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**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK**

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In re:	:	
	:	Case No. 09-13412 (MG)
Metaldyne Corporation, <u>et al.</u> ,	:	
	:	Jointly Administered
Debtor.	:	
	:	
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**REQUEST OF BDC FINANCE, L.L.C.  
PURSUANT TO BANKRUPTCY RULE 7052 FOR  
FINDINGS OF FACT AND RULINGS OF LAW**

Pursuant to Bankruptcy Rules 7052 and 9014(c), BDC Finance, L.L.C. (“**Black Diamond**”) respectfully requests that the Court find the following facts and rulings of law with regard to the contested matter that was heard by the Court on August 7, 2009 (“**Sale Hearing**”) in connection with the proposed sale of assets of the debtors under section 363 of the Bankruptcy Code:<sup>1</sup>

<sup>1</sup> At the Sale Hearing, the Court directed the parties to confer as to the terms of the Debtors’ proposed order, with special reference to reservation of rights language. The parties did confer extensively, exchanging a number of drafts, but were unable to agree upon language. Black Diamond believes that a number of requests for factual findings in the proposed order are either

## I. PROPOSED FINDINGS OF FACT

A. By means of a motion under section 363 of the Bankruptcy Code (“**Motion**”), the Debtors have requested that the Court approve a sale of assets of the Debtors (the “**Proposed Sale**”) to MD Investors, Inc. (“**MD Investors**”).

B. The rights of certain prepetition holders of secured debt (“**Term Lenders**”) against the Debtors and their estates are defined in part by the Credit Agreement and Security Agreement, Hearings Exhibits MDI-1 and MDI-2. J.P. Morgan Chase Bank, N.A. serves as administrative agent under the Credit Agreement, and Collateral Agent under the Security Agreement, and is referred to as the “**Agent**.” The Agent was represented by counsel at the Sale Hearing.

C. The Term Lenders hold prepetition term debt an amount in excess of \$400 million (the “**Term Debt**”). The prepetition claims of the Term Lenders against the estates are secured by the assets to be transferred under the Purchase Agreement (“**Assets**”), Exhibit 1 to ECF #632 (“**Purchase Agreement**”), as well as by certain other assets that are identified in section 1.02 of the Purchase Agreement, and were described generically by Mr. Macakanja’s testimony at the hearing, which would not be transferred in the Proposed Sale (“**Excluded Assets**”).

D. The Purchase Agreement was not made available, even in draft form, to Black Diamond until approximately 10:00 p.m. on August 6, 2009. The final form was not circulated electronically until after 3:00 a.m. on August 7, 2009.

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contrary to the evidence or unsupported by any evidence, and a great number of requests for rulings of law (including the limited reservation of rights as framed in the proposed order) are inappropriate. Black Diamond accordingly has filed its requests for findings and rulings, and a separate objection. (Black Diamond believes that the point on which the Court had directed the parties to try to agree on language is contained in request for ruling of law 13.a.)

E. The Sale Hearing commenced at 9:00 a.m. on August 7, 2009.

F. The Proposed Sale would transfer the Assets to MD Investors.

G. The Proposed Sale would extinguish all security interests of the Term Lenders in the Assets and in the Excluded Assets.

H. The Proposed Sale would extinguish all debt held by or on behalf of the Term Lenders against the Debtors or their estates.

I. Black Diamond is a Term Lender. It objected to the Sale and sought adequate protection of its security interests.

J. The Court was advised that approximately 97% of the holders of the term loan debt support the Sale, and that Term Lenders would receive, in consideration of their prepetition secured claims, a right or interest in MD Investors.

K. No evidence was offered by which the Court might specifically identify or value the rights or interests that may be received by Term Lenders in MD Investors.

L. No evidence was offered as to the formation documents, shareholder agreements, capitalization, or other arrangements of MD Investors, or other evidence that would show the rights of holders of interests in, or instruments issued by MD Investors.

M. The undisputed evidence as to the bids and other events that occurred at the auction on August 5-6, 2009, together with the undisputed testimony of Mr. Macakanja, shows by a preponderance of the evidence that the amount of the Term Debt is well in excess of the value of the Assets.

N. The definition of “Secured Party” in the Security Agreement, Hearing Exhibit MDI-2, embraces both the Agent and Black Diamond.

O. The Security Agreement requires that the Agent distribute to the holders of Term Debt ratably, any collateral received by the Collateral Agent, or any proceeds of the sale thereof. Hearing Exhibit MDI-2 at § 5.02.

P. The proponents of the Motion offered no evidence from which the Court could conclude that the contemplated arrangements with regard to MD Investors constitute a ratable distribution of collateral or its proceeds pursuant to section 5.02 of Exhibit MDI-2.

Q. According to the undisputed testimony (by declaration, and on cross examination live) of Mr. Michael V. Kell, Mr. Kell served on the Debtors’ board of directors and its special committee tasked with overseeing the auction for the sale of the Debtors’ assets that occurred on August 5-6, and has personal knowledge concerning the conduct of the auction.

R. According to undisputed testimony, the Debtors originally concluded that the highest and best offer for the Assets was to be found in aggregating four discrete bids for business segments (the “**Cash Bids**”), which aggregated approximately \$120 million. Kell Decl.

¶ 22.

S. After negotiating changes in the MD Investors’ bid, the Debtors concluded that its credit bid, in which it purported to credit bid the entire Term Loan debt, was the highest and best offer.

T. According to the testimony of Mr. Kell and Mr. Macakanja, the additional changes negotiated with MD Investors involved consideration to parties other than the secured

parties: including \$2.5 million to fund a litigation trust for the benefit of unsecured creditors, \$8.5 million for administrative creditors, and, through the vehicle of the credit bid, the abandonment of a substantial deficiency claim of the Term Lenders for the benefit of unsecured creditors.

U. From the perspective of a secured creditor, the Cash Bids were the highest and best offer.

V. According to the undisputed declaration testimony of Mr. Macakanja, the Cash Bids would have resulted in consideration to Black Diamond in the amount of approximately 20% of its debt, or approximately \$750,000.

## **II. PROPOSED RULINGS OF LAW**

1. Black Diamond, as a Term Lender, holds an interest in estate property that is entitled to adequate protection.

2. The Proposed Sale would extinguish the debt and security interests of Black Diamond.

3. Pursuant to § 363(p) of The Bankruptcy Code, the Movants carry the burden to prove to the Court the adequacy of the protection offered to Black Diamond.

4. Absent express authorization by a Term Lender, which was not given by Black Diamond, the Agent lacked the authority to enter into a credit bid for its collateral and thereby extinguish its security interests therein. Accordingly, the debt and security interests of Black Diamond are not extinguished by the Sale Order or any other order.

5. Absent express authorization by a Term Lender, which was not given by

Black Diamond, the Agent lacked authority to release liens and security interests in collateral that was not sold. It also lacked authority to consent to arrangements under which consideration that would otherwise flow to nonconsenting Term Lenders would be paid to constituents junior in priority to the Term Lenders.

6. None of the Term Lenders had contractual authority to consent to the imposition of such terms on nonconsenting Term Lenders.

7. No evidence has been offered to the Court as to precisely what Black Diamond would receive in consideration of the extinguishment of its debt and security interests. The Court understands that Black Diamond would receive a right to participate in some kind of interest in, or instrument issued by MD Investors, but the record does not afford the Court any opportunity to define or evaluate that interest or instrument.

8. The Movants have not sustained their burden of proof to show adequate protection of Black Diamond.

9. The Debtors are fiduciaries for the entire estate and its creditors, including secured creditors.

10. Even if the Agent was authorized to make a credit bid without the consent of Black Diamond, the Agent was not authorized by the Credit Agreement or the Security Agreement to distribute collateral received, or proceeds thereof, in any manner other than ratably to holders of secured debt. The record affords no basis to determine that the MD Investors arrangements are consistent with that obligation. Nor does the record disclose a basis, other than express consent of a Term Lender, which Black Diamond did not give, that would authorize the

Agent to extinguish that party's debt and security interest in collateral of the estate that was not sold to MD Investors.

11. The Agent's Credit Bid of the full amount of the Debt establishes the value, as between the Agent and each of the Term Lenders, of the Assets received by the Agent, except to the extent that any Term Lender has expressly agreed to the contrary. Because the Agent here bid 100% of the secured debt, it is obligated to distribute to each Term Lender the lesser of (a) 100% of the Term Lender's ratable share of the total debt, including its reasonable attorneys' fees and expenses, or (b) such other amount or consideration that such Term Lender agreed in writing that it would accept in satisfaction of its claim.

12. The Movants did not sustain their burden either to obtain an order as to the good faith of the acquirer, nor as to suspending the statutory stay of the effectiveness of any order approving a sale.

13. Except as set forth in Black Diamond's objection, filed herewith, and above, the Proposed Sale can be approved, but only with modifications as follows:

- (a) All of Black Diamond's rights and remedies are preserved against MD Investors, all property of MD Investors, the Term Lenders, and the Agent, and all other non-debtor parties, including, without limitation, those rights set forth in Request for Ruling no. 8.
- (b) All of Black Diamond's rights and remedies are preserved against the Debtors to the extent of the Excluded Assets and the cash proceeds received by the Debtors at the closing of the

Proposed Sale, and Black Diamond's liens and security interests will attach to all such property in the amount and priority that existed prior to the sale.

- (c) At the closing of the Proposed Sale, the Debtors and MD Investors shall cause an appropriate sum of cash, to be determined by the Court after further hearing, to be held in an escrow account as adequate protection of the prepetition secured claim of Black Diamond, pending resolution of disputes concerning the rights of Black Diamond.

Dated: New York, New York.  
August 11, 2009

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