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## 2019 Winter Leadership Conference

# **The Party's Over; Now, Who's Cleaning Up?: The Post-Apocalyptic Landscape Following a § 363 Sale**

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**The Party's Over, Now Who's Cleaning Up the Mess: the Post-Apocalyptic Landscape  
Following a Section 363 Sale**

A. General Overview of 363 Sale

1. Recent trends point to more and more asset sales (as opposed to debt restructures or true reorganizations) in distressed company context
2. Many opportunities for investment, for buyers, and broad market for distressed assets, for sellers e.g. opportunities to buy a competitor, acquire new business line, move into new markets with minimal effort
3. Carrying out balance sheet restructuring while preserving going concern value through distressed asset sales has become the norm for several reasons
  - a. Can be quicker and cheaper way to tie up loose ends
  - b. More appetite for risk among folks who traffic in the distressed space
  - c. Free and clear of any interest
  - d. High levels of leverage and secured creditor pressure make more prevalent
4. In re Adinath Corp. and Simply Fashion Stores, Ltd., Case No. 15-16885-LMI (Bankr. S.D. Fla. May 6, 2015). See Exhibit A attached.
5. Post-closing, post-sale requirements
  - a. May be simple such as agreement to cooperate post-closing
  - b. May provide indemnifications, default, assistance
  - c. May specifically provide requirements for certain tasks by officers before releases are effective
6. Advantages of 363 sale:
  - a. Free and clear sale order on notice limits successor liability risks
  - b. Court approval eliminates fraudulent transfer risks and overall second-guessing, assuming full disclosures and proper notice
  - c. Certainty, so long as all necessary "magic language" is included in sale order; specificity about claims is helpful
  - d. Broad jurisdictional reach of Bankruptcy Court; reservation of exclusive jurisdiction over sale order matters

- e. Automatic stay gives time for orderly process
- f. Faster and easier than a bankruptcy plan sale
- g. Can assign contracts notwithstanding anti-assignment language (generally)
- h. Buyer can be selective in which assets and liabilities it will take
- i. Generates more value due to lower transaction risks for buyer
- j. Section 363(m) good faith purchaser protection; appeal mootness
- k. Right to credit bid can facilitate a "loan-to-own" strategy for a buyer (but note Section 363(k) allows court to adjust credit bid rights "for cause")

7. Disadvantages of 363 sales:

- a. Scrutiny by third parties
- b. Possible delay due to post-bankruptcy marketing requirement
- c. Loss of control due to public auction
- d. Costs
- e. Bankruptcy causes of action (preference) issues
- f. Full disclosure required; must be an open book
- g. What happens next in the bankruptcy? Liquidating plan? Dismissal? Jevic creates issues.

B. Setting the stage for the post-sale scenario

1. Structured Dismissal

- a. Jevic Holding<sup>1</sup> & progeny – distribution schemes that violate absolute priority rule not allowed
- b. Section 1112(b) of the Bankruptcy Code permits a chapter 11 case to be dismissed if it is in the best interests of creditors and the estate
- c. Jevic: LBO transaction gave rise to fraudulent transfer and preference claims and litigation. Settlement reached providing for a distribution to unsecured creditors without paying priority wage claims in full (which the absolute priority rule requires)

<sup>1</sup> Czyzewski v. Jevic Holding Corp., 137 S.Ct. 973 (2017).

- i. U.S. Supreme Court held that a bankruptcy court cannot authorize a nonconsensual structured dismissal of a chapter 11 case if distributions are made that violate the absolute priority rule
    - ii. U.S. Supreme Court stated it was not expressing a view about the legality of structured dismissals in general, and distinguished between final distributions that violate the absolute priority rule and interim distributions that violate the absolute priority rule, such as first-day wage orders and critical vendor orders
  - d. In cases post-Jevic, courts have followed Jevic in not approving final distributions unless the absolute priority rule is met, or if impacted parties consent
    - i. Query if Jevic should apply to “gifting” plans that violate the absolute priority rule, which Jevic did not directly address.
    - ii. Query what the impact of Jevic may be on any other types of distributions/payments that violate the absolute priority rule other than dismissal orders
  - e. Attached are Guidelines Regarding Voluntary Dismissals of Chapter 11 Cases from the U.S. Bankruptcy Court for the Northern District of California, effective June 1, 2019. See Exhibit B attached.
  - f. Structured dismissal approved as requested by Debtors. In re Old PXPRT, Inc., f/k/a PopExpert, Inc., Case No. 16-30390 (Bankr. N.D. Calif. December 13, 2016). See Exhibit C attached.
2. Conversion to Chapter 7
- a. Chapter 7 trustee expenses
  - b. Chapter 7 distribution scheme may not be desirable to certain stakeholders
3. Chapter 11 Liquidating Trust
- a. Plan of Liquidation will provide
  - b. **Vesting of Assets in the Plan Trust.** On the Effective Date, all Assets of the Estates shall vest in the Plan Trust and constitute Plan Trust Assets, and each Debtor shall be deemed for all purposes to have transferred legal and equitable title of all Assets of its Estate to the Plan Trust for the benefit of the Holders of Claims against its Estate, whether or not such Claims are Allowed Claims as of the Effective Date. provided however, with respect to any Assets that the Plan Trustee has elected to retain in any Debtor for convenience purposes (referred to in the Plan Trust Agreement as the Retained Assets), beneficial ownership of, but not legal title to, such Assets shall be transferred to the Plan Trust (such Assets, including beneficial

ownership of such Retained Assets, are collectively referred to as the "**Plan Trust Assets**"). The Plan Trust Assets are conveyed to the Plan Trust subject, however, to the Plan Liabilities. In accordance with § 1123(b) of the Bankruptcy Code, the Plan Trust shall be vested with, retain and may exclusively enforce, prosecute, and resolve any or all Causes of Action that the Debtors, the Estates, or the Creditors' Committee may have against any Person.

- c. **Transfer of Plan Trust Assets by the Debtors.** On the Effective Date or as soon as practicable thereafter, the Debtors shall take all actions reasonably necessary to transfer control of the Plan Trust Assets to the Plan Trustee. Upon the transfer of control of the Plan Trust Assets in accordance with this Section, the Debtors shall have no further interest in or with respect to the Plan Trust Assets or the Plan Trust.
- d. **Assumption of Plan Obligations.** On the Effective Date, all of the Debtors' rights and obligations with respect to each and every Administrative Expense Claim, Priority Tax Claim, Priority Claim, and Secured Claim, and all other rights and obligations of the Debtors under this Plan, shall be assigned to and assumed by the Plan Trust.
- e. **Transfer of Plan Trust Assets - Tax Treatment.** For federal income tax purposes, all parties (including the Debtors, the Plan Trustee, and the Holders of Claims) shall treat the transfer of the Plan Trust Assets to the Plan Trust in accordance with the terms of this Plan as a transfer to the Holders of the Claims that have a beneficial interest in the Plan Trust, with the Holders of Claims receiving an undivided interest in the Plan Trust Assets attributable to the Debtor with respect to which their Claims relate, followed by a transfer of the Plan Trust Assets by such Holders to the Plan Trust, and the beneficiaries of the Plan Trust shall be treated as the grantors and owners of such beneficiaries' respective portion of the Plan Trust. Notwithstanding the foregoing, in the event that the Plan Trustee timely elects to treat any portion of the Plan Trust subject to disputed claims as a "disputed ownership fund" pursuant to § 1.468B-9(c)(2)(ii) of the Treasury Regulations, any Holders of Claims who, as of the Effective Date, are holders of Disputed Claims shall, to the extent of such Disputed Claims, be subject to U.S. federal income taxation in accordance with rules set forth in § 468B of the Internal Revenue Code and the Treasury Regulations thereunder.
- f. **Formation of Plan Trust.** The Plan Trust shall be formed on or prior to the Effective Date. The Holders of Claims shall be the sole beneficiaries of the Plan Trust. The Plan Trust shall hold legal title to, or beneficial ownership of, the Plan Trust Assets. The Plan Trust shall be established for the primary purpose of liquidating and distributing the Plan Trust Assets.
- g. **Plan Trust Agreement.** The form of the Plan Trust Agreement to be executed following Confirmation of the Plan shall be attached as an exhibit to the Plan Supplement. The Plan Trust Agreement shall set forth the provisions necessary to govern the rights, powers, and obligations of the Plan Trustee and his appointment and removal, as well as to ensure



the treatment of the Plan Trust as a liquidating trust for federal income tax purposes.

C. Issues

1. Who remains for clean up?
  - a. Successor liability – See Exhibit A for example.
2. Governance issues
3. Potential claims against management
  - a. Releases
  - b. Exculpation
  - c. Insider claims
  - d. Fraud
4. D&O implications
  - a. **Director and Officer Fiduciary Duties in Chapter 11:** Management typically wants to control the restructuring effort. Except in unusual circumstances, a Chapter 11 debtor's prepetition officers and directors continue to run the company, making the company a debtor-in-possession or "DIP." This creates a potential conflict. Outside of bankruptcy, management's fiduciary duties are prescribed by state law. Management owes fiduciary duties to the equity holders. But a bankruptcy case creates an estate for the benefit of creditors. Who gets fiduciary protection then?
  - b. **Management's Fiduciary Duties:** The Bankruptcy Code does not discuss whether additional duties should be imposed once the company files bankruptcy. Most courts have determined that traditional state law duties of care and loyalty continue to govern management's conduct. Basically, this means that so long as management does not self-deal or act in bad faith, it will have fulfilled its duties. In addition, the bankruptcy court must approve most extraordinary transactions, providing additional protection. Some courts and commentators, however, have advocated for a federal fiduciary standard under which management would have the "heightened" fiduciary duties of a trustee under the Code. They reason that, in bankruptcy, the company's management acts as a true fiduciary for the estate. Indeed, the Bankruptcy Code says management has the duties of a trustee.
  - c. Insurance protection for D&Os
  - d. Tail Insurance

5. Tax issues
  - a. Tax issues permeate virtually every aspect of life; filing for bankruptcy does not change that fact.
  - b. To effectively represent clients in financial restructurings, bankruptcy lawyers must understand the common tax issues that arise in bankruptcy and how to identify, resolve and leverage them, to complete a successful turnaround.
  - c. Tax sharing agreements
  - d. Monetization of tax attributes
  - e. Tax treatment of liquidation vehicles
  - f. In consumer cases, dischargeability of taxes and tax elections
  - g. Important practical tips and strategies for ensuring that your client uses the tax code to benefit the restructuring: consult with appropriate tax advisor
6. Plan provisions
7. Trustee in 7 or 11
8. State law claims
9. Transition Services Agreement
  - a. In a Transition Services Agreement (TSA), the buyer agrees to pay the seller for support services for a defined period of time post-closing. Such services may include management, accounting, operations systems, human resources, and similar types of services.
  - b. TSA's are usually stand-alone agreements, but incorporated into the sale agreement and made a requirement for closing. Certain key seller employees who are critical to the implementation of the TSA may be named and typically separate employment or consulting contracts are reached with such employees and also made a requirement for closing.
  - c. The TSA should clearly define the scope of services the seller will provide. Typical provisions also include requiring the seller and buyer to cooperate and share information, and requiring the seller to provide such services at substantially the same level and quality, and with the same standard of care, as the seller provided prior to the sale.
  - d. The TSA should also define the term of the agreement, and typically allows the buyer to terminate the TSA at any time with reasonable prior

notice to the seller. There may also be a provision permitting the buyer to extend the TSA term for a certain period of time.

- e. The buyer and seller will often agree to a monthly fee for the services provided in the TSA, and/or hourly or other fixed fee rates for certain types of services; and there are usually limitation of liability and disclaimer of warranty provisions that are common to the industry.

10. What funds remain for wrap up?

D. Financial Adviser issues

- 1. CRO
- 2. Continues as liquidating trustee?
- 3. Continued evaluation of claims and causes of action

E. Case closing, exculpatory provisions

- 1. An exculpation clause may properly exculpate debtor's and unsecured creditors committee's assorted agents and professionals for certain specified acts
- 2. An exculpation clause's temporal limitation must be sufficiently clear to clarify that the clause did not exculpate post-effective date acts
- 3. An exculpation clause did not have to include exceptions for breaches of fiduciary duty, legal malpractice, or ordinary negligence
- 4. In re Fraser's Boiler Service, Inc., 593 B.R. 636 (U.S. Bankruptcy Court, W.D. Washington, 2018)

F. Residue of assets- what to do?

- 1. **Undeliverable Distributions.** If any Distribution or other payment to the Holder of an Allowed Claim under this Plan is returned for lack of a current address for the Holder or otherwise, the Plan Trustee shall file with the Bankruptcy Court the name, if known, and last known address of the Holder and the reason for its inability to make payment. If, after the passage of 90 days, the Distribution or payment still cannot be made, the Plan Advisory Committee may elect either (i) that any further Distribution or payment to the Holder shall be distributed to the Holders of Allowed Claims in the appropriate Class or Classes or (ii) donated to a not-for-profit, non- religious organization approved by the Plan Advisory Committee. In either event, the Allowed Claim shall be deemed satisfied and released, with no recourse to the Plan Trust, the Plan Trustee or the Plan Trust Assets, to the same extent as if the Distribution or payment had been made to the Holder of the Allowed Claim



2. A nonprofit often selected and encouraged is The Anthony H.N. Schnellling Endowment Fund of the ABI. The Fund provides support for various types of educational research and assistance with legislation, such as the recent revisions to the Bankruptcy Code.

G. Wrap up

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ORDERED in the Southern District of Florida on May 6, 2015.

Laurel M. Isicoff, Judge  
United States Bankruptcy Court

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION  
[www.flsb.uscourts.gov](http://www.flsb.uscourts.gov)

In re:	:	Chapter 11 Cases
	:	
ADINATH CORP. AND SIMPLY	:	Case No. 15-16885-LMI
FASHION STORES, LTD., <sup>1</sup>	:	Jointly Administered
	:	
Debtor.	:	
	:	

**ORDER APPROVING SALE OF ALL OR SUBSTANTIALLY ALL OF DEBTOR'S  
ASSETS AND GRANTING RELATED RELIEF**

This case came on to be heard on the 6<sup>th</sup> day of May, 2015 at 8:00 a.m., in Miami, Florida, upon the *Debtor's Emergency Motion Pursuant to Sections 105(A), 363, and 365 Of The Bankruptcy Code and Bankruptcy Rules 6004 and 6006, and Local Rule 6004-1, For (I) Approval of Procedures in Connection With the Sale of All or Substantially All of the Debtor's Assets; (II) Authorization to Enter Into Stalking Horse Agreement in Connection Therewith; (III)*

<sup>1</sup> The Debtors in these Chapter 11 cases, along with the last four digits of each Debtor's federal tax identification are: (i) Adinath Corp., 2110 N.W.95th Avenue, Miami FL 33172 (4843); and (ii) Simply Fashion Stores, Ltd., 2500 Crestwood Boulevard, Birmingham, AL 35210 (6230)..

*Approval of the Payment of Stalking Horse Protections; and (IV) the Setting of Related Auction and Hearing Dates* [ECF 39] (the "Motion")<sup>2</sup>; and it appearing that the relief requested is in the best interests of Simply Fashion Stores, Ltd. (the "Debtor"), its estate, its 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 in the circumstances and it appearing that no other notice need be given; and the Debtor and a joint venture consisting of Hilco Merchant Resources, LLC and Gordon Brothers Retail Partners, LLC (collectively, the "Agent") having agreed upon terms and conditions for the Agent to act as the Debtor's exclusive agent to conduct sales (the "Sale") of certain of the Debtor's assets, including, without limitation, the Merchandise and the owned FF&E (the "Assets"), pursuant to and in accordance with the terms and conditions set forth in that certain Agency Agreement, by and between the Agent and Debtor, as amended by the First Amendment, the final form of which is attached hereto as Composite Exhibit A (the "Agency Agreement"); and the transactions represented by the Agency Agreement having been determined to be the highest and best offer for the Assets; and a hearing having been held on April 20, 2015, on the Motion whereupon the Court entered an Order approving, *inter alia*, the Break-Up Fee, and bidding procedures [ECF No. 83] (the "Bidding Procedures Order"); and a sale hearing having been held on May 6, 2015 (the "Sale Hearing") to consider the remaining relief requested in the Motion and approval of the Agency Agreement; and appearances of all interested parties having been noted on the record of the Sale Hearing; and upon the Declaration in Support of First Day Pleadings (the "First Day Declaration"); and upon all of the proceedings

<sup>2</sup> All capitalized terms not otherwise defined in this Order have the meaning ascribed to them in the Motion or in the Agency Agreement.

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 Debtor, its estate, its 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:**<sup>3</sup>

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 Debtor's 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 Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules").

D. **Notice:** Proper, timely, adequate and sufficient notice of the Motion and the Sale Hearing under the circumstances has been provided in accordance with the Bidding Procedures Order, sections 102(1), 105(a), and 363 of the Bankruptcy Code, Bankruptcy Rules 2002, 4001

<sup>3</sup> 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.



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 JNS INVT, LLC (in its capacity as both the prepetition senior secured lender and the debtor-in-possession lender, collectively, the "Lender"), (iii) the Office of the United States Attorney General, (iv) counsel to the Creditors' 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 ((i) through (ix) collectively, the "Notice Parties"). 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 First Day Declaration, (ii) the testimony and other evidence proffered or adduced at the Sale Hearing, and (iii) the representations of counsel made on the record at the Sale Hearing, the Debtor has thoroughly marketed the Assets and has conducted the bidding solicitation fairly, with adequate opportunity for parties that either expressed an interest in acquiring or liquidating the Assets, or who the Debtor believed may have an interest in acquiring or liquidating the Assets, to submit competing bids. The Debtor 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 Composite Exhibit A, including the form and total consideration to be realized by the Debtor pursuant to the Agency Agreement, (i) is the highest and best offer received by the Debtor for the Assets, (ii) is fair and reasonable, and (iii) is in the best interests of the Debtor, its estate, its 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 Debtor's decision to (i) enter into the Agency Agreement, and (ii) perform under and make payments required by the Agency Agreement, as supported by Soneet Kapila, in his capacity as the Debtor's Chief Restructuring Officer (the "CRO"), is a reasonable exercise of the Debtor's and the CRO's sound business judgment consistent with their fiduciary duties and is in the best interests of the Debtor, its estate, its 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

Debtor 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 unfilled, 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 Debtor's ability to obtain the consideration provided for in the Agency Agreement and, thus, would impact materially and adversely the value that the Debtor's estate would be able to obtain for the sale of such Assets in the liquidation of its stores in conjunction with the Agent. But for the protections

afforded to the Agent under the Bankruptcy Code, this Order and the Agency Agreement, the Agent would not have offered to pay the consideration contemplated in the Agency Agreement. In addition, each entity with an Encumbrance upon the Assets, (i) has consented to the Sale, including as set forth below, 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 this Motion, or whose objections were resolved through the terms of this Order, 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 Debtor's estate, its creditors and other parties in interest; provided, however, that the Encumbrances shall attach to all amounts due to the Debtors under the Agency Agreement (the "Consideration"), including, without limitation, the Guaranteed Amount, the Additional Agent Goods Fee, the Sharing Amount (if any), the proceeds realized upon the sale of Owned FF&E (less the FF&E Commission), the Additional DC/CO Guaranteed Amount and the Additional Guaranteed Amount, in each case in accordance with the order of priority of such Encumbrances under applicable law as exists on the date hereof, including in respect of the liens and security interests granted to the Lender, in its capacity as a debtor-in-possession lender under this Court's Interim Order, dated April 17, 2015 [ECF 42] and, as approved as a final order at the Sale Hearing (the "DIP Order"). Notwithstanding the foregoing the consent of the DIP Lender to the sale is conditioned upon the payment of the DIP Loan pursuant to the DIP Order.

L. **Arm's-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 in the liquidation of its Stores in conjunction with the Agent 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 Debtor or its creditors under any applicable laws.

M. **Good Faith:** The Debtor, its management, including, without limitation, its CRO, its board of directors, and the Agent, its members and its officers, directors, employees, agents and representatives, actively participated in the bidding process and acted in good faith. The Agency Agreement between the Agent and the Debtor 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 Debtor was free to deal with any other party interested in buying or selling on behalf of the Debtor's estate some or all of the Assets. Neither the Debtor 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 Debtor.

O. **Security Interests:** The liens provided for in the Agency Agreement and this Order to secure the obligations of the Debtor 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 Debtor's estates. The absence of such protections would impact materially and adversely the value available to the Debtor in the liquidation of its stores in conjunction 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 Debtor the compensation provided for under the Agency Agreement. In addition, the Lender, which claims a first lien and security interest in substantially all of the Debtor's property as more particularly outlined in the DIP Order (including by virtue of the liens granted to the Lender under the DIP Order for its post-petition financing) to which the Agent's security interests attach pursuant to the terms of the Agency Agreement and this Order, has consented to the security interests provided to the Agent in the Agency Agreement, in accordance with and subject to the satisfaction of the conditions set forth in the Agency Agreement and in Paragraph 31 of this Order.

P. **Corporate Authority:** The Debtor (i) has 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) has all of the corporate or other power and authority necessary to consummate the transactions contemplated by the Agency Agreement, and (iii) has 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 Debtor 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 Debtor or the Debtor's interest 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 Debtor or its estates.

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

**S. Bankruptcy Rule 6003:** The Court finds that the relief requested in this Order is necessary to avoid immediate and irreparable harm to the Debtors' estates if not entered today, and therefore the Court has found sufficient cause exists to enter this Order prior to the expiration of 21 days from the Petition Date.

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 Debtor is 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, which agreement and resolution shall be binding on all parties (including, without limitation, the Debtor, the Committee, the Lender, 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 Debtor 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 Debtor, 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. The CRO, is specifically authorized to act on behalf of the Debtor in connection with the Sale and no other consents or approvals are necessary or required for the Debtor 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 Debtor's creditors (whether known or unknown), the Debtor, 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 Debtor or converting the Debtor's case 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 Debtor, the Agent and their respective successors and permitted assigns, including any trustee or other fiduciary hereafter appointed as a legal representative of the Debtor 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 Debtor 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 the Agency Agreement, 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 Lender, 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 Lender), with all such Encumbrances attaching to the Consideration, including, without limitation, the Guaranteed Amount, the Additional Agent Goods Fee, the Sharing Amount (if any), the proceeds realized upon the sale of Owned FF&E (less the FF&E Commission), the Additional DC/CO Guaranteed Amount and the Additional Guaranteed Amount, in each case in

accordance with the order of priority of such Encumbrances under applicable law as exists on the Petition Date, including in respect of the liens and security interests granted to the Lender, in its capacity as a debtor-in-possession lender under this Court's DIP Order. 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.

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 Debtor, 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 Debtor 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. For the sake of clarity, the UCC financing statements recorded by Iberiabank are not affected by the provisions of this paragraph, as the assets that are secured by Iberiabank's UCC-1 financing statement are not being sold pursuant to the terms of this Order.

12. All entities that are presently in possession of some or all of the Assets or other property in which the Debtor holds 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. The Debtor and the Agent shall not extend the Sale Termination Date beyond June 30, 2015, unless extended by mutual written agreement of the Debtor and the Agent following a commensurate extension of the expiration date of the Letter of Credit.

14. 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 Debtor 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 Debtor prior to the Petition Date) in accordance with the Agency Agreement, the GOB Sale Guidelines, and this Order.

15. 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 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 Debtor to comply with environmental laws consistent with its rights and obligations as a debtor in possession under the Bankruptcy Code. Nothing herein shall be construed to be a debtor 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 Debtor's 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 Debtor's 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 18 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.

16. 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 Debtor shall be presumed to be in compliance with any GOB Laws and Liquidation Laws and, subject to Paragraphs 16 and 17 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 five (5) business days of entry of this Order, the Debtor shall serve copies of this Order, the Agency Agreement and the Sale Guidelines via e-mail, facsimile or regular mail, on the parties set forth on Exhibit C.

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 this Order, any Governmental Unit may assert that a Reserved Dispute exists by serving written notice of such Reserved Dispute to counsel for the Debtor 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. If the Debtor, 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 Debtor, 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 Debtor 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 Debtor's 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 Debtor 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 Debtor 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.

f. 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 Debtor 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.

17. Except to the extent of the reserved rights of Governmental Units expressly granted elsewhere in this Order, the Debtor 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, the GOB Sale Guidelines or any Side Letter (as defined below), 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.

18. Except as expressly provided in the Agency Agreement, the Sale shall be conducted by the Debtor and the Agent notwithstanding any restrictive provision of any lease, sublease or other agreement relative to occupancy affecting or purporting to restrict the conduct of the Sale, the rejection of leases, abandonment of assets or "going dark" provisions. The Agent and landlords of the Stores 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 16 and 17. In the event of any conflict between the GOB Sale Guidelines and any Side Letter, the terms of such Side Letter shall control.

19. Except as expressly provided for herein or in the GOB Sale Guidelines and Side Letters, and except with respect to any Governmental Unit (as to which Paragraphs 16 and 17 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 Debtor, the Agent, or the landlords at the Debtor's 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.

20. The Agent shall have the right to use the Debtor's closing stores and all related store services, furniture, fixtures, equipment and other assets of the Debtor for the purpose of conducting the Sale, free of any interference from any entity or person, subject to compliance with the GOB Sale Guidelines, any Side Letters and this Order and subject to Paragraphs 16 and 17 of this Order.

21. Nothing in this Order shall (a) alter or affect the Debtor's obligations to comply with section 365(d)(3) of the Bankruptcy Code or (b) alter or modify the rights of any lessor or other counterparty to a lease with the Debtor to file an appropriate motion or otherwise seek appropriate relief if the Debtor fails to comply with section 365(d)(3) of the Bankruptcy Code

other than as set forth in the *Debtor's Motion for an Order Authorizing and Approving Procedures for Rejection of Certain Unexpired Leases and Executory Contracts* [ECF No. 92]; provided that the conduct of the Sale in accordance with the Sale Guidelines shall not be a violation of section 365(d)(3) of the Bankruptcy Code.

22. Pursuant to section 554(a) of the Bankruptcy Code, the Debtor and the Agent, as applicable, are permitted to abandon property of the Debtor's estate 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 Debtor may only abandon property located in any store (and, if applicable, the distribution center) on or after the applicable Sale Termination Date. In the event of any such abandonment, 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 Debtor or other party in interest to object thereto.

23. Before any sale, abandonment or other disposition of the Debtor's 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 Debtor's employees and/or customers, or credit card numbers ("Confidential Information") takes effect, the Debtor shall remove or cause to be removed the Confidential Information from the POS Equipment.

24. The Agent shall accept the Debtor's validly-issued gift certificates and gift cards that were issued by the Debtor prior to the Sale Commencement Date, and the Debtor shall reimburse Agent for such amounts during the weekly sale reconciliation provided for and subject

to the limitations set forth in Section 8.7 of the Agency Agreement. The Agent shall accept returns of Merchandise sold by the Debtor prior to the Sale Commencement Date, provided that such return is otherwise in compliance with the Debtor's 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 Debtor shall reimburse Agent for such amounts during the weekly sale reconciliation provided for and subject to the limitations set forth in Section 8.7 of the Agency Agreement.

25. 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 Debtor 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 the consumer must return the merchandise within twenty-one (21) days of their purchase, the consumer must provide a receipt, and the asserted defect must in fact be a "latent" defect. The Debtor 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.

26. 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 Debtor. In addition, the Agent is prohibited from using the websites, social



media sites, e-mail lists, customer lists and e-commerce sites owned by or related to New Dots, LLC or the "Dots" brand.

27. 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 Debtor's obligations relating to any of the Debtor's 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.

28. 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 Debtor. The Debtor 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 Debtor 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 Debtor 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 Debtor 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.

29. Subject to the terms set forth in the Agency Agreement, the Debtor and/or the Agent (as the case may be) are authorized and empowered to transfer Assets among the closing stores and the Distribution Center. The Agent is authorized to sell the Debtor's furniture,