Disruptive Engagement: The Role of Creditors' Committees and Individual Creditors in Asset Sales

Presented by the Asset Sales and Unsecured Trade Creditors Committees

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DISRUPTIVE ENGAGEMENT: THE ROLE OF CREDITORS IN ASSET SALES

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Case Study

- XYZ, a widget maker with assets and operations in New York and California, is struggling.
- After exploring a variety of restructuring options, XYZ decides to commence a chapter 11 case and pursue a section 363 sale of its operating assets.
- On the petition date, its outstanding secured indebtedness totals approximately $500 million and is comprised of:
  - first lien indebtedness under an ABL;
  - secured term loan; and
  - second lien floating rate notes (*i.e.*, second lien on PP&E and third lien on working capital assets).
- XYZ's unsecured indebtedness totals $600 million and includes high yield bonds. XYZ has no significant unencumbered assets.
- XYZ requires DIP financing to support its operational and liquidity needs while it pursues a section 363 sale.

DIP Financing

- Who is providing the DIP financing (*i.e.*, a new lender, a prepetition lender (possibly in connection with a credit bid) or a third party purchaser)?
  - Does the prepetition intercreditor agreement impose limitations with respect to who can provide DIP financing (or the amount and terms of such financing)?
- Purpose of the financing – is it necessary or just a means to an end for the purchaser?
- Milestones – driven by liquidity, restructuring support agreement, etc.
- Limit credit bidding (if appropriate).
  - Liens on all of the assets being sold?
  - "Cause" exist to limit credit bidding?
- Preserve value for unsecured creditors.
  - Carve out avoidance actions from liens granted to DIP Lender and any adequate protection liens; other unencumbered assets?
  - Reserve right to require marshaling of assets.
  - Limit reimbursement of fees and expenses under the DIP financing agreement (or as adequate protection) – for lenders bidding on assets, exclude expenses related to the sale transaction.

DIP Financing (and Adequate Protection) (continued)

- Other considerations:
  - Pursuit, timing and funding of investigations and challenges to perfection of collateral by the Official Committee of Unsecured Creditors (the "Committee") as well as claims against officers and directors (breach of fiduciary duty, etc.) and lenders (fraudulent/preferential transfers).
    - Committee standing motion?
  - Use of Rule 2004 examinations to obtain information about property, liabilities and financial condition of the debtors.
  - Committee not yet formed? Review DIP financing agreement and proposed approval order to ensure rights of general unsecured creditors not negatively impacted.
  - Budget:
    - Line items to pay ordinary course general unsecured vendor claims on a going forward basis.
    - Line item for Committee professional fees in an amount that makes sense – *i.e.*, sufficient so that DIP does not control/limit ability of Committee professionals to adequately represent general unsecured creditors.

Bidding Procedures and Sale Process

- True sale? Should it proceed through a plan?
- Timeline for sale: Extension appropriate? Extent of prepetition marketing efforts?
- Qualified bidder requirements and stalking horse bidder protections:
  - If the proposed purchaser is the DIP Lender or an insider, consider whether milestones and qualified bidder requirements are designed to chill bidding.
  - If the DIP Lender is the stalking horse bidder, should a court assess its proposed breakup fee/expense reimbursement on a stand-alone basis or should it factor in protections provided to the DIP Lender under the DIP approval order?
- Backup bidder?
- Who attends auction?
- Is the sum of the parts greater than the whole? Would a piecemeal sale be better than a sale of the business as whole?

Bidding Procedures and Sale Process (continued)

- If prepetition lenders/creditors intend to credit bid, consider:
  - lien challenge;
  - whether a basis exists to equitably subordinate and/or recharacterize the secured lenders'/creditors' claims; and/or
  - whether cause exists to limit or cap their credit bid(s).
- Landlord issues: Administrative rent; cure.
- Other contract issues? Intellectual property, employee, etc.?
- Intercreditor agreement issues.

Sale

- Valuation and/or allocation disputes.
- Did lenders credit bid?
  - If credit bid includes the DIP, is it fully drawn?
  - Are DIP Lenders (when purchasers) purchasing debtor's assets with its own funds?
- Ensure sale provisions protect the rights of creditors with reclamation/consignment claims that may have priority over some or all of lender claims.
- Who pays cure claims?
- Retain v. transfer preference claims against vendors.
- Are employees being transferred to purchaser? If so, who pays their claims?
- Disguised reorganization without requisite disclosure under section 1129?
- Does the deal favor insiders?

Other Considerations

- How organized/engaged were creditors prepetition?
- Did the company meaningfully engage with (and obtain the support of) key stakeholders before the filing?

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

FOR PUBLICATION

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In re:

AÉROPOSTALE, INC., *et al.*,

Debtors.

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Chapter 11

Case No. 16-11275 (SHL)

(Jointly Administered)

MEMORANDUM OF DECISION

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SEAN H. LANE
UNITED STATES BANKRUPTCY JUDGE

Before the Court is a motion by the above-captioned debtors and debtors-in-possession (collectively, the "Debtors") seeking to (i) equitably subordinate the claims of Aero Investors LLC ("Aero Investors") and MGF Sourcing Holdings, Limited ("MGF Holdings" and, together with Aero Investors, the "Term Lenders"), pursuant to Section 510(c) of the Bankruptcy Code, (ii) disqualify the Term Lenders from credit bidding in a sale of the Debtors' assets, pursuant to Section 363(k) of the Bankruptcy Code, and (iii) recharacterize the Term Lenders' claims, pursuant to Section 105 of the Bankruptcy Code (the "Motion") [ECF No. 496]. The Debtors seek this relief based on their allegations of inequitable conduct by the Term Lenders and certain of their affiliates and the impact on this case of a credit bid by the Term Lenders.

The Court held a trial with fourteen live witnesses from August 15, 2012 to August 23, 2012 (the "Trial"). In support of its case, the Debtors filed declarations in lieu of direct testimony for six witnesses, together with over 400 accompanying exhibits. Those same six witnesses also presented extensive live testimony: Julian R. Geiger (Chief Executive Officer of Aéropostale, Inc.); David J. Dick (Chief Financial Officer of Aéropostale, Inc.); Robert J. Duffy (managing director at Berkeley Research Group, LLC); Deborah Palmer Keiser (founding owner of Rituel Inc. and president of Alabama Chanin); James Doak (managing director at Miller Buckfire & Co., LLC); and Allen Ferrell (economist and Greenfield Professor of Securities Law at Harvard Law School).

In response to the Debtors' case, the Term Lenders presented declarations for seven witnesses, along with some 500 accompanying exhibits. All of these witnesses also presented live testimony: Stefan Kaluzny (co-founder and managing director of Sycamore Partners); James Schwartz (Chief Executive Officer of MGF Sourcing US, LLC, and member of the board of directors of MGF Sourcing Holdings, Limited); Peter Morrow (co-founder and managing director of Sycamore Partners); Joseph J. Sciametta (managing director at Alvarez & Marsal North America, LLC); Alan D. Bell (certified public accountant and retired Ernst & Young LLP audit partner); Holly Felder Etlin (managing director at AlixPartners, LLP); and Adam C. Pritchard (Frances and George Skestos Professor of Law at the University of Michigan).

The parties also submitted deposition designations of an additional six individuals who did not appear as live witnesses: Mark D. Miller (Chief Operating Officer of Aéropostale, Inc.); Elizabeth Ratto (head of the retail finance group at Bank of America, N.A.); Karin Hirtler-Garvey (chairman of the Aéropostale, Inc. board of directors); Kent Kleeberger (former member of the Aéropostale, Inc. board of directors); Dary Kopelioff (principal of Sycamore Partners); Kevin Burke (senior associate at Sycamore Partners); and Jennie Wilson (Chief Financial Officer of MGF Sourcing US, LLC and MGF Sourcing Holdings, Limited).

Given the extensive trial record and the applicable law, the Court must deny the Debtors' Motion. The Court concludes that there is not a basis to equitably subordinate the Term Lenders' claims, limit their ability to credit bid, or recharacterize their loans. The Court is mindful of the high stakes in this case for Aéropostale. But the Court is duty bound to apply the applicable law to the facts of the case, and the Court's equitable powers are not boundless. This opinion constitutes the Court's findings of fact and conclusions of law.[1]

[1] Certain information relevant to a determination of this Motion is confidential business information of the parties. Therefore, a copy of the full Opinion in this case was filed under seal. [ECF No. 723]. To avoid divulging

BACKGROUND

I. The Parties

Aéropostale, Inc. ("Aéropostale" or the "Company") is a retailer of casual apparel and accessories, serving children and young adults through its stores and website. (Dick First Day Affidavit ¶ 12).[2] Aéropostale, Inc. is a publicly traded company, and was until recently listed on the New York Stock Exchange. (Dick First Day Affidavit ¶ 29). Aéropostale, Inc. is the direct or indirect corporate parent of each of the other Debtors. (Dick First Day Affidavit ¶ 30). As of the end of fiscal year 2015, the Debtors operated 811 stores in all 50 states and Puerto Rico and 41 stores in Canada. (Dick First Day Affidavit ¶ 13). The Debtors also have license agreements with unaffiliated third-party operators outside of the United States, under which the Debtors receive a percentage of inventory purchases or sales as royalty income, in return for the use of their trademarks, trade name and branding. (Dick First Day Affidavit ¶ 13). The Debtors receive buying commissions for inventory purchases made by these international licensees from the Debtors' vendors. (Dick First Day Affidavit ¶ 13). While the Debtors design the products sold in their stores, these products are manufactured by the Debtors' merchandise suppliers. (Dick First Day Affidavit ¶ 22). As of the Debtors' bankruptcy filing, their two largest

this confidential information, the Court requested that the parties identify any confidential information in that sealed version of the Opinion. A very small amount of information was identified. This subsequent public version of the Opinion has been edited only to the extent necessary to avoid disclosing this confidential information but also to make public the basis of the Court's decision to the greatest extent possible. For the sake of readability, the Court has edited the text rather than merely redacting the confidential information at issue.

[2] There is an extensive evidentiary record in this proceeding. Trial testimony is cited as "Trial Tr. [page:line] [date] [Witness]." Testimony provided by written declaration is cited as "[Witness] Decl. ¶ ___." Exhibits are cited as "CEX ___ " for the Term Lenders' exhibits and "DX ___" for the Debtors' exhibits. This Opinion also includes some references to the briefs filed by the parties. The Debtors' initial Motion and related memoranda of law are cited as "Motion __." The parties' trial brief is cited as "[Party] Trial Brief __." The parties' proposed findings of fact and conclusions of law are cited as "[Party] Proposed Findings __."

merchandise suppliers were LF Sourcing (Millwork) LLC ("Li & Fung") and TSAM (Delaware) LLC (d/b/a/ MGF Sourcing US LLC) ("MGF"). (Dick First Day Affidavit ¶ 22).

Sycamore Partners is a private equity firm specializing in retail and consumer investments. (Kaluzny Decl. ¶ 2). Stefan Kaluzny and Peter Morrow are Co-Founders and Managing Directors of Sycamore Partners. (Kaluzny Decl. ¶¶ 1-2; Morrow Decl. ¶ 3). In 2013, Sycamore Partners created Hummingbird LLC (later renamed Lemur LLC ("Lemur")), to purchase stock in Aéropostale. (Kaluzny Decl. ¶ 10). In the summer and fall of 2013, Lemur acquired approximately 8% of Aéropostale's common stock in the open market. (Dick First Day Affidavit ¶ 29). Lemur paid roughly $8.00 per share, for an approximate total cost of $54 million. (Kaluzny Decl. ¶¶ 9, 10). The purchase did not provide Sycamore Partners or Lemur with any rights to name board members or otherwise participate in Aéropostale management. (Kaluzny Decl. ¶ 11).

MGF is a global sourcing company that specializes in apparel and accessories. (Schwartz Decl. ¶ 2). It has relationships with more than 100 factory organizations, mainly in Asia and Central and South America. (Schwartz Decl. ¶ 2). Customers place orders with MGF, which then arranges for factories to manufacture the merchandise. (Schwartz Decl. ¶ 2). MGF oversees the manufacturing process to ensure that merchandise conforms to a customer's specifications and then arranges shipment of the merchandise to its customer's U.S. distribution centers. (Schwartz Decl. ¶ 2). MGF and its predecessors have been in business for over 40 years and it employs over 750 people in 13 countries. (Schwartz Decl. ¶ 3). Since November 1, 2011, MGF has been indirectly majority-owned by an affiliate of Sycamore Partners. (Schwartz Decl. ¶ 3). The managing member of MGF—MGF Holdings—maintains a board of directors (the "MGF Board") that monitors performance, sets strategic direction and approves budgets, and

provides input to management regarding significant decisions to be made with respect to MGF. (Schwartz Decl. ¶ 4). MGF Holdings is, in turn, majority-owned by an investment fund affiliated with Sycamore Partners and Sycamore Partners therefore has the power to elect the MGF Board. (Schwartz Decl. ¶ 6). James Schwartz is the Chief Executive Officer and President of MGF and the President of MGF Holdings and has been employed by MGF and its predecessors for more than 33 years. (Trial Tr. 99:8-19, Aug. 16, 2016 (Schwartz)). Jennie Wilson is Chief Financial Officer of MGF and MGF Holdings and reports to Mr. Schwartz. (DX 407, Wilson Dep. Tr. 9:8-10:4.)

As of their bankruptcy filing, the Debtors had outstanding debt obligations of around $223 million, which were secured by substantially all of the Debtors' assets. (Dick First Day Affidavit ¶ 33). This debt was comprised of (i) an asset-based revolving credit facility (the "Prepetition ABL Agreement") with Bank of America, N.A., and (ii) a term loan (the "Prepetition Term Loan Agreement") with the Term Lenders. (Dick First Day Affidavit ¶¶ 33, 37). The two Term Lenders are both affiliates of Sycamore Partners. The first, Aero Investors, is an investment vehicle that was formed by Sycamore Partners' domestic investment funds for the purpose of funding the Prepetition Term Loan transaction. (Kaluzny Decl. ¶ 24). The second, MGF Holdings, is indirectly majority-owned by Sycamore Partners' offshore investment funds. (Kaluzny Decl. ¶ 24). MGF Holdings is the direct parent of MGF. (Kaluzny Decl. ¶ 24).[3]

[3] References to the "Sycamore Parties" includes Sycamore Partners, MGF Holdings, Aero Investors, MGF, Lemur, and Sycamore Partners MM.

II. The Term Loan, the Sourcing Agreement, and the Credit Review Provision

In fiscal year 2013, the company had negative earnings before interest, taxes, depreciation, and amortization ("EBITDA") of $69.1 million. (Trial Tr. 19:21-23, Aug. 17, 2016 (Dick)). Additionally, in fiscal year 2013 there was a decline in Aéropostale's working capital of $100 million and a loss of $185.2 million. (CEX 509, Miller Dep. Tr. 35:21-36:14). In January 2014, therefore, the Debtors hired Barclays to provide advice on transactions to provide liquidity and aid in turnaround efforts at Aéropostale. (CEX 054 at AERO_0050314). Barclays and Aéropostale received financing proposals from several entities, including Advent International and Li & Fung. (CEX 061 at 0050421-25; CEX 509, Miller Dep. Tr. 44:2-45:10, 54:23-56:9.) As part of this process, Aéropostale's then-Chief Executive Officer Tom Johnson reached out to Stefan Kaluzny at Sycamore Partners about the possibility of financing, resulting in Sycamore Partners and Aéropostale negotiating a multi-faceted transaction over the next several months. (Kaluzny Decl. ¶¶ 13-16).

Sycamore Partners offered several different proposals to the Debtors, including loans from Sycamore Partners at 10% interest, loans from MGF Holdings at 0.00% interest coupled with a sourcing agreement rebate mechanism that could be used as the source of cash to repay the loan, and loans that combined both concepts. (CEX 061 at AERO_0050423-25; CEX 509, Miller Dep. Tr. 53:16-54:2, 56:10-57:21; Kaluzny Decl. ¶ 14). The Debtors also considered financing proposals from parties other than Sycamore Partners. (CEX 061 at AERO_0050421-25; CEX 509, Miller Dep. Tr. 44:2-45:10, 54:23-56:9). Aéropostale's board ultimately chose Sycamore's $150 million financing package, which included a sourcing agreement with MGF, over several other third-party proposals. (CEX 509, Miller Dep. Tr. 57:22-59:12). Aéropostale's former Chief Financial Officer and current Chief Operations Officer Mark Miller testified that

the board selected this option in part based on "a hope that the MGF aspect of the arrangement would open up a new source of production for us that could be mutually beneficial." (CEX 509, Miller Dep. Tr. 58:16-19). The $150 million in liquidity provided was also "an important factor." (CEX 509, Miller Dep. Tr. 59:8-12).

The Debtors and the Term Lenders entered into the Prepetition Term Loan Agreement in May 2014. (DX 005). The loan is split into two tranches: (i) $100 million in Tranche A, funded by Aero Investors with an interest rate of 10%, a five-year maturity and all principal due at maturity, and (ii) $50 million in Tranche B, funded by MGF Holdings with an interest rate of 0.00%, a ten-year maturity and annual required principal payments of $5 million. (Dick First Day Affidavit ¶ 38; Kaluzny Decl. ¶ 24). The Prepetition Term Loan Agreement contains a $70 million minimum liquidity covenant. (Dick First Day Affidavit ¶ 38; DX 005 at § 5-12). This liquidity threshold is measured by taking the sum of (a) the Debtors' unused revolving borrowing capacity under the revolving loan tranche of the Prepetition ABL Agreement (excluding the FILO Facility),[4] and (b) the Debtors' cash and cash equivalents. (Dick Decl. ¶ 34; DX 005 at § 5-12). The cash component includes cash on hand and cash in corporate accounts, as well as cash in transit. (Dick Decl. ¶ 34).

The Prepetition Term Loan Agreement requires Aéropostale to provide financial reporting to the Term Lenders, such as borrowing base certificates, financial statements, and certified compliance certificates, "including a calculation of Liquidity." (DX 005 at §§ 5-5, 5-6, 5-7, 5-8). This reporting includes: monthly reports of the Debtors' financial condition and the results of operations, which attach a balance sheet, income statement, cash flow, and

[4] The Prepetition ABL Agreement consists of both a revolving credit facility and a "First-In, Last-Out" or "FILO" facility (the "FILO Facility"). (DX 005). Availability under the FILO Facility is not included in the calculation of liquidity under the $70 million minimum liquidity threshold. (DX 005 at § 5-12).

comparisons of store sales for the corresponding month of the then immediately previous year, as well as to the Debtors' business plan, and the Debtors' analysis and discussions of the results; regular quarterly reporting including the same information as the monthly reports but on a quarterly basis; and annual reporting including forecasts of operations for the subsequent fiscal year. (Dick Decl. ¶ 29). The Prepetition Term Loan Agreement contains a provision requiring that any information received pursuant to the agreement be kept confidential. (DX 005 at § 5-11(d)).[5] The Term Lenders are, however, permitted to share these reports with their affiliates, including MGF. (CEX 509, Miller Dep. Tr. 96:5-15, 97:16-98:18).

Additionally, an Investor Rights Agreement entered into in connection with the Prepetition Term Loan Agreement gave Aero Investors the right to nominate two directors to the Aéropostale board and to select a third independent director jointly with Aéropostale. (CEX 091 at § 3). Stefan Kaluzny and Julian Geiger, Aéropostale's current Chief Executive Officer, were appointed by Aero Investors to the board in May 2014. (Kaluzny Decl. ¶ 28). That same month, Kenneth Gilman was jointly selected to be an independent director. (Kaluzny Decl. ¶ 28). Mr. Geiger had previously been the Chief Executive Officer of Aéropostale from August 1998 to February 2010 and was reappointed to that position by Aéropostale's board of directors in August 2014. (Kaluzny Decl. ¶ 34; Geiger Decl. ¶ 4). Mr. Kaluzny resigned from the

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[5] Section 5-11(d) of the Prepetition Term Loan Agreement provides:

> The Loan Parties each recognize that all appraisals, inventories, analyses, financial information, and other materials which the Agent may obtain, develop, or receive with respect to the Loan Parties is confidential to the Agent and that, except as otherwise provided herein, no Loan Party is entitled to receipt of any of such appraisals, inventories, analyses, financial information, and other materials, nor copies or extracts thereof or therefrom.

(DX 005 at § 5-11(d)).

Aéropostale board in April 2015. (Kaluzny Decl. ¶ 39). He was replaced as the Sycamore-designated director by Kent Kleeberger. (Trial Tr. 69:24-70:1, Aug. 17, 2016 (Dick)).

The Prepetition Term Loan financing package also required that one of the Debtors would enter into a "sourcing agreement" to purchase merchandise from MGF. In May 2014, therefore, Aéropostale Procurement Company, Inc. ("Aéro Procurement") entered into a non-exclusive sourcing agreement with MGF (the "Sourcing Agreement"). (Dick First Day Affidavit ¶ 23; Dick Decl. ¶ 6; Schwartz Decl. ¶ 33). The Tranche B loan was used to secure obligations to MGF under the Sourcing Agreement. (Dick First Day Decl. ¶ 38). The obligations of Aéro Procurement under the Sourcing Agreement were guaranteed by Aéropostale. (Dick Decl. ¶ 6). In exchange for a 0.00% interest rate on the $50 million Tranche B portion of the loan, the Sourcing Agreement required the Debtors to purchase from MGF a minimum volume of $240 million of product for the first two years of the agreement and $280 million for the third through the tenth year. (DX 006; Dick Decl. ¶ 6; Schwartz Decl. ¶ 34, Morrow Decl. ¶¶ 11–12). If the Debtors failed to meet the minimum volume requirement in any given year, they were required to pay a shortfall commission to MGF, which was based on a scaled percentage of the shortfall during the applicable period. (Dick Decl. ¶ 6; Schwartz Decl. ¶ 34). The minimum volume requirement and shortfall commission were to begin in 2016, with the Sourcing Agreement remaining in effect for 10 years. (Dick Decl. ¶ 6; Schwartz Decl. ¶ 34). The Sourcing Agreement also required MGF to pay the Debtors an annual rebate of up to $5 million based on the volume of annual purchases made by the Debtors in a given year. (Dick Decl. ¶ 6; Schwartz Decl. ¶ 35). The rebate was to be applied towards the payment of the required amortization under the Tranche B loan provided by MGF Holdings. (Dick Decl. ¶ 6; Morrow Decl. ¶ 11).

Important for the present dispute, the Sourcing Agreement gave MGF the right to declare a "Credit Review Period" if the Debtors' liquidity dropped below $150 million (the "Credit Review Period").[6] (Dick Decl. ¶ 7; DX 006 at 2). The $150 million liquidity trigger under the Sourcing Agreement was measured in the same manner as the $70 million liquidity measurement in the Prepetition Term Loan Agreement: basically revolving borrowing base (excluding the FILO Facility), plus available cash. (Dick Decl. ¶ 34; DX 005 at § 5-12).

Outside of a Credit Review Period, payment by the Debtors under the Sourcing Agreement was due to MGF 30 days after delivery of the order to the Debtors' distribution center. (Dick Decl. ¶ 44; Schwartz Decl. ¶ 36). But if a Credit Review Period was declared, MGF had the ability to adjust payment terms. (DX 006). Specifically, Section 4(b)(ii) of the Sourcing Agreement provided that:

> Unless another payment schedule is expressly contained in an Order created under this Agreement, Vendor's standard payment terms will apply (i.e., U.S. Dollars, immediately available funds, net 30 days, or, *during a Credit Review Period such other shorter number of days or up-front terms as deemed prudent by [MGF] in the exercise of it [sic] reasonable credit judgment*).

(DX 006 at 11) (emphasis added). This Credit Review Period provision was an important term to MGF and Sycamore Partners, and negotiations on it continued until shortly before signing the transaction. (Kaluzny Decl. ¶¶ 20–22; Morrow Decl. ¶¶ 13–22; Schwartz Decl. ¶¶ 36–40; CEX

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[6] "Credit Review Period" is defined under the Sourcing Agreement as:

> each period beginning on the date that Liquidity shall have been less than $150,000,000, and ending on the date Liquidity shall have been equal to or greater than $150,000,000 for forty five (45) consecutive calendar days; *provided* that a Credit Review Period shall not be deemed to have ended under this definition on more than two (2) occasions in any period of 365 consecutive days. The termination of a Credit Review Period as provided herein shall in no way limit, waive or delay the occurrence of a subsequent Credit Review Period in the event that the conditions set forth in this definition again arise.

(DX 006 at 2) (emphasis in original).

082). The purpose of this provision was to protect MGF from Aéropostale's declining liquidity. (Trial Tr. 76:13-18, Aug. 17, 2016 (Dick)).

Although the liquidity threshold was in the Sourcing Agreement, the top Aéropostale executives were unaware of it or how it was properly calculated. Mr. Dick, the Chief Financial Officer, was not aware until January 2016 that the Sourcing Agreement had a $150 million liquidity threshold. (Trial Tr. 58:22-59:8, Aug. 17, 2016 (Dick); Dick Decl. ¶ 23). The Debtors' Chief Executive Officer, Julian Geiger, never saw the Prepetition Term Loan Agreement, did not learn of the $150 million liquidity threshold until February 24, 2016, was "surprised" when he learned of it, and did not know whether Debtors' liquidity calculations were consistent with the contract. (Trial Tr. 18:20-25, 19:12-15, 63:5-64:3, Aug. 16, 2016 (Geiger)). When Mr. Geiger learned of the liquidity threshold, he asked Mr. Miller, the Chief Operating Officer, whether he was aware of the provision, and Mr. Miller informed him that he was only "vaguely" aware of it. (Trial Tr. 63:14-23, Aug. 16, 2016 (Geiger)).

Attached as Exhibit B to the Sourcing Agreement is a document entitled "Aéropostale's Purchase Order Terms and Conditions." (Dick Decl. ¶ 9; DX 006 at 35-39). It provides that: "[t]he prices herein shall not be increased and the quantities and shipment dates shall not be changed without Aéropostale's written consent." (Dick Decl. ¶ 9; DX 006 at 35). It also states that:

> Any terms or conditions set forth on Vendor's invoices, billing statements, acknowledgment forms, or any other documents which are inconsistent with this order shall be of no force or effect without Aéropostale's written consent.

(Dick Decl. ¶ 10; DX 006 at 35).

III. Aéropostale's Declining Business Performance

The Debtors' operations were profitable for many years, but declining mall traffic, a highly competitive retail environment, and a shift in customer demand from apparel to technology and personal experiences began to contribute to the Debtors' declining financial performance. (Dick Decl. ¶ 13). Already declining in 2013, Aéropostale's financial results and performance continued to deteriorate throughout 2014 and 2015. (CEX 142). Fiscal year 2014 saw a negative EBITDA of $63.5 million. (Trial Tr. 19:24-20:5, Aug. 17, 2016 (Dick)). And in fiscal year 2015, there was negative EBITDA of $69.5 million, despite the company previously projecting that it would break even. (Trial Tr. 20:6-18, Aug. 17, 2016 (Dick)). In fiscal 2015, Aéropostale announced a net loss in the fourth quarter of $21.7 million. (CEX 425, Ex. 99.1 at 1; Trial Tr. 46:3-5, Aug. 17, 2016 (Dick)). This was 50% larger than the fourth quarter loss from 2014, which was $13.5 million. (CEX 425, Ex. 99.1 at 1; Trial Tr. 46:6-8, Aug. 17, 2016 (Dick)). For fiscal 2015, comparable sales decreased 8.6% and net sales decreased 18% from the year before. (CEX 425, Ex. 99.1 at 1; Trial Tr. 226:6–17, Aug. 17, 2016 (Ferrell)). In fiscal 2015, there was a net loss $136.9 million and an operating loss of $119.4 million. (CEX 425, Ex. 99.1 at 2; Trial Tr. 226:18-25, Aug. 17, 2016 (Ferrell)).

In response to declining revenues and continued financial troubles, the Debtors began to restructure and streamline their businesses. (Dick Decl. ¶ 13). Initiatives to this effect included beginning to right-size the Debtors' store base in early 2014 through lease buyouts, negotiating more competitive rents and closing underperforming stores. (Dick First Day Affidavit ¶¶ 51, 52; Dick Decl. ¶ 14). Beginning in 2016, the Debtors also created a two-store format, which split the Debtors' stores between a factory format and a traditional mall format. (Dick Decl. ¶ 15). Factory stores were located primarily in outlet malls and value focused B and C mall locations

and offered the Debtors' core merchandise, including logo-bearing merchandise. (Dick Decl. ¶ 15). Mall format stores were located in higher-end A and B malls and focused on updated, classic merchandise, while de-emphasizing logo-bearing products. (Dick Decl. ¶ 15). The factory store model was rolled out in 460 stores. (Dick Decl. ¶ 15). Thus far, in fiscal year 2016, the factory stores are achieving 4.1% sales comparables over the same stores last year while also increasing the merchandise margin, which is the sale price of goods less the cost of goods. (Dick Decl. ¶ 16; DX 046). As a result, the Debtors did not have to provide greater discounts in order to drive increased sales at the factory stores. (Dick Decl. ¶ 16). The Debtors provided confidential data about the preliminary results in the second quarter of 2016, for both factory stores and mall stores in year over year same store comparables. (Dick Decl. ¶ 18; DX 046). They also provided confidential data about actual results in mall stores for year over year sales. The actual results in mall stores also showed significantly increasing merchandise margin dollars by 6.5% over the prior year. (Dick Decl. ¶ 18). In 2016, the Debtors also developed new brands for the 2016 back-to-school season, reduced their corporate payroll to approximately 100 employees, and pursued various other initiatives. (Dick Decl. ¶ 15).

In January 2016, concerns regarding liquidity and their financial future prompted the Debtors to hire Stifel to explore strategic alternatives. (Trial Tr. 84:4-10, Aug. 17, 2016 (Dick); Trial Tr. 31:22-24, Aug. 16, 2016 (Geiger); Trial Tr. 199:10-12, Aug. 16, 2016 (Doak)). At the end of that same month, the Debtors' board of directors held a meeting where it decided that at the March board meeting, "there will be a presentation on bankruptcy and the checklist/timeline will be reviewed." (CEX 242 at 7; Trial Tr. 35:5-12, Aug. 16, 2016 (Geiger); Trial Tr. 102:23-103:7, Aug. 17, 2016 (Dick)). That meeting occurred sooner than planned. On February 11, 2016, a banruptcy attorney from the law firm Weil Gotshal & Manges LLP attended a telephonic

board of directors' call on February 11, 2016. (CEX 256 at 1; Trial Tr. 36:6-8, Aug. 16, 2016 (Geiger)). On that call, "a discussion . . . occurred regarding starting a process to market the company." (CEX 256 at 2; Trial Tr. 35:19-36:5, Aug. 16, 2016 (Geiger)). On February 25, 2016, Debtors' board held another telephonic board meeting where they discussed disputes with Li & Fung and MGF—its two largest suppliers—and David Dick "discussed his upcoming 'going concern' discussions with [accounting firm] BDO as part of the 10-K process." (CEX 271 at 2). Mr. Dick agreed that by February 24, 2016, Aéropostale could reasonably be described as a distressed company, with its stock at risk of being de-listed and bankruptcy advisors in place. (Trial Tr. 111:19-112:3, Aug. 17, 2016 (Dick)).

IV. Problems Between the Debtors and MGF and the Term Lenders

MGF was aware of the Debtors' weak sales trends and financial condition at the start of the relationship in May 2014, but believed that MGF could do business with the Debtors on 30-day terms. (Schwartz Decl. ¶ 50). But throughout 2014 and 2015, the Debtors continued their sales declines and high rate of cash burn. (Schwartz Decl. ¶ 51). In the third quarter of 2014, the quarterly credit review report produced by MGF's finance staff stated on its "Recommendations Summary" page with respect to Aéropostale that "[t]he Company has declining sales, earnings, and bottom line income during Q2-FY14 compared to last year and prior quarter. . . . However, the Company maintains a fairly strong balance sheet with sufficient assets to cover their obligations." (CX 346 at 2; Schwartz Decl. ¶ 59). But MGF continued to plan and budget for an ongoing sourcing relationship, with Aéropostale's sales growth as one of four key initiatives MGF set for 2015. (Schwartz Decl. ¶ 53).

The quarterly credit review reports produced by MGF's finance staff reflected increasing concern throughout the sourcing relationship. Aéropostale's overall credit score on those reports

ranged between 1.21 and 2.29, below the average of its other customers and well below the "fair" credit threshold of 3.0. (CEX 346; CEX 347; CEX 348; Schwartz Decl. ¶ 59). Throughout 2015, MGF was concerned about the risk posed by the Debtors and believed that the Debtors might fall below the $150 million liquidity threshold in the Sourcing Agreement. (Schwartz Decl. ¶ 52). These concerns were magnified by the broadly struggling teen retailer market, as well as questions received by MGF from its factories regarding the Debtors' financial condition and their expressed worry that they might not be paid. (Schwartz Decl. ¶¶ 52, 54). In the first quarter of 2015, the quarterly review report's "Recommendations Summary" page stated that "[w]hile the Company maintains a fairly strong balance sheet with sufficient assets to cover its current obligations, its cash flow is still negative, despite reduced CapEx spends, and debt is steadily increasing. It has an unused credit line of $116M, but this should not be relied upon for backup." (CEX 347 at 3; Schwartz Decl. ¶ 59). In the third quarter of 2015, the report's "Recommendations Summary" page noted "we should continue to monitor their financial performance as they show signs of financial struggle." (CEX 348 at 3; Schwartz Decl. ¶ 59). In late 2015, MGF began to closely monitor Aéropostale's performance. (Schwartz Decl. ¶ 58; CEX 200 at 20).

MGF monitored the Debtors' liquidity through the monthly financial reports that the Debtors were required to provide the Term Lenders and through the Debtors' quarterly earnings releases. (Schwartz Decl. ¶ 40). MGF also monitored the Debtors' quarterly financials and earnings conference calls. (Schwartz Decl. ¶ 51). MGF periodically received information about the Debtors' financial situation from employees of Sycamore Partners. (Schwartz Decl. ¶ 40). The information provided to Sycamore in its capacity as a lender under the Prepetition Term Loan Agreement disclosed the Debtors' internal financial information, including a balance sheet,

Aéropostale's liquidity position, including its availability under Aéropostale's revolving line of credit which was part of the Prepetition ABL Agreement, and available cash. (Dick Decl. ¶ 30).

In December 2015, the Debtors provided certain projections for the 2016 fiscal year to the Term Lenders, including borrowing base certificates, preliminary cash flow projections, and consolidated balance sheet preliminary projections. (Dick Decl. ¶ 31; DX 051). At a meeting on December 7, 2015, the MGF Board discussed Aéropostale credit risk. (Schwartz Decl. ¶ 55). In its presentation, management reported that "Aéropostale is current on existing A/R balance (30 day payment terms), but could burn through existing cash and available credit by Q2 2016 based on existing loss and declining sales trends." (Schwartz Decl. ¶ 55; CEX 200 at 20). Management reported that MGF had $34.9 million in total exposure to the Debtors at that time, approximately half of which was accounts receivable for merchandise delivered on 30-day payment terms. (Schwartz Decl. ¶ 55; CEX 200 at 20). The other half was based on orders in process, including "fabric liability" incurred at the first step in the production process. (Schwartz Decl. ¶ 55; CEX 200 at 20). Management reported that MGF's exposure to the Debtors "could double at peak volume in 2016 with the sales budget at the MVC [minimum volume commitment] ($240MM)." (Schwartz Decl. ¶ 55; CEX 200 at 20). This $34.9 million in existing exposure was already approaching the amount of MGF's EBITDA cushion for maintaining compliance with the covenants in its credit agreements (although the amounts of its leverage ratio and fixed charge coverage ratio are confidential), so that non-payment by the Debtors could wipe out the liquidity that MGF needed to avoid defaulting on its own loans. (Schwartz Decl. ¶ 56; CEX 200 at 36).[7] But MGF, at that time, did not believe that a Credit Review Period had been triggered. (Schwartz Decl. ¶ 57).

[7] Mr. Schwartz provided the confidential amount of MGF's EBITDA cushion for its leverage ratio covenants and its consolidated fixed charge coverage ratio covenants as of year end 2015. (Schwartz Decl. ¶ 24; CEX 269 at

In January 2016, the Term Lenders analyzed the 2016 financial projections the Debtors had sent in late December and calculated that the Debtors would fall $15 million below the Sourcing Agreement's $150 million threshold in April 2016, $50 million below in May 2016, and come within $5 million in February 2016. (DX 016; CEX 018; Morrow Decl. ¶ 39; DX 404, Burke Dep. Tr. 165:11-16, 166:24-167:19, 168:8-169:5). This analysis based on the Debtors' financial projections caused concern, especially considering the Debtors' history of underperforming on their projections. (Kaluzny Decl. ¶¶ 40-41, 43-44; Morrow Decl. ¶¶ 37-42).

On January 29, 2016, the Debtors provided a package (the "January Package") to the Term Lenders that included a borrowing base certificate, and a variety of additional financial information. (Dick Decl. ¶ 30; DX 050). The borrowing base certificate provided a calculation of availability under the revolving credit facility. (Dick Decl. ¶ 30; DX 050).[8] The January Package reflected the Debtors' view that the availability under the revolving credit facility was $103,876,000 and that it had a borrowing base of $143,633,000. (Dick Decl. ¶ 30; DX 050). The January Package also reflected availability under the FILO Facility of $40,000,000. (Dick Decl. ¶ 35; DX 050).

Executives from the Debtors and MGF met on February 2, 2016, to discuss the status of the parties' relationship. (Dick Decl. ¶ 42; Schwartz Decl. ¶ 61). MGF states that it requested the meeting to better understand the Debtors' financial condition and liquidity position, in order to determine the risk posed by Aéropostale to MGF. (Schwartz Decl. ¶ 61). At the meeting,

19). The loss at that time period of an amount equal to its EBITDA cushion for its leverage ratio covenants would have caused a default under MGF's credit agreements. (Schwartz Decl. ¶ 24). The $240 million relationship with the Debtors could have $50 to $100 million in unsecured credit exposure for MGF, taking into account merchandise delivered but not yet paid for, plus merchandise in various stages of production and shipment. (Schwartz Decl. ¶ 38).

[8] In January 2016, the borrowing base certificate also provided information about the availability under the FILO Facility and available cash and cash equivalents. (Dick Decl. ¶ 33; DX 050 at lines (D), Availability (FILO)).

MGF inquired about increasing the number of orders the Debtors placed with MGF and actions MGF could take to reduce lead times on product and streamline the delivery of goods. (Dick Decl. ¶ 42). But MGF's concerns also were heightened by information the Debtors' management presented, which showed that Aéropostale's financial condition was actually worse than MGF had believed based on MGF's own analysis of Aéropostale's quarterly financials and monthly financial reports to the Term Lenders. (Schwartz Decl. ¶ 61; DX 407, Wilson Dep. Tr. 71:4-72:2; 88:14-25). MGF did not mention the Credit Review Period or the $150 million liquidity threshold. (Dick Decl. ¶ 42).

By February 2016, Aéropostale's stock price fell to $0.26 per share. (Kaluzny Decl. ¶ 48). Lemur sold the entirety of its Aéropostale stock between February 3 and February 8, 2016, resulting in proceeds of approximately $1 million. (Kaluzny Decl. ¶ 49). This was approximately $53 million less than what Lemur initially paid for the shares. (Kaluzny Decl. ¶ 49).

After analyzing the January month-end borrowing base certificate, financial statements, Aéropostale's projections and publicly available information, the Term Lenders concluded in mid-February that Aéropostale was below $150 million in liquidity. (Morrow Decl. ¶¶ 40-41; DX 404, Burke Dep. Tr. 190:14-21).

Pursuant to the Prepetition Term Loan Agreement, the Debtors provided the Term Lenders with another borrowing base certificate on February 11, 2016 (the "February Package") reflecting the Debtors' view of a borrowing base of $130,823,000 consisting of Availability (Revolving Credit) of $96,355,000 and Borrowing Base (FILO) of $34,468,000. (Dick Decl. ¶ 36; DX 052). The February Package was the last financial document provided by Debtors prior

to MGF asserting in the February 24th letter that the $150,000,000 liquidity threshold had been breached. (Dick Decl. ¶ 36).

On February 24, 2016, the MGF Board held a regularly-scheduled board meeting. (Schwartz Decl. ¶ 62). According to Messrs. Kaluzny, Morrow, and Schwartz, the Debtors' poor performance and liquidity were discussed among the board members both before and during the meeting. (Kaluzny Decl. ¶ 45; Morrow Decl. ¶¶ 41-42; Schwartz Decl. ¶¶ 62-66). At the meeting, the MGF Board discussed the risk Aéropostale posed to MGF, with all present agreeing that Aéropostale had dropped below the $150 million liquidity threshold in the Sourcing Agreement based on available information. (Schwartz Decl. ¶ 63). They all expressed doubts about Aéropostale's ability to survive and pay MGF what it was owed. (Schwartz Decl. ¶ 63). The MGF Board decided to continue doing business with Aéropostale, but to revise payment terms. (Schwartz Decl. ¶ 65).

On February 24, 2016, Mr. Schwartz called Mr. Miller to inform him that MGF was declaring a Credit Review Period and seeking cash in advance terms on future orders. (Trial Tr. 110:18-23, Aug. 17, 2016 (Dick)). That same day, MGF sent a letter signed by Mr. Schwartz to the Debtors (the "February 24 Letter"). (DX 024). The February 24 Letter notified the Debtors that "upon information and belief, a Credit Review Period has been triggered, as Aéropostale's Liquidity is less than $150,000,000." (DX 024). Citing to Section 4(b)(ii) of the Sourcing Agreement, MGF stated that they were adjusting the payment terms and that for future orders, the Debtors must either provide "an irrevocable standby letter of credit" in the amount of such orders or deliver funds concurrent with the placement of the order. (DX 024). Thus, full payment was due at the time of placement of an order or, based on the typical lead time for manufacturing and delivering goods, at least 90 days before the goods were received by the

Debtors at their distribution center. (Dick Decl. ¶ 41). By the time the February 24 Letter, MGF's exposure to Aéropostale had grown to approximately $50-60 million and MGF believed that exposure would increase to approximately $80-100 million as new orders came in. (Schwartz Decl. ¶ 67).

Aéropostale responded with a letter signed by Marc Schuback, Aéropostale's General Counsel, dated February 26, 2016. (CEX 489). The letter stated that the Debtors disagreed with the assertion that a Credit Review Period had been triggered. (CEX 489). It noted that MGF's letter "provides absolutely no basis for your conclusion and only states that it is written on 'information and belief.'" (CEX 489). It went on to "request that you provide us with information evidencing your conclusion that a Credit Review Period has been triggered as well as identifying the source(s) of such information. Given your letter, we assume that you should have no problem easily furnishing this information." (CEX 489). The letter did not attempt to demonstrate that the Debtors were above $150 million in liquidity. (CEX 489).

On February 29, 2016, MGF sent a second letter signed by Jennie Wilson, MGF's Chief Financial Officer (the "February 29 Letter"). (DX 025). This letter notified the Debtors that pursuant to Section 4(b)(ii) of the Sourcing Agreement, no pending orders would be delivered unless the Debtors paid MGF the full amount of such order prior to the date the order was to be shipped by MGF's third party logistics provider from the U.S. port to the Debtors. (DX 025). This immediately halted delivery of all pending orders for merchandise by MGF unless the Debtors paid in full prior to shipment. (Dick Decl. ¶ 44).

On March 1, 2016, the Debtors responded with a letter signed by outside counsel at Weil, Gotshal & Manges LLP. (CEX 491). The letter again questioned how MGF had determined that a Credit Review Period was triggered and asserted that MGF's conclusion was based on

information obtained "unlawfully." (CEX 491). The letter further asserted that cash in advance terms were "neither prudent nor reasonable and threatens to cause significant harm to Aéropostale, its business and its shareholders." (CEX 491). The letter asserted that MGF's actions were a breach of the Sourcing Agreement and

> demand[ed] that you retract your letter immediately and confirm that MGF will resume shipments in the ordinary course in compliance with the Sourcing Agreement. Aéropstale and MGF can then meet among [sic] to discuss any concerns that you may have and how to move forward in a reasonable manner and in compliance with the terms of the Sourcing Agreement.

(CX 491). The letter stated that it would hold MGF and its affiliates responsible for damages and loss if MGF did not rescind its requirements, and noted that the Debtors were evaluating other actions to protect Aéropostale. (CEX 491). Soon thereafter, Mr. Schwartz called Mr. Miller to discuss how to operationalize a process for the new payment terms MGF had demanded. (CEX 509, Miller Dep. Tr. 268:25–269:7). Mr. Miller responded that the Debtors had not breached the liquidity threshold, so there was "nothing really to talk about." (Trial Tr. 158:19-159:3, Aug. 16, 2016 (Schwartz)).

The Debtors concede that they did drop below the $150 million liquidity threshold under the Sourcing Agreement by the last day of February 2016, though they learned this information after the fact. (Dick Decl. ¶ 40). As of February 27, 2016, Aéropostale's month-end financials indicated that the Debtors' liquidity would be approximately $129 million. (Trial Tr. 67:8–11, Aug. 17, 2016 (Dick)). Mr. Dick, the Debtors' CFO, now has no reason to believe that the Debtors' liquidity was above the $150 million threshold three days earlier on February 24, 2016. (Trial Tr. 67:15-23, Aug. 17, 2016 (Dick)). In fact, the Debtors had unknowingly been incorrectly calculating the liquidity threshold by including FILO in the borrowing capacity and by double counting credit card receivables. (Trial Tr. 64:7-66:6, 68:10-69:3, 73:3-76:12, 93:12-

20, 96:4-12, Aug. 17, 2016 (Dick)). Mr. Dick did not realize this until months after the fact. (Trial Tr. 96:10-12, Aug. 17, 2016 (Dick)). As a result of their incorrect inclusion of FILO availability, the Debtors systematically overstated their own liquidity by between $34 and $40 million, depending on the month forecasted. (Trial Tr. 93:17-94:25, Aug. 17, 2016 (Dick)). This led the Debtors to overstate their liquidity on numerous occasions, including: (a) throughout January and February 2016, when they began to monitor it, and (b) after February 24, 2016, when denying they were in a Credit Review Period. (CEX 318; Debtors' Trial Brief ¶ 38; Trial Tr. 143:11-144:23, Aug. 17, 2016 (Dick)).

Between April 1, 2016, and April 8, 2016, the Debtors and MGF came to interim agreements with respect to certain shipments. (Trial Tr. 127:15-24, Aug. 17, 2016 (Dick); Dick Decl. ¶ 52)). The Debtors ultimately paid MGF approximately $15.8 million to ship goods and MGF delivered some, but not all, of the outstanding inventory of the Debtors. (Dick Decl. ¶ 52). Subsequent to the Debtors' bankruptcy filing on May 4, 2016, the Debtors and MGF settled the rest of their supply dispute. The Debtors released their claims against MGF in exchange for other consideration, including MGF's agreement to ship. (Trial Tr. 129:7-14, Aug. 17, 2016 (Dick)). On May 24, 2016, this Court entered an order pursuant to Bankruptcy Rule 9019 approving a separate settlement agreement between Debtors and MGF resolving all disputes regarding the Credit Review Period as between MGF and Debtors. [ECF Nos. 168, 189].

MGF suffered consequences upon the post-bankruptcy termination of its relationship with the Debtors, including reduced sales, expense leverage, and leverage with logistics providers, and through what MGF characterizes as the waste of the management time and attention that went into developing the relationship with the Debtors. (Schwartz Decl. ¶ 74).

MGF ultimately laid off approximately half of the employees it hired or transferred to service the Debtors' account. (Schwartz Decl. ¶ 75).

V. Aéropostale's Vendors

It is impossible to understand the dispute before the Court without some additional background about how MGF conducts its business. Entering into a new customer relationship—like the one with Aéropostale in 2014—requires significant effort and expense for MGF upfront and throughout the relationship and may require the hiring of dozens of people specifically for that relationship. (Schwartz Decl. ¶ 14). MGF must first work with the customer to understand the merchandise to be manufactured, including price, design, technical, merchandising and logistical matters. (Schwartz Decl. ¶ 13). MGF must also identify appropriate factories for manufacturing the merchandise and work with those factories to ensure that the products meet customer specifications, price targets and production timelines. (Schwartz Decl. ¶ 13).[9] Because of this process, the first year or two of a new customer relationship may involve errors and misunderstandings regarding pricing, product specifications, sampling, logistics and other issues. (Schwartz Decl. ¶ 15). These problems typically become fewer as the relationship continues and the parties become accustomed to working together. (Schwartz Decl. ¶ 15).

MGF's margins on sales to new customers are lower than those to established customers, because of the time and expense necessary to develop an efficient sourcing system, combined with customers that often demand low pricing immediately. (Schwartz Decl. ¶ 16). MGF

[9] For example, in the first year of the Sourcing Agreement, MGF hired or internally transferred roughly 50 people to service the Debtors, at a cost of $2.4 million for 2015. (Schwartz Decl. ¶ 41; CEX 269). Effort and expense was spent training this team to service the Debtors, arranging for factories to produce merchandise for the Debtors and making logistics arrangements for shipping merchandise from the factories to the Debtors' distribution centers in the United States. (Schwartz Decl. ¶ 41). MGF spent time meeting with the Debtors to understand their designs, technical requirements, budgeting process, and requirements regarding ordering, shipping, invoicing, and payments. (Schwartz Decl. ¶ 41). MGF and the Aéropostale team participated in weekly conference calls about how to service the Debtors. (Schwartz Decl. ¶ 41).

therefore takes a long-term view of its customer relationships, expecting to make little profit early for the sake of building the relationship with the understanding that increased profits will follow as that relationship progresses. (Schwartz Decl. ¶¶ 16-17). MGF believes that a sourcing relationship lasting only a year or two would generally not be worth the trouble and expense. (Schwartz Decl. ¶ 17).

One of the biggest risks to MGF's business is customer credit risk, specifically, that customers will not be able to pay for merchandise that MGF has spent money to source for them. (Schwartz Decl. ¶ 18). MGF incurs increased financial exposure to the credit of its customers at each step in the production process, and that exposure is not eliminated until the customer pays for the merchandise at the end of the order cycle. (Schwartz Decl. ¶ 19). For instance, fabric dyed to a customer's specifications cannot easily be used for other orders and MGF is obligated to pay the factories for it pursuant to their contracts, even if MGF's customer fails to pay MGF for the finished apparel. (Schwartz Decl. ¶ 19). Likewise, once the dyed fabric is cut into the shapes and sizes required for the customer's order, it is impossible to use it for any other order and MGF is obligated to pay the factory for both the fabric and the effort and expense involved in cutting it. (Schwartz Decl. ¶ 20). When the garments are complete and trucked to the customer's distribution centers, MGF is committed to the factories and the logistics providers for additional expenses, plus import duties payable upon landing goods in the United States. (Schwartz Decl. ¶ 20).

MGF's options are limited if a customer fails to pay. (Schwartz Decl. ¶ 22). If the merchandise is already delivered to the customer, then MGF must seek payment through the legal process. (Schwartz Decl. ¶ 22). If MGF has not yet delivered the merchandise, and the order is halted mid-stream, then MGF Sourcing must sell the merchandise to liquidators, which

results in a significantly lower dollar amount because the merchandise may be unfinished or may be located in a foreign country where its style and branding do not appeal to local consumers. (Schwartz Decl. ¶ 22). MGF's ability to liquidate merchandise is often further restricted by provisions in sourcing contracts that prevent MGF from selling products with the customer's branding. (Schwartz Decl. ¶ 22).

MGF depends on timely payments by its customers to finance its operations and to meet financial covenants in its own credit agreements, including staying below a maximum leverage ratio (net debt divided by adjusted EBITDA) and above a minimum consolidated fixed charge coverage ratio (free cash flow divided by debt service charges). (Schwartz Decl. ¶ 23). Violation of these covenants would allow MGF's lenders to exercise their contractual remedies, thereby disrupting MGF's business and threatening its survival. (Schwartz Decl. ¶ 23). MGF monitors its compliance with its financial covenants and its EBITDA cushion—the amount of EBITDA above the minimum amount required to remain in compliance. (Schwartz Decl. ¶ 24).

Because of the importance of its customers' creditworthiness, MGF monitors the performance and financial condition of its customers. (Schwartz Decl. ¶ 25). Additionally, factory owners in other countries often monitor press coverage of the MGF customers for whom their products are destined, and seek assurance from MGF when negative reports cause them concern about the ability of the customer to pay. (Schwartz Decl. ¶ 25). MGF has declined new business because of doubts about the customer's liquidity and ability to pay and in one case stopped doing business with a large existing customer due to persistent unresolved liquidity problems that caused MGF to doubt whether the customer could continue to pay for its merchandise. (Schwartz Decl. ¶ 26).

MGF produces weekly reports tracking the performance of accounts receivable, which show, by customer, the percentage of available credit used and the aging of accounts receivable and are reviewed by MFG senior officers and directors. (Schwartz Decl. ¶ 27). MGF also prepares quarterly credit review reports that discuss the financial condition and performance of each of its customers, including analyzing each customer's credit profile based on publicly available information, plus whatever financial information MGF receives from its customers in the course of the sourcing relationship. (Schwartz Decl. ¶ 28). The reports include recommendations about whether to increase, decrease, or maintain current credit terms for each customer, a detailed presentation of their financials, and the calculation of financial ratios relevant to the customer's creditworthiness. (Schwartz Decl. ¶ 28). The reports assign an overall credit score to each customer based on earnings, balance sheet, growth, cash generation, and penetration risk, which refers to the risk that MGF share of the customer's overall sourcing volume may drop. (Schwartz Decl. ¶ 28).

Shortly after the quarterly credit review reports are issued, Mr. Schwartz, MGF's CEO, meets with the CFO, the controller, and their managers, to discuss the reports, including any threats posed by particular customers and how to protect against them. (Schwartz Decl. ¶ 29). Representatives of Sycamore Partners do not attend these meetings. (Schwartz Decl. ¶ 29). The discussion at these meetings typically covers each customer's financial condition, the financial ratios and their implications for credit risk, and MGF's own financial condition and liquidity requirements. (Schwartz Decl. ¶ 29). On occasion, a customer presenting a particular credit risk to MGF will be discussed by the MGF Board and a board decision may be made about how to address the risk. (Schwartz Decl. ¶ 30).

The majority of MGF customers (including eight customers that totaled a significant, but confidential, amount of MGF's net sales for 2015) are not owned or affiliated with Sycamore Partners. (Schwartz Decl. ¶ 10). Additionally, MGF maintains its own offices, bank accounts, phone numbers, technology systems and email addresses separate from Sycamore Partners. (Schwartz Decl. ¶ 11). MGF does business in its own name and generally does not refer to Sycamore Partners in its marketing. (Schwartz Decl. ¶ 11). MGF also maintains financing separate from Sycamore Partners, which consists of a revolving credit facility with Bank of America and a term loan facility with KKR Financial, both of which were entered into by MGF under its own name. (Schwartz Decl. ¶ 11).

Since November 1, 2011, MGF has been indirectly majority-owned by an affiliate of Sycamore Partners. (Schwartz Decl. ¶ 3). At the time that MGF and the Debtors entered into the Sourcing Agreement, MGF was also owned in party by a company called L Brands. (Schwartz Decl. ¶ 6). During the period of time that L Brands was a minority owner of MGF Holdings, the MGF Board had five members that included two Sycamore representatives, two L Brands representatives, and James Schwartz, the Chief Executive Officer of MGF. (Schwartz Decl. ¶ 6). This was the composition of the MGF Board at the time that it approved the Sourcing Agreement. Later, L Brands sold its remaining interest in MGF Holdings to Sycamore. (Schwartz Decl. ¶ 6).

The MGF Board currently consists of Mr. Schwartz, as well as Stefan Kaluzny and Peter Morrow, who are both managing directors of Sycamore Partners. (Schwartz Decl. ¶ 6). The MGF Board meets quarterly. (Schwartz Decl. ¶ 8). At these meetings, MGF management makes a presentation regarding the company's performance for the prior quarter and the forecast for future periods, and the MGF Board discusses strategic issues facing the company. (Schwartz

Decl. ¶ 8). MGF has a management services contract with an affiliate of Sycamore Partners, the details of which are confidential. (Schwartz Decl. ¶ 9). These personnel include retail specialists with extensive experience in strategic and financial issues relevant to MGF's business. (Schwartz Decl. ¶ 9). In between MGF Board meetings, management of MGF will occasionally discuss the company's business with individuals at Sycamore Partners. (Schwartz Decl. ¶ 9).

To understand the parties' dispute, it is also necessary to know something about the difficulties eluded to earlier between Aéropostale and its largest prepetition merchandise supplier, Li & Fung. The Debtors were party to a master sourcing agreement with Li & Fung, dated February 2, 2015 (the "L&F Agreement"). (Dick Decl. ¶ 59; DX 055). The L&F Agreement had an initial term of 10 years, with a minimum volume requirement of $350 million per year. (Dick Decl. ¶ 59; DX 055). Similar to the Sourcing Agreement, a failure of the Debtors to meet the minimum volume requirement results in a shortfall commission to Li & Fung, and the Debtors were also entitled to rebates under the L&F Agreement. (Dick First Day Affidavit ¶ 24; Dick Decl. ¶ 59; DX 055). Unlike the Sourcing Agreement, the L&F Agreement did not have a liquidity threshold allowing it to adjust payment terms. (DX 055; CEX 509, Miller Dep. Tr. 232:12-20). It contained no basis for allowing Li & Fung to suspend shipping other than late payment by the Debtors. (Trial Tr. 25:8-20, Aug. 17, 2016 (Dick)).

As early as November 2015, Li & Fung expressed concerns about the Debtors' finances and liquidity and subsequently took actions to reduce their exposure. (Dick Decl. ¶ 60; CEX 188; Trial Tr. 48:1-49:13, Aug 16, 2016 (Geiger); Trial Tr. 27:3-17, Aug. 17, 2016 (Dick)). For instance, internal Aéropostale communications during this time period noted Li & Fung was "freaking out" over Aéropostale's financial performance and gross margin on sales. (CEX 188; Trial Tr. 48:1-49:10, Aug. 16, 2016 (Geiger); Trial Tr. 27:3-17, Aug. 17, 2016 (Dick)). In

December 2015, the Debtors and Li & Fung held a meeting at Li & Fung's request to address concerns that Li & Fung had expressed to Julian Geiger. (Dick Decl. ¶ 61; Trial Tr. 28:7-14, 29:1-4, Aug. 17, 2016 (Dick); Trial Tr. 49:11-16, Aug. 16, 2016 (Geiger)). At the meeting, there was a broad discussion regarding the Debtors' business performance, including regarding the Debtors' liquidity, and Li & Fung was provided with financial information in an attempt to ease their concerns, with Li & Fung being walked through a liquidity sensitivity analysis. (Trial Tr. 29:5-14, Aug. 17, 2016 (Dick); Trial Tr. 49:14-50:5, Aug 16, 2016 (Geiger)).

The Debtors ultimately agreed to grant Li & Fung a license to re-sell certain goods that the Debtors elected not to purchase, in the event the Debtors filed for bankruptcy and did not pay for or accept those goods. (Dick Decl. ¶ 64; Trial Tr. 50:17-22, Aug. 16, 2016 (Geiger); Trial Tr. 31:4-32:19, Aug. 17, 2016 (Dick); CEX 193; CEX 217; CEX 218). The Debtors also agreed to grant Li & Fung critical vendor status in the event of a bankruptcy. (CEX 193; CEX 217; CEX 218). In January 2016, Li & Fung and the Debtors spoke again to discuss the relationship, specifically amounts owed to Li & Fung under the L&F Agreement, potential trade terms on a go-forward basis, and the overall state of the Debtors' business. (Dick Decl. ¶ 62; Trial Tr. 36:8-15, Aug. 17, 2016 (Dick)). Li & Fung was provided with an update about the Debtors' performance in the fourth quarter of 2015 and provided a preview of performance for the first quarter of 2016. (Dick Decl. ¶ 62). Also at that time, the Debtors requested the acceleration of a $9.3 million refund payment that was due later in February. (Trial Tr. 36:16-37:2, Aug. 17, 2016 (Dick)).

On February 25, 2016, the Debtors and Li & Fung held a videoconference, during which Li & Fung requested additional assurances about the Debtors' performance and ways to manage Li & Fung's exposure to Aéropostale. (Dick Decl. ¶ 63; Trial Tr. 39:5-18, Aug. 17, 2016

(Dick)). Li & Fung stated that they would like to limit their exposure to Aéropostale to $100 million. (Trial Tr. 54:4-13, Aug 16, 2016 (Geiger)). The Debtors considered several steps during this time period, such as reducing Li & Fung's volume commitment by $100 million to limit its credit exposure and reducing Li & Fung's payment terms from net 40 days to net 20 days. (CEX 240; Trial Tr. 55:10-56:24, Aug. 16, 2016 (Geiger)).

In February 2016, Li & Fung was required under the L&F Agreement to pay the Debtors a rebate of $9.3 million, but Li & Fung unilaterally chose not to make the rebate payment as required. (Dick Decl. ¶ 65; Trial Tr. 38:11-40:10, 41:22-23, Aug. 17, 2016 (Dick)). On March 4, 2016, Li & Fung sent the Debtors a letter seeking shortened payment terms for any goods shipped to the Debtors under L&F's supply agreement. (Dick Decl. ¶ 65). Li & Fung also held certain shipments and required payment before taking new orders. (Trial Tr. 41:19-21, 43:8-44; 52:5-8, Aug. 17, 2016 (Dick); CEX 509, Miller Dep. Tr. 206:5-10). They also unilaterally accelerated payment terms on existing orders that had already been placed, using the shipments they were holding as leverage. (CEX 478; Trial Tr. 52:5-21, Aug. 17, 2016 (Dick); CEX 509, Miller Dep. Tr. 210:2-17.) Ultimately, the Debtors and Li & Fung renegotiated the payment terms in their agreement, agreeing to net-20 payment terms on certain orders and net-7 on others. (Dick Decl. ¶ 65; CEX 322). In consideration for reducing payment terms, Li & Fung provided a 5% rebate on certain orders. (Dick Decl. ¶ 65; CEX 322).

Prior to contracting with Li & Fung, Aéropostale had a longstanding sourcing arrangement with a sourcing company named MMG, which was the sourcing arm of Federated Department Stores. (DX 042 at 37; Trial Tr. 40:3-9, Aug 16, 2016 (Geiger)). In 2014, MMG was Aéropostale's second largest supplier. (DX 042 at 36). In approximately March 2015, the

relationship with MMG ended because MMG also requested collateral, which Aéropostale refused to provide. (DX 042 at 37; Trial Tr. 40:10-13, Aug 16, 2016 (Geiger)).

VI. Expert Witness Testimony

In addition to the historical facts presented at Trial, the parties presented an array of expert testimony in four general areas. First, the parties offered expert testimony about the Sourcing Agreement and whether the new payment terms imposed during the Credit Review Period were reasonable. The Debtor's sourcing expert, Deborah Palmer Keiser, opined that MGF's conduct with respect to the Sourcing Agreement is "inconsistent with generally accepted standards of reasonable credit judgment within the retail industry." (Keiser Decl. ¶¶ 15, 52, 59). Specifically, Ms. Keiser opined that it is rare in the retail industry "to permit a single party to unilaterally alter the terms of an order once a valid purchase order has been placed and for which there is no evidence of failure to meet the terms of the purchase order." (Keiser Decl. ¶¶ 53, 54, 55) (citing Sourcing Agreement, DX 006). Ms. Keiser defines "unilateral" action narrowly, stating it constitutes "shutting down the supply chains, shutting down the supply of product" whereas, she defines parties withholding payments as "industry sparring." (Trial Tr. 194:10–22, Aug. 16, 2016 (Keiser)).

Ms. Keiser testified that in her thirty years working with sourcing agents, she has never seen terms that demand payment in full upon placement of a purchase order. (Keiser Decl. ¶¶ 58, 63). Rather, the most extreme terms she has encountered were 50% due upon order placement, with ordinary terms applied for the remaining 50%. (Keiser Decl. ¶¶ 58, 64). According to Ms. Keiser, such terms are applied in the cases of start-ups with no prior payment history and little credit history. (Keiser Decl. ¶¶ 58, 64).

Ms. Keiser opined that MGF's refusal to ship products already ordered is inconsistent with reasonable credit judgment because in the industry "a reasonable vendor would not seek to adjust purchase order terms retroactively while withholding inventory as leverage." (Keiser Decl. ¶ 60). In fact, Ms. Keiser opined, it would be in the sourcing agent's best interest to ship inventory. (Keiser Decl. ¶ 61). Ms. Keiser testified that it is common for sourcing agents to ease payment terms with brands experiencing financial difficulty. (Keiser Decl. ¶ 65). Rather than impose payable upon order terms, Ms. Keiser testified that there were other "more reasonable payment terms and strategies" MGF could have imposed, including for example, "net-20" terms and amending the Sourcing Agreement to include a provision for a rebate or discount. (Keiser Decl. ¶¶ 68, 69). But she conceded that, before this case, she had never heard of a credit review provision like that in the Sourcing Agreement. (Trial Tr. 169:6–19, Aug. 16, 2016 (Keiser)).

Ms. Keiser expressed no opinion on whether it was reasonable for MGF to attempt to control its credit risk with respect to Aéropostale. (Trial Tr. 179:16–21, Aug. 16, 2016 (Keiser)). She compared the acts of MGF to those of Li & Fung and opined that the amendment made to the L&F Agreement, which imposed new payment terms on existing orders, is consistent with industry custom for a company in Li & Fung's position. (Trial Tr. 176:20–177:6, Aug. 16, 2016 (Keiser); CEX 193). Yet she offered no opinion on whether Li & Fung's decision to limit its credit exposure was reasonable. (Trial Tr. 177:13–16, August 16, 2016 (Keiser)). Ms. Keiser also conceded that the L&F Amendment permitted L&F to make a unilateral change in that they could exercise their right to "sell off" without conferring with Aéropostale. (Trial Tr. 189:22–25, 192:5–13, Aug. 16, 2016 (Keiser)).

The Term Lenders' expert on the subject, Holly Felder Etlin, had a different take. She opined that MGF's decision to require cash in advance for new and existing purchase orders was

"reasonable under common industry factors for assessing credit." (Etlin Decl. ¶¶ 12, 53). Specifically, Ms. Etlin concluded MGF's decision was reasonable because, among other factors, it had significant credit exposure to the Debtors and the financial circumstances of the Debtors was deteriorating. (Etlin Decl. ¶ 12). Additionally, Ms. Etlin found the actions that Li & Fung took to protect its own credit exposure to the Debtors supported her conclusion. (Etlin Decl. ¶¶ 13). Ms. Etlin analyzed MGF's credit risk as related to the Debtors and concluded that it had significant credit exposure to the Debtors in January and February 2016. (Etlin Decl. ¶ 36, 38). She noted/relied upon the fact that, as of February 12, 2016, MGF forecasted its credit exposure to $45.7 million in February 2016 and $50.3 million in March 2016 and would be over $60 million in June 2016. (Etlin Decl. ¶ 38). Based on the Debtors' financial condition, liquidity position and its strained relationship with Li & Fung, Ms. Etlin concluded that MGF's change in payment terms did not cause Aéropostale's bankruptcy. (Etlin Decl. ¶ 67, 68).

According to Ms. Etlin, MGF had several options that it could have used to mitigate its credit risk. (Trial Tr. 134:2–5, 135:7–10, Aug. 18, 2016 (Etlin)). These options included imposing a credit limit, withholding rebates, requiring cash in advance or partial cash payments, or an "insolvency rider" that would permit the vendor to be deemed a "critical vendor" and give them a "sell-up rate." (Trial Tr. 135:11–24, Aug. 18, 2016 (Etlin)). Some of these options would have had a less severe impact on Aéropostale's ability to conduct business. (Trial Tr. 137:12–16, Aug. 18, 2016 (Etlin)). She conceded that there are instances where a sourcing agent may extend payment terms for a retailer. (Trial Tr. 139:10–140:5, Aug. 18, 2016 (Etlin)). She also noted that MGF has in the past extended payment terms to its customers, including for a company whose identity is confidential. (Trial Tr. Under Seal 1, 6:4–10, Aug. 18, 2016 (Etlin)). Ms. Etlin also noted that MGF used a monthly risk tracking tool for all their customers. (Trial

Tr. Under Seal 1, 8:20–25, Aug. 18, 2016 (Etlin)). For example, according to a third quarter 2015 review, MGF's credit exposure to Aéropostale was approximately $34.8 million as of December 7, 2015. (Trial Tr. Under Seal 1, 9:21–24, Aug. 18, 2016 (Etlin); DX 28 at 20). By comparison for the same period, MGF's credit exposure to the confidential company identified above was approximately $36 million. (Trial Tr. Under Seal 1, 9:1–4, Aug. 18, 2016 (Etlin); DX 28 at 22). MGF assessed both Aéropostale and the confidential company identified above as a "poor" credit risk. (Trial Tr. Under Seal 1, 11:15–17, Aug. 18, 2016 (Etlin); DX 26 at Score Summary). But Ms. Etlin identified distinctions between the two companies that explained MGF's different treatment for each company. (Trial Tr. Under Seal 1, 11:5–14, Aug. 18, 2016 (Etlin)).

The second area of expert testimony related to the significance in the market of certain information about Aéropostale. Based on two "event studies," Allen Ferrell concluded on behalf of the Debtors that information reflecting a significant increased risk of Aéropostale's bankruptcy was of market significance. (Trial Tr. 220:9-22, Aug. 17, 2016 (Ferrell)). He assumed that information that the $150 million liquidity threshold would be crossed would significantly increase the likelihood of an Aéropostale bankruptcy. (Ferrell Decl. ¶ 13). He further assumed that the December 2015 projections—prepared by Debtors and shared with the Term Lenders—reflected that the $150 million liquidity threshold would be breached on or around April. (*See* Ferrell Decl. ¶ 13). Based on these two assumptions, he then concluded that the Term Lenders were in possession of information that reflected a significant increased risk of bankruptcy and, therefore, that this in fact was of market significance. (Ferrell Decl. ¶¶ 13, 21). Professor Ferrell did not, however, calculate the probability of Aéropostale filing for bankruptcy at any given point in time. (Trial Tr. Aug. 17, 2016, 235:11-18). Professor Ferrell also did not analyze

whether any information that the Term Lenders received showed a significant increase in Aéropostale's risk of filing for bankruptcy. (Trial Tr. Aug. 17, 2016, 224:23–225:5 (Ferrell)).

On the other side of this issue, the Term Lenders' expert, Adam Pritchard, opined that it is substantially unlikely that a reasonable shareholder would consider the information that the Term Lenders possessed to be important in deciding whether to buy or sell Aéropostale stock. (Pritchard Decl. ¶¶ 5, 5). Specifically, Professor Pritchard testified that this information "would not have altered the total mix of information that a reasonable investor would have considered important to deciding whether to buy or sell" Aéropostale's stock. (Pritchard Decl. ¶ 6). Professor Pritchard concluded that by the end of 2015, the market had concluded that Aéropostale's turn-around plan, announced in May 2014, was unsuccessful. (Pritchard Decl.¶ 14). Professor Pritchard opined that based on his review, Aéropostale's stock had only option value by December 2015 and needed "a miracle to turn it around." (Pritchard Decl. ¶ 38). Professor Pritchard considered a wide variety of stock analysts' reports and news articles in evaluating the information available to the market. (Pritchard Decl. ¶¶15, 16, 18, 19, 20, 21).

Professor Pritchard relied on stock prices in rendering his opinion. In May 2014, Aéropostale's shares were trading above $4.00, but the stock's price was at $.28 per share by the end of December 2015. (Pritchard Decl. ¶ 14). Professor Pritchard testified that from that point until it was de-listed on April 22, 2016, the stock price remained relatively stable in response to new developments at the Company. (Pritchard Decl. ¶¶ 25, 29, 31, 33, 34). On March 17, 2016, the Company announced its net loss of $.27 per share for the fourth quarter of 2015, that it was considering "strategic alternatives," and had hired Stifel to assist in that process. (Pritchard Decl. ¶ 31). After the March 17, 2016 disclosures, Aéropostale's stock price declined from $.48 on March 17, 2016, to $.26 the next day with over 12 million shares trading. (Pritchard Decl. ¶

33). The stock price fell throughout March and traded in the low $.20s for most of April. (Pritchard Decl. ¶ 34). In his view the market's reactions to various disclosures in early 2016 demonstrated that it was "impervious" to bad news. (Pritchard Decl. ¶¶ 24, 27, 28, 40).

On cross-examination, Professor Pritchard conceded that information that Aéropostale was going to be delisted or that it is "virtually certain to file for bankruptcy" could have moved the company's stock price. (Trial Tr. 179:24–180:6, Aug. 18, 2016 (Pritchard)). He also conceded that there was a great deal of trading volume immediately after an April 21, 2016 report that Aéropostale was said to be preparing for bankruptcy by the end of the month, and that in fact, the market reacted strongly to that report. (Trial Tr. 188:3–17, Aug. 18, 2016 (Pritchard)). That April 21, 2016 report was also considered by Professor Ferrell in rendering his analysis. (Ferrell Decl. ¶¶ 14, 15, 16).

The third area of expert testimony related to Aéropostale's economic situation in 2016. The Debtors offered Robert Duffy to opine that if MGF had not imposed new credit terms, Aéropostale likely would have avoided or significantly delayed tripping the $70 million liquidity covenant and any attendant Chapter 11 filing. (Duffy Decl. ¶ 2). Specifically, Mr. Duffy opined that the payment terms demanded in the February 24, 2016 and February 29, 2016 letters would have impacted the Debtors' liquidity by $80 million–$120 million. (Dufy Decl. ¶ 13). Further, Mr. Duffy concluded that if Debtors had agreed to the terms in the February 24th and February 29th letters, they would have tripped the $70 million liquidity covenant. (Duffy Decl. ¶ 13). In conjunction with FTI, Mr. Duffy prepared a liquidity projection to demonstrate the Debtors' liquidity, assuming that standard credit terms would be used from April 30, 2016 through December 3, 2016 (the "Liquidity Projection"). (Duffy Decl. ¶¶ 14, 16; DX 41) Thus, the model assumes no changes to MGF's payment terms until August 20, 2016. (Trial Tr. 63:21–25,

Aug. 18, 2016 (Duffy)). The Liquidity Projection assumes that: "all amounts due and owing between the Debtors and its vendors would have been paid in the ordinary course; . . . Debtors would not have incurred the costs associated with a chapter 11 filing[;] . . . [and] through July 2016, the Debtors would have realized the same margins and level of comparable same-store sales that the Debtors actually realized[.]" (Duffy Decl. ¶ 17). Except for five or six stores that would have closed absent a bankruptcy, Mr. Duffy's analysis assumed that Aéropostale would not close any stores. (Trial Tr. 60:21–61:8, Aug. 18, 2016 (Duffy)). Even with these assumptions, the Liquidity Projection indicates that the Debtors would trip the $70 million liquidity covenant in July 2016. (Duffy Decl. ¶ 21; DX 41). However, Mr. Duffy opined that that Debtors would have been able to "manage through such period" because the Debtors could have managed liquidity through other means. (Duffy Decl. ¶ 21). Further, Mr. Duffy explains that the Liquidity Projection assumes "net 20" payment terms for L&F, which is more onerous than the "net 40" provided for in the L&F Agreement. (Duffy Decl. ¶ 22).

While Mr. Duffy relied on the Liquidity Projection, he had no role in creating the model but he had a role in the assumptions, the presentation, and inputs. (Trial Tr. 21:15–21, Aug. 18, 2016 (Duffy)). On cross-examination, the Term Lenders' counsel ran through various scenarios with Mr. Duffy that would potentially impact Aéropostale's liquidity. (See, e.g., Trial Tr. 79:13–24, 81:18–22, 86:1–87:5, Aug. 18, 2016 (Duffy)). The scenarios included removing the $9 million payment by Li & Fung and previously paid provisional fees in the amount of $7.445 million, as well as applying 20-day terms to MGF orders for the entirety of the projection. (See Trial Tr. 79:14–18, 86:1–87:5, 94:3–15, Aug. 18, 2016 (Duffy)). These scenarios demonstrated that Aéropostale would dip below the $70 million Liquidity Covenant at various points. (Trial Tr. 79:19–80:10, 86:1–87:5, 94:11–95:3, Aug. 18, 2016 (Duffy)).

On this same issue of Aéropostale's economic situation in 2016, the Term Lenders offered Adam Bell. He opined that, as of February 24, 2016, an audit opinion of Aéropostale would have included an explanatory paragraph indicating substantial doubt that the company could continue as a going concern for a reasonable period of time. (Bell Decl. ¶¶ 10, 14, 28). Mr. Bell concluded that Aéropostale faced significant financial risks as identified in the company's fiscal 2014 audit. (Bell Decl. ¶¶ 32–33). Mr. Bell evaluated Aéropostale's 2014 and 2015 Form 10-Ks and found that the Company's financial performance did not improve from 2014 to 2015. (Bell Decl. ¶ 36). In addition, he noted that Aéropostale's liquidity calculation in its 2015 Form 10-K was overstated by approximately $37.4 million. (Bell Decl. ¶ 37). He further relied on the fact that net sales decreased in each quarter in fiscal 2015 from the prior year, both in gross terms and on a comparable store basis. (Bell Decl. ¶ 39).

Mr. Bell acknowledged that losses from operations and net losses in fiscal 2015 improved compared to 2014, yet he opined that this was due at least in part to "one-time items" such as store closings. (Bell Decl. ¶ 40). Nevertheless, he noted that Aéropostale still suffered losses exceeding $100 million in fiscal 2015. (Bell Decl. ¶ 40). Mr. Bell observed that continued declines in net sales and additional cash outflows from operations, combined with capital expenditures, would further reduce Aéropostale's liquidity in fiscal 2016. (Bell Decl. ¶ 43). If he were to plan a fiscal 2015 audit of Aéropostale, Mr. Bell would have considered the notices from the NYSE in September and October 2015 indicating that the company was not in compliance with the NYSE's continued listing requirements. (Bell Decl. ¶ 44). Mr. Bell also identified the amendment to the L&F Agreement, which added an "insolvency event" provision on December 21, 2015, and Aéropostale's engagement of Stifel as an indicators of Aéropostale's

financial difficulties. (Bell Decl. ¶¶ 46, 47). In reaching his conclusion, Mr. Bell also relied on numerous documents and analyses relating to liquidity. (Bell Decl. ¶¶ 51, 54, 68, 70, 73, 73).

Mr. Bell did not consider the impact of the Debtors' turnaround plan or MGF's revised payment terms on the company's performance. (Trial Tr. 148:17–21, 149:5–8, Aug. 18, 2016 (Bell)). Mr. Bell conceded that an audit is a subjective assessment subject to many variables. (Trial Tr. 151:21–152:1, 153:8–22, Aug. 18, 2016 (Bell)). He also conceded that, as of March 7, 2016, Natalie Kotlyar, Aéropostale's audit partner had reviewed "going concern assumptions and stated there is no significant change to analysis from the fourth quarter of 2014. Ms. Kotlyar added that BDO has not identified any corrected or uncorrected misstatements during its third quarter 2015 review." (DX 246 at 69; Trial Tr. 160:2-15, Aug. 18, 2016 (Bell)).

Fourth and finally, the Debtors offered expert James Doak to opine that the Term Lenders' potential credit bid has had a chilling effect on the Debtors' ongoing sale process in bankruptcy. (Doak Decl. ¶ 3, 10). He further stated that "to the extent that the actions of the Sycamore Parties precipitated the Debtors' [C]hapter 11 filing, the Sycamore Parties' actions resulted in substantial damages to the Debtors' stakeholders," particularly general unsecured creditors. (Doak Decl. ¶ 3). Specifically, Mr. Doak's testimony focused on the ongoing sale process. (Doak Decl. ¶¶ 5–10). Mr. Doak testified that potentially interested buyers are concerned that it may not be worth the time and resources to pursue the necessary due diligence involved in submitting a bid if the Term Lenders are permitted to credit bid the full amount of the Debtors' obligations under the Term Loan Agreement. (Doak Decl. ¶ 9; Trial Tr. Under Seal 2 29:6–30:1, Aug. 16, 2016 (Doak)). Some potential bidders have "indicated that they may withdraw from the [s]ale [p]rocess" if the Term Lenders are authorized to credit bid the full

obligations under the Term Loan Agreement. (Doak Decl. ¶ 10; Trial Tr. Under Seal 2 19:4–24, Aug. 16, 2016 (Doak)).

Four specific parties have indicated concern, each of whom has submitted a non-binding indication of interest. (Trial Tr. Under Seal 2 (7:02PM) 6:5–25, Aug.16, 2016 (Doak)). Roughly fifteen parties that stepped away from the sale process indicated that Sycamore's "participation in the process" was an element of their decision. (Trial Tr. Under Seal 2 20:3–9, Aug. 16, 2016 (Doak)). Yet, there remain interested parties at this time, (Trial Tr. Under Seal 2 24:3–21, Aug. 16, 2016 (Doak)), and Mr. Doak testified that he believes the sale could realize between $200 million to $300 million in proceeds. (Doak Decl. ¶ 8). The Debtors provided on a confidential basis the dollar amount of the highest indication of interest offered thus far. (Trial Tr. Under Seal 2 24:23–24, Aug. 16, 2016 (Doak)). On cross-examination, Mr. Doak testified that the Term Lenders have not interfered with the sale process. (Trial Tr. 204:2–205:6, Aug. 16, 2016 (Doak)).[10]

DISCUSSION

I. Equitable Subordination

A. The Legal Standard

Bankruptcy courts "have broad equitable powers and the ability to invoke equitable principles to achieve fairness and justice in the reorganization process." *LightSquared LP v. SP Special Opportunities LLC* (*In re LightSquared Inc.*), 511 B.R. 253, 346 (Bankr. S.D.N.Y. 2014); *see also Pepper v. Litton*, 308 U.S. 295, 308 (1939) ("[T]he bankruptcy court has the power to sift the circumstances surrounding any claim to see that injustice or unfairness is not

[10] The Background section includes those facts central to understanding the parties' dispute. But to avoid undue repetition, the Court does not recount all the communications between and among the parties. These communications are addressed in the Discussion section below as necessary.

done in administration of the bankrupt estate."); 11 U.S.C. § 105(a). The doctrine of equitable subordination, codified in Section 510(c) of the Bankruptcy Code, is one such example of a bankruptcy court's equitable powers. 11 U.S.C. § 510(c). Section 510(c) authorizes a bankruptcy court to, "under principles of equitable subordination, subordinate for purposes of distribution all or part of an allowed claim to all or part of another allowed claim or all or part of an allowed interest to all or part of another allowed interest . . . ." 11 U.S.C. § 510(c). The equitable subordination doctrine "empowers the bankruptcy court to consider whether 'notwithstanding the apparent legal validity of a particular claim, the conduct of the claimant in relation to other creditors is or was such that it would be unjust or unfair to permit the claimant to share *pro rata* with the other claimants of equal status.'" *Mishkin v. Siclari* (*In re Adler, Coleman Clearing Corp.),* 277 B.R. 520, 563 (Bankr. S.D.N.Y. 2002) (quoting *80 Nassau Assocs. v. Crossland Fed. Sav. Bank* (*In re 80 Nassau Assocs.*)*,* 169 B.R. 832, 837 (Bankr. S.D.N.Y. 1994)); *see also Enron Corp. v. Ave. Special Situations Fund II, LP* (*In re Enron Corp.*), 333 B.R. 205, 221–22 (Bankr. S.D.N.Y. 2005) (stating bankruptcy courts may equitably subordinate a claim in order to "promote a just and equitable distribution of the bankruptcy estate."). The doctrine is considered an "extraordinary remedy that is to be used sparingly." *In re Sabine Oil & Gas Corp.*, 547 B.R. 503, 564 (Bankr. S.D.N.Y. 2016) (quoting *Kalisch v. Maple Trade Fin. Co. (In re Kalisch)*, 413 B.R. 115, 133 (Bankr. S.D.N.Y. 2008)).

In determining whether to apply equitable subordination, bankruptcy courts have looked to the test articulated in *Benjamin v. Diamond* (*In re Mobile Steel Corp.*), 563 F.2d 692 (5th Cir. 1977). *See, e.g., In re LightSquared*, 511 B.R. at 347; *Official Comm. of Unsecured Creditors of Sunbeam Corp. v. Morgan Stanley & Co.* (*In re Sunbeam Corp.*), 284 B.R. 355, 363 (Bankr. S.D.N.Y. 2002). The three factors of the *Mobile Steel* test are: "(i) [t]he claimant must have

engaged in some type of inequitable conduct; (ii) [t]he misconduct must have resulted in injury to the creditors of the bankrupt or conferred an unfair advantage on the claimant; [and] (iii) [e]quitable subordination of the claim must not be inconsistent with the provisions of the Bankruptcy Act." *Mobile Steel*, 563 F.2d at 699–700 (citations omitted). In thinking about these factors, the *Mobile Steel* court counsels that three principles be borne in mind. *See id.* at 700. First, "inequitable conduct directed against the bankrupt or its creditors may be sufficient to warrant subordination of a claim irrespective of whether it was related to the acquisition or assertion of that claim." *Id.* Second, "a claim or claims should be subordinated only to the extent necessary to offset the harm which the bankrupt and its creditors suffered on account of the inequitable conduct." *Id.* at 701. Third, relating to the burden of proof, "an objection resting on equitable grounds cannot be merely formal, but rather must contain some substantial factual basis to support its allegation of impropriety." *Id.* The party seeking equitable subordination bears the burden of proof "because there is a presumption of the validity of the proof of claim." *In re Kelton Motors, Inc.*, 121 B.R. 166, 190 (Bankr. D. Vt. 1990); *see* Fed. R. Bankr. P. 3001(f).

As to the first factor, inequitable conduct "is not limited to fraud, but includes even lawful conduct that shocks one's good conscience[.]" *In re Adler, Coleman Clearing Corp.*, 277 B.R. at 563 (citing *80 Nassau Assocs.*, 169 B.R. at 837). Such conduct includes "a secret or open fraud, lack of faith or guardianship by a fiduciary; an unjust enrichment, not enrichment by bon chance, astuteness or business acumen, but enrichment through another's loss brought about by one's own unconscionable, unjust, unfair, close or double dealing or foul conduct." *80 Nassau Assocs.*, 169 B.R. at 837 (quoting *In re Tampa Chain Co.*, 53 B.R. 772, 779 (Bankr. S.D.N.Y. 1985)). The inequitable conduct "need not . . . be specifically related to the creditor's claim, either in its origin or its acquisition, but it may equally arise out of any unfair act on the part of

the creditor, which affects the bankruptcy results to other creditors . . . ." *Id.* at 838 (citation omitted).

It is well-settled that the doctrine of equitable subordination applies to "general creditors" or "'non-insiders,' though the circumstances warranting equitable subordination of a non-insider's claim arise less frequently . . . . " *In re LightSquared*, 511 B.R. at 348; *Official Comm. of Unsecured Creditors of Lois/USA, Inc. v. Conseco Fin. Servicing Corp.* (*In re Lois/USA, Inc.*), 264 B.R. 69, 134–35 (Bankr. S.D.N.Y. 2001) (noting equitable subordination was traditionally limited to three circumstances: "(1) fraud, illegality or breach of a fiduciary duty; (2) undercapitalization; (3) control of use of the debtor as an alter ego for the benefit of the claimant[.]"); *80 Nassau Assocs.*, 169 B.R. at 838. "Unless the non-insider has dominated or controlled the debtor to gain an unfair advantage, the type of inequitable conduct that justifies subordination of a non-insider's claim is 'breach of an existing, legally recognized duty arising under contract, tort or other area of law.'" *In re LightSquared*, 511 B.R. at 348 (quoting *80 Nassau Assocs.*, 169 B.R. at 840). "In commercial cases, the proponent must demonstrate a substantial breach of contract and advantage-taking by the creditor." *80 Nassau Assocs.*, 169 B.R. at 840. Absent a contractual breach, "the proponent must demonstrate fraud, misrepresentation, estoppel or similar conduct that justifies the intervention of equity." *Id.*; *see also In re LightSquared*, 511 B.R. at 348; *In re Kalisch*, 413 B.R. at 133 ("In cases of non-insider equitable subordination . . . the proponent of subordination has the burden of proving, among other things, that the claimant engaged in egregious, improper or wrongful conduct that damages creditors."). "[C]reditor misconduct in connection with the chapter 11 process itself . . . provides an appropriate predicate for equitable subordination of such creditor's claim." *In re LightSquared*, 511 B.R. at 349.

As to the second factor, the claimant's conduct must cause injury "to the debtor or its creditors, or result[] in an unfair advantage to the claimant." *Id.* (citing *Mobile Steel*, 563 F.2d at 700–01). While this prong is stated in the disjunctive, some courts have required that both injury *and* an unfair advantage to the claimant be shown. *See id.* at 347 n.152 (citing *Nisselson v. Softbank AM Corp.* (*In re MarketXT Holdings Corp.*), 361 B.R. 369, 388 (Bankr. S.D.N.Y. 2007); *see also In re Mr. R's Prepared Foods, Inc.* 251 B.R. 24, 29 (Bankr. D. Conn. 2000)). Requiring injury is appropriate considering the nature of equitable subordination, which is "a remedial measure designed to offset harm" and "is not penal in nature." *In re LightSquared Inc.*, 511 B.R. at 348. For a creditor to have received an unfair advantage, it must have received a benefit. *See id.* at 349. A claim should be subordinated "only to the extent necessary to offset the harm which the bankruptcy and its creditors suffered on account of the inequitable conduct." *In re Sunbeam Corp.*, 284 B.R. at 364.

As to the third and final prong of the *Mobile Steel* test, it requires that equitable subordination of the claim be consistent with the Bankruptcy Code. *See Mobile Steel*, 563 F.2d at 700. Courts have noted that the codification of the doctrine in Section 510(c) limits the attention due this third factor. *See In re LightSquared*, 511 B.R. at 352; *80 Nassau Assocs.*, 169 B.R. at 841. This factor acknowledges that a bankruptcy court's equitable powers are "not boundless" and cannot be used "to disregard unambiguous statutory language of the Bankruptcy Code." *In re Enron*, 333 B.R. at 218–19. Applying "the *Mobile Steel* test ensures that the full breath of the remedy of equitable subordination is available while ensuring that its reach does not violate any provision of the Bankruptcy Code or become punitive as opposed to remedial." *Id.* at 219.

B. The Debtors' Claims

The Debtors make three allegations of inequitable conduct. First, they allege that MGF breached the Sourcing Agreement because MGF's new terms violated an objective reasonableness standard in the Sourcing Agreement and because MGF "retroactively" imposed new payment terms for orders already made but not yet delivered. Second, they claim that the Sycamore Parties' overall conduct was part of a secret and improper plan to buy Aéropostale at a discount. Third, the Debtors allege that the Sycamore Parties improperly traded stock while in possession of Aéropostale's material non-public information. But the record here does not establish a claim for equitable subordination based on these three theories.

1. Allegations of a Breach of the Sourcing Agreement

The Court turns first to allegations relating to the Sourcing Agreement. It is important to note from the outset that the Debtors do not dispute that they fell below the $150 million liquidity trigger when MGF declared a Credit Review Period. (Trial Tr. 24:21-25:6, Aug. 16, 2016 (Geiger); Trial Tr. 63:15-25, 66:20-67:14, Aug. 17, 2016 (Dick); CEX 318 (Debtors' compliance certificate of February 27, 2016 reflecting liquidity of $129.3 million)).[11] This is true notwithstanding Aéropostale's vehement protests to the contrary at the time. (CEX 489; CEX 491). The Debtors appear to have taken that position at the end of February 2016 because they repeatedly overstated their liquidity for purposes of the Sourcing Agreement by $34 to $40

[11] There is some confusion about the Sycamore Parties' process in reaching the conclusion that the $150 million liquidity floor had been breached, particularly in light of the misdated and incomplete minutes of the February 24, 2016, MGF Holdings' board meeting where this issue was purportedly addressed. (DX 231; Trial Tr. 177:13-178:13, 182:5–14, Aug. 17, 2016 (Kaluzny); Trial Tr. Under Seal 2 8:8-9:13, Aug. 18, 2016 (Morrow); Trial Tr. 110:3-112:15, 114:12-115:18, Aug. 16, 2015 (Schwartz)). But there is no such confusion over MGF's process for determining that the Credit Review Period was triggered, (Schwartz Decl. ¶ 63; Trial Tr. 112:16-25, Aug. 16, 2016 (Schwartz)), which is more important given that it was MGF's right to declare a Credit Review period under the Sourcing Agreement.

million. (Trial Tr. 93:17-94:25, 143:11-144:23, Aug. 17, 2016 (Dick)). This miscalculation was the result of incorrectly including assets, most notably the FILO Facility, that should not have been counted as part of liquidity under the Sourcing Agreement and the Prepetition Term Loan Agreement. (Trial Tr. 64:7-66:6, 68:10-69:3, 73:3-76:12, 93:12-20, 96:4-12, Aug. 17, 2016 (Dick)). Almost as surprising, the Debtors' management was not even aware of the liquidity trigger in the Sourcing Agreement until it was flagged by Sycamore-designated board member Kent Kleeberger in 2016. (Trial Tr. 58:22-59:8, 69:16-70:6, Aug. 17, 2016 (Dick); Dick Decl. ¶ 23) (Mr. Dick testifying that he was not aware of the $150 million liquidity threshold until informed by Kent Kleeberger in January 2016); (Trial Tr. 63:5-64:3, Aug. 16, 2016 (Geiger) (Mr. Geiger testifying that he was not aware of the $150 million liquidity threshold until February 24, 2016)). These two deficiencies undermine the credibility of the Debtors' management.

Given the undisputed fact that a Credit Review Period was properly invoked by MGF, the question becomes the scope of MGF's rights under the Sourcing Agreement to change payment terms during a Credit Review Period. Under New York law,[12] "when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms. Evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing." *W.W.W. Assocs. v. Giancontieri*, 77 N.Y.2d 157, 162 (1990). "Whether or not a writing is ambiguous is a question of law to be resolved by the courts. . . . It is well settled that extrinsic and parol evidence is not

[12] The Sourcing Agreement provides that it "shall be governed by and construed in accordance with the laws of the State of New York . . . ." (DX 006 at 24).

admissible to create an ambiguity in a written agreement which is complete and clear and unambiguous upon its face." *Id*. at 162-63 (citations and quotations omitted).

"A contract should be read as a whole to ensure that undue emphasis is not placed upon particular words and phrases. . . . Courts 'may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing.'" *Consedine v. Portville Cent. Sch. Dist.*, 12 N.Y.3d 286, 293 (2009) (citations omitted). "[S]pecific clauses of a contract are to be read consistently with the over-all manifest purpose of the parties' agreement. Contracts are also to be interpreted to avoid inconsistencies and to give meaning to all of its terms." *Barrow v. Lawrence United Corp.*, 538 N.Y.S.2d 363, 365 (3d Dep't App. Div. 1989) (citations omitted).

The Debtors first argue that the terms imposed by MGF were unreasonable and therefore a breach of the Sourcing Agreement. Section 4(b)(ii) of the Sourcing Agreement provided that:

> Unless another payment schedule is expressly contained in an Order created under this Agreement, Vendor's standard payment terms will apply (i.e., U.S. Dollars, immediately available funds, net 30 days, or, during a Credit Review Period such other shorter number of days or up-front terms *as deemed prudent by Vendor in the exercise of it [sic] reasonable credit judgment*).

(DX 006 at 11) (emphasis added). The Debtors contend that this language limited MGF to imposing only payment terms during a Credit Review Period that were *prudent* and an exercise of *reasonable credit judgment*, but that the terms in both the February 24 Letter and the February 29 Letter were neither.

The Court agrees that MGF was limited in its ability to apply payment terms under Section 4(b)(ii) of the Sourcing Agreement. The Debtors, however, attempt to impose an objective reasonableness standard on MGF that is not present in the language of the Sourcing Agreement. For instance, the Debtors state that "MGF may require different payment terms, but

only if such terms are *objectively* 'prudent' in the exercise of 'reasonable credit judgment.'" (Motion ¶ 4) [ECF No. 496] (emphasis added). But that is not what the Sourcing Agreement says. Instead, it explicitly allows MGF to impose "such other shorter number of days or *upfront terms* as deemed prudent *by Vendor* in the exercise of *it[s]* reasonable credit judgment." (DX 006 at 11) (emphasis added). Thus, the Term Lenders correctly note that "MGF had the right to apply *its* reasonable credit judgment in light of *its* determination of what was prudent for *it*." (Term Lenders' Trial Brief ¶ 61). Furthermore, the Sourcing Agreement explicitly contemplates the application of "up-front terms" during a Credit Review Period. (DX 006 at 11).

The Debtors next argue that MGF breached the Sourcing Agreement by retroactively applying new payment terms to purchase orders that had already been placed before the start of the Credit Review Period. The Debtors rely on the "Aéropostale Purchase Order Terms and Conditions" attached to the Sourcing Agreement. (DX 006 at 35-39).[13] It provides that "[t]he prices herein shall not be increased and the quantities and shipment dates shall not be changed without Aéropostale's written consent." (DX 006 at 35). It further states that "[a]ny terms or conditions set forth on Vendor's invoices, billing statements, acknowledgment forms, or any other documents which are inconsistent with this order shall be of no force or effect without Aéropostale's written consent." (DX 006 at 35). Based on these provisions, the Debtors contend that the net 30 day payment terms applicable to already placed purchase orders were frozen at the time the orders were placed and that MGF did not have the right to change the payment terms on these orders without first obtaining Aéropostale's written approval.

[13] The Sourcing Agreement provides that "[t]he terms of any . . . Order are governed by Aéropostale's Purchase Order Terms and Conditions set forth in Exhibit B annexed hereto, as may be amended in writing from time to time by the mutual agreement of Aéropostale and the Vendor." (DX 006 at 9).

But the Debtors' interpretation is at odds with the language of Section 4(b)(ii). That section identifies the "standard payment terms" applicable to all orders.[14] More specifically, Section 4(b)(ii) provides that the "standard payment terms" of MGF "will apply" to "an Order created under this Agreement." (DX 006 at 11). It goes on to define standard payment terms as "U.S. Dollars, immediately available funds, net 30 days, or, during a Credit Review Period such other shorter number of days or up-front terms as deemed prudent by Vendor in the exercise of it [sic] reasonable credit judgment." (DX 006 at 11). Thus, Section 4(b)(ii) specifically contemplates payment terms "during a Credit Review Period" to include a "shorter number of days or up-front terms."[15] Thus, there is a specific grant of rights to MGF in Section 4(b)(ii) during a Credit Preview Period, notwithstanding the general terms and conditions found elsewhere in Exhibit B. It is a basic principal of contract interpretation that specific terms in a contract will override the general. *See Bowmer v. Bowmer*, 50 N.Y.2d 288, 294 (1980); *John Hancock Mut. Life Ins. Co. v. Carolina Power & Light Co.*, 717 F.2d 664, 669 n.8 (2d Cir. 1983) ("New York law recognizes that definitive, particularized contract language takes precedence over expressions of intent that are general, summary, or preliminary."); Restatement (Second) of Contracts § 203 (1981) ("In the interpretation of a promise or agreement or a term thereof, . . . specific terms and exact terms are given greater weight than general language."). When general and specific provisions of a contract are inconsistent, "the specific provision controls." *Muzak Corp. v. Hotel Taft Corp.*, 1 N.Y.2d 42, 46 (1956); *Israel v. Chabra*, 12 N.Y.3d 158, 168 n.3 (2009) (stating that if contractual provisions are irreconcilable, "the more specific clause controls

[14] The only qualification in the language of Section 4(b)(ii) is if "another payment schedule is expressly contained" in an order, but the Debtors do not argue that there is another payment schedule contained in the purchase orders at issue. (DX 006 at 11).

[15] The Debtors understood that "up-front terms" meant "CIA or COD"—that is, cash in advance or cash on delivery. (CEX 509, Miller Dep. Tr. 83:20-84:8).

the more general.") (quoting 11 Samuel Williston & Richard A. Lord, A Treatise on the Law of Contracts § 32:15 (4th ed. 1999 & Supp. 2010)).[16]

Nothing in Section 4(b)(ii) limits the language "an Order created under this Agreement" to certain orders. Both orders made prior to and subsequent to a Credit Review Period are "Orders created under" the Sourcing Agreement and both also exist "during" the Credit Review Period. Once made, therefore, an order remains open until delivery and thus is subject to any changes permitted by the contract. (Term Lenders' Trial Brief ¶ 67; *c.f.* CEX 509, Miller Dep. Tr. 86:4-13 (agreeing there is no language in the provision saying that a vendor is restricted in its ability to shorten the number of days or demand up front payment terms only for future orders)). Therefore, the Court rejects the Debtors' position that MGF could not impose new terms during the Credit Review Period for existing orders. This conclusion is consistent with other terms in the Sourcing Agreement, which indicate that an "Order" is a process that starts with a purchase authorization and ends with delivery of the product and payment. For instance, Section 4(a) states that Aéropostale can "cancel an Order at any time, without cause, prior to receipt of the Products" so long as Aéropostale reimburses MGF's costs. (DX 006 at 9-10).[17]

But even if the purchase order provisions were interpreted as conflicting with MGF's rights under the Sourcing Agreement to shorten terms during a Credit Review Period, the

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[16] The Debtors rely on the headings "Pricing" and "Orders" to support their interpretation of the Sourcing Agreement. (*See* Debtors' Proposed Findings ¶ 46). But Section 25 of the Sourcing Agreement provides that "[a]ll section headings contained in this Agreement are for convenience of reference only, do not form a part of this Agreement and will not affect in any way the meaning or interpretation of this Agreement." (DX 006 at 28).

[17] Similarly the price of product ordered under the Sourcing Agreement depended on the actual cost charged by third-party manufacturers, as well as "costs associated with importing the relevant Products into the United States, Canada, or other locations." (DX 006 at 10). Both amounts could not be determined until after the order had been procured and delivered.

payment terms in Section 4(b)(ii) of the Sourcing Agreement would control. That is made clear in Section 4(a) of the Sourcing Agreement, which provides that "in the event of any conflict between the PO [terms and conditions], the applicable purchase order or purchase authorization and this Agreement, the terms of this agreement shall govern, unless otherwise agreed between the parties in writing." (DX 006 at 9).

This conclusion is also supported in both the commercial and statutory context. The Debtors' interpretation would eviscerate the protections afforded to MGF through the liquidity threshold of Section 4(b)(ii). It would permit the Debtors, foreseeing a liquidity crisis, to frontload millions of dollars in orders prior to the beginning of a Credit Review Period, thereby eliminating MGF's ability to protect itself from that exposure. Indeed, Li & Fung took exactly the same type of retroactive action by shortening payment terms to net 20 days and net 7 days on pre-existing orders and refusing to ship pre-existing orders until payment was made. (CEX 322; CEX 509, Miller Dep. Tr. 224:12-227:21; CEX 478; Trial Tr. 52:6-53:15, Aug. 17, 2016 (Dick)). Moreover, similar protections are afforded under the law, even absent contractual language providing for them. Courts have acknowledged demands for adequate assurance under Section 2-609[18] of the Uniform Commercial Code in the form of cash-in-advance or letters of credit as reasonable in spite of pending purchase orders. *See, e.g., In re JW Aluminum Co.*, 200 B.R. 64, 67 (Bankr. M.D. Fla. 1996) (finding that "[t]his Court is satisfied and there is no question under

[18] Section 2-609(1) of the Uniform Commercial Code provides, in part:

> A contract for sale imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired. When reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return.

U.C.C. § 2-609(1).

the circumstances presented that [supplier] was entitled to demand adequate assurance of payment" under Section 2-609, where the vendor had requested adequate assurance in the form of "posting a letter of credit, making cash payments in advance, or shipping on a COD basis" with respect to certain previously placed purchase orders).

Moreover, the Court rejects the Debtors' claim that MGF acted unreasonably in imposing all these new terms. It was undisputed that, for its business, MGF depended upon a $235 million revolver and a $220 million term loan, which had its own financial covenants, including leverage and coverage ratios. (Schwartz Decl. ¶ 24). It was also undisputed that MGF had substantial exposure to Debtors as an unsecured creditor based on its accounts receivable, and orders in process where MGF incurred costs for production and transport. (Schwartz Decl. ¶¶ 25, 58, 69.) Based on its exposure, MGF concluded that an Aéropostale default could cause a default on MGF's *own* debt instruments. (Schwartz Decl. ¶¶ 56, 57, 67). The CEO of MGF, who has been at the company for some 33 years, credibly testified that imposing cash in advance terms was critical for MGF to ensure its own survival. (Schwartz Decl ¶¶ 39, 67, 70). This conclusion was echoed by the Term Lenders' expert, Ms. Etlin. Moreover, MGF had acted on such concerns before with other customers; it had stopped doing business with other customers in the past when their financial condition became bad enough to pose a threat to MGF. (Trial Tr. 159:4-160:1, Aug. 16, 2016 (Schwartz)). And while MGF's poor credit score for Aéropostale was similar to some other MGF customers, MGF reasonably considered other information in assessing each customer's situation, such as that customer's future prospects and its ability to generate positive earnings. (Schwartz Decl. ¶¶ 28-29, Trial Tr. Under Seal 1 28:3-10, 33:22-34:14, Aug. 16, 2016 (Schwartz)).

The reasonableness of MGF's actions is also confirmed by events involving the Debtors' largest supplier, Li & Fung. Like MGF, Li & Fung was concerned about the Debtors' economic performance and wanted to limit its exposure. Starting in November 2015, it repeatedly expressed concern about the Debtors situation. (CEX 188; Trial Tr. 48:1–23, Aug. 16, 2016 (Geiger)). Li & Fung also took aggressive and unilateral action to protect itself. For example, Li & Fung withheld a $9.3 million rebate payment due in February 2016 and, in fact, never made that payment. (Trial Tr. 38:11-40:10, 41:22-23, Aug. 17, 2016 (Dick)). It also held shipments and required payment before taking new orders. (Trial Tr. 41:19-21, 43:8-44:14, 52:5-8, Aug. 17, 2016 (Dick))). Li & Fung took these significant unilateral actions even though none of these actions were expressly permitted by its agreement with the Debtors.[19]

Rather than cry foul as the Debtors did with MGF—which had acted pursuant to rights it bargained for under the Sourcing Agreement—the Debtor twice choose to amend its agreement with Li & Fung to provide more advantageous terms. The first amendment in December 2015 granted key rights to Li & Fung if Debtors filed for bankruptcy, such as a sell-off right, and an agreement for critical vendor status in any bankruptcy. The second amendment in April 2016 shortened payment terms on certain existing orders down to 20 days or 7 days. (CEX 322; Trial Tr. 55:1-7, Aug. 17, 2016 (Dick); CEX 509, Miller Dep. Tr. 206:5-10, 223:19-227:21; Trial Tr. 59:8-62:5, Aug. 16, 2016 (Geiger)). But there is also no evidence that the Debtors offered any of these same concessions to MGF.

[19] The L&F Agreement did not contain a liquidity threshold permitting it to adjust payment terms. (DX 055; Trial Tr. 47:6-47:14, 56:6-57:3, Aug. 16, 2016 (Geiger); Trial Tr. 24:20-23, 42:2-4, Aug. 17, 2016 (Dick); CEX 509, Miller Dep. Tr. 232:12-20). It also contained no basis for allowing Li & Fung to suspend shipping other than late payment by the Debtors, something that no one has alleged occurred. (Trial Tr. 25:17-20, Aug. 17, 2016 (Dick)).

The Debtors point to MGF's failure to consult with them about imposing the new terms as evidence of bad faith. But Li & Fung did not give notice when it declined to make the $9.3 million rebate payment. (Dick Decl. ¶ 65; Trial Tr. 38:11-39:4, Aug. 17, 2016 (Dick)). By contrast, MGF sent its two letters imposing the new terms. (DX 024; DX 025). No discussion among the principals at MGF and Aéropostale ever happened, as the Debtors instead had their lawyers provide a written response to MGF's letters. (*See* Trial Tr. 158:19-159:3, Aug. 16, 2016 (Schwartz) (Miller telling Schwartz that Debtors had not breached the liquidity threshold so there was nothing really to talk about); *see also* Morrow Decl. ¶ 44; CEX 314). In one of those written responses, the Debtors' lawyers went so far as to insist upon an immediate retraction of MGF's letter and resumption of shipments as a condition to any meeting among the parties. (DX 238).[20] This again stands in marked contrast to the Debtors' more cooperative approach with Li & Fung. As Debtors' expert Robert Duffy candidly stated, "the company had two vendors, which made up 70, 75 percent of its purchases and had to come to an agreement with one of those two. And it picked Li & Fung or Li and Fung picked it." (Trial Tr. 77:18-21, Aug. 18, 2016 (Duffy)).

Notably, the Debtors' problems with suppliers extended beyond even MGF and Li & Fung. In 2015, the Debtors ended their relationship with what was then their second largest supplier MMG. (DX 042). While details in the record are sketchy about exactly how the relationship ended, it is undisputed that it ended because MMG wanted additional collateral and the Debtors were unable or unwilling to provide such additional protection. (DX 042 at 37; Trial Tr. 40:10-13, Aug 16, 2016 (Geiger)).

[20] Indeed, the Debtors had already hired lawyers in anticipation of possible litigation with the Sycamore Parties or individuals as to various claims, including the breach of the Sourcing Agreement. (Trial Tr. 7:16-8:9, Aug. 18, 2016 (proffer of evidence)).

Given their difficulties with the two suppliers who provided almost three quarters of Debtors goods, the Court rejects the Debtors' characterization of their supplier relationships as smooth sailing partnerships. (*See* Trial Tr. 52:3-6, Aug. 16, 2016 (Geiger) ("The collaborative discussions we've had with our vendors for many years is well documented. And we've always tried to be very good partners with our vendors. . . ."); *but see* Trial Tr. 78:1-23, Aug. 17, 2016 (Dick) (conceding that he wanted to send Sycamore only what was owed to them under the agreement)). It may well be that Aéropostale's relations with vendors were much smoother during Mr. Geiger's first as Chief Executive Officer the company from August 1998 to February 2010. But this was clearly not the case upon his return when the Debtors were in financial distress and were struggling to satisfy the vendors' concerns given the Debtors' poor economic performance.[21]

Each side called experts to address the reasonableness of the new terms imposed by MGF. Nothing in that testimony changes the result here. The Term Lenders' expert conceded that she had not previously seen a credit review period clause like the one in the Sourcing Agreement. (Trial Tr. 132:10–20, Aug. 18, 2016 (Etlin)). And for the reasons stated above, that clause grants MGF significant rights. Given that clause and the other facts here, Ms. Etlin credibly concluded that MGF's decision to demand cash in advance on all orders was a reasonable credit judgment particularly given Aéropostale's financial condition, MGF's exposure to credit risk from that condition, and the lack of communication from Aéropostale, which led to

[21] The Debtors complain that MGF's prices were too high under the Sourcing Agreement. (Trial Tr. 37:12-38:9, 40:18-41:8, Aug. 16, 2016 (Geiger)). But at one point, the Debtors nonetheless considered using MGF to replace business that would otherwise be done by Li & Fung. (CEX 240; Trial Tr. 37:25-38:10, Aug. 17, 2016 (Dick); CEX 509, Miller Dep. Tr. 198:25-199:25, 201:2-15). For its part, MGF claims that Aéropostale wanted extremely low prices—lower, on average, than any of MGF's other customers—and that its relationship with the Debtor was not profitable because the poor margins and volume. (Schwartz Decl. ¶¶ 47-49). In any event, the issue of price is not relevant to the dispute before the Court as no party has contended that the prices charged were in violation of the Sourcing Agreement.

a deterioration of the customer relationship. (Etlin Decl. ¶¶ 12–13, 53). On the retroactivity point, she also credibly testified that "in managing credit risk, vendors do not make a significant distinction between in process orders, delivered orders and future orders." (Etlin Decl. ¶ 63). On the other hand, the Debtors' expert opined that MGF imposed the most onerous terms available, deeming it impermissible unilateral action. (Keiser Decl. ¶¶ 58, 63). But Ms. Keiser's conclusion was problematic because she could not satisfactorily explain why that same label did not also apply to Li & Fung's actions, including most notably its withholding of the $9.3 million rebate payment. (Trial Tr. 194:10-17, Aug. 16, 2016 (Keiser) (characterizing Li & Fung action as mere "industry sparring")).[22] She seemed to accord no weight to the fact that Li & Fung had no contractual provision permitting such unilateral actions, in contrast to MGF. While withholding a $9.3 million payment is not the same as refusing to ship goods without upfront payment, both actions had the same effect of significantly and adversely impacting the Debtors' liquidity and ability to operate. In the end, Ms. Keiser conceded that she "can't answer and . . . won't answer whether MGF exercised prudent reasonable credit judgment in taking the steps that it did in February of 2016." (Trial Tr. 182:7-13, Aug. 16, 2016 (Keiser)).

The Debtors' expert, Robert Duffy, also does not alter the Court's conclusion. He opined that, if MGF had not imposed the new payment terms, the "Debtors likely would have avoided—or at the very least, significantly delayed" tripping the $70 million liquidity covenant "and any attendant commencement of chapter 11 cases." (Duffy Decl. ¶ 16). But, Mr. Duffy's analysis is based on a series of assumptions, many of which are problematic. For example, he assumed that MGF's standard payment terms would not be adjusted until the week ending August 20, 2016, an

[22] Her opinion about Li & Fung was carefully qualified: she conceded that "[w]ithout knowing the story and without [knowing the judgment], Li & Fung's decision is more consistent with what a vendor or an agent would do when they have concerns." (Trial Tr. 186:23-25, Aug. 16, 2016 (Keiser)).

assumption that cannot be reconciled with the undisputed fact that the liquidity threshold of $150 million was hit in February. (Trial Tr. 55:5–56:6, Aug. 18, 2016 (Duffy)). Mr. Duffy's analysis is similarly dependent on the Prepetition Term Loan Agreement and Prepetition ABL Agreement remaining in place and does not take into account any potential default of those agreements, again a problematic conclusion given all the evidence about liquidity and other financial problems. (Duffy Decl. ¶ 17; Trial Tr. 56:23–57:15, Aug. 18, 2016 (Duffy)). Indeed, Mr. Duffy's testimony is based on not less than nine assumptions that are embedded in the Liquidity Projection, as well as the assumed vendor payment terms. (*See* Duffy Decl. ¶¶ 17, 18).

When some of those assumptions are removed, it is evident that Aéropostale would have tripped the $70 million liquidity trigger at several points in June and July 2016, and in one instance as early as May. (*See, e.g.*, Trial Tr. 79:13–24, 81:18–22, 86:1–87:5, 94:20-23, 95:4-24, Aug. 18, 2016 (Duffy); CEX 507). For example, on cross-examination, the Term Lenders manipulated the model relied on by Mr. Duffy in conducting his Liquidity Projection to, among other things, remove the $9.3 million payment by Li & Fung and apply 20-day terms to MGF orders for the entirety of the projection. (*See* Trial Tr. 79:14–18, 86:1–87:5, 94:3–15, Aug. 18, 2016 (Duffy)). With these adjustments, Aéropostale was expected to drop below the $70 million liquidity covenant at various points. (Trial Tr. 79:19–80:10, 86:1–87:5, 94:11–95:3, Aug. 18, 2016 (Duffy)). Even without removing the assumptions, the Liquidity Projection shows the Debtors dropping below $70 million in liquidity in July 2016. (Duffy Decl. ¶ 20).

The Debtors' position on the likelihood of filing bankruptcy is further undermined by contemporaneous events. The Debtors themselves were considering the possibility of filing for bankruptcy before MGF altered its payment terms. In January 2016, the Debtors planned to have a board presentation about bankruptcy in March 2016. (DEX 242; Trial Tr. 35:5–12, Aug. 16,

2016 (Geiger); Trial Tr. 102:23–103:7, Aug. 17, 2016 (Dick)). But that discussion was moved up to a telephonic board of directors' call on February 11, 2016, where the board discussed starting a process to market the company and the board meeting included the participation of bankruptcy counsel. (CEX 256; Trial Tr. 35:19–36:8, Aug 16, 2016 (Geiger)). Also in January 2016, the Debtor hired Stifel to explore "strategic alternatives." (Trial Tr. 199:10–12, Aug. 16, 2016 (Doak)). Taken together, all the evidence severely undermines the Debtors' contention that everything clearly would have been fine but for MGF.[23]

The Debtors rely on the testimony of James Doak, that "to the extent that the actions of the Sycamore Parties precipitated the Debtors' Chapter 11 filing, the Sycamore Parties' actions resulted in substantial damages to the Debtors' stakeholders," particularly, "the Debtors' general unsecured creditors." (Doak Decl. ¶ 3(ii)). However, the Court finds Mr. Doak's testimony to be conclusory. For instance, while he states that absent a bankruptcy the Debtors would have "continued to honor their obligations to general unsecured creditors," no evidence on this subject is provided. (Doak Decl. ¶¶ 12, 13). And the mere filing of a bankruptcy is insufficient to allege injury in the context of an equitable subordination analysis. *See 80 Nassau Assocs.*, 169 B.R. at 843 ("The filing of a bankruptcy petition, without more, is a legally insufficient allegation of injury to satisfy the requirements of equitable subordination."); *see also Kham & Nate's Shoes No. 2, Inc. v. First Bank of Whiting*, 908 F.2d 1351, 1358 (7th Cir. 1990) (allegation that creditor forced debtor into bankruptcy is not sufficient by itself for equitable subordination because "filing for bankruptcy often helps rather than injures the firm"); *see also In re Kalisch*, 413 B.R.

[23] On the same issue, the Court finds credible the testimony of the Term Lenders' expert, Mr. Bell, who opined that as of February 24, 2016, Aéropostale's 2015 audit would have indicated substantial doubt that the company could continue as a going concern for the period from January 31, 2016, to January 28, 2017. (Bell Decl. ¶ 15). This further supports that Aéropostale was suffering from a pattern of declining performance—with the attendant consequences—regardless of the new payment terms imposed on February 24, 2016. (*See* Bell Decl. ¶ 28).

at 133 ("In all cases concerning equitable subordination actual harm to creditors is a necessary component to application of the doctrine.").

2. Allegations about Sycamore's "Secret Plan"

The Debtors fare no better on their allegation about a conspiracy to push them into bankruptcy and thus buy Aéropostale on the cheap. In support of this theory, the Debtors point first to an alleged conversation between Mr. Geiger and Mr. Kaluzny in the fall of 2013 where Mr. Kaluzny stated that he expected to make an additional investment in Aéropostale and that he would like Geiger to sit on the board and "do nothing" as a Sycamore appointed board member. (Geiger Decl. ¶ 10). The Debtors also cite to the Sycamore Parties' multiple roles as stockholder, lender with board designations, and majority-owner of supplier MGF. Finally, the Debtors cite to various communications—primarily emails—where the Sycamore Parties track the Aéropostale situation, provide direction to MGF on the situation, and express a willingness to own the Company.

But simply put, the Debtors' allegation of a secret plan hatched in the fall of 2013 is not credible. No one can dispute that the Sycamore Parties actively tracked and managed their interest in Aeorpostale. The Sycamore Parties had invested $54 million in equity in the Company and loaned another $150 million. It also had a majority ownership stake in an entity with significant monetary exposure to Aéropostale through the Sourcing Agreement. Given this large economic stake and Aéropostale's continuing and significant losses in 2013, 2014, and 2015, one can easily understand why the Sycamore Parties were closely watching Aéropostale's situation. But in the fall of 2013, the future of Aéropostale had yet to be written and Mr. Kaluzny had just bet $54 million on the upside by purchasing Aéropostale's stock. This was months before Aéropostale sought financing from the Sycamore Parties, who were merely 8%

equity holders in the fall of 2013 and had no other role. Even at the time MGF entered the Sourcing Agreement in 2014, the Sycamore Parties only had two of the five MGF Board members. (Schwartz Decl. ¶ 6). Thus, the evidence does not support a plot to subvert the company in the fall of 2013.

Subsequent events further undermine the Debtors' theory. In addition to the 8% of Aéropostale common stock that Lemur bought on the open market, in connection with the Prepetition Term Loan transaction Aéropostale also issued 1,000 shares of Series B Preferred Stock to affiliates of Sycamore Partners at an aggregate offer price of $100,000. (Dick First Day Affidavit ¶ 49). The common stock underlying the Series B Preferred Stock represented another 5% of the Aeropostale's issued and outstanding common stock as of May 23, 2014. (Dick First Day Affidavit ¶ 49).[24] These equity interests were more valuable if the Company survived. Furthermore, a plan to destroy the value of Aéropostale would place in jeopardy the Sycamore Parties' eventual investment in MGF, a long-established company in the business of supplying product to retailers like Aéropostale. The credible evidence shows that MGF and Aéropostale tried to make the parties' Sourcing Agreement work successfully from its start in 2014 until Aéropostale's liquidity issues forced MGF to act in February 2016. And why wouldn't MGF try to make it work? The Sourcing Agreement was a long term proposition involving more than one quarter of a billion dollars. MGF had front loaded most of its investment by establishing new relationships with factories in Asia that were better suited to Aéropostale's needs than MGF's existing relationships. (Schwartz Decl. ¶ 41). MGF needed the Sourcing Agreement to succeed long-term in order to recoup MGF's upfront investment. The evidence demonstrates that the

[24] Each share of Series B Preferred Stock was convertible to shares of common stock at in initial conversion rate of 3,932.018 for each share of Series B Preferred Stock. (Dick First Day Affidavit ¶ 49).

relationship was progressing until the liquidity trigger was hit in February 2016. (*See* CEX 509, Miller Dep. Tr. 233:16–236:5). Further undermining the Debtors' theory is the lack of credible evidence that the Sycamore Parties caused MGF to take any improper action in connection with the Sourcing Agreement or the invocation of a Credit Review Period. Indeed, it would be exceedingly odd for the Sycamore Parties' board member, Kent Kleeberger to tell Aéropostale management about the $150 million liquidity threshold if the Sycamore Parties had a secret plan to destroy Aéropostale. (Trial Tr. 70:17-23, Aug. 17, 2016 (Dick)).[25]

The Sycamore Parties' multiple roles in their relationship with Aéropostale is also an insufficient basis for relief in this case. Sycamore Partners started out as an equity holder, via Lemur, and subsequently expanded its role. But its role as lender and MGF's role as supplier were not forced upon the Debtors. They were agreements negotiated at arms-length with the Debtors, who concluded that they were the best available options. These agreements provided each of the parties with a variety of rights and the Sycamore Parties' rights included the ability to appoint Aéropostale board members. The Debtors cannot rely on the existence of these rights—agreed to by the Debtors in exchange for consideration, including a $150 million loan—as a basis for relief here.

The Debtors point to a variety of communications, mostly emails, to argue that the Sycamore Parties used their various hats to further the secret plan. But these documents do not establish inequitable conduct. For example, the Debtors cite to emails where someone at the Sycamore Parties mentions the possibility of an Aéropostale bankruptcy. (DX 097). But these emails related to the possibility of Sycamore refinancing its loan to Aéropostale. (Trial Tr. 200:4–8, Aug. 18, 2016 (Morrow)). Sycamore had discussions with at least two other parties on

[25] On cross-examination, the Debtors failed to directly question Mr. Kaluzny about the secret plan.

that issue. In those discussions, Sycamore considered how its position would be effected by a bankruptcy. As Mr. Morrow, a Sycamore Partners' principal credibly explained that Sycamore would normally consider the possibility of a bankruptcy when considering whether to add debt in front of it in a capital structure. (*See* Trial Tr. 201:13–23, Aug. 18, 2016 (Morrow)). One of these same emails also reflect the Sycamore Parties' view that they "would happily own the company through [its] loan." (DX 96). Discussions about the possibility of bankruptcy and related contingency planning are not surprising given Aéropostale's distressed financial condition. Nothing about such discussions was impermissible. *See cf. In re Lehman Bros. Holdings Inc.,* 541 B.R. 551, 583 (S.D.N.Y. 2015) ("'[T]here is generally no objection to a creditor's using his bargaining position, including his ability to refuse to make further loans needed by the debtor, to improve the status of his existing claims.'") (quoting *In re W.T. Grant Co.,* 699 F.2d 599, 610 (2d Cir. 1983)). Rather, the question is whether a party planning to exercise its rights as a creditor takes actions that step over the line into impermissible conduct to further its interest in a way that damages a debtor or the bankruptcy estate. The Court does not find such conduct here. Instead, the totality of the credible evidence at trial demonstrates that the Sycamore Parties did not take actions beyond what was proper to protect their interests. *See In re Lehman Bros.,* 541 B.R. at 583 (a creditor can even "us[e] his bargaining position . . . to improve the status of his existing claims" without triggering a claim for equitable subordination) (citation omitted).

Given these facts, an equitable subordination claim cannot succeed, particularly given that the Sycamore Parties were not an insider. In such circumstances, the bar for equitable subordination is exceedingly high:

> When a non-insider or non-fiduciary is involved, courts have required that a claimant's conduct be egregious and severely unfair

> to other creditors before its claim will be equitably subordinated. . . The conduct required has been described as "substantial misconduct tantamount to fraud, misrepresentation, overreaching or spoilation." . . . Few cases find that non-insider, non-fiduciary claimants meet this standard.

In re Sunbeam Corp., 284 B.R. at 364 (quoting *80 Nassau Assocs.,* 169 B.R. at 838); *see also In re Dreier LLP,* 453 B.R. 499, 517 (Bankr. S.D.N.Y. 2011) ("Although equitable subordination can apply to an ordinary creditor, the circumstances are few and far between.") (quotation omitted); *In re Lehman Bros.,* 541 B.R. at 583.[26]

3. Allegations as to the Improper Trading of Stock

The Debtors also seek equitable subordination based on allegations that Mr. Kaluzny and the Sycamore Parties traded Aéropostale stock while in possession of material non-public information. (Debtors' Trial Brief ¶¶ 4, 91, 133). The Debtors note that Mr. Kaluzny and the Sycamore Parties owed a duty of confidentiality to the Debtors because the Prepetition Term Loan Agreement contained a confidentiality provision requiring the Term Lenders to keep confidential certain information they received from Aéropostale. (Debtors' Trial Brief ¶¶ 96, 97; DX 005 at § 5-11(d)). In fact, the Term Lenders were provided with information about Aéropostale's liquidity and financial condition, including its borrowing base availability and cash on hand, monthly projections for 2016 and the knowledge that Aéropostale had hired restructuring advisors. (Debtors' Trial Brief ¶¶ 98, 99, 101, 103). It is undisputed that the public did not have this information.

In support of its position, the Debtors cite to criminal cases involving insider trading. For example, the Debtors cite *United States v. O'Hagan*, 521 U.S. 642 (1997), for the proposition

[26] In a slide presentation during the closing argument, the Debtors' counsel suggested that the Sycamore Parties should be treated as insiders. The Court does not remember seeing that argument earlier in the case. In any event, the Court rejects that suggestion as unsupported by the credible evidence.

that an individual violates Section 10(b) and Rule 10b-5 of securities laws "when he misappropriates confidential information for securities trading purposes, in breach of a duty owed to the source of the information." (Debtors' Trial Brief ¶ 95) (quoting *O'Hagan*, 521 U.S. at 652). The Debtors quote *United States v. Rajaratnam*, 719 F.3d 139, 158 (2d Cir. 2013) for the notion that "securities fraud occurs when a trade is conducted in 'knowing possession' of material nonpublic information obtained in breach of a fiduciary duty." (Debtors' Trial Brief ¶ 93) (quoting *Rajaratnam*, 719 F.3d at 158). The Debtors also cite *United States v. Falcone*, 257 F.3d 226 (2d Cir. 2001), for the proposition that "[v]iolation of a duty of confidentiality sufficient to state a claim exists 'where there is an explicit acceptance of a duty of confidentiality or where such acceptance may be implied from a similar relationship of trust and confidence between the parties.'" (Debtors' Trial Brief ¶ 94) (quoting *Falcone*, 257 F.3d at 234); (*see also* Debtors' Trial Brief ¶ 95) (a breach of duty of confidence could constitute a misappropriation of confidential information) (citing 17 C.F.R. § 240.10b5-2).

But the Debtors' theory around the stock trade fails because it does not satisfy the requirements for equitable subordination. First and foremost, the Debtors have failed to demonstrate harm to the creditors or the Debtors, or that the Sycamore Parties obtained an unfair advantage. *See Mobile Steel*, 563 F.2d at 700. There is simply no evidence in the record to establish tangible harm to the Debtors or creditors sufficient for equitable subordination.

Moreover, the theory is undercut by the evidence about the stock price and the information that was publicly available. The evidence presented demonstrates that as a result of the trading, Lemur suffered a loss of approximately $53 million. (Kaluzny Decl. ¶ 49). The Court credits the testimony of the Term Lenders' expert, Professor Pritchard, that there was essentially a floor to Aéropostale's stock price and that its price remained steady for much of

February 2016 to April 2016. (Pritchard Decl. ¶¶ 26, 29, 33, 34). During February 3, 2016, to February 8, 2016, the time period in which Lemur sold its shares, the weighted average of Aéropostale's stock price was $.17. (Pritchard Decl. ¶ 26). The stock price remained effectively unchanged for the remainder of February 2016 and traded in the low $.20s for most of April 2016. (Pritchard Decl. ¶¶ 29, 34). With the exception of one hiccup in trading following a disclosure on March 17, 2016, the stock's price remained steady until April 22, 2016 at which point the shares were de-listed from the New York Stock Exchange. (Pritchard Decl. ¶¶ 31, 34). Lemur did not avoid any losses or make any money on its trades. Nor does the evidence demonstrate that the market was affected in any meaningful way by the selling of Lemur's shares. (Pritchard Decl. ¶¶ 25–29).

The Debtors argue that Lemur's trading caused significant harm to the Debtors because: (1) the sell-off sent a negative message to the market; and (2) trading the shares was part of an overall scheme by the Sycamore Parties to push the Debtors into bankruptcy. (Debtors' Trial Brief ¶ 118). To support their allegations of harm, the Debtors cite *Carpenter v. United States*, 484 U.S. 19 (1987), and *FMC Corp. v. Boesky*, 852 F.2d 981 (7th Cir. 1988). The Debtors assert that "[c]onfidential information acquired or computed by a corporation in the course and conduct of its business is 'a species of property to which the corporation has the exclusive right and benefit.'" (Debtors' Trial Brief ¶ 119) (quoting *Carpenter*, 484 U.S. at 26). The Debtors argue that misappropriation of confidential information causes a distinct injury to the company by stripping it of its exclusive right to use the information." (Debtors' Trial Brief ¶ 119) (citing *Boesky*, 852 F.2d at 990–91). The Court does not disagree that, as these cases acknowledge, a company has an interest in its confidential information. *See Carpenter*, 484 U.S. at 26; *Boesky*, 852 F.2d at 990 (concurring with ruling in *Carpenter* that "[c]onfidential business information,

even though intangible in nature, is corporate property."). However, neither of these cases are applicable here. They do not address the type of harm that bankruptcy courts consider in an equitable subordination analysis—whether the misconduct "resulted in injury to the creditors of the bankrupt or conferred an unfair advantage on the claimant." *See Mobile Steel*, 563 F.2d at 700.

Additionally, the Debtors urge the Court to find that the Debtors were harmed because an insider's unauthorized use of information to trade "sends a signal to the world that something important (albeit unknown to the general public) is happening at the company, harming the company by artificially manipulating its financial condition." (Debtors' Trial Brief ¶ 120) (citing *LaSala v. Bordier et Cie*, 519 F.3d 121, 131–32 (3d Cir. 2008)). The Debtors argue that by selling their stock in Aéropostale, Mr. Kaluzny and the Sycamore Parties undermined the integrity and public's regard of the Debtors. (Debtors' Trial Brief ¶ 122). But this is not the type of harm that courts are concerned about when determining whether to equitably subordinate a claim. The cases cited by the Debtors are inapposite because they do not consider whether there has been harm to the bankrupt estate or the debtors' creditors. In *Diamond v. Oreamuno*, 24 N.Y.2d 494 (1969), the court stated that an enterprise has a "great interest in maintaining a reputation of integrity, an image of probity, for its management and in insuring the continued public acceptance and marketability of its stock." *Id.* at 499 (observing that damages could be inferred where officers and directors used material inside information to reap personal profits). Similarly, in *Happ v. Corning, Inc.*, 466 F.3d 41 (1st Cir. 2006), the court stated that "one could also argue that insider trading inherently damages a company by poisoning relations with current and prospective shareholders who supply the capital." *Id.* at 44. These cases focus on the integrity of the marketplace and whether there has been harm from a public policy point of view

and are thus, not relevant to the inquiry before this Court. Once again, there has been no evidence of a harm here that could serve as a basis for relief in this bankruptcy case.

The Debtors contend that "numerous courts have held that misappropriation of inside information constitutes the requisite inequitable conduct necessary for equitable subordination." (Debtors' Trial Brief ¶ 131) (citing *In re Papercraft Corp.*, 211 B.R. 813, 824 (W.D. Pa. 1997), *aff'd and remanded sub nom.*, *Citicorp Venture Capital, Ltd. v. Comm. of Creditors Holding Unsecured Claims*, 160 F.3d 982 (3d Cir. 1998); *In re USDigital, Inc.*, 443 B.R. 22, 50 (Bankr. D. Del. 2011); *In re Joy Recovery Tech. Corp.*, 286 B.R. 54, 84 (Bankr. N.D. Ill. 2009); *In re Kreisler*, 331 B.R. 364, 384 (Bankr. N.D. Ill. 2009); *In re Herby's Foods, Inc.*, 2 F.3d 128, 134 (5th Cir. 1993); *In re Otis & Edwards, P.C.*, 115 B.R. 900, 921 (Bankr. E.D. Mich. 1990)). The Debtors further state that courts have "acknowledged that mis-use of material, nonpublic information by an insider creditor" is a basis for equitable subordination. (Debtors' Trial Brief ¶ 132) (citing *Citicorp Venture Capital, Ltd.*, 160 F.3d at 982). But the cases cited by the Debtors are distinguishable.

In *Citicorp Venture Capital, Ltd. v. Comm. of Creditors Holding Unsecured Claims*, 160 F.3d 982 (3d Cir. 1998), the claimant, while a fiduciary of the debtor secretly purchased millions of claims against the debtor at a discount and sought to control the debtor's assets and make a profit. *See id.* at 984. In that case, the bankruptcy court had found that the claimant's conduct resulted in at least three adverse effects and conferred an unfair advantage on itself. *Id.* at 986. These adverse effects were: (1) selling noteholders "were deprived of an ability to make a fully informed decision concerning the sale of their claims"; (2) dilution of the voting rights of prepetition creditors; and (3) creating a conflict of interest. *Id.* Additionally, the claimant had "engaged in a comprehensive information collection effort made possible by its position on" the

debtor's board of directors and used this information to prepare its own asset purchase offer. *Id.* at 989–90. The other cases cited by the Debtors on this point are similarly distinguishable. *See, e.g., In re USDigital, Inc.*, 443 B.R. at 22 (denying motion to dismiss claim for equitable subordination because facts alleged demonstrate claimants "had an advantage over other creditors because of their insider access to [debtor's] financial condition.").

Moreover, the Debtors' insider trading argument is also undermined by the scope of the ban on stock trading imposed on Aéropostale employees. Between December 4, 2015, and January 22, 2016, employees and members of Aéropostale's Board were permitted to trade in Aéropostale's stock. (CEX 442). The trading window closed again on January 25, 2016. (CEX 442). The period that Aéropostale employees and board members could not trade is referred to as the "Black Out Period." (CEX 442; Dick Decl. ¶ 38). In late December 2015, the Debtors provided the Term Lenders with financial information and projections for the 2016 fiscal year, including projected borrowing base calculations, preliminary cash flow projections, and consolidated balance sheet preliminary projections. (*See* Dick Decl. ¶ 31; CEX 018). The projections were based off of a presentation the Debtors provided to the Term Lenders in October 2015. (*See* DEX 012). The Debtors' employees had this information but were permitted to trade.[27]

Lemur sold its shares of stock in Aéropostale between February 3 and February 8, 2016. (Kaluzny Decl. ¶ 49). When Lemur traded its stocks in early February it did not yet have the February Package, including the borrowing base certificate that was the last information provided to MGF and the Term Lenders before the Credit Review Period was declared.

[27] Notably, it was the December 15, 2016 projections that were central to the opinions of Debtors' expert, Professor Ferrell.

The Court's conclusion on the stock trades is not altered by the testimony of the Debtors' expert, Professor Ferrell. He assessed the significance to the market of certain non-public information, and assumed that the $150 million liquidity trigger would be tripped in April 2016. (Ferrell Decl. ¶ 13). In conducting his analysis, Professor Ferrell assumed that if the $150 million liquidity trigger was tripped, there would be a significantly increased risk that the Debtors would file for bankruptcy. (Ferrell Decl. ¶ 13). At its core, Professor Ferrell's conclusion is the non-controversial notion that a significant increase in the likelihood of bankruptcy would be significant information to the market. (Trial Tr. 220:14–22, Aug. 17, 2016 (Ferrell)). But he did not independently assess the significance of the December 2015 projections upon which he relied. (Trial Tr. 219:20–25, Aug. 17, 2016 (Ferrell); *see* Trial Tr. 224:23–225:5, Aug. 17, 2016 (Ferrell) ("I assume that the calculation that liquidity trip would occur would result in a significant increase in bankruptcy risk.")).[28] Professor Ferrell did not make a factual determination that the December 2015 projections show an increased probability of bankruptcy. (Trial Tr. 234:2–8, Aug. 17, 2016 (Ferrell)). Professor Ferrell's numerous assumptions are also inconsistent with the views of the Debtors' expert, Mr. Duffy, who testified that he believed "the Debtors could have avoided bankruptcy even after the $150 million Sourcing Agreement Liquidity Trigger was tripped[,]" and that the Debtors could have "managed through" a period in which liquidity was close to the $70 million trigger. (Duffy Decl. ¶¶ 20, 21).

There are also questions about whether the information in question is material. The Debtors argue that a company's liquidity projections "are exactly the type of material non-public information upon which insider trading liability can be based." (Debtors' Trial Brief ¶ 106)

[28] *See supra* note 27.

(citing *S.E.C. v. Bauer*, 2012 WL 2217045 (E.D. Wisc. June 15, 2012); *Arnlund v. Smith*, 210 F. Supp. 2d 755 (E.D. Va. 2002)). The Debtors further argue that the fact that the media was speculating about Aéropostale's financial condition does not prevent a finding that the non-public information was material. (Debtors' Trial Brief ¶ 111–12) (citing *S.E.C. v. Mayhew*, 121 F.3d 44 (2d Cir. 1997); *U.S. v. Mylett*, 97 F.3d 663 (2d Cir. 1996)).

The Court does not doubt that information relating to a company's liquidity can be significant. But it does not follow, nor do the cases cited by the Debtors suggest, that this is always the case. *See, e.g., Arnlund*, 210 F. Supp. 2d at 765 (stating "the [c]ourt cannot find that the possibility of bankruptcy and a liquidity crisis would be of no import to a reasonable investor."). For example, in *SEC v. Bauer*, 2012 WL 2217045, the court found that the defendant "'had intimate knowledge' of the Fund's ongoing credit, liquidity, and redemption issues," and was "privy to details regarding defaulted and watch list securities . . . ." *Id.* at *1 (citation omitted). The court made no ruling as to whether information of the company's liquidity, in and of itself, was sufficient to find the defendant had committed insider trading. *See id.* Both *S.E.C. v. Mayhew*, 121 F.3d 44, and *U.S. v. Mylett*, 97 F.3d 663, deal with nonpublic information relating to proposed mergers. Finally, *U.S. v. Rajaratnam*, 802 F. Supp. 2d 491 (S.D.N.Y. 2011), is cited by the Debtors for the notion that information concerning a company's internal projections can be a basis for a securities claim notwithstanding that the public knew some of the information upon which the trades were based. *Id.* at 514. Yet none of these cases set forth an absolute rule regarding materiality of a company's liquidity projections or the knowledge that a company has hired strategic advisors. And the materiality of this information is subject to debate given the analysis presented by the Term Lenders' expert about the stock

price and the information already available about Aéropostale's poor performance. But given its conclusions above, the Court does not need to resolve these questions.[29]

II. Credit Bidding

A. The Legal Standard

"Credit bidding 'allows the secured creditor to bid for its collateral using the debt it is owed to offset the purchase price[,]' which 'ensures that, if the bidding at the sale is less than the amount of the claim the collateral secures, the secured creditor can, if it chooses, bid up the price to as high as the amount of its claim.'" *In re Free Lance-Star Publishing Co. of Fredericksburg, VA*, 512 B.R. 798, 805 (Bankr. E.D. Va. 2014) (quoting *Quality Props. Asset Mgmt. Co. v. Trump Va. Acquisitions, LLC*, 2012 U.S. Dist. LEXIS 115225 (W.D. Va. Aug. 16, 2012)). It therefore provides a safeguard for secured creditors, by insuring against the undervaluation of their collateral at an asset sale. *See RadLax Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2070 (2012) ("The ability to credit-bid helps to protect a creditor against the risk that its collateral will be sold at a depressed price. It enables the creditor to purchase the collateral for what it considers the fair market price (up to the amount of its security interest) without committing additional cash to protect the loan.").

But the right to credit bid is not absolute. *See In re Free Lance-Star*, 512 B.R. at 808; *In re Fisker Auto. Holdings, Inc.*, 510 B.R. 55, 59 (Bankr. D. Del. 2014). Specifically, Section 363(k) of the Bankruptcy Code provides that a party may credit bid "unless the court for cause orders otherwise . . . ." 11 U.S.C. § 363(k). The term "cause" is not defined by the Bankruptcy

[29] Finally, the Court notes that the Debtors appear to seek equitable subordination of the Term Lenders' claims in their entirety. But this seems inconsistent with the doctrine. It is well established that equitable subordination is an equitable remedy and that a claim should be should be subordinated "only to the extent necessary to offset the harm which the bankruptcy and its creditors suffered on account of the inequitable conduct." *In re Sunbeam Corp.*, 284 B.R. at 364; *see also In re LightSquared Inc.*, 511 B.R. at 348.

Code, and it is left to the court to determine whether cause exists on a case-by-case basis. *See In re Olde Prairie Block Owner, LLC*, 464 B.R. 337, 348 (Bankr. N.D. Ill. 2011) (citing *In re N.J. Affordable Homes Corp.*, 2006 WL 2128624, at *16 (Bankr. D. N.J. June 29, 2006)(stating that cause is "intended to be a flexible concept enabling a court to fashion an appropriate remedy on a case-by-case basis"); *In re River Road Hotel Partners, LLC*, 2010 WL 6634603, at *1 (Bankr. N.D. III. Oct. 5, 2010) ("Section 363 gives courts the discretion to decide what constitutes 'cause' and the flexibility to fashion an appropriate remedy by conditioning credit bidding on a case-by-case basis."), *aff'd, River Road Hotel Partners, LLC v. Amalgamated Bank*, 651 F.3d 642 (7th Cir. 2011)).

The decision of whether to deny credit bidding based on cause is within the discretion of the court. *See In re Olde Prairie*, 464 B.R. at 348. But this "discretion does not give the bankruptcy court the authority to act arbitrarily or to be freewheeling. In other words, the standard is not standardless." *In re RML Dev., Inc.*, 528 B.R. 150, 155 (Bankr. W.D. Tenn. 2014) (quoting *In re Davis*, 237 B.R. 177, 182 (M. D. Ala. 1999)). "Intrinsically, acting 'for cause' looks to the court's equity powers that allow the court to balance the interests of the debtor, its creditors, and the other parties of interests in order to achieve the maximization of the estate and an equitable distribution to all creditors." *In re RML*, 528 B.R. at 155 (citations omitted). But "whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code." *Id.* (quoting *Law v. Siegel*, 134 S. Ct. 1188, 1194-95 (2014)). The "modification or denial of credit bid rights should be the extraordinary exception and not the norm." *In re RML*, 528 B.R. at 156.

Courts will deny a secured creditor's right to credit bid due to inequitable conduct. *See, e.g., In re Free Lance-Star Publishing*, 512 B.R. at 804–06. These cases often feature conduct

that also directly impacts the estate or the bidding process. For instance, in the case of *In re Aloha Airlines, Inc.*, 2009 WL 1371950 (Bankr. D. Haw. May 14, 2009), a secured creditor was denied the right to credit bid because of its undisclosed sponsorship of a third party's acquisition of the debtor's assets through that bid. *See id.* at *8. Prior to the petition date, the third party, Mesa Air Group ("Mesa"), had entered into the Hawaii air market with the intention of forcing the debtor out of business through the misuse of information obtained through confidential agreements with the debtor and others. *See id.* at *9. In subsequent litigation regarding the issue, Mesa made sworn misstatements to cover the truth regarding its dishonesty and destroyed records. *See id.* The debtor was subsequently forced to file bankruptcy. During the bankruptcy process, the credit bidder had reached an agreement, initially undisclosed to the court, to grant a license in the debtor's intellectual property to Mesa. *See id.* at *4. When the agreement was made public, the court denied the secured creditor's right to credit bid.

Courts have also limited the right to credit bid when the validity of a creditor's lien is in dispute. *See In re Daufuskie Islands Props.*, LLC, 441 B.R. 60, 64 (Bankr. D.S.C. 2010); *Nat'l Bank of Commerce v. McMullan (In re McMullan)*, 196 B.R. 818, 835 (Bankr. W.D. Ark. 1996), aff'd, 162 F.3d 1164 (8th Cir. 1998)). Other cases look to whether the party seeking to credit bid has failed to comply with the procedural requirements established by the court for the sale of the collateral. *See Greenblatt v. Steinberg*, 339 B.R. 458, 463 (N.D. Ill. 2006) (denying right to credit bid due to failure to comply with sale procedures order**).**

B. The Debtors' Allegations as to Credit Bidding

Relying upon the same allegations asserted for their equitable subordination claim, the Debtors seek to limit the Term Lenders' ability to credit bid at any sale auction. But for the same reasons set forth above, the Court does not find inequitable conduct that would justify limiting a

credit bid by the Term Lenders in this case. Moreover, there is no evidence of inappropriate behavior by the Term Lenders in the bankruptcy. The Term Lenders hold a secured claim in the amount of some $151,250,000[30] and therefore have a statutory right to credit bid the full amount of their claim. *See* 11 U.S.C. § 363(k); *RadLAX*, 132 S. Ct. at 2071. There are no allegations of collusion, undisclosed agreements, or any other actions designed to chill the bidding or unfairly distort the sale process. Consistent with the exercise of their own legal rights, the Term Lenders have been relatively cooperative with the process by, among other things, agreeing to the payment of an expense reimbursement request to a potentially interested bidder and agreeing to a one-week extension of the sale process. *See* Order Authorizing Expense Reimbursement in Connection with the Auction and Sale [ECF No. 587]; Transcript of Hearing Held on August 8, 2016 at 5:10–24, 9:21–25 [ECF No. 639]. Moreover, no party has challenged the validity or extent of the Term Lenders' liens.

Moreover, the Court rejects the Debtors' reliance on cases offered in support of restricting credit bidding based on the trading of Aéropostale stock. For example, the Debtors rely on *Sec. & Exch. Comm'n v. Capital Cove Bancorp LLC*, 2015 WL 9701154 (C.D. Cal. Oct. 13, 2015). But that case is clearly distinguishable. In that case, the court noted "[a] number of inequitable considerations" not present here, including:

> the SEC's prima facie case of Defendants' securities fraud, the Receiver's evidence of a Ponzi scheme, the numerous investors and creditors that were defrauded by the Defendants, the Receiver's finding that Defendants' collective assets will be insufficient to pay 100% of all amounts claimed, and the Receiver's intent to equitably distribute recovery among all those who were harmed.

[30] The proofs of claim filed by Aero Investors LLC and MGF Sourcing Holdings, Limited against each of the Debtors are for amounts not less than $151,250,000. (*See* Claim Nos. 265-80).

Id. at *9. The court also noted that a bona fide dispute existed as to the secured creditor's liens against the properties at issue, a common fact in credit bidding cases that is also not present here. *See id.*

Similarly, the Debtors' mistakenly rely on *In re Family Christian, LLC*, 533 B.R. 600, 631 (Bankr. W.D. Mich. 2015). In that case, the court did not hold that evidence of insider trading satisfied the "for cause" standard in Section 363(k). *See id.* at 631. Rather, the court refused to approve a sale to a party that had been privy to certain information as a "consultation party" to the auction and noted that it "must infer that [the party] gained an unfair advantage by initially participating as one of the [c]onsultation [p]arties and thereafter submitting a bid. This conduct is similar to insider trading . . . ." *Id.* Here, there are no allegations that the Term Lenders have engaged in any unfair advantage over the sale process and in fact, the evidence reflects that the Term Lenders have not interfered in the sale process. (Trial Tr. 204:2–24, Aug. 17, 2016 (Doak)).

Putting aside the allegations of inequitable conduct then, the Court is left with the Debtors' allegations that bidding on the sale of their assets will be chilled by the Term Lenders ability to credit bid. But there are two problems with this argument. The first is the case law. In considering whether to limit the ability to credit bid, it is true that courts will sometimes refer to concerns about the chilling of bidding as a factor.[31] But cases that cite concerns about chilling a

[31] The Third Circuit has rejected the notion that limiting a credit bid for cause must always involve inequitable conduct by the creditor:

> That argument has no basis in the statute. A court may deny a lender the right to credit bid in the interest of any policy advanced by the Code, such as to ensure the success of the reorganization or to foster a competitive bidding environment. *See, e.g.*, 3 Collier on Bankruptcy 363.09[1] ("The Court might [deny credit bidding] if permitting the lienholder would chill the bid process.")

In re Philadelphia Newspapers, LLC, 599 F.3d 298, 316 n.14 (3d Cir. 2010). Of course, that decision must be understood in light of the Supreme Court's more recent decision in *RadLax Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065 (2012) . In that case, the Supreme Court concluded that a debtor may not confirm a Chapter

bid almost invariably also feature some other factor that supports a limitation on the creditor. Indeed, the Court is unaware of any cases where the chilling of bidding alone is sufficient to justify a limit on a credit bid. For instance, the court in *In re Fisker Auto. Holdings, Inc.*, 510 B.R. 55 (Bankr. D. Del. 2014), found that "[t]he evidence in this case is express and unrebutted that there will be *no* bidding—not just the chilling of bidding—if the Court does not limit the credit bid." *Id.* at 60 (noting that without cap on credit bidding "bidding will not only be chilled . . . ; bidding will be frozen."). But the *Fisker* court also relied on other problematic conduct present in that case, observing that the creditor "as the proposed sale purchaser insisted on an unfair process, i.e., a hurried process, and the validity of its secured status has not been determined." *Id.* at 61. Even with all these considerations, the *Fisker* court ultimately did not deny the right to credit bid in its entirety, but rather limited the amount to the price that the creditor has paid to purchase the claim. *See id.* at 59 n.2, 61.

Similarly, the court in *Free Lance-Star Publishing* references a concern about chilling bidding, but the case also involved inequitable conduct. In that case, the creditor initially worked with the debtor prepetition to purchase the debtor's assets in bankruptcy. But at the same time, the same creditor was unilaterally filing financing statements on certain of the debtors' assets. *See In re Free Lance-Star Publishing*, 512 B.R. at 802-04. The court stated that it was troubled by the recordation of the financing statements, noting that the creditor had made "the unilateral decision to expand the scope of its security interest when [its] overt request for the Debtors to grant such liens . . . failed" and that the creditor "knew it did not have a valid lien on the [assets] when it filed the [f]inancing [s]tatements." *Id.* at 806. It was "equally troubled by [the

11 cramdown plan that provides for the sale of the collateral free and clear of the a lien but does not permit the secured creditor to credit bid at the sale. *Id.* at 2073 (noting that "the pros and cons of credit bidding are for the consideration of Congress, not the courts.").

creditor's] efforts to frustrate the competitive bidding process," citing to the creditor's pressure on the debtors to shorten the marketing period for the assets and to conspicuously advertise the creditor's credit bidding rights. *Id.* Thus, while the court cited to bid chilling, it also specifically concluded that the creditor explicitly "tried to depress the sale price of the Debtors' assets, not to maximize the value of those assets." *Id.* at 806. Like *Fisker*, the court did not extinguish the right to credit bid, but limited it to those assets in which the creditor had a valid, properly perfected lien. *See id.* at 808.

In the same vein, the American Bankruptcy Institute Commission to Study the Reform of Chapter 11 recently released its Final Report and Recommendations in which it noted "the fundamental role of credit bidding under state law and section 363(k)" and that "all credit bidding chills an auction process to some extent." American Bankruptcy Institute Commission to Study the Reform of Chapter 11, 2012-2014 Final Report and Recommendations 147 (2014), *available at* hhtp://commission.abi.org/full-report. The Commission "did not believe that the chilling effect of credit bids alone should suffice as cause under section 363(k)." *Id.*

The second problem with the Debtors' argument about bid chilling is the factual record in this case. That record demonstrates an active interest in the Debtors' assets. This includes parties interested in acquiring the business as a going concern and parties interested in liquidating the assets. As of June 16, 2016, the Debtors had contacted 99 parties, which consisted of both strategic and financial buyers. (Sciametta Decl. ¶ 5). In mid-June, twenty-one parties were still interested in pursuing a transaction with the Debtors. (Sciametta Decl. ¶ 5). On or around August 7, 2016, liquidators were invited to participate in the sale process, and all but one of those liquidators contacted are reviewing documents in the Debtors' data room. (Trial Tr. Under Seal 2 9:8–12, 11:4–13, Aug. 16, 2016 (Doak)). The Debtors have received a number of

indications of interest from parties interested in purchasing the Debtors' assets and have been in ongoing discussions with one party about negotiating a stalking horse bid. (Doak Decl. ¶ 8). Mr. Doak testified that he believes there is the potential for the Debtors to realize between $200 million and $300 million in proceeds. (Doak Decl. ¶ 8). The Debtors have been working with several parties in the sale process and those parties are conducting due diligence and working on proposed asset purchase agreements. (Trial Tr. Under Seal 2 24:3–21, Aug. 16, 2016 (Doak)). Mr. Doak testified that he expects other parties, including two specifically identified, to participate in the auction and submit a bid. (Trial Tr. Under Seal 2 24:17–21, Aug. 16, 2016 (Doak)).

Of course, there are no guarantees going forward and the Court is mindful that the Debtors have been unable to find an acceptable stalking horse bidder to date. But the record here is different than in a case like *Fisker*, where there would be no bidding—not just the chilling of bidding—if the Court did not limit the credit bid. *Fisker*, 510 B.R. at 60.

III. Alter Ego

Debtors seek relief against the Term Lenders for alleged inequitable conduct by other corporations—specifically MGF and Lemur—as to the imposition of new payment terms and for the sale of the stock. Thus, the Debtors must demonstrate an alter ego relationship between MGF and Lemur, on the one hand, and the Term Lenders, on the other hand. *See In re Sunbeam Corp.*, 284 B.R. at 367–69 (dismissing equitable subordination claim where alleged inequitable conduct was committed by affiliate of targeted creditor and the unsecured creditors committee failed to adequately allege an alter ego relationship).[32]

[32] At closing argument, the Debtors suggested that it did not need to pierce the corporate veil to prevail on their claim. But they did not offer legal authority to demonstrate how else to attribute the conduct of these otherwise separate corporate entities to the Term Lenders.

In determining whether to disregard the corporate form and pierce the corporate veil, the law of the state of incorporation is applied. *See In re Sunbeam Corp.*, 284 B.R. at 364.[33] It is well-settled that ownership and control are not enough for alter ego liability. *See, e.g., id.* at 366. Rather, the "high standard" of alter ego liability requires that there "must be such complete domination and control that the controlled entity is a mere shell." *Id.* at 365, 367; *see also Mobil Oil Corp. v. Linear Films, Inc.*, 718 F. Supp. 260, 266–67 (D. Del. 1989) (finding no alter ego relationship where the plaintiff alleged the parent "held all of the stock" of the subsidiary, "guaranteed certain debts" of the subsidiary, and "shared common officers and directors" with the subsidiary). "[C]ourts have recognized that the existence of common directors and officer is a normal business practice . . . and that a showing of mere corporate ownership or common management will not be sufficient to justify veil piercing." *Weisfelner v. Blavatnik* (*In re Lyondell Chem. Co.*), 543 B.R. 127, 145 (Bankr. S.D.N.Y. 2016) (quotation omitted); *see also In re Sunbeam Corp.*, 284 B.R. at 366; *Marnavi S.p.A. v. Keehan*, 900 F. Supp. 2d 377, 392 (D. Del. 2012) ("[I]t is well established that mere ownership or direction of a corporate entity, without more, is not sufficient to establish that the corporate form should be disregarded.") (quotation and citation omitted).

To succeed on a claim based on MGF's alleged inequitable conduct, the Debtors must establish that MGF is the alter ego of one the Term Lenders. This is so particularly because the Debtors and MGF entered into a settlement agreement whereby they resolved all disputes regarding the Credit Review Period as between MGF and the Debtors. (*See* Order Pursuant to

[33] Here, the parties cite to Delaware law, which is not surprising given that Lemur, Sycamore Partners, and MGF are incorporated and/or formed in Delaware. (DX 062; DX 066; DX 113). To the extent the parties cite to cases that apply Delaware or New York law, the Court finds the standard to disregard corporate separateness remains essentially the same. *See, e.g., In re Sunbeam Corp.*, 284 B.R. at 365; *Network Enters., Inc. v. APBA Offshore Prods., Inc.*, 427 F. Supp. 2d 463, 489 (S.D.N.Y. 2006).

Rule 9019 of the Federal Rules of Bankruptcy Procedure Approving Settlement Agreement Between MGF and Debtors [ECF No. 189]). But the Debtors have failed to do so. MGF and its predecessors have been in business for over forty years and for the majority of that time it was owned by someone other than Sycamore Partners. (Schwartz Decl. ¶ 3). MGF is managed on a day-to-day basis by Mr. Schwartz, the CEO, the CFO and her finance staff, and the COO and his operations staff. (Schwartz Decl. ¶ 5). While MGF has a management services contract with an affiliate of Sycamore Partners, (Schwartz Decl. ¶ 9), MGF has its own offices, phone numbers, technology systems, bank accounts, and e-mail addresses, separate from those of Sycamore Partners. (Schwartz Decl. ¶ 11). Additionally, it also has financing in its own name, consisting of a revolving credit facility with Bank of America and a term loan with KKR Financial. (Schwartz Decl. ¶ 11).

The Debtors presented several e-mail communications to support their allegations that Mr. Kaluzny exerted control over MGF. For example, in one e-mail Mr. Kaluzny directed MGF's CEO, Mr. Schwartz, to call "the purchasing gal at Aero" and "[a]sk point blank whether there is something going on. Ask point blank what they are doing w li and fung." (DX 56). Mr. Kaluzny also directed Mr. Schwartz to "[f]eign being super alarmed" and states "[a]ll tone is nice and personally friendly, but 'hurt.'" (DX 56; *see also* DX 161 (e-mail from Jennie Wilson to James Schwartz, stating "I think we should talk with Dary and see if they want us to engage with Aero on liquidity and ultimately payment terms."). Additionally, Mr. Kaluzny was involved in negotiating the Sourcing Agreement between MGF and Aéropostale. (Trial Tr. 193:13–25, Aug. 18, 2016 (Morrow)). But MGF's CEO, CFO, and other members of the MGF management team were also involved in the discussions of the Sourcing Agreement. (Trial Tr. 193:13–25, Aug. 18, 2016 (Morrow); CEX 509, Miller Dep. Tr. 23:19–25)). The fact that the Sycamore Parties'

personnel was involved in these discussions is not surprising given that MGF and the Sycamore Partners were parties to an advisory agreement, under which the Sycamore Parties provided certain services to MGF. (DX 060; *see also* DX 014 (e-mail from Dary Kopelioff to Daniel Bloch, at MGF stating they "have been tracking liquidity" and will "share with you now and on a go-forward basis."). In any event, the Debtors have failed to demonstrate that MGF was a "mere shell" and that it was completely dominated by Mr. Kaluzny or one of his other entities to justify piercing the corporate veil. *See In re Sunbeam Corp.*, 284 B.R. at 367.

With respect to Lemur, the alter ego issue is a closer question. In summer 2013, Sycamore's investment committee, consisting of Messrs. Kaluzny and Morrow, decided to invest in Aéropostale and to that end, in late August and September 2013, through an entity named Hummingbird LLC (later renamed Lemur LLC), they purchased approximately $54 million of Aéropostale's common stock. (Morrow ¶ 8; Kaluzny Decl. ¶ 10). Mr. Kaluzny is the President, CEO, Vice President and Secretary of Lemur. (DX 61; DX 66). Between February 3 and February 8, 2016, Mr. Kaluzny directed Lemur to sell its entire equity stake in Aéropostale. (Kaluzny ¶¶ 49–50; Trial Tr. 188:22–24, Aug. 17, 2016 (Kaluzny)). As a practical matter, Mr. Kaluzny exercised control over Lemur as it had no other officers and indeed no other function other than to invest in Aéropostale. (Kaluzny Decl. ¶¶ 10–11, 49). There is no doubt that Mr. Kaluzny wore different hats with respect to the various Sycamore Parties. (Kaluzny Decl. ¶¶ 1, 5, 6; DX 61; DX 62; DX 66; DX 86; DX 112; DX 113). Yet this alone is insufficient to pierce the corporate veil. *See In re Lyondell Chem. Co.*, 543 B.R. at 145. The parties have not provided sufficient factual or legal information to determine the corporate separateness of Lemur with respect to the other Sycamore Parties or MGF. But the Court does not need to resolve this

question as to Lemur given the Court's other rulings on the merits of the claims for equitable subordination and a limitation on credit bidding.

IV. Recharacterization

In determining whether to recharacterize the Tranche B facility of the Prepetition Term Loan Agreement as equity, the Court considers the factors set out in *Bayer Corp. v. MascoTech, Inc. (In re AutoStyle Plastics, Inc.)*, 269 F.3d 726 (6th Cir. 2001), along with the facts and circumstances surrounding the transaction. *See AutoStyle Plastics*, 269 F.3d at 750; *In re Lyondell Chem.*, 544 B.R. at 93. The *AutoStyle* factors are:

> (1) the names given to the instruments, if any, evidencing the indebtedness; (2) the presence or absence of a fixed maturity date and schedule of payments; (3) the presence or absence of a fixed rate of interest and interest payments; (4) the source of repayments; (5) the adequacy or inadequacy of capitalization; (6) the identity of interest between the creditor and the stockholder; (7) the security, if any, for the advances; (8) the corporation's ability to obtain financing from outside lending institutions; (9) the extent to which the advances were subordinated to the claims of outside creditors; (10) the extent to which the advances were used to acquire capital assets; and (11) the presence or absence of a sinking fund to provide repayments.

AutoStyle Plastics, 269 F.3d at 750; *see In re Lyondell Chem.*, 544 B.R. at 93 (applying the *AutoStyle* factors); *Adelphia Commc'ns Corp. v. Bank of Am.* (*In re Adelphia Commc'ns Corp.*), 365 B.R. 24, 74 (Bankr. S.D.N.Y. 2007). Considering these factors and the evidence presented at trial, the Court concludes that the Debtors have failed to establish the vast majority of the *AutoStyle* factors, each of which is discussed below. *See Adelphia Commc'ns Corp.*, 365 B.R. at 74; *In re SubMicron Sys. Corp.*, 432 F.3d at 456.[34]

[34] The Court notes that the Debtors did not address recharacterization in its Trial Brief. (*See* Debtors' Trial Brief [ECF No. 660]). Thus, references to the Debtors' argument on the recharacterization issue are to the Debtors' Motion.

As for the first factor—the names given to the instruments—the Tranche B facility was documented as a loan. (DX 005). Indeed, the Debtors refer to it as a loan. (Motion ¶ 7; Dick First Day Affidavit ¶ 38). This factor weighs against recharacterization. *See AutoStyle Plastics*, 269 F.3d at 750.

With respect to the second factor—the presence of a fixed maturity date and repayment schedule—the Tranche B facility had a fixed maturity date, and a required schedule of annual amortization payments. (DX 005 at AI-MGF 0071388, *id.* § 2-9; Trial Tr. 206:25–207:3, Aug. 17, 2016 (Kaluzny)). This factor weighs against recharacterization.

As for the third factor—the presence of a fixed rate of interest and interest payments—the Tranche B facility does not bear interest, which weighs in favor of recharacterization. (DX 005 § 2-10(b)). However, this factor is not dispositive. Additionally, the evidence presented establishes that the loan was structured to create economic returns and ultimate repayment through the MGF Sourcing Agreement. (Morrow Decl. ¶¶ 11–12; *see also* CEX 010).

With respect to the fourth factor—the source of repayments—the Tranche B facility was fully secured by a blanket lien on substantially all of the Debtors' assets. (*See* Dick First Day Affidavit ¶¶ 33, 37–38; Morrow Decl. ¶ 11; DX 005 § 8-1). Repayment of the Tranche B facility is thus not dependent on the success of the Debtors' business, which weighs against recharacterization. *See AutoStyle Plastics*, 269 F.2d at 751; *In re Lyondell Chem.*, 544 B.R. at 96; *see also Seaver v. Ashenfelter* (*In re MSP Aviation, LLC*), 531 B.R. 795, 807 (Bankr. D. Minn. 2015) ("[W]hen the creditor has secured the transaction with a lien, courts will generally find in favor of a loan."). As to this factor, the Debtors contend that "the Tranche B Facility does not have a fixed amortization schedule. Instead, repayment is effectively dependent on the continued demand for merchandise from MGF and the application of rebates under the Sourcing

Agreement." (*See* Motion ¶ 97(iv)). But this is incorrect. The Prepetition Term Loan Agreement provides "[t]he Borrower shall repay the aggregate outstanding principal amount of the Tranche B Term Loans installments of $5,000,000.00 on each Annual True Up Date . . . ." (DX 005 § 2.9(b)). Furthermore, the Debtors contemplated repaying the loan. (CEX 107 (e-mail from Marc Miller to Julian Geiger stating that additional liquidity "would allow us to pay back our Sycamore loan more quickly."); CEX 61 at AERO_0050423).

As for the fifth factor—the adequacy or inadequacy of capitalization—the Debtors argue they were "inadequately capitalized at the time the Tranche B Facility was advanced." (Motion ¶ 97(v)). However, while courts have stated that "inadequate capitalization is strong evidence that the advances are capital contributions" the Court gives this factor modest weight. *See In re Lyondell Chem.*, 544 B.R. at 97; *see also Official Comm. of Unsecured Creditors v. Bay Harbour Master Ltd. (In re BH S & B Holdings LLC)*, 420 B.R. 112, 159 (Bankr. S.D.N.Y. 2009) (stating "[c]ourts should not put too much emphasis on this factor, in any event, because all companies in bankruptcy are in some sense undercapitalized."). Here, the Debtors sought out financing to fund its turnaround—it would thus be inappropriate to penalize the Term Lenders for lending to a distressed company. (CEX 061; Morrow Decl. ¶ 10; Kaluzny ¶¶ 13, 15).

With respect to the sixth factor—the identity of interest between the creditor and the stockholder—MGF Holdings advanced 100% of the Tranche B facility but owned no equity in the Debtors. Thus, this factor weighs against recharacterization. *See AutoStyle Plastics*, 269 F.3d at 751. The Court acknowledges that an affiliate of MGF Holdings, Lemur, owned approximately 8% of the Debtors common stock at the time the Tranche B facility was made but finds that does not change its consideration of this factor.

The seventh factor is security, if any, for the advances. As noted above, the Tranche B facility was secured by liens on substantially all of the Debtors' assets. (DX 005 § 8-1; *see also* Kaluzny Decl. ¶¶ 20–26; Morrow Decl. ¶¶ 14–20; Motion ¶ 97(vii)). Thus, this factor weighs against recharacterization. *See S & B Holdings*, 420 B.R. at 159.

The eighth factor is the corporation's ability to obtain outside financing. As previously noted, the Debtors sought out proposals for financing and in fact received financing proposals from other potential lenders at or about the time they accepted the Term Lenders' proposal. (Morrow Decl. ¶ 10; Kaluzny ¶¶ 13, 15; CEX 061 at 0050421-25)). The Court finds this factor weighs against recharacterization. *See cf. In re Lyondell Chem.*, 544 B.R. at 98–99 ("The fact that no reasonable creditor would have acted in the same manner is strong evidence that the advances were capital contributions rather than loans.").

The ninth factor is the extent to which advances were subordinated to claims of outside creditors. The Tranche B facility was structured to be senior to the majority of claims against the Debtors, except for the pre-petition asset based lenders. (CEX 031; Motion ¶ 97(ix)).

As to the tenth factor—the extent to which the advances were used to acquire capital assets—the terms of the Tranche B facility state that the "proceeds of the Tranche B Term Loans shall be used solely for working capital and general corporate purposes of the Borrower . . . ." (DX 005 § 2-1(b)(ii)). Additionally, Debtors concede that that Term Loans were not used to purchase capital assets. (*See* Motion ¶ 97(x)). This factor weighs against recharacterization.

The eleventh and final factor is the presence or absence of a sinking fund. Here, the Tranche B facility is secured by liens over substantially all of the Debtors' assets and thus, there is no need for a sinking fund. *See S & B Holdings*, 420 B.R. at 158, 160. The Court finds this factor is irrelevant to its analysis.

Based on the *AutoStyle* factors and the surrounding facts and circumstances, the Court finds that the parties intended the Tranche B facility to be a loan. Accordingly, the Court denies the Debtors' request to recharacterize it as equity.

CONCLUSION

For the reasons set forth above, the Court denies the Motion. The Term Lenders shall submit a proposed order on three days' notice.

Dated: New York, New York
August 26, 2016

/s/ Sean H. Lane
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
REICHOLD HOLDINGS US, INC., et al.,	)	
	)	
	)	Case No. 14-12237 (MFW)
Debtors	)	Jointly Administered
	)	
	)	

MEMORANDUM OPINION[1]

Before the Court is a limited Objection filed by the liquidating trustee (the "Trustee") of Reichhold Holdings US, Inc. (the "Debtor") to an administrative claim for its reclamation rights under section 546(c) filed by Covestro LLC ("Covestro"). For the reasons set forth below, the Trustee's Objection will be overruled.

I. BACKGROUND

The Debtor filed a chapter 11 bankruptcy petition on September 30, 2014. (D.I. 1.) At the time of the filing, the Debtor was a borrower under a prepetition credit facility (the "Prepetition Loan") with Oaktree Capital Management, L.P. (the "Prepetition Lender"). In connection with the Prepetition Loan, the Debtor entered into a security agreement that granted the Prepetition Lender a lien in substantially all of the Debtor's assets, including inventory.

[1] This Memorandum Opinion constitutes the findings of fact and conclusions of law of the Court pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure.

On October 2, 2014, the Court entered an Interim Order authorizing the Debtor to obtain post-petition financing (the "DIP Loan") from a group of lenders (the "DIP Lenders"). The Interim Order authorized the Debtor to repay the Prepetition Loan in full from proceeds of the DIP Loan. (D.I. 54 at p. 9.) The DIP Loan was secured by a first priority lien on all prepetiton and postpetition property of the Debtor's estate, including inventory. (D.I. 54.) The first priority lien, however, did not attach to property that was "subject to valid, perfected and non-avoidable liens (or to valid liens in existence as of the Petition Date that are subsequently perfected as permitted by section 546(b) of the Bankruptcy Code." (Id. at p. 21.) The DIP Loan was subsequently repaid from the sale of the Debtor's assets on September 15, 2015. (D.I. 1042.) On January 13, 2016, the Court confirmed the Debtor's plan of liquidation. (D.I. 1385.)

Within days of the bankruptcy filing (on October 3, 2014), Covestro delivered a written reclamation demand to the Debtor. (See POC 4905, Ex. A.) On December 24, 2014, Covestro filed a proof of claim in the amount of $965,248.14. (See POC 167.) Thereafter, Covestro and the Debtor entered into a critical vendor agreement, pursuant to which the Debtor agreed to make certain payments to Covestro. In turn, Covestro agreed to amend its proof of claim after each payment to reflect the reduction in the net amount owed. Pursuant to that agreement, Covestro

amended its proof of claim twice. The two payments made by the Debtor satisfied the section 503(b)(9) portion of Covestro's claim (for goods delivered within 20 days of the petition date) but did not pay its claim in full.

On October 1, 2015, Covestro filed a proof of claim (the "Reclamation Claim") seeking $411,781.72 as an administrative expense. The Reclamation Claim sought the value of goods delivered to the Debtor between 21 and 45 days prior to the commencement of the Debtor's bankruptcy case. The Debtor filed a limited objection to the Reclamation Claim on May 26, 2016, on the ground that the Reclamation Claim was rendered valueless when the Prepetition Loan was repaid. (D.I. 1563). Covestro responded to the objection on June 9, 2016, and the Court heard oral argument on June 27, 2016. (D.I. 1569). The matter is now ripe for decision.

II. JURISDICTION

The Court has subject matter jurisdiction over this contested matter. 28 U.S.C. §§ 1334(b) & 157(b)(1). The Court may enter a final order in proceedings concerning claim allowance. Stern v. Marshall, 131 S. Ct. 2594, 2611 (2011).

III. DISCUSSION

A. Legal Standard

Section 546(c) recognizes a vendor's right of reclamation for goods sold to a debtor. It provides

> that subject to the prior rights of a holder of a security interest in such goods or the proceeds thereof . . . a seller of goods that has sold goods to the debtor in the ordinary course of such seller's business [has the right] to reclaim such goods if the debtor has received [them] while insolvent within 45 days before the commencement of a case under this title.

11 U.S.C. § 546(c). Section 546(c) does not create an independent right of reclamation; rather, it permits an exception to the trustee's strong arm powers if the seller has a right of reclamation under state law. Allegiance Healthcare Corp. v. Primary Health Sys. (In re Primary Health Sys., Inc.), 258 B.R. 111, 114 (Bankr. D. Del. 2001) (citations omitted). In order to prevail, a reclaiming seller must be able to prove that it had a valid right of reclamation under state law. Circuit City Stores, Inc., 441 B.R. 496, 505 (Bankr. E.D. Va. 2010) (citation omitted).

A seller seeking reclamation under section 2-702 of the Uniform Commercial Code ("UCC") and Bankruptcy Code section 546(c) must prove four elements: (1) the debtor was insolvent when the goods were delivered; (2) a written demand was made not later than 45 days of the debtor's receipt of such goods, or not later than 20 days following the petition date if the 45-day

period expires post-petition; (3) the goods were identifiable at the time of demand; and (4) the goods were in possession of the debtor at the time of demand. In re Hechinger Inv. Co. of Delaware, Inc., 274 B.R. 402, 405 (Bankr. D. Del. 2001) (citations omitted).

The UCC, as adopted in Pennsylvania,[2] provides that "[w]here a seller discovers that a buyer has received goods on credit while insolvent he may reclaim the goods." 13 Pa. Stat. and Cons. Stat. Ann. § 2702(2). A seller's right to reclaim is subject to the rights of a buyer in the ordinary course of business or other good faith purchaser. 13 Pa. Stat. and Cons. Stat. Ann. § 2702(3). However, the mere presence of a secured creditor with superior rights under UCC section 2-702(3) does not extinguish a vendor's reclamation rights. In re Pester Ref Co., 964 F.2d 842, 846 (8th Cir. 1992); United States v. Westside Bank, 732 F.2d 1259 (5th Cir. 1984).

B. Prior Rights

The Trustee contends that the DIP Lenders' rights, though granted after Covestro's reclamation rights arose, relate back to the Prepetition Lender's rights because the DIP Loan repaid the Prepetition Loan. Therefore, the Trustee contends that the two liens should be viewed as an "integrated transaction." In re Dana Corp. 367 B.R. 409, 420 (Bankr. S.D.N.Y. 2007) (quoting In

[2] Pennsylvania law governs the instant dispute. (See POC 4905, Ex. B at 4.)

re Dairy Mart Convenience Stores, Inc., 302 B.R. 128 (Bankr. S.D.N.Y. 2003)). Based on the theory that the goods were used to repay the Prepetition Lender, the Trustee further contends that Covestro's rights were extinguished when the Debtor repaid the Prepetition Loan because reclamation permits a seller to reclaim only the goods themselves. Circuit City, 441 B.R. at 510-11.

Covestro responds that its reclamation rights are not subject to the DIP Lenders' rights because the DIP Lenders' floating lien was distinct and separate from the Prepetition Lender's lien, and arose after Covestro's rights arose.

The Trustee's position is supported by the Dairy Mart and Dana Corp. decisions by the Bankruptcy Court for the Southern District of New York. In Dairy Mart, the Court held that where a prepetition secured lender had a floating lien on inventory and was paid from the proceeds of a post-petition loan supported by a new floating lien, the goods securing the prepetition lender's debt were effectively used to repay that debt.

> Thus, at the time that [the prepetition secured lender's] secured claim was paid on October 31, 2001, all of the goods or proceeds of those goods were disposed of to "pay" [the prepetition secured lender's] secured claim. In this context, the reclamation goods or the proceeds from those goods have been used to satisfy the secured creditor's claim. As such the goods or their proceeds have effectively been "paid" to the secured creditor, and the Reclamation Claims in those goods is valued at zero.

Dairy Mart, 302 B.R. at 136. Although the post-petition lien was granted after the reclamation rights arose, the Dairy Mart Court

related it back to the prepetition lien, finding both liens were an "integrated transaction." Id. at 135.

Adopting the reasoning in Dairy Mart, the court in Dana Corp. reached the same conclusion.[3] The Dana Corp. Court reasoned that since the lien chain between prepetition and DIP lenders remained unbroken, the DIP lender's rights should relate back to the prepetition lender's rights. Dana Corp., 367 B.R. at 421 ("Because the reclaimed goods or the proceeds thereof were either liquidated in satisfaction of the Prepetition Indebtedness or pledged to the DIP Lenders pursuant to the DIP Facility, the reclaimed goods effectively were disposed of as part of the March 2006 repayment of the Prepetition Credit Facility."). As a result, the Dana Corp. Court held that the reclamation claims were valueless. Id. at 421.

Covestro's position is supported by In re Phar-Mor, 301 B.R. 482, 498 (Bankr. N.D. Ohio 2003), aff'd 534 F.3d 502, 506-07 (6th Cir. 2008). In Phar-Mor, the Bankruptcy Court held that a post-petition lender's floating lien on the debtor's inventory did not constitute an assumption of the prepetition creditor's lien, but an entirely new lien that did not defeat an intervening reclaiming seller's rights. Id. at 498 ("[A] debtor's decision to grant a security interest in inventory to a subsequent secured

[3] A previous version of section 546(c) was in effect when Dairy Mart was decided. See 11 U.S.C. 546(c) (2003). However, the court in Dana Corp. found that the Dairy Mart holding was equally applicable to amended section 546(c).

lender cannot defeat a seller's reclamation rights."). The Sixth Circuit affirmed the bankruptcy court's holding in Phar-Mor, explicitly rejecting the Dana Corp. and Dairy Mart holdings. Phar Mor, 534 F.3d at 506-07.

The Court respectfully disagrees with Dairy Mart and Dana Corp. and agrees with the Phar-Mor decision. The function of a lien is to secure a debt; once that debt is repaid, the lien and the rights of the lien-holder terminate. See Unisys Fin. Corp. v. Resolution Trust Corp., 979 F.2d 609, 611 (7th Cir. 1992) ("A lien is parasitic on a claim. If the claim disappears - poof! the lien is gone."). In this case, when the Prepetition Loan was paid from the DIP Loan, the Prepetition Lender's lien was satisfied but Covestro's reclamation rights remained in force. The fact that funds obtained from the DIP Loan were used to satisfy the Prepetition Loan, or that the Debtor granted the DIP Lenders a lien in inventory to obtain such funds, is irrelevant. Covestro's reclamation rights arose before the DIP Lenders' security interest attached, and the DIP Lenders' lien was expressly subject to reclamation rights under section 546. (See D.I. 54 at p. 21.)

The Court agrees with Dairy Mart's observation that a prepetition lender could elect to foreclose on its collateral, and should it do so, would likely defeat a vendor's reclamation rights. Dairy Mart, 302 B.R. at 135. This conclusion is

compelled by statute: a reclaiming seller's rights are subject to the prior rights of a secured lender. Foreclosure is among those rights. See 13 Pa. Stat. and Cons. Stat. Ann. § 9601 (upon default, "a secured party may reduce a claim to judgment, foreclose, or otherwise enforce the claim, security interest, . . . by any available judicial procedure").

However, the Court thinks it is too much of a stretch to conclude, as the Dairy Mart and Dana Corp. Courts did, that the repayment of the Prepetition Loan from the DIP Loan was repayment from the "sale" of the reclaiming creditor's goods. In fact, Covestro's goods were not sold and their proceeds were not paid to the Prepetition Lender. The Prepetition Lender was paid from the proceeds of the DIP Loan and the reclaimed goods were merely pledged to secure that loan. Nor can the Court find that the DIP Loan and the Prepetition Loan are an "integrated transaction." They were two different loans by two different lenders at two different times. Because Covestro's rights arose before the DIP Lenders had any rights in the goods, the Court concludes that the DIP Lenders do not have prior rights in the goods under section 546(c).[4]

[4] The Court also finds the Trustee's reliance on Circuit City unpersuasive. In Circuit City, the court denied a reclamation claim because the seller did not diligently pursue its claim. Circuit City, 441 B.R. at 508 ("Respondents [sic] failure to diligently pursue their Reclamation Claims warrants denial of their Reclamation Claims as a matter of law."). While the Court expressed agreement with the Dana Corp. decision, that portion of the opinion was not relevant to the Court's holding

The Court finds the Trustee's reliance on other cases likewise misplaced. In Primary Health, the Court held that "a creditor with a prior perfected security interest in inventory which contains an after-acquired property clause is a good faith purchaser under the UCC." Primary Health, 258 B.R. at 114 (citations omitted) (emphasis supplied). The Primary Health holding did not deal with the rights of a reclaiming seller against a secured lender with a subsequently perfected security interest as here.

In Advanced Marketing, the Court considered the scope of reclamation rights when a pre-petition secured claim that encumbered all of the debtor's assets remained unpaid. Simon & Schuster, Inc. v. Advanced Mktg. Servs. (In re Advanced Mktg. Servs.), 360 B.R. 421, 427 (Bankr. D. Del. 2007) ("Although the Senior Facility may be satisfied at some future date, [the reclaiming seller] has failed to establish when that will occur and, more importantly, whether any of the Goods subject to its reclamation claim will still be in the Debtors' possession at that time."). In the instant dispute, the Prepetition Loan was fully paid with funds from the DIP Loan on the second day of the case. Consequently, the holding in Advanced Marketing is not applicable.

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that the reclaiming sellers did not act diligently in pursuing their claims, and was, therefore, mere dicta. Id. at 509-11.

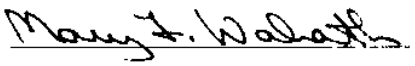
IV. CONCLUSION

For the foregoing reasons, the Court will overrule the Trustee's limited Objection to the Reclamation Claim.[5]

An appropriate Order follows.

Date: August 24, 2016

BY THE COURT:



Mary F. Walrath
United States Bankruptcy Judge

[5] The Court's ruling only deals with the Trustee's limited objection. The Trustee reserved all rights to object to the Reclamation Claim on other grounds. Therefore, the Court makes no findings whether the Reclamation Claim satisfies the other requirements of section 546(c) and state law.

of Title 20, Education, and provisions set out as a note under section 1078–1 of Title 20, were to cease to be effective Oct. 1, 1996, prior to repeal by Pub. L. 102–325, title XV, § 1558, July 23, 1992, 106 Stat. 841.

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by section 257 of Pub. L. 99–554 effective 30 days after Oct. 27, 1986, but not applicable to cases commenced under this title before that date, see section 302(a), (c)(1) of Pub. L. 99–554, set out as a note under section 581 of Title 28, Judiciary and Judicial Procedure.

Amendment by section 283 of Pub. L. 99–554 effective 30 days after Oct. 27, 1986, see section 302(a) of Pub. L. 99–554.

Pub. L. 99–509, title V, § 5001(b), Oct. 21, 1986, 100 Stat. 1912, provided that: "The amendments made by subsection (a) of this section [amending this section] shall apply only to petitions filed under section 362 of title 11, United States Code, which are made after August 1, 1986."

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

REPORT TO CONGRESSIONAL COMMITTEES

Pub. L. 99–509, title V, § 5001(a), Oct. 21, 1986, 100 Stat. 1911, directed Secretary of Transportation and Secretary of Commerce, before July 1, 1989, to submit reports to Congress on the effects of amendments to 11 U.S.C. 362 by this subsection.

§ 363. Use, sale, or lease of property

(a) In this section, "cash collateral" means cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents whenever acquired in which the estate and an entity other than the estate have an interest and includes the proceeds, products, offspring, rents, or profits of property and the fees, charges, accounts or other payments for the use or occupancy of rooms and other public facilities in hotels, motels, or other lodging properties subject to a security interest as provided in section 552(b) of this title, whether existing before or after the commencement of a case under this title.

(b)(1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate, except that if the debtor in connection with offering a product or a service discloses to an individual a policy prohibiting the transfer of personally identifiable information about individuals to persons that are not affiliated with the debtor and if such policy is in effect on the date of the commencement of the case, then the trustee may not sell or lease personally identifiable information to any person unless—

(A) such sale or such lease is consistent with such policy; or

(B) after appointment of a consumer privacy ombudsman in accordance with section 332, and after notice and a hearing, the court approves such sale or such lease—

(i) giving due consideration to the facts, circumstances, and conditions of such sale or such lease; and

(ii) finding that no showing was made that such sale or such lease would violate applicable nonbankruptcy law.

(2) If notification is required under subsection (a) of section 7A of the Clayton Act in the case of a transaction under this subsection, then—

(A) notwithstanding subsection (a) of such section, the notification required by such subsection to be given by the debtor shall be given by the trustee; and

(B) notwithstanding subsection (b) of such section, the required waiting period shall end on the 15th day after the date of the receipt, by the Federal Trade Commission and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, of the notification required under such subsection (a), unless such waiting period is extended—

(i) pursuant to subsection (e)(2) of such section, in the same manner as such subsection (e)(2) applies to a cash tender offer;

(ii) pursuant to subsection (g)(2) of such section; or

(iii) by the court after notice and a hearing.

(c)(1) If the business of the debtor is authorized to be operated under section 721, 1108, 1203, 1204, or 1304 of this title and unless the court orders otherwise, the trustee may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing.

(2) The trustee may not use, sell, or lease cash collateral under paragraph (1) of this subsection unless—

(A) each entity that has an interest in such cash collateral consents; or

(B) the court, after notice and a hearing, authorizes such use, sale, or lease in accordance with the provisions of this section.

(3) Any hearing under paragraph (2)(B) of this subsection may be a preliminary hearing or may be consolidated with a hearing under subsection (e) of this section, but shall be scheduled in accordance with the needs of the debtor. If the hearing under paragraph (2)(B) of this subsection is a preliminary hearing, the court may authorize such use, sale, or lease only if there is a reasonable likelihood that the trustee will prevail at the final hearing under subsection (e) of this section. The court shall act promptly on any request for authorization under paragraph (2)(B) of this subsection.

(4) Except as provided in paragraph (2) of this subsection, the trustee shall segregate and account for any cash collateral in the trustee's possession, custody, or control.

(d) The trustee may use, sell, or lease property under subsection (b) or (c) of this section—

(1) in the case of a debtor that is a corporation or trust that is not a moneyed business, commercial corporation, or trust, only in accordance with nonbankruptcy law applicable to the transfer of property by a debtor that is such a corporation or trust; and

(2) only to the extent not inconsistent with any relief granted under subsection (c), (d), (e), or (f) of section 362.

(e) Notwithstanding any other provision of this section, at any time, on request of an entity

that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest. This subsection also applies to property that is subject to any unexpired lease of personal property (to the exclusion of such property being subject to an order to grant relief from the stay under section 362).

(f) The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if—

(1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;

(2) such entity consents;

(3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;

(4) such interest is in bona fide dispute; or

(5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

(g) Notwithstanding subsection (f) of this section, the trustee may sell property under subsection (b) or (c) of this section free and clear of any vested or contingent right in the nature of dower or curtesy.

(h) Notwithstanding subsection (f) of this section, the trustee may sell both the estate's interest, under subsection (b) or (c) of this section, and the interest of any co-owner in property in which the debtor had, at the time of the commencement of the case, an undivided interest as a tenant in common, joint tenant, or tenant by the entirety, only if—

(1) partition in kind of such property among the estate and such co-owners is impracticable;

(2) sale of the estate's undivided interest in such property would realize significantly less for the estate than sale of such property free of the interests of such co-owners;

(3) the benefit to the estate of a sale of such property free of the interests of co-owners outweighs the detriment, if any, to such co-owners; and

(4) such property is not used in the production, transmission, or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light, or power.

(i) Before the consummation of a sale of property to which subsection (g) or (h) of this section applies, or of property of the estate that was community property of the debtor and the debtor's spouse immediately before the commencement of the case, the debtor's spouse, or a co-owner of such property, as the case may be, may purchase such property at the price at which such sale is to be consummated.

(j) After a sale of property to which subsection (g) or (h) of this section applies, the trustee shall distribute to the debtor's spouse or the co-owners of such property, as the case may be, and to the estate, the proceeds of such sale, less the costs and expenses, not including any compensation of the trustee, of such sale, according to the interests of such spouse or co-owners, and of the estate.

(k) At a sale under subsection (b) of this section of property that is subject to a lien that secures an allowed claim, unless the court for cause orders otherwise the holder of such claim may bid at such sale, and, if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property.

(*l*) Subject to the provisions of section 365, the trustee may use, sell, or lease property under subsection (b) or (c) of this section, or a plan under chapter 11, 12, or 13 of this title may provide for the use, sale, or lease of property, notwithstanding any provision in a contract, a lease, or applicable law that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title concerning the debtor, or on the appointment of or the taking possession by a trustee in a case under this title or a custodian, and that effects, or gives an option to effect, a forfeiture, modification, or termination of the debtor's interest in such property.

(m) The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

(n) The trustee may avoid a sale under this section if the sale price was controlled by an agreement among potential bidders at such sale, or may recover from a party to such agreement any amount by which the value of the property sold exceeds the price at which such sale was consummated, and may recover any costs, attorneys' fees, or expenses incurred in avoiding such sale or recovering such amount. In addition to any recovery under the preceding sentence, the court may grant judgment for punitive damages in favor of the estate and against any such party that entered into such an agreement in willful disregard of this subsection.

(o) Notwithstanding subsection (f), if a person purchases any interest in a consumer credit transaction that is subject to the Truth in Lending Act or any interest in a consumer credit contract (as defined in section 433.1 of title 16 of the Code of Federal Regulations (January 1, 2004), as amended from time to time), and if such interest is purchased through a sale under this section, then such person shall remain subject to all claims and defenses that are related to such consumer credit transaction or such consumer credit contract, to the same extent as such person would be subject to such claims and defenses of the consumer had such interest been purchased at a sale not under this section.

(p) In any hearing under this section—

(1) the trustee has the burden of proof on the issue of adequate protection; and

(2) the entity asserting an interest in property has the burden of proof on the issue of the validity, priority, or extent of such interest.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2572; Pub. L. 98–353, title III, §442, July 10, 1984, 98 Stat. 371;

Pub. L. 99–554, title II, § 257(k), Oct. 27, 1986, 100 Stat. 3115; Pub. L. 103–394, title I, § 109, title II, §§ 214(b), 219(c), title V, § 501(d)(8), Oct. 22, 1994, 108 Stat. 4113, 4126, 4129, 4144; Pub. L. 109–8, title II, §§ 204, 231(a), title XII, § 1221(a), Apr. 20, 2005, 119 Stat. 49, 72, 195; Pub. L. 111–327, § 2(a)(13), Dec. 22, 2010, 124 Stat. 3559.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 363(a) of the House amendment defines "cash collateral" as defined in the Senate amendment. The broader definition of "soft collateral" contained in H.R. 8200 as passed by the House is deleted to remove limitations that were placed on the use, lease, or sale of inventory, accounts, contract rights, general intangibles, and chattel paper by the trustee or debtor in possession.

Section 363(c)(2) of the House amendment is derived from the Senate amendment. Similarly, sections 363(c)(3) and (4) are derived from comparable provisions in the Senate amendment in lieu of the contrary procedure contained in section 363(c) as passed by the House. The policy of the House amendment will generally require the court to schedule a preliminary hearing in accordance with the needs of the debtor to authorize the trustee or debtor in possession to use, sell, or lease cash collateral. The trustee or debtor in possession may use, sell, or lease cash collateral in the ordinary course of business only "after notice and a hearing."

Section 363(f) of the House amendment adopts an identical provision contained in the House bill, as opposed to an alternative provision contained in the Senate amendment.

Section 363(h) of the House amendment adopts a new paragraph (4) representing a compromise between the House bill and Senate amendment. The provision adds a limitation indicating that a trustee or debtor in possession sell jointly owned property only if the property is not used in the production, transmission, or distribution for sale, of electric energy or of natural or synthetic gas for heat, light, or power. This limitation is intended to protect public utilities from being deprived of power sources because of the bankruptcy of a joint owner.

Section 363(k) of the House amendment is derived from the third sentence of section 363(e) of the Senate amendment. The provision indicates that a secured creditor may bid in the full amount of the creditor's allowed claim, including the secured portion and any unsecured portion thereof in the event the creditor is undersecured, with respect to property that is subject to a lien that secures the allowed claim of the sale of the property.

SENATE REPORT NO. 95–989

This section defines the right and powers of the trustee with respect to the use, sale or lease of property and the rights of other parties that have interests in the property involved. It applies in both liquidation and reorganization cases.

Subsection (a) defines "cash collateral" as cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents in which the estate and an entity other than the estate have an interest, such as a lien or a co-ownership interest. The definition is not restricted to property of the estate that is cash collateral on the date of the filing of the petition. Thus, if "non-cash" collateral is disposed of and the proceeds come within the definition of "cash collateral" as set forth in this subsection, the proceeds would be cash collateral as long as they remain subject to the original lien on the "non-cash" collateral under section 552(b). To illustrate, rents received from real property before or after the commencement of the case would be cash collateral to the extent that they are subject to a lien.

Subsection (b) permits the trustees to use, sell, or lease, other than in the ordinary course of business, property of the estate upon notice and opportunity for objections and hearing thereon.

Subsection (c) governs use, sale, or lease in the ordinary course of business. If the business of the debtor is authorized to be operated under § 721, 1108, or 1304 of the bankruptcy code, then the trustee may use, sell, or lease property in the ordinary course of business or enter into ordinary course transactions without need for notice and hearing. This power is subject to several limitations. First, the court may restrict the trustee's powers in the order authorizing operation of the business. Second, with respect to cash collateral, the trustee may not use, sell, or lease cash collateral except upon court authorization after notice and a hearing, or with the consent of each entity that has an interest in such cash collateral. The same preliminary hearing procedure in the automatic stay section applies to a hearing under this subsection. In addition, the trustee is required to segregate and account for any cash collateral in the trustee's possession, custody, or control.

Under subsections (d) and (e), the use, sale, or lease of property is further limited by the concept of adequate protection. Sale, use, or lease of property in which an entity other than the estate has an interest may be effected only to the extent not inconsistent with any relief from the stay granted to that interest's holder. Moreover, the court may prohibit or condition the use, sale, or lease as is necessary to provide adequate protection of that interest. Again, the trustee has the burden of proof on the issue of adequate protection. Subsection (e) also provides that where a sale of the property is proposed, an entity that has an interest in such property may bid at the sale thereof and set off against the purchase price up to the amount of such entity's claim. No prior valuation under section 506(a) would limit this bidding right, since the bid at the sale would be determinative of value.

Subsection (f) permits sale of property free and clear of any interest in the property of an entity other than the estate. The trustee may sell free and clear if applicable nonbankruptcy law permits it, if the other entity consents, if the interest is a lien and the sale price of the property is greater than the amount secured by the lien, if the interest is in bona fide dispute, or if the other entity could be compelled to accept a money satisfaction of the interest in a legal or equitable proceeding. Sale under this subsection is subject to the adequate protection requirement. Most often, adequate protection in connection with a sale free and clear of other interests will be to have those interests attach to the proceeds of the sale.

At a sale free and clear of other interests, any holder of any interest in the property being sold will be permitted to bid. If that holder is the high bidder, he will be permitted to offset the value of his interest against the purchase price of the property. Thus, in the most common situation, a holder of a lien on property being sold may bid at the sale and, if successful, may offset the amount owed to him that is secured by the lien on the property (but may not offset other amounts owed to him) against the purchase price, and be liable to the trustee for the balance of the sale price, if any.

Subsection (g) permits the trustee to sell free and clear of any vested or contingent right in the nature of dower or curtesy.

Subsection (h) permits sale of a co-owner's interest in property in which the debtor had an undivided ownership interest such as a joint tenancy, a tenancy in common, or a tenancy by the entirety. Such a sale is permissible only if partition is impracticable, if sale of the estate's interest would realize significantly less for the estate that sale of the property free of the interests of the co-owners, and if the benefit to the estate of such a sale outweighs any detriment to the co-owners. This subsection does not apply to a co-owner's interest in a public utility when a disruption of the utilities services could result.

Subsection (i) provides protections for co-owners and spouses with dower, curtesy, or community property rights. It gives a right of first refusal to the co-owner

or spouse at the price at which the sale is to be consummated.

Subsection (j) requires the trustee to distribute to the spouse or co-owner the appropriate portion of the proceeds of the sale, less certain administrative expenses.

Subsection (k) [enacted as (*l*)] permits the trustee to use, sell, or lease property notwithstanding certain bankruptcy or ipso facto clauses that terminate the debtor's interest in the property or that work a forfeiture or modification of that interest. This subsection is not as broad as the anti-ipso facto provision in proposed 11 U.S.C. 541(c)(1).

Subsection (*l*) [enacted as (m)] protects good faith purchasers of property sold under this section from a reversal on appeal of the sale authorization, unless the authorization for the sale and the sale itself were stayed pending appeal. The purchaser's knowledge of the appeal is irrelevant to the issue of good faith.

Subsection (m) [enacted as (n)] is directed at collusive bidding on property sold under this section. It permits the trustee to void a sale if the price of the sale was controlled by an agreement among potential bidders. The trustees may also recover the excess of the value of the property over the purchase price, and may recover any costs, attorney's fees, or expenses incurred in voiding the sale or recovering the difference. In addition, the court is authorized to grant judgment in favor of the estate and against the collusive bidder if the agreement controlling the sale price was entered into in willful disregard of this subsection. The subsection does not specify the precise measure of damages, but simply provides for punitive damages, to be fixed in light of the circumstances.

REFERENCES IN TEXT

Section 7A of the Clayton Act, referred to in subsec. (b)(2), is classified to section 18a of Title 15, Commerce and Trade.

The Truth in Lending Act, referred to in subsec. (*o*), is title I of Pub. L. 90–321, May 29, 1968, 82 Stat. 146, as amended, which is classified generally to subchapter I (§1601 et seq.) of chapter 41 of Title 15, Commerce and Trade. For complete classification of this Act to the Code, see Short Title note set out under section 1601 of Title 15 and Tables.

AMENDMENTS

2010—Subsec. (d). Pub. L. 111–327, §2(a)(13)(A), struck out "only" before dash at end of introductory provisions.

Subsec. (d)(1). Pub. L. 111–327, §2(a)(13)(B), amended par. (1) generally. Prior to amendment, par. (1) read as follows: "in accordance with applicable nonbankruptcy law that governs the transfer of property by a corporation or trust that is not a moneyed, business, or commercial corporation or trust; and".

Subsec. (d)(2). Pub. L. 111–327, §2(a)(13)(C), inserted "only" before "to the extent".

2005—Subsec. (b)(1). Pub. L. 109–8, §231(a), substituted ", except that if the debtor in connection with offering a product or a service discloses to an individual a policy prohibiting the transfer of personally identifiable information about individuals to persons that are not affiliated with the debtor and if such policy is in effect on the date of the commencement of the case, then the trustee may not sell or lease personally identifiable information to any person unless—" and subpars. (A) and (B) for period at end.

Subsec. (d). Pub. L. 109–8, §1221(a), substituted "only—" and pars. (1) and (2) for "only to the extent not inconsistent with any relief granted under section 362(c), 362(d), 362(e), or 362(f) of this title."

Subsecs. (*o*), (p). Pub. L. 109–8, §204, added subsec. (*o*) and redesignated former subsec. (*o*) as (p).

1994—Subsec. (a). Pub. L. 103–394, §214(b), inserted "and the fees, charges, accounts or other payments for the use or occupancy of rooms and other public facilities in hotels, motels, or other lodging properties" after "property".

Subsec. (b)(2). Pub. L. 103–394, §§109, 501(d)(8)(A), struck out "(15 U.S.C. 18a)" after "Clayton Act" and amended subpars. (A) and (B) generally. Prior to amendment, subpars. (A) and (B) read as follows:

"(A) notwithstanding subsection (a) of such section, such notification shall be given by the trustee; and

"(B) notwithstanding subsection (b) of such section, the required waiting period shall end on the tenth day after the date of the receipt of such notification, unless the court, after notice and hearing, orders otherwise."

Subsec. (c)(1). Pub. L. 103–394, §501(d)(8)(B), substituted "1203, 1204, or 1304" for "1304, 1203, or 1204".

Subsec. (e). Pub. L. 103–394, §219(c), inserted at end "This subsection also applies to property that is subject to any unexpired lease of personal property (to the exclusion of such property being subject to an order to grant relief from the stay under section 362)."

1986—Subsec. (c)(1). Pub. L. 99–554, §257(k)(1), inserted reference to sections 1203 and 1204 of this title.

Subsec. (*l*). Pub. L. 99–554, §257(k)(2), inserted reference to chapter 12.

1984—Subsec. (a). Pub. L. 98–353, §442(a), inserted "whenever acquired" after "equivalents" and "and includes the proceeds, products, offspring, rents, or profits of property subject to a security interest as provided in section 552(b) of this title, whether existing before or after the commencement of a case under this title" after "interest".

Subsec. (b). Pub. L. 98–353, §442(b), designated existing provisions as par. (1) and added par. (2).

Subsec. (e). Pub. L. 98–353, §442(c), inserted ", with or without a hearing," after "court" and struck out "In any hearing under this section, the trustee has the burden of proof on the issue of adequate protection".

Subsec. (f)(3). Pub. L. 98–353, §442(d), substituted "all liens on such property" for "such interest".

Subsec. (h). Pub. L. 98–353, §442(e), substituted "at the time of" for "immediately before".

Subsec. (j). Pub. L. 98–353, §442(f), substituted "compensation" for "compenation".

Subsec. (k). Pub. L. 98–353, §442(g), substituted "unless the court for cause orders otherwise the holder of such claim may bid at such sale, and, if the holder" for "if the holder".

Subsec. (*l*). Pub. L. 98–353, §442(h), substituted "Subject to the provisions of section 365, the trustee" for "The trustee", "condition" for "conditions", "or the taking" for "a taking", and "interest" for "interests".

Subsec. (n). Pub. L. 98–353, §442(i), substituted "avoid" for "void", "avoiding" for "voiding", and "In addition to any recovery under the preceding sentence, the court may grant judgment for punitive damages in favor of the estate and against any such party that entered into such an agreement in willful disregard of this subsection" for "The court may grant judgment in favor of the estate and against any such party that entered into such agreement in willful disregard of this subsection for punitive damages in addition to any recovery under the preceding sentence".

Subsec. (*o*). Pub. L. 98–353, §442(j), added subsec. (*o*).

EFFECTIVE DATE OF 2005 AMENDMENT

Pub. L. 109–8, title XII, §1221(d), Apr. 20, 2005, 119 Stat. 196, provided that: "The amendments made by this section [amending this section and sections 541 and 1129 of this title and enacting provisions set out as a note under this section] shall apply to a case pending under title 11, United States Code, on the date of enactment of this Act [Apr. 20, 2005], or filed under that title on or after that date of enactment, except that the court shall not confirm a plan under chapter 11 of title 11, United States Code, without considering whether this section would substantially affect the rights of a party in interest who first acquired rights with respect to the debtor after the date of the filing of the petition. The parties who may appear and be heard in a proceeding under this section include the attorney general of the State in which the debtor is incorporated, was formed, or does business."

Amendment by sections 204 and 231(a) of Pub. L. 109–8 effective 180 days after Apr. 20, 2005, and not applicable

with respect to cases commenced under this title before such effective date, except as otherwise provided, see section 1501 of Pub. L. 109–8, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by Pub. L. 99–554 effective 30 days after Oct. 27, 1986, but not applicable to cases commenced under this title before that date, see section 302(a), (c)(1) of Pub. L. 99–554, set out as a note under section 581 of Title 28, Judiciary and Judicial Procedure.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

CONSTRUCTION OF SECTION 1221 OF PUB. L. 109–8

Pub. L. 109–8, title XII, §1221(e), Apr. 20, 2005, 119 Stat. 196, provided that: "Nothing in this section [see Effective Date of 2005 Amendment note above] shall be construed to require the court in which a case under chapter 11 of title 11, United States Code, is pending to remand or refer any proceeding, issue, or controversy to any other court or to require the approval of any other court for the transfer of property."

§ 364. Obtaining credit

(a) If the trustee is authorized to operate the business of the debtor under section 721, 1108, 1203, 1204, or 1304 of this title, unless the court orders otherwise, the trustee may obtain unsecured credit and incur unsecured debt in the ordinary course of business allowable under section 503(b)(1) of this title as an administrative expense.

(b) The court, after notice and a hearing, may authorize the trustee to obtain unsecured credit or to incur unsecured debt other than under subsection (a) of this section, allowable under section 503(b)(1) of this title as an administrative expense.

(c) If the trustee is unable to obtain unsecured credit allowable under section 503(b)(1) of this title as an administrative expense, the court, after notice and a hearing, may authorize the obtaining of credit or the incurring of debt—

(1) with priority over any or all administrative expenses of the kind specified in section 503(b) or 507(b) of this title;

(2) secured by a lien on property of the estate that is not otherwise subject to a lien; or

(3) secured by a junior lien on property of the estate that is subject to a lien.

(d)(1) The court, after notice and a hearing, may authorize the obtaining of credit or the incurring of debt secured by a senior or equal lien on property of the estate that is subject to a lien only if—

(A) the trustee is unable to obtain such credit otherwise; and

(B) there is adequate protection of the interest of the holder of the lien on the property of the estate on which such senior or equal lien is proposed to be granted.

(2) In any hearing under this subsection, the trustee has the burden of proof on the issue of adequate protection.

(e) The reversal or modification on appeal of an authorization under this section to obtain credit or incur debt, or of a grant under this section of a priority or a lien, does not affect the validity of any debt so incurred, or any priority or lien so granted, to an entity that extended such credit in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and the incurring of such debt, or the granting of such priority or lien, were stayed pending appeal.

(f) Except with respect to an entity that is an underwriter as defined in section 1145(b) of this title, section 5 of the Securities Act of 1933, the Trust Indenture Act of 1939, and any State or local law requiring registration for offer or sale of a security or registration or licensing of an issuer of, underwriter of, or broker or dealer in, a security does not apply to the offer or sale under this section of a security that is not an equity security.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2574; Pub. L. 99–554, title II, §257(*l*), Oct. 27, 1986, 100 Stat. 3115; Pub. L. 103–394, title V, §501(d)(9), Oct. 22, 1994, 108 Stat. 4144.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 364(f) of the House amendment is new. This provision continues the exemption found in section 3(a)(7) of the Securities Act of 1933 [15 U.S.C. 77c(a)(7)] for certificates of indebtedness issued by a trustee in bankruptcy. The exemption applies to any debt security issued under section 364 of title 11. The section does not intend to change present law which exempts such securities from the Trust Indenture Act, 15 U.S.C. 77aaa, et seq. (1976).

SENATE REPORT NO. 95–989

This section is derived from provisions in current law governing certificates of indebtedness, but is much broader. It governs all obtaining of credit and incurring of debt by the estate.

Subsection (a) authorizes the obtaining of unsecured credit and the incurring of unsecured debt in the ordinary course of business if the business of the debtor is authorized to be operated under section 721, 1108, or 1304. The debts so incurred are allowable as administrative expenses under section 503(b)(1). The court may limit the estate's ability to incur debt under this subsection.

Subsection (b) permits the court to authorize the trustee to obtain unsecured credit and incur unsecured debts other than in the ordinary course of business, such as in order to wind up a liquidation case, or to obtain a substantial loan in an operating case. Debt incurred under this subsection is allowable as an administrative expense under section 503(b)(1).

Subsection (c) is closer to the concept of certificates of indebtedness in current law. It authorizes the obtaining of credit and the incurring of debt with some special priority, if the trustee is unable to obtain unsecured credit under subsection (a) or (b). The various priorities are (1) with priority over any or all administrative expenses: (2) secured by a lien on unencumbered property of the estate; or (3) secured by a junior lien on encumbered property. The priorities granted under this subsection do not interfere with existing property rights.

Subsection (d) grants the court the authority to authorize the obtaining of credit and the incurring of debt with a superiority, that is a lien on encumbered prop-

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
SPORTS AUTHORITY HOLDINGS, INC., *et al.*,[1]	Case No. 16-_____ (___)
Debtors.	(Joint Administration Requested)

DEBTORS' MOTION FOR INTERIM AND FINAL ORDERS (A) AUTHORIZING THE DEBTORS TO (I) CONTINUE TO SELL CONSIGNED GOODS IN THE ORDINARY COURSE OF BUSINESS FREE AND CLEAR OF ALL LIENS, CLAIMS AND ENCUMBRANCES AND (II) GRANT ADMINISTRATIVE EXPENSE PRIORITY TO CONSIGNMENT VENDORS FOR CONSIGNED GOODS DELIVERED POSTPETITION; AND (B) GRANT REPLACEMENT LIENS TO CONSIGNMENT VENDORS WITH PERFECTED SECURITY INTERESTS IN CONSIGNED GOODS AND/OR REMIT THE CONSIGNMENT SALE PRICE ARISING FROM SALE OF CONSIGNED GOODS TO PUTATIVE CONSIGNMENT VENDORS

Sports Authority Holdings, Inc. and its affiliated debtors and debtors in possession in the above-captioned chapter 11 cases (collectively, the "Debtors") hereby move this Court (this "Motion") for entry of an interim order (the "Interim Order") and a final order (the "Final Order"), substantially in the forms annexed hereto as Exhibit A and Exhibit B, respectively, pursuant to sections 105, 363, 503, 1107 and 1108 of title 11 of the United States Code (the "Bankruptcy Code") and Rules 2002, 4001, and 6004 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), (a) authorizing the Debtors to (i) continue to sell inventory delivered to the Debtors on consignment (the "Consigned Goods") by various vendors (the "Consignment Vendors") in the ordinary course of business, free and clear of all liens, claims and encumbrances, and (ii) grant administrative expense priority under section 503(b) of the

[1] The Debtors and the last four digits of their respective taxpayer identification numbers are as follows: Sports Authority Holdings, Inc. (9008); Slap Shot Holdings, Corp. (8209); The Sports Authority, Inc. (2802); TSA Stores, Inc. (1120); TSA Gift Card, Inc. (1918); TSA Ponce, Inc. (4817); and TSA Caribe, Inc. (5664). The headquarters for the above-captioned Debtors is located at 1050 West Hampden Avenue, Englewood, Colorado 80110.

Bankruptcy Code to Consignment Vendors for all undisputed obligations arising from Consigned Goods delivered to the Debtors after the Petition Date (as defined below); and (b) grant replacement liens to Consignment Vendors who have valid, enforceable, non-avoidable and perfected lien on any Consigned Goods that are sold and/or remit the Consignment Sale Price (as defined below) to putative Consignment Vendors with the consent of the Debtors' secured lenders that might otherwise have a lien on the Consigned Goods.

In support of this Motion, the Debtors rely upon and incorporate by reference the *Declaration of Jeremy Aguilar in Support of the Debtors' Chapter 11 Petitions and Requests for First Day Relief* (the "First Day Declaration"), which was filed with the Court concurrently herewith. In further support of this Motion, the Debtors respectfully represent as follows:

JURISDICTION AND VENUE

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334(b) and 157, and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware dated as of February 29, 2012. This is a core proceeding pursuant to 28 U.S.C. § 157(b), and pursuant to Rule 9013-1(f) of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the "Local Rules"), the Debtors consent to the entry of a final order by the Court in connection with this Motion to the extent that it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments in connection herewith consistent with Article III of the United States Constitution. Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409. The statutory and legal predicates for the relief requested herein are sections 105, 363, 503, 1107 and 1108 of the Bankruptcy Code and Bankruptcy Rules 2002, 4001, and 6004.

BACKGROUND

A. General Background

2. On the date hereof (the "Petition Date"), each of the Debtors commenced a voluntary case under chapter 11 of the Bankruptcy Code. Pursuant to sections 1107(a) and 1108 of the Bankruptcy Code, the Debtors are continuing to manage their financial affairs as debtors in possession.

3. Contemporaneously herewith, the Debtors filed a motion seeking joint administration of their chapter 11 cases (collectively, the "Chapter 11 Cases") pursuant to Bankruptcy Rule 1015(b) and Local Rule 1015-1. No trustee, examiner, or official committee of unsecured creditors has been appointed in these Chapter 11 Cases.

4. Information regarding the Debtors' history and business operations, capital structure and primary secured indebtedness, and the events leading up to the commencement of these Chapter 11 Cases, can be found in the First Day Declaration.

B. Consigned Goods; Consignment Vendors

5. A substantial portion of the Debtors' business involves the sale of Consigned Goods that are delivered to the Debtors by approximately 170 Consignment Vendors and sold in the Debtors' retail stores and online. The Debtors estimate that, as of the Petition Date, the Debtors possess approximately 8.5 million units of Consigned Goods with an invoice cost to the Debtors of approximately $84.8 million in the aggregate. The Debtors store, maintain, and insure the Consigned Goods at the Debtors' sole expense.

6. The Debtors' relationships with their Consignment Vendors allow the Debtors to receive and resell a wide range of popular goods in their stores without the need to commit working capital up front to cover the cost of selling such inventory and the constraints that such commitment would otherwise impose on the Debtors. Consigned Goods include, without

limitation, (a) active wear and outerwear for men, women, and children; (b) seasonal accessories; (c) recreational gear for a variety of outdoor activities, including camping, water sports, fishing, and hunting; (d) gear for team sports including baseball, soccer, football, and basketball; (e) gear for indoor exercise and fitness activities; (f) golf gear and apparel; and (g) select footwear, socks, insoles, and accessories. The Debtors rely on their ability to provide a wide selection of goods to meet their customers' needs and drive customer traffic, and they would be unable to do this without the Consigned Goods. For these reasons, the Debtors' relationships with the Consignment Vendors are invaluable.

7. In the ordinary course of business, the Debtors and each Consignment Vendor enter into an agreement, a countersigned "pay by scan" vendor deal sheet summary, or another similar arrangement (each, a "Consignment Agreement" and collectively, the "Consignment Agreements"), which, along with the Uniform Commercial Code (the "U.C.C."), governs the Debtors' respective relationship with such Consignment Vendor. The agreed-upon invoice price that the Debtors owe to the Consignment Vendors on account of all Consigned Goods is collectively referred to herein as the "Consignment Sale Price." Pursuant to the terms of each Consignment Agreement, upon the sale of any Consigned Goods, the Debtors remit the applicable Consignment Sale Price per item sold to the applicable Consignment Vendors in the ordinary course of business in accordance with the applicable Consignment Agreements. Any proceeds from the sale of any Consigned Goods that exceed the applicable Consignment Sale Price constitute the Debtors' gross profits (collectively, the "Consignment Proceeds"). During fiscal year 2015 which ended January 30, 2016, the sale of Consigned Goods resulted in total revenues of approximately $244 million and generated approximately $128 million in Consignment Proceeds for the Debtors.

8. The Debtors depend upon the continued availability of Consigned Goods so that they can continue to offer the fullest range of retail sporting goods to their customers at a time when customer retention is particularly critical to the success of the Debtors' value maximization efforts. The Debtors have an immediate need, especially at the outset of these Chapter 11 Cases, to continue to sell the Consigned Goods in the ordinary course of business to prevent disruption to the Debtors' business and to preserve the value of the Debtors' going concern for the benefit of the estates and all stakeholders. Without the ability to sell Consigned Goods, the Debtors would experience significant loss in sales volume, disrupting the Debtors' business and jeopardizing their efforts to maximize value. Therefore, the Debtors request authorization to continue to sell Consigned Goods in the ordinary course of business and in accordance with the Debtors' prepetition practices and procedures, as modified herein.

9. It is equally critical that Consignment Vendors continue to deliver Consigned Goods to the Debtors upon request during the postpetition period to replenish the Debtors' inventory and enable the Debtors to continuously offer the fullest range of goods to their customers. To that end, the Debtors request authorization to negotiate acceptable terms with certain Consignment Vendors whereby such Consignment Vendors will deliver Consigned Goods to the Debtors during the postpetition period. In exchange for the postpetition delivery of Consigned Goods, the Debtors seek the Court's authorization to grant to applicable Consignment Vendors administrative expense priority status under section 503(b) of the Bankruptcy Code for all undisputed obligations arising from the delivery of Consigned Goods to the Debtors during the postpetition period.

C. The Debtors' Proposed Replacement Liens and/or Payment of Consignment Claims

10. The Debtors acknowledge that some Consignment Vendors may have security interests or liens in certain Consigned Goods that were delivered to the Debtors prior to the

Petition Date, while other Consignment Vendors may either have security interests that are not valid, enforceable, non-avoidable and perfected, or have no security interests in any Consigned Goods. The Debtors propose to grant to each applicable Consignment Vendor a replacement lien on the proceeds of the applicable Consigned Goods, up to the amount of the applicable Consignment Sale Price (such replacement lien, a "Consignment Replacement Lien"), which would have the same validity and priority as the liens that existed and were held by the applicable Consignment Vendor on such Consigned Goods immediately prior to the sale of such Consigned Goods in the Debtors' stores, and which would be subject to any claims and defenses the Debtors or other parties may have with respect to such liens.[2]

11. To preserve the status quo, the Debtors propose to deposit and set aside on a weekly basis all Consignment Proceeds into a segregated account, which will constitute the "cash collateral," as such term is defined in section 363 of the Bankruptcy Code (the "Cash Collateral") of the Debtors' secured lenders that may have liens on Consigned Goods and proceeds arising from any sale thereof (collectively, the "Secured Lenders").[3]

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[2] Pursuant to Local Rule 4001-2(a)(i)(G), the Debtors must highlight proposed adequate protection provisions that would prime any secured lien without the consent of the applicable lien holder. Here, the Debtors do not seek to prime any other liens. Instead, the Debtors seek replacement liens on the applicable Consignment Proceeds for Consignment Vendors that hold valid, enforceable, non-avoidable and perfected lien on Consigned Goods, with such liens having the same validity and priority such liens enjoyed before the sale of the applicable Consigned Goods, and subject to applicable defenses thereto.

[3] As used in this Motion, the "Secured Lenders" are (a) Bank of America, N.A., as agent under that certain Second Amended and Restated Credit Agreement, dated as of May 17, 2012 (as amended, amended and restated, supplemented or otherwise modified from time to time, the "ABL Credit Agreement") by and among The Sports Authority, Inc. and TSA Stores, Inc., as borrowers, Slap Shot Holdings Corp. and TSA Gift Card, Inc., as guarantors, Bank of America, N.A., as administrative agent, and the lenders party thereto, which provides up to $650 million in aggregate loans in the form of an asset-based revolving credit facility and matures on May 17, 2017; (b) Wells Fargo Bank, National Association, as FILO Agent under that certain Second Amendment to the ABL Credit Agreement by and among The Sports Authority, Inc. and TSA Stores, Inc. as borrowers, Slap Shot Holdings Corp. and TSA Gift Card, Inc., as guarantors, Bank of America, N.A. as administrative agent, Wells Fargo Bank, National Association, as FILO agent (the "FILO Agent"), the lenders under the ABL Credit Agreement, and the additional lenders party thereto, which provided for the addition to the ABL Credit Agreement of a $95 million first-in, last-out term loan tranche; (c) Wilmington Savings Fund Society, FSB, as agent under that certain Amended and Restated Credit Agreement, dated as of November 16, 2010, by and among The Sports Authority, Inc., as borrower, Slap Shot Holdings Corp., TSA Stores, Inc., and

12. In addition, upon obtaining consent from the Secured Lenders, the Debtors seek authority to remit the Consignment Sale Price to applicable putative Consignment Vendors in the ordinary course. The Debtors will use reasonable best efforts where appropriate and practicable to condition such payments on the applicable Consignment Vendor's agreement to (a) accept such payment in satisfaction of all or a part of its prepetition claim against the Debtors, and (b) continue to provide goods to the Debtors during these Chapter 11 Cases on terms that are no less favorable to the Debtors than those practices and programs in place during the one-year period immediately preceding the Petition Date (the "Customary Trade Terms"). Moreover, the Debtors' remittance of the Consignment Sale Price to Consignment Vendors pursuant to the Interim Order or the Final Order shall be premised on the assumption that the applicable Consignment Vendor has taken the necessary steps to properly perfect its interest in the applicable Consigned Goods. In the event that a Consignment Vendor accepts payment pursuant to the Interim Order or the Final Order and it is later determined that such Consignment Vendor did not have a valid, enforceable, non-avoidable and perfected lien on any Consigned Goods, then the Debtors reserve the right to seek to have the payment recharacterized as an improper postpetition transfer on account of a prepetition claim and to seek either to (a) recover such improper Postpetition transfer or (b) have the improper Postpetition transfer applied to any outstanding postpetition balance relating to such Consignment Vendor.[4]

TSA Gift Card, Inc. as guarantors, Bank of America, N.A., as administrative agent, and the lenders named therein (the "Term Lenders"), whereby the Term Lenders extended a term loan in the original principal amount of approximately $300 million; (d) Bank of America, N.A. as Administrative Agent and Collateral Agent (in such capacity, the "DIP Agent"), and the revolving lenders parties thereto (the "Revolving DIP Lenders"); and (e) Wells Fargo Bank, National Association as FILO Agent (the "DIP FILO Agent"), and the FILO lenders parties thereto (the "FILO DIP Lenders").

[4] Concurrently herewith, the Debtors filed the *Debtors' Motion for Interim and Final Orders Authorizing Debtors to Pay Certain Prepetition Claims of Critical Vendors* (the "Critical Vendor Motion"). The Debtors may alternatively determine that certain Consignment Vendors qualify as "critical vendors" as such term is used in

RELIEF REQUESTED

13. The Debtors seek entry of the Interim Order and the Final Order (a) authorizing the Debtors to (i) continue to sell Consigned Goods in the ordinary course of business, free and clear of all liens, claims and encumbrances, and (ii) grant administrative expense priority under section 503(b) of the Bankruptcy Code to Consignment Vendors for all undisputed obligations arising from the delivery of Consigned Goods to the Debtors after the Petition Date; and (b) granting replacement liens to Consignment Vendors that have valid, enforceable, non-avoidable and perfected lien on any Consigned Goods that are sold and/or remitting the Consignment Sale Price to putative Consignment Vendors upon obtaining the appropriate consents from the Debtors' Secured Lenders.

BASIS FOR RELIEF REQUESTED

A. The Continued Sale of Consigned Goods is Authorized Pursuant to Sections 105(a) and 363(b) of the Bankruptcy Code

14. Section 105(a) of the Bankruptcy Code provides, in relevant part, that "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). Section 363(b) permits a debtor to use, sell, or lease, estate property "other than in the ordinary course of business" after notice and a hearing. 11 U.S.C. § 363(b)(1). Courts have authorized relief under section 363(b) where a debtor demonstrated a sound business justification for such relief. *See Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1071 (2d Cir. 1983) ("The rule we adopt requires that a judge determining a § 363(b) application expressly find from the evidence presented before him at the hearing a good business reason to grant such an application."); *In re*

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the Critical Vendor Motion, and may seek to pay such Consignment Vendors on account of certain prepetition claims under the Court order granting the relief requested in the Critical Vendor Motion.

Ionosphere Clubs, Inc., 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1985) ("[T]he debtor must articulate some business justification, other than mere appeasement of major creditors.").

15. "The business judgment rule 'is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interest of the company.'" *Official Comm. of Subordinated Bondholders v. Integrated Res., Inc.,* 147 B.R. 650, 656 (S.D.N.Y. 1992) (quoting *Smith v. Van Gorkom,* 488 A.2d 858, 872 (Del. 1985)). The business judgment rule applies in chapter 11 cases. *See Official Comm. of Subordinated Bondholders v. Integrated Res., Inc.,* 147 B.R. 650, 656 (S.D.N.Y. 1992) ("Delaware business judgment rule principles have 'vitality by analogy' in Chapter 11."); *Comm. of Asbestos-Related Litigants and/or Creditors v. Johns-Manville Corp. (In re Johns-Manville Corp.),* 60 B.R. 612, 615-16 (Bankr. S.D.N.Y. 1986) ("[T]he Code favors the continued operation of a business by a debtor and a presumption of reasonableness attaches to a Debtor's management decisions."). Once a debtor has articulated a valid business justification, the court accords great deference to such judgment, even in the context of chapter 11 cases. *See Integrated Res.,* 147 B.R. at 656; *In re Johns-Manville Corp.,* 60 B.R. at 615-16. The Third Circuit has explained that "under normal circumstances the court would defer to the trustee's judgment so long as there is a legitimate business justification" with respect to sales under section 363. *Myers v. Martin (In re Martin)*, 91 F.3d 389, 395 (3d Cir. 1996).

16. Here, the Debtors believe that it is in their best interests and the best interests of their estates to continue selling Consigned Goods in the ordinary course of business and in accordance with their prepetition practices and procedures to maximize sales, retain their customer base by offering the widest possible selection of sporting goods, and thereby minimize disruption to their business. The Debtors further believe that it is critical that they have access to

all proceeds from sales in the ordinary course of business to maintain sufficient liquidity to meet their working capital needs, augment their restructuring efforts, and preserve the going concern value of their business for the benefit of all stakeholders.

17. This court and others have permitted other similarly situated debtors to continue to sell consigned goods in the ordinary course of their business in several chapter 11 cases involving retail debtors. *See, e.g.*, *In re Ultra Stores, Inc.*, Case No. 09-11854 (Bankr. S.D.N.Y. Apr. 14, 2009) (interim order), (Bankr. S.D.N.Y. Apr. 28, 2009) (final order); *In re Tweeter Opco, LLC*, Case No. 08-12646 (Bankr. D. Del. Nov. 26, 2008) (interim order), (Bankr. D. Del. Dec. 1, 2008 (final order); *In re Friedman's Inc.*, Case No. 08-10161 (Bankr. D. Del. Jan. 29, 2008) (interim order), (Bankr. D. Del. Feb. 13, 2008) (final order); *In re Whitehall Jewelers Holdings, Inc.*, Case No. 08-11261 (Bankr. D. Del. June 24, 2008) (interim order), (Bankr. D. Del. July 18, 2008) (final order); *In re Hancock Fabrics, Inc.*, Case No. 07-10353 (Bankr. D. Del. Apr. 13, 2007).

18. Accordingly, the Debtors submit that it essential to their restructuring efforts that they have continued ability to sell Consigned Goods in the ordinary course of business and that there is sufficient business justification for such sale authority.

B. Pursuant to Section 503(b) of the Bankruptcy Code, the Debtors May Grant Administrative Expense Priority for Obligations Arising From the Postpetition Delivery of Consigned Goods

19. Pursuant to section 503(b) of the Bankruptcy Code, certain obligations that arise in connection with the postpetition delivery of goods and services, including goods ordered prepetition, are entitled to treatment as administrative expense priority claims because they benefit the estate postpetition. Accordingly, granting administrative expense priority to Consignment Vendors that deliver Consigned Goods after the Petition Date for obligations arising from the delivery of such goods will not provide such Consignment Vendors with any

greater priority than they would otherwise have if the relief requested herein were not granted. Therefore, the requested relief will not prejudice any other party in interest in these Chapter 11 Cases. The Debtors' ability to receive Consigned Goods is critical to the Debtors' ability to continue their operations without substantial disruption and delays. Therefore, the Debtors submit that the Court should confirm the administrative expense priority of the obligations arising from Consigned Goods delivered after the Petition Date to the Debtors upon their request. This court and others have granted similar relief to retail debtors. *See, e.g.*, *In re Northstar Aerospace (USA) Inc.*, Case No. 12-11817 (Bankr. D. Del. June 15, 2012); *In re Ultra Stores, Inc.*, Case No. 09-11854 (Bankr. S.D.N.Y. Apr. 14, 2009) (interim order), (Bankr. S.D.N.Y. Apr. 28, 2009) (final order).

C. Sale of Consigned Goods Free and Clear of Liens, Claims and Encumbrances is Authorized Under Section 363 of the Bankruptcy Code

20. A debtor in possession may sell property under sections 363(b) and 363(f) of the Bankruptcy Code "free and clear of any interest in such property of an entity other than the estate" if any one of the following conditions is satisfied:

(1) applicable non-bankruptcy law permits the sale of such property free and clear of such interest;

(2) such entity consents;

(3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;

(4) such interest is a bona fide dispute; or

(5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

11 U.S.C. § 363(f).

21. Although the term "any interest" is not defined in the Bankruptcy Code, the Third Circuit has noted the trend in modern cases toward a "broader interpretation which includes other

obligations that may flow from ownership of the property." *Folger Adam Security, Inc. v. DeMatteis/MacGregor, JV*, 209 F.3d 252, 258-59 (3d Cir. 2000). The scope of section 363(f) is not limited to in rem interests in a debtor's assets. *Id.* (citing *In re Leckie Smokeless Coal Co.,* 99 F.3d 573, 581-82 (4th Cir. 1996)). A debtor can therefore sell its assets under section 363(f) free and clear of successor liability that otherwise would have arisen under federal statute. *Id.*

22. The Debtors request approval to continue to sell Consigned Goods free and clear of any liens, claims and encumbrances in accordance with section 363(f) of the Bankruptcy Code. The Debtors anticipate that they will be able to satisfy one or more of the conditions set forth in section 363(f) in connection with any liens, claims and encumbrances a party may assert with respect to any Consigned Goods. Furthermore, the Debtors propose that any such liens, claims, and encumbrances be transferred and attached to the proceeds of Consigned Goods, up to the amount of the relevant Consignment Sale Price, with the same priority and subject to the same rights, claims, defenses, and objections, if any, of all parties with respect thereto.

D. Remittance of the Consignment Sale Price to the Consignment Vendors is Warranted Pursuant to Sections 105(a) and 363 of the Bankruptcy Code

23. The Court may authorize remittance of the Consignment Sale Price to the applicable Consignment Vendors pursuant to section 363 of the Bankruptcy Code. Section 363(b)(1) of the Bankruptcy Code provides that a debtor may "after notice and a hearing, use, sell, or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b)(1). A debtor's decision to use, sell, or lease assets outside the ordinary course of business must be based upon the sound business judgment of that debtor. *See Official Comm. of Unsecured Creditors of LTV Aerospace & Def. Co. v. LTV Co. (In re Chateaugay Corp.)*, 973 F.2d 141, 143 (2d Cir. 1992) (holding that a court determining an application pursuant to section 363(b) must find from the evidence a good business reason to grant such application); *In re*

Ionosphere Clubs, Inc., 100 B.R. 670, 675 (Bankr. S.D.N.Y. 1989) (standard for determining a section 363(b) motion is whether the debtor has a "good business reason" for the requested relief); *In re James A. Phillips, Inc.*, 29 B.R. 391, 397 (S.D.N.Y. 1983) (authorizing a contractor to pay prepetition claims of some suppliers who were potential lien claimants pursuant to section 363 because the payments were necessary for the general contractors to release funds owed to the debtors). "Where the debtor articulates a reasonable basis for its business decisions (as distinct from a decision made arbitrarily or capriciously), courts will generally not entertain objections to the debtor's conduct." *Comm. of Asbestos-Related Litigants and/or Creditors v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 60 B.R. 612, 616 (Bankr. S.D.N.Y. 1986).

24. Numerous courts have also used their section 105(a) equitable powers under the necessity of payment doctrine to authorize payment of a debtor's prepetition obligations where, as here, such payment is necessary to effectuate the "paramount purpose" of chapter 11 reorganization, which is to prevent the debtor from going into liquidation and to preserve the going concern value of the Debtors. *See, e.g.*, *In re Lehigh Co. & New England Ry. Co.*, 657 F.2d 570, 581 (3d Cir. 1981) ("[T]he necessity of payment doctrine . . . [permits] immediate payment of claims of creditors where those creditors will not supply services or material essential to the conduct of the business until their pre-reorganization claims shall have been paid." (citation omitted)). This doctrine "recognizes the existence of the judicial power to authorize a debtor in a reorganization case to pay prepetition claims where such payment is essential to the continued operation of the debtor," which is consistent with a paramount goal of chapter 11: "facilitating the continued operation and rehabilitation of the debtor." *In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 176 (Bankr. S.D.N.Y. 1989). *See also In re Just For Feet, Inc.*, 242 B.R. 821, 825 (Bankr. D. Del. 1999) (collecting cases); *In re Columbia Gas Sys., Inc.*,

136 B.R. 930, 939 (Bankr. D. Del. 1992) (recognizing that "[i]f payment of a prepetition claim 'is essential to the continued operation of [the debtor], payment may be authorized").

25. Remittance of the Consignment Sale Price to the applicable Consignment Vendors is necessary to ensure that the Debtors can continue to receive goods for resale to their customers and, in turn, preserve and enhance the value of the Debtors' estates. Selling goods provided by the Consignment Vendors is an essential aspect of the Debtors' business operations. If the Debtors can no longer offer the Consigned Goods, they will suffer severe losses in sales volume and be required to search for substitute vendors, likely requiring the Debtors to forgo existing favorable trade terms to the extent any substitute vendors are viable.

26. What's more, remittance of the Consignment Sale Price to the applicable Consignment Vendors will not harm any party. The Debtors will only make such payments (a) with the consent of the Secured Lenders that arguably have a lien on the applicable Consignment Sale Price, and (b) where the Debtors are satisfied that the applicable Consignment Vendor has a valid, enforceable, non-avoidable and perfected lien on Consigned Goods. Accordingly, remittance of the Consignment Sale Price to the applicable Consignment Vendors will not affect the substantive rights of any party; but will enable the Debtors to continue their consignment relationships for the benefit of all parties in interest.

27. Courts in this District have regularly granted authority similar to the relief requested herein. *See, e.g.*, *In re Hancock Fabrics, Inc.*, Case No. 16-10296 (Bankr. D. Del. Feb. 3, 2016) (interim order); *In re LodgeNet Interactive Corp.*, Case No. 13-10238 (Bankr. S.D.N.Y. Jan. 29, 2013) (interim order), (Bankr. S.D.N.Y. Feb. 27, 2013) (final order); *In re RoomStore, Inc.*, Case No. 11-37790 (Bankr. E.D. Va. Dec. 14, 2011) (interim order), (Bankr. E.D. Va. Jan.

3, 2012) (final order); *In re Ultra Stores, Inc.*, Case No. 09-11854 (Bankr. S.D.N.Y. Apr. 14, 2009) (interim order), (Bankr. S.D.N.Y. Apr. 28, 2009) (final order).

E. Immediate Relief is Justified

28. Pursuant to Bankruptcy Rule 6003, the Court may grant relief within 21 days after the filing of the petition regarding a motion to "use, sell, lease, or otherwise incur an obligation regarding property of the estate" only if such relief is necessary to avoid immediate and irreparable harm. Fed. R. Bankr. P. 6003(b). Immediate and irreparable harm exists where the absence of relief would impair a debtor's ability to reorganize or threaten the debtor's future as a going concern. *See In re Ames Dep't Stores, Inc.*, 115 B.R. 34, 36 n.2 (Bankr. S.D.N.Y. 1990) (discussing the elements of "immediate and irreparable harm" in relation to Bankruptcy Rule 4001).

29. Moreover, Bankruptcy Rule 6003 authorizes the Court to grant the relief requested herein to avoid harm to the Debtors' customers and other third parties. Unlike Bankruptcy Rule 4001, Bankruptcy Rule 6003 does not condition relief on imminent or threatened harm to the estate alone. Rather, Bankruptcy Rule 6003 speaks of "immediate and irreparable harm" generally. *Cf.* Fed. R. Bankr. P. 4001(b)(2), (c)(2) (referring to "irreparable harm to the estate"). Indeed, the "irreparable harm" standard is analogous to the traditional standards governing the issuance of preliminary junctions. *See* 9 Alan N. Resnick & Henry J. Sommer, *Collier on Bankruptcy* ¶ 4001.07[b][3] (16th ed.) (discussing source of "irreparable harm" standard under Rule 4001(c)(2)). Courts will routinely consider third-party interests when granting such relief. *See, e.g., Capital Ventures Int'l v. Argentina*, 443 F.3d 214, 223 n.7 (2d Cir. 2006); *see also Linnemeir v. Bd. of Trs. of Purdue Univ.*, 260 F.3d 757, 761 (7th Cir. 2001).

30. As described herein and in the First Day Declaration, the Debtors will suffer immediate and irreparable harm absent the relief requested herein. Accordingly, Bankruptcy Rule 6003 has been satisfied and the relief requested herein should be granted.

REQUEST FOR WAIVER OF STAY

31. To implement the foregoing, the Debtors seek a waiver of any stay of the effectiveness of the order approving this Motion. Pursuant to Bankruptcy Rule 6004(h), any "order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of 14 days after entry of the order, unless the court orders otherwise." Fed. R. Bankr. P. 6004(h). The Debtors submit that the relief requested in this Motion is necessary to avoid immediate and irreparable harm to the Debtors for the reasons set forth herein. Accordingly, the Debtors submit that ample cause exists to justify a waiver of the 14-day stay imposed by Bankruptcy Rule 6004(h).

32. To implement the foregoing immediately, the Debtors respectfully request a waiver of the notice requirements of Bankruptcy Rule 6004(a) to the extent they are deemed applicable.

DEBTORS' RESERVATION OF RIGHTS

33. Nothing contained herein is intended or should be construed as an admission of the validity of any claim against the Debtors, a waiver of the Debtors' rights to dispute any claim, or an approval, assumption, or rejection of any agreement, contract, or lease under section 365 of the Bankruptcy Code. The Debtors expressly reserve their rights to contest any invoice or claim, lien or interest in, on account of, or related to any Consigned Goods.

34. The Debtors do not waive any claims by the filing of the Motion. The Debtors also reserve the right to file any motion or other pleading respecting any Consigned Goods or Consignment Vendors.

NOTICE

35. The Debtors have provided notice of this Motion to: (a) the Office of the United States Trustee for the District of Delaware; (b) holders of the 50 largest unsecured claims on a consolidated basis against the Debtors; (c) Riemer & Braunstein LLP (attn: Donald Rothman) as counsel for (i) Bank of America, N.A., in its capacity as Administrative Agent and Collateral Agent under the Second Amended and Restated Credit Agreement, dated as of May 17, 2012, and (ii) certain DIP Lenders under the Debtors' proposed postpetition financing facility; (d) Brown Rudnick LLP (attn: Robert Stark and Bennett Silverberg) as counsel for (i) Wilmington Savings Fund Society, FSB as Administrative Agent and Collateral Agent under the Amended and Restated Credit Agreement, dated as of May 3, 2006 and amended and restated as of November 16, 2010 and (ii) certain Term Lenders under the Amended and Restated Credit Agreement, dated as of May 3, 2006 and amended and restated as of November 16, 2010; (e) Choate, Hall & Stewart LLP (attn: Kevin Simard) as counsel for (i) Wells Fargo Bank, National Association, in its capacity as FILO Agent under the Second Amendment to Second Amended and Restated Credit Agreement, dated as of November 3, 2015, and (ii) certain DIP Lenders under the Debtors' proposed postpetition financing facility; (f) O'Melveny & Meyers LLP (attn: John Rapisardi) as counsel for certain holders of 11.5% Senior Subordinated Notes Due February 19, 2018 under the Securities Purchase Agreement, dated as of May 3, 2006; (g) all holders of 11.5% Senior Subordinated Notes Due February 19, 2018 under the Securities Purchase Agreement, dated as of May 3, 2006; (h) the Consignment Vendors; and (i) all parties that have filed a notice of appearance and request for service of papers pursuant to Bankruptcy Rule 2002. Notice of this Motion and any order entered hereon will be served in accordance with Local Rule 9013-1(m). In light of the nature of the relief requested herein, the Debtors submit that no other or further notice is necessary.

WHEREFORE, the Debtors respectfully request that the Court grant the relief requested herein and such other and further relief as the Court may deem just and proper.

Dated: March 2, 2016
Wilmington, Delaware

/s/ Andrew L. Magaziner

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Proposed Counsel to the Debtors and Debtors in Possession

EXHIBIT A

PROPOSED INTERIM ORDER

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
SPORTS AUTHORITY HOLDINGS, INC., *et al.*,[1]	Case No. 16-_____ (___)
Debtors.	(Jointly Administered)
	Ref. Docket No. ____

INTERIM ORDER (A) AUTHORIZING THE DEBTORS TO (I) CONTINUE TO SELL CONSIGNED GOODS IN THE ORDINARY COURSE OF BUSINESS FREE AND CLEAR OF ALL LIENS, CLAIMS AND ENCUMBRANCES AND (II) GRANT ADMINISTRATIVE EXPENSE PRIORITY TO CONSIGNMENT VENDORS FOR CONSIGNED GOODS DELIVERED POSTPETITION; AND (B) GRANT REPLACEMENT LIENS TO CONSIGNMENT VENDORS WITH PERFECTED SECURITY INTERESTS IN CONSIGNED GOODS AND/OR REMIT THE CONSIGNMENT SALE PRICE ARISING FROM SALE OF CONSIGNED GOODS TO PUTATIVE CONSIGNMENT VENDORS

Upon the *Debtors' Motion for Interim and Final Orders (a) Authorizing the Debtors to (i) Continue to Sell Consigned Goods in the Ordinary Course of Business Free and Clear of All Liens, Claims and Encumbrances and (ii) Grant Administrative Expense Priority to Consignment Vendors for Consigned Goods Delivered Postpetition; and (b) Grant Replacement Liens to Consignment Vendors with Perfected Security Interests in Consigned Goods and/or Remit the Consignment Sale Price Arising from Sale of Consigned Goods to Putative Consignment Vendors* (the "Motion")[2] filed by the above-captioned debtors and debtors in possession (collectively, the "Debtors"); and the Court having found that it has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334(b) and 157, and the *Amended Standing Order of Reference* from

[1] The Debtors and the last four digits of their respective taxpayer identification numbers are as follows: Sports Authority Holdings, Inc. (9008); Slap Shot Holdings, Corp. (8209); The Sports Authority, Inc. (2802); TSA Stores, Inc. (1120); TSA Gift Card, Inc. (1918); TSA Ponce, Inc. (4817); and TSA Caribe, Inc. (5664). The headquarters for the above-captioned Debtors is located at 1050 West Hampden Avenue, Englewood, Colorado 80110.

[2] All capitalized terms used and not defined herein shall have the meanings ascribed to them in the Motion.

the United States District Court for the District of Delaware dated as of February 29, 2012; and the Court having found that venue of these cases and the Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and the Court having found that this matter is a core proceeding pursuant to 28 U.S.C. § 157(b); and the Court having found that it may enter a final order consistent with Article III of the United States Constitution; and the Court having found that notice of the Motion has been given as set forth in the Motion and that such notice is adequate and no other or further notice need be given; and the Court having considered the First Day Declaration; and upon the record of the hearing and all of the proceedings had before the Court; and the Court having found that the relief sought in the Motion is in the best interests of the Debtors, their estates, their creditors and all other parties in interest; and the Court having found that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein; and after due deliberation and sufficient cause appearing therefor,

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED as set forth herein on an interim basis until such time as the Court conducts a final hearing on this matter (the "Final Hearing").

2. The Final Hearing shall take place on _____, 2016 at __:__ _.m. (prevailing Eastern Time). Any objections or responses to the Motion shall be filed on or before 4:00 p.m. (prevailing Eastern Time) _____, 2016 and served on the parties required by Local Rule 2002-1(b).

3. The Debtors are authorized to continue to sell the Consigned Goods received pre-petition from the Consignment Vendors in the ordinary course of business, free and clear of all liens, claims and encumbrances. The Debtors shall set aside all proceeds from the sale of Consigned Goods into a separate escrow account on a weekly basis.

4. Consignment Vendors are granted, on an interim basis subject to the entry of the Final Order, Consignment Replacement Liens on the proceeds of any Consigned Goods that are sold after the Petition Date up to the Consignment Sale Price, with such Consignment Replacement Liens having the same validity and priority as any lien that existed on the Consigned Goods immediately prior to their sale, subject to any claims and defenses the Debtors or other parties may have had with respect to the applicable liens on the Consigned Goods.

5. Notwithstanding paragraph 4 herein, upon obtaining consent from the Secured Lenders, the Debtors are hereby authorized, on an interim basis, to remit the Consignment Sale Price to putative Consignment Vendors arising from the sale of Consigned Goods received prepetition. The Debtors shall use reasonable efforts where appropriate and practicable to condition such payments on the applicable Consignment Vendor's agreement to (a) accept such payment in satisfaction of all or a part of its prepetition claim against the Debtors, and (b) continue to provide goods to the Debtors during these Chapter 11 Cases on Customary Trade Terms.

6. In the event that a Consignment Vendor accepts payment pursuant to this Interim Order and it is later determined that such Consignment Vendor did not have a valid, enforceable, non-avoidable and perfected lien on Consigned Goods, then the Debtors' rights to seek to have the payment recharacterized as an improper postpetition transfer on account of a prepetition claim and to seek either to (a) recover such improper Postpetition transfer or (b) have the improper Postpetition transfer applied to any outstanding postpetition balance relating to such Consignment Vendor are hereby expressly preserved.

7. The Debtors are authorized to order and receive Consigned Goods from Consignment Vendors during the postpetition period and to grant administrative expense priority

to Consignment Vendors for undisputed obligations arising from the delivery of Consigned Goods during the postpetition period. In exchange for the postpetition delivery of such Consigned Goods, the Debtors are authorized to grant to the applicable Consignment Vendors administrative expense priority under section 503(b) of the Bankruptcy Code for all undisputed obligations arising from the delivery of Consigned Goods to the Debtors during the postpetition period.

8. Nothing in this Interim Order shall be construed to limit, or in any way affect, the rights of any party to dispute any claim asserted by a Consignment Vendor on any grounds, including contesting or disputing the improper perfection or lack of perfection of any purported security interest with respect to any Consigned Goods, or to assert offsets against or defenses to such claim, as to amount, liability or otherwise.

9. This Interim Order is not a determination that any Consignment Vendor is or is not entitled to adequate protection, that any Consignment Vendor does or does not have a consignment relationship with the Debtors, or that any Consignment Vendor has or does not have a valid, enforceable, non-avoidable and perfected lien on any Consigned Goods, all parties reserving all rights on such issues.

10. Nothing in this Interim Order shall decrease or increase the rights of any party with respect to the Consigned Goods, or take away or provide any Consignment Vendor with any interest in the proceeds of any Consigned Goods that are less than or greater than the interest that such Consignment Vendor would have absent the entry of this Order, and after giving effect to any waiver or releases that a Consignment Vendor may have given.

11. Nothing in the Motion or this Interim Order shall be deemed or construed as: (a) an admission as to the validity of any claim or lien against the Debtors or their estates; (b) a

waiver of the Debtors' right to dispute any claim or lien; (c) an approval or assumption of any agreement, contract, or lease pursuant to section 365 of the Bankruptcy Code; (d) an admission of the priority status of any claim; or (e) a modification of the Debtors' rights to seek relief under any section of the Bankruptcy Code on account of any amounts owed or paid to any Consignment Vendor.

12. To the extent that Bankruptcy Rule 6004(h) is applicable, the terms and conditions of this Interim Order shall be immediately effective and enforceable upon its entry.

13. The Debtors are authorized to take all actions necessary to effectuate the relief granted pursuant to this Interim Order in accordance with the Motion.

14. The Court shall retain jurisdiction with respect to all matters arising from or related to the implementation of this Interim Order.

Dated: March ___, 2016
Wilmington, Delaware

_____

UNITED STATES BANKRUPTCY JUDGE

EXHIBIT B

PROPOSED FINAL ORDER

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
SPORTS AUTHORITY HOLDINGS, INC., *et al.*,[1]	Case No. 16-_____ (___)
Debtors.	(Jointly Administered)
	Ref. Docket Nos. ____ & ____

FINAL ORDER (A) AUTHORIZING THE DEBTORS TO (I) CONTINUE TO SELL CONSIGNED GOODS IN THE ORDINARY COURSE OF BUSINESS FREE AND CLEAR OF ALL LIENS, CLAIMS AND ENCUMBRANCES AND (II) GRANT ADMINISTRATIVE EXPENSE PRIORITY TO CONSIGNMENT VENDORS FOR CONSIGNED GOODS DELIVERED POSTPETITION; AND (B) GRANT REPLACEMENT LIENS TO CONSIGNMENT VENDORS WITH PERFECTED SECURITY INTERESTS IN CONSIGNED GOODS AND/OR REMIT THE CONSIGNMENT SALE PRICE ARISING FROM SALE OF CONSIGNED GOODS TO PUTATIVE CONSIGNMENT VENDORS

Upon the *Debtors' Motion for Interim and Final Orders (a) Authorizing the Debtors to (i) Continue to Sell Consigned Goods in the Ordinary Course of Business Free and Clear of All Liens, Claims and Encumbrances and (ii) Grant Administrative Expense Priority to Consignment Vendors for Consigned Goods Delivered Postpetition; and (b) Grant Replacement Liens to Consignment Vendors with Perfected Security Interests in Consigned Goods and/or Remit the Consignment Sale Price Arising from Sale of Consigned Goods to Putative Consignment Vendors* (the "Motion")[2] filed by the above-captioned debtors and debtors in possession (collectively, the "Debtors"); and the Court having found that it has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334(b) and 157, and the *Amended Standing Order of Reference* from

[1] The Debtors and the last four digits of their respective taxpayer identification numbers are as follows: Sports Authority Holdings, Inc. (9008); Slap Shot Holdings, Corp. (8209); The Sports Authority, Inc. (2802); TSA Stores, Inc. (1120); TSA Gift Card, Inc. (1918); TSA Ponce, Inc. (4817); and TSA Caribe, Inc. (5664). The headquarters for the above-captioned Debtors is located at 1050 West Hampden Avenue, Englewood, Colorado 80110.

[2] All capitalized terms used and not defined herein shall have the meanings ascribed to them in the Motion.

the United States District Court for the District of Delaware dated as of February 29, 2012; and the Court having found that venue of these cases and the Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and the Court having found that this matter is a core proceeding pursuant to 28 U.S.C. § 157(b); and the Court having found that it may enter a final order consistent with Article III of the United States Constitution; and the Court having found that notice of the Motion has been given as set forth in the Motion and that such notice is adequate and no other or further notice need be given; and the Court having considered the First Day Declaration; and hearings having been held to consider the relief requested in the Motion; and upon the record of the hearings and all of the proceedings had before the Court, including the hearing held on _____, 2016; and the Court having entered that certain *Interim Order (a) Authorizing the Debtors to (i) Continue to Sell Consigned Goods in the Ordinary Course of Business Free and Clear of All Liens, Claims and Encumbrances and (ii) Grant Administrative Expense Priority to Consignment Vendors for Consigned Goods Delivered Postpetition; and (B) Grant Replacement Liens to Consignment Vendors with Perfected Security Interests in Consigned Goods and/or Remit the Consignment Sale Price Arising from Sale of Consigned Goods to Putative Consignment Vendors* [D.I. ___] on _____, 2016; and upon the record of the hearing and all of the proceedings had before the Court; and the Court having found that the relief sought in the Motion is in the best interests of the Debtors, their estates, their creditors and all other parties in interest; and the Court having found that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein; and after due deliberation and sufficient cause appearing therefor,

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED on a final basis as set forth herein.

2. The Debtors are authorized to continue to sell the Consigned Goods received pre-petition from the Consignment Vendors in the ordinary course of business, free and clear of all liens, claims and encumbrances. The Debtors shall set aside all proceeds from the sale of Consigned Goods into a separate escrow account on a weekly basis.

3. Consignment Vendors are granted Consignment Replacement Liens on the proceeds of the Consigned Goods that are sold after the Petition Date up to the Consignment Sale Price, with such Consignment Replacement Liens having the same validity and priority as any liens that existed on the Consigned Goods immediately prior to their sale, subject to any claims and defenses the Debtors or other parties may have had with respect to the applicable lien on the Consigned Goods.

4. Notwithstanding paragraph 3 herein, upon obtaining consent from the Secured Lenders, the Debtors are hereby authorized to remit the Consignment Sale Price to putative Consignment Vendors arising from the sale of Consigned Goods received prepetition. The Debtors shall use reasonable efforts where appropriate and practicable to condition such payments on the applicable Consignment Vendor's agreement to (a) accept such payment in satisfaction of all or a part of its prepetition claim against the Debtors, and (b) continue to provide goods to the Debtors during these Chapter 11 Cases on Customary Trade Terms.

5. In the event that a Consignment Vendor accepts payment pursuant to this Interim Order and it is later determined that such Consignment Vendor did not have a valid, enforceable, non-avoidable and perfected lien on any Consigned Goods, then the Debtors' rights to seek to have the payment recharacterized as an improper postpetition transfer on account of a prepetition claim and to seek either to (a) recover such improper Postpetition transfer or (b) have the

improper Postpetition transfer applied to any outstanding postpetition balance relating to such Consignment Vendor are hereby expressly preserved.

6. The Debtors are authorized to order and receive Consigned Goods from Consignment Vendors during the postpetition period and to grant administrative expense priority to Consignment Vendors for undisputed obligations arising from the delivery of Consigned Goods during the postpetition period. In exchange for the postpetition delivery of such Consigned Goods, the Debtors are authorized to grant to the applicable Consignment Vendors administrative expense priority under section 503(b) of the Bankruptcy Code for all undisputed obligations arising from the delivery of Consigned Goods to the Debtors during the postpetition period.

7. Nothing in this Final Order shall be construed to limit, or in any way affect, the ability of any party to dispute any claim asserted by a Consignment Vendor on any grounds, including contesting or disputing the improper perfection or lack of perfection of any purported security interest with respect to any Consigned Goods, or to assert offsets against or defenses to such claim, as to amount, liability or otherwise.

8. This Final Order is not a determination that any Consignment Vendor is or is not entitled to adequate protection, that any Consignment Vendor does or does not have a consignment relationship with the Debtors, or that any Consignment Vendor has or does not have valid, enforceable, non-avoidable and perfected lien on any Consigned Goods, all parties reserving all rights on such issues.

9. Nothing in this Final Order shall decrease or increase the rights of any party with respect to the Consigned Goods, or take away or provide any Consignment Vendor with any interest in the proceeds of any Consigned Goods that are less than or greater than the interest that

such Consignment Vendor would have absent the entry of this Final Order, and after giving effect to any waiver or releases that a Consignment Vendor may have given.

10. Nothing in the Motion or this Final Order shall be deemed or construed as: (a) an admission as to the validity of any claim or lien against the Debtors or their estates; (b) a waiver of the Debtors' right to dispute any claim or lien; (c) an approval or assumption of any agreement, contract, or lease pursuant to section 365 of the Bankruptcy Code; (d) an admission of the priority status of any claim; or (e) a modification of the Debtors' rights to seek relief under any section of the Bankruptcy Code on account of any amounts owed or paid to any Consignment Vendor.

11. To the extent that Bankruptcy Rule 6004(h) is applicable, the terms and conditions of this Final Order shall be immediately effective and enforceable upon its entry.

12. The Debtors are authorized to take all actions necessary to effectuate the relief granted pursuant to this Final Order in accordance with the Motion.

13. The Court shall retain jurisdiction with respect to all matters arising from or related to the implementation of this Final Order.

Dated: _____, 2016
Wilmington, Delaware

_____

UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
SPORTS AUTHORITY HOLDINGS, INC., *et al.*,[1]	Case No. 16-10527 (MFW)
Debtors.	(Joint Administration Requested)
	RE: D.I. 9

LIMITED OBJECTION TO DEBTORS' MOTION FOR INTERIM AND FINAL ORDERS (A) AUTHORIZING THE DEBTORS TO (I) CONTINUE TO SELL CONSIGNED GOODS IN THE ORDINARY COURSE OF BUSINESS FREE AND CLEAR OF ALL LIENS, CLAIMS AND ENCUMBRANCES AND (II) GRANT ADMINISTRATIVE EXPENSE PRIORITY TO CONSIGNMENT VENDORS FOR CONSIGNED GOODS DELIVERED POSTPETITION; AND (B) GRANT REPLACEMENT LIENS TO CONSIGNMENT VENDORS WITH PERFECTED SECURITY INTERESTS IN CONSIGNED GOODS AND/OR REMIT THE CONSIGNMENT SALE PRICE ARISING FROM SALE OF CONSIGNED GOODS TO PUTATIVE CONSIGNMENT VENDORS

Agron, Inc. ("**Agron**"), a supplier of goods on a consignment basis to TSA Stores, Inc., ("**TSA**,[2]" hereinafter the "**Debtors**"), objects on a limited basis to Debtors' Motion for Interim and Final Orders (A) Authorizing the Debtors to (I) Continue to Sell Consigned Goods in the Ordinary Course of Business Free and Clear of All Liens, Claims and Encumbrances and (II) Grant Administrative Expense Priority to Consignment Vendors for Consigned Goods Delivered Postpetition; and (B) Grant Replacement Liens to Consignment Vendors with Perfected Security

[1] The Debtors and the last four digits of each Debtor's federal tax identification numbers are as follows: Sports Authority Holdings, Inc. (9008); Slap Shot Holdings, Copr. (8209); The Sports Authority, Inc. (2802); TSA Stores, Inc. (1120); TSA Gift Card, Inc. (1918); TSA Ponce, Inc. (4817); and TSA Caribe, Inc. (5664). The headquarters for the above-captioned Debtors is located at 1050 West Hampden Avenue, Englewood, Colorado 80110.

[2] TSA Stores, Inc. filed a separate voluntary chapter 11 petition for relief under title 11 of the United States Code on March 2, 2016 and has been assigned case no. 16-bk-10530-MFW. The Debtors have filed a motion requesting joint administration under the above-referenced caption.

Interests in Consigned Goods and/or Remit the Consignment Sale Price Arising from Sale of Consigned Goods to Putative Consignment Vendors (the "**Consignment Motion**"), as follows:

1. Agron has delivered from time to time certain goods on consignment (the "**Consignment Property**") to TSA pursuant to a Pay by Scan Vendor Management Program instituted by TSA (the "**Pay by Scan Program**").

2. Agron is an exclusive licensee for adidas accessories. Agron designs, markets, and distributes accessories to retailers and consumers across the United States.

3. The Consignment Property delivered by Agron to TSA consists of duffel bags and sackpacks, men's and women's underwear, small accessories such as compression sleeves and head and wristbands, soccer and team socks (which differ from athletic multi-packs), caps and knit hats. Soccer and team socks which are used for team related sports (such as soccer, football, baseball and basketball) are sold as single packs and sometimes 2 per pack. All of Agron's products are adidas branded.

4. Agron initially entered into the Pay by Scan Program with TSA in 2011. Attached hereto as Exhibit "1" are true and correct copies of 2011 vendor deal sheet summaries executed by Agron with regard to the Pay by Scan Program. Attached hereto as Exhibit "2" are true and correct copies of the current vendor deal sheet summaries regarding the Pay by Scan Program executed by TSA and Agron in 2015. Attached hereto as Exhibit "3" is a true and correct copy of a questions and answers sheet prepared by TSA and provided by TSA to Agron with respect to the Pay by Scan Program.

5. As reflected in Exhibit 2, TSA's "2015 Vendor Deal Sheet Summary Pay by Scan" executed by TSA and Agron provides:

> TSA and Vendor [Agron] agree that the arrangement contemplated by this agreement shall be a consignment as defined in Section 9-102

> of the Colorado and Delaware Uniform Commercial Codes. Vendor shall retain title to all goods subject to this agreement until the date of sale at which time title shall pass from Vendor to the purchaser of such goods. Vendor shall be entitled to file UCC-1 Financing Statements to reflect this consignment.
>
> The term of this agreement shall commence on the Effective Date and remain in effect until a new agreement is signed by TSA and Vendor.

6. Agron has filed UCC-1 Financing Statements with respect to the Consignment Property. New consignment agreements beyond the 2015 agreements have not been entered into by TSA and Agron.

7. On March 2, 2016, TSA filed a voluntary chapter 11 petition commencing the above-captioned bankruptcy cases.

8. Following the filing of its bankruptcy petition, the Debtors filed certain "first day" motions, including the Consignment Motion. In footnote 4 of the Consignment Motion, the Debtors indicate that they may also seek to pay certain "Consignment Vendors" as "critical vendors" on account of certain prepetition claims in connection with a concurrently filed *Motion for Interim and Final Orders Authorizing Debtors to Pay Certain Prepetition Claims of Critical Vendors* (the "**Critical Vendor Motion**").

9. Agron objects to the Consignment Motion on a limited basis. The Consignment Motion, as presented, does not adequately protect Agron's ownership interest in the Consigned Property. This shortcoming in the Consignment Motion may be solved by (i) eliminating the clawback risk described in paragraph 12 of the Consignment Motion; (ii) granting Agron an unavoidable, valid, perfected replacement lien; (iii) granting Agron the protections of Bankruptcy Code section 507(b); and (iv) treating Agron as a critical vendor as contemplated in the Critical Vendor Motion, in addition to providing the protections requested in the Consignment Motion.

10. In *In re Whitehall Jewelers Holdings, Inc.*, 2008 Bankr. LEXIS 2120 (Bankr. D. Del. Jul. 28, 2008), Judge Gross addressed a motion by the debtors to approve a sale or a going out of business arrangement to sell assets, including inventory comprised largely of consigned goods. In the *Whitehall Jewelers* case, there was a Vendor Trading Agreement (the "**VTA**") that contained consignment language very similar to the consignment language contained in TSA's Pay by Scan Program.

11. Consignment vendors in the *Whitehall Jewelers* case asserted that they held an ownership interest in the consignment goods sufficient to prevent the sale of those goods. Judge Gross found that a bankruptcy court could not approve a sale of consigned property without first determining whether the property is property of the estate. The court cited significant authority in support of this view, stating:

> A bankruptcy court may not allow the sale of property as "property of the estate" without first determining whether the property is property of the estate. See *Moldo v. Clark (In re Clark)*, 266 B.R. 163, 172 (B.A.P. 9th Cir. 2001) ("[T]he property that can be sold free and clear under section 363(f) is defined by subsections (b) and (c) of section 363 as 'property of the estate.'"); *Darby v. Zimmerman (In re Popp)*, 323 B.R. 260, 266 (B.A.P. 9th Cir. 2005) (even before one gets to Section 363(f), Section 363(b), as interpreted by Rodeo, requires that the estate demonstrate 'that the property it proposes to sell is "property of the estate."); *Anderson v. Conine (In re Robertson)*, 203 F.3d 855, 863 (5th Cir. 2000) (holding that section 363(f) does not permit a trustee to sell the property of a non-debtor spouse because such property was not "property of the estate"); In re Coburn, 250 R.R. 401, 403 (Bankr. M.D. Fla. 1999) (finding it necessary to determine whether an asset is property of the estate in order to decide whether the trustee is entitled to sell the asset pursuant to section 363(f).

In re Whitehall Jewelers, Inc., 2008 Bankr. LEXIS 2120, at *9-10.

12. In *Whitehall Jewelers,* Judge Gross cited *In re Interiors of Yesterday, LLC*, 2007 Bankr. LEXIS 449, at *10 (Bankr. D. Conn. Feb. 2, 2007), for the proposition that a

15. At a minimum, Agron's interest in the Consigned Property is entitled to adequate protection. "For example, a right to redeem under a pledge or a right to recover property under a consignment are both interests that are entitled to protection. This classification is important because adequate protection depends upon the interest and property involved." *In re Alyucan Interstate Corp.*, 12 B.R. 803, 806 (Bankr. D. Utah 1981). In *Whitehall Jewelers*, Judge Gross stated that "the Debtors may, of course, continue with the sale of the Asset Goods [non-consigned property]. They may not, absent adequate protection to or consent from the Consignment Vendors, proceed with the sale of Consigned Goods." *In re Whitehall Jewelers Holdings, Inc.*, 2008 Bankr. LEXIS 2120, at *18-19.

16. The legislative history provides:

> Sections 362, 363, and 364 require, in certain circumstances, that the court determine in noticed hearings whether the interest of a secured creditor or co-owner of property with the debtor is adequately protected in connection with the sale or use of property. The interests of which the court may provide protection in the ways described in this section include equitable as well as legal interests. For example, a right to enforce a pledge and a right to recover property delivered to a debtor under a consignment agreement or an agreement of sale or return are interests that may be entitled to protection.

Sen. Rep. No. 95-989 and S. 2266, 95th Cong., 2d Sess (1978) pp. 49, 54.

17. Before the Debtors may attempt to use or sell (whether in the ordinary course of business or otherwise) the Consigned Property without Agron's consent, it must establish title to the Consigned Property through an adversary proceeding. The Debtors, for example, may not simply file the Consignment Motion to establish title, but must establish title through an adversary proceeding. Therefore, approval of the Consignment Motion should be subject to consent by Agron to the use or sale of Consigned Property and adequate protection of Agron's ownership interest in the Consigned Property.

18. Agron's Limited Objection to the Consignment Motion can be resolved by (i) eliminating the clawback risk described in paragraph 12 of the Consignment Motion; (ii) granting Agron an unavoidable, valid, perfected replacement lien; (iii) granting Agron the protections of Bankruptcy Code section 507(b); and (iv) treating Agron as a critical vendor as contemplated in the Critical Vendor Motion, in addition to providing the protections requested in the Consignment Motion.

Dated: March 2, 2016
Wilmington, Delaware

GELLERT SCALI BUSENKELL & BROWN, LLC

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Counsel for Agron, Inc.

EXHIBIT 1

ID:
CLINT PIERCE

SPORTS AUTHORITY

2011 VENDOR DEAL SHEET SUMMARY

PAY BY SCAN

EFFECTIVE PERIOD: 1/30/2011 THROUGH 1/28/2012

VENDOR NUMBER: 24218
VENDOR NAME: Agron, Inc
DEPTS: 940-030 SUB DEPT:

ENTITLEMENTS

CO-OP %: 2.00%
MDF PROGRAM: MDF %: MDF $:
OTHER PROGRAM: E-COMMERCE CO-OP OTHER %: 2.8% FOR E-COM 2011 ONLY
REBATE %:
REBATE TIERS: 1% $3,500,000 & ABOVE @ VENDOR.
REBATE EXCLUSIONS: SPLIT COST
LOGISTICS:
OTHER ENTITLEMENTS:
AMOUNT $
AMOUNT $

DEFECTIVE PROGRAM

DFC: x RTV:

FREIGHT TERMS

PREPAID: COLLECT: x

PAYMENT/DISCOUNT TERMS

NEW STORE DAYS: NS %: FIXED $:
INITIAL ORDER DAYS: Net 30 EOFM
INITIAL ORDER %:
RE-ORDER DAYS:
RE-ORDER %:

PAYMENT METHOD

% Of Retail: x Cost: Other: Vendor Portion %: 43.00% TSA Portion %: 57.00%
PYMT DETAILS:
SHRINK: VENDOR & TSA WILL SPLIT SHRINK AT 50% OF RETAIL SALES UP TO $200K SHRINK $. ANYTHING ABOVE IS RESPONSIBILITY OF TSA.

SIGNATURES

VENDOR: Karla S Huff PRINT NAME: KARLA HUFF Date: 6/13/11
BUYER: PRINT NAME: Date:
DMM: PRINT NAME: Date:

*All terms on this Summary agreed to by TSA and Vendor will transfer to the 2011 Vendor Agreement

ID: 647
Stephen Binkley

SPORTS AUTHORITY

TSA STORES, INC.

2011 DOMESTIC VENDOR DEAL SHEET (VENDOR AGREEMENT)

PAY BY SCAN

EFFECTIVE PERIOD: 1/30/2011 THROUGH 1/28/2012

VENDOR NAME: Agron, Inc VENDOR NUMBER: 24218
TSA DEPARTMENT(S): 962 SUB DEPT:
VENDOR BRANDS*: adidas BUYER NAME:

All Purchase Goals and Threshold clauses are based on purchases for (select one):

[X] The department/departments indicated in this agreement. [ ] All TSA departments that Vendor sells merchandise to.

VENDOR CORPORATE INFORMATION

ADDRESS:	2440 S. Sepulveda Blvd	CITY: Los Angeles	STATE: CA
ZIP CODE:	90064	COUNTRY: USA	TAX ID: 95-4245974 **W-9 REQUIRED
MAIN PHONE:	(800) 966-7697	MAIN FAX: (310) 312-1753	OTHER #:

SALES INFORMATION

VP OF SALES: Eric Luthro EMAIL: eluthro@agron.com PHONE: (800) 966-7697 x196
ADDRESS: 2440 S. Sepulveda Blvd
FAX: (310) 312-1753 OTHER PHONE: x196

N SALES MNGR: Karla Huff EMAIL: khuff@agron.com PHONE: (800) 966-7697
ADDRESS: 2440 S. Sepulveda Blvd
FAX: (310) 312-1753 OTHER PHONE: x140

R SALES MNGR: ~~Jack Macdonald~~ JEFF GADANSKI EMAIL: ~~jack.macdonald@adidas.com~~ JEFF.GADANSKI@ADIDAS.COM PHONE: (800) 289-2723
ADDRESS: 5055 N. Greeley Ave
FAX: (971) 234-9999 OTHER PHONE: x4198

Vendor represents that there is no manufacturer's representative, dealer, or other third party receiving commissions or payments in connections with this contract, except for the following (if applicable):

REP NAME: Peter Schuster COMPANY: adidas COMMISSION:
ADDRESS: 21 Canyon Cedar CITY, ST: Littleton, CO ZIP: 80127
PHONE: (603) 834-0270 FAX: (413) 480-6527 EMAIL: peter.schuster@adidas.com

CUSTOMER SERVICE DEPARTMENT CONTACT

NAME: Isabell Cano EMAIL: icano@agron.com PHONE: (800) 966-7697
ADDRESS: 2440 S. Sepulveda Blvd
FAX: (310) 312-1753 OTHER PHONE:x128

MIS DEPARTMENT CONTACT

NAME: Ray Westcott EMAIL: rwestcott@agron.com PHONE: (800) 966-7697
ADDRESS: 2440 S. Sepulveda Blvd
FAX: (310) 312-1753 OTHER PHONE:x145

VENDOR INITIALS: _____ TSA INITIALS: _____

DISTRIBUTION DEPARTMENT CONTACT

NAME: Marc Hernandez	EMAIL: mhernandez@agron.com	PHONE: (800) 966-7697
ADDRESS: 2440 S. Sepulveda Blvd	FAX: (310) 312-1753	PHONE: x133

TRANSPORTATION CONTACT

VNDR CONTACT NAME: Marc Hernandez	EMAIL: mhernandez@agron.com	PHONE: (800) 966-7697
ADDRESS: 2440 S. Sepulveda Blvd	FAX: (310) 312-1753	PHONE 2: x133
FREIGHT NAME: Marc Hernandez	EMAIL: mhernandez@agron.com	PHONE: (800) 966-7697
ADDRESS: 2440 S. Sepulveda Blvd	FAX: (310) 312-1753	PHONE 2: x133

VENDOR COMPLIANCE CONTACT

NAME: Marc Hernandez	EMAIL: mhernandez@agron.com	PHONE: (800) 966-7697
ADDRESS: 2440 S. Sepulveda Blvd	FAX: (310) 312-1753	PHONE 2: x133

DEAL SHEET CONTACTS (EX. Vendor Accountant, Co-op Coordinator, etc)

NAME: Karla Huff	EMAIL: khuff@agron.com	PHONE: (800) 966-7697
ADDRESS: 2440 S. Sepulveda Blvd	FAX: (310) 312-1753	PHONE 2: x140
PRES/CEO: Wade Siegel	EMAIL: wsiegel@agron.com	PHONE: (800) 966-7697
ADDRESS: 2440 S. Sepulveda Blvd	FAX: (310) 312-1753	PHONE 2: x104

INSURANCE CONTACT AND INFORMATION

CARRIER: CAN	POLICY #: 2026470366	EXP DTE:
ADDRESS:		
FAX: (213) 553-8466	COVERAGE AMT: 80,000,000	

SHIPPING INFORMATION

ADDRESS: 2101 East Via Arado	CITY, ST: Rancho Dominguez, CA	ZIP: 90220
NAME: Mauricio Enriquez	EMAIL: menriquez@agron.com	
PORT OF ORIGIN:	COUNTRY:	
PHONE/FAX: (310) 254-0300	PRODUCT TYPE:	

ADDRESS 2:	CITY, ST:	ZIP:
NAME:	EMAIL:	
PORT OF ORIGIN:	COUNTRY:	
PHONE/FAX:	PRODUCT TYPE:	

ADDRESS 3:	CITY, ST:	ZIP:
NAME:	EMAIL:	
PORT OF ORIGIN:	COUNTRY:	
PHONE/FAX:	PRODUCT TYPE:	

VENDOR INITIALS: _____ TSA INITIALS: _____

FREIGHT EXPENSE

(Place an "X" in the applicable box): Prepaid (Vendor Pays): [ ] Collect* (TSA Pays): [X]

*Must use TSA LCC for collect. No "add to invoice" without TSA Transportation Department written approval.

If shipping method is Direct Store Delivery (DSD) Prepaid Freight is Required.

FREE FREIGHT ALLOWANCE CONDITIONS:

FOB ADDRESS: CITY STATE: ZIP:

PAYMENT INFORMATION

Payment is based on (Choose Method):

% of Retail (Detail Below): [X] COST: [ ] OTHER (Detail Below): [ ]

If Payment Method is % of Retail: VENDOR PORTION %: 43.00% TSA PORTION %: 57.00%

If Payment Method is Other, Detail Below:

DEFECTIVE RETURN AUTHORIZATION/DESTROY FOR CREDIT INFORMATION

Choose One Method:

DESTROY FOR CREDIT: [X] RETURN TO VENDOR: [ ]

Merchandise will be disposed to include 8% handling fee of the cost of goods (as if sold by TSA) disposed. If Vendor does not authorize DFC, TSA will physically return defective merchandise to Vendor, at Vendor's expense. TSA will use Vendor's carrier if such information is provided to TSA. If Vendor does not provide return authorization information within 90 days of request by TSA, TSA may DFC the goods even if Vendor has not checked DFC below.

Collection Method: Vendor will pay handling fees as a TSA generated Charge back that will be deducted from invoice.

Defective Return Authorization:

Defective merchandise that is returned to vendor will incur an 8% handling fee of the original cost of goods based on the last selling cost for consolidated returns from our Return Centers. Non-defective merchandise that is returned for a recall, pack-up, or any other reason, will incur a 4% handling fee of the original cost of goods based on the last selling fir consolidated returns from our Return Centers. Additionally, all merchandise required to be returned will be assessed freight charges equal to the freight inbound and freight returned to vendor.

Disposed for Credit:

Allows TSA to charge Vendor for defective merchandise without sending product back. TSA will dispose of this product, to include 8% handling fee of the original cost of goods based on the last selling cost disposed.

Indicate if return merchandise may be field disposed for credit ("DFC"): YES: [X] NO: [ ]

RTV's that are not DFC will be physically returned to Vendor, at Vendor's expense. TSA will use TSA carriers and deduct all related freight charges (equal to the freight inbound and freight returned to vendor). If Vendor does not provide return authorization information within 90 days of request by TSA, TSA may DFC the goods even if Vendor has not checked DFC above.

Due to the cost of ocean freight, all merchandise shipped to Alaska and Hawaii locations will be DFC. Merchandise covered by RTV program will not be physically returned for these locations.

Type of Merchandise that applies to DFC*: Defective Items Only *If none specified, DFC applies to all Merchandise.

DEFECTIVE RETURN EXCEPTIONS:

VENDOR INITIALS: _____ TSA INITIALS: _____

RETURN TO VENDOR INFORMATION

Please identify all that apply and include return authorization ("RA") information. Merchandise shipped to Alaska and Hawaii locations will be DFC and not be physically returned to vendor.

Items with an * are required fields.

***Please select the preferred method of obtaining an RA: PHONE: [ ] FAX: [ ] E-MAIL: [ ]**

RA FREQUENCY:

*FAX #: (310) 312-1753 E-MAIL: icano@agron.com

*ADDRESS 1: 2101 East Via Arado *CITY ST: Rancho Dominguez, CA *ZIP: 90220

*CONTACT NAME: Isabell Cano EMAIL 2:

*PHONE FAX 2:

MERCH THAT APLLIES TO ADDRESS 1:

ADDRESS 2: CITY ST: ZIP:

CONTACT NAME: EMAIL 2:

PHONE FAX 2:

MERCH THAT APLLIES TO ADDRESS 2:

Are Add-Ons Allowed? [ ] YES [X] NO

PARCEL CARRIER: TSA SELECTED CARRIER LTL CARRIER: TSA SELECTED CARRIER

Attach additional return center addresses in the same format

EDI TRADING

Place and "X" where applicable: [X] In-House [ ] Third Party

COMPANY:

EDI CONTACT: Loudette Salomon EMAIL: lsalomon@agron.com

PHONE: (800) 966-7697 FAX: (312) 473-7223

ADDRESS: 2440 S. Sepulveda Blvd CITY ST: Los Angeles, CA ZIP: 90064

OTHER PHONE: x161

Does your company subscribe to the Inovis Catalogue (Formerly QRS):

[X] YES [ ] NO, Then please contact Inovis at 1-877-446-6847, option 4 and reference Sports Authority Catalogue Program.

INOVIS ACCOUNT #: R0510

ORDER INFORMATION

Is Merchandise? [X] PRE - TICKETED MSRP [ ] (GOH) PRE - HUNG

[ ] PRE - TICKETED TSA RETAIL PRICE [ ] EAS - TAGGED

UPC Code supplied on all merchandise: [X] YES [ ] NO

SPECIAL COMMENTS:

VENDOR INITIALS: _____ TSA INITIALS: _____

CO-OPERATIVE ADVERTISING COMMITMENT INFORMATION

Participation Schedule: Vendor elects to participate in the TSA advertising programs indicated below:

Place "X" Where	Program Name	Advertising Rebate (%) (Ex. 2.00%)	Amount $
X	Cooperative Advertising	2.00%	0
X	E-COMMERCE CO-OP (#007)	2.50%	

*If Vendor uses a different name for co-op (i.e. key funds, MDF, etc.) then the TSA buyer should insert the name of the program in the Program Name column. If certain purchases by TSA are excluded from the advertising commitment calculation or other terms apply, then list the excluded items and additional details in the applicable boxes below:

EXCLUDED ITEMS:

ADDITIONAL TERMS:

Advertising Rebate (%)	Purchase Goals				Exclusions From Purchases (List specific items)
	From:		To:		
	From:		To:		
	From:		To:		

Unless otherwise stated the Co-op Advertising Commitment is based on COST sales for TSA's fiscal year, payable by DFI at 100% reimbursement with N POP requirements. All Advertising Commitment and Sales Incentive Program Purchase Goal Tiers are retroactive to dollar 1 and are computed using the highest Advertising Rebate % achieved.

MARGIN SUPPORT PROGRAM

Please indicate whether Vendor elects to participate in TSA's Margin Support Program by placing an "X" in the applicable box:

[ ] YES [X] NO

Vendor will pay TSA an amount (the "Margin Support Payment") that allows TSA to realize a gross profit margin on retail sales during the Effective Period of the merchandise purchased under the agreement that equals the Guaranteed Margin listed below. The Margin Support Payment will be calculated by subtracting (i) TSA's actual margin on sales of the Merchandise during the effective period from (ii) the Guaranteed Margin and (iii) multiplying the result by the retail sales price for sales of the Merchandise during the effective period. TSA's margin will be calculated by subtracting TSA's landed cost of the Merchandise from the retail sales price for such Merchandise. TSA will calculate the Margin Support Payment within 180 days after the effective period.

Department*	Guaranteed Margin %	Sales Target $	Margin Target $

* If this applies to more than one department, list all departments that it applies to and the amounts committed for each department.

OTHER/ADDITIONAL ENTITLEMENTS

Please indicate whether Vendor elects to participate in other entitlement programs by placing an "X" in the applicable box:

[ ] YES [X] NO

Other/Additional Program Package Details:

Department*	Amount Committed
Total Amount Committed:	

*If this applies to more than one department, list all departments that it applies to and the amount committed for each department.

VOLUME REBATE INFORMATION

Volume Rebate* (%)	Purchase Goals* ($)				Exclusions From Purchases (List specific items)
1.00%	From:	7,975,000	To:	8,799,999	@VENDORS SPLIT (COST)
2.00%	From:	8,800,000	To:		
0.00%	From:	0	To:	0	
0.00%	From:	0	To:	0	

*Unless otherwise stated the Volume Rebate Program is based on COST sales for TSA's fiscal year, payable by DFI at 100% reimbursement. If certain purchases by TSA are excluded from the volume rebate calculation, then list the excluded items in the chart immediately above. All Volume Rebate and Purchase Goal Tiers are retroactive to dollar 1 and are computed using the highest Volume Rebate % achieved.

LOGISTICS REBATE INFORMATION

Vendor will pay TSA a Logistics Rebate in order to defray a portion of TSA's logistics costs. The Logistics Rebate is calculated by multiplying the Rate of Logistics Rebate indicated below times TSA's sales during the Effective Period from Vendor that are shipped to any of TSA's distribution facilities.

RATE OF LOGISTICS REBATE: _____

PAYMENT INFORMATION, TERMS AND DISCOUNTS

REMIT ADDRESS:	2440 S. Sepulveda Blvd Suite 210	CITY: Los Angeles	STATE: CA
REMIT ZIP CODE:	90064	COUNTRY: USA	TAX ID: 95-4245974
MAIN PHONE:	(800) 966-7697	MAIN FAX: (310) 473-7223	
REMIT E-MAIL:	agomperts@agron.com		

Are Vendor's accounts receivables from TSA factored (select one)? [ ] YES [X] NO

FACTOR NAME:	PHONE:	FAX:
ADDRESS:	CITY ST:	
ZIP:	CONTACT:	
E-MAIL:		
OTHER:		

ORDER TYPE	Purchase Order Payment Terms* (# of Days for Payment)	Pricing Discounts* (% Discount, additional terms)
INITIAL ORDER:	Net 30 EOFM	
RE-ORDER:		
NEW STORE:	days in addition to terms listed above on New Store Opening Inventory as defined in TSA's Vendor Relationship Guide.	Per Store
CONTAINER/ POE/ IMPORT:		
OTHER:		

*All Vendor invoicing must comply with the terms and conditions that are part of this Agreement. All of Vendor's invoices must be submitted via an EDI 810 document. **All Payment Terms listed above are based on the later of:** (i) TSA's receipt of invoice; or (ii) TSA's receipt of the Merchandise at the location designated by TSA. All Pricing Discounts are based on the gross unit cost of the items included in an Order and are in addition to all other discounts and payment terms. If additional Payment Terms exist, please list in comment section below. All correspondence must be in writing and received within six months of the invoice date.

COMMENTS:

COLLECTION METHOD

Vendor will pay all Defective Allowance, Advertising Commitment, Margin Support, Volume Rebate, Logistics Rebate, and any other or additional Entitlements monthly in the manner selected below (Place an "X" in only one of the following; if none selected then the method will be TSA generated chargeback). Note: All unpaid claims will be deducted from open invoices 30 days after billing. TSA will hold in accounts payable amount equal to chargeback until claim is paid/settled.

[X] **TSA GENERATED CHARGEBACK (Most Preferred)** [ ] **VENDOR CHECK (Send only to TSA Vendor Acct. Dept.)**

[ ] **ITEMIZED LINE ITEM OFF INVOICE (Must be initiated by vendor)**

MOST FAVORED NATIONS

VENDOR WARRANTS THAT PRICES CHARGED TO TSA FOR MERCHANDISE OR SERVICES (ON A NET PRICE BASIS) WILL BE NO HIGHER THAN THE LOWEST PRICES CHARGED BY VENDOR TO ANY OF ITS CUSTOMERS, EXCEPT AS FOLLOWS:

EXCEPTIONS: Shrink splits 50/50 up to 200K shrink $. TSA responsible for all shrink over 200K.

Vendor is responsible for all missing or lost goods (shrink), Split 50% with TSA.

- If Vendor is converting to the Pay-by-Scan program, Vendor shall reimburse TSA for all costs of goods on hand at the time of conversion.
- Vendor shall adhere to the invoice and shipping policies, as well as the terms and conditions of TSA's Vendor Relationship Guide which is available at www.thesportsauthority.com.
- TSA and Vendor agree that the arrangement contemplated by this agreement shall be a consignment as defined in Section 9-102 of the Colorado and Delaware Uniform Commercial Codes. Vendor shall retain title to all goods subject to this agreement until the date of sale at which time title shall pass from Vendor to the purchaser of such goods. Vendor shall be entitled to file UCC-1 Financing Statements to reflect this consignment.
- The term of this agreement shall commence as of the Effective Date and remain in effect until a new agreement is signed by TSA and Vendor.

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be executed by their duly authorized representatives as of the date indicated below.

Vendor	TSA STORES, INC.
By: [signature]	By: _____ (Buyer)
Print Name: ANTON SCHIFF	Print Name: _____
Title: CO-CEO	Title: _____
Date: 7/18/11	Date: _____
PLEASE SIGN AND INITIAL USING BLUE INK TO ALLOW FOR EASY IDENTIFICATION OF THE ORIGINAL AGREEMENT.	By: _____ (DMM)
	Print Name: _____
	Title: Divisional Merchandise Manager
	Date: _____

ID: 649
Stephen Binkley

SPORTS AUTHORITY®

TSA STORES, INC.

2011 DOMESTIC VENDOR DEAL SHEET (VENDOR AGREEMENT)

PAY BY SCAN

EFFECTIVE PERIOD: 1/30/2011 THROUGH 1/28/2012

VENDOR NAME: Agron, Inc VENDOR NUMBER: 24218
TSA DEPARTMENT(S): 944 SUB DEPT:
VENDOR BRANDS*: adidas BUYER NAME:

All Purchase Goals and Threshold clauses are based on purchases for (select one):

[X] The department/departments indicated in this agreement. [ ] All TSA departments that Vendor sells merchandise to.

VENDOR CORPORATE INFORMATION

ADDRESS:	2440 S. Sepulveda Blvd	CITY: Los Angeles	STATE: CA
ZIP CODE:	90277	COUNTRY: USA	TAX ID: 95-4545974 **W-9 REQUIRED
MAIN PHONE:	(800) 966-7697	MAIN FAX: (310) 312-1753	OTHER #:

SALES INFORMATION

VP OF SALES: Eric Luthro EMAIL: eluthro@agron.com PHONE: (800) 966-7697
ADDRESS: 2440 S. Sepulveda Blvd
FAX: (310) 312-1753 OTHER PHONE: x196

N SALES MNGR: Karla Huff EMAIL: khuff@agron.com PHONE: (800) 966-7697
ADDRESS: 2440 S. Sepulveda Blvd
FAX: (310) 312-1753 OTHER PHONE: x140

R SALES MNGR: ~~Lindsey Sweeney~~ JEFF GADANSKI EMAIL: ~~lindsey.sweeney@adidas.com~~ JEFF.GADANSKI@ADIDAS.COM PHONE: (800) 289-2723
ADDRESS: 5055 N. Greeley Ave.
FAX: (971) 234-9999 OTHER PHONE: x4198

Vendor represents that there is no manufacturer's representative, dealer, or other third party receiving commissions or payments in connections with this contract, except for the following (if applicable):

REP NAME: Peter Schuster COMPANY: Adidas COMMISSION:
ADDRESS: 21 Canyon Cedar CITY, ST: Littleton, CO ZIP: 80127
PHONE: (603) 834-0270 FAX: (413) 480-6527 EMAIL: peter.schuster@adidas.com

CUSTOMER SERVICE DEPARTMENT CONTACT

NAME: Peter Sholian EMAIL: psholian@agron.com PHONE: (800) 966-7697
ADDRESS: 2440 S. Sepulveda Blvd
FAX: (310) 312-1753 OTHER PHONE:x153

MIS DEPARTMENT CONTACT

NAME: Ray Westcott EMAIL: rwestcott@agron.com PHONE: (800) 966-7697
ADDRESS: 2440 S. Sepulveda Blvd
FAX: (310) 312-1753 OTHER PHONE:x145

VENDOR INITIALS: _____ TSA INITIALS: _____

DISTRIBUTION DEPARTMENT CONTACT

NAME: Marc Hernandez	EMAIL: mhernandez@agron.com	PHONE: (800) 966-7697
ADDRESS: 2440 S. Sepulveda Blvd	FAX: (310) 312-1753	PHONE: x133

TRANSPORTATION CONTACT

VNDR CONTACT NAME: Marc Hernandez	EMAIL: mhernandez@agron.com	PHONE: (800) 966-7697
ADDRESS: 2440 S. Sepulveda Blvd	FAX: (310) 312-1753	PHONE 2: x133
FREIGHT NAME: Marc Hernandez	EMAIL: mhernandez@agron.com	PHONE: (800) 966-7697
ADDRESS: 2440 S. Sepulveda Blvd	FAX: (310) 312-1753	PHONE 2: x133

VENDOR COMPLIANCE CONTACT

NAME: Marc Hernandez	EMAIL: mhernandez@agron.com	PHONE: (800) 966-7697
ADDRESS: 2440 S. Sepulveda Blvd	FAX: (310) 312-1753	PHONE 2: x133

DEAL SHEET CONTACTS (EG: Vendor Accountant, Co-op Coordinator, etc.)

NAME: Karla Huff	EMAIL: khuff@agron.com	PHONE: (800) 966-7697
ADDRESS: 2440 S. Sepulveda Blvd	FAX: (310) 312-1753	PHONE 2: x140
PRES/CEO: Wade Siegel	EMAIL: wsiegel@agron.com	PHONE: (800) 966-7697
ADDRESS: 2440 S. Sepulveda Blvd	FAX: (310) 312-1753	PHONE 2: x104

INSURANCE CONTACT AND INFORMATION

CARRIER: CAN	POLICY #: 2026470366	EXP DTE:
ADDRESS:		
FAX: (213) 553-8466	COVERAGE AMT: 80,000,000	

SHIPPING INFORMATION

ADDRESS: 2101 East Via Arado	CITY, ST: Rancho Dominguez, CA	ZIP: 90220
NAME: Mauricio Enriquez	EMAIL: menriquez@agron.com	
PORT OF ORIGIN:	COUNTRY:	
PHONE/FAX: (310) 254-0300	PRODUCT TYPE:	
ADDRESS 2:	CITY, ST:	ZIP:
NAME:	EMAIL:	
PORT OF ORIGIN:	COUNTRY:	
PHONE/FAX:	PRODUCT TYPE:	
ADDRESS 3:	CITY, ST:	ZIP:
NAME:	EMAIL:	
PORT OF ORIGIN:	COUNTRY:	
PHONE/FAX:	PRODUCT TYPE:	

VENDOR INITIALS: _____ TSA INITIALS: _____

FREIGHT EXPENSE

(Place an "X" in the applicable box): Prepaid (Vendor Pays): [ ] Collect* (TSA Pays): [X]

*Must use TSA LCC for collect. No "add to invoice" without TSA Transportation Department written approval.

If shipping method is Direct Store Delivery (DSD) Prepaid Freight is Required.

FREE FREIGHT ALLOWANCE CONDITIONS:

FOB ADDRESS: CITY STATE: ZIP:

PAYMENT INFORMATION

Payment is based on (Choose Method):

% of Retail (Detail Below): [X] COST: [ ] OTHER (Detail Below): [ ]

If Payment Method is % of Retail: VENDOR PORTION %: 43.00% TSA PORTION %: 57.00%

If Payment Method is Other, Detail Below:

* packs will be 45/55 split.

DEFECTIVE RETURN AUTHORIZATION/DESTROY FOR CREDIT INFORMATION

Choose One Method:

DESTROY FOR CREDIT: [X] RETURN TO VENDOR: [ ]

Merchandise will be disposed to include 8% handling fee of the cost of goods (as if sold by TSA) disposed. If Vendor does not authorize DFC, TSA will physically return defective merchandise to Vendor, at Vendor's expense. TSA will use Vendor's carrier if such information is provided to TSA. If Vendor does not provide return authorization information within 90 days of request by TSA, TSA may DFC the goods even if Vendor has not checked DFC below.
Collection Method: Vendor will pay handling fees as a TSA generated Charge back that will be deducted from invoice.

Defective Return Authorization:

Defective merchandise that is returned to vendor will incur an 8% handling fee of the original cost of goods based on the last selling cost for consolidated returns from our Return Centers. Non-defective merchandise that is returned for a recall, pack-up, or any other reason, will incur a 4% handling fee of the original cost of goods based on the last selling fir consolidated returns from our Return Centers. Additionally, all merchandise required to be returned will be assessed freight charges equal to the freight inbound and freight returned to vendor.

Disposed for Credit:

Allows TSA to charge Vendor for defective merchandise without sending product back. TSA will dispose of this product, to include 8% handling fee of the original cost of goods based on the last selling cost disposed.

Indicate if return merchandise may be field disposed for credit ("DFC"): YES: [X] NO: [ ]

RTV's that are not DFC will be physically returned to Vendor, at Vendor's expense. TSA will use TSA carriers and deduct all related freight charges (equal to the freight inbound and freight returned to vendor). If Vendor does not provide return authorization information within 90 days of request by TSA, TSA may DFC the goods even if Vendor has not checked DFC above.
Due to the cost of ocean freight, all merchandise shipped to Alaska and Hawaii locations will be DFC. Merchandise covered by RTV program will not be physically returned for these locations.

Type of Merchandise that applies to DFC*: Defective Items Only *If none specified, DFC applies to all Merchandise.

DEFECTIVE RETURN EXCEPTIONS:

VENDOR INITIALS: _____ TSA INITIALS: _____

RETURN TO VENDOR INFORMATION

Please identify all that apply and include return authorization ("RA") information. Merchandise shipped to Alaska and Hawaii locations will be DFC and not be physically returned to vendor.

Items with an * are required fields.

***Please select the preferred method of obtaining an RA: PHONE: [ ] FAX: [ ] E-MAIL: [ ]**

RA FREQUENCY:

*FAX #: (310) 312-1753 E-MAIL: psholian@agron.com

*ADDRESS 1: 2101 East Via Arado *CITY ST: Rancho Dominguez, CA *ZIP: 90220

*CONTACT NAME: Peter Sholian EMAIL 2:

*PHONE FAX 2:

MERCH THAT APLLIES TO ADDRESS 1:

ADDRESS 2: CITY ST: ZIP:

CONTACT NAME: EMAIL 2:

PHONE FAX 2:

MERCH THAT APLLIES TO ADDRESS 2:

Are Add-Ons Allowed? [ ] YES [ ] NO

PARCEL CARRIER: LTL CARRIER:

Attach additional return center addresses in the same format

EDI TRADING

Place and "X" where applicable: [X] In-House [ ] Third Party

COMPANY:

EDI CONTACT: Loudette Salomon EMAIL: lsalomon@agron.com

PHONE: (800) 966-7697 FAX: (312) 473-7223

ADDRESS: 2440 S. Sepulveda Blvd CITY ST: Los Angeles, CA ZIP: 90277

OTHER PHONE: x161

Does your company subscribe to the Inovis Catalogue (Formerly QRS):

[X] YES [ ] NO, Then please contact Inovis at 1-877-446-6847, option 4 and reference Sports Authority Catalogue Program.

INOVIS ACCOUNT #: R0510

ORDER INFORMATION

Is Merchandise? [X] PRE - TICKETED MSRP [ ] (GOH) PRE - HUNG

[ ] PRE - TICKETED TSA RETAIL PRICE [ ] EAS - TAGGED

UPC Code supplied on all merchandise: [X] YES [ ] NO

SPECIAL COMMENTS:

VENDOR INITIALS: _____ TSA INITIALS: _____ Page 4

CO-OPERATIVE ADVERTISING COMMITMENT INFORMATION

Participation Schedule: Vendor elects to participate in the TSA advertising programs indicated below:

Place "X" Where	Program Name	Advertising Rebate (%) (Ex. 2.00%)	Amount $
X	Cooperative Advertising	2.00%	0
X	E-COMMERCE CO-OP (#007)	2.50%	

*If Vendor uses a different name for co-op (i.e. key funds, MDF, etc.) then the TSA buyer should insert the name of the program in the Program Name column. If certain purchases by TSA are excluded from the advertising commitment calculation or other terms apply, then list the excluded items and additional details in the applicable boxes below:

EXCLUDED ITEMS:

ADDITIONAL TERMS:

Advertising Rebate (%)	Purchase Goals				Exclusions From Purchases (List specific items)
	From:		To:		
	From:		To:		
	From:		To:		

Unless otherwise stated the Co-op Advertising Commitment is based on COST sales for TSA's fiscal year,payable by DFI at 100% reimbursement with N POP requirements. All Advertising Commitment and Sales Incentive Program Purchase Goal Tiers are retroactive to dollar 1 and are computed using the highest Advertising Rebate % achieved.

MARGIN SUPPORT PROGRAM

Please indicate whether Vendor elects to participate in TSA's Margin Support Program by placing an "X" in the applicable box:

[ ] YES [X] NO

Vendor will pay TSA an amount (the "Margin Support Payment") that allows TSA to realize a gross profit margin on retail sales during the Effective Period of the merchandise purchased under the agreement that equals the Guaranteed Margin listed below. The Margin Support Payment will be calculated by subtracting (i) TSA's actual margin on sales of the Merchandise during the effective period from (ii) the Guaranteed Margin and (iii) multiplying the result by the retail sales price for sales of the Merchandise during the effective period. TSA's margin will be calculated by subtracting TSA's landed cost of the Merchandise from the retail sales price for such Merchandise. TSA will calculate the Margin Support Payment within 180 days after the effective period.

Department*	Guaranteed Margin %	Sales Target $	Margin Target $

* If this applies to more than one department, list all departments that it applies to and the amounts committed for each department.

OTHER/ADDITIONAL ENTITLEMENTS

Please indicate whether Vendor elects to participate in other entitlement programs by placing an "X" in the applicable box:

[ ] YES [X] NO

Other/Additional Program Package Details:

Department*	Amount Committed
Total Amount Committed:	

*If this applies to more than one department, list all departments that it applies to and the amount committed for each department.

VOLUME REBATE INFORMATION

Volume Rebate* (%)	Purchase Goals* ($)				Exclusions From Purchases (List specific items)
1.00%	From:	6,202,000	To:	6,799,999	@VENDOR SPLIT (COST)
2.00%	From:	6,800,000	To:		
0.00%	From:	0	To:	0	
0.00%	From:	0	To:	0	

*Unless otherwise stated the Volume Rebate Program is based on COST sales for TSA's fiscal year, payable by DFI at 100% reimbursement. If certain purchases by TSA are excluded from the volume rebate calculation, then list the excluded items in the chart immediately above. All Volume Rebate and Purchase Goal Tiers are retroactive to dollar 1 and are computed using the highest Volume Rebate % achieved.

LOGISTICS REBATE INFORMATION

Vendor will pay TSA a Logistics Rebate in order to defray a portion of TSA's logistics costs. The Logistics Rebate is calculated by multiplying the Rate of Logistics Rebate indicated below times TSA's sales during the Effective Period from Vendor that are shipped to any of TSA's distribution facilities.

RATE OF LOGISTICS REBATE: _____

PAYMENT INFORMATION, TERMS AND DISCOUNTS

REMIT ADDRESS:	2440 S. Sepulveda Blvd Suite 210	CITY: Los Angeles	STATE: CA
REMIT ZIP CODE:	90064	COUNTRY: USA	TAX ID: 95-4245974
MAIN PHONE:	(800) 966-7697	MAIN FAX: (310) 473-7223	
REMIT E-MAIL:	agomperts@agron.com		

Are Vendor's accounts receivables from TSA factored (select one)? [ ] YES [X] NO

FACTOR NAME:	PHONE:	FAX:
ADDRESS:	CITY ST:	
ZIP:	CONTACT:	
E-MAIL:		
OTHER:		

ORDER TYPE	Purchase Order Payment Terms* (# of Days for Payment)	Pricing Discounts* (% Discount, additional terms)
INITIAL ORDER:	Net 30 EOFM	
RE-ORDER:		
NEW STORE:	days in addition to terms listed above on New Store Opening Inventory as defined in TSA's Vendor Relationship Guide.	Per Store
CONTAINER/ POE/ IMPORT:		
OTHER:		

*All Vendor invoicing must comply with the terms and conditions that are part of this Agreement. All of Vendor's invoices must be submitted via an EDI 810 document. **All Payment Terms listed above are based on the later of:** (i) TSA's receipt of invoice; or (ii) TSA's receipt of the Merchandise at the location designated by TSA. All Pricing Discounts are based on the gross unit cost of the items included in an Order and are in addition to all other discounts and payment terms. If additional Payment Terms exist, please list in comment section below. All correspondence must be in writing and received within six months of the invoice date.

COMMENTS:

COLLECTION METHOD

Vendor will pay all Defective Allowance, Advertising Commitment, Margin Support, Volume Rebate, Logistics Rebate, and any other or additional Entitlements monthly in the manner selected below (Place an "X" in only one of the following; if none selected then the method will be TSA generated chargeback). Note: All unpaid claims will be deducted from open invoices 30 days after billing. TSA will hold in accounts payable amount equal to chargeback until claim is paid/settled.

[X] TSA GENERATED CHARGEBACK (Most Preferred) [ ] VENDOR CHECK (Send only to TSA Vendor Acct. Dept.)

[ ] ITEMIZED LINE ITEM OFF INVOICE (Must be initiated by vendor)

MOST FAVORED NATIONS

VENDOR WARRANTS THAT PRICES CHARGED TO TSA FOR MERCHANDISE OR SERVICES (ON A NET PRICE BASIS) WILL BE NO HIGHER THAN THE LOWEST PRICES CHARGED BY VENDOR TO ANY OF ITS CUSTOMERS, EXCEPT AS FOLLOWS:

EXCEPTIONS: Shrink splits 50/50 up to 200K shrink $. TSA responsible for all shrink over 200K.

Vendor is responsible for all missing or lost goods (shrink), Split 50% with TSA.

•If Vendor is converting to the Pay-by-Scan program, Vendor shall reimburse TSA for all costs of goods on hand at the time of conversion.
•Vendor shall adhere to the invoice and shipping policies, as well as the terms and conditions of TSA's Vendor Relationship Guide which is available at www.thesportsauthority.com.
•TSA and Vendor agree that the arrangement contemplated by this agreement shall be a consignment as defined in Section 9-102 of the Colorado and Delaware Uniform Commercial Codes. Vendor shall retain title to all goods subject to this agreement until the date of sale at which time title shall pass from Vendor to the purchaser of such goods. Vendor shall be entitled to file UCC-1 Financing Statements to reflect this consignment.
•The term of this agreement shall commence as of the Effective Date and remain in effect until a new agreement is signed by TSA and Vendor.

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be executed by their duly authorized representatives as of the date indicated below.

Vendor	TSA STORES, INC.
By: [signature]	By: _____ (Buyer)
Print Name: ANTON SCHIFF	Print Name: _____
Title: CEO - GEO	Title: _____
Date: 7/18/11	Date: _____
PLEASE SIGN AND INITIAL USING BLUE INK TO ALLOW FOR EASY IDENTIFICATION OF THE ORIGINAL AGREEMENT.	By: _____ (DMM)
	Print Name: _____
	Title: Divisional Merchandise Manager
	Date: _____

VENDOR INITIALS: [initials] TSA INITIALS: _____

ID: 620
Rob Will

SPORTS AUTHORITY®

TSA STORES, INC.

2011 DOMESTIC VENDOR DEAL SHEET (VENDOR AGREEMENT)

PAY BY SCAN

EFFECTIVE PERIOD: 1/30/2011 THROUGH 1/28/2012

VENDOR NAME: Agron, Inc
VENDOR NUMBER: 24218
TSA DEPARTMENT(S): 929
SUB DEPT:
VENDOR BRANDS*: adidas
BUYER NAME:

All Purchase Goals and Threshold clauses are based on purchases for (select one):

[X] The department/departments indicated in this agreement. [ ] All TSA departments that Vendor sells merchandise to.

VENDOR CORPORATE INFORMATION

ADDRESS:	2440 South Sepulveda Blvd	CITY: Los Angeles	STATE: CA
ZIP CODE:	90277	COUNTRY: USA	TAX ID: 95-4245974 **W-9 REQUIRED
MAIN PHONE:	(800) 966-7697	MAIN FAX: (310) 312-1753	OTHER #:

SALES INFORMATION

VP OF SALES: Eric Luthro EMAIL: ELuthro@agron.com PHONE: (800) 966-7697
ADDRESS: 2440 South Sepulveda Blvd
FAX: (310) 312-1753 OTHER PHONE: x196

N SALES MNGR: Karla Huff EMAIL: KHuff@agron.com PHONE: (800) 966-7697
ADDRESS: 2440 South Sepulveda Blvd
FAX: (310) 312-1753 OTHER PHONE: x140

R SALES MNGR: ~~Lindsey Sweeney~~ JEFF GADANSKI EMAIL: ~~Lindsey.Sweeney@adidas.com~~ JEFF.GADANSKI@ADIDAS.COM PHONE: (800) 289-2723
ADDRESS: 5055 N Greeley Ave
FAX: (971) 234-9999 OTHER PHONE: x4198

Vendor represents that there is no manufacturer's representative, dealer, or other third party receiving commissions or payments in connections with this contract, except for the following (if applicable):

REP NAME: Peter Schuster COMPANY: adidas COMMISSION:
ADDRESS: 21 Canyon Cedar CITY, ST: Littleton, CO ZIP: 80127
PHONE: (603) 834-0270 FAX: (413) 480-6527 EMAIL: Peter.Schuster@adidas.com

CUSTOMER SERVICE DEPARTMENT CONTACT

NAME: Peter Shollan EMAIL: PShollan@agron.com PHONE: (800) 966-7697
ADDRESS: 2440 South Sepulveda Blvd
FAX: (310) 312-1753 OTHER PHONE:x153

MIS DEPARTMENT CONTACT

NAME: Ray Westcott EMAIL: RWestcott@agron.com PHONE: (800) 966-7697
ADDRESS: 2440 South Sepulveda Blvd
FAX: (310) 312-1753 OTHER PHONE:x145

VENDOR INITIALS: _____ TSA INITIALS: _____

DISTRIBUTION DEPARTMENT CONTACT

NAME: Marc Hernandez	EMAIL: MHernandez@agron.com	PHONE: (800) 966-7697
ADDRESS: 2440 South Sepulveda Blvd	FAX: (310) 312-1753	PHONE: x133

TRANSPORTATION CONTACT

VNDR CONTACT NAME: Marc Hernandez	EMAIL: MHernandez@agron.com	PHONE: (800) 966-7697
ADDRESS: 2440 South Sepulveda Blvd	FAX: (310) 312-1753	PHONE 2: x133
FREIGHT NAME: Marc Hernandez	EMAIL: MHernandez@agron.com	PHONE: (310) 312-1753
ADDRESS: 2440 South Sepulveda Blvd	FAX: (310) 312-1753	PHONE 2: x133

VENDOR COMPLIANCE CONTACT

NAME: Marc Hernandez	EMAIL: MHernandez@agron.com	PHONE: (800) 966-7697
ADDRESS: 2440 South Sepulveda Blvd	FAX: (310) 312-1753	PHONE 2: x133

DEAL SHEET CONTACTS (IE: Vendor Accountant, Co-op Coordinator, etc.)

NAME: Karla Huff	EMAIL: KHuff@agron.com	PHONE: (800) 966-7697
ADDRESS: 2440 South Sepulveda Blvd	FAX: (310) 312-1753	PHONE 2: x140
PRES/CEO: Wade Siegel	EMAIL: WSiegel@agron.com	PHONE: (800) 966-7697
ADDRESS: 2440 South Sepulveda Blvd	FAX: (310) 312-1753	PHONE 2: x104

INSURANCE CONTACT AND INFORMATION

CARRIER: CAN	POLICY #: 2026470366	EXP DTE:
ADDRESS:		
FAX: (213) 553-8466	COVERAGE AMT: $80,000,000	

SHIPPING INFORMATION

ADDRESS: 2101 East Via Arado	CITY, ST: Rancho Dominguez, CA		ZIP: 90220
NAME: Mauricio Enriquez	EMAIL: MEnriquez@agron.com		
PORT OF ORIGIN:	COUNTRY:		
PHONE/FAX: (310) 254-0300	PRODUCT TYPE:		
ADDRESS 2:	CITY, ST:		ZIP:
NAME:	EMAIL:		
PORT OF ORIGIN:	COUNTRY:		
PHONE/FAX:	PRODUCT TYPE:		
ADDRESS 3:	CITY, ST:		ZIP:
NAME:	EMAIL:		
PORT OF ORIGIN:	COUNTRY:		
PHONE/FAX:	PRODUCT TYPE:		

VENDOR INITIALS: _____ TSA INITIALS: _____

FREIGHT EXPENSE

(Place an "X" in the applicable box): Prepaid (Vendor Pays): [ ] Collect* (TSA Pays): [X]

*Must use TSA LCC for collect. No "add to invoice" without TSA Transportation Department written approval.

If shipping method is Direct Store Delivery (DSD) Prepaid Freight is Required.

FREE FREIGHT ALLOWANCE CONDITIONS:

FOB ADDRESS: CITY STATE: ZIP:

PAYMENT INFORMATION

Payment is based on (Choose Method):

% of Retail (Detail Below): [X] COST: [ ] OTHER (Detail Below): [ ]

If Payment Method is % of Retail: VENDOR PORTION %: 43.00% TSA PORTION %: 57.00%

If Payment Method is Other, Detail Below:

DEFECTIVE RETURN AUTHORIZATION/DESTROY FOR CREDIT INFORMATION

Choose One Method:

DESTROY FOR CREDIT: [X] RETURN TO VENDOR: [ ]

Merchandise will be disposed to include 8% handling fee of the cost of goods (as if sold by TSA) disposed. If Vendor does not authorize DFC, TSA will physically return defective merchandise to Vendor, at Vendor's expense. TSA will use Vendor's carrier if such information is provided to TSA. If Vendor does not provide return authorization information within 90 days of request by TSA, TSA may DFC the goods even if Vendor has not checked DFC below.
Collection Method: Vendor will pay handling fees as a TSA generated Charge back that will be deducted from invoice.

Defective Return Authorization:

Defective merchandise that is returned to vendor will incur an 8% handling fee of the original cost of goods based on the last selling cost for consolidated returns from our Return Centers. Non-defective merchandise that is returned for a recall, pack-up, or any other reason, will incur a 4% handling fee of the original cost of goods based on the last selling fir consolidated returns from our Return Centers. Additionally, all merchandise required to be returned will be assessed freight charges equal to the freight inbound and freight returned to vendor.

Disposed for Credit:

Allows TSA to charge Vendor for defective merchandise without sending product back. TSA will dispose of this product, to include 8% handling fee of the original cost of goods based on the last selling cost disposed.

Indicate if return merchandise may be field disposed for credit ("DFC"): YES: [X] NO: [ ]

RTV's that are not DFC will be physically returned to Vendor, at Vendor's expense. TSA will use TSA carriers and deduct all related freight charges (equal to the freight inbound and freight returned to vendor). If Vendor does not provide return authorization information within 90 days of request by TSA, TSA may DFC the goods even if Vendor has not checked DFC above.
Due to the cost of ocean freight, all merchandise shipped to Alaska and Hawaii locations will be DFC. Merchandise covered by RTV program will not be physically returned for these locations.

Type of Merchandise that applies to DFC*: [Defective Items Only] *If none specified, DFC applies to all Merchandise.

DEFECTIVE RETURN EXCEPTIONS:

VENDOR INITIALS: [AX] TSA INITIALS: [ ]

RETURN TO VENDOR INFORMATION

Please identify all that apply and include return authorization ("RA") information. Merchandise shipped to Alaska and Hawaii locations will be DFC and not be physically returned to vendor.

Items with an * are required fields.

***Please select the preferred method of obtaining an RA: PHONE: [ ] FAX: [ ] E-MAIL: [ ]**

RA FREQUENCY:

*FAX #: (310) 312-1753 E-MAIL: PShollan@agron.com

*ADDRESS 1: 2101 East Via Arado *CITY ST: Rancho Dominguez, CA *ZIP: 90220

*CONTACT NAME: Peter Shollan EMAIL 2: PShollan@agron.com

*PHONE FAX 2: (800) 966-7697 ext 128

MERCH THAT APLLIES TO ADDRESS 1:

ADDRESS 2: CITY ST: ZIP:

CONTACT NAME: EMAIL 2:

PHONE FAX 2:

MERCH THAT APLLIES TO ADDRESS 2:

Are Add-Ons Allowed? [ ] YES [X] NO

PARCEL CARRIER: TSA SELECTED CARRIER LTL CARRIER: TSA SELECTED CARRIER

Attach additional return center addresses in the same format

EDI TRADING

Place and "X" where applicable: [X] In-House [ ] Third Party

COMPANY:

EDI CONTACT: Loudette Salomon EMAIL: LSalomon@agron.com

PHONE: (800) 966-7697 FAX: (312) 473-7223

ADDRESS: Same as vendor corp CITY ST: ZIP:

OTHER PHONE: x161

Does your company subscribe to the Inovis Catalogue (Formerly QRS):

[X] YES [ ] NO, Then please contact Inovis at 1-877-446-6847, option 4 and reference Sports Authority Catalogue Program.

INOVIS ACCOUNT #: R0510

ORDER INFORMATION

Is Merchandise? [X] PRE - TICKETED MSRP [ ] (GOH) PRE - HUNG

[ ] PRE - TICKETED TSA RETAIL PRICE [ ] EAS - TAGGED

UPC Code supplied on all merchandise: [X] YES [ ] NO

SPECIAL COMMENTS:

VENDOR INITIALS: _____ TSA INITIALS: _____

CO-OPERATIVE ADVERTISING COMMITMENT INFORMATION

Participation Schedule: Vendor elects to participate in the TSA advertising programs indicated below:

Place "X" Where	Program Name	Advertising Rebate (%) (Ex. 2.00%)	Amount $
X	Cooperative Advertising	2.00%	0
X	E-COMMERCE CO-OP (#007)	2.50%	

*If Vendor uses a different name for co-op (i.e. key funds, MDF, etc.) then the TSA buyer should insert the name of the program in the Program Name column. If certain purchases by TSA are excluded from the advertising commitment calculation or other terms apply, then list the excluded items and additional details in the applicable boxes below:

EXCLUDED ITEMS:

ADDITIONAL TERMS:

Advertising Rebate (%)	Purchase Goals				Exclusions From Purchases (List specific items)
	From:		To:		
	From:		To:		
	From:		To:		

Unless otherwise stated the Co-op Advertising Commitment is based on COST sales for TSA's fiscal year,payable by DFI at 100% reimbursement with N POP requirements. All Advertising Commitment and Sales Incentive Program Purchase Goal Tiers are retroactive to dollar 1 and are computed using the highest Advertising Rebate % achieved.

MARGIN SUPPORT PROGRAM

Please indicate whether Vendor elects to participate in TSA's Margin Support Program by placing an "X" in the applicable box:

[ ] YES [X] NO

Vendor will pay TSA an amount (the "Margin Support Payment") that allows TSA to realize a gross profit margin on retail sales during the Effective Period of the merchandise purchased under the agreement that equals the Guaranteed Margin listed below. The Margin Support Payment will be calculated by subtracting (i) TSA's actual margin on sales of the Merchandise during the effective period from (ii) the Guaranteed Margin and (iii) multiplying the result by the retail sales price for sales of the Merchandise during the effective period. TSA's margin will be calculated by subtracting TSA's landed cost of the Merchandise from the retail sales price for such Merchandise. TSA will calculate the Margin Support Payment within 180 days after the effective period.

Department*	Guaranteed Margin %	Sales Target $	Margin Target $

* If this applies to more than one department, list all departments that it applies to and the amounts committed for each department.

OTHER/ADDITIONAL ENTITLEMENTS

Please indicate whether Vendor elects to participate in other entitlement programs by placing an "X" in the applicable box:

[ ] YES [X] NO

Other/Additional Program Package Details:

Department*	Amount Committed
Total Amount Committed:	

*If this applies to more than one department, list all departments that it applies to and the amount committed for each department.

VOLUME REBATE INFORMATION

Volume Rebate* (%)	Purchase Goals* ($)				Exclusions From Purchases (List specific items)
1.00%	From:	150,000	To:		@ VENDOR SPLIT (COST)
	From:		To:		
	From:		To:		
	From:		To:		

*Unless otherwise stated the Volume Rebate Program is based on COST sales for TSA's fiscal year, payable by DFI at 100% reimbursement. If certain purchases by TSA are excluded from the volume rebate calculation, then list the excluded items in the chart immediately above. All Volume Rebate and Purchase Goal Tiers are retroactive to dollar 1 and are computed using the highest Volume Rebate % achieved.

LOGISTICS REBATE INFORMATION

Vendor will pay TSA a Logistics Rebate in order to defray a portion of TSA's logistics costs. The Logistics Rebate is calculated by multiplying the Rate of Logistics Rebate indicated below times TSA's sales during the Effective Period from Vendor that are shipped to any of TSA's distribution facilities.

RATE OF LOGISTICS REBATE: _____

PAYMENT INFORMATION, TERMS AND DISCOUNTS

REMIT ADDRESS:	2440 South Sepulveda Blvd Suite 210	CITY: Los Angeles	STATE: CA
REMIT ZIP CODE:	90064	COUNTRY: USA	TAX ID: 95-4245974
MAIN PHONE:	(800) 966-7697	MAIN FAX: (310) 473-7223	
REMIT E-MAIL:	AGomperts@agron.com		

Are Vendor's accounts receivables from TSA factored (select one)? [ ] YES [X] NO

FACTOR NAME:	PHONE:	FAX:
ADDRESS:	CITY ST:	
ZIP:	CONTACT:	
E-MAIL:		
OTHER:		

ORDER TYPE	Purchase Order Payment Terms* (# of Days for Payment)	Pricing Discounts* (% Discount, additional terms)
INITIAL ORDER:	Net 30 EOFM	
RE-ORDER:		
NEW STORE:	days in addition to terms listed above on New Store Opening Inventory as defined in TSA's Vendor Relationship Guide.	Per Store
CONTAINER/ POE/ IMPORT:		
OTHER:		

*All Vendor invoicing must comply with the terms and conditions that are part of this Agreement. All of Vendor's invoices must be submitted via an EDI 810 document. **All Payment Terms listed above are based on the later of:** (i) TSA's receipt of invoice; or (ii) TSA's receipt of the Merchandise at the location designated by TSA. All Pricing Discounts are based on the gross unit cost of the items included in an Order and are in addition to all other discounts and payment terms. If additional Payment Terms exist, please list in comment section below. All correspondence must be in writing and received within six months of the invoice date.

COMMENTS:

COLLECTION METHOD

Vendor will pay all Defective Allowance, Advertising Commitment, Margin Support, Volume Rebate, Logistics Rebate, and any other or additional Entitlements monthly in the manner selected below (Place an "X" in only one of the following; if none selected then the method will be TSA generated chargeback). Note: All unpaid claims will be deducted from open invoices 30 days after billing. TSA will hold in accounts payable amount equal to chargeback until claim is paid/settled.

[X] **TSA GENERATED CHARGEBACK (Most Preferred)** [ ] **VENDOR CHECK (Send only to TSA Vendor Acct. Dept.)**

[ ] **ITEMIZED LINE ITEM OFF INVOICE (Must be initiated by vendor)**

MOST FAVORED NATIONS

VENDOR WARRANTS THAT PRICES CHARGED TO TSA FOR MERCHANDISE OR SERVICES (ON A NET PRICE BASIS) WILL BE NO HIGHER THAN THE LOWEST PRICES CHARGED BY VENDOR TO ANY OF ITS CUSTOMERS, EXCEPT AS FOLLOWS:

EXCEPTIONS: Shrink splits 50/50 up to 200K shrink $. TSA responsible for all shrink over 200K.

Vendor is responsible for all missing or lost goods (shrink), Split 50% with TSA.

•If Vendor is converting to the Pay-by-Scan program, Vendor shall reimburse TSA for all costs of goods on hand at the time of conversion.
•Vendor shall adhere to the invoice and shipping policies, as well as the terms and conditions of TSA's Vendor Relationship Guide which is available at www.thesportsauthority.com.
•TSA and Vendor agree that the arrangement contemplated by this agreement shall be a consignment as defined in Section 9-102 of the Colorado and Delaware Uniform Commercial Codes. Vendor shall retain title to all goods subject to this agreement until the date of sale at which time title shall pass from Vendor to the purchaser of such goods. Vendor shall be entitled to file UCC-1 Financing Statements to reflect this consignment.
•The term of this agreement shall commence as of the Effective Date and remain in effect until a new agreement is signed by TSA and Vendor.

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be executed by their duly authorized representatives as of the date indicated below.

Vendor	TSA STORES, INC.
By: [signature]	By: _____ (Buyer)
Print Name: ANDREW SCHIFF	Print Name: _____
Title: CO-CEO	Title: _____
Date: 7/18/11	Date: _____
PLEASE SIGN AND INITIAL USING BLUE INK TO ALLOW FOR EASY IDENTIFICATION OF THE ORIGINAL AGREEMENT.	By: _____ (DMM)
	Print Name: _____
	Title: Divisional Merchandise Manager
	Date: _____

VENDOR INITIALS: [initials] TSA INITIALS: _____ Page 8

EXHIBIT 2

ID: 649

SPORTS AUTHORITY

2015 VENDOR DEAL SHEET SUMMARY

PAY BY SCAN

•If Vendor is converting to the Pay-by-Scan program, Vendor shall reimburse TSA for all costs of goods on hand at the time of conversion.
•Vendor shall adhere to the invoice and shipping policies, as well as the terms and conditions of TSA's Vendor Relationship Guide which is available at www.tradingpartnerinsight.com/tsa/Login.aspx and incorporated by reference.
•TSA and Vendor agree that the arrangement contemplated by this agreement shall be a consignment as defined in Section 9-102 of the Colorado and Delaware Uniform Commercial Codes. Vendor shall retain title to all goods subject to this agreement until the date of sale at which time title shall pass from Vendor to the purchaser of such goods. Vendor shall be entitled to file UCC-1 Financing Statements to reflect this consignment.
•The term of this agreement shall commence as of the Effective Date and remain in effect until a new agreement is signed by TSA and Vendor.

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be executed by their duly authorized representatives as of the date indicated below.

Vendor	TSA STORES, INC.
By: [signature]	By: [signature] (Buyer)
Print Name: ANTON SCHIFF	Print Name: Laura Gillilan
Title: CO-CEO	Title: Buyer Socks
Date: 3/31/15	Date: 4/2/15
PLEASE SIGN AND INITIAL USING BLUE INK TO ALLOW FOR EASY IDENTIFICATION OF THE ORIGINAL AGREEMENT.	By: [signature] (DMM)
	Print Name: Michelle VanEss
	Title: Divisional Merchandise Manager
	Date: 4/2/15

ID: 620

SPORTS AUTHORITY

2015 VENDOR DEAL SHEET SUMMARY

PAY BY SCAN

•If Vendor is converting to the Pay-by-Scan program, Vendor shall reimburse TSA for all costs of goods on hand at the time of conversion.
•Vendor shall adhere to the invoice and shipping policies, as well as the terms and conditions of TSA's Vendor Relationship Guide which is available at www.tradingpartnerinsight.com/tsa/Login.aspx and incorporated by reference.
•TSA and Vendor agree that the arrangement contemplated by this agreement shall be a consignment as defined in Section 9-102 of the Colorado and Delaware Uniform Commercial Codes. Vendor shall retain title to all goods subject to this agreement until the date of sale at which time title shall pass from Vendor to the purchaser of such goods. Vendor shall be entitled to file UCC-1 Financing Statements to reflect this consignment.
•The term of this agreement shall commence as of the Effective Date and remain in effect until a new agreement is signed by TSA and Vendor.

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be executed by their duly authorized representatives as of the date indicated below.

Vendor	TSA STORES, INC.
By:	By: (Buyer)
Print Name: ANTONY SCHIFF	Print Name: Tom Austin
Title: CO-CEO	Title: Buyer
Date: 3/31/15	Date: 5/1/15
PLEASE SIGN AND INITIAL USING BLUE INK TO ALLOW FOR EASY IDENTIFICATION OF THE ORIGINAL AGREEMENT.	By: (DMM)
	Print Name:
	Title: Divisional Merchandise Manager
	Date: 5/11/15

ID. 649

SPORTS AUTHORITY

2015 VENDOR DEAL SHEET SUMMARY

PAY BY SCAN

EFFECTIVE PERIOD 2/1/2015 THROUGH 1/30/2016

VENDOR NUMBER: 24218
VENDOR NAME: Agron, Inc
DEPTS: 940, 944, 959, 962
SUB DEPT:

ENTITLEMENTS

CO-OP %: 2.00%
MDF PROGRAM: _____ MDF % _____ MDF $ _____
ECOMMERCE CO-OP/ OTHER PROGRAM: ECOMMERCE CO-OP OTHER %: 2.50%
CO-OP/MDF EXCLUSIONS: _____
REBATE %: _____
REBATE TIERS: _____
REBATE EXCLUSIONS: _____
LOGISTICS: _____
OTHER ENTITLEMENTS: _____ AMOUNT $ _____
_____ AMOUNT $ _____

DEFECTIVE PROGRAM

DFC: X RTV: _____

FREIGHT TERMS

PREPAID FREIGHT: _____ COLLECT FREIGHT: X

PAYMENT/DISCOUNT TERMS

INITIAL ORDER DAYS: Net 30 EOFM %: _____
RE-ORDER DAYS: _____ %: _____
NEW STORE %: _____ FIXED $: _____ Per Store

PAYMENT METHOD

% Of Retail: X Cost: ___ Other: ___ Vendor Portion %: _____ TSA Portion %: _____

PYMT DETAILS: Dept 962 Subdept 6 (team socks) 42%ven/58%TSA; Dept 944 Subdept 130 (packs) 45%/55%; all others 43%/57%

SHRINK: VENDOR & SA WILL SPLIT SHRINK AT 50% OF RETAIL SALES UP TO $200K SHRINK $. ANYTHING ABOVE IS RESPONSIBILITY OF SA. THE $200K SHRINK CAP IS AN AGGREGATE FOR AGRON'S TOTAL BUSINESS AND INCLUDES 940 944. 959. 962. 929. 921 ALL DEPTS

VENDOR INITIALS: [illegible] TSA INITIALS: [illegible]

ID: 620

SPORTS AUTHORITY

2015 VENDOR DEAL SHEET SUMMARY

PAY BY SCAN

EFFECTIVE PERIOD 2/1/2015 THROUGH 1/30/2016

VENDOR NUMBER: 24218
VENDOR NAME: Agron, Inc
DEPTS: 929, 931
SUB DEPT:

ENTITLEMENTS

CO-OP %: 2.00%
MDF PROGRAM: _____ MDF % _____ MDF $ _____
ECOMMERCE CO-OP/ OTHER PROGRAM: ECOMMERCE CO-OP OTHER %: 2.50%
CO-OP/MDF EXCLUSIONS: _____
REBATE %: _____
REBATE TIERS: _____
REBATE EXCLUSIONS: _____
LOGISTICS: _____
OTHER ENTITLEMENTS: _____ AMOUNT $ _____
_____ AMOUNT $ _____

DEFECTIVE PROGRAM

DFC: X RTV: _____

FREIGHT TERMS

PREPAID FREIGHT: _____ COLLECT FREIGHT: X

PAYMENT/DISCOUNT TERMS

INITIAL ORDER DAYS: Net 30 EOFM %: _____
RE-ORDER DAYS: _____ %: _____
NEW STORE %: _____ FIXED $: _____ Per Store

PAYMENT METHOD

% Of Retail: X Cost: ___ Other: ___ Vendor Portion %: 43.00% TSA Portion %: 57.00%

PYMT DETAILS: _____

SHRINK: VENDOR: SA WILL SPLIT SHRINK AT 60% OF RETAIL SALES UP TO $200K SHRINK $. ANYTHING ABOVE IS RESPONSIBILITY OF SA. THE $200K SHRINK CAP IS AN AGGREGATE FOR AGRON'S TOTAL BUSINESS AND INCLUDES ALL DEPTS (940, ALL 959, 962, 929, 931)

VENDOR INITIALS: [illegible] TSA INITIALS: _____

EXHIBIT 3

Pay by Scan: Questions and Answers

SPORTS AUTHORITY.

1. **What is Pay by Scan?**
   - Pay by Scan is a vendor management program where the vendor owns the inventory while it is in our retail stores. Payment is made to the vendor based on completed sales transactions.
   - For a more detailed process document please go to www.thesportsauthority.com, about us/vendor information/ Vendor Partnerships/Pay by Scan SOP. If you need a username and password please email tsacompliance@thesportsauthority.com
2. **How much time is required for testing?**
   - A week is the minimum but it depends upon the replenishment method selected and the vendor's system capabilities.
3. **What are the overall program requirements?**
   - If a new vendor buyer must request a vendor number.
   - Testing requires a minimum of one week from the date of approval.
   - Deal sheet must be completed and approved.
   - The vendor must be able to pre-ticket product and is required to ship SDQ if more than one sku and the product ships through the DC.
   - Vendor covers shrink 100% unless otherwise approved.
4. **How does payment work?**
   - Payment terms are 15 days EOM (end of month). End of month is our fiscal month, example period 1, February ends on 2/28 a check would be cut approximately 3/16 for all sales in fiscal February. The vendor DOES NOT invoice us.
   - Payments **are not** made via EDI 810 Invoice, they are manual based on sales for the agreed upon period.
   - It is vitally important that all cost information be correct in our system to ensure payment is made at the correct cost.
   - Please note that consumer returns are deducted from the period that they occur and are not necessarily defective or return to vendor.
5. **Once scanned when is the check mailed?**
   - Payment terms are 15 days EOM (end of month). End of month is our fiscal month, example period 1, February ends on 2/28 a check would be cut approximately 3/16 for all sales transactions in fiscal February.
6. **Current vendor participation?**
   - As of end of year 2008 there were 28 active vendors. This number is subject to change at any time.

Pay by Scan: Questions and Answers

SPORTS AUTHORITY

7. **Who covers freight?**
- In most cases the vendor covers freight; however this is a point that is better answered as part of the negotiations for this program between the vendor and the Buyer.

8. **What is the procedure for stocking and restocking product?**
- We have several options to replenish the stores; this will be decided between the vendor and the buyer.
    - Buyer buys: Buyer create orders and sends to vendor just like in a traditional retail environment.
    - E3: TSA's E3 replenishment system will generate orders and send over to vendor same as in a traditional environment.
    - Reverse PO: In this environment TSA sends the vendor a block of PO numbers, the vendor sends an ASN (using the PO numbers provided) when the product ships,TSA uses the ASN to create an order in our system.
    - For more information on any of these options please send an email to kdavis@thesportsauthority.com.

9. **Who will determine which items are going to be stocked at each door?**
- Between the Buyer and vendor it is decided which items go to which doors.

10. **Who determines when to put the product on sale?**
- This is a decision between the Buyer and vendor and should be clearly communicated to ensure all parties understand the impact of placing these items on sale.

11. **Do you have vendor references we can contact?**
- Absolutely, please contact your buyer for more information.

CERTIFICATE OF SERVICE

I, Margaret F. England, Esquire, hereby certify that on March 2, 2016, I caused a true and correct copy of the *Limited Objection to Debtors' Motion for Interim and Final Orders (A) Authorizing the Debtors to (I) Continue to Sell Consigned Goods in the Ordinary Course of Business Free and Clear of All Liens, Claims and Encumbrances and (II) Grant Administrative Expense Priority to Consignment Vendors for Consigned Goods Delivered Postpetition; and (B) Grant Replacement Liens to Consignment Vendors with Perfected Security Interests in Consigned Goods and/or Remit the Consignment Sale Price Arising from Sale of Consigned Goods to Putative Consignment Vendors* to be served via the CM/ECF electronic notification system and served via Hand Delivery as indicated upon the party listed below:

Via Hand Delivery	***Via Hand Delivery***
Michael R. Nestor, Esquire Andrew Magaziner, Esquire Young Conaway Stargatt & Taylor Rodney Square 1000 North King Street Wilmington, DE 19801	Hannah Mufson McCollum, Esquire Office of the United States Trustee U. S. Department of Justice 844 King Street, Suite 2207 Lockbox #35 Wilmington, DE 19801

Dated: March 2, 2016

Margaret F. England
Margaret F. England (DE #4248)

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
SPORTS AUTHORITY HOLDINGS, INC., *et al.*,[1]	Case No. 16-10527 (MWF)
Debtors.	(Jointly Administered)
	Ref. Docket No. 9

INTERIM ORDER (A) AUTHORIZING THE DEBTORS TO (I) CONTINUE TO SELL CONSIGNED GOODS IN THE ORDINARY COURSE OF BUSINESS FREE AND CLEAR OF ALL LIENS, CLAIMS, ENCUMBRANCES, AND INTERESTS; AND (II) GRANT ADMINISTRATIVE EXPENSE PRIORITY AND PURCHASE MONEY SECURITY INTERESTS TO CONSIGNMENT VENDORS FOR CONSIGNED GOODS DELIVERED POSTPETITION; AND (B) GRANT REPLACEMENT LIENS TO CONSIGNMENT VENDORS WITH SECURITY INTERESTS AND/OR HOLDING TITLE OR OWNERSHIP RIGHTS IN CONSIGNED GOODS AND/OR REMIT THE CONSIGNMENT SALE PRICE ARISING FROM SALE OF CONSIGNED GOODS TO PUTATIVE CONSIGNMENT VENDORS

Upon the *Debtors' Motion for Interim and Final Orders (a) Authorizing the Debtors to (i) Continue to Sell Consigned Goods in the Ordinary Course of Business Free and Clear of All Liens, Claims and Encumbrances and (ii) Grant Administrative Expense Priority to Consignment Vendors for Consigned Goods Delivered Postpetition; and (b) Grant Replacement Liens to Consignment Vendors with Perfected Security Interests in Consigned Goods and/or Remit the Consignment Sale Price Arising from Sale of Consigned Goods to Putative Consignment Vendors* (the "Motion")[2] filed by the above-captioned debtors and debtors in possession (collectively, the "Debtors"); and objections to the Motion having been asserted, either in a

[1] The Debtors and the last four digits of their respective taxpayer identification numbers are as follows: Sports Authority Holdings, Inc. (9008); Slap Shot Holdings, Corp. (8209); The Sports Authority, Inc. (2802); TSA Stores, Inc. (1120); TSA Gift Card, Inc. (1918); TSA Ponce, Inc. (4817); and TSA Caribe, Inc. (5664). The headquarters for the above-captioned Debtors is located at 1050 West Hampden Avenue, Englewood, Colorado 80110.

[2] All capitalized terms used and not defined herein shall have the meanings ascribed to them in the Motion.

writing filed with the Court or orally at the hearing on the Motion on March 3, 2016, by various Consignment Vendors of the Debtors, including (without limitation) Agron, Inc., Gordini, SGS Sports, Castlewood Apparel Corp., Implus Footcare, LLC, and Asics America Corporation; and the Court having found that it has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334(b) and 157, and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware dated as of February 29, 2012; and the Court having found that venue of these cases and the Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and the Court having found that this matter is a core proceeding pursuant to 28 U.S.C. § 157(b); and the Court having found that it may enter a final order consistent with Article III of the United States Constitution; and the Court having considered the First Day Declaration; and upon the record of the hearing and all of the proceedings had before the Court; and the Court having overruled the objections solely to the extent necessary for entry of this Interim Order and the relief provided for herein, and the Court having found that the relief sought in the Motion, as modified by the Debtors at the hearing and as set forth in this Interim Order, is in the best interests of the Debtors and their estates; and the Court having found that the legal and factual bases set forth in the Motion and on the record of the hearing establish just cause for the relief granted herein; and after due deliberation and sufficient cause appearing therefor,

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED as set forth herein on an interim basis until such time as the Court conducts a final hearing on this matter (the "Final Hearing").

2. The Final Hearing shall take place on March 29, 2016 at 1:00 p.m. (prevailing Eastern Time). Any objections or responses to the Motion shall be filed on or before 4:00 p.m. (prevailing Eastern Time) on March 22, 2016 and served on the parties required by Local Rule

2002-1(b). All objections previously filed with respect to the Motion shall be deemed to apply at the Final Hearing, shall be considered by the Court in connection therewith, and are not required to be re-filed. Any Consignment Vendor who previously filed an objection to the Motion or who joined in a previously filed objection may file a supplement to the prior objection or joinder by the March 22, 2016 deadline set forth above. The Court did not make any final ruling on the previously filed objection(s) or joinder(s) at the interim hearing and nothing set forth in this Interim Order constitutes a ruling with respect to any such objection or joinder with respect to the Final Hearing.

3. Subject to the entry of a final order and to the terms of each applicable consignment agreement (except as specifically modified by this Interim Order), the Debtors are authorized to sell the Consigned Goods received before the Petition Date (the "Prepetition Consigned Goods") from the Consignment Vendors, with all liens, claims and interests in the Prepetition Consigned Goods, if any, to attach to the applicable proceeds of sale of the Prepetition Consigned Goods (the "Consignment Sale Proceeds") in each case with the same legal, right, title and/or ownership or other interest and/or the same validity, priority, enforceability and effect as existed as of the Petition Date with respect to such Prepetition Consigned Goods.

4. The Debtors shall deposit all the Consignment Sale Proceeds from the post-petition sale of Prepetition Consigned Goods into a separate escrow account at Wells Fargo Bank, N.A. (the "Escrow Account"). The contents of the Escrow Account (the "Escrow Proceeds") shall remain segregated until the earliest of the following to occur: (a) written agreement by the Debtors; the DIP Agent; the DIP FILO Agent; Bank of America, N.A., as agent under the ABL Credit Agreement (the "ABL Agent"); the FILO Agent; and Wilmington Savings

Fund Society, FSB, as successor administrative agent (the "Term Agent") under that certain Amended and Restated Credit Agreement, dated as of November 16, 2010, by and among The Sports Authority, Inc., as borrower, Slap Shot Holdings Corp., TSA Stores, Inc., and TSA Gift Card, Inc. as guarantors, Bank of America, N.A., as administrative agent, and the lenders named therein (the DIP Agent, the DIP FILO Agent, the ABL Agent, the FILO Agent, and the Term Agent, collectively, the "Secured Lender Agents"); and any Consignment Vendor that asserts an interest in the Escrow Proceeds, or (b) further order of this Court that directs the Debtors where and when to disburse the Escrow Proceeds. The Debtors shall maintain a record of all Prepetition Consigned Goods that are sold on and after the Petition Date and the corresponding Consignment Sale Proceeds. The Debtors shall provide each Consignment Vendor but no more frequently than once every week, a report regarding the sale of each Consignment Vendor's respective Consigned Goods, the amount of Consignment Sale Proceeds in the Escrow Account, and any amounts disbursed from the Escrow Account. At any time on or after March 10, 2016, a Consignment Vendor may provide the Debtors with written notice to stop selling such Consignment Vendor's Prepetition Consigned Goods. Upon receipt of such notice, the Debtors shall segregate the Prepetition Consigned Goods provided by that Consignment Vendor and cease all sales thereof pending further order of the Court.

5. Upon the agreement referenced in Paragraph 4(a) above, the Debtors are hereby authorized to release that amount of the Escrow Proceeds received on account of the sale of the subject Consignment Vendor's Prepetition Consigned Goods.

6. To the extent that the Debtors believe after reasonable due diligence that there is a legitimate case or controversy as to whether a Consignment Vendor has a valid, perfected, unavoidable and senior lien or ownership right or interest in the Prepetition Consigned Goods,

then the Debtors shall, in their discretion, on or before March 23, 2016, file an adversary proceeding (a "Consignment Challenge") in this Court seeking, among other things, a declaration that such Consignment Vendor does not have a valid, perfected, unavoidable and senior lien or ownership right or interest in the Prepetition Consigned Goods, or be forever barred from bringing such action. The Secured Lender Agents shall also have standing to assert any Consignment Challenge with respect to the matters described in this Paragraph 6 to the extent that the Debtors inform them and the respective Consignment Vendor on, or before March 16, 2016, that the Debtors do not intend to bring a Consignment Challenge with respect to a particular Consignment Vendor. Upon the filing of a Consignment Challenge, absent written consent of the Consignment Vendor, the Debtors shall immediately (i) cease, desist, and refrain from selling any of the Consignment Vendor's Prepetition Consigned Goods; and (ii) segregate and account to the Consigned Vendor for all remaining Consigned Vendor's Prepetition Consigned Goods. To the extent that a Consignment Challenge is brought against a Consignment Vendor (whether by the Debtors or any of the Secured Lender Agents), the Debtors shall not settle or otherwise resolve such Consignment Challenge without first consulting with each Secured Lender Agent asserting an interest in the Prepetition Consigned Goods. This Court shall retain jurisdiction over all matters related to any Consignment Challenge. Nothing in this Interim Order shall preclude a Consignment Vendor from bringing an action seeking to recover any portion of the Escrow Proceeds in which the Consignment Vendor asserts an interest that is not otherwise subject to a Consignment Challenge.

7. The Debtors are authorized to order and receive Consigned Goods from Consignment Vendors. In exchange for the postpetition delivery of such Consigned Goods (the "Postpetition Consigned Goods"), the applicable Consignment Vendor shall hold (i) a first

priority purchase money security interest in such Postpetition Consigned Goods and in the Consignment Sale Proceeds therefrom, (ii) a superpriority administrative expense claim under section 507(b) of the Bankruptcy Code to the extent of any diminution in the value of the Consignment Vendor's postpetition secured claim, and (iii) an allowed administrative expense claim under section 503(b) of the Bankruptcy Code. The Consignment Vendor's section 507(b) superpriority claim will be treated pari passu with any other superpriority claim granted in this bankruptcy case. The perfection of the postpetition security interest in Postpetition Consigned Goods and proceeds thereof will be deemed effective without the need to file any financing statement or further notice to any party in interest, including the Secured Lender Agents. The Debtors shall remit the Consignment Sale Price to the applicable Consignment Vendors on account of the sale of their respective Postpetition Consigned Goods in the ordinary course of business.

8. This Interim Order shall not constitute findings of fact or conclusions of law with respect to any potential case or controversy regarding the Consigned Goods, including but not limited to a determination that any Consignment Vendor is or is not entitled to adequate protection, that the Consigned Goods are property of the Debtors' estates as that term is defined at section 541 of the Bankruptcy Code, that any Consignment Vendor does or does not have a consignment relationship with the Debtors, that any Consignment Vendor holds or does not own, hold right, title to, or have any ownership or other interest in Consigned Goods or otherwise, or that any Consignment Vendor has or does not have a valid, enforceable, non-avoidable and perfected lien or encumbrance on any Consigned Goods, and it is expressly understood that all parties are reserving all rights on such issues. All such rights shall be unaffected by this Interim Order and the status quo of such rights as of the Petition Date is to be undisturbed.

9. Except as expressly provided herein, nothing in this Interim Order shall decrease or increase the rights of any party with respect to the Consigned Goods, or take away or provide any Consignment Vendor with any interest in the proceeds of any Consigned Goods that are less than or greater than the interest that such Consignment Vendor would have absent the entry of this Interim Order. The Debtors shall not settle or otherwise resolve any Consignment Challenge without first providing the Secured Lender Agents with no fewer than ten (10) days' advance written notice of a motion pursuant to Bankruptcy Rule 9019 seeking approval of the terms of such proposed settlement or resolution, and thereafter consulting with the Secured Lender Agents with respect to such proposed settlement or resolution. All rights of the Secured Lenders and the Secured Lender Agents to intervene in any Consignment Challenge and/or to commence any action against any Consignment Vendor or any other party to preserve, defend, or assert any rights or interests that the Secured Lenders and the Secured Lender Agents may have are expressly reserved and are not impaired by this Interim Order.

10. This Interim Order shall govern the treatment of Prepetition Consigned Goods and Consignment Sale Proceeds with respect to all sales by the Debtors, including going out of business ("GOB") sales. To the extent that the Court's interim order granting the Debtors' motion regarding closing store procedures on a limited basis (Doc. 156), or future order granting the Debtors' motion for authority to sell substantially all assets (Doc. 106), conflicts with the terms of this Interim Order as to the treatment of the Consignment Sale Price, the terms of this Interim Order shall govern as to the treatment of the Consignment Sale Price.

11. Nothing in the Motion or this Interim Order shall be deemed or construed as: (a) an admission as to the existence or validity of any claim, lien, or encumbrance against the Debtors or their estates; (b) an admission or waiver with respect to any claim of ownership or

other interest in the Consigned Goods and/or proceeds therefrom; (c) a waiver of the Debtors' right to dispute any claim, lien, or encumbrance; (d) an approval or assumption of any agreement, contract, or lease pursuant to section 365 of the Bankruptcy Code; (e) an admission of the priority status of any claim; or (f) a modification of the Debtors' rights to seek relief under any section of the Bankruptcy Code on account of any amounts owed or paid to any Consignment Vendor.

12. To the extent that Bankruptcy Rule 6004(h) is applicable, the terms and conditions of this Interim Order shall be immediately effective and enforceable upon its entry.

13. The Debtors are authorized to take all actions necessary to effectuate the relief granted pursuant to this Interim Order in accordance with the Motion.

14. The Court shall retain jurisdiction with respect to all matters arising from or related to the implementation of this Interim Order.

15. The Debtors shall serve a copy of this Order, within one (1) business day after entry of this Order upon each Consignment Vendor, by first class mail and by either facsimile or email, and shall immediately thereafter file a certification of service that includes the facsimile number or email address used for such service.

Dated: March 11, 2016
Wilmington, Delaware

MARY F. WALRATH
UNITED STATES BANKRUPTCY JUDGE