AMERICAN BANKRUPTCY INSTITUTE

2017 Southwest Bankruptcy Conference

Short Arguments on Interesting Chapter 11 Topics

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CONCURRENT SESSION

2017

SHORT ARGUMENTS ON INTERESTING CHAPTER 11 TOPICS

(Or, Four Moot Court Arguments on Current Chapter 11 Issues)

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AMERICAN BANKRUPTCY INSTITUTE 25TH ANNUAL SOUTHWEST CONFERENCE
September 7-9, 2017
Hotel del Coronado
San Diego, California

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CONSIGNMENTS

A. Issues Overview

Consignments of personal property are generally governed by Revised Article 9 of the Uniform Commercial Code. Consignments that satisfy the definition contained in UCC § 9-102(a)(20) require perfection, while those that do not, are generally governed by state common law and statutory law.

Pursuant to UCC § 9-102(a)(20) a consignment means a transaction in which a person delivers goods to a merchant for the purpose of sale and:

- The merchant that: (i) deals in goods of a kind under a name other than the name of the person making delivery; (ii) is not an auctioneer; and (iii) is not generally known by its creditors to be substantially engaged in selling the goods of others.
- With respect to each delivery, the aggregate value of the goods is $1,000 or more at the time of delivery.
- The goods are not consumer goods immediately before delivery.
- The transaction does not create a security interest that secures an obligation.

To the extent there is not a consignment relationship under Article 9, a creditor may still attach its interest to a debtor's goods under UCC § 2-326.

In relevant part UCC § 2-326 provides that:

- Unless otherwise agreed, if delivered goods may be returned by the buyer even though they conform to the contract, the transaction is a "sale or return" if the goods are delivered primarily for resale. Goods held on sale or return are subject to such claims while in the buyer's possession.

Accordingly, if the transaction is determined to be a "sale or return" creditors of the buyer can maintain a security interest in such goods, which will be superior to an unperfected security interest of the seller.

In an Article 9 consignment, assuming that a consignor does not perfect its interest in goods, the consignee can grant a security interest in the goods to another creditor who will have an interest superior to that of a consignor pursuant to UCC § 9-319(a).

In contrast, because a common law consignor retains ownership of the goods, the goods are not property of a consignee's bankruptcy estate, the claims of the consignee's creditors cannot

attach to the consigned goods and the consignee cannot sell the consigned goods except in compliance with the consignment agreement.

An unperfected consignor can prevent the application of UCC § 9-319(a) if it can prove that the transaction is not governed by Article 9 of UCC. This often turns on whether the consignor can show that the consignee was "generally known by its creditors to be substantially engaged in selling the goods of others."

In such instances, the consignor must prove by a preponderance of the evidence that (i) the consignee is substantially engaged in selling the goods of others, and (ii) it is generally known by the creditors of the consignee that this is the case.

- In order to be "substantially engaged" in selling the goods of others, a merchant must not hold less than 20% of the value of its inventory on a consignment basis. *See In re Valley Media, Inc.*, 279 B.R. 105, 125 (Bankr. D. Del. 2002).
- To satisfy the "generally known" prong, the consignor must prove that a majority of the consignee's creditors, with the majority being determined by the number of creditors not the amount of creditor claims, were aware that the consignee was substantially engaged in selling the goods of others. *See id.*

Consignors rarely perfect their interest and, as a result, often face this difficult burden of proof.

Despite the difficulty faced by consignors, in a few recent chapter 11 cases (*In re Whitehall Jewelers Inc.* – Case No. 08-11261, *In re Family Christian LLC* – Case No. 1:15-bk-00643, and *In re Sports Authority Holdings Inc.* – Case No. 1:16-bk-10527) the Delaware and Michigan bankruptcy courts refused to approve sales of consigned goods free and clear of the consignors' interests absent a prior determination (through an adversary proceeding) that the consigned goods were property of the debtor's estate.

> In *Whitehall Jewelers*, the court refused to authorize the sale of consigned goods until the court determined the ownership of the consigned goods. The court reasoned that a debtor cannot sell goods that are not property of the estate. Additionally, the court found that it could not invalidate a lien as part of the relief requested in sale motion. As such, Whitehall was forced to institute 124 separate lawsuits over whether the consigned goods were property of the estate. Ultimately, Whitehall negotiated a favorable global settlement of their claims with the consignors, and agreed to return the consigned goods to participating consignors and pay them for the consigned goods that were sold, from an escrow account. Specifically, and pursuant to the Global Settlement Agreement [Docket No. 507], Whitehall entered into various vendor agreements, with participating vendors whereby Whitehall agreed to: (i) undertake a program to return all remaining consigned

goods on the effective date to the participating vendors, and (ii) pay each participating vendor an amount equal to 100% of the amount that was required to be segregated with respect to the proceeds of postpetition sales of the consigned goods from and after the petition date through proposed return of the consigned goods.

In *Family Christian*, Family Christian sought approval of a sale of substantially all of its assets, including goods it had acquired under consignment agreements. As of the petition date, Family Christian had between 150-200 consignment vendors. The consignment vendors argued that Article 9 of the UCC did not apply, and that consignments were "true consignments" while Family Christian argued that the consignments fell within Article 9 of the UCC. Eventually, the consignors and Family Christian reached a settlement. The settling consignors agreed to the sale of the consigned goods in exchange for sharing in a cash payment of $500,000 plus one of two payment options: (i) payment of each consignor's § 503(b)(9) claim plus 10% of the book value of the consignor's goods sold after a particular date, or (ii) payment of 35% of the book value of the consignor's goods sold after a particular date. Other consignors who were not part of the settling group were offered the same payment options if they accepted the chapter 11 plan. Notwithstanding, many opted to reject the plan, and Family Christian was required to litigate the issue or return the consigned goods.

In *Sports Authority*, the court authorized Sports Authority to sell consigned goods in the ordinary course of business so long as Sports Authority complied with prepetition agreements, which included remitting part of the sale proceeds to consignment vendors. *See In re TSAWD Holdings Inc.*, 565 B.R. 292, 295 (Bankr. D. Del 2017). Sports Authority filed adversary proceedings against substantially all of the consignment vendors, but was required to pay the consignors (even those that did not satisfy UCC Article 9's consignment requirements) for consigned goods sold after the bankruptcy filing pending resolution of the adversary proceedings. However, the order provided that these amounts would be subject to disgorgement if the rights of the consignment vendors were ultimately determined to be junior to the rights of the secured lenders. After the adversary proceedings were filed, Sports Authority's secured lenders and nearly half of the consignment vendors reached a settlement, whereby Sports Authority could continue to sell the consigned goods at their liquation sales at discounted rates. The settling consignment vendors stipulated that the consigned goods and proceeds from the sale were subject to a lien of the secured lenders, and that distribution of the proceeds were a carveout from the lien. The settling consignment vendors were paid 25%-49% of the amount due under the consignment agreements. Some of these cases continued to be litigated (see *(Sports Authority) In re TSAWD Holdings, Inc.*, 565 B.R. 292 (Bankr. D. Del. 2017) discussed below).

B. Hypothetical

Blackhall Stores ("Blackhall") is a nationwide teen clothing retailer that offers consumers a wide selection of surf and beach related apparel and products. Due to declining sales and an inability to make debt service payments on its $200 million asset based credit facility (the "ABL"), Blackhall filed for relief under Chapter 11 of the Bankruptcy Code. The ABL is secured by perfected security interests in substantially all assets, including goods, inventory and proceeds thereof; while no valuation has occurred, the ABL is generally believed to be undersecured. As of the Petition Date, a substantial portion of the assets held by Blackhall were comprised of consigned goods (the "Consigned Goods") from approximately 11 consignment vendors; under the consignment agreements with the consignors, the consignors retain title to the goods until such goods are sold, and are entitled to payment per a schedule equal to approximately 50% of the sale price of the Consigned Goods. Blackhall estimates that as of the Petition Date, it held approximately $20 million of Consigned Goods in its stores and approximately $80 million of other inventory. There is a dispute as to whether Blackhall's creditors are aware that a substantial portion of Blackhall's products are Consigned Goods. As of the Petition Date, only 2 of the 11 consignment vendors filed UCC-1 financing statements and took the other steps necessary to perfect their interests in the Consigned Goods under the UCC.

Blackhall has filed motions with Bankruptcy Court seeking authorization to sell its assets pursuant to § 363 of the Bankruptcy Code in the following manner: (i) to conduct liquidation sales of all assets in five (5) stores, (ii) to sell all of the remaining assets to Amazing Excess Stock Co., (iii) for the consignors who filed UCC-1 financing statements, to escrow an amount of sale proceeds equal to the amount to which such consignors would have been entitled under their consignment agreements pending review of the consignors' perfection steps, and (iv) to immediately turn over all other sale proceeds to the administrative agent for the ABL.

C. Relevant Case Law

***In re Whitehall Jewelers Holdings, Inc.*, No. 08-11261 (KG), 2008 WL 2951974 (Bankr. D. Del. July 28, 2008)**

At issue was whether the debtors were permitted to sell consigned goods pursuant to Section 363(f)(4) of the Bankruptcy Code. *Id.* at 1. A substantial portion of the debtors' inventory comprised of consigned goods received from vendors. The relationship between the debtors and each vendor was governed by a Vendor Trading Agreement (the "VTA"), which provided that the parties intended that the transfer and delivery of goods to be characterized as a Consignment under the UCC. *Id.* The VTA also provided that the consignor was to remain the owner of the consigned goods, and that consignee would not acquire any right, title or interest to the consigned goods other than the right to possess the consigned goods as a consignee and sell the consigned goods. *Id.* The debtors classified the vendors as: (i) vendors who failed to file financing statements or who failed

to comply with UCC Article 9; or (ii) vendors whose consignments were governed by UCC Article 2. *Id.* at 2.

The debtors argued that the court had authority to permit the sale under Section 363(f)(4) of the Bankruptcy Code because a *bona fide* dispute existed as to the consigned goods. *Id.* at 3.[1] Notwithstanding the debtors' claim, the court reasoned that 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." *Id.* at 4. According to the court, the "Debtors are not permitted to sell the Consignment Inventory under section 363(f)(4) of the Bankruptcy Code without first demonstrating to this Court that the Consigned Goods are property of the estate." *Id.*

Here, the debtors were unable to prove that the consigned goods were property of the estate. "Given the terms of the VTA that the Consignment Vendors remain owners of their goods, as well as Debtors' filing with the Securities and Exchange Commission disclaiming Debtors' ownership, the . . . interests are simply not sufficient to demonstrate that the Consigned Goods are property of the estate." *Id.* at 6. "Moreover, the [c]ourt cannot determine whether the Consigned Goods are property of the estate through a contested matter, such as a sale motion under Section 363." *Id.* Instead, relying on Third Circuit precedent,[2] the court held that "a lien can only be invalidated by an adversary proceeding commenced pursuant to Rule 7001(2), and not by motion." *Id.* The court denied the debtors' motion pending the court's resolution in adversary proceedings of the validity of interest of the Vendors. *Id.* at 7. As such the debtors were ordered to initiate over 120 adversary proceedings.

Subsequent to this ruling, Whitehall negotiated a global settlement of their claims with the vendors whereby Whitehall was able to sell the consigned goods. Pursuant to the global settlement Whitehall agree to return the consigned goods to participating consignors and pay them for the consigned goods that were sold from an escrow account.

***(Sports Authority) In re TSAWD Holdings, Inc.*, 565 B.R. 292 (Bankr. D. Del. 2017)**

On May 3, 2016, the court entered a final order in the debtors' main case authorizing the debtors to sell consigned goods in the ordinary course of business so long as the debtors complied with their prepetition agreements, including remitting part of the sale proceeds to consignment

[1] The debtors claimed that there was a *bona fide* dispute on the following grounds: First, if the provision of consigned goods is governed by Article 9 of the UCC, the vendors failed to perfect their asserted interests rendering them unsecured creditors. Second, the non-authenticated vendors failed to take the necessary steps to assert priority of their interests and thus are the equivalent of unsecured creditors. Third, if Article 9 does not apply, there is a *bona fide* dispute as to whether Article 2 of the UCC would validate the vendor's asserted interests (pursuant to UCC § 2-326, the consigned goods of all vendors would be deemed a "sale or return" and thus subject to the claims of the debtors' creditors). *Id.* at 3.

[2] *SLW Capital, LLC v. Mansaray—Ruffin (In re Mansaray—Ruffin)*, 530 F.3d 230, 2008 WL 2498048 (3d Cir. June 24, 2008)

vendors. *Id.* at 295. However, the order expressly permitted disgorgement of such amounts from the consignment vendors if the court determined through adversary proceedings that the rights of the lenders were superior to those of the consignment vendors. Wilmington Savings Fund Society, FSB ("WSFS"), as administrative and collateral agent on the term loan credit and security agreements, under which WSFS was granted a security interest in the debtor's inventory, filed a motion seeking a declaration that it had a perfected security interest in the debtors' inventory and sale proceeds senior to that of the vendor and seeking disgorgement of the sale proceeds of that inventory. *Id.*

WSFS argued that its lien in the debtors' inventory attached to the consigned goods and was superior to the vendor's because the vendor never perfected its security interest in the goods. *Id.* at 299. The vendor, on the other hand, claimed that WSFS did not have a superior interest because Article 9 of the UCC was not applicable. *Id.* The vendor claimed that the arrangement it had with the debtors did not fit the UCC definition of consignment because the debtors were substantially engaged in selling goods of others and generally known by their creditors to be doing so. Further, the vendor claimed that WSFS had actual knowledge of the consignment agreement, which under Colorado law gave a consignor priority over a secured creditor with actual knowledge of the consignment relationship. *Id.* at 299-300. WSFS also argued that the consignor was precluded from arguing that the transaction is not an Article 9 consignment because the consignment agreement expressly provided that the "arrangement shall qualify as a consignment under section 9-102(a)(20) of both the Colorado and Delaware versions of the UCC." *Id.* at 300.

Before analyzing these claims, the court noted that consignments that satisfy the UCC definition require perfection in accordance with the UCC, while those that do not are governed by state common and statutory law. *Id*. at 298. "[I]f the consignment meets the UCC definition, the consignor obtains a purchase money security interest ("PMSI") in the goods and retains title." *Id*. However, to maintain priority in the consigned goods, the consignor must perfect its PMSI prior to delivery of the goods. *Id.* at 299. When the consignor does not, "the consigned goods are subject to competing claims of other secured creditors of the consignee and priority is determined by reference to the UCC." *Id.* Moreover, UCC § 9-319(a) permits the consignee to grant a security interest in the consigned goods to another creditor who will have an interest superior to that of the consignor, if the consignor's security interest is not perfected. *Id.* An unperfected consignor may prevent the application of UCC § 9-319(a) if it can prove, by a preponderance of the evidence, that the transaction is not governed by Article 9 because the consignment does not fit the UCC definition. *Id.*

On the issue presented the court initially noted that UCC § 1-302 "permits parties to vary the effect of the UCC's provisions, so long as defined terms are not altered." *Id.* at 300. In this instance, the court determined that the Agreement's statement that the "arrangement shall qualify as a consignment under section 9-102(a)(20) [of the UCC]" implicitly "deem[ed] the debtors a

'merchant,' a defined term within the UCC." *Id.* Notwithstanding, if the "Debtors were generally known to be selling the goods of others or if WSFS knew the [goods] were sold to the Debtors on consignment, as Soffe contends, then the Debtors were not merchants, and the [consignment agreement] impermissibly change[d] the UCC definitions of consignment and merchant." *Id.* On these grounds the court reasoned that it could not enforce the contractual provision since it was inconsistent with the requirements of the UCC. As such, the court denied WSFS's motion for partial judgment because there was a disputed issue of fact: "whether the [consignment agreement] is a consignment under Article 9." *Id.* at 301.

***In re Interiors of Yesterday, LLC*, No. 02-30563LMW, 2007 WL 419646 (D. Conn. Feb. 2, 2007)**

Before the court was the chapter 7 trustee's motion to dismiss the debtor's chapter 7 case on grounds that no creditors would benefit from the proceeding. The debtor operated a shop where antiques, rugs and other decorative items were offered for sale. *Id.* at 1. A substantial portion of the debtor's inventory was claimed to be the goods of the consignors. *Id.*

The trustee argued that the case should be dismissed since the inventory would only have value to a disinterested purchaser if the trustee could give such purchaser clear title (i.e., sell the property free and clear). *Id.* at 5. The consignors claimed that the inventory was their property. *Id.* Although the trustee argued that it "could avoid the Consignors' interest in the [i]nventory pursuant to chapter 5 of the Bankruptcy Code," the court found that the trustee could not sell the inventory pursuant to Section 363(b) or Section 363(f) prior to successful avoidance of the consignors' interest in the inventory.

The court also reasoned that the trustee could not sell the inventory pursuant to Section 363(f)(4) "without successful litigation against the Consignors on the theory that the Consignors' interest in the [i]nventory is subject to a 'bona fide dispute.'" *Id.* at 6. This is because Section 363(f)(4) requires that the subject property is "property of the estate." *Id.* at 6. As such, the trustee would likely have to commence adversary proceedings to determine the property of the estate "because the issue likely may not be amenable to resolution in the context of Section 363 motion." *Id.* Since, litigation against the consignors would be necessary to sell the assets the court dismissed the proceeding.

***In re Valley Media, Inc.*, 279 B.R. 105 (Bankr. D. Del. 2002)**

The debtor filed a motion to sell its inventory at an auction and certain objections were made by consignment vendors. *Id.* at 111-12. The objections were primarily filed by vendors who provided the DNA division of the debtor ("DNA") with consignment goods under certain distribution agreements. *Id.* at 112. The vendors sought to exclude inventory that they provided to DNA on a consignment basis from the sale.

According to the court, once it is determined that "either former U.C.C. § 2-326(3) or revised U.C.C. §§ 9-102(a)(20) & 9-319(a) applies, the goods are deemed to be on sale or return with respect to claims made by the creditors of the consignee." *Id* at 123. This allows the consignee's creditors to "attach the consigned goods as if the consignee actually had title to the goods." *Id.* A consignor may prevent this if it files a UCC-1 financing statement or proves that the deliveree is generally known by his creditors to be substantially engaged in selling the goods of others. *Id.* If either of these apply then the consignee's creditors may not reach the consigned goods in the consignee's possession.

Because the vendors did not perfect their interests, the question was whether they were able to demonstrate that the consignee was generally known by its creditors to be substantially engaged in the selling of goods of others and therefore the consignment was not governed by Article 9. *Id.* at 124. Proving this standard is "ultimately the burden of the consignor," and the consignor must prove by a preponderance of the evidence that "(1) the consignee is substantially engaged in selling the goods of others, and (2) that it is generally known by the creditors of the consignee that this is the case." *Id.* at 125. In order to be "substantially engaged" in selling the goods of others, "a merchant must not hold less than 20% of the value of its inventory on a consignment basis." *Id.* To satisfy the generally known prong, one must prove that a majority of the consignee's creditors are aware that the consignee was substantially engaged in selling the goods of others, with the majority being determined by the number of creditors and not by the amount of the creditor claims. *Id.* On this issue, the court determined that the debtor was the subject of the test. *Id.* at 126. Even though DNA was the consignee under the consignment agreements, it was an unincorporated division of the Debtor, and not a legal entity that could have creditors of its own. *Id.* With the debtor as the party subject to the inquiry, the court found that the vendors did provide sufficient evidence to meet the standard. *Id.* at 131-32.

Despite this finding, the court then went on to note, that "a consignor that failed to protect its interest under former U.C.C. § 2-326(3) or revised U.C.C. § 9-102(a)(20) might prevail over a secured creditor of the consignee who had actual knowledge of the consignment, [even though, the] consignor will not prevail over a trustee exercising its powers pursuant to 11 U.S.C. § 544(a)." *Id.* Further, since the "Objecting Vendors [did] not prove[] that Valley was generally known by its creditors to be substantially engaged in selling the goods of others, a judicial lien creditor may attach consigned goods in the possession of Valley[.]" *Id.* at 133. Finally, the court determined that the debtor must bring an adversary proceeding to complete an 11 U.S.C. § 544(a) action. *Id.* Notwithstanding, the court allowed the debtor to sell the contested inventory since its interest in the inventory were superior to the interests of the objecting vendors.

***In re Downey Creations, LLC*, 414 B.R. 463 (Bankr. S.D. Ind. 2009)**

Suppliers of goods brought an adversary proceeding against the debtor and bank, which held security interest in the debtor's assets, asserting replevin for goods delivered to the debtor.

The debtor argued that the subject transactions were consignments under Revised Article 9 of the UCC and that the suppliers' failure to file financing statements rendered their interests in the subject goods subordinate to the bank's blanket lien. *Id.* at 465. Through contractual agreements with retail jewelers, the debtor conducted special event trunk shows, selling goods to the retailers' customers and invoicing the retailer for the wholesale cost of the goods. The suppliers delivered goods to the debtor to be sold to the debtor's customers at these trunk shows. *Id.* at 466. The debtor secured its obligations under a promissory note with a bank, which granted the bank a security interest in substantially all of debtor's assets, including all then-owned and after-acquired inventory and the proceeds therefrom. *Id.* The bank then filed a financing statement perfecting its security interest. All but two suppliers did not file financing statements, and the two that did, filed them after the bank filed its financing statement. *Id.*

According to the court, the case turned on whether the transactions were consignments under the UCC, which in turn was a question of whether the debtor was "generally known by its creditors to be substantially engaged in selling the goods of others." *Id.* at 467. First the court examined the question of who had the burden of proving the applicability of section 9-102(a)(20). The debtor argued that the burden fell on the party to be protected by section 9-102(a)(20). *Id.* at 467-68. The court rejected the Debtor's argument, but still determined that the suppliers had the burden. *Id.* at 468. Instead of placing the burden on the party to be protected, the court determined that it made more sense to "place the burden on the party who bears the risk under § 9-102(a)(20), i.e., the consignor." *Id.* at 471. Thus, the suppliers had to prove that the debtor's creditors generally knew that the debtor was substantially engaged in selling the goods to others. *Id.* at 471.

Under the facts of the case the suppliers were unable to satisfy this burden. "Even if a given creditor knew – by virtue of its own transactions with [the debtor] – that [the debtor] was engaged in selling the goods of others, it does not necessarily follow that the creditor knew that [the debtor] was *substantially* engaged in selling others' goods." *Id.* at 472. Evidence of general knowledge within an industry is insufficient. *Id.* "While the Court is willing to infer for summary judgment purposes that [the debtor]'s three insiders . . . had actual knowledge that [the debtor] was substantially engaged in selling the goods of others, these creditors are too few to support the [supplier]'s argument that Article 9 does not apply to the Contested Transaction." *Id.* Instead, it was up to the suppliers to show that a majority of the 91 creditors listed on the debtor's bankruptcy schedules knew that the debtor was substantially engaged in selling goods of others. *Id.*

***In re Morgansen's*, 302 B.R. 784 (Bankr. E.D.N.Y. 2003)**

The debtor filed a voluntary petition for chapter 11 relief, and the case was later converted to one under chapter 7. *Id.* at 786. The debtor was in the business of selling various expensive items such as jewelry, art and collectibles to retail customers, other dealers and interior decorators. At times the debtor also conducted auction sales of its inventory. *Id.* 70% of the items that the

debtor sold were obtained by consignment. The trustee proposed an auction sale, and objections to the sale were filed by several alleged consignors.

According to the court, the "law of consignments is governed by the Uniform Commercial Code (UCC), especially section UCC 9-102(a)(20) and next UCC 2-326." *Id.* at 787. The general approach is to first go to "section 9-102(a)(20), and if the transaction does not fit under this section, then to go next to section 2-326; if the transaction does not fit under section 2-236, then the transaction falls entirely outside the Uniform Commercial Code, and the court must then fall back on the common law bailments and other traditional practices." *Id.* In order for a transaction to fit under section 9-102(a)(20) each of the attributes of a consignment must be satisfied, and according to the court, the burden of proof with respect to each attribute falls on the party claiming protection (not the party who bears the risk as stated in *In re Downey* (*see supra*)). *Id.*

With respect to section 9-102(a)(20) the court made the following findings. First, the debtor was a merchant who dealt in goods delivered to it for the purpose of sale, and operated under a trade-name other than the names of the consignors. *Id.* Second, even though the debtor sold some goods via auctions, the debtor did not act exclusively as an auctioneer, and the consignors did not support their contentions that selling some goods by auction made the Debtor an "auctioneer." *Id.* at 788. Third, the opposing consignors, did not satisfy their burden of proving that a majority of the debtor's creditors knew the debtor was substantially engaged in selling the goods of others. *Id.* "The [D]ebtor [had] significant unsecured claims from utility companies and other third party suppliers of goods and services that may not know exactly what kind of business is conducted on the premises" and the "personal knowledge of a few protesting consignors does not satisfy their burden of proof of what subjectively the other creditors generally knew." *Id.*

The court then analyzed section 2-326 of the UCC. First it noted that the provisions of section 2-326 that formerly dealt with consignment were replaced by new provisions in Article 9. *Id.* at 789. Notwithstanding, per the terms of the consignment agreements, which provided that the debtor was authorized to sell the consigned items by private sales or by auction, it was clear that the arrangement was a "sale or return" which are subject to a buyer's creditors while in the buyer's possession. *Id.* "Under UCC Section 2-326 as amended, goods which are consigned for sale, are property of the bankruptcy estate of the 'consignee,' and subject to the claims of the creditors of the entity doing the sale[.] If a person takes goods to one who is considered a consignee (a 'buyer' for resale) and that buyer files for bankruptcy relief, the buyer/debtor's trustee will take the goods as property of the debtor's estate." *Id.* Further, [u]nder section 544(a) of the Bankruptcy Code, these goods may be sold by the debtor's trustee." *Id.*

IMPAIRMENT

A. Issues Overview

Section 1124(a)(1) of the Bankruptcy Code states that a class of claims or interests is "impaired under a plan unless, with respect to each claim or interest of such class, the plan – (1) leaves unaltered the legal, equitable, and contractual rights to which such claim or interest entitles the holder of such claim or interest."

The question of whether a class of claims is impaired has come up, basically, in two scenarios. First, how much needs to be paid in respect of claim in order to render the holder's legal, equitable and contractual rights unimpaired? And second, is claim impaired if the plan treats it in accordance with the provisions of the Bankruptcy Code rather than state law?

As to the first question, the court in *In re New Valley Corp.*, 168 B.R. 73 (Bankr. D.N.J. 1994), interpreting section 1124(a)(3) – which has since been repealed – held that an unsecured creditor was unimpaired if it received "cash equal to . . . the allowed amount of such claim . . . ." without accounting for or paying postpetition interest. That decision was in contrast to other opinions holding that to be unimpaired in a solvent debtor case, unsecured creditors had to be paid in full with postpetition interest in order for the plan to be fair and equitable in cram down under 1127(b)(2).

Congress thereafter repealed section 1124(a)(3), thus overruling the *New Valley* case.

The question that now arises is whether the payment of postpetition interest is a requirement for a class of unsecured claims to be unimpaired and, if required, the applicable interest rate. Most recently, that question was presented to Judge Sontchi in the *Energy Future Holdings* case, and the decision and Judge Sontchi's reasoning are discussed below.

As to the second kind of impairment, it has become known as "statutory impairment versus plan impairment." That is, are you impaired as a result of what the plan does, or as a result of what the Bankruptcy Code does? The *American Solar King* case discussed below was the leading case at the time (1988) and has been cited by most courts faced with the statutory versus plan impairment issue.

B. Hypothetical

Company X is an innovative creator of Widgets, which will be used in a new generation of mobile and other advanced communication technologies. In fact these particular Widgets – Number 1 Widgets – are mission critical to this technology and central to it. The technology does not work without, and is premised upon, Number 1 Widgets.

Company X decides to auction off the Number 1 Widgets, thereby enabling the select few winners to incorporate the same into their products and bring a technology to the market that is far superior to existing products, if not a technology that is entirely unique. No one else presently has this technology, and no one else makes Number 1 Widgets.

An auction for several lots of Number 1 Widgets occurs in February 2015 (the "First Auction"). Five winning bidders are declared. Company X agrees to seller financing and each winning bidder agrees to execute a promissory note payable to Company X, and a security agreement granting Company X a security interest in the applicable Number 1 Widgets. These notes and security agreements are executed five months after the auction concludes (*i.e.*, in July 2015), and Company X appropriately files a UCC-1 financing statement against each of the five winning bidders. The total proceeds from the auction of the Number 1 Widgets is $3 billion.

One of the five winning bidders – Nuevo Sciences, Inc. – executes a promissory note to Company X for $400 million. Although the incurrence of this payment obligation likely renders Company X insolvent (because it is basically a startup formed to take advantage of the new technology), it is confident, and optimistic, in its ability to grow as a company and make its founders rich through deployment of the technology won at First Auction. Specifically, because Number 1 Widgets are limited in number, and because there are only four other companies who now have that technology and who can compete with Neuvo Sciences, Neuvo is confident that it has a unique upper hand on the rest of the market (along with the other four winning bidders) and the same will provide Nuevo with access to the capital markets to finance its business operations.

However, prior to the time the notes and security agreements are executed in July 2015, Company X auctions off several lots of Number 2 Widgets (the "Second Auction"). There are 20 winning bidders for Number 2 Widgets, which garner an aggregate price of $750 million, even though the total number of Number 2 Widgets auctioned off exceeded the number of Number 1 Widgets from the First Auction. The Second Auction was not announced until a month after the First Auction was concluded and the winning bidders had been declared.

In addition, although one could argue that Number 2 Widgets are in fact technologically inferior to the Number 1 Widgets, Number 2 Widgets can still nonetheless be used in the same manner as Number 1 Widgets. Therefore, holders of Number 2 Widgets can now bring to market the same new products that the holders of Number 1 Widgets thought they would have the unique ability to produce. Put another way, after the auction for Number 1 Widgets only five people in the United States had the ability to deploy this new technology, giving them a unique and leading market edge. After the auction of the Number 2 Widgets, a total of 25 people can now deploy this technology – the number of players in the market has increased five-fold.

Given that the price of Number 2 Widgets was much lower than the cost of Number 1 Widgets – indeed less than a third of the price – the cost of entry into the market was greatly

decreased for participants in the Second Auction. As a result, participants in the Second Auction found the capital markets open and willing to provide financing.

On the other hand, the capital markets were no longer willing to finance Nuevo Sciences given its greatly increased cost for the technology (and, hence, the increased amount of debt on its balance sheet as compared to winners in the Second Auction).

Nuevo had no choice but to file for chapter 11.

During the course of its case Nuevo Sciences sued Company X for a constructive fraudulent conveyance, contending that at the time Nuevo incurred the obligation to pay Company X $400 million for the widgets – four months after the First Auction – it (i) was either insolvent or rendered insolvent as a result of incurring the obligation and (ii) received less than reasonably equivalent value because by the time the notes and security agreement were signed in June 2015 (obligating Neuvo to pay $400 million) the Second Auction had occurred which basically flooded the market with widgets, thereby depressing the value of Number 1 Widgets. Thus, contended Neuvo, by the time it executed the loan documents in July 2015, although it had agreed to pay $400 million for Number 1 Widgets, their value had declined to $95 million as a result of the market being flooded through the Second Auction.

After trial, the bankruptcy court found that indeed, a constructive fraudulent conveyance had occurred, and the value of the property received by Neuvo Sciences was $95 million.

Neuvo promptly proposes a chapter 11 plan pursuant to which Company X is treated as a secured creditor with a claim in the amount of $95 million. The plan proposes to pay Company X on the same terms as the original promissory note executed by Neuvo in June, 2015. As part of confirmation, Neuvo files the forms of promissory note and security agreement as plan documents, and they are identical in form to those executed in June 2015, except that the principal amount of the loan is reduced from $400 million to $95 million.

The Plan provides that Company X is unimpaired and not entitled to vote to accept or reject the Plan.

Company X objects to confirmation, contending that it is impaired and it should be entitled to vote no.

C. Relevant Case Law

In re American Solar King Corp., 90 B.R. 808 (Bankr. W.D. Tex. 1988)

American Solar King Corp. ("ASK" or the "Debtor") as debtor and debtor in possession, proposed a chapter 11 plan that placed parties to various securities litigation into Class V. The plan provides that claims in Class V would be subordinated pursuant to section 510(b) of the

Bankruptcy Code with the holders of such claims to "take nothing and be fully discharged." The Debtor contended the holders of Class V claims were unimpaired, deemed to accept the plan and not entitled to vote. Cardinal Investments, a defendant in certain litigation against the Debtor who had counterclaimed for damages arising from short sales of ASK stock, objected to the plan contending that it was impaired and entitled to vote, and its "no" vote should be tallied accordingly. At the confirmation hearing the debtor deleted the "take nothing" language from its plan, which left the Court to determine whether Class V treatment – pursuant to section 510(b) of the Bankruptcy Code – constituted impairment such that the holders of Class V claims were entitled to vote (Cardinal was the only member of Class V).

First, the Court concluded that Cardinal's claim for damages against ASK stemming from short sales of ASK stock was "appropriately one subject to Section 510(b), as the damages ultimately derive from the attempted speculation in the company's stock . . . ." 90 B.R. at 818.

Turning, then, to the impairment question, Judge Clark quickly determined that Class V was not impaired simply by virtue of subjecting the claims to section 510(b) of the Bankruptcy Code, because impairment is what the plan does, not what the statute does. "Insofar as the plan accords members of the class treatment in accordance with Section 510(b), Class V is not impaired." *Id.* Judge Clark continued:

> The question presented is whether the *de facto* subordination accomplished by Section 510(b) automatically renders the holders of such claims impaired for plan purposes (what we shall here call "impairment by statute") absent a plan provision to the contrary. Put another way, must a plan affirmatively "cure" statutory impairment in order to render the affected claims unimpaired?
>
> A closer inspection of the language employed in Section 1124(1) reveals "impairment by statute" to be an oxymoron. Impairment results from what the *plan* does, not what the statute does. *See* 11 U.S.C. § 1124(1) ("a class of claims . . . is impaired under a plan unless . . . *the plan* leaves unaltered the legal . . . rights to which such claim . . . entitles the holder of such claim . . ."') (emphasis added). A plan which "leaves unaltered" the legal rights of a claimant is one which, by definition, does not impair the creditor. A plan which leaves a claimant subject to other applicable provisions of the Bankruptcy Code does no more to alter a claimant's legal rights than does a plan which leaves a claimant vulnerable to a given state's usury laws or to federal environmental laws. The Bankruptcy Code itself is a statute which, like other statutes, helps to define the legal rights of persons, just as surely as it limits contractual rights.

> Any alteration of legal rights is a consequence not of the plan but of the bankruptcy filing itself . . . . If a plan leaves a claimholder subject to a given provision of the Code relating to the treatment of certain claims, the plan has certainly left unaltered the legal rights to which *such claim* entitles the holder.

90 B.R. at 819-20.

***In re PPI Enters. (US), Inc.*, 324 F.3d 197 (3d Cir. 2003)**

The debtor filed for chapter 11 to, among other things, limit a landlord's lease termination damages, under section 502(b)(6) of the Bankruptcy Code. The debtor proposed that the landlord's claim be paid 100 cents in "cash and other consideration as required." The bankruptcy court determined, among other things, that the landlord's claim was subject to the 502(b)(6) cap and that claim was unimpaired under the debtors' plan. The district court affirmed and the matter was further appealed to the Third Circuit. The central issue before the Court of Appeals was whether the landlord was impaired or unimpaired under the debtors' plan.

Reviewing the case posture and the rulings below, the Third Circuit began by noting that the bankruptcy court had rejected the landlord's impairment argument, relying on *American Solar King*, finding that the landlord "confuse[d] two distinct concepts: (i) plan impairment . . . and (ii) statutory impairment . . . ." 324 F.3d at 203 (alteration in original; internal quotation marks omitted). In affirming the Third Circuit continued:

> Generally, we agree with the *Solar King* analysis . . . . This language in § 1124(1) does not address a creditor's claim "under nonbankruptcy law" . . . . In other words, a creditor's claim outside of bankruptcy is not the relevant barometer for impairment; we must examine whether the plan itself is a source of limitation on a creditor's legal, equitable, or contractual rights.
>
> . . . . Accordingly, we hold that where § 502(b)(6) alters a creditor's nonbankruptcy claim, there is no alteration of the claimant's legal, equitable, and contractual rights for the purposes of impairment under § 1124(1).
>
> The *Solar King* court adopted a similar rationale when interpreting § 510(b), which automatically subordinates security purchase and sale claims to the claims of general, unsecured creditors . . . . Like § 502(b)(6), this Code section is mandatory, not discretionary. To hold that its mere application in a bankruptcy proceeding causes impairment would nullify its meaning.

> * * *
>
> [Landlord] is only "entitled" to his rights under the Bankruptcy Code, including the § 502(b)(6) cap. [Landlord] might have received considerably more if he had recovered on his leasehold claims before PPIE filed for bankruptcy. But once PPIE filed for Chapter 11 protection, that hypothetical recovery became irrelevant. [Landlord] is only entitled to his "legal, equitable, and contractual rights," as they now exist. Because the Bankruptcy Code, not the Plan, is the only source of limitation on those rights here, [landlord's[claim is not impaired under § 1124(1)

324 F.3d at 204-205.

***In re Energy Future Holdings Corp.*, 540 B.R. 109 (Bankr. D. Del. 2015)**

UMB Bank, N.A. ("UMB"), as the indenture trustee for certain payment-in-kind notes (the "PIK Notes" and such holders being "PIK Noteholders"), filed an unsecured claim (the "PIK Claim") asserting $1.57 billion in principal plus interest and fees, including, among other things, postpetition interest at the contract rate. The debtors filed a partial objection to UMB's claim, focusing on the request for postpetition interest. The Bankruptcy Court held that the allowable portion of the PIK Claim could not include postpetition interest under the plain language of section 502(b)(2), which excludes claims for unmatured interest. But, the Court found that to be just the beginning of the analysis, as "there is a distinction between the payment of interest *on an allowed claim* as opposed to *as an allowed claim*." 540 B.R. at 111 (emphasis in original). Although section 502(b)(2) governs the calculation of an allowed claim, sections 1124 and 1129 of the Bankruptcy Code govern what must be received by a creditor on account of its allowed claim for a plan to be confirmed.

Where the holder of a claim in an impaired class votes to reject the plan, section 1129(a)(7) requires that the holder "receive or retain under the plan on account of such claim . . . property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of [the Bankruptcy Code] on such date." To satisfy this best interests test, courts look to section 726(a) of the Bankruptcy Code, which sets forth the liquidation distribution waterfall. The second priority for distributions under section 726(a) is payment of allowed unsecured claims, whereas the fifth priority is the payment of postpetition interest at the legal rate – but of course, the fifth priority only comes into play if there is enough cash to reach down to that level. Reviewing these provisions of the Bankruptcy Code, Judge Sontchi determined that holders of unsecured claims such as the PIK Noteholders, must receive postpetition interest at the legal rate to satisfy the best interests test (if such is applicable), but only if such payment would occur in a hypothetical chapter 7 liquidation. 540 B.R. at 113. (The Court also reaffirmed that the "legal rate" for purposes of both chapter 7 and

the chapter 11 best interests test is the federal judgment rate. *See generally In re Washington Mutual, Inc.,* 461 B.R. 200, 242-43 (Bankr. D. Del. 2011)).

In situations where a cram down is necessary under section 1129(b), section 1129(b)(1) requires that the plan be fair and equitable with respect to each non-accepting impaired class, and that the plan not discriminate unfairly. With respect to a rejecting class of unsecured claims, section 1129(b)(2)(B)(i) states that whether a plan is fair and equitable "includes" whether "the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim".[3] Under this statutory provision, postpetition interest is not required to be paid given that this subsection only measures proper distributions by considering *allowable* portions of unsecured claims, and unmatured interest is disallowed under section 502(b)(2). However, the Court acknowledged that the word "includes" in the lead-in to section 1129(b)(2) does have some meaning, and held that "[a]t most, it allows a court to weigh equitable considerations in deciding whether to award postpetition interest," 540 B.R. at 117, and that such determination "will vary on a case by case basis and must be supported by an evidentiary record. 540 B.R. at 118.

To be unimpaired, among other things, a plan must "leave[] unaltered the legal, equitable, and contractual rights to which such claim…entitles the holder of such claim." 11 U.S.C. § 1124(1). UMB argued that postpetition interest had to be paid on the PIK Claim at the contract rate (pursuant to the terms of the underlying note documents) for the claim to be unimpaired. However, the court determined that under *PPI*, because the Bankruptcy Code precludes the payment of postpetition interest (*i.e.*, under section 502(b)(2)), that it is the Bankruptcy Code, not the plan, that impaired creditors' entitlement to postpetition interest under the indenture. Thus, payment of postpetition interest at the contract rate was not required for the claim to be unimpaired under the plan. Therefore, the failure of a plan to provide for a distribution on account of amounts disallowed by the Bankruptcy Code itself does not per se render the claim impaired. But, due to the language of section 1124(1) that specifically references "equitable rights," Judge Sontchi held that to be unimpaired, a solvent debtor's plan must provide for that the Court has the ability (under its equitable powers) to award postpetition interest:

> Finally, the plan in this case need not provide for the payment in cash on the effective date of post-petition interest at the contract rate for the PIK Noteholders to be unimpaired. Indeed, the plan need not provide for any payment of interest, even at the Federal judgement rate. But in order for the PIK Noteholders to be unimpaired *the plan*

[3] Section 1129(b)(2) provides that "[f]or the purposes of this subjection, the condition that a plan be fair and equitable with respect to a class *includes* the following requirements . . .. (B) [w]ith respect to a class of unsecured claims . . . ." (emphasis added)

> *must provide that the Court may award post-petition interest at an appropriate if it determines to do so under its equitable power*.

504 B.R. at 124 (emphasis added).

CRAM DOWN VALUATION/FORECLOSURE

A. Issues Overview

Pursuant to § 1129(b) of the Bankruptcy Code, a debtor can cram down a secured creditor in a chapter 11 plan of reorganization, if the plan provides that: "holders of such claims retain the liens securing such claims . . . to the extent of the allowed amount of such claims," and the "holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property." *See* 11 U.S.C. § 1129(b)(2)(A).

In determining the value of a claim for cram down purposes, § 506(a)(1) of the Bankruptcy Code provides that: "[a]n allowed claim of a creditor secured by a lien on property in which the estate has an interest, . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property." *See* 11 U.S.C. § 506(a)(1). Importantly, "[s]uch value shall be determined in light of the ***purpose of the valuation and of the proposed disposition or use of such property***[.]" *See id.*

In *Assocs. Commercial Corp. v. Rash*, 520 U.S. 953 (1997), the Supreme Court reasoned that the replacement-value standard, and not the foreclosure-value standard, is the proper valuation standard where the debtor retains property pursuant to a plan of reorganization. The value of the property and the amount secured by 506(a) is the price a "willing buyer in the debtor's trade, business, or situation would pay to obtain like property from a willing seller." *Rash*, 520 U.S. at 960.

Pursuant to *Rash*, courts have continued to use the replacement-value standard in valuing a secured creditor's collateral, because "the replacement-value standard accurately gauges the debtor's 'use' of the property." *Rash*, 502 U.S. at 963.

In *In re Sunnyslope Hous. Ltd. P'Ship*, a debtor owned an apartment complex in Phoenix, Arizona that was used as low-income housing. First Southern National Bank ("First Southern") purchased a loan that the debtor had used to secure financing for the property. The debtor filed for bankruptcy and exercised its cram down power. Unusually, foreclosure value was higher than replacement value in this instance because a foreclosure would have removed restrictions limiting the use of the property to low income housing. The debtor claimed that the complex should be valued as low-income housing, given the restrictions on and intended use of the property for low-income housing (i.e., replacement value), while First Southern contended that the covenants should be disregarded for valuation purposes (i.e., foreclosure value) because a foreclosure would remove those restrictions. Although the foreclosure value was higher than the replacement value, the Ninth Circuit reasoned that First Southern was not entitled to the value of the property at its "highest and

best use." Instead, and relying on *Rash*, the Court determined that the property should be valued in light of its "proposed disposition or use." Since the proposed disposition and use was for low-income housing, the property was valued accordingly.

Sunnyslope thus applied *Rash* to adopt a bright line rule, whereby the valuation of secured collateral for cram down purposes will always be the "replacement value" even when the "foreclosure value" leads to greater value for creditors.

B. Hypothetical

Moonhill Housing Inc. (Moonhill), a California not-for profit corporation, owns real estate improved with a state of the art residential rental facility for senior citizens. The rental facility includes 100 units, and provides moderate-cost housing for lower income senior citizens. Moonhill is tax exempt under IRC § 501(c)(3). The acquisition and construction of the property were financed by General Bank through promissory notes, which are secured by perfected liens on the property. Moonhill has since defaulted on the notes and has filed for relief under chapter 11 of the Bankruptcy Code. As of the Petition Date, Moonhill owes $20,000,000 on the notes, and has approximately $10 million of unsecured claims.

Moonhill subsequently filed its Chapter 11 plan of reorganization (the "Plan"). Pursuant to the Plan, Moonhill seeks to continue to own and operate the property for senior citizens and to retain its real estate. General Bank voted to reject the Plan, and Moonhill is seeking to cram down the Plan pursuant to Bankruptcy Code § 1129(b)(2). Under the Plan, General Bank will retain its security interest in the property and receive payments equaling the value of its collateral. Moonhill has valued the property at $11 million, which is the value of the property if Moonhill continues to use the property for housing lower income senior citizens as a not-for-profit entity. General Bank values the property at $22 million, which is the value of property if it is not used by to provide housing for lower income senior citizens and if it is operated on a for-profit basis. A valuation expert has confirmed that the property is worth $22 million if operated by a for-profit entity and $11 million if operated by a not-for-profit entity. Moonhill contends that the higher value should apply. General Bank did *not* make a § 1111(b) election.

C. Relevant Case Law

***In re Sunnyslope Housing Ltd. Partnership*, No. 12-17241, 2017 WL 2294746 (9th Cir. May 26, 2017)**

A debtor sought to retain and use a creditor's collateral in its Chapter 11 plan though a "cram down." *Id.* at 1. Relying on Supreme Court and Ninth Circuit precedent, the court determined that a replacement-value standard rather than a foreclosure-value standard applied to the cram down valuation, despite the fact that the foreclosure value exceeded the replacement

value. Under the unique facts of the case, the foreclosure would have invalidated covenants requiring that the secured property, an apartment complex, be used for low-income housing.

According to the Ninth Circuit, the value of the claim is "determined in light of the purpose of the valuation and of the proposed disposition or use of such property." *Id* at 4. Relying on *Associates Commercial Corp. v. Rash*, 520 U.S. 953 (1997), the Ninth Circuit reaffirmed that the value of collateral is to be determined based upon its "proposed disposition or use" in the plan of reorganization. *Id.* at 5 (quotation marks omitted). Because, the debtor is "in, not outside of, bankruptcy, . . . the foreclosure value is not relevant because the creditor is not foreclosing." *Id* at 4 (quotation marks omitted). Accordingly, the "actual use" is the "proper guide" and replacement value is proper valuation. *Id.* at 5. "The essential inquiry under *Rash* is to determine the price that a debtor in Sunnyslope's position would pay to obtain an asset like the collateral for the particular use proposed in the plan of reorganization." *Id.*

Although the creditor argued that the property should be valued at its highest and best use (i.e., the value of the property, without any low-income restrictions), the court noted that absent foreclosure, the "very event that the Chapter 11 plan sought to avoid, Sunnyslope cannot use the property except as affordable housing, nor could anyone else." Since the "actual use" of the property was to be for low-income housing, the property had to be valued with such use in mind. *Id.* Put simply, "*Rash* did not adopt a rule requiring that the bankruptcy court value the collateral at the higher of its foreclosure value or replacement value." *Id.*

The lender also argued that the plan was not "fair and equitable." *Id.* at 6. On this issue, the bankruptcy court, found that the plan was fair and equitable because "First Southern retained its lien and received the present value of its allowed claim over the term of the plan." *Id.* There was no dispute regarding whether the lender retained its lien, and the valuation (for the reasons discussed above) was deemed appropriate. *Id.*

Finally, the court discussed the lender's § 1111(b) election. The Ninth Circuit noted that "§ 1111(b) of the Bankruptcy Code allows a secured creditor to elect to have its claim treated as either fully or partially secured. An election affects the treatment of the unsecured portion of the claim under the plan and the procedural protections afforded to the creditor." *Id* at 7. In the case at hand, the bankruptcy court required the lender to make its election 7 days after the court issued a ruling on valuation, and the lender timely did so, choosing to treat its entire claim as secured. *Id.* Despite the election, the lender argued that the bankruptcy court erred in not allowing it to make a second election after district court required that tax credits be added to the valuation. *Id.* The Ninth Circuit determined that the increased valuation of the collateral "was not material to the election decision," and did not permit the court to modify the scheduling order. *Id.* Moreover, the Ninth Circuit determined that "[a]llowing a second election would give First Southern a second chance to object to the plan, this time both as a secured and unsecured creditor and, given the potential size of the unsecured claim, the ability to prevent approval of the reorganization plan."

Id. at 8. "[T]his [was] precisely the option First Southern had at the time of its first election, when it chose to forgo having any portion of its claim treated as unsecured, instead seeking to increase the valuation of its secured claim through appeal." *Id.*

The lender in *Sunnyslope* did not argue that plan could not be confirmed on grounds that it violated Bankruptcy Code § 1129(a)(7)(A), which provides that with respect to each impaired class of claims that each holder of a claim or interest of such class "will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7[.]" 11 U.S.C. § 1129(a)(7)(A)(ii). The lender did not make this argument because § 1129(a)(7) "has an exception for classes of secured claims which have made the election provided for in [§] 1111(b)." *See* 7-1129 Collier on Bankruptcy P 1129.02. When a § 1111(b) election is made, "each member of the electing class must receive or retain under the plan on account of such claim property of a value, as of the effective date of the plan, that is not less than the value of such holder's interest in the estate's interest in the property that secures such claims." *Id.*; 11 U.S.C. § 1129(a)(7)(B). Accordingly, after a § 1111(b) election is made, a secured creditor can no longer claim that he/she is entitled to a value that its not less than the amount he/she would receive if the debtor were liquidated. In *Sunnyslope*, if the lender had not made the § 1111(b) election, then the court may have been required to apply the liquidation-value instead of the replacement-value to satisfy the requirements of § 1129(a)(7)(A). Had the lender not received the liquidation value, then it is unlikely that the plan would have been fair and equitable.[4]

***Associates Commercial Corp. v. Rash*, 520 U.S. 953 (1997)**

Creditor objected to a Chapter 13 plan, which proposed that debtors would retain creditor's collateral, a tractor truck, for use in debtors' business. *Id.* at 953. The creditor maintained that the

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[4] Collier provides an example showing how an § 1111(b) election affects a creditor's entitlement under § 1129(a)(7).

> Under normal practice, such creditors would have a secured claim equal to the value of the collateral, and an unsecured claim equal to the deficiency. When the section 1111(b) election is made, however, the secured creditor waives its deficiency claim for the right to have a lien on the collateral equal to the full amount of its allowed claim. Thus, a creditor owed $100 secured by collateral worth $50 who elects under section 1111(b) would have an allowed claim of $100 secured by a lien on the collateral of $100.
>
> To satisfy section 1129(a)(7) in such circumstances, the plan must give the creditor "property"--say a note--that has a present value that is not less that [sic] $50--which is "the value of the holder's interest in the estate's interest in the property" securing such claim. The lower figure, $50, is used since the estate's interest in the collateral tops out at the collateral's value. Again, caution is urged, since the requirements of section 1129(b)'s fair and equitable rule, especially the effect of section 1129(b)(2)(A), will be to give the secured creditor more.

See 7-1129 Collier on Bankruptcy P 1129.02.

proper valuation was the price the debtor would have to pay to purchase a like vehicle, while the debtors argued that the proper valuation was the net amount the creditor would realize upon foreclosure and sale of the collateral. *Id.* at 957. The debtors' Chapter 13 plan invoked the cram down power pursuant to 11 U.S.C. § 1325(a)(5).

Prior to the Supreme Court's decision, the Fifth Circuit determined that the proper valuation was foreclosure value. *Id.* at 958. Relying on language from the first sentence of Section 506(a) – "[a]n allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property"– the Fifth Circuit reasoned that the collateral should be valued from the creditor's perspective. Because "the creditor's interest is in the nature of a security interest, giving the creditor the right to repossess and sell the collateral and nothing more[,] . . . the valuation should start with what the creditor could realize by exercising that right." *Id.* at 958-59 (quotation marks omitted). The Fifth Circuit read Section 506(a) to mean that "the starting point for the valuation [is] what the creditor could realize if it sold the estate's interest in the property according to the security agreement, namely through repossin[ing] and sell[ing] the collateral." *Id* at 960 (quotation marks omitted). The Supreme Court disagreed with the Fifth Circuit's reading of Section 506(a), finding that the first portion of the section imparts no valuation standard. "A direction simply to consider the "value of such creditor's interest" does not expressly reveal *how* that interest is the valued." *Id.* at 960-61. Instead, this phrase was meant to note that "a secured creditor's claim is to be divided into secured and unsecured portions, with the secured portion of the claim limited to the value of the collateral." *Id.* at 961.

Ultimately, the Supreme Court determined that the second sentence of Section 506(a) spoke to the question of *how* secured claims are to be valued. "Such value . . . shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property." *Id.* at 961 (quotation marks omitted). According to the Supreme Court "the proposed disposition or use" of the collateral "is of paramount importance to the valuation question." *Id.* at 962. "If a secured creditor does not accept a debtor's Chapter 11 plan, the debtor has two options for handling allowed secured claims: surrender the collateral to the creditor, . . . ; or, under the cram down option, keep the collateral over the creditor's objection and provide the creditor, over the life of the plan, with the equivalent of the present value of the collateral . . . ." *Id.* at 962 (citation and quotation marks omitted). As such, "applying a foreclosure-value standard when the cram down option is invoked attributes no significance to the different consequences of the debtor's choice to surrender the property or retain it. A replacement-value standard, on the other hand, distinguishes retention from surrender and renders meaningful the key words 'disposition or use.'" *Id.* Of prime significance, is the fact that the "replacement-value standard accurately gauges the debtor's 'use' of the property." *Id.* at 963. Furthermore, in a footnote, the Supreme Court noted: "[w]hether replacement value is the equivalent of retail value, wholesale value, or some other value will depend on the type of debtor and the nature of the property." *Id.* at 965 n.6. Ultimately, in a cram

down, the value of the property and the amount secured by 506(a) is "the price a willing buyer in the debtor's trade, business, or situation would pay to obtain like property from a willing seller." *Id.* at 960.

***In re Mayslake Village-Plainfield Campus, Inc.*, 441 B.R. 309 (Bankr. N.D. Ill. 2010)**

The debtor was an Illinois not-for-profit corporation that owned real estate with a 186-unit senior housing facility that provided moderate-cost housing for lower income senior citizens. The debtor was also a tax exempt entity under I.R.C. Section 501(c)(3). *Id.* at 313. The acquisition and construction of the property were financed by the predecessor of the lender, and the debts were evidenced by two notes executed by the debtor. *Id.* The debtor filed for bankruptcy under chapter 11, and filed a plan which provided for the debtor to (i) continue to own and operate the property as a residential rental facility for senior citizens and to (ii) retain its real estate and sales tax exemptions. *Id.* at 314. The lender made its election pursuant to Section 1111(b) to have its undersecured claim treated as if it were fully secured. Further, all of the voting creditors, except the lender, voted to accept the plan. *Id.* At trial it was indicated that the value of the property was $8.9 million if operated by a for-profit entity and $13.4 million if operated by a not-for-profit entity. *Id.* Notwithstanding, the debtor argued that this was the appropriate value of the property because (i) the figure was consistent with the lender's book valuation of the property and (ii) the lender had the advantage of ownership without passing of title since the Plan provided that the net rental income from the property was to be paid to the lender. *Id.* at 320. The lender objected to the plan on several grounds including: (i) the projected payments did not provide the lender with a present value that was greater than or equal to the present value of the property; (ii) the treatment of the lender's claims was not "fair and equitable;" and (iii) the plan was not feasible. *Id.* at 315.

In reviewing the lender's objections, the bankruptcy court looked to whether the cram down was allowed, and determined that the cram down would only be appropriate if the lender retained its liens and received payments equal to or exceeding the value of its interest in the property. *Id.* at 319. As such, the court focused its inquiry on the value of the property. Under the plan, the debtor proposed to keep the property and operate it in the same manner and for the same purpose that it did prepetition. As such, the debtor contended that the property should be valued at $8.9 million because the figure was consistent with the Lender's book valuation of the property. *Id.* at 320. Conversely, the lender claimed that $13.4 million was the appropriate value of the property.

According to the court, the "operative language of § 506(a)(1)'s last sentence provides that value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property[.]" *Id* (quotation marks omitted). At trial, the expert opined that the property was worth $8.9 million if operated by a for-profit entity, but worth $13.4 million if operated by a not-for-profit entity (like the debtor). *Id.* The court reasoned that the first value was close to the foreclosure value, while the latter was roughly the equivalent of the replacement value.

Thus, and because the plan proposed that the debtor retain and continue to operate the property, "the higher value should apply." *Id.* "[T]he Court concludes that the Property, which the Debtor proposes to retain, operate, and control, should be valued at $13.4 million for purposes of the Plan. The logic of *Rash* and the text from § 506(a)(1) . . . militate in favor of using the higher figure to value the Property." *Id.* at 321.

GIFT CARDS

The Gift that Keeps on Giving?

A. Issues Overview

How many nightstand drawers in the USA are full of unused or partially used gift cards? Depending on the retailer, a significant percentage of gift cards purchased by consumers or given upon return of merchandise by consumers go unused. In the cases involving major national retail chains, these unused gift cards may constitute a multi-million dollar obligation of the issuing company. The management of liabilities surrounding gift cards may be hard to quantify and manage, as the ultimate holders of gift cards are not easily tracked, and though many have no expiration dates, they become less likely to be redeemed as years pass.

In Chapter 11 retailer cases, thought must be given to treatment of existing gift cards both prior to the filing along with other "first-day" issues, and in terms of how such liabilities will be treated in the context of a plan. Retailers commonly seek to retain goodwill with their customers by seeking to honor the prepetition gift cards on their terms, or on modified terms, during the Chapter 11 case. Another bucket of issues concerns the sale of new gift cards after the filing of a Chapter 11 case. While a retail debtor may want to preserve its ability to generate a valuable postpetition stream of income, courts are concerned with protecting unwitting consumer purchasers of gift cards from risks essentially similar to those of a postpetition unsecured lender.

The issues involved in this analysis start with what type of claim the holder of a prepetition gift card holds. Is it a general unsecured claim? Is it a consumer "deposit" entitled to priority under Bankruptcy Code Section 502(a)(7). The authorities are split. *Compare*, *In re City Sports, Inc.,* 554 B.R. 329 (Bankr. D. Del. 2016)(claims based on unredeemed prepetition gift cards ruled general unsecured claims) with *In re WW Warehouse, Inc.,* 313 B.R. 588 (Bankr. D. Del. 2004).

It is not unusual for a debtor to propose modified terms, e.g. conditioning the use of a gift card on minimum purchases. *See, e.g.*, *In re Sharper Image Corp.,* Case No. 08-10322 (KG) (Bankr. D. Del. March 7, 2008) (including copy of "Customer & Merchandise Gift Card Policy").

Sale of new gift cards postpetition has engendered some courts to restrict use of all or some of the proceeds from gift card sales, so as not to have consumers stuck with a worthless gift card if a reorganization fails. *In re Skin Sense, Inc*., 2017 WL 47317 (Bankr. E.D.N.C. Feb. 3, 2017).

Other complications may include inter-company transfers and prepetition and postpetition liens on sales and proceeds. These issues have yet to generate case law.

B. Hypothetical

Athletic Brands Unlimited, Inc. ("ABU"), your chapter 11 debtor in possession, has been in business a few years. ABU is the 100% owner of the following subsidiaries, also in Chapter 11:

Slick's Sporting Goods ("SSG") – a retail chain of 50 stores located in the Eastern and Central US; and

Sports Unlimited Brands ("SUB") – a retail chain of 50 stores located in the Western and Rocky Mountain states.

ABU has sold Gift Cards redeemable at either SSG or SUB stores, and SSG and SUB have sold Gift Cards only redeemable at their respective stores. None of the Gift Cards have expiration dates.

ABU has traditionally sold about $1 million of its gift cards each year. On the filing date, ABU's books and records reflect unused gift card liabilities totaling $600,000.

SSG has traditionally sold about $3 million of its gift cards each year. On the filing date, SSG's books and records reflect unused gift card liabilities totaling $4,000,000.

SUB has traditionally sold about $1 million of its gift cards each year. On the filing date, SSG's books and records reflect unused gift card liabilities totaling $1,000,000.

In their first day motions, the Debtors have set forth the following:

ABU

1. ABU has moved for an order allowing it to honor all prepetition gift cards in the ordinary course, supported by an affidavit indicating that POS systems in place in both chains can accurately allocate where the cards are used, and that the subsidiaries can then forward the corresponding information to ABU, which will reimburse the correct subsidiary for the amount redeemed.

2. ABU indicates that it will discontinue sales of gift cards postpetition at this time.

3. ABU's bondholders assert a prepetition lien on all assets of ABU.

SSG

1. SSG has moved for an order allowing it to honor all prepetition gift cards in the ordinary course.

2. SSG has moved for an order allowing it to sell postpetition gift cards in the ordinary course without differentiation to consumers and to use proceeds of the sales in the ordinary course of business.

3. SSG granted a blanket lien on all of SSG's assets to the SSG OLD Co that sold the SSG chain to ABU, to secure the purchase price for the SSG OLD Co Stock.

SUB

1. SUB has moved for an order allowing it to honor all prepetition gift cards in the ordinary course after notice to customers that gift cards must be redeemed within the next 90 days and must be used in purchases that are at least double the amount of the gift card. SUB asserts that this will increase foot traffic in its stores.

2. SUB has been losing money and closing stores. It is likely to liquidate in a going out of business sale to the public, but has not yet filed motions proposing the sale. It does not believe a buyer for the going concern will materialize.

3. SUB has nominal secured debt, and a very active general unsecured creditors' committee.

C. Relevant Case Law

***In re Skin Sense, Inc*., 2017 WL 47317 (Bankr. E.D.N.C. Feb. 3, 2017)**

This recent case provides a helpful overview of the issues created by outstanding gift card obligations and a debtors' desire to continue to sell gift cards on a postpetition basis. Unlike most cases on this subject, the debtor Skin Sense, Inc. was not a national retailer, but was a small, closely held business that had operated two spa locations in North Carolina. A significant portion of Skin Sense's income was generated through sales of gift cards, particularly around the December holidays, Valentine's Day and Mother's Day. Early in its Chapter 11 case, Skin Sense sought court authority: (1) to continue to sell gift cards to customers postpetition, and use the proceeds of gift card sales in the ordinary course of business, and (2) to honor gift cards sold prepetition on an ordinary course basis for postpetition services, with an estimated obligation on outstanding, unused prepetition gift cards of $215,000. A significant portion of Skin Sense's annual revenues was generated by gift card sales.

The court first considered the nature of gift cards and related unsecured liabilities:

> A gift card I '[a] record evidencing a promise, made for monetary consideration, by a seller or issuer that goods or services will be provided to the owner of the record to the value shown in the record. . . . unused gift

> cards exist as a net liability to a business…*In the context of bankruptcy, funds received from gift cards amount to unsecured debt for a debtor, and those individuals that purchased gift cards are accordingly unsecured creditors.*"

Id. at p.3. Further, the court notes that authorities appear split on whether claims arising from unused, prepetition gift cards are entitled to a priority as a prepetition consumer deposit under Bankruptcy Code Section 507(a)(7), or whether they are simple general unsecured claims. *Id.* at p.4.

With that background, the court in *Skin Sense* focused on whether a debtor should be allowed to sell gift cards in the ordinary course of business after a Chapter 11 filing. The court strongly considered the risks to consumers purchasing gift cards postpetition, likening them to "*unknowing – postpetition debtor-in-possession lenders."* The court found that in the context of a small spa business, the risks to consumers of never receiving value if the business were to close was too great in that: (1) as primarily a *service* business, the prospect of making consumers whole was not viable, (2) the proportion of gift card income to regular income was too high to assure that the liabilities could be covered, (3) the company was not being sold as a going concern to a buyer that could undertake the liabilities in the future, and (4) the creation of a large class of small administrative priority claimants would be a burden on a future trustee. *Id* at 5.

Based on these concerns, the court allowed postpetition gift card sales, but conditioned the sales on Skin Sense sequestering 85% of the proceeds until the gift cards were redeemed. The apportionment was based on testimony that historically 15% of sold gift cards were never redeemed. The court dismissed as unworkable a proposal by the debtor to provide a lien on real property to secure the postpetition gift card claims. Thus, the debtor won the war, but lost the battle because it was unable to gain access to most of the revenue garnered from the postpetition gift cards sales, which would not produce the working capital desired by the debtor.

***In re City Sports, Inc.*, 554 B.R. 329 (Bankr. D. Del. 2016)**

The court in *City Sports* faced the single issue of whether approximately $1,182,000 in unused prepetition gift cards asserted on behalf of consumers by the Commonwealth of Massachusetts should be treated as general unsecured claims or as priority consumer deposit claims under Bankruptcy Code Section 507(a)(7). The court held that the claims were general unsecured claims not entitled to priority treatment. *Id*. at 344.

The court analyzed the issue on the basis of defining "deposit" - first on a "plain meaning" basis, and then by extensively analyzing the legislative history. Notably, "deposit," is not defined in the Bankruptcy Code. The court determined that the essence of a "deposit" for purposes of

Section 507(a)(7) must include a "temporal relationship," *i.e.* that the subject transaction is not fully complete:

> …The term deposit connotes a *temporal relationship* between the time the consideration is given and the time the right to use or possess is vested in the individual giving the consideration. The temporal aspect is important because it is what allows section 507(a)(7) to encompass deposits that are a fractional payment, as well as deposits for the full payment amount. It is this temporal relationship that distinguishes consideration tendered as a deposit from consideration tendered as a mere payment for goods and services.
>
> In re *Nittany Enterprises, Inc*., 502 B.R. 447, 455 (Bankr. W.D. Va. 2012) citing [In re *Palmas del Mar Country Club, Inc.]*, 443 B.R. at 575 (surveying section 507(a)(7) cases).

Id. at 335. The court concluded that a gift card transaction is complete – when the gift card is purchased. *Id*. at 338.

In its extensive analysis of the legislative history, the court recognizes that gift cards were discussed but ultimately not expressly mentioned in the statute as adopted, though no reason for the omission has been put forward. Other courts that have analyzed the legislative history have relied on a discussion of the W.T. Grant liquidation in 1976 contained in the legislative history where commentators posited that holders of "Grant Scrips" (a form of gift certificate) should have been afforded a priority as a basis for the new priority provision. However, the court in *City Sports* dismissed this rationale by distinguishing the W.T. Grant Scrips as having had some lay-away component. *Id.* at 343.

***Compare*: *In re WW Warehouse, Inc.*, 313 B.R. 329 (Bankr. D. Del. 2004)**

This case presents the identical issue considered in *City Sports*. It also sets forth both a "plain meaning" and legislative history analysis, but comes to the complete opposite conclusion on each, and thus holds that claims based on prepetition gift cards *are* entitled to Section 507(a)(7) priority treatment.

Sample Orders:

In re Hancock Fabrics, Inc., Case No. 16-10296 (BLS) (Bankr. D. Del. February 3, 2016)

In re Sharper Image Corp., Case No. 08-10322 (KG) (Bankr. D. Del. March 7, 2008) (including copy of "Customer & Merchandise Gift Card Policy")

In re Quiksilver, Inc., Case No. 15-11880 (BLS) (Bankr. D. Del. September 10, 2015).

In re The Wet Seal, Inc., Case No. 15-10081 (CSS) (Bankr. D. Del. January 20, 2015).

In re Sports Authority Holdings, Inc., Case No. 16-10527 (MFW) (Bankr. D. Del. May 24, 2016).

See Also: Quirk, Marion M., "*Gift Cards and their Disparate Treatment in Chapter 11 Cases,*" 33 APR Am. Bankr. Inst. J. 54 (April 2014) (comparing treatment of gift card holder claims in *The Sharper Image* and *Borders* cases.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

ORIGINAL

In re:	:	Chapter 11
HANCOCK FABRICS, INC., *et al.*,[1]	:	Case No. 16-10296 (BLS)
Debtors.	:	Jointly Administered
	:	**Re: Docket No. 10**

ORDER PURSUANT TO SECTION 105(a) OF THE BANKRUPTCY CODE AUTHORIZING THE DEBTORS (A) TO HONOR CERTAIN PREPETITION OBLIGATIONS TO CUSTOMERS AND TO CONTINUE CUSTOMER PROGRAMS AND (B) TO HONOR CERTAIN OTHER PREPETITION OBLIGATIONS NECESSARY TO MAINTAIN THE EXISTENCE OF CUSTOMER PROGRAMS

Upon the motion (the "**Motion**")[2] of the Debtors for entry of an order (this "**Order**"): authorizing the Debtors (i) to honor certain prepetition obligations to customers and to continue customer programs and (ii) to honor certain other prepetition obligations necessary to maintain the existence of customer programs, all as more fully set forth in the Motion; and due and sufficient notice of the Motion having been provided under the particular circumstances, and it appearing that no other or further notice need be provided; and the Court having jurisdiction to consider the Motion and the relief requested therein in accordance with 28 U.S.C. §§ 157 and 1334; and consideration of the Motion and the relief requested therein being a core proceeding under 28 U.S.C. § 157(b); and venue being proper before this Court under 28 U.S.C. §§ 1408 and 1409; and a hearing having been held to consider the relief requested in the Motion on an interim basis (the "**Hearing**"); and upon the First Day Declaration, the record of the Hearing,

[1] The Debtors in these cases, along with the last four digits of each Debtor's federal tax identification number, are Hancock Fabrics, Inc. (0905), Hancock Fabrics, LLC (9837), Hancock Fabrics of MI, Inc. (5878), hancockfabrics.com, Inc. (9698), HF Enterprises, Inc. (7249), HF Merchandising, Inc. (8522) and HF Resources, Inc. (9563). The Debtors' corporate headquarters is located at One Fashion Way, Baldwyn, MS 38824.

[2] Capitalized terms used but not defined in this Order have the meanings used in the Motion.

and all the proceedings before the Court; and the Court having found and determined that the relief requested in the Motion is necessary to avoid immediate and irreparable harm to the Debtors and their estates, as contemplated by Federal Rule of Bankruptcy Procedure 6003, and that such relief is in the best interests of the Debtors, their estates and creditors, and any parties in interest; and that the legal and factual bases set forth in the Motion and at the Hearing establish just cause for the relief granted herein; and after due deliberation thereon and sufficient cause appearing therefor, it is HEREBY ORDERED THAT:

1. The Motion is granted as set forth herein.

2. The Debtors are authorized, but not directed, to perform and honor their prepetition obligations related to the Customer Programs in the ordinary course of business as the Debtors deem appropriate; provided, however, that the Debtors shall not honor prepetition obligations with respect to gift cards and merchandise-only cards in an aggregate amount in excess of $2.4 million without further permission from the Court.

3. To the extent the Debtors issue gift cards post-petition, the Debtors shall implement a procedure which enables them to differentiate whether a gift card was issued prior to or after the Petition Date.

4. The Debtors are authorized, but not directed, to continue, modify, replace and/or terminate any existing Customer Programs and/or implement such new Customer Programs as the Debtors deem appropriate in the ordinary course of business, in each case without further application to the Court.

5. Nothing herein or in the Motion shall be deemed to constitute an assumption of an executory contract, whether under Bankruptcy Code section 365 or otherwise.

6. Nothing herein amends that certain Debtor-in-Possession Credit Agreement dated on or about February 2, 2016 by and among, *inter alia*, the Debtors, Wells Fargo Bank, N.A. as Administrative Agent, Collateral Agent and Swing Line Lender, and GACP Finance Co., LLC, as Term Agent (the **"DIP Credit Agreement"**) (including without limitation any budget

incorporated therein) or any order of this Court approving the DIP Credit Agreement (including without limitation any budget incorporated therein).

7. The requirements as set forth in Bankruptcy Rule 6003(b) are satisfied by the contents of the Motion.

8. The Debtors are authorized and empowered to take all actions necessary or appropriate to implement the relief granted in this Order.

9. This Court will retain jurisdiction over all matters arising from or related to the implementation or interpretation of this Order.

Dated: February 3, 2016
Wilmington, Delaware

THE HONORABLE BRENDAN L. SHANNON
CHIEF UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	:	**Chapter 11**
SHARPER IMAGE CORPORATION,	:	**Case No. 08-10322 (KG)**
Debtor.	:	**Re: Docket Nos 9, 47 and 122**

SUPPLEMENTAL ORDER PURSUANT TO SECTIONS 105(a), 363(b), AND 503(b)(1) OF THE BANKRUPTCY CODE AUTHORIZING DEBTOR TO HONOR CERTAIN PREPETITION CUSTOMER PROGRAMS

Upon the motion, dated February 19, 2008 (the "First Day Motion"), and the supplement thereto, dated March 3, 2008 (the "Supplement" and, together with the First Day Motion, the "Motion"), of Sharper Image Corporation, as debtor and debtor in possession (the "Debtor" or "Sharper Image"), pursuant to sections 105(a), 363(b), and 503(b)(1) of title 11 of the United States Code (the "Bankruptcy Code"), for an order authorizing the Debtor to (i) honor Gift Certificates[1] and Merchandise Certificates in the manner described in the Motion and (ii) honor its undisputed prepetition obligations under the Modified Certificate Program, all as more fully set forth in the Motion; and upon consideration of the Declaration of Rebecca L. Roedell in Support of the Debtor's Chapter 11 Petition and Request for First Day Relief, sworn to on February 19, 2008; and the Court having jurisdiction to consider the Motion and the relief requested therein pursuant to 28 U.S.C. §§ 157 and 1334; and consideration of the Motion and the relief requested therein being a core proceeding pursuant to 28 U.S.C. § 157(b); and venue being proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409; and the Court having

[1] Capitalized terms used herein but not otherwise defined shall have the meanings ascribed to them in the Motion.

entered an Order dated February 20, 2008 granting the relief requested in the First Day Motion (the "Initial Customer Programs Order"), and an Order dated March 4, 2008, shortening the notice required for consideration of the relief requested in the Supplement; and due and proper notice of the Motion having been provided under the circumstances to (i) the United States Trustee for the District of Delaware; (ii) the attorneys for the Statutory Creditors' Committee; (iii) the attorneys for Wells Fargo Retail Finance, LLC, as prepetition and postpetition secured lender to the Debtor; and (iv) each person or entity that has filed a notice of appearance and request for service of documents, and it appearing that no other or further notice need be provided; and the Court having determined that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein; and upon all of the proceedings had before the Court and after due deliberation and sufficient cause appearing therefor, it is

ORDERED that the Motion is granted as modified herein; and it is further

ORDERED that, pursuant to sections 105(a), 363(b), and 503(b)(1) of the Bankruptcy Code, the Debtor is authorized to continue to honor Gift Certificates and Merchandise Certificates, consistent with the Modified Certificate Program, in the ordinary course of its business, and to perform and honor all of its undisputed prepetition obligations thereunder, as it deems appropriate in its business judgment *provided, however*, that (i) the relief granted herein shall not constitute an approval or assumption of any Customer Program or related agreement or policy pursuant to section 365 of the Bankruptcy Code, and (ii) in the event that the Debtor seeks to modify the Modified Certificate Program, the Debtor will seek such relief by motion on notice to parties in interest; and it is further

ORDERED that this Supplemental Order does not limit the authority granted to the Debtor in the Initial Customer Programs Order; and it is further

ORDERED that nothing in this Order or the Motion shall be construed as prejudicing any rights the Debtor may have to contest the amount or basis of any prepetition or postpetition obligations relating to the Customer Programs; and it is further

ORDERED that nothing in this Order or the Motion shall be construed as impairing or otherwise affecting the rights of Gift Certificate and Merchandise Certificate holders to assert claims based upon the Certificates against the Debtor and/or its estate in the event that such holders do not redeem the Certificates in connection with the Modified Certificate Program; and it is further

ORDERED that Sharper Image shall post notice of the Modified Certificate Program in the form annexed hereto as Exhibit "A", which form is approved by the Court, on its website www.sharperimage.com and on the website of its Court-appointed claims agent www.kccllc.net/sharperimage and shall be distributed in the stores to customers seeking to redeem gift cards; and it is further

ORDERED that Sharper Image is authorized to take all actions necessary to implement the terms of this Order; and it is further

ORDERED that Rule 6003(b) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") has been satisfied; and it is further

ORDERED that notwithstanding any applicability of Bankruptcy Rule 6004(h), the terms and conditions of this Order shall be immediately effective and enforceable upon entry of this Order; and it is further

ORDERED that the requirements of Bankruptcy Rule 6004(a) are waived.

Dated: Wilmington, Delaware
March 7, 2008

HONORABLE KEVIN GROSS
UNITED STATES BANKRUPTCY JUDGE

EXHIBIT "A"

SHARPER IMAGE CORPORATION
CUSTOMER & MERCHANDISE GIFT CARD POLICY

1. This policy is purely voluntary.

2. If you choose to redeem your card, you must purchase merchandise equal to twice the current value of the gift card to redeem the card.

3. If you choose to redeem your card, you may not redeem the gift card partially. Cards must be redeemed in full.

4. How does it work? If you have a $25 card, you must purchase at least $50 to be able to use the card. If you have partially used your card before March 7, 2008, you must spend twice the remaining balance.

5. A Customer who does not wish to redeem his or her card as part of this program may have a priority claim in Sharper Image's bankruptcy case. In a bankruptcy case, priority unsecured claims get paid prior to general unsecured claims, although there is no assurance of payment. Information about filing a claim and claim forms can be obtained on the following website:

   http://www.kccllc.net/sharperimage

or by calling the following number: []

6. Sharper Image is working diligently to be able to honor the cards without condition in the future. A Customer who does not use his or her card as part of this program may be able to use the card without condition in the future, although Sharper Image cannot guaranty this result. This policy is subject to further order of the United States Bankruptcy Court for the District of Delaware.

7. Cards may not be accepted at stores that are closing, unless notified at the particular store to the contrary. For those Customers who do not live near a store remaining open, the cards can be redeemed on the internet at www.sharperimage.com or through the catalogue.

WCSR 3856245v3

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	:	Chapter 11
QUIKSILVER, INC., *et al.*,	:	Case No. 15-11880 (BLS)
Debtors.[1]	:	(Jointly Administered)
	:	**Related Docket No. 9**

ORDER PURSUANT TO BANKRUPTCY CODE SECTIONS 105(a) AND 363(b) AND BANKRUPTCY RULES 6003 AND 6004 AUTHORIZING THE DEBTORS TO (I) MAINTAIN CUSTOMER PROGRAMS AND (II) HONOR OR PAY RELATED PREPETITION OBLIGATIONS

Upon the motion (the "Motion")[2] of the Debtors for entry of an order (this "Order") (i) authorizing the Debtors to maintain and administer the Customer Programs and honor the Customer Obligations in the ordinary course of business and in a manner consistent with past practice, (ii) authorizing the Debtors to continue, replace, implement, modify and/or terminate one or more of the Customer Programs, in each case as the Debtors deem appropriate in their business judgment and in the ordinary course of business, without further application to the Court, (iii) authorizing the Banks to honor and process check and electronic transfer requests related to the foregoing, and (iv) granting related relief; and upon consideration of the First Day Declaration; and due and sufficient notice of the Motion having been given under the particular circumstances; and it appearing that no other or further notice is necessary; and it appearing that

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[1] The Debtors and the last four digits of their respective taxpayer identification numbers are as follows: Quiksilver, Inc. (9426), QS Wholesale, Inc. (8795), DC Direct, Inc. (8364), DC Shoes, Inc. (0965), Fidra, Inc. (8945), Hawk Designs, Inc. (1121), Mt. Waimea, Inc. (5846), Q.S. Optics, Inc. (2493), QS Retail, Inc. (0505), Quiksilver Entertainment, Inc. (9667), and Quiksilver Wetsuits, Inc. (9599). The address of the Debtors' corporate headquarters is 5600 Argosy Circle, Huntington Beach, California 92649.

[2] Capitalized terms not otherwise defined herein shall have the meanings ascribed to such terms in the Motion or the First Day Declaration.

the relief requested in the Motion is in the best interests of the Debtors, their estates, their creditors, and other parties in interest; and after due deliberation thereon; and good and sufficient cause appearing therefor; it is hereby,

ORDERED, ADJUDGED, AND DECREED that:

1. The Motion is GRANTED as set forth herein.

2. The Debtors are authorized, in their sole discretion, to maintain and administer the Customer Programs and honor prepetition Customer Obligations related thereto in the ordinary course of business and in a manner consistent with past practice.

3. The Debtors are authorized to continue, replace, implement, modify, and/or terminate any of the Customer Programs, in each case as the Debtors deem appropriate in their business judgment and in the ordinary course of business, without further application to the Court.

4. The credit card companies, internet vendors, and check processors used by the Debtors are authorized to offset chargebacks, returns, and processing fees on account of customer purchases in the ordinary course of business, whether such purchases were made prior to or after the Petition Date.

5. All applicable banks and other financial institutions are hereby authorized, when requested by the Debtors in their sole discretion, to receive, process, honor, and pay all prepetition and postpetition checks, drafts, and other forms of payment, including fund transfers, on account of the Customer Obligations, whether such checks or other requests were submitted prior to or after the Petition Date.

6. The Debtors' banks and other financial institutions shall rely on the direction and representations of the Debtors as to which checks and fund transfers should be honored and paid pursuant to this Order, and any such bank shall not have any liability to any

party for relying on such direction and representations by the Debtors as provided for in this Order or for inadvertently honoring or dishonoring any check or fund transfer.

7. The Debtors' banks shall, at the direction of the Debtors, receive, process, honor, and pay all prepetition and postpetition checks and fund transfers on account of the Customer Obligations that had not been honored and paid as of the Petition Date, provided that sufficient funds are on deposit in the applicable accounts to cover such payments and any such bank shall not have any liability to any party for relying on such direction by the Debtors as provided for in this Order or for inadvertently failing to follow such direction.

8. To the extent the Debtors have not yet sought to remit payment on account of the Customer Obligations, the Debtors are authorized, but not directed, to issue checks or provide for other means of payment of the Customer Obligations.

9. The Debtors shall be and hereby are authorized to issue new postpetition checks or effect new postpetition fund transfers on account of the Customer Obligations to replace any prepetition checks or fund transfer requests that may be dishonored or rejected.

10. Nothing in the Motion or this Order, nor the Debtors' payment of claims pursuant to this Order, shall be deemed or construed as (i) an admission as to the validity of any claim against the Debtors; (ii) a waiver of the Debtors' rights to dispute any claim on any grounds; (iii) a promise to pay any claim; (iv) an implication or admission that any particular claim would constitute a Customer Obligation; or (v) the assumption of any contract.

11. Nothing contained in the Motion or this Order is intended or should be construed to create an administrative priority claim on account of any Customer Program or Customer Obligation.

12. Notwithstanding anything to the contrary contained herein, the relief granted in this Order and any payment to be made hereunder shall be subject to the terms of any orders approving entry into debtor-in-possession financing and authorizing the use of cash collateral approved by this Court in these Chapter 11 Cases (including with respect to any budgets or other covenants governing or relating to such debtor-in-possession financing and/or use of cash collateral). To the extent there is any inconsistency between the terms of such orders and any action taken or proposed to be taken hereunder, the terms of such orders shall control.

13. The requirements of Bankruptcy Rule 6003(b) have been satisfied with respect to the relief requested in the Motion.

14. This Order shall be immediately effective and enforceable upon its entry. To the extent that it may be applicable, the fourteen-day stay imposed by Bankruptcy Rule 6004(h) is hereby waived.

15. The Debtors are authorized and empowered to take all actions necessary to implement the relief granted in this Order.

16. This Court shall retain jurisdiction with respect to all matters arising from or related to the implementation, interpretation, or enforcement of this Order.

Dated: Wilmington, Delaware
Sept 10, 2015

HONORABLE BRENDAN L. SHANNON
CHIEF UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re THE WET SEAL, INC., a Delaware corporation, *et al.*[1] Debtors.	Chapter 11 Case No.: 15-10081 (CSS) (Jointly Administered) **Re: Docket Nos. 8 & 53**

ORDER AUTHORIZING MAINTENANCE, ADMINISTRATION, AND CONTINUATION OF CERTAIN CUSTOMER PROGRAMS

Upon the motion (the "Motion")[2] of The Wet Seal, Inc. and its subsidiaries, the debtors and debtors in possession (the "Debtors") in the above-captioned jointly administered chapter 11 cases (the "Cases"), for entry of an order, pursuant to sections 105(a) and 363(b) of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (the "Bankruptcy Code"), and Rules 6003 and 6004 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), (a) authorizing the Debtors to maintain and administer customer-related programs as described in the Motion (collectively, the "Customer Programs") and honor prepetition obligations to customers related thereto in the ordinary course of business and in a manner consistent with past practice, (b) authorizing the Debtors to continue, replace, implement, modify and/or terminate one or more of the Customer Programs, in each case as the Debtors deem appropriate in their business judgment and in the ordinary course of business, without further application to the Court, (c) authorizing banks and other financial institutions to honor and process check and electronic transfer requests related to the foregoing, and (d) granting related relief; and upon consideration

[1] The Debtors and the last four digits of their respective federal taxpayer identification numbers are as follows: The Wet Seal, Inc. (5940); The Wet Seal Retail, Inc. (6265); Wet Seal Catalog, Inc. (7604); and Wet Seal GC, LLC (2855-VA). The Debtors' address is 26972 Burbank, Foothill Ranch, CA 92610.

[2] Capitalized terms used but not defined herein shall have the meanings ascribed to them in the Motion.

of the Hillebrandt Declaration and the entire record of these Cases; and it appearing that the Court has jurisdiction to consider the Motion pursuant to 28 U.S.C. §§ 1334 and 157, and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware dated February 29, 2012; and it appearing that the Motion is a core matter pursuant to 28 U.S.C. § 157(b)(2) and that the Court may enter a final order consistent with Article III of the United States Constitution; and it appearing that venue of these Cases and of the Motion is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and the Court having previously entered the *Bridge Order Authorizing the Debtors to Honor Their Customer Programs on a Limited Basis* [Docket No. 53]; and it appearing that due and adequate notice of the Motion has been given under the circumstances, and that no other or further notice need be given; and it appearing that the relief requested in the Motion is in the best interests of the Debtors' estates, their creditors, and other parties in interest; and after due deliberation, and good and sufficient cause appearing therefor, it is hereby

ORDERED, ADJUDGED AND DECREED THAT:

1. The Motion is GRANTED, as set forth herein.

2. The Debtors are authorized, but not directed, to satisfy their prepetition obligations arising from the Customer Programs in the ordinary course of business as they become due in their sole discretion.

3. The Debtors are authorized to continue, replace, implement, modify and/or terminate one or more of the Customer Programs, in each case as the Debtors deem appropriate in their business judgment and in the ordinary course of business, without further application to the Court.

4. The Banks are authorized, when requested by the Debtors, in the Debtors' discretion, to honor and process checks or electronic fund transfers drawn on the Debtors' bank accounts to pay prepetition obligations authorized to be paid hereunder, whether such checks or other requests were submitted prior to, or after, the Petition Date, provided that sufficient funds are available in the applicable bank accounts to make such payments. The Banks may rely on the representations of the Debtors with respect to whether any check or other transfer drawn or issued by the Debtors prior to the Petition Date should be honored pursuant to this Order, and any such Bank shall not have any liability to any party for relying on such representations by the Debtors, as provided for in this Order.

5. Nothing in the Motion or this Order, nor as a result of any payment made pursuant to this Order, shall be deemed or construed as (a) an admission as to the validity or priority of any claim or lien against the Debtors or an approval or assumption of any agreement, contract, or lease pursuant to section 365 of the Bankruptcy Code or (b) a waiver of the right of the Debtors, or shall impair the ability of the Debtors, to contest the validity or amount of any payment made pursuant to this Order.

6. The credit card companies, internet vendors, and check processors used by the Debtors are authorized to offset chargebacks, returns, and fees on account of customer purchases in the ordinary course of business that may have arisen before the Petition Date up to the aggregate amount set forth in the Motion.

7. The Debtors are authorized to issue postpetition checks, or to effect postpetition fund transfer requests, in replacement of any checks or fund transfer requests that are dishonored as a consequence of these chapter 11 cases with respect to prepetition amounts owed in connection with the Customer Programs.

8. Nothing contained in the Motion or this Order is intended or should be construed to create an administrative priority claim on account of any Customer Programs.

9. The Debtors are authorized and empowered to take all actions necessary to implement the relief granted in this Order.

10. Bankruptcy Rule 6003(b) has been satisfied because the relief requested in the Motion is necessary to avoid immediate and irreparable harm to the Debtors. The requirements of Bankruptcy Rule 6004(a) are waived.

11. Notwithstanding any provision in the Bankruptcy Rules to the contrary: (a) this Order shall be effective immediately and enforceable upon its entry; (b) the Debtors are not subject to any stay in the implementation, enforcement, or realization of the relief granted in this order; and (c) the Debtors are authorized and empowered, and may in their discretion and without further delay, take any action necessary or appropriate to implement this Order.

12. The Court retains jurisdiction with respect to all matters arising from or related to the implementation or interpretation of this Order.

Dated: January 20, 2015
Wilmington, Delaware

CHRISTOPHER S. SONTCHI
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.	Jointly Administered
	Ref. Docket Nos. 106 & 1186

ORDER, PURSUANT TO SECTIONS 105, 363, AND 365 OF THE BANKRUPTCY CODE, APPROVING SALE OF DEBTORS' ASSETS AND GRANTING RELATED RELIEF

Upon the above-captioned debtors' and debtors-in-possessions' (the "Debtors") *Motion, Pursuant to Sections 105, 363 and 365 of the Bankruptcy Code, Fed. R. Bankr. P. 2002, 6003, 6004, 6006, 9007, 9008 and 9014 (the "Bankruptcy Rules") and Del. Bankr. L.R. 2002-1, 6004-1 and 9006-1 (the "Local Rules"), for Entry of (I) an Order (A) Approving Bid Procedures in Connection with the Sale of Substantially All of the Debtors' Assets, (B) Scheduling an Auction for and Hearing to Approve Sale of Assets, (C) Approving Notice of Respective Date, Time and Place for Auction and for Hearing on Approval of Sale, (D) Approving Procedures for the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases, (E) Approving Form and Manner of Notice Thereof, and (F) Granting Related Relief; and (II) an Order Authorizing and Approving (A) the Sale of Substantially All of the Debtors' Assets Free and Clear of Liens, Claims, Rights, Encumbrances, and Other Interests, (B) the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases, and (C) Related Relief* [D.I.

[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.

106] (the "Motion"); and in connection with this Court's (the "Court") *Order (A) Approving Bid Procedures in Connection with the Sale of Substantially All of the Debtors' Assets, (B) Scheduling an Auction for and Hearing to Approve Sale of Assets, (C) Approving Notice of Respective Date, Time and Place for Auction and for Hearing on Approval of Sale, (D) Approving Procedures for the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases, (E) Approving Form and Manner of Notice Thereof, and (F) Granting Related Relief* [D.I. 1186] (the "Bidding Procedures Order"); and it appearing that the relief requested is in the best interests of the Debtors, their estates, their creditors, and other parties in interest; and it appearing that this Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334; and it appearing that consideration of the Motion and the relief requested therein is a core proceeding pursuant to 28 U.S.C. § 157; and adequate notice of the Motion having been given and it appearing that no other notice need be given; and the Debtors and a joint venture consisting of Hilco Merchant Resources, LLC, Gordon Brothers Retail Partners, LLC, and Tiger Capital Group, LLC (collectively, the "Agent") having agreed upon terms and conditions for the Agent to act as the Debtors' exclusive agent to conduct sales (the "Sale") of certain of the Debtors' assets that are subject to the Agency Agreement (as defined below), including, without limitation, the Merchandise and Owned FF&E ("Assets"), which terms and conditions are set forth in that certain Agency Agreement, by and between the Agent and Debtors, [the final form] of which is attached hereto as Exhibit A (the "Agency Agreement")[2]; and the transaction represented by the Agency Agreement having been determined to be the highest and best offer for the Assets; and a sale hearing having been held on May 24, 2016 (the "Sale Hearing") to consider the relief requested in the Motion and approval of the Agency Agreement; and

[2] Capitalized Terms which are not defined herein shall have the meanings ascribed to such terms in the Agency Agreement.

appearances of all interested parties having been noted on the record of the Sale Hearing; and upon the Declaration of Bernard Douton [Docket No. 2002 (the "Douton Declaration"); and upon the Declaration of Stephen Coulombe [Docket No. 2001 (the "Coulombe Declaration"); and upon all of the proceedings had before the Court (including but not limited to the testimony and other evidence proffered or adduced at the Sale Hearing); and the Court having found and determined that the relief sought in the Motion is in the best interests of the Debtors, their estates, their creditors, and all parties in interest and 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

FOUND AND DETERMINED THAT:[3]

A. **Jurisdiction:** This Court has jurisdiction to consider the Motion and the relief requested therein pursuant to 28 U.S.C. §§ 157 and 1134. Approval of the Debtors entry into the Agency Agreement, and the transactions contemplated thereby is a core proceeding under 28 U.S.C. §§ 157(b)(2)(A), (D), (N) and (O).

B. **Venue:** Venue of these cases in this district is proper pursuant to 28 U.S.C. § 1409(a).

C. **Statutory Predicates:** The statutory predicates for the approval of the Agency Agreement and transactions contemplated therein are sections 105, 363, 364 and 554 of the Bankruptcy Code and Rules 2002, 4001, 6004 and 9014 of the Bankruptcy Rules.

D. **Notice:** Proper, timely, adequate and sufficient notice of the Motion and the Sale Hearing has been provided in accordance with sections 102(1), 105(a), and 363 of the

[3] The findings of fact and the conclusions of law stated herein shall constitute the Court's findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052, made applicable to this proceeding pursuant to Bankruptcy Rule 9014. To the extent any finding of fact shall be determined to be a conclusion of law, it shall be so deemed, and to the extent any conclusion of law shall be determined to be a finding of fact, it shall be so deemed.

Bankruptcy Code, Bankruptcy Rules 2002, 4001 and 6004, and in compliance with the Bidding Procedures Order. No other or further notice is required.

E. **Opportunity to be Heard:** A reasonable opportunity to object or be heard regarding the relief requested in the Motion and the transactions pursuant thereto has been afforded to all interested persons and entities including, without limitation, the following: (i) the Office of the United States Trustee, (ii) counsel to the DIP Agent, the FILO Agent, and the Term Agent, (iii) the Office of the United States Attorney for the District of Delaware, (iv) counsel to the Committee, (v) all parties who are known to assert any lien, claim, interest or encumbrance in or upon any of the Assets, (vi) all lessors of leases for the Stores, (vii) all applicable federal, state, and local taxing authorities (collectively, the "Taxing Authorities"), (viii) all applicable state attorneys general and (ix) all other applicable parties in interest, including all entities on the general case service list as of the date of entry of the Bidding Procedures Order. Objections, if any, to the Motion have been withdrawn or resolved and, to the extent not withdrawn or resolved, are hereby overruled.

F. **Marketing Process:** As demonstrated by: (i) the Douton Declaration , (ii) the Coulombe Declaration, (iii) the testimony and other evidence proffered or adduced at the Sale Hearing, and (iv) the representations of counsel made on the record at the Sale Hearing, the Debtors have thoroughly marketed the Assets and have conducted the bidding solicitation fairly, with adequate opportunity for parties that either expressed an interest in acquiring or liquidating the Assets, or who the Debtors believed may have an interest in acquiring or liquidating the Assets, to submit competing bids. The Debtors and the Agent have respectively negotiated and undertaken their roles leading to the Sale and entry into the Agency Agreement in a diligent, noncollusive, fair and good faith manner.

G. **Highest and Best Offer:** The Agency Agreement attached hereto as Exhibit A, including the form and total consideration to be realized by the Debtors pursuant to the Agency Agreement, (i) is the highest and best offer received by the Debtors for the Assets, (ii) is fair and reasonable, and (iii) is in the best interests of the Debtors, their estates, their creditors and all other parties in interest. There is no legal or equitable reason to delay entry into the Agency Agreement, and the transactions contemplated therein, including, without limitation, the Sale.

H. **Business Judgment:** The Debtors' decision to (i) enter into the Agency Agreement, and (ii) perform under and make payments required by the Agency Agreement, is a reasonable exercise of the Debtors' sound business judgment consistent with their fiduciary duties and is in the best interests of the Debtors, their estates, their creditors, and all other parties in interest.

I. **Personally Identifiable Information:** The transactions contemplated by the Agency Agreement do not include the sale or lease of personally identifiable information, as defined in section 101(41A) of the Bankruptcy Code ("Personally Identifiable Information") (or assets containing personally identifiable information).

J. **Time of the Essence:** Time is of the essence in effectuating the Agency Agreement and proceeding with the Sale contemplated therein without interruption. Based on the record of the Sale Hearing, and for the reasons stated on the record at the Sale Hearing, the Sale under the Agency Agreement must be commenced on the first day following entry of this Order to maximize the value that the Agent may realize from the Sale, and the value that the Debtors may realize from entering into the Agency Agreement. Accordingly, cause exists to lift the stay to the extent necessary, as contemplated by Bankruptcy Rules 4001(a) and 6004(h) and permit the immediate effectiveness of this Order.

K. **Sale Free and Clear:** A sale of the Assets other than one free and clear of liens, claims, encumbrances, defenses (including, without limitation, rights of setoff and recoupment) and interests, including, without limitation, security interests of whatever kind or nature, mortgages, conditional sales or title retention agreements, pledges, deeds of trust, hypothecations, liens, encumbrances, assignments, preferences, debts, easements, charges, suits, licenses, options, rights-of-recovery, judgments, orders and decrees of any court or foreign or domestic governmental entity, taxes (including foreign, state and local taxes), licenses, covenants, restrictions, indentures, instruments, leases, options, off-sets, claims for reimbursement, contribution, indemnity or exoneration, successor, product, environmental, tax, labor, ERISA, CERCLA, alter ego and other liabilities, causes of action, contract rights and claims, to the fullest extent of the law, in each case, of any kind or nature (including, without limitation, all "claims" as defined in section 101(5) of the Bankruptcy Code), known or unknown, whether pre-petition or post-petition, secured or unsecured, choate or inchoate, filed or unfiled, scheduled or unscheduled, perfected or unperfected, liquidated or unliquidated, noticed or unnoticed, recorded or unrecorded, contingent or non-contingent, material or non-material, statutory or non-statutory, matured or unmatured, legal or equitable (collectively, "Encumbrances") and without the protections of this Order would hinder the Debtors' ability to obtain the consideration provided for in the Agency Agreement and, thus, would impact materially and adversely the value that the Debtors' estates would be able to obtain for the sale of such Assets. But for the protections afforded to the Agent under the Bankruptcy Code and this Order, the Agent would not have offered to pay the consideration contemplated in the Agency Agreement. In addition, subject to Paragraph 13 hereof, each entity with an Encumbrance upon the Assets, (i) has consented to the Sale or is deemed to have consented to

the Sale, (ii) could be compelled in a legal or equitable proceeding to accept money satisfaction of such interest, or (iii) otherwise falls within the provisions of section 363(f) of the Bankruptcy Code, and therefore, in each case, one or more of the standards set forth in section 363(f)(1)-(5) of the Bankruptcy Code has been satisfied. Those holders of Encumbrances who did not object, or who withdrew their objections, to the Motion are deemed to have consented pursuant to section 363(f)(2) of the Bankruptcy Code. Therefore, approval of the Agency Agreement and the consummation of the Sale free and clear of Encumbrances is appropriate pursuant to section 363(f) of the Bankruptcy Code and is in the best interests of the Debtors' estates, their creditors and other parties in interest.

L. **Arms-length Sale:** The consideration to be paid by the Agent under the Agency Agreement was negotiated at arm's-length and constitutes reasonably equivalent value and fair and adequate consideration for the Assets under the Bankruptcy Code, the Uniform Fraudulent Transfer Act, the Uniform Fraudulent Conveyance Act and the laws of the United States, any state, territory, possession thereof or the District of Columbia. The terms and conditions set forth in the Agency Agreement are fair and reasonable under these circumstances and were not entered into for the purpose of, nor do they have the effect of, hindering, delaying or defrauding the Debtors or their creditors under any applicable laws.

M. **Good Faith:** The Debtors and the Agent, and their respective boards of directors, officers, directors, employees, agents, professionals and representatives, actively participated in the bidding process and acted in good faith. The Agency Agreement between the Agent and the Debtors was negotiated and entered into based upon arm's length bargaining, without collusion or fraud, and in good faith as that term is used in sections 363(m) and 364(e) of the Bankruptcy Code. The Agent shall be protected by sections 363(m) and 364(e) of the Bankruptcy Code in

the event that this Order is reversed or modified on appeal. The Debtors were free to deal with any other party interested in buying or selling on behalf of the Debtors' estate some or all of the Assets. Neither the Debtors nor the Agent has engaged in any conduct that would cause or permit the Sale, the Agency Agreement, or any related action or the transactions contemplated thereby to be avoided under section 363(n) of the Bankruptcy Code, or that would prevent the application of sections 363(m) or 364(e) of the Bankruptcy Code. The Agent has not violated section 363(n) of the Bankruptcy Code by any action or inaction. Specifically, the Agent has not acted in a collusive manner with any person and was not controlled by any agreement among bidders. The Agent's prospective performance and payment of amounts owing under the Agency Agreement are in good faith and for valid business purposes and uses.

N. **Insider Status:** The Agent is not an "insider" as that term is defined in section 101(31) of the Bankruptcy Code. No common identity of directors or controlling stockholders exists between the Agent and the Debtors.

O. **Security Interests:** The liens provided for in the Agency Agreement and this Order to secure the obligations of the Debtors under the Agency Agreement to the Agent are necessary to induce the Agent to agree to terms for the Agency Agreement that maximize value for the Debtors' estates. The absence of such protections would impact materially and adversely the value available to the Debtors in the liquidation of the Assets in partnership with a liquidation agent. But for the protections afforded to the Agent under the Bankruptcy Code, this Order, and the Agency Agreement, the Agent would not have agreed to pay the Debtors the compensation provided for under the Agency Agreement. In addition, the Lenders, which hold security interests in the property to which the Agent's security interests attach, have consented to the

security interests provided for in the Agency Agreement, subject to the satisfaction of the conditions set forth in the Agency Agreement and in Paragraph 34 of this Order.

P. **Corporate Authority:** The Debtors (i) have full corporate or other power to execute, deliver and perform their obligations under the Agency Agreement and all other transactions contemplated thereby (including without limitation, reaching an agreement and resolution regarding the final reconciliation contemplated by the Agency Agreement), and entry into the Agency Agreement has been duly and validly authorized by all necessary corporate or similar action, (ii) have all of the corporate or other power and authority necessary to consummate the transactions contemplated by the Agency Agreement, and (iii) have taken all actions necessary to authorize and approve the Agency Agreement and the transactions contemplated thereby. No consents or approvals, other than those expressly provided for herein or in the Agency Agreement, are required for the Debtors to consummate such transactions.

Q. **No Successor Liability:** No sale, transfer or other disposition of the Assets pursuant to the Agency Agreement or entry into the Agency Agreement will subject the Agent to any liability for claims, obligations or Encumbrances asserted against the Debtors or the Debtors' interests in such Assets by reason of such transfer under any laws, including, without limitation, any bulk-transfer laws or any theory of successor or transferee liability, antitrust, environmental, product line, de facto merger or substantial continuity or similar theories. The Agent is not a successor to the Debtors or their respective estates.

R. **No Sub Rosa Plan:** Entry into the Agency Agreement and the transactions contemplated thereby neither impermissibly restructure the rights of the Debtors' creditors, nor impermissibly dictates the terms of a liquidating plan of reorganization for the Debtors. Entry into the Agency Agreement does not constitute a sub rosa chapter 11 plan.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

A. Motion Granted, Objections Overruled

1. The relief requested in the Motion is granted as set forth herein.

2. Any remaining objections to the Motion or the relief requested therein that have not been withdrawn, waived, or settled, and all reservations of rights included in such objections are overruled in all respects and denied.

B. Agency Agreement Approved and Authorized

3. The Agency Agreement is approved pursuant to section 363 of the Bankruptcy Code. The Debtors are hereby authorized and empowered to enter into and perform under the Agency Agreement, and the Agency Agreement (and each of the transactions contemplated therein (including, without limitation, reaching an agreement and resolution regarding the final reconciliation contemplated by the Agency Agreement (following appropriate consultation with the Lenders), which agreement and resolution shall be binding on all parties (including, without limitation, the Debtors, the Committee, the Lenders, any successor chapter 7 or chapter 11 trustee, and all other parties in interest) without further order of the Court)) is hereby approved in its entirety and is incorporated herein by reference. The failure to include specifically any particular provision of the Agency Agreement in this Order shall not diminish or impair the effectiveness of such provisions, it being the intent of the Court that the Agency Agreement and all of its provisions, payments and transactions, be authorized and approved in their entirety. Likewise, all of the provisions of this Order are nonseverable and mutually dependent.

4. All amounts payable to the Agent under the Agency Agreement shall be payable to the Agent without the need for any application of the Agent therefor or any further order of the Court.

5. Subject to the provisions of this Order, the Debtors and the Agent are hereby authorized, pursuant to sections 105(a) and 363(b)(1) of the Bankruptcy Code, to conduct the Sale in accordance with the Agency Agreement and the sale guidelines (the "GOB Sale Guidelines") attached hereto as Exhibit B, which GOB Sale Guidelines are hereby approved in their entirety.

6. Pursuant to section 363(b) of the Bankruptcy Code, the Debtors, the Agent and each of their respective officers, employees and agents are hereby authorized and directed to execute such documents and to do such acts as are necessary or desirable to carry out the Sale and effectuate the Agency Agreement and each of the transactions and related actions contemplated or set forth therein. Michael E. Foss, the Debtors' Chief Executive Officer, is specifically authorized to act on behalf of the Debtors in connection with the Sale and no other consents or approvals are necessary or required for the Debtors to carry out the Sale, effectuate the Agency Agreement and each of the transactions and related actions contemplated or set forth therein.

C. Order Binding

7. This Order shall be binding upon and shall govern the acts of all entities, including, without limitation, all filing agents, filing officers, title agents, title companies, recorders of mortgages, recorders of deeds, registrars of deeds, administrative agencies, governmental departments, secretaries of state, federal, state and local officials, and all other persons and entities who may be required by operation of law, the duties of their office, or contract, to accept, file, register or otherwise record or release any documents or instruments, or who may be required to report or insure any title or state of title in or to the Assets.

8. This Order and the terms and provisions of the Agency Agreement shall be binding on all of the Debtors' creditors (whether known or unknown), the Debtors, the Agent,

and their respective affiliates, successors and assigns, and any affected third parties including, but not limited to, all persons asserting an interest in the Assets, notwithstanding any subsequent appointment of any trustee, party, entity or other fiduciary under any section of the Bankruptcy Code with respect to the forgoing parties, and as to such trustee, party, entity or other fiduciary, such terms and provisions likewise shall be binding. The provisions of this Order and the terms and provisions of the Agency Agreement, and any actions taken pursuant hereto or thereto shall survive the entry of any order which may be entered confirming or consummating any plan(s) of the Debtors or converting the Debtors' cases from chapter 11 to chapter 7, and the terms and provisions of the Agency Agreement, as well as the rights and interests granted pursuant to this Order and the Agency Agreement, shall continue in these or any superseding cases and shall be binding upon the Debtors, the Agent and their respective successors and permitted assigns, including any trustee or other fiduciary hereafter appointed as a legal representative of the Debtors under chapter 7 or chapter 11 of the Bankruptcy Code. Any trustee appointed in this case shall be and hereby is authorized to operate the business of the Debtors to the fullest extent necessary to permit compliance with the terms of this Order and the Agency Agreement, and Agent and the trustee shall be and hereby are authorized to perform under the Agency Agreement upon the appointment of the trustee without the need for further order of this Court.

D. Good Faith.

9. Entry into the Agency Agreement is undertaken by the parties thereto in good faith, as that term is used in sections 363(m) and 364(e) of the Bankruptcy Code, and Agent shall be protected by sections 363(m) and 364(e) of the Bankruptcy Code in the event that this Order is reversed or modified on appeal. The reversal or modification on appeal of the authorization provided herein to enter into the Agency Agreement and consummate the transactions contemplated thereby shall not affect the validity of such transactions, unless such authorization

is duly stayed pending such appeal. The Agent is entitled to all of the benefits and protections afforded by sections 363(m) and 364(e) of the Bankruptcy Code. The transactions contemplated by the Agency Agreement are not subject to avoidance pursuant to section 363(n) of the Bankruptcy Code.

E. Conduct of the Sale

10. Except as otherwise provided in this Order or the Agency Agreement and subject to Paragraph 13 hereof, pursuant to section 363(f) of the Bankruptcy Code, the Agent shall be authorized to sell all Merchandise, the Owned FF&E and other Assets to be sold pursuant to the Agency Agreement free and clear of any and all Encumbrances, including, without limitation, the liens and security interests, as the same may have been amended from time to time, of the Lenders whether arising by agreement, any statute or otherwise and whether arising before, on or after the date on which these chapter 11 cases were commenced, with any presently existing liens encumbering all or any portion of the Assets or the proceeds thereof (including, but not limited to, the first-priority security interest of the Lenders (but only to the extent allowed in and pursuant to the Agency Agreement and this Order, as applicable) attaching only to the Guaranteed Amount and other amounts payable to the Debtors under the Agency Agreement, with the same priority, validity, force and effect as the same had with respect to the assets at issue, subject to any and all defenses, claims and/or counterclaims or setoffs that may exist. For the sake of clarity, however, nothing in this paragraph is intended to diminish the liens in favor of the Agent, as reflected in the Agency Agreement and this Order, that attach to, among other things, the Proceeds of the Sale. To the extent that the DIP Loan remains unpaid, the Guaranteed Amount will be paid by the Agent to the DIP Agent as the Debtors' designee pursuant to the Agency Agreement, with any such amounts to be applied by the DIP Agent in the manner and in

the amounts and times as provided in the Court's "*Final Order (I) Authorizing Debtors To Obtain Post-Petition Secured Financing Pursuant To 11 U.S.C. §§ 105, 362, 363, And 364; (II) Granting Liens And Superpriority Claims To Post-Petition Lenders Pursuant To 11 U.S.C. §§ 364 And 507; (III) Authorizing The Use Of Cash Collateral And Providing Adequate Protection To Prepetition Secured Parties And Modifying The Automatic Stay Pursuant To 11 U.S.C. §§ 361, 362, 363, And 364; And (IV) Scheduling A Final Hearing Pursuant To Bankruptcy Rules 4001(B) And (C) And Local Rule 4001-2*", entered May 3, 2016 [D.I. No. 1699] (the "DIP Financing Order").

11. If any person or entity that has filed financing statements, mortgages, construction or mechanic's liens, lis pendens or other documents or agreement evidencing liens on or interests in the Assets shall not have delivered to the Debtors, in proper form for filing and executed by the appropriate parties, termination statements, instruments of satisfaction, or releases of any Encumbrances which the person or entity has with respect to the Assets, each such person or entity is hereby directed to deliver all such statements, instruments and releases and the Debtors and the Agent are hereby authorized to execute and file such statements, instruments, releases and other documents on behalf of the person or entity asserting the same and the Agent is authorized to file a copy of this Order which, upon filing, shall be conclusive evidence of the release and termination of such interest. Each and every federal, state and local governmental unit is hereby directed to accept any and all documents and instruments necessary or appropriate to give effect to the Sale and related transactions.

12. All entities that are presently in possession of some or all of the Assets or other property in which the Debtors hold an interest that are or may be subject to the Agency

Agreement hereby are directed to surrender possession of such Assets or other property to the Agent.

13. Notwithstanding anything set forth in this Order, the Agent is permitted to sell the Consignment Goods solely to the extent that such authority was granted to the Debtors, and the Debtors shall comply with the Court's *Final Order Authorizing the Debtors to Sell Prepetition Consigned Goods* [Docket No. 1704]. The Debtors will continue to comply with all terms and conditions of the Final Consignment Order, the Debtors will direct the Agent to sell goods that are subject to the Final Consignment Order in compliance therewith, and the Agent will comply with the Debtors' instructions respecting the sale of such goods

14. The Debtors and the Agent shall not extend the Sale Termination Date beyond August 31, 2016, unless extended by mutual written agreement of the Debtors and the Agent, in consultation with the Lenders and the Committee, following a commensurate extension of the expiration date of the Agent Letter of Credit.

15. Unless otherwise ordered by the Court, all newspapers and other advertising media in which the Sale may be advertised and all landlords are directed to accept this Order as binding authority so as to authorize the Debtors and the Agent to consummate the Agency Agreement and to consummate the transactions contemplated therein, including, without limitation, to conduct and advertise the Sale in the manner contemplated by the Agency Agreement, including, without limitation, conducting and advertising of the Sale (at the contractual rates charged to the Debtors prior to the Petition Date) in accordance with the Agency Agreement, the GOB Sale Guidelines, any Side Letter (as defined herein), and this Order.

16. Nothing in this Order or the Agency Agreement releases, nullifies, or enjoins the enforcement of any liability to a governmental unit under environmental laws or regulations (or any associated liabilities for penalties, damages, cost recovery, or injunctive relief) that any entity would be subject to as the owner, lessor, lessee, or operator of the property after the date of entry of this Order. Nothing contained in this Order or the Agency Agreement authorizes the transfer or assignment of any governmental (a) license, (b) permit, (c) registration, (d) authorization or (e) approval, or the discontinuation of any obligation thereunder, without compliance with all applicable legal requirements under police or regulatory law. Nothing in this Order divests any tribunal of any jurisdiction it may have under police or regulatory law to interpret this Order or to adjudicate any defense asserted under this Order. Nothing contained in this Order or in the Agency Agreement shall in any way (i) diminish the obligation of any entity to comply with environmental laws, or (ii) diminish the obligations of the Debtors to comply with environmental laws consistent with their rights and obligations as debtors in possession under the Bankruptcy Code. Nothing herein shall be construed to be a determination that the Agent is an operator with respect to any environmental law or regulation. Moreover, the Sale shall not be exempt from, and the Agent shall be required to comply with, laws of general applicability, including, without limitation, public health and safety, criminal, tax, labor, employment, environmental, antitrust, fair competition, traffic and consumer protection laws, including consumer laws regulating deceptive practices and false advertising (collectively, "General Laws"). Nothing in this Order shall alter or affect the Debtors' and Agent's obligations to comply with all applicable federal safety laws and regulations. Nothing in this Order shall be deemed to bar any Governmental Unit (as defined in Bankruptcy Code section 101(27)) from enforcing General Laws in the applicable non-bankruptcy forum, subject to the Debtors' or the

Agent's right to assert in that forum or before this Court that any such laws are not in fact General Laws or that such enforcement is impermissible under the Bankruptcy Code, this Order, or otherwise, pursuant to Paragraph 20 hereunder. Notwithstanding any other provision in this Order, no party waives any rights to argue any position with respect to whether the conduct was in compliance with this Order and/or any applicable law, or that enforcement of such applicable law is preempted by the Bankruptcy Code. Nothing in this Order shall be deemed to have made any rulings on any such issues.

17. Disputes Between Government Units and the Debtor or the Agent. To the extent that the Sale is subject to any federal, state or local statute, ordinance, or rule, or licensing requirement solely directed at regulating "going out of business," "store closing," similar inventory liquidation sales, or bulk sale laws (each a "GOB Law," and together, the "GOB Laws"), including laws restricting safe, professional and non-deceptive, customary advertising such as signs, banners, posting of signage, and use of sign-walkers solely in connection with the Sale and including ordinances establishing license or permit requirements, waiting periods, time limits or bulk sale restrictions that would otherwise apply solely to Sale (collectively, the "Liquidation Laws"), the following provisions shall apply:

a. Provided that the Sale is conducted in accordance with the terms of this Order, the Agency Agreement and the GOB Sale Guidelines, and in light of the provisions in the laws of many Governmental Units that exempt court-ordered sales from their provisions, the Debtors shall be presumed to be in compliance with any GOB Laws and Liquidation Laws and, subject to Paragraphs 17 and 19 herein, are authorized to conduct the Sale in accordance with the terms of this Order and the GOB Sale Guidelines without the necessity of further showing compliance with any such GOB Laws and Liquidation Laws.

b. Within three (3) days of entry of this Order, the Debtors shall serve copies of this Order, the Agency Agreement and the Sale Guidelines via e-mail, facsimile, and/or regular U.S. mail, on: (i) the Attorney General's office for each state where the Sale is being held, (ii) the county consumer protection agency or similar agency for each county where the Sale will be held, (iii) the division of consumer protection for each state where the Sale will be held; and (iv) the chief legal counsel for each local jurisdiction where the Sale will be held.

c. To the extent there is a dispute arising from or relating to the Sale, this Order, the Agency Agreement, or the GOB Sale Guidelines, which dispute relates to any GOB Laws or Liquidation Laws (a "Reserved Dispute"), the Court shall retain exclusive jurisdiction to resolve the Reserved Dispute. Any time within fifteen (15) days following service of the Order, any Governmental Unit may assert that a Reserved Dispute exists by serving written notice of such Reserved Dispute to counsel for the Debtors and counsel for the Agent at the addresses set forth in the Agency Agreement so as to ensure delivery thereof within one (1) business day thereafter. The Debtors shall, in turn, serve written notice of such Reserved Dispute on any affected landlords. If the Debtors, the Agent and the Governmental Unit are unable to resolve the Reserved Dispute within fifteen (15) days of service of the notice, the aggrieved party may file a motion with this Court requesting that this Court resolve the Reserved Dispute (a "Dispute Resolution Motion").

d. In the event a Dispute Resolution Motion is filed, nothing in this Order shall preclude the Debtors, a landlord, the Agent or other interested party from asserting (i) that the provisions of any GOB Laws and/or Liquidation Laws are preempted by the Bankruptcy Code or (ii) that neither the terms of this Order, nor the Debtors or the Agent's conduct pursuant to this Order, violates such GOB Laws and/or Liquidation Laws. Filing a Dispute Resolution Motion as

set forth herein shall not be deemed to affect the finality of this Order or to limit or interfere with the Debtors' or the Agent's ability to conduct or to continue to conduct the Sale pursuant to this Order and the Agency Agreement, absent further order of this Court. The Court grants authority for the Debtors and the Agent to conduct the Sale pursuant to the terms of this Order, the Agency Agreement, and/or the GOB Sale Guidelines attached hereto and to take all actions reasonably related thereto or arising in connection therewith. The Governmental Unit shall be entitled to assert any jurisdictional, procedural, or substantive arguments it wishes with respect to the requirements of its Liquidation Laws or the lack of any preemption of such GOB Laws and/or Liquidation Laws by the Bankruptcy Code. Nothing in this Order shall constitute a ruling with respect to any issues to be raised in any Dispute Resolution Motion.

e. If, at any time, a dispute arises between the Debtors and/or the Agent and a Governmental Unit as to whether a particular law is a GOB Law and/or Liquidation Law, and subject to any provisions contained in this Order related to GOB Laws and/or Liquidation Laws, then any party to that dispute may utilize the provisions of Subparagraphs (b) and (c) hereunder by serving a notice to the other party and proceeding thereunder in accordance with those Paragraphs. Any determination with respect to whether a particular law is a GOB Law and/or Liquidation Law shall be made de novo.

18. Notwithstanding anything herein to the contrary, and in view of the importance of the use of sign-walkers, banners, and other advertising to the Sale, to the extent that disputes arise during the course of the Sale regarding laws regulating the use of sign-walkers and banner advertising and the Debtors and the Agent are unable to resolve the matter consensually with the Governmental Unit, any party may request an immediate telephonic hearing with this Court pursuant to these provisions. Such hearing will, to the extent practicable, be scheduled initially

within two (2) business days of such request. This scheduling shall not be deemed to preclude additional hearings for the presentation of evidence or arguments as necessary.

19. Except to the extent of the reserved rights of Governmental Units expressly granted elsewhere in this Order, and subject to any Side Letter, the Debtors and Agent are hereby authorized to take such actions as may be necessary and appropriate to implement the Agency Agreement and to conduct the Sale without necessity of further order of this Court as provided in the Agency Agreement or the GOB Sale Guidelines, including, but not limited to, advertising the Sale as "going out of business," "total liquidation," "store-closing" or similar-themed sales through the posting of signs (including the use of exterior banners at non-enclosed mall Stores, and at enclosed mall Stores to the extent the applicable Store entrance does not require entry into the enclosed mall common area), use of signwalkers and street signage.

20. Except as expressly provided in this Order, the Agency Agreement, and any Side Letter, the Sale shall be conducted by the Debtors and the Agent notwithstanding any restrictive provision of any lease, sublease or other agreement relative to occupancy abandonment of assets or "going dark" provisions or other provisions that purport to prohibit, restrict or otherwise interfere with the conduct of the Sale. The Agent and landlords of the Stores and the Distribution Centers are authorized to enter into agreements ("Side Letters") between themselves modifying the GOB Sale Guidelines without further order of the Court, and such Side Letters shall be binding as among the Agent and any such landlords, provided that nothing in such Side Letters affects the provisions of Paragraphs 17 and 19. In the event of any conflict between the GOB Sale Guidelines and any Side Letter, or between this Order and any Side Letter, the terms of such Side Letter shall control.

21. Except as expressly provided for herein or in the GOB Sale Guidelines (as such GOB Sale Guidelines may be modified by a Side Letter with a landlord of the Stores), and except with respect to any Governmental Unit (as to which Paragraphs 17 and 19 shall apply), no person or entity, including but not limited to any landlord, licensor, or creditor, shall take any action to directly or indirectly prevent, interfere with, or otherwise hinder consummation of the Sale, or the advertising and promotion (including the posting of signs and exterior banners or the use of signwalkers) of such Sale, and all such parties and persons of every nature and description, including landlords, licensors, creditors and utility companies and all those acting for or on behalf of such parties, are prohibited and enjoined from (i) interfering in any way with, or otherwise impeding, the conduct of the Sale and/or (ii) instituting any action or proceeding in any court or administrative body seeking an order or judgment against, among others, the Debtors, the Agent, or the landlords at the Debtors' closing Stores that might in any way directly or indirectly obstruct or otherwise interfere with or adversely affect the conduct of the Sale or other liquidation sales at the Stores and/or seek to recover damages for breach(es) of covenants or provisions in any lease, sublease or license based upon any relief authorized herein.

22. The Agent shall have the right to use the Debtors' closing Stores and all related store services, furniture, fixtures, equipment and other assets of the Debtors for the purpose of conducting the Sale, free of any interference from any entity or person, subject to compliance with the GOB Sale Guidelines (as such GOB Sale Guidelines may be modified by a Side Letter with a landlord of the Stores) and this Order and subject to Paragraphs 17 and 19 of this Order.

23. Except as otherwise provided in this Order as relates to the closing stores and the closing store landlords or in the GOB Sale Guidelines (as such GOB Sale Guidelines may be modified by a Side Letter Agreement with a landlord), nothing in the Agency Agreement shall in any way alter or affect any rights of landlords of the

closing stores and the distribution centers to enforce the provisions of their leases against the Debtors as the tenant, or diminish the obligations of the Debtors to comply with the terms of the leases or section 365(d)(3) of the Bankruptcy Code, including, but not limited to, any landlord's rights to seek to enforce the Debtors' obligations under the leases or to seek indemnification in accordance with the terms of the leases; provided that the conduct of the Sale in accordance with the GOB Sale Guidelines shall not be a violation of section 365(d)(3) of the Bankruptcy Code.

24. The Agent is permitted to abandon property of the Debtors' estates in accordance with the terms and provisions of the Agency Agreement, without incurring liability to any person or entity; provided, however, that, unless the Agent otherwise consents, the Debtors may only abandon property located in any Store ~~(and, if applicable, a Distribution Center)~~ on or after the applicable Sale Termination Date and after consultation with the Lenders and the Committee. [See Order "A"] ~~Notwithstanding any provisions of the Agency Agreement or this Order, the Debtors are not~~ authorized to abandon any ~~property~~ at the DC Landlords' locations except upon further notice ~~and a hearing pursuant to Section 554 of the Bankruptcy Code.~~

25. Before any sale, abandonment or other disposition of the Debtors' computers (including software) and/or cash registers and any other point of sale FF&E located at the Stores (collectively, "POS Equipment") that may contain customer lists, identifiable personal and/or confidential information about the Debtors' employees and/or customers, or credit card numbers, ("Confidential Information") takes effect, the Debtors shall remove or cause to be removed the Confidential Information from the POS Equipment.

26. The Agent shall accept the Debtors' validly-issued gift certificates and gift cards that were issued by the Debtors prior to the Sale Commencement Date during the first thirty-four (34) days of the Sale, and the Debtors shall reimburse Agent for such amounts during the weekly

Rider A

Rider to Para. 24:

In the event of any such abandonment upon the rejection of a Lease, all applicable landlords shall be authorized to dispose of such property without any liability to any individual or entity that may claim an interest in such abandoned property; and such abandonment shall be without prejudice to any landlord's right to assert any claim based on such abandonment and without prejudice to the Debtors or any other party in interest to object thereto. For the avoidance of doubt, the Debtors are not authorized to abandon any property at any Distribution Center except upon further notice and a hearing pursuant to Section 554 of the Bankruptcy Code.

sale reconciliation provided for and subject to the limitations set forth in Section 8.7 of the Agency Agreement; provided, however, that unless otherwise directed by the Debtors, Agent shall not accept any League Gift Certificates; provided further, however, the Agent shall not be required to accept any mall and/or landlord-issued gift cards, gift certificates, merchandise credits or other similar items unless satisfactory arrangements are made between and among the Agent, the Debtors, and the issuer of such items for reimbursement to the Agent and the Debtors for all such amounts honored during the Sale Term.

27. The Agent shall accept returns of merchandise sold by the Debtors prior to the Sale Commencement Date for the first thirty (30) days after the entry of this Order, provided that such return is otherwise in compliance with the Debtors' return policies in effect as of the date such item was purchased and the customer is not repurchasing the same item so as to take advantage of the sale price being offered by the Agent, and the Debtors shall reimburse Agent for such amounts during the weekly sale reconciliation provided for and subject to the limitations set forth in Section 8.5 of the Agency Agreement. The Agent shall not sell any certificates or gift cards and the Agent shall not accept coupons or honor any other employee or other discounts.

28. All state and federal laws relating to implied warranties for latent defects shall be complied with and are not superseded by the sale of said goods or the use of the terms "as is" or "final sales." The Debtors and/or the Agent shall accept return of any goods purchased during the Sale that contain a defect which the lay consumer could not reasonably determine was defective by visual inspection prior to purchase for a full refund, provided that (i) the consumer must return the affected good(s) within twenty-one (21) days of their purchase, (ii) the consumer must provide a receipt, and (iii) the asserted defect must in fact be a "latent" defect. The Debtors

shall promptly reimburse Agent in cash for any refunds Agent is required to issue to customers in respect of any goods purchased during the Sale that contain such a latent defect.

29. During the Sale Term, the Agent shall be granted a limited license and right to use the trade names, logos and customer, mailing and e-mail lists, websites and social media relating to and used in connection with the operation of the Stores as identified in the Agency Agreement, solely for the purpose of advertising the Sale in accordance with the terms of the Agency Agreement; provided, however, that the Agent shall not receive Personally Identifiable Information from the Debtors.

30. The Agent shall be permitted to include in the Sale Additional Agent Goods in accordance with the terms and provisions of the Agency Agreement. Any transactions relating to the Additional Agent Goods are, and shall be construed as, a true consignment from Agent to Debtors. Debtors acknowledge that the Additional Agent Goods shall be consigned to Debtors as a true consignment under Article 9 of the Uniform Commercial Code in effect in the State of Delaware (the "UCC"). Subject to the terms set forth in the Agency Agreement, Agent is hereby granted a first priority security interest in (i) the Additional Agent Goods and (ii) the proceeds realized upon the sale or disposition of the Additional Agent Goods in the Sale, which security interest shall be deemed perfected pursuant to this Order without the requirement of filing UCC financing statements or providing notifications to any prior secured parties (provided that Agent is hereby authorized to deliver any notices and file any financing statements and amendments thereof under the applicable UCC identifying Agent's interest in the Additional Agent Goods (and any proceeds from the sale thereof) as consigned goods thereunder and the Debtors as the consignee therefor, and Agent's security interest in such Additional Agent Goods and Additional Agent Goods proceeds). Subject to the terms of the Agency Agreement (including Section 4.1

thereof), and solely to the extent applicable, the proceeds of the sales of Additional Agent Goods sold at a particular Store shall be taken into account when calculating any percentage rent due pursuant to the terms of the applicable lease agreement.

31. Except as expressly provided for in the Agency Agreement, nothing in this Order or the Agency Agreement, and none of the Agent's actions taken in respect of the Sale shall be deemed to constitute an assumption by Agent of any of the Debtors' obligations relating to any of the Debtors' employees. Moreover, the Agent shall not become liable under any collective bargaining or employment agreement or be deemed a joint or successor employer with respect to such employees.

32. All sales, excise, gross receipts, and other taxes attributable to sales of Merchandise and Additional Agent Goods (including any consigned goods sold as part of the Sale) as indicated on the Debtors' point of sale equipment (other than taxes on income, but specifically including, without limitation, gross receipts taxes) payable to any Taxing Authority having jurisdiction (collectively, "Sales Taxes") shall be added to the sales price of Merchandise and Additional Agent Goods (including any consigned goods sold as part of the Sale) and collected by Agent in trust for the Debtors at time of sale and paid over to the Debtors or collected by the Debtors. All Sales Taxes shall be deposited into a segregated account designated by the Debtors and Agent solely for the deposit of such Sales Taxes. The Agent shall not be liable for Sales Taxes except as expressly provided in the Agency Agreement and the payment of any and all Sales Taxes is the responsibility of the Debtors. The Debtors are directed to remit all taxes arising from the Sale to the applicable Taxing Authorities as and when due, provided that in the case of a bona fide dispute the Debtors are only directed to pay such taxes upon the resolution of the dispute, if and to the extent that the dispute is decided in favor of the

Taxing Authority. For the avoidance of doubt, Sales Taxes collected and held in trust by the Debtors shall not be used to pay any creditor or any other party, other than the Taxing Authority for which the Sales Taxes are collected. The Agent shall collect, remit to the Debtors and account for Sales Taxes as and to the extent provided in the Agency Agreement. This Order does not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law, and does not constitute a declaratory judgment with respect to any party's liability for taxes under State law.

33. Subject to the terms set forth in the Agency Agreement, the Debtors and/or the Agent (as the case may be) are authorized and empowered to transfer Assets among the closing Stores and the Distribution Centers. The Agent is authorized to sell the Debtors' furniture, fixtures and equipment and abandon the same, in each case, as provided for and in accordance with the terms of the Agency Agreement.

F. Liens Granted To Agent

34. Pursuant to Bankruptcy Code section 364(d), in consideration of and effective upon payment by Agent of the Initial Guaranty Payment on the Payment Date and delivery of the Letter of Credit to the DIP Agent and the Debtors, the Debtors hereby grant to Agent first priority, senior security interests in and liens (subject to the subordination provisions set forth in paragraph 35) upon: (i) the Merchandise; (ii) the Additional Agent Goods; (iii) all Proceeds (including, without limitation, credit card Proceeds); (iv) the Agent's commission regarding the sale or other disposition of Designated Goods under Section 5.4 of the Agency Agreement and/or the sale or other disposition of Consignment Goods under Section 5.5 of the Agency Agreement; (v) in the event the Debtors elect the FF&E Guaranty Option, the Owned FF&E and the proceeds realized from the sale or other disposition of Owned FF&E after payment of the Additional Guaranteed Amount; or, alternatively, the FF&E Commission; (vi) Agent's percentage share of

the Sharing Amounts (if any), and (vii) all "proceeds" (within the meaning of Section 9-102(a)(64) of the Code) of each of the foregoing (all of which are collectively referred to herein as the "Agent Collateral"), to secure the full payment and performance of all obligations of the Debtors to Agent under the Agency Agreement. Effective upon entry of the of this Order, payment of the Initial Guaranty Payment on the Payment Date, and delivery of the Letter of Credit to the DIP Agent and the Debtors, the security interests and liens granted to the Agent pursuant to this Order and the Agency Agreement shall be deemed properly perfected without the necessity of filing UCC-1 financing statements or any other documentation or further order of this Court. For the avoidance of doubt, Agent's lien does not attach to any credit card receivables or other amounts from the sale of goods prior to the Sale Commencement Date.

35. Without any further act by or on behalf of the Agent or any other party (including (without limitation) the Lenders and the Debtors), the Agent's security interests in and liens upon the Agent Collateral created under this Order and the Agency Agreement are (i) validly created, (ii) perfected, and (iii) senior to all other liens and security interests; provided, however, that (x) until the Debtors receive payment in full of the Guaranteed Amount, the Debtors' percentage share of the Sharing Amounts (if any), Expenses, in the event the Debtors elect the FF&E Guaranty Option, the Additional Guaranteed Amount or, alternatively, the proceeds realized upon a sale of Owned FF&E (less the Agent FF&E Commission), as applicable, and such other amounts due to the Debtors under the Agency Agreement, the security interests and liens granted to Agent pursuant to this Order and the Agency Agreement shall be junior and subordinate in all respects to the security interests and liens of Lenders in the Agent Collateral but solely to the extent and amount of the unpaid portion of the any of the Guaranteed Amount, the Debtors' percentage share of the Sharing Amounts (if any), Expenses, in the event the Debtors elect the

FF&E Guaranty Option, the Additional Guaranteed Amount or, alternatively, the proceeds realized upon a sale of Owned FF&E (less the Agent FF&E Commission), as applicable, and such other amounts due to the Debtors under the Agency Agreement, and (y) upon payment in full of the Guaranteed Amount, the Debtors' percentage share of the Sharing Amounts (if any), Expenses, in the event the Debtors elect the FF&E Guaranty Option, the Additional Guaranteed Amount or, alternatively, the proceeds realized upon a sale of Owned FF&E (less the Agent FF&E Commission), as applicable, and such other amounts due to the Debtors under the Agency Agreement, any security interest or lien of the Lenders in the Agent Collateral shall be junior and subordinate in all respects to the security interest and liens of Agent in the Agent Collateral. The Debtors shall cooperate with Agent with respect to all filings (including, without limitation, UCC-1 financing statements) and other actions to the extent reasonably requested by Agent in connection with the security interests and liens granted under the Agency Agreement. The Debtors will not sell, grant, assign or transfer any security interest in, or permit to exist any lien or encumbrance on, any of the Agent Collateral other than in favor of the Agent and Lenders. In the event of an occurrence of an Event of Default by the Debtors under the Agency Agreement, in any jurisdiction where the enforcement of its rights under the Agency Agreement or this Order is sought, the Agent shall have, in addition to all other rights and remedies, the rights and remedies of a secured party under the Code.

G. Other Provisions

36. The Agent shall not be liable for any claims against the Debtors, and the Debtors shall not be liable for any claims against Agent, in each case, other than as expressly provided for in the Agency Agreement. The Agent shall have no successor liability whatsoever with respect to any Encumbrances or claims of any nature that may exist against the Debtors, including, without limitation, the Agent shall not be, or to be deemed to be: (i) a successor in

interest or within the meaning of any law, including any revenue, successor liability, pension, labor, ERISA, bulk-transfer, products liability, tax or environmental law, rule or regulation, or any theory of successor or transferee liability, antitrust, environmental, product line, de facto merger or substantial continuity or similar theories; or (ii) a joint employer, co-employer or successor employer with the Debtors, and the Agent shall have no obligation to pay the Debtors' wages, bonuses, severance pay, vacation pay, WARN act claims (if any), benefits or any other payments to employees of the Debtors, including pursuant to any collective bargaining agreement, employee pension plan, or otherwise, except as expressly set forth in the Agency Agreement.

37. The Agent is a party in interest and shall have the ability to appear and be heard on all issues related to or otherwise connected to this Order, the various procedures contemplated herein, any issues related to or otherwise connected to the Sale, and the Agency Agreement.

38. Nothing contained in any plan confirmed in the Debtors' chapter 11 cases or any order of this Court confirming such plan or in any other order in this chapter 11 cases (including any order entered after any conversion of this case to a case under chapter 7 of the Bankruptcy Code) shall alter, conflict with, or derogate from, the provisions of the Agency Agreement or the terms of this Order.

39. The Agency Agreement and related documents may be modified, amended or supplemented by the parties thereto in accordance with the terms thereof without further order of this Court, provided that the Committee and Lenders consent, which consent shall not be unreasonably withheld or delayed.

40. Except with respect to any Governmental Unit (as to which the provisions of Paragraphs 17 and 19 shall apply), this Court shall retain exclusive jurisdiction with regard to all

issues or disputes relating to this Order or the Agency Agreement, including, but not limited to, (i) any claim or issue relating to any efforts by any party or person to prohibit, restrict or in any way limit banner and signwalker advertising, including with respect to any allegations that such advertising is not being conducted in a safe, professional and non-deceptive manner, (ii) any claim of the Debtors, the landlords and/or the Agent for protection from interference with the Sale, (iii) any other disputes related to the Sale, and (iv) to protect the Debtors and/or the Agent against any assertions of Encumbrances. No such parties or person shall take any action against the Debtors, the Agent, the landlords or the Sale until this Court has resolved such dispute. This Court shall hear the request of such parties or persons with respect to any such disputes on an expedited basis, as may be appropriate under the circumstances.

41. Notwithstanding Bankruptcy Rules 4001 and 6004, or any other law that would serve to stay or limit the immediate effect of this Order, this Order shall be effective and enforceable immediately upon entry and its provisions shall be self-executing. In the absence of any person or entity obtaining a stay pending appeal, the Debtors and the Agent are free to perform under the Agency Agreement at any time, subject to the terms of the Agency Agreement.

42. To the extent that anything contained in this Order explicitly conflicts with a provision in the Agency Agreement or the GOB Sale Guidelines, this Order shall govern and control.

43. On the Payment Date and to the extent that the DIP Loan remains unpaid, the Debtors are authorized and directed to (a) pay the DIP Agent the Initial Guaranty Payment with any such amounts to be applied by the DIP Agent in the manner and in the amounts and times as provided in DIP Financing Order other than with respect to $10 million in aggregate amount of

the FILO Loan, which shall continue to be governed by the DIP Credit Agreement (as amended) and the Final DIP Order, and the amount shall remain outstanding and be repaid in full upon the earlier of July 15, 2016 and receipt of the balance of the Guaranteed Amount, and (b) deliver the Letter of Credit to the DIP Agent. In addition, from and after the Payment Date and to the extent that the DIP Loan remains unpaid, the Debtors are authorized and directed to pay the DIP Agent on each other date on which payment is made by the Agent for the benefit of the Debtors, each other amount payable by the Agent to the Debtors under the Agency Agreement, including, without limitation, the balance of the Guaranteed Amount, the Sharing Amounts, and the proceeds realized upon a sale of Owned FF&E (less the Agent FF&E Commission) or the FF&E Guaranty Amount, as applicable, with any such amounts to be applied by the DIP Agent, in the manner and in the amounts and times as provided in the DIP Financing Order.

44. Immediately upon the Payment Date, and on each other date on which payment is to be made by the Agent to or for the benefit of the Debtors, the Debtors are authorized and directed to repay, or cause to be repaid, the DIP Obligations, indefeasibly and in cash, by making one or more payments to the DIP Agent, for the benefit of the DIP Lenders. For the avoidance of doubt, nothing contained herein modifies paragraphs 33 or 43 of the DIP Financing Order.

45. Nothing contained in this Order shall deemed as consent by I&G Direct Real Estate 33k, LP, PAC Finance 1, LLC or Haines Center- Burlington (the "DC Landlords") for purposes of the Debtors obtaining any extensions provided by Section 365(d)(4) of the Bankruptcy Code.

46. The Bankruptcy Court shall retain exclusive jurisdiction with respect to all matters and disputes arising from or related to the interpretation or implementation of this Order,

including without limitation, disputes arising between the DC Landlords and the Agent and/or the Debtors.

47. Comenity Bank's Limited Objection To The [Proposed] Order, Pursuant To Sections 105, 363, And 365 Of The Bankruptcy Code, Approving Sale Of Debtors' Assets And Granting Related Relief [D.I. 2021] is resolved as follows: notwithstanding any provision to the contrary in this Order, (i) within 36 hours of the date of the entry of this Order, the Debtors, the Agent, and their respective agents, successors, and assigns shall not accept or process any purchases with private label credit cards issued in accordance with the Private Label Credit Card Program Agreement dated October 5, 1999 and related documents (collectively, the "Private Label Agreement"); (ii) the Private Label Agreement shall be deemed rejected effective July 1, 2016; (iii) the Debtors and Comenity Bank each agree that the non-acceptance of the credit cards as provided herein is not a breach of the Private Label Agreement by the other party; (iv) Comenity Bank's rights to assert setoff, recoupment, and/or chargebacks are preserved, and the Debtors' rights to challenge any asserted setoff, recoupment, and/or chargebacks are preserved; and it is agreed that such parties' rights are not affected by this Order (v) Comenity Bank's right to assert any prepetition claims (including any contract rejection claims) and postpetition claims are preserved, and such claims shall be filed on or before August 1, 2016 (except for claims arising after July 1, 2016, which are fully preserved), and the rights of all parties in interest to challenge such claims are preserved; and, (vi) the Debtors shall continue to preserve and provide Comenity Bank with access to the Debtors' records related to credit transactions as provided in the Private Label Agreement through July 1, 2016.

48. Nothing contained herein shall prejudice any party's right to argue that it should be entitled to a payment of an administrative expense claim related to the Debtors' use and occupancy of a lease during the period March 2, 2016 to March 31, 2016.

49. The objections to the Motion filed by Ameriform Acquisition Company, LLC d/b/a KL Industries, Gordini USA, Inc., and SP Images, Inc. (collectively, the "Secured Vendors" and each, a "Secured Vendor") [D.I. 1866, 1877, 1884, 2003, 2007, and 2008] are resolved as follows: the following additional terms will apply to the postpetition sale of consigned goods delivered to the Debtors prepetition from each of the Secured Vendors in which the respective Secured Vendor holds a perfected, first priority lien (the "Perfected Goods"): (a) absent written consent by the applicable Secured Vendor and the Debtors, to the extent the Debtors sell any of the Perfected Goods by the applicable Secured Vendor, the sale price for such goods shall be at least the amount of such vendor's secured claim; provided, however, that the Debtors have no obligation to sell any such goods; (b) any agency commission payable to the Agent shall come out of the Debtors' share of proceeds of the sale of such goods; (c) the Debtors and such vendor will cooperate and attempt to reasonably resolve the treatment of any Perfected Goods left unsold at the end of the term of the Agency Agreement.

50. Neither the Debtors nor the Agent shall sell any fixtures and equipment that belong to PepsiCo, Inc. or Quaker Sales & Distribution, Inc., including any coolers and refrigerators.

Dated: May 24 2016
Wilmington, Delaware

MARY F. WALRATH
UNITED STATES BANKRUPTCY JUDGE