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Parka Problems: The 2009 Eddie Bauer Bankruptcy

J. Logan Wilson

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Parka Problems: The 2009 Eddie Bauer Bankruptcy

J. Logan Wilson and S. Ashton Smith



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Cast of Characters

Eddie Bauer (1899–1986)

The founder of Eddie Bauer, Inc. A sportsman and outdoorsman, he embodied Eddie Bauer’s brand identity. He was the first person to patent and design the quilted goose down jacket

William Niemi, Sr.

A businessman and one of Eddie Bauer’s friends. He partnered with Mr. Bauer in 1953 and owned the business entirely with his son, William Niemi, Jr., from 1968 to 1971.

General Mills

An international food company. It owned Eddie Bauer, Inc. from 1971 to 1988 and expanded the company from largely a mail order business with one retail store to a much larger retailer, opening around sixty stores during its ownership period.

Spiegel, Inc.

A large catalog company. It acquired Eddie Bauer from General Mills and owned it from 1988 until Spiegel’s bankruptcy in 2003. It expanded the company at a breakneck pace, opening hundreds of stores and licensing its name widely.

Eddie Bauer as Debtor

Includes Eddie Bauer Holdings, Inc., Eddie Bauer, Inc., Eddie Bauer Fulfillment Services, Inc., Eddie Bauer Diversified Sales, LLC, Eddie Bauer Services, LLC, Eddie Bauer International Development, LLC, Eddie Bauer Information Technology, LLC, Financial Services Acceptance Corporation, and Spiegel Acceptance Corporation.

The Honorable Mary R. Walrath

The judge that oversaw the 2009 Eddie Bauer bankruptcy. Judge Walrath is a United States Bankruptcy Judge for the District of Delaware. She was appointed in 1998 and served as Chief Bankruptcy Judge from 2003 to 2008. She received her undergraduate degree from Princeton University in 1976 and received a J.D., cum laude, from Villanova University in 1979. After graduating

from law school, Judge Walrath clerked with the Honorable Emil F. Goldhaber, Chief Judge of the United States Bankruptcy Court for the Eastern District of Pennsylvania. After her clerkship and prior to taking the bench, Judge Walrath spent the majority of her career as a debtor/creditor rights and commercial litigation attorney at the Philadelphia law firm of Clark, Ladner, Fortenbaugh & Young.¹

Rainier Holdings, LLC

An investment company and the stalking horse bidder for Eddie Bauer's 2009 bankruptcy Section 363 sale.

Golden Gate Capital

A large investment company. Purchased Spiegel, Inc. in a Section 363 sale in 2003, then subsequently purchased Eddie Bauer through a subsidiary in Eddie Bauer's 2009 Section 363 sale.

Kurtzman Carson Consultants, LLC

The claims agent for Eddie Bauer's bankruptcy.

Bank of America

The agent for both Eddie Bauer's \$51 million revolving credit facility and its \$100 million DIP credit facility.

Wilmington Trust FSB

The agent for Eddie Bauer's \$191 million Senior Secured Credit Facility

¹ *The Honorable Mary F. Walrath*, [32ND NATIONAL FORUM ON CLIENT PROTECTION](#) (June 3–4, 2016).

Chapter 1: Introduction²

Eddie Bauer's 2009 bankruptcy is a demonstration of both the value and potential consequences of corporate bankruptcies and restructurings. Eddie Bauer's 2009 filing was in large part a product of being saddled with a \$300 million debt burden and dilution of its brand identity by its previous owner, Spiegel, Inc., which filed bankruptcy in 2003. On the other hand, its bankruptcy proved very successful, resulting in Eddie Bauer's sale to Jos. A. Bank Clothiers, Inc. for \$825 million in 2014.³

In this paper, we explore the beginnings of Eddie Bauer, its corporate ownership history, and the details of its 2009 bankruptcy. Through this study, we hope to demonstrate the value and potential wins of a bankruptcy filing, as well as the potential risks and pitfalls to be had in the process.

² In drafting this paper, we relied heavily on the excellent works of previous students on both the Eddie Bauer bankruptcy and the K-Mart bankruptcy in formatting our paper and gathering sources and knowledge on the bankruptcy process and the procession of the Eddie Bauer bankruptcy. See generally Jon Fisher & Justin Wolbert, *The Story of K-Mart's Reorganization*, CHAPTER 11 BANKRUPTCY CASE STUDIES (2011); Austin Fleming & Bryan C. Hathorn, *Tragedy on the Descent: The Ascent and Fall of Eddie Bauer*, CHAPTER 11 BANKRUPTCY CASE STUDIES (2010).

³ Siddharth Cavale, *Jos. A. Bank to Buy Eddie Bauer in Bid to Stay Independent*, REUTERS (Feb. 14, 2014, 3:07 p.m.), <https://perma.cc/3CM8-LG8D>.

Chapter 2: Eddie Bauer's Beginnings (1920–1988)

Eddie Bauer, the person, was born on Orcas Island in the San Juan Islands in the state of Washington on October 19, 1899.⁴ In 1913, Mr. Bauer started working at Piper & Taft, a sporting goods store.⁵ In 1920, after gaining experience at Piper & Taft, Mr. Bauer opened the first Eddie Bauer store, Eddie Bauer's Sports Shop, at age 21 in downtown Seattle to sell sporting equipment, clothing and accessories.⁶ The store first focused on sporting goods like tennis rackets and fishing tackle, moving more into apparel later.⁷ In 1922, Mr. Bauer established the Eddie Bauer Creed “[t]o give you such outstanding quality, value, service and guarantee that we may be worthy of your high esteem,” and guarantee that “[e]very item we sell will give you complete satisfaction or you may return it for a full refund,” that the company still uses today.⁸ Such guarantees were rare for companies at that time.⁹ In 1934, Mr. Bauer patented the Bauer Shuttlecock, which popularized badminton in the United States and is still the standard of the sport today.¹⁰

The company's first foray into outerwear and apparel began in 1936.¹¹ After nearly dying from hypothermia on a winter fishing trip in 1935, Mr. Bauer designed the “Skyliner,” the first quilted goose down jacket in North America, which he would patent in 1940.¹² However, in

⁴ *Our Founder*, EDDIE BAUER, <https://perma.cc/FDJ4-UK8Q> (last visited Mar. 16, 2017).

⁵ *Id.*

⁶ In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Declaration of Marvin Edward Toland of Eddie Bauer Holdings, Inc., in Support of First Day Motions, at 3 ([Dkt. 2](#)) (June 17, 2009); *Our Founder*, EDDIE BAUER, <https://perma.cc/FDJ4-UK8Q> (last visited Mar. 16, 2017).

⁷ See In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Declaration of Marvin Edward Toland of Eddie Bauer Holdings, Inc., in Support of First Day Motions, at 3 ([Dkt. 2](#)) (June 17, 2009).

⁸ *Our Founder*, EDDIE BAUER, <https://perma.cc/FDJ4-UK8Q> (last visited Mar. 16, 2017).

⁹ *Eddie Bauer Holdings, Inc.*, INTERNATIONAL DIRECTORY OF COMPANY HISTORIES, ENCYCLOPEDIA.COM, <https://perma.cc/TCN7-X6VY> (last visited Apr. 9, 2017).

¹⁰ James R. Warren, *Bauer, Eddie (1899–1986)*, HISTORYLINK.ORG (Sept. 16, 1999), <https://perma.cc/9E8Y-V4CK>; *Our Founder*, EDDIE BAUER, <https://perma.cc/FDJ4-UK8Q> (last visited Mar. 16, 2017).

¹¹ *Our Founder*, EDDIE BAUER, <https://perma.cc/FDJ4-UK8Q> (last visited Mar. 16, 2017).

¹² In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Declaration of Marvin Edward Toland of Eddie Bauer Holdings, Inc., in Support of First Day Motions, at 3 ([Dkt. 2](#)) (June 17,

1942, production at factories was diverted for the war need.¹³ U.S. Army Air Corps commissioned more than 50,000 “Eddie Bauer B-9 Flight Parkas” to keep pilots warm at high altitude.¹⁴ Eddie Bauer also produced more than 250,000 sleeping bags and countless other items for the war.¹⁵ Eddie Bauer was the sole supplier granted permission to label his products sent to the war effort, leading to a massive post-war boom in sales and established the Eddie Bauer brand.¹⁶

In 1945, the company published its first catalog, “Eddie Bauer Alaska Outfitter,” selling garments and sleeping bags insulated with goose down.¹⁷ The company secured a virtual monopoly on the insulated jacket market by 1949, employing 125 tailors just to keep up with demand.¹⁸ Catalog sales were massively successful, comprising essentially all of the company’s

2009); James R. Warren, *Bauer, Eddie (1899–1986)*, HISTORYLINK.ORG (Sept. 16, 1999), <https://perma.cc/9E8Y-V4CK>; *Our Founder*, EDDIE BAUER, <https://perma.cc/FDJ4-UK8Q> (last visited Mar. 16, 2017).

¹³ In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Declaration of Marvin Edward Toland of Eddie Bauer Holdings, Inc., in Support of First Day Motions, at 4 ([Dkt. 2](#)) (June 17, 2009); James R. Warren, *Bauer, Eddie (1899–1986)*, HISTORYLINK.ORG (Sept. 16, 1999), <https://perma.cc/9E8Y-V4CK>; *Our Founder*, EDDIE BAUER, <https://perma.cc/FDJ4-UK8Q> (last visited Mar. 16, 2017).

¹⁴ In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Declaration of Marvin Edward Toland of Eddie Bauer Holdings, Inc., in Support of First Day Motions, at 4 ([Dkt. 2](#)) (June 17, 2009); James R. Warren, *Bauer, Eddie (1899–1986)*, HISTORYLINK.ORG (Sept. 16, 1999), <https://perma.cc/9E8Y-V4CK>; *Our Founder*, EDDIE BAUER, <https://perma.cc/FDJ4-UK8Q> (last visited Mar. 16, 2017).

¹⁵ In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Declaration of Marvin Edward Toland of Eddie Bauer Holdings, Inc., in Support of First Day Motions, at 4 ([Dkt. 2](#)) (June 17, 2009); James R. Warren, *Bauer, Eddie (1899–1986)*, HISTORYLINK.ORG (Sept. 16, 1999), <https://perma.cc/9E8Y-V4CK>; *Our Founder*, EDDIE BAUER, <https://perma.cc/FDJ4-UK8Q> (last visited Mar. 16, 2017).

¹⁶ In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Declaration of Marvin Edward Toland of Eddie Bauer Holdings, Inc., in Support of First Day Motions, at 4 ([Dkt. 2](#)) (June 17, 2009); James R. Warren, *Bauer, Eddie (1899–1986)*, HISTORYLINK.ORG (Sept. 16, 1999), <https://perma.cc/9E8Y-V4CK>; *Our Founder*, EDDIE BAUER, <https://perma.cc/FDJ4-UK8Q> (last visited Mar. 16, 2017).

¹⁷ *Our Founder*, EDDIE BAUER, <https://perma.cc/FDJ4-UK8Q> (last visited Mar. 16, 2017).

¹⁸ James R. Warren, *Bauer, Eddie (1899–1986)*, HISTORYLINK.ORG (Sept. 16, 1999), <https://perma.cc/9E8Y-V4CK>.

business until the 1970s.¹⁹ The company also capitalized on the press from outfitting more than 40 major mountaineering expeditions from 1953 to 1983, including Jim Whittaker, who was the first American to reach the summit of Mount Everest, in 1963.²⁰

In 1949, suffering from work exhaustion, Mr. Bauer transferred all common stock Eddie Bauer, Inc. to friend and hunting partner, William Niemi.²¹ However, Mr. Bauer would return in 1953 to form a fifty-fifty partnership with Mr. Niemi, with both bringing their sons into the business, as well.²² The partnership proved successful until Mr. Bauer and his son retired in 1968, selling their interests to William Niemi, Sr. and William Niemi, Jr., for \$1.5 million.²³ After his retirement, Mr. Bauer hunted, fished, and gained acclaim for training Labrador retrievers until his death in 1986.²⁴

Together with Mr. Niemi, Sr. and Mr. Niemi, Jr., investors who helped to finance the 1968 acquisition also gained stock in the company, which was then incorporated as Eddie Bauer, Inc.²⁵ By 1970, sales had surged to \$9.1 million.²⁶ Eddie Bauer, Inc., planned to conduct an initial public offering, but due to a stock market dip, management concluded a sale would be best.²⁷

¹⁹ *Id.*

²⁰ In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Declaration of Marvin Edward Toland of Eddie Bauer Holdings, Inc., in Support of First Day Motions, at 4–5 ([Dkt. 2](#)) (June 17, 2009).

²¹ *Our Founder*, EDDIE BAUER, <https://perma.cc/FDJ4-UK8Q> (last visited Mar. 16, 2017).

²² *Eddie Bauer Holdings, Inc.*, INTERNATIONAL DIRECTORY OF COMPANY HISTORIES, ENCYCLOPEDIA.COM, <https://perma.cc/TCN7-X6VY> (last visited Apr. 9, 2017); *Our Founder*, EDDIE BAUER, <https://perma.cc/FDJ4-UK8Q> (last visited Mar. 16, 2017).

²³ *Eddie Bauer Holdings, Inc.*, INTERNATIONAL DIRECTORY OF COMPANY HISTORIES, ENCYCLOPEDIA.COM, <https://perma.cc/TCN7-X6VY> (last visited Apr. 9, 2017).

²⁴ *Our Founder*, EDDIE BAUER, <https://perma.cc/FDJ4-UK8Q> (last visited Mar. 16, 2017).

²⁵ *Eddie Bauer Holdings, Inc.*, INTERNATIONAL DIRECTORY OF COMPANY HISTORIES, ENCYCLOPEDIA.COM, <https://perma.cc/TCN7-X6VY> (last visited Apr. 9, 2017).

²⁶ *Id.*

²⁷ *Id.*

In 1971, General Mills bought Eddie Bauer, Inc., for 311,000 shares of General Mills common stock valued at around \$10 million.²⁸ Upon its acquisition, General Mills aggressively expanded Eddie Bauer, Inc.'s retail business, turning it from one retail store and a mail order business into a major retailer with around 60 stores by 1988.²⁹ The company also began shifting production from expedition gear to “casual lifestyle apparel.”³⁰ By 1984, retail sales comprised about 70% of the company's revenues.³¹

²⁸ *Id.*

²⁹ James R. Warren, *Bauer, Eddie (1899–1986)*, HISTORYLINK.ORG (Sept. 16, 1999), <https://perma.cc/9E8Y-V4CK>.

³⁰ *Id.*

³¹ *Eddie Bauer Holdings, Inc.*, INTERNATIONAL DIRECTORY OF COMPANY HISTORIES, ENCYCLOPEDIA.COM, <https://perma.cc/TCN7-X6VY> (last visited Apr. 9, 2017).

Chapter 3: Eddie Bauer's Acquisition by Spiegel, Inc. and Spiegel's Bankruptcy (1988–2005)

In July 1988, General Mills sold Eddie Bauer to Spiegel, Inc. (“Spiegel”), an Illinois-based catalog company, to divest itself of all nonfood-related businesses.³² Spiegel was the 100% owner of Eddie Bauer, Inc. from 1988 to 2005.³³ Spiegel would expand Eddie Bauer, Inc. at an explosive rate, increasing the number of retail stores from 58 to 399 and outlet stores from 3 to 102 by the end of 2002.³⁴ From 1990 to 2002, catalog sales also increased from 61.2 million to 101.6 million.³⁵ Under Spiegel, Eddie Bauer turned away from its outdoor apparel roots and began to focus more on women’s casual apparel.³⁶ Eddie Bauer also began to diversify on a larger scale, selling home goods and other products in some stores.³⁷ Spiegel heavily licensed the Eddie Bauer name throughout the 90s for items such as furniture, eyeglasses, bicycles, car seats, and vehicles.³⁸ In 1993, Eddie Bauer expanded to Germany and Japan.³⁹ By 1998, Eddie Bauer included 556 stores in the U.S. and Canada, 32 in Japan, and 9 in Germany.⁴⁰

³² *Eddie Bauer Holdings, Inc.*, INTERNATIONAL DIRECTORY OF COMPANY HISTORIES, ENCYCLOPEDIA.COM, <https://perma.cc/TCN7-X6VY> (last visited Apr. 9, 2017); James R. Warren, *Bauer, Eddie (1899–1986)*, HISTORYLINK.ORG (Sept. 16, 1999), <https://perma.cc/9E8Y-V4CK>.

³³ In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Declaration of Marvin Edward Toland of Eddie Bauer Holdings, Inc., in Support of First Day Motions, at 11 ([Dkt. 2](#)) (June 17, 2009).

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Eddie Bauer Holdings, Inc.*, INTERNATIONAL DIRECTORY OF COMPANY HISTORIES, ENCYCLOPEDIA.COM, <https://perma.cc/TCN7-X6VY> (last visited Apr. 9, 2017); James R. Warren, *Bauer, Eddie (1899–1986)*, HISTORYLINK.ORG (Sept. 16, 1999), <https://perma.cc/9E8Y-V4CK>.

³⁷ James R. Warren, *Bauer, Eddie (1899–1986)*, HISTORYLINK.ORG (Sept. 16, 1999), <https://perma.cc/9E8Y-V4CK>.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

In 2001 and 2002, net sales decreases at Spiegel's three merchant divisions, including Eddie Bauer, Inc., as well as government action for risky credit card issuances by Spiegel's special-purpose bank, led to lower liquidity and breaches in Spiegel's financing arrangements.⁴¹ Resulting difficulties led Spiegel, along with its affiliates and subsidiaries, including Eddie Bauer, to petition for chapter 11 relief on March 17, 2003 in the United States Bankruptcy court for the Southern District of New York.⁴² Under Spiegel and its affiliates' Amended Joint Plan of Reorganization, Eddie Bauer emerged from the bankruptcy as a stand-alone company.⁴³ Eddie Bauer Holdings, Inc. was formed to serve as the parent company for Eddie Bauer, Inc. and its subsidiaries.⁴⁴ Certain unsecured creditors of Eddie Bauer, Inc. and its related Debtor affiliates received 30 million shares of common stock.⁴⁵ Eddie Bauer Holdings, Inc., Eddie Bauer, Inc., and their subsidiaries also entered into a \$300 million senior secured term loan agreement, the proceeds of which were used to pay back Spiegel creditors and were not used to fund any of Eddie Bauer's operations.⁴⁶ More than 200 Eddie Bauer stores were closed in the process, and the company sold its headquarters to Microsoft, Inc.⁴⁷

⁴¹ In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Declaration of Marvin Edward Toland of Eddie Bauer Holdings, Inc., in Support of First Day Motions, at 11 ([Dkt. 2](#)) (June 17, 2009).

⁴² *Id.* at 12 (citing In re Spiegel, Inc. et al., Case no. 03-11540 (BRL) (jointly administered case in which other Debtors included Eddie Bauer, Inc., Eddie Bauer Diversified Sales, LLC, Eddie Bauer International Development, LLC, and Eddie Bauer Services, LLC) (Filed Mar. 17, 2003)).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 12–13.

⁴⁷ James R. Warren, *Bauer, Eddie (1899–1986)*, HISTORYLINK.ORG (Sept. 16, 1999), <https://perma.cc/9E8Y-V4CK>.

Chapter 4: Aftermath of Spiegel's Bankruptcy and Events Leading Up to the 2009 Bankruptcy (2005–2009)

The primary factors leading to Eddie Bauer's 2009 Bankruptcy included the \$300 million loan taken on during the Spiegel bankruptcy to pay creditors, a diminishing brand identity through Spiegel's dilution of the brand by expanding the scope of products to which it was applied, and diminishing sales in the Great Recession.⁴⁸

The Spiegel bankruptcy encumbered Eddie Bauer in more ways than just the \$300 million loan to pay off Spiegel creditors. Eddie Bauer was also saddled with Spiegel's post-retirement, defined-benefit healthcare and life insurance plans, benefits, and pension plans unassociated with its own historical obligations. Eddie Bauer also assumed a 50,000 square foot information technology center in Westmont, Illinois, and a 2.2 million square foot distribution center in Groveport, Ohio. These facilities were not well suited to Eddie Bauer's reorganized operations and burdened the company with high overhead costs.

From 2005 to 2007, Eddie Bauer had to spend most of its time and money dealing with debts from the Spiegel bankruptcy, rather than looking at expansion or reinvestment. Consequently, Eddie Bauer was highly leveraged as it entered the recession. As of the petition date, the company had over \$304 million in total consolidated debt. The annual cash interest expense on this debt was \$21 million. Roughly 50% of the company's EBITDA (earnings before interest, taxes, depreciation, and amortization) was dedicated solely to servicing existing indebtedness. The recession also reduced consumer spending to extremely low levels, cutting deeply into Eddie Bauer's revenue. Additionally, Eddie Bauer's shift from men's outdoor apparel to women's casual apparel reduced sales per square foot from \$440 to \$230.

Eddie Bauer's many difficulties in the years after the Spiegel bankruptcy led its leadership to consider a Chapter 11 case and a sale under 11 U.S.C. § 363(f). In December 2008, Eddie Bauer hired Peter J. Solomon Company to serve as its investment banker in a potential sale of its assets. In April and May of 2009, Peter J. Solomon Company found fifty-five potential bidders for Eddie Bauer, twenty of which confidentially reviewed Eddie Bauer's financial books and records to assess its condition. After reviewing the bidders, Eddie Bauer selected Rainier Holdings, LLC, as its "stalking horse bidder" to substantially all of Eddie Bauer's assets in a Section 363 sale.

After entering into an Asset Purchase Agreement with Rainier Holdings, LLC as a stalking horse bidder and failing to negotiate out of its upcoming potential breaches of its

⁴⁸ In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Declaration of Marvin Edward Toland of Eddie Bauer Holdings, Inc., in Support of First Day Motions ([Dkt. 2](#)) (June 17, 2009).

financial covenants on its \$191 million Senior Secured Term Loan, Eddie Bauer filed a petition for relief under Chapter 11 in June 2009.

Chapter 5: Filing the Petition and First Day Motions

The previous chapters covered the background of Eddie Bauer’s bankruptcy. We now dive headlong into the bankruptcy case itself, which started with the filing of the petition⁴⁹ for relief under Chapter 11 of the Bankruptcy Code on June 17, 2009, in the United States Bankruptcy Court for the District of Delaware. The petition commenced the bankruptcy case and operated as a stay⁵⁰ against creditors who would might seek to liquidate the assets in which they held a secured interest, and enforce their claims, without getting relief from the automatic stay.⁵¹ The case was assigned to the Honorable Mary F. Walrath.⁵²

A. First Day Motions

Along with the voluntary petition itself, Eddie Bauer filed 32 motions and applications known as “First Day Motions.” This avalanche of filings is the norm in Chapter 11 bankruptcy cases of large companies. The First Day Motions focused on some of the primary goals of bankruptcy: orchestrating claims, protecting asset (and going concern) values, providing an opportunity to implement deals, and giving Eddie Bauer an opportunity to restructure its business through a Section 363 sale.⁵³ Eddie Bauer’s initial goal was primarily protecting asset values by selling the company. Management’s view was that the business would have more value as a “going concern,” preserving business operations and the revenue stream that those operations produced rather than liquidating Eddie Bauer’s assets as piecemeal. Thus, the company sought a quick Section 363 sale⁵⁴ to a third party, with sale proceeds to be distributed among creditors under a subsequently confirmed plan. Here, we analyze the most important first-day motions and their practical and statutory support.

⁴⁹ In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Voluntary Petition ([Dkt. 1](#)) (June 17, 2009).

⁵⁰ 11 U.S.C. § 362.

⁵¹ 11 U.S.C. § 362(d) (relief from the stay may be granted “(1) for cause, including lack of adequate protection of an interest in property of such party in interest,” especially when the debtor does not have an equity in the property and *the property is not necessary to an effective reorganization.*” (emphasis added)).

⁵² See Cast of Characters.

⁵³ MICHAEL L. BERNSTEIN & GEORGE W. KUNEY, BANKRUPTCY IN PRACTICE, FIFTH EDITION (2015).

⁵⁴ 11 U.S.C. § 363 (“The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.”).

1. Joint Administration of the Chapter 11 Case

Among the initial filings with the bankruptcy court was a motion for joint administration of chapter 11 cases.⁵⁵ Since Eddie Bauer Holdings, Inc. filed jointly with its American affiliates,⁵⁶ Eddie Bauer requested that the bankruptcy court consolidate the cases for an optimal and economical resolution of all cases, asserting that the motions, applications, hearings and orders arising in the cases would jointly affect Eddie Bauer Holdings and its affiliates. The motion stated that Sections 105⁵⁷ and 1015 of the Bankruptcy Code, Rule 1015(b) of the Federal Rules of Bankruptcy Procedure, and local court rules⁵⁸ authorized the court to consolidate the filings. The court agreed, and approved and granted all motions. Amalgamating the many entities under the Eddie Bauer Holdings, Inc. umbrella allowed for a single caption for the case (In re Eddie Bauer Holdings, Inc., et al.) and furthered administrative efficiency of the case without prejudice to any party of interest while also accurately reflecting Eddie Bauer's business operations and financial affairs in their entirety. Accordingly, Eddie Bauer would file monthly operating reports according to the Operating Guidelines and Financial Reporting Requirements promulgated by the U.S. Trustee on a consolidated basis. Furthermore, Canadian affiliates Eddie Bauer of Canada, Inc. and Eddie Bauer Customer Services, Inc. sought and received recognition of the consolidated case in American court so that orders of the Bankruptcy court would have "full force and effect in the same manner and in all respects as if they had been made by a Canadian Court."⁵⁹

⁵⁵ In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Motion of the Debtors for Entry of an Order Pursuant to Rule 1015(B) of the Federal Rules of Bankruptcy Procedure Directing the Joint Administration of the Debtors' Chapter 11 Cases ([Dkt. 3](#)) (June 17, 2009).

⁵⁶ Eddie Bauer, Inc., Eddie Bauer Fulfillment Services, Inc., Eddie Bauer Diversified Sales, LLC, Eddie Bauer Services, LLC, Eddie Bauer International Development, LLC, Eddie Bauer Information Technology, LLC, Financial Services Acceptance Corporation, and Spiegel Acceptance Corporation.

⁵⁷ Section 105 of the Bankruptcy Code grants the Bankruptcy court the "all writs power," allowing the court the residual power to issue any order, process or judgment necessary or appropriate to carry out provisions of the Bankruptcy Code. 11 U.S.C. § 105.

⁵⁸ Rule 1015-1 of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy court for the District of Delaware.

⁵⁹ R.S.C. 1985, c. C-36 §18.6; Companies' Creditors Arrangement Act (Canada).

2. Motion to Employ Kurtzman Carson Consultants (“KCC”) LLC as Claims Agent

Eddie Bauer also sought⁶⁰ to employ KCC as their claims agent. Normally, the Delaware Clerk’s Office could and normally would serve notice and administer claims for a bankruptcy case. However, in large cases such as this (Eddie Bauer had over 900 potential creditors and thousands of other parties in interest receiving notices), that work can be overwhelming for a court clerk. Thus, Eddie Bauer proposed that they hire KCC to serve as notice, claims and solicitation agent, as they were “a bankruptcy administrator specializing in comprehensive chapter 11 administrative services.” KCC would enable effective and efficient noticing of the thousands of creditors and parties in interest and of the thousands of filings in the case. The court granted this motion, meaning that KCC would “transmit, receive, docket and maintain proofs of claim filed in connection to the chapter 11 cases.”

3. Motion for an Order Approving Cross-Border Insolvency Protocol

As Eddie Bauer had affiliates across America’s northern border, and all management decisions regarding the Canadian affiliates were made by officers and directors in the U.S., it was necessary to have a cross-border insolvency protocol⁶¹ to coordinate between the bankruptcy court and the Superior Court of Justice, Commercial List, for the Judicial District of Ontario (the “Canadian Court”). The consolidated chapter 11 case was recognized by the Canadian Court, and this protocol provided for “coordination to prevent inconsistent, conflicting, or duplicative rulings, ensure[d] notice to all parties, and preserve[d] the jurisdictional integrity of the Courts.” This motion was granted by the bankruptcy court under the catch-all provision of Section 105(a)⁶² of the Bankruptcy Code, with the court having jurisdiction over the matter as a “core proceeding” under Section 157(b)(2)⁶³. The protocol stated that the Canadian Court recognized

⁶⁰ In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Motion of the Debtors for Entry of Order Authorizing Debtors to Employ and Retain Kurtzman Carson Consultants LLC as Notice, Claims and Solicitation Agent *Nunc Pro Tunc* to the Petition Date ([Dkt. 4](#)) (June 17, 2009).

⁶¹ In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Debtors’ Motion for an Order Approving Cross-Border Insolvency Protocol ([Dkt. 5](#)) (June 17, 2009).

⁶² The court “may issue any order, process, or judgment that is necessary and appropriate to carry out the provisions of the Bankruptcy Code . . . to assure the Bankruptcy court’s power to take whatever action is appropriate or necessary in aid of the exercise of their jurisdiction.” 11 U.S.C. § 105(a).

⁶³ 11 U.S.C. § 157(b)(2) (“Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under

the validity of the Section 362⁶⁴ automatic stay and actions against the American debtors and their property under the automatic stay by the U.S. Court, and that the U.S. Court recognized the validity of the automatic stay and actions against the Canadian affiliates and their property under the Companies' Creditors Arrangement Act by the Canadian Court. The representatives and officials from each respective nation remained under the sole and exclusive jurisdiction of their nation's court. Further, the Canadian Court would consult with the U.S. Court regarding interpretation and application of the automatic stay and any orders of the U.S. court modifying or granting relief from the stay, and that each court would provide appropriate notices to their counterpart across the border. If there was any dispute, the courts would consult with one another before rendering a binding decision on the matter, defer determination of the matter to the other court by transferring the matter wholly or partially, or the courts would hold a joint hearing to resolve the issue.

4. Motion of the Debtors (A) Authorizing Continued Use of Existing Cash Management System, Bank Accounts, Business Forms and Investment Guidelines; (B) Granting Postpetition Intercompany Claims Administrative Status and (C) Authorizing Continued Intercompany Arrangements and Historical Practices.⁶⁵

Eddie Bauer has “complex business and financial affairs requiring collection, disbursement and movement of funds through numerous bank accounts throughout the United States and Canada.” U.S. Trustee Guidelines require companies in chapter 11 to close all existing bank accounts and create debtor-in-possession accounts, including separate accounts for the payment of taxes, for cash collateral, and to create new checks labeled “debtor-in-possession.” However, Eddie Bauer claimed this would severely disrupt their financial operations and “be antithetical to the stabilization of [their] operations and to their all-important ability to maintain ‘business as usual.’” The bankruptcy court agreed it was in the best interest of all parties that Eddie Bauer be “authorized and approved to continue using existing cash management system, bank accounts, business forms and investment guidelines, postpetition intercompany claims administrative status, and authorized debtors to continue intercompany arrangements and

subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.”).

⁶⁴ 11 U.S.C. § 362.

⁶⁵ In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Motion of the Debtors (A) Authorizing the Continued Use of Existing Cash Management System, Bank Accounts, Business Forms and Investment Guidelines; (B) Granting Postpetition Intercompany Claims Administrative Status and (C) Authorizing Continued Intercompany Arrangements and Historical Practices ([Dkt. 6](#)) (June 17, 2009).

historical practices.” The Court also waived the requirements of Section 345(b),⁶⁶ allowing the company to maintain its current deposit practices⁶⁷.

5. Motion Authorizing Payment of Certain Taxes and Fees and Directing Banks to Honor and Process Related Checks and Transfers⁶⁸

Rule 6003 of the Federal Rules of Bankruptcy Procedure permits the bankruptcy court to allow a company to pay all or part of a claim that arose before the filing of the petition within twenty-one days of filing the petition if “necessary to avoid immediate and irreparable harm,” while Section 363(b) also authorizes payment of certain prepetition claims. Further, some of the taxes were entitled to priority status under Section 507(a)(8) (and Section 105(a) grants broad authority to “issue any order, process, or judgment . . . necessary or appropriate to carry out the provisions of this title.” Since Eddie Bauer owed an aggregate of \$7,375,000 in sales tax, use tax, franchise tax, real and personal property taxes, business license fees, and annual report taxes, the court granted Eddie Bauer the ability to continue paying taxes “to protect the value and assets of the estate and to ensure a smooth continuation of the debtor’s business,” pursuant to 11 U.S.C. Section 105(A), under the “doctrine of necessity.”⁶⁹

6. Other Motions Permitting Continued “Business as Usual”

As Eddie Bauer was in retail business, it was important for them to continue “business as usual” to not harm their value, which would harm the potential interest of both Eddie Bauer and

⁶⁶ *Id.* (“For deposits or investments that are not ‘insured or guaranteed by the United States or by a department or instrumentality of the United States or backed by the full faith and credit of the United States,’ Section 345(b) of the Bankruptcy Code provides that the estate must require from the entity with which the money is deposited or invested a bond in favor of the United States secured by the undertaking of an adequate corporate surety.”).

⁶⁷ 11 U.S.C. § 345(a) (“A trustee in a case under this title may make such deposit or investment of the money of the estate for which such trustee serves as will yield the maximum reasonable net return on such money, taking into account the safety of such deposit or investment.”).

⁶⁸ *In re EBHI Holdings, Inc.*, Case No. 09-12099, Bankr. Del., Motion of the Debtors for an Order Pursuant to 11 U.S.C. §§ 105(a), 363(b), 507(a)(8) and 541(d), (I) Authorizing Payment of Certain Taxes and Fees and (II) Authorizing and Directing Banks and Financial Institutions to Honor and Process Related Checks and Transfers ([Dkt. 8](#)) (June 17, 2009).

⁶⁹ The “doctrine of necessity” reflects the practice in many large Chapter 11 cases of granting “critical vendor” motions in order to allow, for example, large retail chains to continue to operate its business. Mark G. Douglas, *Revisiting the Doctrine of Necessity*, JONES DAY PUBLICATIONS (May 30, 2003), <http://www.jonesday.com/revisiting-the-doctrine-of-necessity-05-30-2003/>.

its creditors who would seek repayment from the Section 363 sale proceeds. Deteriorating relationships with suppliers and customers undoubtedly would harm the value of the company and thus harm the interests of both the debtors and creditors. As a result, the debtors filed motions to ensure continued service by utility providers;⁷⁰ permitting them to continue customer service practices and programs, pay prepetition obligations to customers, and pay fees related to credit card transactions and gift card programs⁷¹ and a bridge order to cover the time between the petition date and hearing on the aforementioned customer service programs motion;⁷² to permit compensation of their employees and independent contractors and fund employee health benefits;⁷³ to authorize payment of prepetition claims of critical vendors, administrative claimholders, customer agents and shippers, and postpetition delivery orders.⁷⁴ The court granted these motions to allow the company to maintain good relationships with its suppliers, customers, and employees.

⁷⁰ In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Motion of the Debtors for Entry of an Interim and Final Order Pursuant to 11 U.S.C. §§ 105(a) and 366 (I) Prohibiting Utility Providers from Discontinuing, Altering or Refusing Utility Services, (II) Deeming Utility Providers Adequately Assured of Future Performance; and (III) Establishing Procedures for Determining Adequate Assurance of Payment ([Dkt. 9](#)) (June 17, 2009).

⁷¹ In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Motion of the Debtors for Entry of an Order Authorizing the Debtors to (A) Honor Certain Prepetition Obligations to Customers, (B) Maintain Certain Customer Service Policies, Programs and Practices in the Ordinary Course of Business and (C) Pay Certain Fees Associated with Credit Card Transactions and Gift Card Programs ([Dkt. 10](#)) (June 17, 2009).

⁷² In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Motion of Debtors for the Entry of a Bridge Order with Respect to Certain Customer Services Policies, Programs and Practices ([Dkt. 11](#)) (June 17, 2009).

⁷³ In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Motion of the Debtors for an Order Authorizing (A) the Debtors to Pay Certain Prepetition: (I) Wages, Salaries, and Other Compensation; (II) Employee, Medical and Similar Benefits; (III) Reimbursable Employee Expenses; (IV) Other Miscellaneous Employee Expenses and Benefits; and (V) Independent Contractor Fees and Expenses and (B) Directing Banks to Receive, Process, Honor and Pay All Checks Presented for Payment and Electronic Payment Requests Relating to the Foregoing ([Dkt. 12](#)) (June 17, 2009).

⁷⁴ In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Motion of the Debtors for an Order (A) Authorizing Debtors to Pay Prepetition Claims of Certain (I) Critical Vendors, (II) Administrative Claimholders, (III) Customs Agents and Shippers, (B) Authorizing the Debtors to Pay for Postpetition Delivery of Outstanding Orders and (C) Granting Certain Related Relief ([Dkt. 13](#)) (June 17, 2009).

7. DIP Motion

Eddie Bauer's ability to obtain funding to finance its post-petition operations was vital for its survival until the Section 363 sale was finalized.⁷⁵ At the time of its petition filing, Eddie Bauer had no unencumbered cash or other assets, so it had to obtain a DIP credit facility⁷⁶ and get permission from its creditors to use their cash collateral to finance its operations.

At the time of filing, Eddie Bauer owed over \$328 million to Pre-Petition Revolving Lenders and Pre-Petition Term Lenders. These loans included a roughly \$51 million revolving credit facility with Bank of America acting as the facility's agent. The \$51 million Revolving Credit Facility had a first priority lien on Eddie Bauer's inventory and certain accounts receivable balances and related assets, and a junior lien on substantially all of Eddie Bauer's other assets other than the Groveport, Ohio distribution facility. The loan amount also included a roughly \$191 million Senior Secured Term Credit Facility with Wilmington Trust FSB acting as the facility's agent. The Senior Secured Term Loan had a first priority lien on certain real estate assets, equipment, general intangibles, capital stock, and intellectual property, and a second priority lien on substantially all of Eddie Bauer's other assets. Eddie Bauer's debt also included a \$75 million balance on Eddie Bauer's outstanding 5.25% unsecured convertible notes.

Eddie Bauer obtained a lender group to finance its DIP facility with Bank of America acting as the facility's agent. The DIP facility allowed for \$90 million in the interim before finalizing the facility, and \$100 million at final approval of the DIP motion. The facility required a first priority lien on all of Eddie Bauer's assets. The term of the facility was to be thirty days after the entry of the interim order unless, among other things, a final order on the motion was entered on or before that date, or until the Section 363 sale finalized.

The DIP motion also included a "roll-up" provision. A roll-up provision basically "rolls up" certain pre-petition debts into the DIP facility, giving those pre-petition debts the same

⁷⁵ See *In re EBHI Holdings, Inc.*, Case No. 09-12099, Bankr. Del., Emergency Motion for Interim and Final Orders (I) Authorizing Debtors to Obtain Postpetition Financing Pursuant to 11 U.S.C. §§ 105, 362, 363 and 364; (II) Authorizing Use of Cash Collateral Pursuant to 11 U.S.C. § 363; (III) Granting Liens and Superpriority Claims; (IV) Granting Adequate Protection to Prepetition Secured Parties Pursuant to 11 U.S.C. §§ 362, 362, 363, and 364; and (V) Scheduling Final Hearing on the Debtors' Motion to Incur Such Financing on a Permanent Basis Pursuant to Bankruptcy Rule 4001 ([Dkt. 14](#)) (June 17, 2009).

⁷⁶ A DIP facility is basically just a loan large enough to sustain the debtor's post-petition operational costs until the business liquidates, restructures, or is sold in a Section 363 sale.

priority rights and security interests as the DIP facility.⁷⁷ Here, the roll-up provision converted Bank of America’s \$51 million prepetition Revolving Credit Facility into a post-petition administrative expense, passing over the Senior Secured Term Loan in priority.⁷⁸ As a result, Bank of America stood to have a substantial win in issuing the DIP facility, as it could roll up its \$51 Revolving Credit Facility into the DIP facility to be paid as an administrative expense, while also earning several million dollars in fees and interest on a loan that would only last thirty days or until the Section 363 sale was finalized.

Three other key provisions were included in Eddie Bauer’s DIP motion. First, the DIP motion included a “carve-out” provision, which would set aside money from the DIP facility to pay for administrative expenses of the bankruptcy estate. This provision reduced objections by creditors to the payment of the estate’s administrative expenses, since money was already set aside for payment of most administrative expenses, which will be discussed further in the Administrative Expenses section of this paper. The DIP motion also contained a provision allowing for the use of cash collateral from Eddie Bauer’s prepetition loans, which those secured creditors have an interest. Eddie Bauer’s prepetition creditors consented to the use of the cash collateral from their loans, so long as Eddie Bauer met the terms of the DIP motion. Finally, the DIP motion also provided for “Adequate Protection Payments” to be given to creditors to assure them that the values of their security interests would not diminish as a result of the DIP facility or motion.

Several creditors objected to the DIP motion,⁷⁹ and several other creditors joined in their objections.⁸⁰ The landlord creditors objected to the motion because they felt that it might grant

⁷⁷ Nicole M. Stephansen, *Roll-Up Financing Gains Prominence*, LEXOLOGY (June 15, 2010), <https://perma.cc/7EUX-TWNB>.

⁷⁸ *In re EBHI Holdings, Inc.*, Case No. 09-12099, Bankr. Del., Emergency Motion for Interim and Final Orders (I) Authorizing Debtors to Obtain Postpetition Financing Pursuant to 11 U.S.C. §§ 105, 362, 363 and 364; (II) Authorizing Use of Cash Collateral Pursuant to 11 U.S.C. § 363; (III) Granting Liens and Superpriority Claims; (IV) Granting Adequate Protection to Prepetition Secured Parties Pursuant to 11 U.S.C. §§ 362, 362, 363, and 364; and (V) Scheduling Final Hearing on the Debtors' Motion to Incur Such Financing on a Permanent Basis Pursuant to Bankruptcy Rule 4001, at 4 ([Dkt. 14](#)) (June 17, 2009).

⁷⁹ *In re EBHI Holdings, Inc.*, Case No. 09-12099, Bankr. Del., Limited Objection of the Prime Retail Landlords and Steamtown Mall Partners, L.P. to Emergency Motion for Interim and Final Orders (I) Authorizing Debtors to Obtain Postpetition Financing Pursuant to 11 U.S.C. §§ 105, 362, 363 and 364; (II) Authorizing Use of Cash Collateral Pursuant to 11 U.S.C. § 363; (III) Granting Liens and Superpriority Claims; (IV) Granting Adequate Protection to Prepetition Secured Parties Pursuant to 11 U.S.C. §§ 362, 362, 363, and 364; and (V) Scheduling Final Hearing on the Debtors' Motion to Incur Such Financing on a Permanent Basis Pursuant to Bankruptcy Rule 4001 ([Dkt. 187](#)) (June 29, 2009); *In re EBHI Holdings, Inc.*, Case No. 09-

the DIP facility lenders a right to occupy Eddie Bauer's leased areas and that the senior priority lien granted to the DIP facility would be superior to the state's tax liens.⁸¹ The court largely ignored this objection.⁸²

12099, Bankr. Del., Limited Objection to Entry of Final Order Pursuant to 11 U.S.C. Sections 105, 361, 362, 363, and 364, and Rules 2002, 4001 and 9014 of the Federal Rules of Bankruptcy Procedure (1) Authorizing Incurrence by the [Debtors] of Post-Petition Secured Indebtedness with Priority over Certain Secured Indebtedness and with Administrative Superpriority, (2) Granting Liens, (3) Authorizing Use of Cash Collateral by the [Debtors Pursuant] to 11 U.S.C. Section 363 and Providing for Adequate Protection, (4) Modifying the Automatic Stay and (5) Scheduling a Final Hearing ([Dkt. 209](#)) (June 30, 2009); In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Objection of Wilmington Trust FSB, as Agent for Debtors' Secured Term Lenders, to Debtors' DIP Financing Motion ([Dkt. 253](#)) (July 3, 2009); In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Objection of the Official Committee of Unsecured Creditors to Debtors' Motion for Final Order (I) Authorizing Debtors to Obtain Postpetition Financing Pursuant to 11 U.S.C. §§ 105, 362, 363 and 364; (II) Authorizing Use of Cash Collateral Pursuant to 11 U.S.C. § 363; (III) Granting Liens and Superpriority Claims; (IV) Granting Adequate Protection to Prepetition Secured Parties Pursuant to 11 U.S.C. §§ 361, 362, 363, and 364; and (V) Scheduling Final Hearing on the Debtors' Motion to Incur Such Financing on a Permanent Basis Pursuant to Bankruptcy Rule 4001 ([Dkt. 259](#)) (July 3, 2009).

⁸⁰ In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Joinder of the Taubman Landlords in the Limited Objection of Prime Retail Landlords and Steamtown Mall Partners, L.P. to the Emergency Motion for Final Orders (I) Authorizing Debtors to Obtain Postpetition Financing Pursuant to 11 U.S.C. §§ 105, 362, 363, and 364 (II) Authorizing Use of Cash Collateral Pursuant to 11 U.S.C. § 363; (III) Granting Liens and Superpriority Claims; (IV) Granting Adequate Protection to Prepetition Secured Parties Pursuant to 11 U.S.C. §§ 361, 362, 363 and 364; and (V) Scheduling Final Hearing on the Debtors Motion to Incur such Financing on a Permanent Basis Pursuant to Bankruptcy Rule 4001 ([Dkt. 213](#)) (June 30, 2009); In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Joinder of Bayer Retail Company, L.L.C. in the Limited Objection of the Prime Retail Landlords and Steamtown Mall Partners, L.P. to Emergency Motion for Interim and Final Orders (I) Authorizing Debtors to Obtain Postpetition Financing Pursuant to 11 U.S.C. §§ 105, 362, 363 and 364; (II) Authorizing Use of Cash Collateral Pursuant to 11 U.S.C. § 363; (III) Granting Liens and Superpriority Claims; (IV) Granting Adequate Protection to Pre-petition Secured Parties Pursuant to 11 U.S.C. §§ 361, 362, 363 and 364; and (V) Scheduling a Final Hearing on the Debtors Motion to Incur Such Financing on a Permanent Basis Pursuant to Bankruptcy Rule 4001 ([Dkt. 219](#)) (June 30, 2009).

⁸¹ In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Limited Objection of the Prime Retail Landlords and Steamtown Mall Partners, L.P. to Emergency Motion for Interim and Final Orders (I) Authorizing Debtors to Obtain Postpetition Financing Pursuant to 11 U.S.C. §§ 105, 362, 363 and 364; (II) Authorizing Use of Cash Collateral Pursuant to 11 U.S.C. § 363; (III) Granting Liens and Superpriority Claims; (IV) Granting Adequate Protection to Prepetition Secured Parties Pursuant to 11 U.S.C. §§ 362, 362, 363, and 364; and (V) Scheduling Final Hearing on the Debtors' Motion to Incur Such Financing on a Permanent Basis Pursuant to Bankruptcy Rule 4001 ([Dkt. 187](#)) (June 29, 2009); In re EBHI Holdings, Inc., Case No. 09-

The Official Committee of Unsecured Creditors also objected, claiming that the term and amount of the DIP facility was not long enough to find the highest possible bidder in the Section 363 sale.⁸³ The Official Committee of Unsecured Creditors also disliked the “unwarranted and

12099, Bankr. Del., Limited Objection to Entry of Final Order Pursuant to 11 U.S.C. Sections 105, 361, 362, 363, and 364, and Rules 2002, 4001 and 9014 of the Federal Rules of Bankruptcy Procedure (1) Authorizing Incurrence by the [Debtors] of Post-Petition Secured Indebtedness with Priority over Certain Secured Indebtedness and with Administrative Superpriority, (2) Granting Liens, (3) Authorizing Use of Cash Collateral by the [Debtors Pursuant] to 11 U.S.C. Section 363 and Providing for Adequate Protection, (4) Modifying the Automatic Stay and (5) Scheduling a Final Hearing ([Dkt. 209](#)) (June 30, 2009); In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Joinder of the Taubman Landlords in the Limited Objection of Prime Retail Landlords and Steamtown Mall Partners, L.P. to the Emergency Motion for Final Orders (I) Authorizing Debtors to Obtain Postpetition Financing Pursuant to 11 U.S.C. §§ 105, 362, 363, and 364 (II) Authorizing Use of Cash Collateral Pursuant to 11 U.S.C. § 363; (III) Granting Liens and Superpriority Claims; (IV) Granting Adequate Protection to Prepetition Secured Parties Pursuant to 11 U.S.C. §§ 361, 362, 363 and 364; And (V) Scheduling Final Hearing on the Debtors Motion to Incur such Financing on a Permanent Basis Pursuant to Bankruptcy Rule 4001 ([Dkt. 213](#)) (June 30, 2009); In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Joinder of Bayer Retail Company, L.L.C. in the Limited Objection of the Prime Retail Landlords and Steamtown Mall Partners, L.P. to Emergency Motion for Interim and Final Orders (I) Authorizing Debtors to Obtain Postpetition Financing Pursuant to 11 U.S.C. §§ 105, 362, 363 and 364; (II) Authorizing Use of Cash Collateral Pursuant to 11 U.S.C. § 363; (III) Granting Liens and Superpriority Claims; (IV) Granting Adequate Protection to Pre-petition Secured Parties Pursuant to 11 U.S.C. §§ 361, 362, 363 and 364; and (V) Scheduling a Final Hearing on the Debtors Motion to Incur Such Financing on a Permanent Basis Pursuant to Bankruptcy Rule 4001 ([Dkt. 219](#)) (June 30, 2009).

⁸² See In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Final Order Pursuant to 11 U.S.C. Sections 105, 361, 362, 363 and 364, and Rules 2002, 4001 and 9014 of the Federal Rules of Bankruptcy Procedure (1) Authorizing Incurrence by the Debtors of Post-Petition Secured Indebtedness with Priority Over Certain Secured Indebtedness and with Administrative Superpriority, (2) Granting Liens, (3) Authorizing Use Of Cash Collateral by the Debtors Pursuant to 11 U.S.C. Section 363 and Providing for Adequate Protection, and (4) Modifying the Automatic Stay ([Dkt. 313](#)) (July 8, 2009).

⁸³ In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Objection of the Official Committee of Unsecured Creditors to Debtors’ Motion for Final Order (I) Authorizing Debtors to Obtain Postpetition Financing Pursuant to 11 U.S.C. §§ 105, 362, 363 and 364; (II) Authorizing Use of Cash Collateral Pursuant to 11 U.S.C. § 363; (III) Granting Liens and Superpriority Claims; (IV) Granting Adequate Protection to Prepetition Secured Parties Pursuant to 11 U.S.C. §§ 361, 362, 363, and 364; and (V) Scheduling Final Hearing on the Debtors’ Motion to Incur Such Financing on a Permanent Basis Pursuant to Bankruptcy Rule 4001 ([Dkt. 259](#)) (July 3, 2009).

offensive” benefits and protections to the secured lenders, asserting these benefits and protections would “marginalize” the unsecured creditors’ chances at recovery. The court generally disregarded the Official Committee of Unsecured Creditors’ objection, as well.⁸⁴

The key objection to the DIP motion came from the \$191 million Senior Secured Term Lenders.⁸⁵ The Senior Secured Term Lenders disliked that the DIP motion would require them to seek emergency relief from the court if Eddie Bauer changed its budget, while the DIP lenders were entitled to approve or refuse any budget changes before they were made. The DIP motion would also remove the Section 506(c) waiver rights that the Senior Secured Term Lenders negotiated for prior to the DIP motion. Section 506(c) allows a Debtor in Possession (“DIP”) or trustee to recover reasonable and necessary costs for preserving or disposing of secured property against the amount the creditor can receive.⁸⁶ Section 506(c) waivers, which secured parties typically ask for, generally waive this recovery right.⁸⁷ The Senior Secured Term Lenders threatened to revoke consent of the use of their cash collateral if these objections were not dealt with, which would have decimated Eddie Bauer’s ability to operate going forward.

In approving the DIP motion, the court ultimately acknowledged the Senior Secured Term Lenders’ objections.⁸⁸ The court included language into the DIP motion that the 506(c)

⁸⁴ See *In re EBHI Holdings, Inc.*, Case No. 09-12099, Bankr. Del., Final Order Pursuant to 11 U.S.C. Sections 105, 361, 362, 363 and 364, and Rules 2002, 4001 and 9014 of the Federal Rules of Bankruptcy Procedure (1) Authorizing Incurrence by the Debtors of Post-Petition Secured Indebtedness with Priority Over Certain Secured Indebtedness and with Administrative Superpriority, (2) Granting Liens, (3) Authorizing Use Of Cash Collateral by the Debtors Pursuant to 11 U.S.C. Section 363 and Providing for Adequate Protection, and (4) Modifying the Automatic Stay ([Dkt. 313](#)) (July 8, 2009).

⁸⁵ *In re EBHI Holdings, Inc.*, Case No. 09-12099, Bankr. Del., Objection of Wilmington Trust FSB, as Agent for Debtors’ Secured Term Lenders, to Debtors’ DIP Financing Motion ([Dkt. 253](#)) (July 3, 2009).

⁸⁶ 11 U.S.C. § 506(c).

⁸⁷ *To Surcharge or Not to Surcharge: The Third Circuit Says Only in Sharply Limited Circumstances*, WEIL BANKRUPTCY BLOG (Sept. 11, 2013), <https://perma.cc/73WS-NSBU?type=image>.

⁸⁸ *In re EBHI Holdings, Inc.*, Case No. 09-12099, Bankr. Del., Final Order Pursuant to 11 U.S.C. Sections 105, 361, 362, 363 and 364, and Rules 2002, 4001 and 9014 of the Federal Rules of Bankruptcy Procedure (1) Authorizing Incurrence by the Debtors of Post-Petition Secured Indebtedness with Priority Over Certain Secured Indebtedness and with Administrative Superpriority, (2) Granting Liens, (3) Authorizing Use Of Cash Collateral by the Debtors Pursuant to 11 U.S.C. Section 363 and Providing for Adequate Protection, and (4) Modifying the Automatic Stay ([Dkt. 313](#)) (July 8, 2009).

waiver would not apply to the Senior Secured Term Lenders. The court also revised the budget approval language to require the debtor to obtain a court order to change its budget with no creditor having first consent rights.

8. Motion for Bidding Procedures for the Section 363 Sale

As Eddie Bauer was seeking a sale at the heart of its bankruptcy proceedings, this motion⁸⁹ was one of the major first day filings. Section 363⁹⁰ authorizes the sale of property of the estate outside the ordinary course of business by the trustee. The sale motion was effectively a motion for Eddie Bauer’s management to sell its assets as a going concern. To do so, Eddie Bauer had to establish a procedure for the sale of “substantially all of [its] assets free and clear of all claims and any other interests, liens, mortgages, pledges, secured interests, rights of first refusal, obligations and encumbrances of any kind whatsoever.” Eddie Bauer faced severe liquidity restraints, exhausted options to address that issue (including raising cash via refinancing of the prepetition credit facility), and faced continued financial deterioration, so a sale “free and clear” would go a long way toward solving the issues that brought Eddie Bauer to the bankruptcy court in the first place. This sale would allow the company’s operations to shake off the many claims against its assets while continuing to operate, albeit with new corporate ownership.

To begin this process, Eddie Bauer obtained a “stalking horse bidder,”⁹¹ which established a floor for its auction-style bidding and promoted competitive bidding. Eddie Bauer’s stalking horse bidder was Rainier Holdings LLC (an affiliate of CCMP Capital), which received

⁸⁹ In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Motion Pursuant to 11 U.S.C. §§ 105(a), 363, 365, and Bankruptcy Rules 2002, 6004, 6006 for (I) Entry of an Order (A) Establishing Bidding and Auction Procedures Related to the Sale of All of the Debtors' Assets; (B) Approving Bid Protections for the Sale of the Debtors' Assets; (C) Scheduling an Auction and Sale Hearing for the Sale of the Debtors' Assets; (D) Establishing Certain Notice Procedures for Determining Cure Amounts for Executory Contracts and Leases to be Assigned; and (E) Granting Certain Related Relief; and (II) Entry of an Order (A) Approving the Sale of the Debtors' Assets Free and Clear of All Liens, Claims, Encumbrances and Interests; (B) Authorizing the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases; (C) Establishing Rejection Procedures and Guidelines for Conducting Store Closing Sales; and (D) Extending the Deadline to Assume or Reject Unexpired Leases of Nonresidential Real Property Pursuant to 11 U.S.C. § 365(d)(4) ([Dkt. 24](#)) (June 17,2009).

⁹⁰ 11 U.S.C. § 363 (“The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.”).

⁹¹ Brad B. Erens, *Bankruptcy Sales: The Stalking Horse*, JONES DAY PUBLICATIONS (March 2015), <https://perma.cc/B6K3-DMNC>.

assurance of compensation for the time and expense in putting together its offer for Eddie Bauer's assets and the risk arising from participating in the bidding and auction process in the form of a \$5,057,500 break-up fee, expense reimbursement up to \$250,000, plus escrow agent fees and expenses if their Asset Purchase Agreement with Eddie Bauer was terminated. The break-up fee is "essentially additional compensation to the stalking horse to induce it to be the initial bidder and lay the groundwork for other potential bidders in an auction."⁹² The stalking horse bid was \$202,300,000 cash for substantially all of Eddie Bauer's assets, assumption of at least 250 real property leases in the U.S. and 36 in Canada, while retaining substantially all of Eddie Bauer's employees.

Next, Eddie Bauer established bidding procedures under Section 363(b)(1).⁹³ This was a competitive, auction-style bidding procedure where bidders would deliver an executed Confidentiality Agreement, Letter of Indication with their estimated purchase price and any other consideration, as well as information to assure Eddie Bauer of the bidder's wherewithal to close the sale. Furthermore, Eddie Bauer established a \$6,200,000 "overbid amount," requiring that bidding start at \$208,500,000. The bidding would then go by at least \$500,000 increments past that amount. Further, the bidder would provide the funds for the break-up fee plus expenses to the stalking horse bidder. These procedures permitted credit bidding by Eddie Bauer's secured creditors, allowing those creditors to use their secured credit as a portion of a bid to purchase Eddie Bauer. The sale met the requirements of Section 363(f) (free and clear of interests), and creditor liens would attach to the proceeds of the sale.

Lastly, this motion provided for the DIP's assumption or rejection of executory contracts and unexpired leases;⁹⁴ for the court to lift store closing sales restrictions (i.e., that restrictions in store leases on store closing sales be invalidated and exempted from federal, state, and local laws, statutes, rules, and ordinances related to store closing sales); and for approval that the debtor pay certain or all of the allowed secured claims out of the proceeds of creditor collateral that was sold.

The court granted this motion and modified it to allow the rejection of inadequate bids, insufficient bids, or bids not conforming to the requirements of the Bankruptcy Code, bidding

⁹² Brad B. Erens, *Bankruptcy Sales: The Stalking Horse*, JONES DAY PUBLICATIONS (March 2015), <https://perma.cc/B6K3-DMNC>.

⁹³ 11 U.S.C. § 363 ("The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.").

⁹⁴ 11 U.S.C. § 365(a) (The debtor-in-possession "subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor."). Executory contracts are defined and discussed in depth later in this paper.

procedures, the terms and conditions of sale, or those “contrary to the best interests of the Debtors, their estates and creditors” prior to rejection by the bankruptcy court. Essentially, this order gave Eddie Bauer ultimate control of the bidding process, with oversight by the court.

At auction, the company’s assets, including its corporate name and trademarks, were sold following competitive bidding to Golden Gate Capital for \$286,000,000⁹⁵ at the closing of the bidding procedures. Golden Gate committed to also “maintain the substantial majority of Eddie Bauer’s stores and employees” and pay the break-up fee and expenses to Rainier Holdings.

B. Post-Sale Business

On August 3, 2009, in connection with the Section 363 sale, Eddie Bauer’s officers resigned, except for the Chief Financial Officer and the General Counsel, who continued in limited roles after that date.⁹⁶ As mentioned, substantially all of the employees were transferred to Golden Gate. The board of directors approved the appointment of a Chief Restructuring Officer, Brent Kugman, which the Bankruptcy court also approved. Mr. Kugman served as the sole executive officer at that point, with the debtors having no employees (having been transferred to Golden Gate).

⁹⁵ *Eddie Bauer Goes to Golden Gate*, NEW YORK TIMES (July 17, 2009), <https://perma.cc/3ZD8-C8ER>.

⁹⁶ In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Disclosure Statement for the First Amended Joint Plan of Liquidation of EBHI Holdings, Inc., et al. ([Dkt. 1269](#)) (January 26, 2009).

Chapter 6: Treatment of Eddie Bauer’s Executory Contracts

Eddie Bauer’s treatment of its executory contracts was a key aspect of its bankruptcy case. Executory contracts are generally defined as contracts with continuing performance obligations on both sides of the agreement, such as leases and some service agreements.⁹⁷ The bankruptcy code does not define executory contracts, but courts generally defer to Professor Countryman’s definition: “a contract which the obligation of both the bankrupt and the other party to the contract is so far clearly unperformed that failure of either to complete performance would constitute a material breach excusing the performance of the other.”⁹⁸

Executory contracts can generally be assumed, assumed and assigned, or rejected at the debtor’s will.⁹⁹ To assign an executory contract to the “new” entity that will continue after the chapter 11 reorganization, the bankruptcy estate must first assume the contract, then assign it to whatever entity continues the debtor’s business.¹⁰⁰ If assumed, payment of the executory contract will become an administrative expense of the estate.¹⁰¹ Additionally, the debtor will have cure any defaults or provide adequate assurance that the default will be cured, compensate the other party for any loss from a default or provide adequate assurance of compensation, and provide adequate assurance of future performance.¹⁰² If rejected, the debtor’s rejection will be treated as a pre-petition breach of that contract, creating an general unsecured claim against the debtor’s estate.¹⁰³

⁹⁷ Bob Eisenbach, *Executory Contracts—What Are They And Why Do They Matter In Bankruptcy?*, IN THE RED: THE BUSINESS BANKRUPTCY BLOG (July 18, 2006), <https://perma.cc/W8UA-N9WE>.

⁹⁸ *Executory Contracts under 365*, AMERICAN BANKRUPTCY INSTITUTE (Nov. 1, 2004), <https://perma.cc/62QP-Z3AU> (citing Vern Countryman, *Executory Contracts in Bankruptcy: Part I*, 57 MINN. L. REV. 439, 469 (1973)).

⁹⁹ 11 U.S.C. § 365(a).

¹⁰⁰ 11 U.S.C. § 365(f).

¹⁰¹ *See Executory Contracts under 365*, AMERICAN BANKRUPTCY INSTITUTE (Nov. 1, 2004), <https://perma.cc/62QP-Z3AU>

¹⁰² 11 U.S.C. § 365(b)(1).

¹⁰³ *See* 11 U.S.C. § 365(g).

In this case, as in most cases, Eddie Bauer assumed and assigned the leases for stores it wished to continue to operate after the Section 363 sale and rejected those it no longer wanted. In a few cases, Eddie Bauer also renegotiated the leases outside the bankruptcy process with the landlords for more favorable terms instead of rejection.¹⁰⁴ This renegotiation power is useful to both the landlord and debtor, as the debtor can obtain more favorable terms in its lease and the landlord can prevent the lease from being rejected outright in the bankruptcy.¹⁰⁵

Eddie Bauer received few objections to its assumption and assignment or rejection of its executory contracts, since the law in this area is very favorable to the debtor.¹⁰⁶ However, the executory contract holders did object on some grounds. First, there were objections based on the contract holders' rights to adequate assurance of future performance.¹⁰⁷ The contract holders

¹⁰⁴ Austin Fleming & Bryan C. Hathorn, *Tragedy on the Descent: The Ascent and Fall of Eddie Bauer*, CHAPTER 11 BANKRUPTCY CASE STUDIES, at 85–86 (2010) (citing Greg Lamm, *Eddie Bauer Cuts Size of Kemper Lease*, PUGET SOUND BUS. J. (June 22, 2009), <http://www.bizjournals.com/seattle/stories/2010/01/04/daily45.html>).

¹⁰⁵ *Id.*

¹⁰⁶ *See generally* 11 U.S.C. § 365 (the Code clearly provides the debtor with a lot of leeway in dealing with executory contracts).

¹⁰⁷ In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Limited Objection of the Macerich Company, the Forbes Company, Cousins Properties Incorporated, and Southgate Mall Associates to Motion Pursuant to 11 U.S.C. §§ 105(A), 363, 365, and Bankruptcy Rules 2002, 6004, 6004 [sic] for (I) Entry of an Order (A) Establishing Bidding and Auction Procedures Related to the Sale of All of the Debtors' Assets; (B) Approving Bid Protections for the Sale of the Debtors' Assets; (C) Scheduling an Auction and Sale Hearing for the Sale of the Debtors' Assets; (D) Establishing Certain Notice Procedures for Determining Cure Amounts for Executory Contracts and Leases to Be Assigned; and (E) Granting Certain Related Relief; and (II) Entry of an Order (A) Approving the Sale of the Debtors' Assets Free and Clear of All Liens, Claims, Encumbrances and Interests; (B) Authorizing the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases; (C) Establishing Rejection Procedures and Guidelines for Conducting Store Closing Sales; and (D) Extending the Deadline to Assume or Reject Unexpired Leases of Nonresidential Real Property Pursuant to 11 U.S.C. § 365(D)(4) ([Dkt. 140](#)) (June 25, 2009); In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Limited Objection by Capital Augusta Properties Limited Partnership to Debtors' Motion Pursuant to 11 U.S.C. §§ 105(A), 363, 365, and Bankruptcy Rules 2002, 6004, 6006 for (I) Entry of an Order (A) Establishing Bidding and Auction Procedures Related to the Sale of All of the Debtors' Assets; (B) Approving Bid Protections for the Sale of the Debtors' Assets; (C) Scheduling an Auction and Sale Hearing for the Sale of the Debtors' Assets; (D) Establishing Certain Notice Procedures for Determining Cure Amounts for Executory Contracts and Leases to be Assigned; and (E) Granting Certain Related Relief; and (II) Entry of an Order (A) Approving the Sale of the Debtors' Assets Free and Clear of all Liens, Claims, Encumbrances and Interests; (B) Authorizing the Assumption and Assignment of Certain Executory Contracts and Unexpired

were worried about the Section 363 buyer's ability to perform under the leases, and argued that more time would be needed to assess the buyer's performance abilities. The court largely rejected this argument for the non-leaseholders, but required that the unexpired, non-residential leaseholders be supplied with the bidders' financial information as they requested.¹⁰⁸

Additionally, the contract holders objected that provisions for their rights to cure and compensation for pecuniary loss were insufficient.¹⁰⁹ They asserted that Eddie Bauer's proposed fourteen-day window to object to their compensation amount or to cure the lease was not enough time. The court largely rejected this argument.¹¹⁰

Leases; (C) Establishing Rejection Procedures and Guidelines for Conducting Store Closing Sales; and (D) Extending the Deadline to Assume or Reject Unexpired Leases of Nonresidential Real Property Pursuant to 11 U.S.C. § 365(d)(4) ([Dkt. 149](#)) (June 25, 2009).

¹⁰⁸ In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Order Pursuant to 11 U.S.C. §§ 105(a), 363, 365, and Bankruptcy Rules 2002, 6004, 6006 (A) Establishing Bidding and Auction Procedures Related to the Sale of All of the Debtors' Assets; (B) Approving Bid Protections for the Sale of All of the Debtors' Assets; (C) Scheduling an Auction and Sale Hearing for the Sale of All of the Debtors' Assets; (D) Establishing Certain Notice Procedures for Determining Cure Amounts for Executory Contracts and Leases to be Assigned; and (E) Granting Certain Related Relief ([Dkt. 222](#)) (June 30, 2009).

¹⁰⁹ In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Limited Objection of the Macerich Company, the Forbes Company, Cousins Properties Incorporated, and Southgate Mall Associates to Motion Pursuant to 11 U.S.C. §§ 105(A), 363, 365, and Bankruptcy Rules 2002, 6004, 6004 [sic] for (I) Entry of an Order (A) Establishing Bidding and Auction Procedures Related to the Sale of All of the Debtors' Assets; (B) Approving Bid Protections for the Sale of the Debtors' Assets; (C) Scheduling an Auction and Sale Hearing for the Sale of the Debtors' Assets; (D) Establishing Certain Notice Procedures for Determining Cure Amounts for Executory Contracts and Leases to Be Assigned; and (E) Granting Certain Related Relief; and (II) Entry of an Order (A) Approving the Sale of the Debtors' Assets Free and Clear of All Liens, Claims, Encumbrances and Interests; (B) Authorizing the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases; (C) Establishing Rejection Procedures and Guidelines for Conducting Store Closing Sales; and (D) Extending the Deadline to Assume or Reject Unexpired Leases of Nonresidential Real Property Pursuant to 11 U.S.C. § 365(D)(4) ([Dkt. 140](#)) (June 25, 2009).

¹¹⁰ In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Order Pursuant to 11 U.S.C. §§ 105(a), 363, 365, and Bankruptcy Rules 2002, 6004, 6006 (A) Establishing Bidding and Auction Procedures Related to the Sale of All of the Debtors' Assets; (B) Approving Bid Protections for the Sale of All of the Debtors' Assets; (C) Scheduling an Auction and Sale Hearing for the Sale of All of the Debtors' Assets; (D) Establishing Certain Notice Procedures for Determining Cure Amounts for Executory Contracts and Leases to be Assigned; and (E) Granting Certain Related Relief ([Dkt. 222](#)) (June 30, 2009).

The contract holders also objected to the treatment of some clauses in their executory contracts being treated as unenforceable anti-assignment clauses.¹¹¹ Some shopping center lease provisions receive special treatment under the bankruptcy code based on the shopping center's requirements, among other things.¹¹² The contract holders also asserted their right to payment on post-petition obligations on unexpired leases until the debtor decided to assume or reject the contract. No order appeared to address either of these objections, but the Code requires that both be met, so it is likely the objections were at least acknowledged by the debtors and accommodating arrangements were made.

One key objection involved Eddie Bauer's non-lease executory contract with Distribution Management Group, Inc. ("DMG").¹¹³ DMG had negotiated favorable shipping deals with FedEx and other distributors for Eddie Bauer and designed efficient shipping schemes that saved Eddie Bauer millions of dollars. DMG argued that its agreement and the FedEx shipping agreement were essentially one contract because of their involvement in negotiation the FedEx agreement, and that Eddie Bauer had to assume and assign or reject both agreements. Eddie Bauer argued that the DMG contract was separate from its contract with FedEx, and that it could assume and assign the shipping contract with FedEx and reject DMG contract.¹¹⁴ The court,

¹¹¹ In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Limited Objection by Capital Augusta Properties Limited Partnership to Debtors' Motion Pursuant to 11 U.S.C. §§ 105(A), 363, 365, and Bankruptcy Rules 2002, 6004, 6006 for (I) Entry of an Order (A) Establishing Bidding and Auction Procedures Related to the Sale of All of the Debtors' Assets; (B) Approving Bid Protections for the Sale of the Debtors' Assets; (C) Scheduling an Auction and Sale Hearing for the Sale of the Debtors' Assets; (D) Establishing Certain Notice Procedures for Determining Cure Amounts for Executory Contracts and Leases to be Assigned; and (E) Granting Certain Related Relief; and (II) Entry of an Order (A) Approving the Sale of the Debtors' Assets Free and Clear of all Liens, Claims, Encumbrances and Interests; (B) Authorizing the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases; (C) Establishing Rejection Procedures and Guidelines for Conducting Store Closing Sales; and (D) Extending the Deadline to Assume or Reject Unexpired Leases of Nonresidential Real Property Pursuant to 11 U.S.C. § 365(d)(4) ([Dkt. 149](#)) (June 25, 2009).

¹¹² 11 U.S.C. § 365(b)(3).

¹¹³ In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Objection of Distribution Management Group to Partial Assumption and Assignment of DMG-FedEx Contracts and DMG Confidentiality Agreement to Everest Holdings LLC ([Dkt. 603](#)) (August 13, 2009).

¹¹⁴ In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Debtors' Response to Objection of Distribution Management Group, Inc., to Partial Assumption and Assignment of DMG-FedEx Contracts and DMG Confidentiality Agreement to Everest Holdings LLC ([Dkt. 861](#)) (June 26, 2009).

however, found that DMG had not been timely in its objection to Eddie Bauer's rejection of its contract, and thus the objection failed.¹¹⁵

¹¹⁵ In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Order, Pursuant to Sections 105, 363, and 365 of the Bankruptcy Code and Bankruptcy Rules 2002, 6004, and 6006 Approving the Rejection of Unexpired Real Property Lease and Overruling the Objections of Distribution Management Group, Inc. ([Dkt. 908](#)) (October 22, 2009).

Chapter 7: Treatment of Administrative Expenses

Most of Eddie Bauer's administrative expenses were either transferred to the Section 363 buyer or paid out of the funds set aside from the DIP facility.¹¹⁶ However, several creditors sought payment of their claims as administrative expenses outside of the ordinary course of business, which requires court approval.¹¹⁷

One such creditor was Peter J. Solomon Company, the investment bank Eddie Bauer hired to solicit potential bidders for the Section 363 sale that located Rainier Holdings, LLC as a stalking horse bidder.¹¹⁸ Peter J. Solomon Company submitted a \$3.75 million claim. The Official Committee of Unsecured Creditors objected to Peter J. Solomon Company's claim, arguing that most of Peter J. Solomon Company's work occurred pre-petition, with only thirty days of work falling after the petition filing date.¹¹⁹ The Official Committee of Unsecured

¹¹⁶ See *In re EBHI Holdings, Inc.*, Case No. 09-12099, Bankr. Del., Emergency Motion for Interim and Final Orders (I) Authorizing Debtors to Obtain Postpetition Financing Pursuant to 11 U.S.C. §§ 105, 362, 363 and 364; (II) Authorizing Use of Cash Collateral Pursuant to 11 U.S.C. § 363; (III) Granting Liens and Superpriority Claims; (IV) Granting Adequate Protection to Prepetition Secured Parties Pursuant to 11 U.S.C. §§ 362, 362, 363, and 364; and (V) Scheduling Final Hearing on the Debtors' Motion to Incur Such Financing on a Permanent Basis Pursuant to Bankruptcy Rule 4001 ([Dkt. 14](#)) (June 17, 2009); *In re EBHI Holdings, Inc.*, Case No. 09-12099, Bankr. Del., Order Granting Motion Pursuant to 11 U.S.C. §§ 105(a), 363(b), 507(a) and 541(d), (I) Authorizing Payment of Certain Taxes and Fees and (II) Authorizing and Directing Banks and Financial Institutions to Honor and Process Related Checks and Transfers ([Dkt. 59](#)) (June 18, 2009); *In re EBHI Holdings, Inc.*, Case No. 09-12099, Bankr. Del., Order Granting Motion for an Order (A) Authorizing Debtors to Pay Prepetition Claims of Certain (I) Critical Vendors, (II) Administrative Claimholders, (III) Customs Agents and Shippers, (B) Authorizing the Debtors to Pay for Postpetition Delivery of Outstanding Orders and (C) Granting Certain Related Relief ([Dkt. 61](#)) (June 18, 2009); *In re EBHI Holdings, Inc.*, Case No. 09-12099, Bankr. Del., Order (A) Authorizing the Debtors to Pay Certain Prepetition: (I) Wages, Salaries, and other Compensation; (II) Employee, Medical and Similar Benefits; (III) Reimbursable Employee Expenses; (IV) Other Miscellaneous Employee Expenses and Benefits; and (V) Independent Contractor Fees and Expenses, and (B) Directing Banks to Receive, Process, Honor and Pay All Checks Presented for Payment and Electronic Payment Requests Relating to the Foregoing ([Dkt. 65](#)) (June 18, 2009).

¹¹⁷ 11 U.S.C. § 363(b).

¹¹⁸ *In re EBHI Holdings, Inc.*, Case No. 09-12099, Bankr. Del., Debtors' Application Pursuant to Sections 327(a) and 328(a) of the Bankruptcy Code for an Order Authorizing the Debtors to Employ Peter J. Solomon Company as Investment Banker and Financial Advisor for the Debtors *Nunc Pro Tunc* to the Petition Date ([Dkt. 28](#)) (June 17, 2009).

¹¹⁹ *In re EBHI Holdings, Inc.*, Case No. 09-12099, Bankr. Del., Limited Objection by the Official Committee of Unsecured Creditors to Application for Order Authorizing the Retention and

Creditors asserted that this claim would be better characterized as a general unsecured prepetition debt, rather than an administrative expense of the bankruptcy. The court disagreed, however, and approved Eddie Bauer's engagement of Peter J. Solomon Company and fees of \$2.95 million plus \$66,000 in transactions expenses to be paid to Peter J. Solomon Company as administrative expenses.¹²⁰

Another creditor that sought administrative expense treatment was the Pension Benefit Guarantee Corporation (the "PBGC").¹²¹ The PBGC claimed minimum funding obligations for retirement plans, unfunded benefit liabilities, and premiums in the pension plans should all be paid as administrative expenses of the bankruptcy. After negotiating these claims with Eddie Bauer, PBGC and Eddie Bauer agreed that PBGC was entitled to a \$21 million general unsecured claim in the bankruptcy filing.¹²²

Employment of Peter J. Solomon Company as Investment Banker and Financial Advisor to the Debtors Under 11 U.S.C. §327(a), 328(a) ([Dkt. 265](#)) (July 6, 2009).

¹²⁰ In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Order Pursuant to Sections 327(a) and 328(a) of the Bankruptcy Code Authorizing the Debtors to Retain and Employ Peter J. Solomon Company as Investment Banker and Financial Advisor for the Debtors *Nunc Pro Tunc* to the Petition Date ([Dkt. 310](#)) (July 8, 2009); In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., First and Final Application of Peter J. Solomon Company as Investment Banker and Financial Advisor to the Debtors for Interim and Final Allowance of Compensation and Reimbursement of Expenses for the Period from June 17, 2009 through July 31, 2009 ([Dkt. 677](#)) (Aug. 28, 2009); In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Order Granting First and Final Application of Peter J. Solomon Company as Investment Banker and Financial Advisor to the Debtors for Interim and Final Allowance of Compensation and Reimbursement of Expenses for the Period from June 17, 2009 through July 31, 2009. ([Dkt. 764](#)) (Sept. 21, 2009).

¹²¹ In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Debtors' Objection to Proof of Claim Nos. 890, 891, 892, 893, 956, 966, 968, 969 and 1031 Filed by the Pension Benefit Guaranty Corporation for Unpaid Minimum Funding Contributions ([Dkt. 1129](#)) (Dec. 23, 2009); In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Debtors' Objection to Proof of Claim Nos. 902, 903, 904, 905, 1054, 1055, 1056, 1057 and 1058 Filed by the Pension Benefit Guaranty Corporation for Unfunded Benefit Liabilities ([Dkt. 1130](#)) (Dec. 23, 2009); In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Debtors' Objection to Proof of Claim Nos. 950, 951, 953, 955, 957, 1000, 1001, 1002 and 1003 filed by the Pension Benefit Guaranty Corporation for Termination and Other Premium Liabilities ([Dkt. 1131](#)) (Dec. 23, 2009).

¹²² In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Order Approving Stipulation for Resolution and Settlement of All Claims Filed by the Pension Benefit Guaranty Corporation Against the Debtors ([Dkt. 1302](#)) (Jan. 21, 2010).

Finally, Eddie Bauer also requested that incentive plan payments to its executives and managers receive administrative expense treatment.¹²³ The plans called for Eddie Bauer executives to share 5% of the proceeds and Eddie Bauer managers to share 2.5% of the proceeds of the Section 363 sale if the sale amount exceeded the minimum stalking horse bid. Surprisingly, this request was approved with no objections.¹²⁴

¹²³ In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Motion of the Debtors for Entry of an Order Approving Key Executive Incentive Plan and Key Manager Incentive Plan ([Dkt. 197](#)) (June 29, 2009).

¹²⁴ In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Order Approving Key Executive Incentive Program and Key Manager Incentive Program ([Dkt. 493](#)) (July 22, 2009).

Chapter 8: Claims Process and Eddie Bauer's Objections

Creditors are required under the Bankruptcy Code to submit proof of their claims to determine how much they are entitled to in a distribution of the estate's assets and to determine their voting rights on the plan.¹²⁵ The court approved a claims bar date, i.e., the date by which creditors must submit their claims, of September 21, 2009 for individual claims and December 14, 2009 for governmental claims.¹²⁶ After receiving these claims, Eddie Bauer was then entitled to file objections to those claims.

Eddie Bauer filed six total nonsubstantive omnibus objections, generally for duplicate claims, amended claims, late-filed claims, and claims with no supporting documentation.¹²⁷ Four of the nonsubstantive omnibus objections had no creditor response and were granted.¹²⁸ Several

¹²⁵ 11 U.S.C. §§ 501, 502, 1129(c).

¹²⁶ In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Order Pursuant to Bankruptcy Rule 3003(c)(3) and Local Rule 2002-1(e), Establishing Bar Dates for Filing Proofs of Claim and Approving the Form and Manner of Notice Thereof ([Dkt. 470](#)) (July 21, 2009).

¹²⁷ We relied on Austin Fleming & Bryan C. Hathorn, *Tragedy on the Descent: The Ascent and Fall of Eddie Bauer*, CHAPTER 11 BANKRUPTCY CASE STUDIES (2010), in helping to assemble the objection filings. In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Debtors' First Omnibus (Non-Substantive) Objection to Claims Pursuant to § 502(b) of the Bankruptcy Code, Bankruptcy Rules 3003 and 3007, and Local Rule 3007-1 ([Dkt. 996](#)) (November 20, 2009); In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Debtors' Second Omnibus (Non-Substantive) Objection to Claims Pursuant to § 502(b) of the Bankruptcy Code, Bankruptcy Rules 3003 and 3007, and Local Rule 3007-1 ([Dkt. 997](#)) (November 20, 2009); In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Debtors' Fourth Omnibus (Non-Substantive) Objection to Claims Pursuant to § 502(b) of the Bankruptcy Code, Bankruptcy Rules 3003 and 3007, and Local Rule 3007-1 ([Dkt. 1304](#)) (January 29, 2010); In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Debtors' Seventh Omnibus (Non-Substantive) Objection to Claims Pursuant to § 502(b) of the Bankruptcy Code, Bankruptcy Rules 3003 and 3007, and Local Rule 3007-1 ([Dkt. 1378](#)) (February 26, 2010); In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Debtors' Ninth Omnibus (Non-Substantive) Objection to Claims Pursuant to § 502(b) of the Bankruptcy Code, Bankruptcy Rules 3003 and 3007, and Local Rule 3007-1 ([Dkt. 1403](#)) (March 5, 2010); In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Debtors' Eleventh Omnibus (Non-Substantive) Objection to Claims Pursuant to § 502(b) of the Bankruptcy Code, Bankruptcy Rules 3003 and 3007, and Local Rule 3007-1 ([Dkt. 1503](#)) (April 9, 2010).

¹²⁸ In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Order Sustaining Debtors' First Omnibus (Non-Substantive) Objection to Claims Pursuant to § 502(b) of the Bankruptcy Code, Bankruptcy Rules 3003 and 3007, and Local Rule 3007-1 ([Dkt. 1098](#)) (December 17, 2009); In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Order Sustaining Debtors' Fourth Omnibus (Non-Substantive) Objection to Claims Pursuant to § 502(b) of the Bankruptcy Code, Bankruptcy Rules 3003 and 3007, and Local Rule 3007-1 ([Dkt. 1384](#)) (March 2, 2010); In re

creditors objected to the second nonsubstantive omnibus objection, stating two main arguments: (i) that their claims were mailed well before the claims bar date, but were not received through no fault of the creditor,¹²⁹ and (ii) claims requesting that life insurance claims be paid as priority claims in the bankruptcy.¹³⁰ The court allowed the creditor objections on the bar date issue where creditors submitted proof that their claims were timely submitted but not received, but rejected the life insurance objections.¹³¹

Eddie Bauer also filed five total substantive omnibus objections, generally arguing that claims should be reclassified; modified and allowed; deemed satisfied; deemed not liable; modified and reclassified; liquidated and allowed or liquidated and reclassified.¹³² Four of the

EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Order Sustaining Debtors' Ninth Omnibus (Non-Substantive) Objection to Claims Pursuant to § 502(b) of the Bankruptcy Code, Bankruptcy Rules 3003 and 3007, and Local Rule 3007-1 ([Dkt. 1490](#)) (April 5, 2010); In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Order Sustaining Debtors' Seventh Omnibus (Non-Substantive) Objection to Claims Pursuant to § 502(b) of the Bankruptcy Code, Bankruptcy Rules 3003 and 3007, and Local Rule 3007-1 ([Dkt. 1491](#)) (April 5, 2010).

¹²⁹ In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Response to Debtors' Second Omnibus Objection to Claims (Non-Substantive) ([Dkt. 1066](#)) (December 7, 2009); In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Response to Debtors' Second Omnibus Objection to Claims (Non-Substantive). ([Dkt. 1070](#)) (December 9, 2010); In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Response of Carmen's Distribution Systems, Inc. to Debtors' Second Omnibus (Non-Substantive) Objection to Claims Pursuant to § 502(b) of the Bankruptcy Code, Bankruptcy Rules 3003 and 3007, and Local Rule 3007-1 ([Dkt. 1081](#)) (December 14, 2009); In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Response of Carmen's Distribution Systems, Inc. to Debtors' Second Omnibus (Non-Substantive) Objection to Claims Pursuant to § 502(b) of the Bankruptcy Code, Bankruptcy Rules 3003 and 3007, and Local Rule 3007-1 ([Dkt. 1089](#)) (December 14, 2009).

¹³⁰ In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Response to Debtors' Second Omnibus Objection to Claims (Non-Substantive) ([Dkt. 1090](#)) (December 14, 2009); In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Objection to Debtors' Second Omnibus Objection to Claims (Non-Substantive) ([Dkt. 1092](#)) (December 14, 2009).

¹³¹ In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Order Sustaining Debtors' Second Omnibus (Non-Substantive) Objection to Claims Pursuant to § 502(b) of the Bankruptcy Code, Bankruptcy Rules 3003 and 3007, and Local Rule 3007-1 ([Dkt. 1164](#)) (January 4, 2010).

¹³² In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Debtors' Third Omnibus (Substantive) Objection to Claims Pursuant to § 502(b) of the Bankruptcy Code, Bankruptcy Rules 3003 and 3007, and Local Rule 3007-1 ([Dkt. 998](#)) (November 20, 2009); In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Debtors' Fifth Omnibus (Substantive) Objection to Claims Pursuant to § 502(b) of the Bankruptcy Code, Bankruptcy Rules 3003 and 3007, and Local Rule 3007-1 ([Dkt. 1305](#)) (January 29, 2010); In re EBHI Holdings, Inc., Case No. 09-

substantive omnibus objections received no response and were granted.¹³³ One creditor objected to the third substantive omnibus objection, resulting in the court granting the creditor's request for a \$10,000 life insurance policy to be reclassified as a general unsecured claim.¹³⁴

12099, Bankr. Del., Debtors' Sixth Omnibus (Substantive) Objection to Claims Pursuant to § 502(b) of the Bankruptcy Code, Bankruptcy Rules 3003 and 3007, and Local Rule 3007-1 ([Dkt. 1306](#)) (January 29, 2010); In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Debtors' Eighth Omnibus (Substantive) Objection to Claims Pursuant to § 502(b) of the Bankruptcy Code, Bankruptcy Rules 3003 and 3007, and Local Rule 3007-1 ([Dkt. 1379](#)) (February 26, 2010); In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Debtors' Tenth Omnibus (Substantive) Objection to Claims Pursuant to § 502(b) of the Bankruptcy Code, Bankruptcy Rules 3003 and 3007, and Local Rule 3007-1 ([Dkt. 1404](#)) (March 5, 2010).

¹³³ In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Order Sustaining Debtors' Sixth Omnibus (Substantive) Objection to Claims Pursuant to § 502(b) of the Bankruptcy Code, Bankruptcy Rules 3003 and 3007, and Local Rule 3007-1 ([Dkt. 1412](#)) (March 9, 2010); In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Order Sustaining Debtors' Fifth Omnibus (Substantive) Objection to Claims Pursuant to § 502(b) of the Bankruptcy Code, Bankruptcy Rules 3003 and 3007, and Local Rule 3007-1 ([Dkt. 1413](#)) (March 9, 2010); In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Order Sustaining Debtors' Tenth Omnibus (Substantive) Objection to Claims Pursuant to § 502(b) of the Bankruptcy Code, Bankruptcy Rules 3003 and 3007, and Local Rule 3007-1 ([Dkt. 1492](#)) (April 5, 2010); In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Order Sustaining Debtors' Eighth Omnibus (Substantive) Objection to Claims Pursuant to § 502(b) of the Bankruptcy Code, Bankruptcy Rules 3003 and 3007, and Local Rule 3007-1 ([Dkt. 1493](#)) (April 5, 2010).

¹³⁴ In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Response to Third Omnibus Objection to Claims (Substantive) ([Dkt. 1068](#)) (December 8, 2009); In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Order Sustaining Debtors' Third Omnibus (Substantive) Objection to Claims Pursuant to § 502(b) of the Bankruptcy Code, Bankruptcy Rules 3003 and 3007, and Local Rule 3007-1 ([Dkt. 1307](#)) (January 29, 2010).

Chapter 9: Liquidation Plan after the Section 363 Sale

At its most basic level, a chapter 11 plan is “a collective contract among the debtor, its creditors, equity interest-holders, and administrative claimants.”¹³⁵ Generally speaking, the plan divides up creditors and interest-holders into classes of similarly situated parties, who vote on the proposed plan as a class.¹³⁶ The plan broadly categorizes the classes into tiers of administrative claimants, secured creditors, unsecured creditors, special unsecured creditors, and equity-holders in order of priority on the payment ladder. Those with higher priority on the ladder are paid first and, if paid-in-full, are considered “unimpaired” and deemed to vote in favor of the plan. As the funds are distributed down the ladder, classes become “impaired” and receive less than full satisfaction of their claims or nothing at all, entitling those classes to a vote on the plan (or deeming to have rejected if the class receives no distribution). For example, a Class 5 claim cannot be paid if Class 4 is not paid in full, unless Class 4 agrees to the less-favorable treatment. Furthermore, the creditors must receive at least as much under the plan as they would under a chapter 7 plan.¹³⁷

The administrative claimants have first priority to payouts and, in the vast majority of cases, are paid in full on the effective date or as soon thereafter as the court approves their fee and expense applications—this includes the attorneys, accountants and claims agents associated with the chapter 11 case. Few cases are administratively insolvent and cannot pay down the first rung, but in those cases, there can be no plan in the first place.

Next up are the secured creditors, which must be subdivided into “similarly situated”¹³⁸ classes among them. The creditors are divided into different classes to specify different treatment for creditors that are not similarly situated and not give them all the same loan terms. These creditors are normally dealt with in bankruptcy via refinancing—either by an exit facility¹³⁹ or refinancing with the existing lender, e.g., by extending the term of the note.

¹³⁵ MICHAEL L. BERNSTEIN & GEORGE W. KUNEY, *BANKRUPTCY IN PRACTICE*, FIFTH EDITION (2015).

¹³⁶ *Id.*

¹³⁷ 11 U.S.C. § 1129(a)(7)(A)(ii).

¹³⁸ “Similarly situated creditors” are lenders with *pari passu* (same priority) interest in the same collateral.

¹³⁹ An exit facility substitutes the lender or lender group with a new lender group.

The third broad category is the general unsecured creditors. Unsecured creditors are paid after the secured creditors, as is normally the case. In bankruptcy, unsecured creditors run a greater risk of receiving nothing on their debt, as all the slices of the pie may have already been passed out by the time the unsecured parties get to the head of the line.

Special unsecured creditors may be identified for separate classification and treatment. These may include those with whom the debtor plans to continue to do business as supply vendors and, thus, they may be amenable to less favorable treatment in order to obtain future business. These could also be secured creditors with deficiency claims.

Lastly, the equity interest-holders get whatever is left after the other distributions have been made, if there is any left after the administrative expenses, secured creditors, and unsecured creditors have been satisfied.

A. The Eddie Bauer Liquidation Plan

The initial proposed plan¹⁴⁰ to liquidate Eddie Bauer and distribute its remaining assets¹⁴¹ was filed along with the accompanying disclosure statement¹⁴² on December 22, 2009. On January 26, 2009, amendments to the plan¹⁴³ and the disclosure statement¹⁴⁴ were filed. As there were a substantial number of impaired creditors, the debtors invoked the “cramdown” provision of Section 1129(b)(1).¹⁴⁵ Under the cramdown provision, it is possible to confirm a plan without satisfying the “every class has voted to accept the plan” requirement of Section 1129(a)(8)¹⁴⁶ if

¹⁴⁰ In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Joint Plan of Liquidation of EBHI Holdings, Inc., et al. ([Dkt. 1121](#)) (December 22, 2009).

¹⁴¹ 11 U.S.C. § 1129.

¹⁴² In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Disclosure Statement for the Joint Plan of Liquidation of EBHI Holdings, Inc., et al. ([Dkt. 1122](#)) (December 22, 2009).

¹⁴³ In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., First Amended Joint Plan of Liquidation of EBHI Holdings, Inc., et al. ([Dkt. 1269](#)) (January 26, 2009).

¹⁴⁴ In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Disclosure Statement for the First Amended Joint Plan of Liquidation of EBHI Holdings, Inc., et al. ([Dkt. 1270](#)) (January 26, 2009).

¹⁴⁵ 11 U.S.C. § 1129(b)(1).

¹⁴⁶ 11 U.S.C. § 1129(a)(8) (requiring that all every class has to approve the plan via a vote. Creditors representing one half in number and two thirds in total amount of each class must vote yes in order to approve the plan).

“the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.”¹⁴⁷ To pass that test, the plan must pass the requirements of Section 1129(b)(2)¹⁴⁸.

The first priority claims¹⁴⁹ in this case were the administrative expenses, referred to as unclassified claims. Along with administrative expenses, the unclassified claims included statutory fees, professional fees, and priority tax claims. The bankruptcy estate was not anticipated to be administratively insolvent, meaning the unclassified claims would be paid in full. The administrative expense claims totaled approximately \$30,660,000, with a range of \$150,000 to \$240,000 of allowed claims. The priority tax claims were approximately \$3,350,000 in the aggregate, with \$280,000 to \$2,300,000 of that amount allowed. The statutory fees and professional claims were both listed at \$0 asserted and allowed.

Furthermore, the plan provided for substantive consolidation of the debtors regarding voting and treatment of all claims and interests except General Secured Claims.

The classified claims were organized as follows: Class 1 Other Priority Claims, Class 2 General Secured Claims, Class 3 Term Lender Secured Claims, Class 4 General Unsecured Claims, Class 5 Noteholder Securities Claims, Class 6 Intercompany Claims, Class 7A Interests and Class 7B Interests and Securities Claims. Further, Class 1 Other Priority Claims and Class 2 General Secured Claims were not impaired by the plan. Classes 3 through 7B were impaired under the plan.

¹⁴⁷ 11 U.S.C. § 1129(b)(1).

¹⁴⁸ 11 U.S.C. § 1129(b)(2) provides three categories of claimants: A) secured equitable, B) unsecured equitable, and C) equity equitable. The secured parties must be able to retain the liens securing their claims, must receive the proceeds from the sale of their collateral under the Section 363 sale, or receive the “indubitable equivalent” of their claims. The unsecured and equity categories are subject to the absolute priority rule, which provides that if a class receives nothing, no class below it can receive anything.

¹⁴⁹ In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Disclosure Statement for the First Amended Joint Plan of Liquidation of EBHI Holdings, Inc., et al. ([Dkt. 1270](#)) (January 26, 2009).

| Class | Description | Approximate Amount Asserted | Range of Estimated Allowed Amounts | Range of Estimated Recovery | Status |
|-------|-------------------------------|-----------------------------|------------------------------------|-----------------------------|--|
| N/A | Administrative Expense Claims | \$30,660,000 | \$150,000 - \$240,000 | 100% | Unclassified and not entitled to vote |
| N/A | Priority Tax Claims | \$3,350,000 | \$280,000 - \$2,300,000 | 100% | Unclassified and not entitled to vote |
| N/A | Statutory Fees | \$0 | \$0 | 100% | Unclassified and not entitled to vote |
| N/A | Professional Claims | \$0 | \$0 | 100% | Unclassified and not entitled to vote |
| 1 | Other Priority Claims | \$270,000 | \$0 - \$50,000 | 100% | Unimpaired, deemed to accept the Plan and not entitled to vote |
| 2 | General Secured Claims | \$1,200,000 | \$0 - \$900,000 | 100% | Unimpaired, deemed to accept the Plan and not entitled to vote |
| 3 | Term Lender Secured Claim | \$202,993,054 | \$202,993,054 | 85%-95% | Impaired and entitled to vote |
| 4 | General Unsecured Claims | \$165,113,408 | \$104,843,408 - \$143,843,408 | 2%-17% | Impaired and entitled to vote |
| 5 | Noteholders Securities Claims | N/A | N/A | N/A | Impaired, deemed to reject the Plan and not entitled to vote |
| 6 | Intercompany Claims | N/A | N/A | N/A | Impaired, deemed to reject the Plan and not entitled to vote |
| 7A | Interests | N/A | N/A | N/A | Impaired, deemed to reject the Plan and not entitled to vote |
| 7B | Interests Securities Claims | N/A | N/A | N/A | Impaired, deemed to reject the Plan and not entitled to vote |

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1. Class 1 Other Priority Claims

These included “any claim, other than an administrative expense claim or a priority tax claim, of a creditor to the extent such claim is entitled to priority” pursuant to Section 507(a).¹⁵¹ These claims would receive cash proceeds from the Section 363 sale in full satisfaction of their

¹⁵⁰ In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Disclosure Statement for the First Amended Joint Plan of Liquidation of EBHI Holdings, Inc., et al. ([Dkt. 1270](#)) (January 26, 2009).

¹⁵¹ 11 U.S.C. § 507.

claims or other treatment as the parties agreed to in writing.¹⁵² Since Class 1 was not impaired and was “deemed to have accepted the plan” pursuant to Section 1126(f),¹⁵³ they were not entitled to vote on the plan. There were approximately \$270,000 of claims asserted under this class, with \$0 to \$50,000 of estimated allowed amounts.¹⁵⁴¹⁵⁵ This class would recover 100% of their claims.¹⁵⁶

2. Class 2 General Secured Claims

This class included all secured claims against the debtors other than the Class 3 term lender claims. The claims in this class totaled \$1,200,000 approximately in terms of the amount asserted, \$0 to \$900,000 estimated range of allowed amounts at a 100% recovery rate. The creditors in this class would receive

“(a) [c]ash equal to the amount of such Allowed General Secured Claim, or (b) such other treatment as to which the Debtors and the holder of such Allowed General Secured Claim have agreed upon in writing, and the Liens and security interests on the Debtors’ Assets securing each such Allowed General Secured Claim shall be released and the Debtors and their Estates shall no further liability therefor.”

¹⁵² In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Disclosure Statement for the First Amended Joint Plan of Liquidation of EBHI Holdings, Inc., et al. ([Dkt. 1270](#)) (January 26, 2009).

¹⁵³ 11 U.S.C. § 1126.

¹⁵⁴ In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Disclosure Statement for the First Amended Joint Plan of Liquidation of EBHI Holdings, Inc., et al. ([Dkt. 1270](#)) (January 26, 2009).

¹⁵⁵ “Under 11 U.S.C. § 1129(b), a Chapter 11 debtor can “cramdown” a reorganization plan over the dissent of a secured creditor only if the plan provides the creditor with deferred payments of a “value” at least equal to the “allowed amount” of the secured claim as of the effective date of the plan. In other words, the deferred payments, discounted to present value by applying an appropriate interest rate (the “cramdown rate”), must equal the allowed amount of the secured creditor's claim.” 17 A.L.R. Fed. 3d Art. 8.

¹⁵⁶ In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Disclosure Statement for the First Amended Joint Plan of Liquidation of EBHI Holdings, Inc., et al. ([Dkt. 1270](#)) (January 26, 2009).

Additionally, deficiency claims under this class would be treated as Class 4 General Unsecured Claims under the plan. Since Class 2 was not impaired, it was deemed to have accepted the plan pursuant to Section 1126(f) and could not vote on the plan.

3. Class 3 Term Lender Secured Claims

This class includes the Pre-Petition Term Agent's claim on behalf of the Pre-Petition Term Lenders, allowed in the amount of \$202,993,054 (100% of the total amount asserted) plus "post-petition interest and all out-of-pocket fees and expenses of the Pre-Petition Term Agent and the Pre-Petition Term Lenders (including, but limited to, attorney fees, audit fees, appraiser fees and financial advisor fees) as provided for in the Committee Settlement Stipulation." The debtors estimated that 85% to 95% of this amount would be recovered. In full satisfaction of their claim, this class would receive periodic distributions from the liquidating trust. Furthermore, the deficiency claim and adequate protection claim of this class were released and cancelled as part of the Committee Settlement Stipulation. As this class was impaired, it was permitted to vote on the plan.

4. Class 4 General Unsecured Claims

This class included all unsecured claims other than the term lender deficiency claims, the intercompany claims, the noteholder securities claims and the interests securities claims. The general unsecured claimholders would receive the remaining available cash after Eddie Bauer's distribution to the unclassified and classified claims. The holder of an allowed general unsecured claim would receive periodic distributions from the liquidating trust on a pro rata basis with other holders of such claims. The debtors estimated \$165,113,408 asserted in this class, \$104,843,408 to \$143,843,408 of which would be allowed, and an estimated 2% to 17% rate of recovery. Since Class 4 was impaired, it could vote on the plan.

5. Class 5 Noteholder Securities Claims

Noteholder Securities Claims included "unknown claims, demands, rights, liabilities and causes of action of any kind whatsoever, known or unknown, which have been or could be asserted . . . against any debtor and/or the indenture trustee arising out of, relating to or in connection with" the purchase, sale, or other actions taken in connection with the Senior Notes. These claims did not include direct claims for payment for principal, interest, fees and expenses due under the Senior Notes. There were no estimated amounts provided asserted or allowed for these claims. Holders of such claims would receive nothing under the plan, and their claims would be cancelled. As a result, they were deemed to have rejected the plan under Section 1126(g).¹⁵⁷

¹⁵⁷ 11 U.S.C. § 1126(g).

6. Class 6 Intercompany Claims

This class of claims were the claims of any debtor against any other debtor in the consolidated bankruptcy, but excluded claims of a debtor against a non-debtor affiliate or a non-debtor subsidiary.¹⁵⁸ Since the cases were consolidated, these claims received no distribution and were cancelled. The class was impaired and deemed to have rejected the plan under Section 1126(g).¹⁵⁹

7. Class 7A Interests and Class 7B Interests and Securities Claims.

In this context, Class 7A interests meant, “in the context of holding an equity security of the debtors . . . an interest or share in, or warrant, option, restricted stock unit, or other right asserted against[] the Company of the type described in the definition of ‘equity security’” under Section 101(16)¹⁶⁰. The class included “all common stock and all warrants, options or other rights to purchase or subscribe to, or otherwise obtain common stock issued by the company.”¹⁶¹ Holders of interests received no distributions, their debts were cancelled, and as impaired parties, were deemed to have rejected the plan.¹⁶²

Class 7B interests securities claims included “unknown claims, demands, rights, liabilities, and causes of action” arising from the purchase, sale or other decision made or foregone relating to the interests, the purchase, ownership or sale of the interests, and any other claims arising out of the interests that would be subject to Section 510(b).¹⁶³ Holders of Class 7B

¹⁵⁸ In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Disclosure Statement for the First Amended Joint Plan of Liquidation of EBHI Holdings, Inc., et al. ([Dkt. 1270](#)) (January 26, 2009).

¹⁵⁹ *Id.*; 11 U.S.C. § 1126(g).

¹⁶⁰ 11 U.S.C. § 101(16).

¹⁶¹ In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Disclosure Statement for the First Amended Joint Plan of Liquidation of EBHI Holdings, Inc., et al. ([Dkt. 1270](#)) (January 26, 2009).

¹⁶² 11 U.S.C. § 1126(g).

¹⁶³ 11 U.S.C. § 510(b).

interests securities claims received no distributions, their debts were cancelled, and as impaired parties, were deemed to have rejected the plan.¹⁶⁴

B. Court approval of the plan

On January 29, 2010, the bankruptcy court approved the disclosure statement, established the voting record date and deadline, approved procedures for soliciting, receiving and tabulating votes on the plan, filing objections to the plan, and approving the manner and forms of notice.¹⁶⁵ The court found that the disclosure statement contained adequate information under Section 1125,¹⁶⁶ and that the info provided was “in sufficient detail” and “reasonably practicable in light of the nature and history of the debtor.” The Court set the date for the confirmation hearing for March 18, 2010 and the deadline for filing and serving objections to confirmation of the plan on March 4, 2010.¹⁶⁷ The voting record date for Senior Notes and Interests was January 21, 2010, and January 28, 2010, for all other claims.

¹⁶⁴ 11 U.S.C. § 1126(g).

¹⁶⁵ In re EBHI Holdings, Inc., Case 09-12099, Bankr. Del., Order (A) Approving the Disclosure Statement, (B) Establishing the Voting Record Date, Voting Deadline and Other Dates, (C) Approving Procedures for Soliciting, Receiving and Tabulating Votes on the Plan and for Filing Objections to the Plan and (D) Approving the Manner and Forms of Notice and Other Related Documents. ([Dkt. 1289](#)) (January 29, 2010).

¹⁶⁶ 11 U.S.C. § 1125.

¹⁶⁷ In re EBHI Holdings, Inc., Case 09-12099, Bankr. Del., Order (A) Approving the Disclosure Statement, (B) Establishing the Voting Record Date, Voting Deadline and Other Dates, (C) Approving Procedures for Soliciting, Receiving and Tabulating Votes on the Plan and for Filing Objections to the Plan and (D) Approving the Manner and Forms of Notice and Other Related Documents. ([Dkt. 1289](#)) (January 29, 2010).

Chapter 10: Objections To the Plan and Final Approval

Several creditors objected to Eddie Bauer’s plan. One of the main, non-withdrawn objections came from the Internal Revenue Service and the U.S. Customs and Border Patrol.¹⁶⁸ Their objections claimed that certain exculpation and liability limitation provisions of the plan violated the Anti-Injunction Act. The court responded by revising some language of the plan to limit exculpation “solely with respect to its conduct as a committee, and not with respect to the actions of its members as individual creditors.”¹⁶⁹

After settling the objections to the plan, the creditor classes entitled to a vote submitted their approval for the plan.¹⁷⁰ The Class 3 Secured Term Lenders voted to approve the plan. Of the Class 4 Unsecured Claimholders, 95% of the claimholders representing 88% of the value of the class voted to approve the plan.

As a result, on March 18, 2010, the court approved Eddie Bauer’s plan.¹⁷¹

¹⁶⁸ In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Objection by the Internal Revenue Service to the Debtors' Joint Plan of Liquidation ([Dkt. 1246](#)) (January 21, 2010); In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Objection by Customs and Border Protection to the Debtors' Joint Plan of Liquidation ([Dkt. 1400](#)) (March 4, 2010).

¹⁶⁹ In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Findings of Fact, Conclusions of Law and Order Confirming First Amended Joint Plan of Liquidation of EBHI Holdings, Inc., et al. ([Dkt. 1450](#)) (March 18, 2010).

¹⁷⁰ In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Certification of Michael J. Paque with Respect to the Tabulation of Votes on the First Amended Joint Plan of Liquidation of EBHI Holdings, Inc. et al. ([Dkt. 1435](#)) (March 15, 2010).

¹⁷¹ In re EBHI Holdings, Inc., Case No. 09-12099, Bankr. Del., Findings of Fact, Conclusions of Law and Order Confirming First Amended Joint Plan of Liquidation of EBHI Holdings, Inc., et al. ([Dkt. 1450](#)) (March 18, 2010).

Chapter 11: Conclusion

Eddie Bauer's bankruptcy wrapped up successfully after its plan was approved. Golden Gate brought Eddie Bauer back to its roots of focusing on higher-end men's clothing and outerwear. Golden Gate's skilled management and renewal of Eddie Bauer proved massively successful, resulting in its 2014 sale to Jos. A. Bank Clothiers, Inc. for \$825 million in 2014.¹⁷² Considering Golden Gate purchased Eddie Bauer in 2009 for only \$286 million, their acquisition resulted in a \$539 million increase in enterprise value in just five years. Although such an acquisition was risky, it appears to have paid off.

Ultimately, as discussed in this paper, most parties came out of the Eddie Bauer bankruptcy in decent shape, at least based on how those parties would be expected to do in a Chapter 11 proceeding. Businesses should take note of this proceeding to demonstrate the value of knowing when to file for bankruptcy and to hire skilled counsel (including lawyers, accountants, bankers, etc.) to guide them through the process. More simply, Eddie Bauer also serves as a lesson in the dangers of diluting the brand identity and quality that made your business successful in the name of rapid expansion and supposedly growing a customer base.

¹⁷² Siddharth Cavale, *Jos. A. Bank to Buy Eddie Bauer in Bid to Stay Independent*, REUTERS (Feb. 14, 2014, 3:07 p.m.), <https://perma.cc/3CM8-LG8D>.