

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re: ATOPTECH, INC., ¹ Debtor.	: : : : : : : : :	Chapter 11 Case No. 17-10111 (MFW) Ref. No. 32, 223, 237, 249
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**SYNOPSYS’ OBJECTION TO (I) DEBTOR’S PROPOSED
SALE TO AVATAR INTEGRATED SYSTEMS, INC. AND
(II) MOTION TO OBTAIN POST-PETITION SECURED FINANCING**

Synopsys, Inc. (“Synopsys”), by and through the undersigned counsel, hereby files this objection (this “Objection”) in response to (i) the *Motion of Debtor for Orders (I) Authorizing and Approving (A) Bidding Procedures, (B) Buyer Protections for Stalking Horse, (C) Procedures Related to the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases, (D) the Form and Manner of Notice; (II) Scheduling the Bid Deadline and Auction; (III) Authorizing and Approving (A) the Sale of Certain Assets Free and Clear of All Liens, Claims, Encumbrances and Interests and (B) the Assumption and Assignment of Certain Contracts and (IV) Granting Related Relief* [Docket No. 32] (the “Sale Motion”) and (ii) the *Motion of the Debtor for a Final Order Pursuant to Sections 105, 361, 362, 363(c), 364(c)(1), 364(c)(2), 364(d)(1), 364(e) and 507 of the Bankruptcy Code Authorizing Debtor to (A) Obtain Post-Petition Secured Financing from Avatar Integrated Systems, Inc.; and (B) Pay Certain Related Fees and Charges* [Docket No. 237] (the “DIP Motion”). In support hereof, Synopsys submits and incorporates by reference (i) the *Declaration of Richard L. Wynne in Support of the Objection of Synopsys, Inc. to (I) Debtor’s Proposed Sale to Avatar Integrated Systems, Inc. and (II) Related Motion to Obtain Post-Petition Secured Financing* (the “Supplemental Wynne”

¹ The last four digits of the Debtor’s federal tax identification number are 1945. The Debtor’s headquarters and mailing address is 2111 Tasman Drive, Santa Clara, CA 95054.

Declaration”), (ii) the *Declaration of Nicole Lamb-Hale in Support of the Objection of Synopsys, Inc. to (I) Debtor’s Proposed Sale to Avatar Integrated Systems, Inc. and (II) Related Motion to Obtain Post-Petition Secured Financing* (the “Lamb-Hale Declaration”), (iii) the *Declaration of Joseph Benkert in Support of the Objection of Synopsys, Inc. to (I) Debtor’s Proposed Sale to Avatar Integrated Systems, Inc. and (II) Related Motion to Obtain Post-Petition Secured Financing* (the “Benkert Declaration”), (iv) the *Declaration of Dr. Matthew Guthaus* (the “Supplemental Guthaus Declaration”) and (v) the *Declaration of Arthur J. Gajarsa* (the “Gajarsa Declaration”) each filed contemporaneously herewith. In addition, Synopsys incorporates by reference (i) the *Declaration of Richard L. Wynne in Support of the Objection of Synopsys, Inc. to the Debtor’s Bidding Procedures and Related Objections* [Docket No. 134] (the “Wynne Declaration”), (ii) the *Declaration of Krista S. Schwartz in Support of the Objection of Synopsys, Inc. to the Debtor’s Bidding Procedures and Related Objections* [Docket No. 133] (the “Schwartz Declaration”) and (iii) the *Declaration of Dr. Matthew Guthaus in Support of the Objection of Synopsys, Inc. to the Debtor’s Bidding Procedures and Related Objections* [Docket No. 137] (the “Guthaus Declaration”), which were each filed on February 13, 2017, and represents as follows:

PRELIMINARY STATEMENT

1. After an eight-week delay and an estimated \$2.6 million additional cash burn, ATopTech, Inc. (the “Debtor”) has once again proposed a sale of substantially all of its assets to a foreign buyer. This time it is to a newly-created shell corporation, controlled by a Chinese industrial magnate who is outside the jurisdiction of the U.S. Courts, and who refuses to provide any relevant information concerning himself, his affiliates, or his connections to the Chinese government, Mr. Jingyuan Han. Mr. Han, who cannot be compelled to appear and testify at next

week's sale hearing, and who refuses to participate in a routine deposition, is nonetheless asking this Court to exercise its jurisdiction and power to approve a sale of the Debtor's assets to his newly-created shell entity, Avatar Integrated Systems, Inc. ("Avatar").

2. Mr. Han is seeking to invoke this Court's jurisdiction to obtain the assets of a debtor free and clear of claims and interests, and to have the ability to close the transaction immediately upon entry of this Court's order if he so chooses. If Mr. Han chooses not to close quickly, in the event that he seeks to delay the closing to fulfill the closing condition of obtaining approval of the transaction from the Committee on Foreign Investment in the United States ("CFIUS") and not take the risk that CFIUS will order divestment of the Debtor's assets if he closes the purchase without their approval, he is instead asking that this Court grant him the extraordinary protections provided to a lender for debtor-in-possession financing, including super priority liens that will be senior to the claims of all unsecured creditors, including Synopsys whose claim represents 90% of the scheduled general unsecured claims.

3. This financing will be solely used to fund the Debtor's continuing operating losses, during the potentially lengthy CFIUS approval process, thereby reducing the actual sale proceeds available to the estate and creditors by as much as two-thirds of the proposed \$9 million purchase price, \$6 million. As will be discussed in more depth below, this is an inappropriate shifting of the risks of obtaining CFIUS approval, and the entire proposed transaction contains improper components.

4. Most important to Synopsys, at the Bidding Procedures Hearing (defined below), this Court ruled that any buyer at a section 363 sale of the Debtor's assets would be subject to and bound by the Permanent Injunction (defined below) preventing continuing infringement of Synopsys' intellectual property. However, based upon the structure of this proposed transaction,

once he owns and controls the Debtor's assets, Mr. Han will be able to, with complete impunity, transfer the Debtor's infringing assets (containing Synopsys' patents and copyrights) outside the jurisdiction of the U.S. courts, as only his U.S. shell company could be found liable for any violations of the Permanent Injunction. This alone should be reason enough for this Court to deny the proposed sale to Avatar, however it gets worse. Much worse.

5. It is not often that pleadings in bankruptcy courts deal with issues of national security. However, transactions in the semiconductor industry, particularly sales to Chinese buyers, have drawn heightened scrutiny in the recent past by the Department of Defense, CFIUS, and the President. Summarizing the in-depth analysis contained in his declaration, former Assistant Secretary of Defense Joseph Benkert, a retired Navy Captain and senior Defense Department official who oversaw the CFIUS review of over 400 proposed sales concludes:

Based on my education, training and experience, and my analysis of the documents and information considered in this case, it is my opinion that CFIUS will consider the Debtor's proposed sale to Avatar (the "Proposed Transaction") to be the type of transaction that threatens to impair the national security of the United States. A series of similar transactions, particularly in the past two years, have required a lengthy CFIUS process and/or have not been successful. In my opinion, the Proposed Transaction is likely to receive thorough CFIUS scrutiny and there is a material risk that it will not receive CFIUS approval.

See Benkert Decl. ¶ 25.

6. Similarly, Nicole Lamb-Hale, former Assistant Secretary of Commerce for Manufacturing and Services in the U.S. Department of Commerce's International Trade Administration, among other senior government positions, who represented the Department of Commerce as a principal and a voting member of CFIUS, submitted the Lamb-Hale Declaration, which details the CFIUS review process, including the recent developments such as the blocking of the sale of a manufacturer of components for the semiconductor industry to a Chinese buyer

by President Obama in December 2016, and other recent denials or delays of sales relating to the semiconductor industry to Chinese buyers. She summarizes her conclusions as follows:

It is likely that CFIUS will review the Debtor's proposed sale to Avatar . . . and the DIP loan, whether or not the Debtor and Avatar file joint voluntary notices of the Proposed Transaction and the DIP Loan with CFIUS. Accordingly, because the CFIUS review process can take a significant amount of time, it is likely that the closing of the Proposed Transaction and the DIP Loan will be delayed by CFIUS review.

While it is not possible to predetermine the outcome of a CFIUS review, in my opinion, it is likely that the Proposed Transaction and the DIP Loan will not obtain CFIUS clearance.

See Lamb-Hale Decl. ¶¶ 8-9.

7. As further explained by Mr. Benkert, “In determining whether a transaction presents national security risks, CFIUS assesses whether the foreign person has the capability or intention to exploit or cause harm (*i.e.*, whether there is a threat). CFIUS will want to understand the buyer, ownership structure, sources of financing, any ties to the Chinese government or government-controlled entities, and the business rationale for the transaction (*e.g.*, whether the buyer has other than commercial motives). This is precisely the type of information that Synopsys has sought to obtain from Mr. Han, to no avail.

8. President Obama, in blocking the sale of the U.S. business of Aixtron SE, a German manufacturer of equipment for the global semiconductor industry, by the China based Fujian Grand Chip Investment Fund, stated in his order “The national security risk posed by the transaction relates, among other things, to the military applications of the overall technical body of knowledge and experience of Aixtron, a producer and innovator of semiconductor manufacturing equipment and technology, and the contribution of Aixtron's U.S. business to that body of knowledge and experience.”

9. These are serious issues; however, there is no evidence in the record that the Debtor has taken them seriously or even considered these risks. The Debtor's previously proffered 30(b)(6) witness who was deposed before the bid procedures hearing on a variety of topics, Randy Lederman, could not testify at all about the CFIUS approval process (*see* Wynne Decl., Ex. 1; Tr. of Hr.'g, Apr. 5, 2017, at 66:1-67:11, *In re AtopTech, Inc.*, No. 17-11011 (MFW) (Bankr. D. Del.)), and there has been no other evidence proffered or introduced with respect to the risks of obtaining CFIUS approval, or the Debtor or its Board's consideration of these risks.

10. Because Synopsys has been blocked by Mr. Han from obtaining the relevant information, or really *any* information on him and his business and governmental connections, Synopsys has only been able to do a certain amount of public record investigation into Mr. Han. What has been obtained, as discussed below, shows that Mr. Han has at least extensive past governmental ties, and that he is involved in a variety of semiconductor companies and activities that will draw intense scrutiny from CFIUS and the relevant government departments, substantially delaying, if not blocking the proposed sale. As far as Synopsys can tell, none of this information has been considered or provided to the Debtor, or its board or advisors and certainly none of it has been offered to this Court, the U.S. Trustee, creditors or Synopsys.

11. Synopsys had not desired to purchase the Debtor's assets or business operations; its goal in pursuing its claims in this case has been to protect its intellectual property and the hundreds of millions of dollars that it has invested in creating that intellectual property. However, because of the various risks articulated above, Synopsys has submitted a competing bid to purchase certain of the Debtor's assets for a cash purchase price of \$10 million. Not only does this bid exceed the cash price offered in the Stalking Horse APA (defined below), it nearly

triples the actual value of Avatar's bid to the estate, in addition to bringing other benefits to the estate, including certainty of closing and full and final settlement of all litigation between Synopsys and the Debtor. Should the Debtor proceed nonetheless with seeking approval of a proposed sale to Avatar, Synopsys requests that this Court deny such request.

BACKGROUND

A. Entry of Permanent Injunction and Debtor's Previous Sale Process

12. As the Court is aware, for the past three years, Synopsys and the Debtor have been involved in litigation before the U.S. District Court for the Northern District of California, San Francisco Division (the "District Court") regarding the Debtor's infringement of Synopsys' intellectual property rights, including whether the Debtor's place and route software product, Aprisa, infringes Synopsys' copyrights and patents (collectively, the "District Court Action"). *See Synopsys, Inc. v. AtopTech, Inc.*, No. 13-cv-03965 MMC (DMR) (N.D. Cal.). Additional details on the District Court Action are set forth in *Synopsys' Objection to Motion of Debtors for Orders (I) Authorizing and Approving (A) Bidding Procedures, (B) Buyer Protections for Stalking Horse, (C) Procedures Related to the Assumption and Assignment of Certain Executory Contracts and Unexpired Lease, (D) the Form and Manner of Notice; (II) Scheduling the Bid Deadline and Auction; (III) Authorizing and Approving (A) the Sale of Certain Assets Free and Clear of All Liens, Claims, Encumbrances and Interests and (B) the Assumption and Assignment of Certain Contracts and (IV) Granting Related Relief* [Docket No. 129] (the "Bidding Procedures Objection") which is incorporated herein by reference.

13. On January 17, 2017, the Debtor filed the Sale Motion seeking, among other relief, (a) approval of a sale of the Debtor's business as a going concern, including all of its intellectual property, pursuant to an asset purchase agreement with Draper Athena (the "Draper

Athena APA”) and (b) approval of certain bidding and sale procedures in connection with the sale (the “Bidding Procedures”).

14. On February 13, 2017, Synopsys filed the Bidding Procedures Objection, which sought clarification that the contemplated sale to Draper Athena could not proceed free and clear of a permanent injunction issued in the District Court Action which, *inter alia*, bars the Debtor from further infringing on Synopsys’ copyrights (the “Permanent Injunction”).²

15. Despite clear language in the Permanent Injunction making it applicable to any purchaser of the Debtor’s assets, including, most importantly, a “purchaser under 11 U.S.C. § 363,” the Debtor refused to clearly state its position with respect to whether the Permanent Injunction applied to a successor purchaser and to put potential purchasers on notice that any sale of the Debtor’s assets would be subject to the Permanent Injunction.

16. On February 21, 2017, the Court held a hearing to consider approval of the Bidding Procedures (the “Bidding Procedures Hearing”), among other matters. At the Bidding Procedures Hearing, the Court approved the Bidding Procedures, but ruled that the Permanent Injunction would apply to any successor purchaser (in accordance with the terms thereof) and required the Debtor to include language in the Bidding Procedures and related notices alerting potential bidders to the fact that the sale was subject to the Permanent Injunction. *See* Tr. of Hr.’g, Feb. 21, 2017, at 18:2-3, *In re AtopTech, Inc.*, No. 17-11011 (MFW) (Bankr. D. Del.) (Walrath, J.) (“The permanent injunction is applicable to any buyer.”); *id.* at 23:17-18 (Walrath,

² In pertinent part, the Permanent Injunction provides that

Atoptech, Inc. *and its successors or assigns (including any purchaser under 11 U.S.C. § 363)*, subsidiaries, affiliates officers, directors, employees, principals, agents, and attorneys, and those who are in active concert or participation with them . . . from infringing Synopsys’ copyrights with U.S. Registration Nos. TX 7-261-049, TX 7- 260-556, TX 7-663-729, and TX 7-664-316, until the expiration of the copyrights.

Permanent Injunction at 1 (emphasis added).

J.) (“Doesn’t [the Permanent Injunction] have to be in the notice of the sale?”); *id.* at 25:18-20 (Walrath, J.) (directing the Debtor to “[j]ust say that [the] attached [Permanent Injunction] is applicable to both the debtor and any buyer”).

17. During a status conference before the Court on April 5, 2017, the Debtor informed the Court that Draper Athena was no longer interested in pursuing a purchase of the Debtor’s assets as contemplated by the Draper Athena APA. *See* Tr. of Hr.’g, Apr. 5, 2017, at 5:17-24, *In re AtopTech, Inc.*, No. 17-11011 (MFW) (Bankr. D. Del.). The Debtor informed the Court that it was pursuing a sale with an undisclosed buyer, subject to documentation, and that if such sale did not materialize, it would conduct an auction without the benefit of a stalking horse. *Id.* at 8:6-16.

18. By order dated April 21, 2017 [Docket No. 234] (the “Bidding Procedures Order”), the Court (a) approved an updated form of Bidding Procedures, (b) scheduled an auction for May 9, 2017 (the “Auction”) and (c) scheduled a sale hearing based on the results of the auction for May 12, 2017. Bidding Procedures Order, at ¶¶ 3, 9, 14.

B. The New Proposed Sale and Buyer

19. On April 19, 2017, the Debtor filed that certain purchase agreement (as amended, the “Stalking Horse APA”), dated April 18, 2017 by and among the Debtor, as seller, Jingyuan Han on behalf of an entity to be formed prior to closing, as purchaser, and King Mark International Limited (“King Mark”), as guarantor [Docket No. 239]. The Stalking Horse APA contemplates the sale of substantially all assets of the Debtor to Avatar for a purchase price of \$9 million (the “Proposed Transaction”). *See* Stalking Horse APA, § 2.2(a).

20. Avatar was formed after the Stalking Horse APA was signed, and is owned by King Mark, which is itself a recently-formed entity, incorporated on March 30, 2017 in Hong Kong. *See* Suppl. Wynne Decl., Ex. 7. Synopsys notes that both King Mark and Avatar were

formed after the Bidding Hearing (at which counsel to Avatar appeared telephonically as representing an interested party) and are owned and controlled by Mr. Han, a person who appears to have connections to the Chinese government and whose companies have been accused of corporate malfeasance and industrial espionage. *See ASML US Inc. v. Xtal Inc.*, No. 16-cv-295051 [Docket No. 2] (Cal. Sup. Ct. May 11, 2016) (the “Xtal Complaint”).³ Contrary to Avatar’s assertions,⁴ Mr. Han’s corporate and political affiliations and connections are entirely relevant because, as was the case with the proposed sale to Draper Athena, any sale to Avatar will be subject to review by CFIUS. *See* Benkert Declaration ¶13 (“CFIUS will want to understand the buyer, ownership structure, sources of financing, any ties to the Chinese government or government-controlled entities, and the business rationale for the transaction”).

21. In an apparent attempt to work around the concerns Synopsys raised at the Bidding Procedures Hearing in connection with the Draper Athena APA—namely, that conditioning closing of a sale on receipt of CFIUS Clearance⁵ presents unreasonable risks to the Debtor’s estate, the Stalking Horse APA provides that Avatar has the discretion to seek CFIUS review. If Avatar elects to seek CFIUS Clearance, receipt of such clearance will become a

³ A copy of the Xtal Complaint is attached to the Wynne Declaration as Exhibit 3. Synopsys has not had the opportunity to conduct discovery into these allegations but the complaint itself raises serious issues that merit further investigation before entrusting the Debtor’s assets to Avatar.

⁴ *See Opposition of Avatar Integrated Systems, Inc. and King Mark International Limited to Emergency Motion of Synopsys, Inc. for Entry of an Order (I) Compelling Certain Disclosures by Jingyuan Han, King Mark International Limited and Avatar Integrated Systems, Inc. and (III) Adjourning the Sale Hearing* [Docket No. 269], at ¶ 10.

⁵ “CFIUS Clearance” means

a determination by CFIUS that (a) the proposed sale is not a covered transaction and not subject to review under Section 721 of the Defense Production Act of 1950, as amended, (b) the proposed sale presents no unresolved national security concerns or (c) CFIUS has sent a report to the President of the United States requesting the President’s decision with respect to the joint voluntary notice and either (i) the President has announced a decision not to take any action to suspend or prohibit the proposed sale to the Purchaser or (ii) the President has not taken any action after 15 days from the date the President received such report from CFIUS.

Stalking Horse APA, § 1.1(bb).

condition to closing the proposed transaction under the Stalking Horse APA. *See* Stalking Horse APA at ¶ 8.1(d).

22. Notwithstanding Avatar's purported discretion as to whether to seek CFIUS approval, as set forth below and in the Lamb-Hale Declaration, CFIUS review is not always voluntary and review of the proposed transaction is likely given the current political climate, the industry in which the Debtor operates, and the identity and ownership of Avatar. *See* Lamb-Hale Decl., ¶ 20. Therefore, in an effort to obtain information necessary to evaluate the risks associated with receipt of CFIUS approval, on April 21, 2017, Synopsys filed and served notices of deposition of King Mark and Mr. Han. *See* Docket Nos. 243 & 244. Thereafter, on April 28, 2017, the Debtor filed an amendment to the Stalking Horse APA, which provides that Avatar shall act as "Purchaser" under the Stalking Horse APA and replace Mr. Han in all capacities under the Stalking Horse APA. *See* Docket No. 249 (the "Amendment").

23. Apparently taking the position that the Amendment eliminates the need for any inquiry into Mr. Han, his affiliates or holdings, to date, Avatar has refused to disclose to the Court, the U.S. Trustee, other parties in interest (including Synopsys), and perhaps even the Debtor, basic information about the Proposed Transaction, such as who or what is funding the purchase of the Debtor's assets. *See* Suppl. Wynne Decl. Ex. 7 (in response to inquiries about the source of funds for the Proposed Transaction, counsel to Avatar states "[w]e consider questions delving into why Avatar made certain business decisions and who is funding the purchase price of the acquisition to be irrelevant, improperly intrude into King Mark and Avatar's business dealings, and potentially invade the attorney-client privilege.").

24. Far from being irrelevant, the identity of the person or entity funding Avatar's acquisition of the Debtor's assets will have a direct impact on whether the Proposed Transaction

can pass muster with CFIUS. The likelihood of the Proposed Transaction obtaining CFUIS approval (or not) is of significant concern for Synopsys and all creditors because the Stalking Horse APA provides for the Debtor's incurrence of \$6 million in debt pursuant to a postpetition senior secured revolving credit facility (the "DIP Facility"), which will be used to fund the Debtor's operations and losses pending the satisfaction or waiver of all closing conditions to the proposed sale, including CFIUS approval. DIP Motion, at ¶ 9. The repayment of the DIP Facility will be credited against the proceeds of the proposed sale. *Id.* at ¶ 10. In addition, in exchange for the proceeds of the DIP Facility, the Debtor will provide Avatar with a security interest in "all assets of the Debtor, whether now existing or hereafter acquired or created, and the products and proceeds thereof" on a super-priority priming basis. DIP Motion, ¶ 12.

25. Attached to the DIP Motion is a proposed budget (the "Budget"), which appears to indicate that the Debtor will run out of cash by the end of July. *See* DIP Motion, Ex. B. Should the proposed sale transaction be subject to scrutiny by CFIUS (which it will), a process that will take months (*see* Lamb-Hale Decl., ¶ 20), the proposed DIP Facility will finance the Debtor's continuing losses from operations while CFIUS approval is pending. The Budget contemplate that if the Proposed Transaction closes in October, \$4.5 million of the \$6 million DIP Facility (which is credited toward the \$9 million purchase price set forth in the APA) will be spent prior to closing, meaning that the Debtor's estate will net approximately \$4.5 million in sale proceeds from the proposed transaction—if CFIUS Clearance is obtained at all and the sale is able to close in October. If it is delayed further, the entire \$6 million DIP could be spent.

26. As such, Avatar's bid is the equivalent of, at best, a \$4.5 million bid (plus the breakup fee) or even a \$3 million bid, by a domestic buyer who is not subject to CFIUS and who

can close immediately, because such a buyer would be responsible for whatever operating losses the business incurs following closing.

C. The Debtor's Continuing Infringement

27. Although the DIP Facility is a new development with respect to the currently proposed sale, certain objectionable aspects of the Draper Athena APA unfortunately persist in the current Stalking Horse APA, including the transfer of Synopsys' intellectual property. As set forth in the Bidding Procedures Objection and the exhibits contained therein, the Debtor has a history of denying that it has copied Synopsys' intellectual property, only to be proven wrong time and time again, including in the District Court Action, where court-ordered discovery produced approximately 250,000 pages of Synopsys materials found to have been improperly accessed and copied. *See* Bidding Procedures Objection, ¶ 35(d).

28. The Debtor has claimed repeatedly, and incorrectly, first to Synopsys, then to the District Court and the jury in the District Court Action, and now in statements to this Court and in the Draper Athena APA and the Stalking Horse APA, that the current versions of the Debtor's primary product, Aprisa (then 16.05 and now Aprisa versions 16.12 and later) do not infringe on Synopsys' intellectual property.

29. In an unsuccessful attempt to address some of the issues Synopsys raised in the Bidding Procedures Objection with respect to problems and deficiencies within the Draper Athena APA, the Stalking Horse APA purports to limit the version of Aprisa to be transferred to Avatar to version 16.12 and later versions, which the Debtor represents do not infringe on Synopsys' copyrights or patents.⁶ There are two fundamental issues with the Stalking Horse APA on this point. First, as drafted, the Stalking Horse APA and related schedules actually

⁶ As set forth below, the changes to the Draper Athena APA reflected in the Stalking Horse APA do not accurately implement this goal and, in any event, are insufficient.

transfer all of the executable code and all prior versions of Aprisa (including those that were found to infringe by the jury in the District Court Action) to Avatar. *See* Stalking Horse APA ¶ 2.1(a). Second, the Stalking Horse APA includes representations by the Debtor that are false and misleading, including, for example, Section 3.9(n), which states that

The versions of Aprisa and Apogee included in the Transferred Assets (the “Transferred Versions”) do not infringe any of Synopsys Inc.’s copyrights that Synopsys, Inc. has asserted in the Synopsys Copyright Litigation and do not infringe any of the patents that Synopsys, Inc. has asserted in the Synopsys Patent Litigation, and comply with the Injunction. None of the Transferred Versions contain a translation table. All customers of the Business have migrated to one of the Transferred Versions. Seller has modified the Transferred Versions to remove the features of such software accused of patent infringement in the Synopsys Patent Litigation.

Stalking Horse APA, § 3.9(n).

30. While Synopsys is not asking the Court to decide whether Aprisa 16.12 does in fact infringe⁷ on its intellectual property, given the above-referenced representations in the Stalking Horse APA and similar representations made to Synopsys and the Court, which are simply inaccurate, Synopsys is compelled to correct the record. As set forth in the Guthaus Declaration and Supplemental Guthaus Declaration, a preliminary analysis indicates that Aprisa

⁷ As reflected in the Guthaus Declaration and Supplemental Guthaus Declaration, it is a lengthy and complicated process for Synopsys’ experts to evaluate and test substantial amounts of the Debtor’s executable code (particularly as multiple releases of each version are regularly created), and determine every specific instance of copyright infringement. That exhaustive analysis has not been completed, nor does it need to be for the purposes of the Sale Motion and this Objection. It would equally be a time consuming and unnecessary process to ask the Bankruptcy Court to rule on whether any particular product or version of Aprisa continues to infringe on Synopsys’ intellectual property. Those are issues for another day, in another court, if necessary. However, because Synopsys’ expert has already performed a preliminary analysis that shows that certain of the Debtor’s representations in the Stalking Horse APA and statements to this Court are inaccurate, Synopsys is compelled to provide that analysis and not sit idly by as misstatements are made. The only relevant issue for the Proposed Transaction is that Avatar is on notice that Aprisa 16.12 continued to infringe and the representation to the contrary in the Stalking Horse APA is inaccurate. Avatar has had significant time to conduct its own due diligence on the infringement issues Synopsys has raised, and it has had complete access to the infringement analysis Synopsys previously filed under seal with this Court. Therefore, if Avatar is the successful bidder at the Auction and the Proposed Transaction is approved by this Court over the objections of Synopsys, one of the significant modifications that should be made to the Stalking Horse APA and any sale order relate to Avatar’s waiver of any remedies or claims against the estate arising from the the inaccuracy of the representations made with respect to infringement.

16.12 continues to infringe on Synopsys' intellectual property rights. Suppl. Guthaus Decl. ¶¶ 14, 37; Suppl. Guthaus Decl. ¶¶ 12-21. Among other things, Aprisa 16.12 continues to include Synopsys' PrimeTime report formats and PrimeTime command set elements in violation of the Permanent Injunction. *Id.*; *see also* Bidding Procedures Obj., ¶¶ 25-36. Further details and specific examples and explanations of how Aprisa 16.12 infringes Synopsys' copyrights are set forth in the Guthaus Declaration and Supplemental Guthaus Declaration.

OBJECTION

A. The Sale Cannot Be Approved Because the Stalking Horse APA is Inaccurate, Internally Inconsistent and Contemplates the Sale and Transfer of Materials that Infringe on Synopsys' Intellectual Property in Violation of the Permanent Injunction.

31. Despite this Court's clear instruction at the Bidding Procedures Hearing that any purchaser would be subject to the Permanent Injunction, the Stalking Horse APA remains shockingly unclear on this point. Rather than simply stating that Avatar is bound by the Permanent Injunction, the Stalking Horse APA provides as follows:

Upon the terms and subject to the conditions set forth in this Agreement, at the Closing, Purchaser shall assume and thereafter pay, perform and discharge (or, where applicable, shall cause its Affiliates to pay, perform or discharge) when due, all of the following Liabilities of Seller (collectively, the "**Assumed Liabilities**") and no others: . . . any obligations related to the continued use of Intellectual Property Rights after the Closing *as determined in a final judgment* in connection with the Synopsys Patent Litigation and, for the sake of clarity, subject to any obligations related to the continued use of Intellectual Property Rights pursuant to the injunction issued by the court in the Synopsys Copyright Litigation

Stalking Horse APA §2.1(d) (emphasis added).

32. Notwithstanding the attempt to provide "clarity," this provision merely creates confusion. As an initial matter, the reference to the Synopsys Patent Litigation when the Permanent Injunction relates only to Synopsys' copyright claims, in addition to the reference to a

final judgment when no final judgment has been entered in the District Court Action, only serve to create unnecessary confusion about the true meaning of this provision. More importantly, however, Section 2.1(d) of the Stalking Horse APA appears to suggest that the obligation to comply with the Permanent Injunction is tied to the “continued use of Intellectual Property Rights.” As defined in the Stalking Horse APA, “Intellectual Property Rights” is merely a list of non-specific intellectual property rights.⁸ For Section 2.1(d) to be effective, it must refer to the intellectual property that is being transferred under the Stalking Horse APA—*i.e.*, the “Transferred Technology” and “Transferred IPR” being acquired by Avatar pursuant to the Stalking Horse APA. The Stalking Horse APA and proposed sale order must be amended to

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Section 1.1(aaaa) of the Stalking Horse APA defines “Intellectual Property Rights” as

collectively, on a worldwide basis, any and all industrial and intellectual property rights in any jurisdiction, whether statutory or common law rights, including but not limited to all rights in the following: (i) patents and applications therefor and all reissues, divisionals, renewals, extensions, provisionals, continuations and continuations-in-part thereof, (ii) all industrial designs and any registrations and applications therefor, and all mask works, including all registrations and application therefor and any equivalent or similar rights in semiconductor masks, layouts, architectures or topology, (iii) all common law trademarks and service marks, domain names and trademark and service mark registrations and applications therefor, including all renewals in connection therewith, and other indicators of source, and the goodwill of the business related thereto, (iv) all copyrights (whether registered or unregistered) in any work of authorship, and all copyright registrations, renewals and applications in connection therewith, (v) all rights in databases and data collections, (vi) all moral rights of authors, however denominated, (vii) all rights in trade secrets and other confidential information (including confidential ideas, research and development, know-how, formulas, compositions, manufacturing and production processes and techniques, technical data, designs, drawings, specifications, customer, sales prospect, distributor and supplier lists, pricing and cost information, and marketing plans and proposals), (viii) any analogous, corresponding or similar proprietary rights to any of the foregoing anywhere in the world, and (ix) all rights to prosecute and perfect the foregoing through administrative prosecution, registration, recordation, or other proceeding, and all causes of action and rights to sue or seek other remedies arising from or relating to the foregoing, including for any past or ongoing misuse or misappropriation; provided, however, that to the extent that the term “Intellectual Property Rights” is used in this Agreement in the context of selling, conveying, transferring, assigning or delivering Intellectual Property Rights, sub-clause (vi) above should be read as follows: “all moral rights of authors, however denominated, except to the extent that such personal rights are non-assignable by Applicable Laws.

clearly reflect Avatar's obligation to comply with the Permanent Injunction in accordance with the Court's ruling.

33. There are several other instances of ambiguity and inconsistencies in the Stalking Horse APA and Synopsys has provided the Debtor and Avatar with a chart outlining these deficiencies, as it had previously done to Draper Athena, a copy of which is attached to the Supplemental Wynne Declaration as Exhibit 8 (the "APA Issues Chart"). Of note, Section 2.1(a)(iii) of the Stalking Horse APA purports to transfer the source code for all versions of Aprisa released by the Debtor prior to closing the sale transaction. *See* Schedule 2.1(a)(iii). Similarly, Section 2.1(a)(ii) of the Stalking Horse APA lists Aprisa / Apogee JIRA issue tracking and product management, training materials, customer test cases, run script and results, computers, servers, and databases, among others, as assets to be transferred to Avatar. *See* Schedule 2.1(a)(ii). The transfer of these items, as well as certain others set forth on Schedule 2.1(a)(ii) and Schedule 2.1(a)(iii), would necessarily include the transfer of the prior versions of Aprisa that were found by a jury to infringe on Synopsys' copyrights the District Court Action.

34. Synopsys continues to discuss the foregoing issues as well as other concerns with specific provisions of the APA set forth in the APA Issues Chart with counsel to the Debtor and Avatar and will advise the Court if any of these issues are resolved prior to the Sale Hearing. To date, however, the parties have not reached a consensus regarding appropriate limitation on the materials that can and should be transferred pursuant to the Stalking Horse APA. When Synopsys raised these and other concerns with counsel to Avatar, it received the following insufficient response:

The Excluded Assets section of the APA explicitly states, "Notwithstanding anything to the contrary in this agreement, Purchaser shall not acquire, and Seller shall retain the following assets, properties, and rights owned or leased by seller (collectively, Excluded Assets) . . .

(xiii) all versions of Aprisa and Apogee prior to 16.12.” *See* Article 2.1(c). Thus, even if other sections of the APA (or schedules thereto) could be read broadly enough to provide for Avatar’s acquisition of prior versions of Aprisa (which Avatar disputes), the “notwithstanding” language quoted above makes it abundantly clear that the “Excluded Assets” section controls and Avatar “shall not” acquire versions of Aprisa “prior to 16.12.

Suppl. Wynne Decl. Ex. 9.

35. Synopsys respectfully disagrees—the Stalking Horse APA is anything but “abundantly clear” and the language cited by counsel to Avatar is not a panacea for all of the Stalking Horse APA’s deficiencies. Excluding “all versions of Aprisa and Apogee prior to 16.12” from those assets to be acquired by the Stalking Horse Purchaser is not the same as excluding all source code, build and release systems, training materials, test cases and documentation for all versions of Aprisa and Apogee prior to 16.12 and the transfer of these items to a newly created shell purchaser controlled by someone outside the jurisdiction of the U.S. courts is highly prejudicial to Synopsys.

1. Aprisa 16.12 Continues to Infringe on Synopsys’ Copyrights Rendering Representations in the Stalking Horse APA Untrue, Subjecting the Estate to Potential Claims

36. Even if Synopsys were to adopt Avatar’s view and accept the fallacy that the APA contemplates the transfer solely of Aprisa 16.12, the fact remains that version 16.12 still infringes on Synopsys’ copyrights. As set forth above and in the Guthaus Declaration and Supplemental Guthaus Declaration, among other things, Aprisa 16.12 (a) continues to include Synopsys’ PrimeTime report formats and PrimeTime command set elements and (b) contains source code that allows customers to continue to use various Synopsys command options in Aprisa. Guthaus Decl. ¶¶ 14; 37.

37. Synopsys understands that a full and final determination of whether Aprisa 16.12 infringes on Synopsys’ copyrights and patents is a highly technical matter that may be more

appropriately determined by the District Court, and Synopsys is not asking the Court to decide this issue today. However, a preliminary analysis by Synopsys' expert suggests that Aprisa 16.12 does contain Synopsys' copyrighted material (*see* Suppl. Guthaus Decl. ¶ 13) and, as discussed above, in Section 3.9(n) of the Stalking Horse APA, the Debtor represents and warrants that Aprisa 16.12 does not infringe on Synopsys' copyrights.

38. The Debtor cannot be permitted to enter into a purchase agreement that contains an inaccurate representation, which could give rise to claims against the estate. All representations in the Stalking Horse APA regarding the lack of infringement on Synopsys' intellectual property must be stricken from the Stalking Horse APA. Avatar should make its own determination with respect to whether any of the assets it is acquiring infringe as well as its ability to comply with the Permanent Injunction. If, knowing Synopsys' position, Avatar chooses to move forward with the Proposed Transaction, the Stalking Horse APA and proposed sale order should be modified to make it clear that Avatar has no recourse against the estate if it is later finally determined by the District Court or another court of competent jurisdiction that Aprisa 16.12 continues to infringe.

39. Further, the proposed sale, as currently constructed, is prohibited by the Permanent Injunction. Paragraph 1 of the Permanent Injunction provides that:

ATopTech shall not . . . sell, offer to license, lease, or sell . . . any product (including without limitation Aprisa versions 07.11 through 15.10), script, translation table, program, version or documentation containing (i) PrimeTime's report formats, or (ii) the name and associated syntax of the PrimeTime non-SDC commands, variables or attributes ("non-SDC command set") identified in Trial Exhibits 1439-1441, electronically attached hereto as an Appendix. . .

40. As noted above and in the Guthaus Declaration and Supplemental Guthaus Declaration, Aprisa 16.12 contains Synopsys' PrimeTime Report formats. *See* Suppl. Guthaus Decl. ¶¶ 14-20. Thus, the sale of Aprisa 16.12 to Avatar is not permitted by the Permanent

Injunction and further, any other elements of the Debtor's business, such as computers, databases and network equipment, must be thoroughly cleansed prior to being transferred to Avatar (or any other purchaser) in order to ensure that infringing materials are not being sold in violation of the Permanent Injunction.

B. The Proposed Transaction and DIP Facility Should Not be Approved Because They Improperly Shift the Risk of Obtaining CFIUS Approval from Avatar to Creditors

41. As set forth in greater detail in the Lamb-Hale and Benkert Declarations, CFIUS can be expected to scrutinize the acquisition of the Debtor by a Chinese-controlled entity, a process that will take time and may ultimately result in CFIUS blocking the transaction. *See* Lamb-Hale Decl., ¶¶ 20, 25; Benkert Decl., ¶ 25.

42. Although the CFIUS process is generally a joint, voluntary process that parties initiate based on the perceived risk that the President might require divestment post-closing if there are national security or critical infrastructure concerns associated with a particular covered transaction, CFIUS does *not* need consent from parties to a transaction to review the transaction or order divestment and other remedies. *See* Lamb-Hale Decl., at ¶¶ 15-16. Thus, even if Avatar elects not to seek CFIUS Clearance, CFIUS can, and likely will, request that the parties submit notice of the Proposed Transaction for review. *See id.* It is likely that the review process will take at least three months, although it is impossible to predict with certainty. *See id.* ¶ 20. The Debtor or Avatar's apparent concern regarding this lengthy delay is why Avatar is seeking to advance a \$6 million loan to cover operating losses through at the least the projected closing date in October, and potentially beyond. The problem with this construct is that CFIUS approval likely will not be obtained and the Debtor may ultimately end up back where these cases started, but now with no cash and a large secured claim against the estate.

1. The Debtor May Not Ignore The Interests of the Estate and Its Creditors In Exercising Business Judgment

43. In support of its request for approval of the Proposed Transaction, the Debtor invokes the business judgment standard, under which bankruptcy courts will generally approve sales outside the ordinary course of business under section 363(b) of the Bankruptcy Code when they are supported by “sound business reasons.” *See Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1071 (2d Cir. 1983); *In re Stingfree Techs., Inc.*, No. 08-16232, 2009 Bankr. LEXIS 3023, at *35 (Bankr. E.D. Pa. Feb. 4, 2009) (“The determining standard for a motion to sell under section 363(b) is often referred to as the business judgment test.”); *In re Montgomery Ward Holding Corp.*, 242 B.R. 147, 153 (D. Del. 1999) (“In evaluating whether a sound business decision justifies the use, sale or lease of property under Section 363(b), courts consider a variety of factors, which essentially represent a ‘business judgment test.’”).

44. In reality, there is more to meeting the business judgment standard within the context of sales under section 363(b) of the Bankruptcy Code than providing boilerplate business justifications for a proposed transaction; otherwise the requirement of court approval would be effectively meaningless. It is therefore not enough that the trustee or debtor in possession has plausible reasons for recommending approval of the proposed transaction; the transaction must in fact be the best available option under the circumstances and must maximize value to the estate and its creditors. *Stingfree*, 2009 Bankr. LEXIS 3023, at *36 (“Typically, when the chapter 11 debtor in possession intends to liquidate estate assets, sound business judgment involves acceptance of the highest bid.”); *In re Lahijani*, 325 B.R. 282, 288 (9th Cir. BAP 2005) (“The court’s obligation in § 363(b) sales is to assure that optimal value is realized by the estate under the circumstances.”); *In re Integrated Resources, Inc.*, 135 B.R. 746, 750 (Bankr.

S.D.N.Y. 1992) (“When 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 re Bakalis, 220 B.R. 525, 532 (Bankr. E.D. Pa. 1998) (“Although a trustee’s business judgment enjoys ‘great judicial deference’, this discretion is not without limit. A duty is imposed upon the trustee to maximize the value obtained from a sale, particularly in liquidation cases.”).

45. The role of the bankruptcy court in reviewing a proposed transaction has thus been explained as follows:

If . . . the trustee’s authority [to sell property of the estate outside the ordinary course] is only conditional, then it stands to reason that the requisite review of the contemplated activity must be more. At the very least it suggests that those who are entitled by the Code to offer input before the trustee can proceed may include in that input whatever better alternatives they believe are available. *In other words, the focus is to shift in such circumstances from considering only whether the trustee’s proposal is defensible to whether the proposal made is in fact the best that can be had for the estate.*

In re Engman, 395 B.R. 610, 625 (Bankr. W.D. Mich. 2008) (emphasis added). It therefore follows that the bankruptcy court need not approve a proposed sale recommended by a debtor-in-possession “if it has an awareness there is another proposal in hand which, from the estate’s point of view, is better or more acceptable.” *In re Broadmoor Place Invs., L.P.*, 994 F.2d 744, 746 (10th Cir. Kan. 1993). And, while non-economic factors (such as offers of employment to the debtor’s former employees) may be taken into account, such considerations must generally yield to maximization of value to the estate and its creditors. *In re After Six, Inc.*, 154 B.R. 876, 878 (E.D. Penn. 1993) (court ordered highest dollar amount bid accepted despite committee’s preference for a lower amount bid that included a promise to employ debtors’ former employees); *In re Gulf States Steel*, 285 B.R. 497, 516 (Bankr. N.D. Ala. 2002) (finding that purchase price and the benefit to the estate took precedence over factors such as the number of

jobs created in the local community as a result of a given bid, the effect on the community of a given bid, environmental issues presented by the different bids, and the preferences of the local government of one bidder over another).

46. Here, the Debtor has provided no business reasons, sound or otherwise, for the proposed sale to Avatar, because the Sale Motion itself (which, unlike the exhibits thereto, was never amended after Draper Athena backed out) contemplated an entirely different transaction with a different stalking horse purchaser. This in and of itself is sufficient grounds to deny approval of the proposed sale to Avatar.

47. Nevertheless, the Sale Motion does state the following with respect to the proposed transaction with Draper Athena, which presumably is the Debtor's justification for the sale to Avatar as well: "The Debtor submits that entry into the Agreement is a sound exercise of the Debtor's business judgment because: (a) the Agreement provides for the sale of the Debtor's business as a going concern, thereby maximizing the sale value, as compared to liquidating its assets on a piecemeal basis and (b) it allows certain employees to continue employment by the Successful Bidder." Sale Motion, ¶ 44. And that is all it says.

48. What it does not say is that Synopsys has made multiple different proposals to purchase the assets of the Debtor and settle the ongoing District Court Action between the parties, each of which would provide more value to the estate and its creditors, with less uncertainty, cost and delay, than a sale to Avatar on the terms set forth in the Stalking Horse APA. Those prior proposals and negotiations did not result in an agreement, and are now not relevant as Synopsys has made a \$10 million cash bid, along with a proposal that it will hire a minimum of 25 of the Debtor's current employees, on comparable terms. Any analysis between equivalent cash bids by Synopsys and Avatar shows that the Synopsys bid has

significant built-in advantages:: (1) Synopsys is a U.S. company not subject to CFIUS and would be prepared to close the transaction within three weeks of an order being entered approving the sale, (2) Synopsys would not require creditors to bear the risk of a lengthy, and potentially unsuccessful, attempt to obtain a CFIUS Clearance for the transaction, or force the estate to incur millions of dollars in operating losses and substantial professional fees while waiting for CFIUS approval and administering this case; (3) Synopsys' claim, which represents 90% of the scheduled unsecured claims, as well as the pending litigation between the parties, would be fully resolved as an integral part of the transaction, thereby expediting a wind down of the case through a consensual liquidating plan, eliminating enormous costs and uncertainty for the estate and its creditors.⁹

49. Based on these considerations, the circumstances of this case demand that the Debtor realistically assess the uncertainty and delay that the CFIUS Clearance process will impose prior to closing the transaction with Avatar, and recognize that Synopsys' bid constitutes a higher and better offer.

⁹ In accordance with the *Order Granting Debtor's Motion for Order Pursuant to Sections 105(a), 501, 502, 503 and 1111(a) of the Bankruptcy Code, Bankruptcy Rules 2002 and 3003(c), and Local Rules 1009-2 and 2002-1(e), (I) Establishing Bar Dates for Filing Claims and Proofs of Interest Against the Debtors and (II) Approving Form and Manner of Notice Thereof* [Docket No. 184], Synopsys filed a proof of claim asserting a claim against the Debtor in the amount of \$30.4 million plus certain additional amounts. The Debtor has yet to formally object to Synopsys' proof of claim, and the allowance of the claim is not currently before the Court; however the Debtor has repeatedly stated its belief that the full amount of Synopsys' jury award will ultimately be reduced on appeal or otherwise, including, most recently, in the *Response of Arnold & Porter Kaye Scholer LLP to Limited Objection of Synopsys, Inc. to First Monthly Application of Arnold & Porter Kay Scholer LLP, Special Litigation Counsel to the Debtor, for the Allowance of Compensation and Disbursement of Expenses for the Period from January 13, 2017 through February 28, 2017* [Docket No. 255]. Synopsys expects that the value of its claim may come into play in connection with the Auction and, therefore, contemporaneously with the filing of this Objection Synopsys filed the Gajarsa Declaration, which sets forth the reasons Synopsys' jury verdict is unlikely to be disturbed on appeal.

2. The DIP Facility is an Improper Attempt to Circumvent CFIUS Approval And Is Not In The Best Interests Of The Estate

50. The proposed debtor-in-possession financing arrangement with Avatar cannot be approved by this Court unless the debtor establishes that it is otherwise unable to reasonably obtain unsecured credit, and the credit is necessary for the debtor's continued operation.

11 U.S.C. § 364(d)(1); *In re Barbara K. Enters., Inc.*, No. 08-11474 (MG) 2008 WL 2439649, at *8 (Bankr. S.D.N.Y. June 16, 2008) (citing *In re Ames Dept. Stores, Inc.*, 115 B.R. 34, 37 (Bankr. S.D.N.Y. 1990)); *In re Aqua Assocs.*, 123 B.R. 192, 196 (Bankr. E.D. Pa. 1991) (stating that requests for postpetition financing must show the funds are "necessary to preserve the assets of the estate"). Moreover, debtor in possession financing should not be approved unless such financing "is in the best interest of the general creditor body." *In re Roblin Indus., Inc.*, 52 B.R. 241, 244 (Bankr. W.D.N.Y. 1985) (citing *In re Vanguard Diversified, Inc.*, 31 B.R. 364, 366 (Bankr. E.D.N.Y. 1983)); accord *In re Tenney Village Co.*, 104 B.R. 562, 569 (Bankr. D.N.H. 1989) ("The debtor's prevailing obligation is to the bankruptcy estate and, derivatively, to the creditors who are its principal beneficiaries."). If these threshold criteria are met, the court must then consider whether the terms of the proposed financing are fair, reasonable and adequate.

In re Los Angeles Dodgers LLC, 457 B.R. 308, 312-13 (Bankr. D. Del. 2011) (citing *In re Crouse Group, Inc.*, 71 B.R. 544, 546 (Bankr. E.D.Pa. 1987)); *Aqua Assocs.*, 123 B.R. at 195-96; *Barbara K. Enters.*, 2008 WL 2439649, at *10.

51. Here, the Debtor cannot establish either of the two threshold elements for approval of DIP financing: (a) that such financing is necessary for the Debtor's continued operation or (b) that it sought to obtain credit on an unsecured basis. First, the Debtor's own Budget reveals that it can sustain operations with its available cash and projected customer receipts through July, and therefore would not need to draw upon the DIP loan until August. As

explained above, Synopsys has submitted a bid that would not require the Debtor to maintain its current, money-losing operations much beyond the end of May, let alone July. And, Synopsys' bid offers more cash value than the Stalking Horse Bid, in fact exceeding the minimum required overbid, thereby realizing more value for the estate.

52. Furthermore, Avatar has refused to inform other bidders or the Court if it will waive the closing condition with respect to CFIUS approval until the day after the Auction. If it does waive approval, there is no need for the financing¹⁰. And, by the Debtor's own projections, the need for DIP financing is months away, and there is no need that can be demonstrated to approve DIP financing without a more fully developed record and an actual need. If the Debtor sought interim DIP financing in the first days of a chapter 11 case but didn't need the financing until months later, such a request would be denied to provide an opportunity for creditors to properly assess the transaction and any issues. Similarly here, Avatar has committed to providing the DIP Facility in the future, there has been no opportunity for Synopsys to take appropriate discovery, and there is no need for that financing now. If it appears more certain in 30 or 60 days that such financing is needed, because Avatar has delayed the closing to seek CFIUS approval, then this issue can be revisited.

53. Second, even assuming that there is actually a need for DIP financing in this case (which the Debtor's own Budget demonstrates there is not), the Debtor does not even pretend that it made any attempt to obtain such credit on an unsecured basis. Instead, the Debtor offers the flimsy excuse that, "in the interest of time and avoiding delays to the marketing and sale processes, as well as to conserve estate assets, the Debtor did not explore the options to obtain credit on an unsecured basis or by providing junior liens or liens on otherwise

¹⁰ While Avatar certainly has reserved the right to waive CFIUS approval, and close the transaction, it is highly likely that CFIUS will nonetheless review the transaction and can order that Avatar divest itself of the Debtor's assets and other remedies, which would be at Avatar's risk. See Lamb-Hale Decl., ¶¶ 8-9.

unencumbered collateral.” DIP Motion, ¶ 13. However, there is no clause in the statute permitting Debtors to opt out of the requirement of seeking credit on an unsecured basis, just as there is nothing in the statute to permit a debtor to obtain DIP financing that it *might* need at some future date. If a sale to Avatar is ultimately approved, and it becomes clear that all of the Debtor’s cash will be consumed by the CFIUS approval process (an abominable result for the estate and its creditors that should not be countenanced by the Court), then the Debtor can seek approval of the DIP facility at that time.

3. There is a Significant Risk that Avatar Will Not Obtain CFIUS Clearance for the Proposed Transaction

54. Recently, CFIUS has applied heightened scrutiny to transactions involving Chinese investment in the U.S. semiconductor industry (which utilizes the chips that are produced using software developed and sold by Synopsys and the Debtor). *See* Lamb-Hale Decl., ¶ 25; Benkert Decl., ¶ 12. This likely is due, at least in part, to: (a) reports that the Chinese government is dedicating significant funding and effort to development of the Chinese semiconductor industry; (b) the number of Chinese acquisitions in the U.S. semiconductor industry over the last few years; and (c) a recent report from the President’s Council on Science and Technology (“PCAST”), which concluded that China is seeking to reshape the global semiconductor industry in a manner that threatens U.S. leadership in that sector. *See* Benkert Decl., ¶¶ 14-17. For these reasons, CFIUS is likely to carefully scrutinize the acquisition of the Debtor by Avatar and may even recommend that the President block the transaction.

55. As reflected in various publicly available sources, the failure of several recent transactions involving Chinese acquisitions in the semiconductor industry reflect CFIUS’ increased scrutiny of transactions in this arena and demonstrate the real risk that a CFIUS Clearance. For example:

- In December 2016, President Obama invoked his authority to block the acquisition of the U.S. business of Aixtron SE, a German manufacturer of equipment for the global semiconductor industry, by the China-based Fujian Grand Chip Investment Fund. *See* Lamb-Hale Decl., ¶ 23. In its press release announcing the President’s intent to block the transaction, CFIUS cited the national security risk deriving from the potential military application of the “overall technical body of knowledge and experience of Aixtron.”¹¹
- In August 2016, GCS Holdings, which provides foundry services for radio frequency integrated circuits, wireless devices and opto electronics, terminated a sale of the company to San’an Opto due to concerns raised by CFIUS. *Id.*;¹²
- In September 2015, Unis Union Information System Limited, as subsidiary of Tsinghua University-owned Unisplendour Corp. Ltd. sought to acquire an approximately 15% stake in Western Digital Corp. Despite the fact that the interest was not to be a controlling interest and no technologies would be exchanged as part of the investment, CFIUS launched an investigation into the transaction and the parties scuttled the deal due to the Committee’s resistance. *Id.*;¹³ and
- Fairchild Semiconductor International, Ltd. elected to select a lower-priced bidder, U.S.-based ON Semiconductor, rather than accepting a higher bid from China Resources Micro Electronics Ltd. and Hua Capital Management Co. *Id.*¹⁴

56. As these transactions illustrate, transactions in the semiconductor industry with Chinese buyers have difficulty withstanding CFIUS scrutiny.

57. As set forth above and in the Benkert Declaration, there are a number of issues that CFIUS assesses in determining whether a transaction poses national security risks. *See* Benkert Decl. ¶ 13. CFIUS will want to understand the prospective buyer, any control persons affiliated with the buyer, their respective affiliations with other semiconductor-related companies

¹¹ *See* U.S. Dep’t of the Treasury, Statement on the President’s Decision Regarding the U.S. Business of Aixtron SE (Dec. 2, 2016), available at <https://www.treasury.gov/press-center/press-releases/Pages/jl0679.aspx>;

¹² *See also* LEDInside, GCS Holdings Sell to San’an Opto Blocked by U.S. Authorities, To Form Joint Venture (Aug., 2, 2016), available at http://www.ledinside.com/news/2016/8/gcs_holdings_sell_to_san'an_opto_blocked_by_us_authorities_to_form_joint_venture.

¹³ *See also* David McLaughlin and Aaron Ricadela, BLOOMBERG TECH., *Western Digital Loses China Investor Over Security Review* (Feb. 23, 2016), available at <https://www.bloomberg.com/news/articles/2016-02-23/western-digital-to-buy-sandisk-as-transaction-with-unis-blocked>

¹⁴ *See also* Chelsea Naso, LAW 360, *CFIUS Concerns Halt Unisplendour’s \$4B Western Digital Play* (Feb. 23, 2016), available at <https://www.law360.com/articles/762441/cfius-concerns-halt-unisplendour-s-4b-western-digital-play>.

and their respective ties to the Chinese government, including any Chinese government financing, backing or involvement related to the transaction. *Id.* While Avatar is a newly-formed company, publicly available information about its control person, Mr. Han, will be of interest to CFIUS. As a result, Synopsys sought to depose Mr. Han. Avatar, however, has objected to that deposition and has so far refused to produce Mr. Han for deposition.

58. In an effort to limit its inquiries, Synopsys asked 20 targeted questions to Avatar's counsel concerning Mr. Han and/or a potential 30(b)(6) witness and received very little information in return. *See* Suppl. Wynne Decl., Ex. 4. For example, Synopsys asked for all current and former ties Mr. Han has, or in the past has had, with the Chinese government, and was told that only that he holds no current position; all further information requests were refused.

59. After being stymied by Avatar and its counsel, Synopsys has been forced to rely on publicly available information regarding Mr. Han in order to evaluate the Proposed Transaction and likelihood that CFIUS approval will be obtained. Based on its own investigation of publicly available information, Synopsys has found that:

- Mr. Han is a Chinese national from Qianxi County, Tangshan City, Hebei Province.¹⁵
- Mr. Han currently serves as the chairman and the chief executive officer of China Oriental Group Co Ltd. ("China Oriental"), a Hong Kong listed conglomerate with business interests primarily in the steel industry in China, and has substantial other business interests, including serving as a Director of Hebei Jinxi Iron and Steel Group Zhengda Steel Co Ltd as chairman.¹⁶
- While it may technically be true that Mr. Han does not currently hold a formal position with the Chinese government, Mr. Han does have very extensive ties to the Chinese government and has held many positions in the past. For example, Mr. Han was a government cadre in Qianxi County, Hebei Province.¹⁷

¹⁵ *See* China Oriental Group Limited, Company Profile and Key Milestones, available at http://www.chinaorientalgroup.com/e/about_profile.php.

¹⁶ *Id.*

¹⁷ *See* Zhongjin Online Network, *China Has a Number of Rich Political Background* (Jan. 15, 2014), available at <http://business.sohu.com/20140115/n393532648.shtml>.

- According to an article published by Sohu Business, Mr. Han is one of the richest entrepreneurs in China and worked in the Chinese government, having served as the acting executive deputy county magistrate, the acting deputy secretary of CPC committee, and a member of the standing committee of CPC in Qianxi County.¹⁸
- Mr. Han was also a deputy to the 11th Provincial People's Congress of Hebei, the provincial legislative body of the Hebei Province, from 2008 to 2013.¹⁹
- Mr. Han has significant experience and interests in the semiconductor industry, which he first entered by incorporating Oriental Jingyuan Science Technology (Beijing) Co Ltd ("Oriental Jingyuan") in February 2014. China Oriental's 2015 Annual report disclosed that China Oriental indirectly holds a 49.8% equity interest in Oriental Jingyuan.²⁰
- In a private enterprise seminar with provincial government officials on June 9, 2015,²¹ Lifeng Yu, the general manager of Mr. Han's company, Hebei Jinxi, told the provincial leaders that the company had entered into the semiconductor industry by acquiring US semiconductor companies and research teams with the aim of introducing the cutting-edge technologies to China. The provincial leaders apparently endorsed Hebei Jinxi's strategy of diversifying its industrial structures and asked relevant departments to give necessary attention and support.²²
- Zongqiang (Zongchang) Yu, a California resident, is also listed as a director and manager of Oriental Jingyuan. Mr. Yu has now become the CEO and CFO of Avatar. See Suppl. Wynne Decl. Ex. 3.
- China Oriental incorporated XTAL Inc. ("XTAL"), a Silicon Valley based semiconductor consulting company, in Delaware in 2014. The company focuses on EDA (Electrical Design Automation), IC design and software solutions.²³
- Mr. Yu is XTAL's chief executive officer and director, and a co-founder.²⁴
- China Oriental's 2015 Annual report disclosed that China Oriental indirectly holds a 67.1% equity interest in XTAL.²⁵

¹⁸ See *id.*

¹⁹ See China Iron and Steel Industry Association List of Directors of the Fourth Council, available at <http://www.chinaisa.org.cn/gxportal/html/1389860890198.html>.

²⁰ See China Oriental Group Company Limited Annual Report 2015, available at http://www.chinaorientalgroup.com/attachment/2016042712170100102496082_tc.pdf.

²¹ See Zhong Tai, *Provincial Leaders to Tianjin to Promote Transformation and Upgrading of Structure to Give a High Rating*, Boraaid, available at http://www.boraaid.cn/company_news/read_381883.html.

²² See *id.* This is a significant area for relevant inquiry as to whether or not Mr. Han and his affiliated entities and enterprises, are acting on behalf of the Chinese government and receiving substantial government support and assistance, all issues that bear heavily on the prospects for obtaining CFIUS approval.

²³ See XTAL Inc., Ca-Registry.com, available at <https://www.ca-registry.com/C3657973-xtal-inc>.

²⁴ See China Oriental Group Company Limited Annual Report 2015, available at http://www.chinaorientalgroup.com/attachment/2016042712170100102496082_tc.pdf.

²⁵ *Id.*

- XTAL is currently being sued by a semiconductor processing equipment manufacturer for a variety of corporate malfeasance claims, including corporate espionage and civil conspiracy. *See* XTAL Compl.

60. Synopsys makes no representations as to the accuracy of the foregoing public records. However, what these records do demonstrate is that a more fulsome investigation into Mr. Han's various governmental connections and semi-conductor and EDA-related activities is warranted and will certainly be undertaken during the CFIUS investigation and review process. Because the Debtor is attempting to transfer its business, which involves foundational technology for the semiconductor space, to an entity controlled by a Chinese national with likely involvement in the semiconductor industry, it is likely that the Proposed Transaction and DIP Facility will not survive CFIUS review. *See* Lamb-Hale Decl., ¶¶ 8-9; 25; *see also* Benkert Decl., ¶ 24.

4. Even if Avatar is Eventually Able to Obtain CFIUS Clearance, it will be After Lengthy and Costly Delays that Prejudice the Debtor's Creditors

61. Even if CFIUS ultimately approves the proposed transaction (which, as set forth above, is unlikely), the review process could take a significant amount of time and delay closing the Proposed Transaction, which, when combined with the Debtor's operating losses and the DIP Facility, creates significant risks for the Debtor's creditors.

62. As discussed in the Lamb-Hale Declaration, CFIUS can be initiated in two ways. First, it can be voluntarily initiated by the parties to a transaction that will result in control of a U.S. business by a foreign person. Second, for transactions where the parties do not voluntarily seek CFIUS review, CFIUS can initiate its own review and may, as part of that investigation, request that the parties file a joint notice. Lamb-Hale Decl., ¶ 15.

63. Typically, the parties to a covered transaction (one that results in foreign control of a U.S. business) file a draft joint voluntary notice with CFIUS in advance of filing a formal

notice. Lamb-Hale Decl., ¶ 16. This procedure allows CFIUS to ask questions and comment on the notice before the statutorily dictated time periods commence. *Id.* Parties typically wait for CFIUS's comments on the draft joint voluntary notice before filing a formal notice. *Id.*

64. After the parties submit a formal notice to CFIUS or CFIUS initiates its own review, CFIUS conducts a 30-day review of the transaction. *Id.* at ¶ 17. At the conclusion of the 30-day review period, CFIUS will either approve the transaction or initiate a 45-day investigation of the transaction. *Id.* Section 721(b)(2) of FINSA mandates the investigation of certain covered transactions including, without limitation, those that will result in foreign government control of a U.S. business. Fifty-two of the one-hundred forty-seven notices filed with CFIUS in 2014 were subject to a 45-day investigation period. *Id.*

65. For those transactions that undergo a 45-day investigation period, as set forth in the CFIUS Regulations, CFIUS shall send a report to the President requesting the President's decision if (i) CFIUS recommends that the President suspend or prohibit the transaction; (ii) CFIUS is unable to reach a decision on whether to recommend that the President suspend or prohibit the transaction; or (iii) CFIUS requests that the President make a determination with regard to the transaction. *Id.* at ¶ 18. Under such circumstances, pursuant to Section 721(d) of FINSA, the President shall announce the decision on whether to suspend or prohibit the covered transaction not later than 15 days after the date on which the investigation is completed. *Id.*

66. If Avatar is the successful bidder following the Auction, it will inform parties whether they will seek CFIUS Clearance on May 10, 2017. Suppl. Wynne Decl. Ex. 7. Given the typical timeline outlined above, coupled with the likelihood that the Proposed Transaction will almost certainly be subject to the additional 45-day investigation period, the CFIUS process can be expected to take approximately three months, which means that a potential decision from

CFIUS concerning the proposed transaction would not come before the middle or end of August. *See* Lamb-Hale Decl., ¶ 20. Moreover, as described in the Benkert Declaration, many recent parties with transactions noticed to CFIUS have had to withdraw and refile their notices because the investigation time period elapses prior to the parties resolving national security issues with CFIUS. *See* Benkert Decl., ¶ 19.

67. The above-described timelines make the proposed transaction unreasonable given the circumstances of this chapter 11 case. The Budget indicates that the Debtor will run out of cash by the end of July. *See* DIP Motion, Ex. B. Even if the Debtor and Avatar decide not to seek CFIUS approval, CFIUS likely will seek to review the transaction on its own. The attendant delay caused by the CFIUS process, which is almost certain to occur, and may not even result in CFIUS Clearance of the transaction, will cause the Debtor to burn through all of its current cash *plus* potentially through the proposed \$6 million DIP Facility just to keep its operations running. In the best case scenario, the Debtor will be left with a small pool of remaining sale proceeds to distribute to creditors several months from now. More likely, however, Avatar will not receive CFIUS approval after a protracted process during which the Debtor has spent all of its cash and DIP Facility proceeds, leaving Avatar with an outstanding \$6 million senior secured claim against the estate that Avatar can seek to enforce by foreclosing on the Debtor's assets, leaving little value, if any, for the Debtor's creditors. Under these circumstances, it is clear that entry in to the Stalking Horse APA and DIP Facility is unreasonable, not in the best interests of the Debtor's estate and an improper exercise of the Debtor's business judgment.

5. The DIP Facility is an Improper Attempt to Circumvent CFIUS Approval

68. As a preliminary matter, Synopsys notes that the Debtor is seeking approval to obtain funding under the DIP Facility for which no credit agreement has been filed or shared

with parties in interest and that, therefore, seeking approval of such financing is premature and inappropriate this time.

69. More troubling, however, is the design of the overall structure of the DIP Facility as a way to circumvent the CFIUS process. If CFIUS Clearance is not obtained, Avatar will have the ability to foreclose on and take possession and control of the Debtor's assets—the very result that CFIUS would have been trying to prevent.

70. This attempted end-run around CFIUS may itself be blocked. While the extension of a loan or a similar financing arrangement by a foreign person to a U.S. business, regardless of whether accompanied by the creation in the foreign person of a secured interest in securities or other assets of the U.S. business, does not, by itself, constitute a CFIUS covered transaction, a covered transaction can occur when there is a significant possibility that the foreign person may obtain control of a U.S. business as a result of a default under a financing arrangement or other condition. *See* Lamb-Hale Decl. ¶¶ 12-13. If CFIUS reviews and rejects the acquisition of the Debtor by Avatar, Avatar's ability to obtain control over the Debtor's assets under the DIP Facility would become almost certain as the Debtor will have spent all of its cash maintaining operations, and will have no ability to repay the DIP Facility.

71. Under these circumstances, CFIUS would have jurisdiction over the transaction and could request that a CFIUS filing be made. This is likely, particularly in light of the fact that, to Synopsis' knowledge, Mr. Han (the person with control over Avatar) does not make loans in the ordinary course of his business and the above-described heightened level of concern relating to Chinese acquisitions of U.S. semiconductor technology, if property assets as part of the DIP financing. *Id.*

CONCLUSION

72. The Debtor's proposed sale to Avatar and the incurrence of \$6 million in senior secured DIP financing is inappropriate and severely prejudices Synopsys as both the owner of valuable intellectual property that was stolen by the Debtor, but also as the estate's largest creditor. If the Proposed Transaction is approved, not only will Synopsys be exposed to the risk that its intellectual property will be shipped overseas where its ability to enforce the Permanent Injunction is significantly curtailed, but it will also see its recovery from sale proceeds significantly diminished by a prolonged CFIUS approval process and the ability of Avatar to foreclose on the Debtor's assets once that approval is denied. Accordingly, Synopsys respectfully requests that the Court deny approval of the Sale and DIP Motions.

Dated: May 5, 2017
Wilmington, Delaware

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