr. D. Del. Sept. 2, 2008); *In re Dura Auto. Sys., Inc.*, Case No. 06-11202 (Bankr. D. Del. Nov. 20, 2006); *In re J.L. French Auto. Castings, Inc.*, Case No. 06-10119 (Bankr. D. Del. Mar. 3, 2006); *In re W.R. Grace & Co.*, Case No. 01-01139 (Bankr. D. Del. Jan. 24, 2005).

33. Courts granting such relief generally have done so by imposing notice and hearing requirements on any proposed transfer of stock to or by an entity whose holdings of such stock exceed, or would exceed as a result of the proposed transfer, a certain threshold amount. To accomplish this, the court and the debtor are given notice of any proposed transfers of stock by entities whose aggregate stock holdings exceed a certain dollar or share threshold, giving the debtor an opportunity to object to such transfer at a hearing.

34. The order in *First Merchants Acceptance* is typical in this regard. See 1998 Bankr. LEXIS 1816 (Bankr. D. Del. 1998). In that case, the court entered an order imposing on any entity intending to (a) acquire, accumulate, or sell more than a prescribed number of shares of the debtor, or to add additional shares to such a block, or (b) acquire or sell any subordinated reset notes or unsecured claims against the debtors, a duty to provide notice to the court and to the debtor's counsel, after which the debtor was afforded 30 days to object to such transaction with a hearing to be held so that the court could decide whether to allow any such transfer to be consummated. See e.g., *In re Dura Auto. Sys., Inc.*, No. 06-11202 (Bankr. D. Del. Nov. 20, 2006) (stock trading restrictions applied to persons who were, or would become as a result of the proposed transfer, a 4.5% stockholder); *In re Calpine Corp.*, No. 05-60200 (Bankr. S.D.N.Y. Dec. 21, 2005) (same). Although the relief that the Debtor requests in this motion is similar to that granted in *First Merchants Acceptance*, it excludes transfers by claimholders from the scope of the notice and hearing procedures, thus making the requested relief significantly less burdensome than the relief granted in *First Merchants Acceptance*.

35. The Debtor's Tax Attributes are valuable assets of its estate that will inure to the benefit of its stakeholders and facilitate the Debtor's reorganization. Unrestricted trading in the Equity Securities with no advance warning of such trades or unrestricted deductions for worthless stock jeopardizes these assets and impairs their value for the Debtor's stakeholders at large. The requested relief imposes a minimal burden to achieve a substantial benefit for the Debtor, its estate, creditors and other interested parties. Accordingly, this Court should grant the requested relief and establish a notice and hearing procedure governing the trading of Equity Securities.

VI. The Proposed Notice Provisions Satisfy Due Process Requirements

36. The Debtor's proposed notice provisions, as set forth in the Interim and Final Orders, will serve to put interested parties on notice of the restrictions on transfers of Equity

Securities. The Debtor proposes to provide notice of the restrictions imposed through entry of both the Interim and Final Orders to holders of the Debtor's Equity Securities.

37. The foregoing notice procedures satisfy due process and the strictures of Bankruptcy Rule 9014 by providing the relevant counterparties with notice and an opportunity to object and attend a hearing. *See, e.g., In re Colorado Mountain Cellars, Inc.*, 226 B.R. 244, 246 (D. Colo. 1998) (noting that a hearing is not required to satisfy Bankruptcy Rule 9014). Further, the proposed notice procedures protect the due process rights of the parties-in-interest without unnecessarily exposing the Debtor's estate to unwanted administrative expenses.

VII. Granting the Requested Relief on an Interim Basis Is Necessary to Avoid Irreparable Harm to the Debtor

38. Once a Tax Attribute is limited under Section 382, its use is limited forever. Granting the relief sought herein on an interim basis pursuant to the Interim Order is necessary to avoid an irrevocable loss of the Tax Attributes and the irreparable harm that would be caused through the Debtor's loss of its ability to offset taxable income with Tax Attributes.

39. Accordingly, the Debtor submits that, absent the interim relief granted in the Interim Order, the Debtor and its estate could suffer immediate and irreparable harm. Immediate and irreparable harm exists where the absence of relief would impair a debtor's ability to reorganize or threaten the debtor's future as a going concern. *See In re Ames Dep't Stores, Inc.*, 115 B.R. 34, 36 n.2 (Bankr. S.D.N.Y. 1990) (discussing the elements of "immediate and irreparable harm" in relation to Bankruptcy Rule 4001(c)(2)); *see also* Fed. R. Bankr. P. 6003, Committee Notes (noting that cases applying Bankruptcy Rule 4001(b)(2) and (c)(2) may "provide guidance" for relief under Bankruptcy Rule 6003). Here, if the Court does not grant the relief sought in this motion on an interim basis and instead waits until the Final Hearing on this motion, holders of the Debtor's Equity Securities could be emboldened to transfer such securities before

the restrictions contemplated herein are imposed by the Court in the Final Order. Such trading or deductions would put the Tax Attributes in jeopardy, as described above, and would therefore be counterproductive to the Debtor's objectives in seeking this relief. Accordingly, the Debtor requests that the procedures described herein be approved immediately on an interim basis.

The Debtor's Reservation of Rights

40. Nothing contained herein is intended or should be construed as an admission as to the validity or priority of any claim (or equity interest in) against the Debtor, a waiver of the Debtor's rights to dispute any claim (or equity interest) or an approval or assumption of any agreement, agreement, contract, or lease under Bankruptcy Code § 365. The Debtor expressly reserves its rights to contest any claim.

Notice

41. No trustee, examiner or creditors' committee has been appointed in this Chapter 11 Case. Notice of this Motion will be provided to: (i) the Office of the United States Trustee; (ii) the holders of the 20 largest unsecured claims against the Debtor; (iii) Gibson, Dunn & Crutcher LLP, Attn: Michael A. Rosenthal and Matthew G. Bouslog, 200 Park Avenue, New York, New York 10166-0193, counsel to 210; (iv) the Securities and Exchange Commission; (v) the Internal Revenue Service; and (vi) any Substantial Shareholders known to the Debtor. Due to the urgency of the circumstances surrounding this Motion and the nature of the relief requested herein, the Debtor respectfully submits that no further notice of this Motion is required.

WHEREFORE, for the reasons set forth herein and in the First Day Declaration, the Debtor respectfully requests entry of the Interim and Final Orders granting the relief requested herein and such other relief as may be appropriate under the circumstances.

RESPECTFULLY SUBMITTED this 13th day of August, 2017

ERIC TERRY LAW, PLLC

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