



Order Filed on April 19, 2017 by  
Clerk U.S. Bankruptcy Court  
District of New Jersey

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEW JERSEY**

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In re:

OPENPEAK, INC.,

Debtor.

Case No.: 16-28464 (SLM)

Chapter: 7

Hearing Date: April 18, 2017 11:00 a.m.

Judge: Hon. Stacey L. Meisel

**ORDER AUTHORIZING SALE OF ASSETS OF  
OPENPEAK, INC. FREE AND CLEAR OF ALL LIENS, CLAIMS,  
INTERESTS AND ENCUMBRANCES PURSUANT TO  
11 U.S.C. §§363 (b), (f) AND (m)**

The relief set forth on the following pages, numbered two through thirteen is hereby  
**ORDERED.**

**DATED: April 19, 2017**

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Honorable John K. Sherwood  
United States Bankruptcy Court

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**THIS MATTER** having been presented to the Court upon the motion of Charles M. Forman, Trustee (the “Trustee”), for entry of an order (A) approving settlement and carve-out agreement; (B) authorizing public sale of assets free and clear of liens, claims, interests and encumbrances; and (C) granting related relief [Doc. No. 53] (the “Sale Motion”); and the Court having entered an order on April 3, 2017, [Doc. No. 64] (the “Sale Order”) granting the relief sought by the Trustee in the Sale Motion; and it appearing to the Court that an auction (the “Auction”) was conducted on April 13, 2017, consistent with the Sale Order; and the Trustee having determined at the conclusion of the Auction that the bulk bid of \$1,025,000 submitted by Hao Ni and Plymouth Ventures LLC or an entity to be formed by them ( the “Purchaser”) for all of the Debtor’s intellectual property wherever located and all related assets (the “IP Assets”) is the highest and best offer received by the Trustee for the IP Assets; and the Trustee having submitted a supplemental declaration [Doc. No. 79] (the “Trustee’s Supplemental Declaration”) and a supplemental declaration from the Trustee’s broker [Doc. No. 79-2] (the “Supplemental Kelakos Declaration”) in support of the relief sought herein; and objections, if any, to the relief requested in the Sale Motion having been either withdrawn, resolved or overruled; and the Court having considered all of the pleadings and filings related to the Sale Motion and the relief granted in this order; and for good cause shown;

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**IT IS HEREBY FOUND AND DETERMINED THAT:**

A. **Jurisdiction and Venue.** This Court has jurisdiction (i) to consider the Sale Motion pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding under 28 U.S.C. § 157(b). Venue of this case and matter in this district is proper under 28 U.S.C. §§ 1408 and 1409.

B. **Legal Predicates.** The legal predicates for the relief sought in the Motion are Bankruptcy Code sections 105(a), 363(b), 363(f), 363(m), 503, and 507, and Bankruptcy Rules 2002, 6004, 7062, 9006, 9007, and 9014.

C. **Notice.** As evidenced by the affidavits of service filed with the Court at Docket Nos. 56 and 65, and based on the representations of counsel at the Sale Hearing, (i) proper, timely, adequate, and sufficient notice of the Sale Motion, the Sale Hearing, the Auction, and the Sale Hearing has been provided in accordance with Bankruptcy Code sections 102(1), and 363, and Bankruptcy Rules 2002, 6004, 9006 and 9014, and the Sales Order, to each party entitled to such notice;(ii) such notice was good, sufficient, and appropriate under the particular circumstances; and (iii) no other or further notice of the Sale Motion or the Sale Hearing is or shall be required.

D. **Opportunity to Object.** A fair and reasonable opportunity to object or be heard with respect to the Sale Motion and the relief requested therein has been afforded to all interested persons and entities, including: (a) all entities known to have expressed an interest in a transaction with respect to the IP Assets; (b) the Purchaser; (c) counsel to the Secured Lender; (d) the Office of the United States Trustee for the District of New Jersey; (e) the U.S. Attorney

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for the District of New Jersey; (f) the Internal Revenue Service; (g) all entities known to have asserted any Encumbrance in or upon any of the IP Assets; (h) each Licensee known to the Trustee; (i) any such other party entitled to notice pursuant to Bankruptcy Rule 2002 and the Local Bankruptcy Rules for the United States Bankruptcy Court for the District of New Jersey.

E. **Assignment; Successor Liability.** The transfer and assignment of the IP Assets to the Purchaser, will not subject the Purchaser to any liability whatsoever arising prior to the Closing Date or solely by reason of such transfer under the laws of the United States, any state, territory, or possession thereof, or the District of Columbia, based, in whole or in part, directly or indirectly, on any theory of law or equity, including, without limitation, any theory of equitable law, including, without limitation, any theory of antitrust, successor, or transferee liability.

F. **Sale in Best Interests.** The consideration provided by the Purchaser constitutes the highest or otherwise best offer for the IP Assets and provides fair consideration and reasonably equivalent value to the Trustee in exchange for the IP Assets.

G. **Highest and Best Offer.** The Trustee engaged in a thorough marketing process for the IP Assets and conducted an auction process in accordance with, and has otherwise complied in all respects with, the Sale Order. The auction process set forth in the Sales Order afforded a full, fair and reasonable opportunity for any person or entity to make a higher or otherwise better offer to purchase the IP Assets. The Auction was duly noticed and conducted in a non-collusive, fair and good faith manner and a reasonable opportunity has been given to any interested party to make a higher or better offer for the IP Assets.

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H. **Business Justification.** Sound business reasons exist for the sale of the IP Assets to Purchaser. The consummation of the sale constitutes the Trustee's exercise of sound business judgment and is in the best interests of the Debtor, its estate and all other parties in interest. For these reasons and based on the other evidence of record, the Court finds that (i) the offer by the Purchaser constitutes the highest or otherwise best offer for the IP Assets under the circumstances, and (ii) the closing of the sale to Purchaser presents the best opportunity to realize value for the IP Assets.

I. **Condition to Sale Transaction.** Entry of this Order is a condition precedent to the Purchaser's obligation to consummate sale of the IP.

J. **Good Faith Purchaser.** The Purchaser (i) is a good faith purchaser for value and, as such, is entitled to all of the protections afforded under section 363(m) of the Bankruptcy Code and any other applicable or similar bankruptcy and non-bankruptcy law, and (ii) has otherwise proceeded in good faith in all respects in connection with this proceeding. Neither the Purchaser nor Trustee has engaged in any conduct that would cause or permit the proposed sale to be avoided or result in the imposition of any costs or damages under 11 U.S.C. § 363(n) and the Purchaser will be acting in good faith within the meaning of 11 U.S.C. § 363(m) in closing the transactions contemplated herein.

K. **Free and Clear.** The Trustee has provided notice as set forth in this Order to (i) Counsel for Hercules Capital Corp. ("Hercules"), the Debtor's primary secured creditor, and (ii) all other entities asserting or holding Encumbrances on the IP Assets. The Trustee has complied with the requirements of Bankruptcy Code section 363(f) because in each

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case, one or more of the standards set forth in in section 363(f)(1)-(5) has been satisfied, and may sell the IP Assets free and clear of all Encumbrances, subject to Paragraph 7 of this Order. Hercules has consented to the sale in accordance with section 363(f)(2) of the Bankruptcy Code. All other holders of Encumbrances, if any, in or against the IP Assets have either expressly consented or did not object, or withdrew their objections to the Sale Motion and are deemed to have consented in accordance with section 363(f)(2) of the Bankruptcy Code, subject to Paragraph 7 of this Order.

L. **Consideration.** As demonstrated by the Trustee's Supplemental Declaration, the Kelakos Supplemental Declaration, the other evidence proffered or adduced at the Sale Hearing, and the arguments of counsel made on the record at the Sale Hearing, the consideration provided by the Purchaser for the IP Assets (i) is fair, full, adequate, and reasonable; (ii) is the highest or otherwise best offer for the IP Assets; and (iii) constitutes reasonably equivalent value, reasonable market value, and fair consideration under the Bankruptcy Code and under the laws of the United States, any state, territory, possession, or the District of Columbia (including, without limitation, the Uniform Fraudulent Conveyance Act and the Uniform Fraudulent Transfer Act).

M. **Purchaser Not a Successor.** The Purchaser is not and shall not be deemed a successor to the Company or Trustee as a result of the consummation of the Sale Transaction.

N. **Legal and Factual Bases.** The legal and factual bases set forth in the Sale Motion and all related pleadings, including the Trustee's Supplemental Declaration and the

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Kelakos Supplemental Declaration, and the representations by the parties and findings by the Court, if any, at the Sale Hearing establish just cause for the relief granted herein.

**IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that:**

1. All objections to the Sale Motion that have not been withdrawn, waived or resolved as set forth herein are overruled on the merits.

2. Purchaser is approved as the Successful Bidder for the IP Assets and the sale of the IP assets is authorized, approved and confirmed.

3. The Trustee is authorized to sell and assign the IP Assets to the Purchaser consistent with the provisions of the Sale Order, and the Trustee is further authorized to take all actions necessary to consummate the transactions and take all other actions as may be reasonably requested by the Purchaser for the purpose of selling and assigning the IP Assets, without further order of the Court.

4. Upon transfer of title by the Trustee to the Purchaser of the IP Assets conveyed herein, all prior ownership or equitable title interests in such assets shall be extinguished, subject to Paragraph 7 of this Order.

5. The IP assets are being sold “as is and where is.”

6. Pursuant to Sections 363(b) and 363(f) of the Bankruptcy Code, the IP Assets shall be transferred on the Closing Date free and clear of all Encumbrances, including, without limitation, all restrictions, hypothecations, charges, indentures, instruments, options, security interests, conditional sale rights or other title retention agreements, pledges, judgments, demands, rights of first refusal, consent rights, contract rights, rights of recovery, reimbursement rights,

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contribution claims, indemnity rights, exoneration rights, alter-ego claims, tax claims, regulatory violations by any governmental entity, decrees of any court or foreign or domestic governmental entity, charges of any kind or nature, debts arising in any way in connection with any agreements, acts, or failures to act, obligation claims, demands, guaranties, contractual or other commitment rights and claims, and all other matters of any kind and nature, whether known or unknown, choate or inchoate, filed or unfiled, scheduled or unscheduled, noticed or unnoticed, recorded or unrecorded, perfected or unperfected, allowed or disallowed, contingent or non-contingent, liquidated or unliquidated, matured or unmatured, material or non-material, disputed or undisputed, whether arising prior to or subsequent to the commencement of the Debtor's Chapter 7 Case, and whether imposed by agreement, understanding, law, equity or otherwise, including claims otherwise arising under any theory, law or doctrine of successor liability or related theories, as well as any and all "claims" as that term is defined and used in the Bankruptcy Code, including section 101(5) thereof (all of the foregoing, collectively, "Claims"), with such Encumbrances and Claims to attach to the proceeds of the sale in the order of their priority, with the same validity, force and effect which they now have as against such IP Assets, and (ii) to the maximum extent permitted by law, any other interests within the meaning of section 363(f) of the Bankruptcy Code.

7. Notwithstanding anything else in this Order or the Sale Order, including, but not limited to, Paragraph 6 of this Order, the IP Assets shall not be sold free and clear of, and shall remain subject to, the rights, if any, of AT&T Services, Inc. and its affiliates (collectively "AT&T") under the November 18, 2015, *Technology and License Agreement* between AT&T



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Services, Inc. and the Debtor, and any other agreement with the Debtor to which AT&T is a party, and under Bankruptcy Code section 365(n), to the extent applicable. For the avoidance of doubt, no rights are extended to any third parties other than AT&T.

8. Following the Closing, the Trustee and Purchaser are authorized to file a certified copy of this Order, which, once filed, registered or otherwise recorded, shall at the time of the Closing constitute conclusive evidence of the release of all Encumbrances and Claims of any kind or nature whatsoever with respect to the IP Assets being transferred at the Closing.

9. At the Closing, all of the Trustee's legal, equitable, and beneficial right, title and interest in and to, and possession of, the IP Assets being transferred at such Closing shall be immediately vested in the Purchaser pursuant to Bankruptcy Code sections 105(a), 363(b), and 363(f) of the Bankruptcy Code free and clear of any and all Encumbrances and Claims except as otherwise provided herein. Such transfer shall constitute a legal, valid, binding, and effective transfer of the IP Assets and shall vest the Purchaser with good and marketable title to such IP Assets.

10. The Purchaser is hereby authorized in connection with the consummation of the sale to assign, transfer, allocate, or otherwise dispose of any of the IP Assets to and among its affiliates, designees, assignees, and/or successors (i) in a manner as it, in its sole discretion, deems appropriate and (ii) with all of the rights and protections accorded under this Order, and the Trustee shall cooperate with and take all actions reasonably requested by the Purchaser to effectuate any of the foregoing.

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11. The Purchaser is not and shall not be deemed a successor to the Company as a result of the consummation of the sale.

12. The Purchaser shall not have any responsibility for any liability or other obligation of the Debtor or Trustee, whether known or unknown, now existing or hereafter arising, asserted or unasserted, fixed or contingent, liquidated or unliquidated, including under any law or theory of successor or vicarious liability, antitrust law, environmental law, foreign, federal, state or local revenue law, or products liability law. Without limiting the generality of the foregoing, the Purchaser shall not be liable for any (a) liabilities, debts, or obligations on account of any taxes arising, accruing or payable under, out of, in connection with, or in any way relating to the ownership of the IP Assets prior to the Closing, (b) environmental liabilities or obligations arising from conditions first existing prior to the Closing (including, without limitation, the presence of hazardous, toxic, polluting, or contaminating substances or wastes), which may be asserted on any basis, including, without limitation, under the Comprehensive Environmental Response Compensation and Liability Act (“CERCLA”), or (c) liabilities, debts or obligations arising from conditions first existing or actions occurring prior to the Closing with respect to any labor, employment, or similar law, rule or regulation, including the laws specified in this paragraph (including filing requirements under any such laws, rules or regulations) (“Successor or Transferee Liability”).

13. Effective upon the Closing, all persons and entities are forever prohibited and enjoined from commencing or continuing in any manner any action or other proceeding, whether in law or equity, in any judicial, administrative, arbitral, or other proceeding against the

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Purchaser, or its assets (including the IP Assets), with respect to any (a) Encumbrance or Claim or (b) Successor or Transferee Liability, in each case, relating to the IP Assets, including, without limitation, the following actions with respect to clauses (a) and (b): (i) commencing or continuing any action or other proceeding pending or threatened; (ii) enforcing, attaching, collecting or recovering in any manner any judgment, award, decree or order; (iii) creating, perfecting or enforcing any Encumbrance or Claim; (iv) asserting any setoff, right of subrogation, or recoupment of any kind; or (v) commencing or continuing any action, in any manner or place, that does not comply with, or is inconsistent with, the provisions of this Order or other orders of this Court, or the agreements or actions contemplated or taken in respect hereof.

14. The Purchaser has acted without collusion, in good faith. The Sale Transaction may not be avoided, nor may any costs or damages be imposed, under 11 U.S.C. § 363(n) and the Purchaser is entitled to all of the protections afforded by Bankruptcy Code section 363(m).

15. The bill of sale attached to the Trustee's Supplemental Declaration is approved. Any agreements, documents, or other instruments related to the sale of the IP Assets may be modified, amended, or supplemented by the parties thereto, in a writing signed by all parties, and in accordance with the terms thereof, without further order of the Court, provided that any such modification, amendment, or supplement (a) does not have a material adverse effect on the Debtor's estates or the Trustee and (b) does not impact or impair AT&T's interests pursuant to Paragraph 7 of this Order, if any.

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16. All persons and entities, including, without limitation, all federal, state or local government agents, departments or instrumentalities, holding liens or claims against the assets conveyed herein arising on or before the closing date, or out of events occurring before the closing date, of any kind or nature with respect to those assets, are barred from asserting such liens or claims against the assets or the purchaser of those assets.

17. All persons or entities holding the IP Assets or any records or documents relating thereto on behalf of the Debtor or the Trustee are authorized and directed to turn over such IP Assets and records or documents to the Purchaser upon the closing on the sale by the Trustee.

18. The stay imposed under Federal Rule of Bankruptcy Procedure 6004(h) shall not apply to this order or the transactions contemplated hereunder and this order shall be enforceable and effective immediately upon its entry.

19. This court retains exclusive jurisdiction to (a) enforce and implement this order and (b) to resolve any disputes, controversies or claims arising out of or relating to this order or the sale approved herein.

20. This Order: shall be effective as a determination that, as of the Closing the conveyances described herein have been effected; and is and shall be binding upon and govern the acts of all entities, including, without limitation, all filing agents, filing officers, administrative agencies, governmental departments, secretaries of state, federal and local officials, and all other persons and entities who may be required by operation of law, the duties of their office, or contract, to accept, file, register, or otherwise record or release any documents or instruments; and each of the foregoing persons and entities is hereby directed to accept for

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filing any and all of the documents and instruments necessary and appropriate to consummate the transactions contemplated herein.

21. The Trustee is authorized and directed to pay to Hercules, upon his receipt at closing, all sale gross proceeds in the amount of \$1,025,000, less (i) the agreed upon carve-out approved by the Sale Order in the amount of \$225,000 and (ii) the fees payable to the Trustee's broker, Kelakos Advisors, in the amount of \$52,500, on account of the secured claims and liens asserted by Hercules and allowed under the Sale Order, without further notice to creditors or order of the Court.