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### Gymboree Takes a Time-Out to Reorganize under Chapter 11

Eboni James

Kendria Lewis

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# **Gymboree Takes a Time-Out to Reorganize under Chapter 11**

By:  
*Eboni James*  
&  
*Kendria Lewis*

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## Cast of Characters

**Credit Suisse AG, Cayman Branch-** provides investment banking to clients through three regionally focused divisions: Swiss Universal Bank, and International Wealth Management and Asia Pacific.

**Daniel Griesemer-** Mr. Griesemer has been Chief Executive Officer and President at The Gymboree Corporation since May 22, 2017. Mr. Griesemer serves as an Executive Director at GYMBOREE HOLDING Corp. Mr. Griesemer is an agile and experienced retail executive with an established track record of building customer loyalty in an omni-channel environment.

**Elizabeth Schumacher-** Ms. Elizabeth Schumacher, also known as Betsy, has been Executive Vice President and General Manager of Gymboree & Gymboree Outlet at The Gymboree Corporation since April 29, 2015. Ms. Schumacher joined The Gymboree Corporation in April 2015.

**James A. Mesterharm-** Mr. Mesterharm, who is the Managing Director at AlixPartners LLP, was the Chief Restructuring Officer of The Gymboree Corporation beginning June 11, 2017. Mr. Mesterharm has been the Managing Director at AlixPartners, LLC since 2001. Mr. Mesterharm specializes in developing financial and operating strategies for underperforming and troubled companies. He has significant expertise in interim crisis management, cost reduction Plan development and implementation, cash management, capital structure refinancing and business Plan development for acquisition and restructuring purposes.

**Joan Barnes-** Ms. Barnes is the founder of Gymboree Corporation. Barnes's wish to open an exercise facility for parents and their toddlers came from her stemmed from her desire to share playtime and physical fitness with her own baby girl. She opened the first Gymboree recreation and exercise outlet in 1976.

**Judy Robbins-** Ms. Robbins was the United States Trustee for the Eastern District of Virginia during Gymboree's Chapter 11 Bankruptcy.

**Liyuan Woo-** Ms. Liyuan Woo has been the Interim Chief Financial Officer of The Gymboree Corporation since June 11, 2017.

**LF Centennial Pte. Ltd. ("Li & Fung")-** is a global supply chain manager primarily for US and EU brands, department stores, hypermarkets, specialty stores, catalogue-led companies, and ecommerce sites, hired to serve as an intermediary between the Debtors and foreign vendors.

**Lazard Freres & Co. LLC (“Lazard”)**- investment banker hired in January 2017 to assist the Debtors in analyzing their capital structure and potential sources of liquidity and runway to facilitate the operational changes necessary to reduce the operational costs associated with their “brick and mortar” footprint, including various restructuring and recapitalization options.

**Michael A. Condyles-** Mr. Condyles, with Kutak Rock LLP, was the lead attorney representing the Debtors in their bankruptcy and restructuring process.

**Robert Jacob-**Assisted Joan Barnes in establishing Gymboree as a franchise.

**Subsidiaries Party to Restructuring-** Gym-Card, LLC; Gym-Market, Inc.; Gymboree Manufacturing, Inc.; Gymboree Operations, Inc.; Gymboree Retail Stores, Inc.; and S.C.C. Wholesale, Inc.

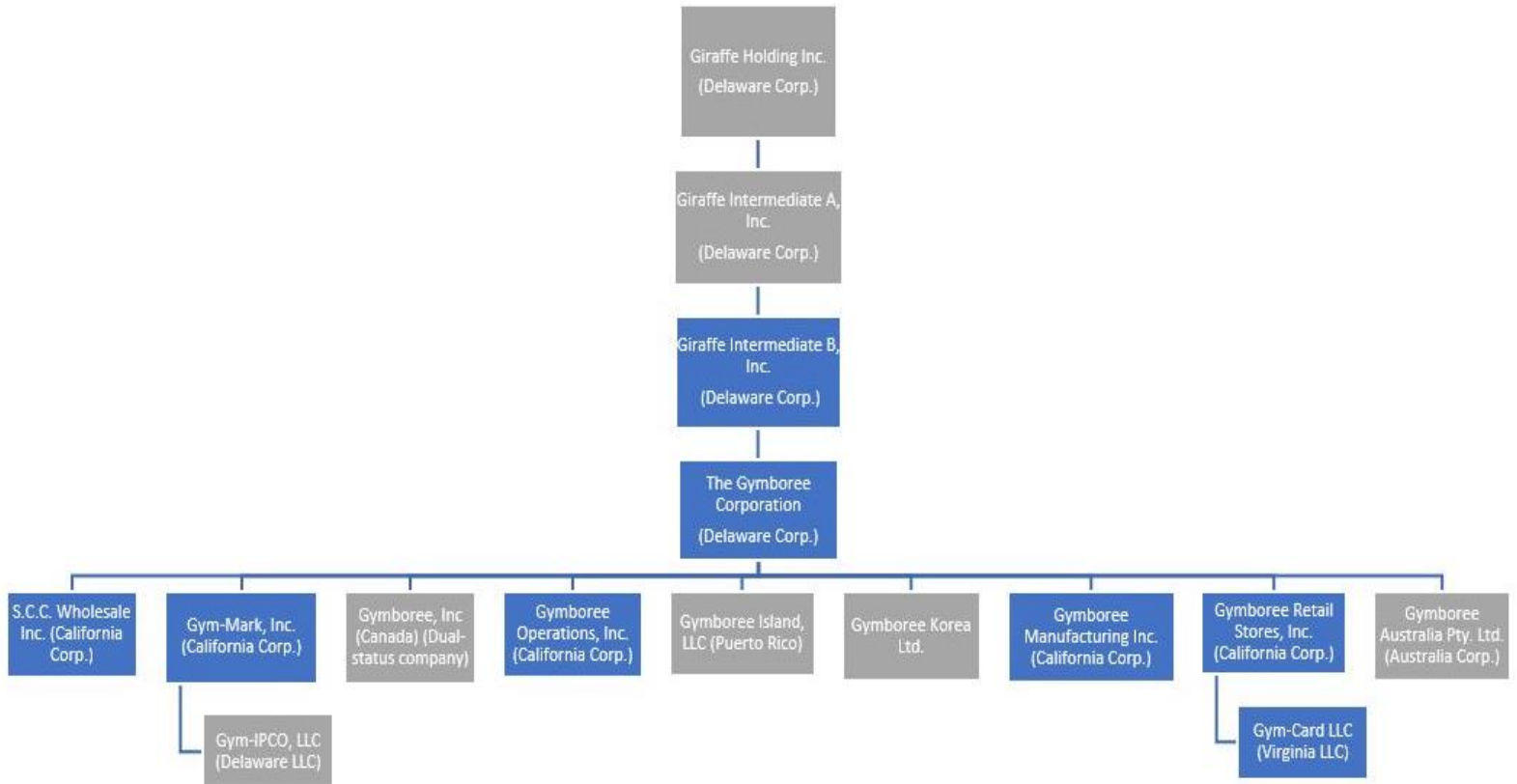
**The Gymboree Corporation (“the Corporation”)** - the parent company of each of the subsidiaries. The Corporation is a specialty retailer, operating stores with high-quality clothes and accessories for children. Its brands include Gymboree, Janie and Jack, and Crazy 8. Founded in 1976, the Corporation went from offering parent-child classes in the San Francisco Bay Area to currently operating over 900 retail stores in the United States and Canada, along with franchises around the world.

**The Honorable Keith L. Phillips-** Judge Keith L. Phillips was the bankruptcy judge in the Eastern District of Virginia who presided over the Gymboree Chapter 11 Bankruptcy.

**Unsecured Creditors’ Committee (“OCC”)** - the United States Trustee appointed 7 creditors to serve on the Official Committee of Unsecured Creditors. The Committee was comprised of Hansoll Textile, GGP L.P., PREIT Services LLC, Deutsche Bank Trust Company Americas, Simon Property Group Inc., Hutchin Hill Capital Primary Fund Ltd, and Li & Fung Centennial Pte Ltd. The Committee was instrumental in the successful reorganization of The Gymboree Corporation and its affiliates.

**ZEAVION Holding-** founded by Jack Shi, is a Singapore-based company with a focus on business development and investment in the education and entertainment sectors. The privately-held company bought Gymboree Play & Music and its central operations and centers in North America.

## Corporate Structure

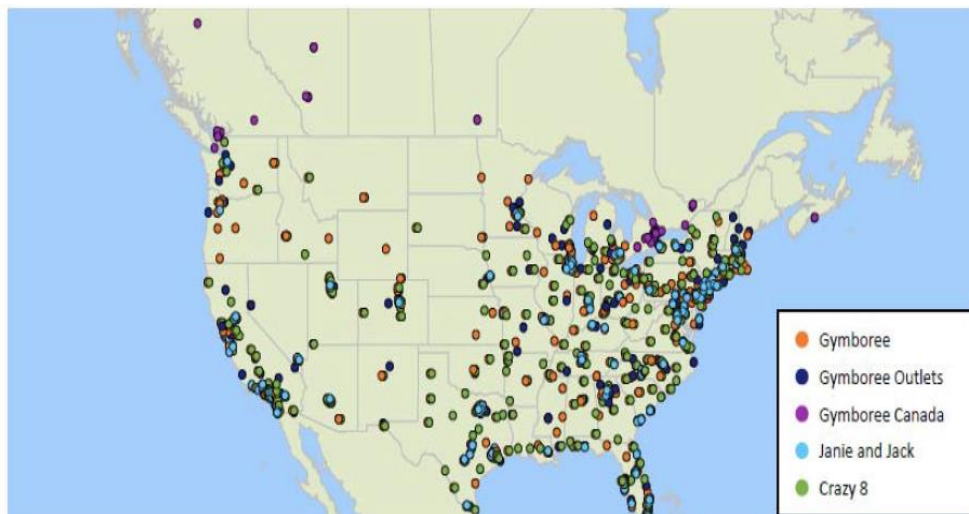


Not included in the Bankruptcy

Included in the Bankruptcy

## Introduction

The Gymboree Corporation (“Gymboree”) —a subsidiary of Giraffe Holding— is a California based retailer that designs and manufactures high quality children’s apparel across North America.<sup>1</sup> In 2015, Gymboree operated a total of 1,322 retail stores, including 607 Gymboree stores, 170 Gymboree Outlet stores, 150 Janie and Jack shops and 395 Crazy 8 stores, as well as their respective online stores.<sup>2</sup> The map below pinpoints the Debtors’ domestic and Canadian stores.<sup>3</sup>



Gymboree also offered programs facilitating parent-child development at 698 franchised and Company-operated Gymboree Play & Music centers in the United States, and over 40 other countries. In 2016, Gymboree sold Gymboree Play & Music for 127.5 million dollars, and thereafter focused solely on retail. Gymboree’s sale of Gymboree Play & Music is discussed in Section II of this paper.<sup>4</sup>

On June 11, 2017 (“Petition Date”), Gymboree and its seven affiliates (collectively, the “Debtors”) each filed a voluntary petition in the United States Bankruptcy Court for the Eastern

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<sup>1</sup> [Declaration of James A. Mesterharm, Chief Restructuring Officer of The Gymboree Corporation in Support of Chapter 11 Petitions and First Day Motions](#), Case 17-32986, Doc. No. 30, p. 14. This section of the paper relies heavily upon Mr. Mesterharm’s knowledge of the Debtors’ history, operations, financial affairs, and restructuring initiatives as the Chief Restructuring Officer for the Gymboree Corporation.

<sup>2</sup> *Id.* at 6.

<sup>3</sup> *Id.* at 19.

<sup>4</sup> *See infra* Section II.



District of Virginia declaring Chapter 11 bankruptcy.<sup>5</sup> The cases would later be administratively consolidated for convenience.<sup>6</sup> The 2017 Chapter 11 filing was the result of the Debtors' struggle to manage 1.1 billion dollars of debt.<sup>7</sup> With the newly established Plan, Gymboree and its affiliated Debtors hoped to eliminate 1 billion dollars in indebtedness.<sup>8</sup> This paper explores Gymboree's establishment and corporate ownership history and seeks to outline the steps Gymboree took to achieve a successful reorganization of the company. We hope to demonstrate how essential pre-bankruptcy negotiations are in ensuring a speedy and successful reorganization process.<sup>9</sup> First, however, we are going to dive into Gymboree's history and its beginnings.

## I. Background: The Origins of Gymboree

In 1976, Joan Barnes founded the first Gymboree, initially called Kindergym, at a Jewish community center in San Rafael, California.<sup>10</sup> Prior to opening the first Gymboree, Barnes taught modern dance to children in New York City. She then became an administrator at the Jewish community center.<sup>11</sup> Partially inspired by her personal desire to share playtime and physical fitness with her own baby girl, Barnes took over the secular program at the Jewish center and convinced the Jewish community center's board of directors to start what became the pilot program for what is now known as Gymboree Play & Music.<sup>12</sup> Gymboree Play & Music would be a place that parents and their toddlers could exercise and play together.<sup>13</sup>

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<sup>5</sup> [Declaration of James A. Mesterharm](#), *supra* note 1, at 2.

<sup>6</sup> *Id.* at 34.

<sup>7</sup> *Id.* at 19.

<sup>8</sup> *Id.*

<sup>9</sup>In drafting this paper, we relied heavily on previous students' outstanding works on the Gymboree Chapter 11 bankruptcy for purposes of formatting our paper and gathering sources as well as requisite knowledge on the bankruptcy process. *See generally* JJ. Logan Wilson S. Ashton Smith, *Parka Problems: The 2009 Eddie Bauer Bankruptcy* (2017).

<sup>10</sup> YOUTUBE, <https://www.youtube.com/watch?v=fDISFcIzt4c> (last visited April 28, 2018).

<sup>11</sup> YOUTUBE, <https://www.youtube.com/watch?v=bKFb2WYFOjs> (last visited April 28, 2018).

<sup>12</sup> *Id.* In an effort to get the name Kindergym trademarked with the Department of Incorporations, the company was faced with difficulty in that the Department found the name to be "generic." Thus, the company and its founder renamed the company Gymboree with much success.

<sup>13</sup> *See supra* note 11.

With her new adventure, she gained instant success.<sup>14</sup> Barnes had no problem filling her classes, as mothers and fathers lined up to enroll their children.<sup>15</sup> After realizing the commercial potential of her newly found concept, Barnes opened a second center in the late 1970s for parents with children ranging in ages three months to four years old.<sup>16</sup> Barnes' expertise, however, lay in creating meaningful moments with parents and their children through physical fitness and playtime, not creating franchises.<sup>17</sup> Thus, Barnes connected with a franchise specialist, Robert Jacob, who would help her establish a successful Gymboree franchise.<sup>18</sup> Barnes' net worth had soared well past 1 million dollars by 1985.<sup>19</sup>

By 1987, Barnes had given birth to ten exercising centers in foreign countries and over 355 centers throughout the United States.<sup>20</sup> Combined, those units generated 10 million dollars in sales annually.<sup>21</sup> Gymboree had become very popular among parents and children and eventually became the foundation for its future success in the retail industry.<sup>22</sup> Backed by Gymboree's accrued goodwill, the founder opened the first few Gymboree retail stores in 1986.<sup>23</sup> Accordingly, Gymboree began to successfully design and manufacture unique, high-quality merchandise for children ages newborn to nine.<sup>24</sup>

The new stores were comprised of about 40% hard goods and 60% apparel that attracted buyers in middle-class markets.<sup>25</sup> Initially, Gymboree was successful because it was able to

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<sup>14</sup> *Id.*

<sup>15</sup> *Gymboree Corporation History*, FUNDINGUNIVERSE, <https://perma.cc/EUY7-64SZ>.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> FUNDINGUNIVERSE, *supra* note 15 <https://perma.cc/EUY7-64SZ>.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

sustain its unique image and increase its profits by self-manufacturing its products.<sup>26</sup> Again, the business soared as sales reached approximately 10 million dollars with 32 retail stores throughout various shopping malls combined with the 350 Gymboree centers throughout the United States.<sup>27</sup> In 1989, however, the company reported a net loss of approximately 1 million dollars.<sup>28</sup>

After a while, it had become evident that the success of the Gymboree's fitness centers were declining while the retail stores were booming.<sup>29</sup> Barnes' influence in operations eventually dwindled as her investment partner, U.S. Venture Partners, was convinced that Gymboree was failing to reach its full potential.<sup>30</sup> Just as Gymboree's stresses and successes "ebbed and flowed," so too did Barnes' health and marriage.<sup>31</sup> Barnes suffered from a stress-induced eating disorder and failing marriage.<sup>32</sup> "When things were going well, the eating disorder receded, but when things got really stressful and the pressure grew, it became front and forward," which is why Barnes decided to call it quits.<sup>33</sup> By 1990, Joan Barnes was admitted into a long-term treatment center where she spent several years on a journey to recovery.<sup>34</sup>

New management took over the company after Barnes' departure and made several necessary changes to ensure Gymboree's success, and in 1993 Gymboree went public.<sup>35</sup>

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> Joan Barnes & Michael Coffino, *Play It Forward: From Gymboree to the Yoga Mat and Beyond* (2016).

<sup>32</sup> *Journey*, JOAN BARNES SPEAKS, (April 29, 2018, 9:35 PM), <https://perma.cc/QNM4-TVHS>.

<sup>33</sup> *Gymboree Founder Joan Barnes Shares Her Journey from Young Mom to Mogul*, EXTRA, (April 29, 2018, 9:35 PM), <https://perma.cc/RFR2-8EAD>.

<sup>34</sup> LADIES WHO LAUNCH, (April 29, 2018, 9:35 PM), <https://perma.cc/32CU-34YB>.

<sup>35</sup> FUNDINGUNIVERSE, *supra* note 15, <https://perma.cc/EUY7-64SZ>.

Throughout the late 1990s, Gymboree’s earnings and profits were constantly rising and falling, which led to high turnover rates among corporate executives.<sup>36</sup> It became apparent that there needed to be some corporate restructuring.<sup>37</sup> So, in 1998 Gymboree added four new senior management positions: chief information officer, senior vice-president in sourcing and logistics, vice-president logistics, and managing directorship.<sup>38</sup> This proved to be a success; sales figures showed a 20% increase in sales after implementing the new management personnel.<sup>39</sup> That summer, Gymboree also relocated its sole distribution center to Dixon, California.<sup>40</sup>

## II. The Debtors’ Business

### A. Brand Offerings

The logo for Gymboree, featuring the word "GYMBOREE" in a bold, orange, sans-serif font. A small registered trademark symbol (®) is located at the bottom right of the letter "E".

Gymboree was launched in 1986.<sup>41</sup> Gymboree was designed for kids, age 0 to 14, with products priced between \$15 to \$45.<sup>42</sup> The brand is offered both nationally and internationally across 586 stores, 174 outlets, and 48 franchised stores.<sup>43</sup> In 2016, Gymboree accounted for approximately 61% of the Debtors’ revenue. Gymboree’s competitors include Macy’s, The Gap, Children’s Place, Carters, and TJ Maxx.<sup>44</sup>

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<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 9.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*



As an affiliate of Gymboree, Janie and Jack launched its line in 2002.<sup>45</sup> Janie and Jack provided consumers with dressy to dressed-up casual attire for children with a distinct quality, design, and detail.<sup>46</sup> This timeless, dressy casual collection is sold in boutique-like outlets.<sup>47</sup> As the Debtors' highest-end brand offering, Janie and Jack designs are priced between \$24 to \$250.<sup>48</sup> Its operation includes 104 stores, 45 outlets, and two franchise stores.<sup>49</sup> The brand accounted for 17% of the Debtors' revenue in 2016.<sup>50</sup> Janie and Jack is most comparable to other high-end retailers, such as Nordstrom, Ralph Lauren, and J. Crew, targeting families with a median household income of \$125,000.<sup>51</sup> To complement the quality and design of their clothes and accessories, Janie and Jack offers individualized customer service by providing suggestions regarding the apparel options that best suit each customer's need.<sup>52</sup> Customers also have the option of purchasing Janie and Jack merchandise online.<sup>53</sup>

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<sup>45</sup> *Id.* at 10.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> JANIE AND JACK, <https://perma.cc/4VCK-U2KA> (last visited April 29, 2018).



As the newest addition to the Gymboree family, Crazy 8 launched its brand in 2007.<sup>54</sup> Crazy 8 provides apparel priced 20%-30% less than the Gymboree line.<sup>55</sup> The brand consists of very versatile fashion for the value-oriented consumers.<sup>56</sup> Apparel prices at Crazy 8 ranges from \$2 to \$25.<sup>57</sup> The bright colors and bold patterns invite kids to be bold and be themselves.<sup>58</sup> Families consisting of three or more children with an household income of \$75,000 typically shop at Crazy 8, as they value a more practical approach to shopping.<sup>59</sup> The three brands are offered across the United States and Canada.<sup>60</sup> In 2015, Gymboree operated a total of 1,322 retail stores, including 607 Gymboree stores, 170 Gymboree Outlet stores, 150 Janie and Jack stores and 395 Crazy 8 stores.<sup>61</sup>

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<sup>54</sup> [Declaration of James A. Mesterharm, Chief Restructuring Officer of The Gymboree Corporation in Support of Chapter 11 Petitions and First Day Motions](#), Case 17-32986, Doc. No. 30, p. 11.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> CRAZY 8, <https://perma.cc/75ZD-3EUV> (last visited April 29, 2018).

<sup>59</sup> [Declaration of James A. Mesterharm](#), *supra* note 54, at 11.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

## B. Supply Chain



While the Debtors maintained control over their brands by designing and merchandising in-house, the Debtors utilized international sourcing and production protocol that relied heavily on foreign suppliers.<sup>62</sup> “Substantially, all of the Debtors’ retail products [were] manufactured overseas, where the Debtors work[ed] with a diverse set of suppliers comprised of over 100 vendors and 166 factories to manufacture apparel in accordance with their specifications.”<sup>63</sup> Most of the suppliers were located in China, Vietnam, Indonesia, Bangladesh, and India, and the transactions between the Debtors and foreign suppliers did not consist of long term contracts.

Approximately 93% of the Debtors’ foreign products were sourced through LF Centennial Pte. Ltd. (“Li & Fung”). Li & Fung served as a liaison between the Debtors and foreign vendors. Specifically, Li & Fung helped the Debtors negotiate prices and purchase orders and communicated with foreign vendors to ensure timely production and compliance with foreign laws and regulations. By utilizing Li & Fung as an intermediary, the Debtors were able to reduce the cost of production by 6%. “The Debtors routinely evaluated new vendors within the Li & Fung network to ensure competitive pricing and [had] significantly shifted their sourcing portfolio since 2011 to vertically-integrated factories...”<sup>64</sup>

Overseas manufacturers manufactured and shipped inventory to the Debtors’ Freight on Board (“FOB”). Under FOB,<sup>65</sup> the Debtors’ paid freight forwarders to transport merchandise from foreign manufacturers to the United States. The inventory was shipped to the Debtors’ warehouse in Dixon, California.

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<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> Under FOB, title is transferred to the Debtors at the foreign port when merchandise and goods are loaded for shipment to the United States.

In 2016, the Debtors began selling their Gymboree and Crazy 8 inventory in bulk quantities (i.e. wholesaling) to larger merchants, such as T.J. Maxx and Amazon.<sup>66</sup> The Debtors greatly benefited from wholesaling in this manner because they were able to establish a broader customer base, gaining consumers who would not normally shop at Crazy 8 or Gymboree.<sup>67</sup> Platforms such as Amazon and T.J. Maxx also allowed the Debtors to profit from the geographic markets where the wholesaler served as a “one-stop-shop” for all of the consumers’ needs.<sup>68</sup> For inventory purposes, the Debtors elected to maintain a single distribution center located in Dixon, California.<sup>69</sup> The merchandise and other inventory were shipped from the Dixon facility to the physical retail sites and to the customers to fulfill online orders.<sup>70</sup>

### **III. Prepetition Transactions**

#### **A. Gymboree Goes Private (Merger Agreement)**

On October 11, 2010, Gymboree entered an agreement and plan of merger (the “Merger Agreement”) with Giraffe Holding, Inc. (the “Parent”), a Delaware corporation and Giraffe Acquisition Corporation (“Acquisition Sub”).<sup>71</sup> Acquisition Sub is a Delaware corporation that operates as a wholly-owned subsidiary of the Parent. As consideration for the merger, Acquisition Sub offered to acquire all of Gymboree’s outstanding shares at a price of \$65.40 per share or 1.76 billion dollars. On November 23, 2010, Acquisition Sub and Gymboree merged pursuant to the Merger Agreement, with Gymboree continuing as the surviving entity and a wholly owned subsidiary of the Parent.

#### **B. Gymboree Sells Gymboree Play & Music**

On July 15, 2016, Gymboree sold Gymboree Play & Music for 127.5 million dollars in cash, netting approximately 80 million dollars after taxes, to ZEAVION Holding, a privately-

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<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* On May 5, 2015, Gymboree sold its distribution center in Dixon, California for net proceeds of 25.9 million, and entered into a leaseback of the property from the purchaser for a period of 15 years. Approximately \$10.9 million of the proceeds from the sale were restricted to fund capital expenditures or reduce Gymboree’s liability under the Term Loan Facility.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*



held company focusing on education.<sup>72</sup> ZEAVION now owns the Gymboree Play & Music business, including the central operations and centers in North America.<sup>73</sup> ZEAVION also acquired the intellectual property of Gymboree Play & Music’s curriculum and certain related trademarks.<sup>74</sup> As such, Gymboree Play & Music is now a standalone, privately-held company.<sup>75</sup> Gymboree’s global apparel business and related retail brands were excluded from the transaction.<sup>76</sup> Today, Gymboree remains a big player in the children’s clothing market, competing with stores such as The Children’s Place and the Gap.<sup>77</sup>

#### **IV. Events Leading to Chapter 11 Filing**

##### **A. Challenging Operating Environment**

Unfortunately, the Debtors, along with many other retailers were victims of society’s shift from malls and shopping centers to online shopping. As consumers increasingly shopped online, retail companies, such as Gymboree, lost a large number of customers. Additionally, the Debtors struggled to keep up with their competitors, “such as Children’s Place and the Gap, who [had] less leveraged capital structures.”<sup>78</sup> This meant their competitors were able to offer their customers lower prices than Gymboree.

These issues, along with the Debtors’ poor online presence, caused a decline in the Debtors’ sales and operations. In 2016, the Debtors’ experienced a 24% decline (from 94 million

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<sup>72</sup> [Amended Disclosure Statement Disclosure Statement for the First Amended Joint Chapter 11 Plan of Reorganization of the Gymboree Corporation and Its Debtor Affiliates](#), Case 17-32986, Doc. No. 449, p. 31. Approximately \$109 million from the sale was restricted for purposes of paying down outstanding obligations under the term loan credit agreement and capital expenditures. Gymboree has used the proceeds of the sale to delever its balance sheet, invest in its online offerings, store network, and supply chain infrastructure. As of the Petition Date, the remaining balance of the restricted cash attributable to the Play & Music Transaction was approximately \$13.6 million.

<sup>73</sup> *Gymboree Agrees to Sell Play & Music Business To ZEAVION*, CISION PR NEWSWIRE, (April 29, 2018, 9:35 PM), <https://perma.cc/87hv-px4y>.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Gymboree Corporation History*, FUNDINGUNIVERSE, <https://perma.cc/EUY7-64SZ>.

<sup>78</sup> *Id.* at 19.

dollars in 2015 to 71 million dollars in 2016) in their earnings before interest, taxes, depreciation, and amortization.<sup>79</sup>

## **B. Supply Chain Challenges**

As previously mentioned, foreign vendors were crucial to the Debtors' ongoing business operations. Specifically, the Debtors' depended on the uninterrupted flow of inventory through their supply chain.<sup>80</sup> Historically, the Debtors enjoyed short term favorable trade terms with foreign vendors, including payment terms that allowed the Debtors to pay for shipments as many as 75 days from the date of shipment.<sup>81</sup> However, in January 2017 the foreign vendors were reluctant to continue to offer such terms after media coverage revealed Gymboree's leadership changes and looming debt overhang.<sup>82</sup>

Foreign vendors demanded revised trade terms including prepayments, cash on delivery, and a discontinuation of credit extensions.<sup>83</sup> "This shift in payment terms both strained the Debtors' liquidity and put the delivery of the Debtors' winter 2017 purchase orders at material risk, jeopardizing the Debtors' ability to fully capitalize on customer demand during the peak holiday selling season."<sup>84</sup>

In light of the contractual changes, on April 21, 2017, Gymboree entered into an agreement with Li & Fung.<sup>85</sup> The agreement provided that Gymboree would (1) provide a 10 million dollar standby letter of credit and (2) issue a 20 million dollar incremental term loan to Li & Fung.<sup>86</sup> In turn, Li & Fung agreed to extend credit to Gymboree in purchases from vendors in

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<sup>79</sup> *Id.* at 5.

<sup>80</sup> [Declaration of James A. Mesterharm, Chief Restructuring Officer of The Gymboree Corporation in Support of Chapter 11 Petitions and First Day Motions](#), Case 17-32986, Doc. No. 30, p. 23.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* As is typical in the apparel industry, the Debtors' inventory represents a substantial portion of the ABL Facility borrowing base. Thus, delay in vendors' shipments of new inventory to the Debtors limits the Debtors' ability to borrow under the ABL Facility which, in a vicious cycle, further limits the Debtors' ability to secure fresh inventory.

<sup>84</sup> *Id.* at 23.

<sup>85</sup> *Id.* at 24.

<sup>86</sup> *Id.*

Bangladesh with respect to the Debtors' current and future purchase orders and actively promote and support positive messages to foreign vendors.<sup>87</sup>

### **C. Prepetition Waiver/Amendment**

To add to the list of financial issues leading up to the Chapter 11 filing, Gymboree also defaulted on their Asset-Based Loan ("ABL").<sup>88</sup> On May 12, 2017, ABL agents and lenders received notice that the Debtors' failed to maintain a combined account availability of 17.5 million dollars and 10% of the term loan borrowing, pursuant to the ABL credit agreement.<sup>89</sup> While the Debtors' were technically in default under this covenant, the ABL agents decided to waive the default and allow the Debtors' to remain in compliance with the agreement.<sup>90</sup> In return, the Debtors agreed to provide weekly status calls regarding their financials, provide weekly borrowing base certificates, and cooperate with the ABL agents.<sup>91</sup>

### **D. Management Changes**

Gymboree also experienced two major management changes. In March 2017, Gymboree's Chief Executive Officer ("CEO"), Mark Breitbard, announced his resignation.<sup>92</sup> The position was temporarily filled by Mark Weiker, a long-time director.<sup>93</sup> Going forward, Gymboree initiated a nationwide search for a permanent CEO. On May 22, 2017, the Debtors appointed Daniel J. Griesemer as CEO.<sup>94</sup>

In May 2017, a month before the Debtors filed for bankruptcy, the Chief Financial Officer ("CFO"), also announced his resignation, effective immediately.<sup>95</sup> He contended that his

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<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 25.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 26.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

decision was solely based on personal issues.<sup>96</sup> The Debtors appointed Liyuan Woo as temporary CFO until the Debtors could find someone to fill the position permanently.<sup>97</sup>

### **E. Exploration of Strategic Alternatives**

Faced with the financial difficulties outlined above, the Debtors realized the need to explore restructuring alternatives. In January 2017, the Debtors retained a legal advisor and investment banker.<sup>98</sup> The Debtors, in March 2017, also hired a restructuring and financial advisor.<sup>99</sup> “Together, the Debtors and their advisors analyzed the Debtors’ capital structure and potential sources of liquidity and runway to facilitate operational changes necessary to reduce the burdensome operational costs associated with their brick and mortar footprint, including various restructuring and recapitalization options.”<sup>100</sup>

By exploring restructuring alternatives, the Debtors commenced a detailed review of their real estate portfolio in an effort to locate their underperforming retail stores.<sup>101</sup> The Debtors, along with their team of hired professionals, decided it best that the Debtors renegotiate and restructure their current real estate leases.<sup>102</sup> “As part of the restructuring, the Debtors planned to exit or renegotiate leases across their portfolio.”<sup>103</sup>

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<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 26. The Debtors retained Kirkland and Ellis LLP, as a legal advisor, and Lazard Freres & Co, LLC as investment banker.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 27.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

## V. Prepetition Capital Structure

By the Petition Date, the Debtors had accrued approximately 1.1 billion in total funded debt obligations.<sup>104</sup> The Debtors' prepetition debt obligations consisted of 81 million dollars under the senior secured asset-based revolving credit facility (the "ABL Revolver"); 47.5 million dollars outstanding under Gymboree's asset-based term loan (the "ABL Term Loan") and, together with the ABL Revolver (the "ABL Facility"); 788.8 million dollars in aggregate principal amount outstanding under the Debtors' senior secured term loan (the "Term Loan Facility"); and 171 million dollars in aggregate principal amount of 9.125% unsecured senior notes due 2018 (the "Unsecured Notes").<sup>105</sup>

The following chart depicts the Debtors' prepetition capital structure:<sup>106</sup>

Funded Debt	Maturity	Outstanding Principal Amount
ABL Revolver	December 2017	\$81.0 million
ABL Term Loan	December 2017	\$47.5 million
Term Loan Facility	February 2018	\$788.8 million
Unsecured Notes	December 2018	\$171.0 million
<b>Total Funded Debt:</b>		<b>\$1,088.3 million</b>

### A. ABL Facility

On March 30, 2012, the Gymboree Corporation, as lead borrower, entered into an ABL Credit Agreement (the "ABL Agreement") that had been amended and restated from time to time.<sup>107</sup> The ABL Agreement provided for a senior secured revolving credit facility, consisting of 225 million dollars and a senior secured term loan consisting of 50 million dollars, subject to a

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<sup>104</sup> [Declaration of James A. Mesterharm, Chief Restructuring Officer of The Gymboree Corporation in Support of Chapter 11 Petitions and First Day Motions](#), Case 17-32986, Doc. No. 30, p. 19.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

171.2 million dollar borrowing base.<sup>108</sup> The Debtors' obligations under the ABL Facility were secured, subject to certain exceptions, by a first priority lien on the Debtors' assets, including the Debtors' accounts receivable, inventory, cash and cash equivalents.<sup>109</sup> The ABL Facility was also secured by a second priority lien on the Debtors' capital stock and other personal property, including, without limitations, the Debtors' intellectual property and investment contracts.<sup>110</sup> Immediately before filing the petition establishing this Chapter 11 Bankruptcy proceeding, the Debtors had 81 million dollars in borrowings and approximately 49.3 million dollars in letters of credit outstanding under the ABL Revolver Facility.<sup>111</sup> In addition, the Debtors had 47.5 million dollars outstanding under the ABL Term Loan.<sup>112</sup>

## **B. Term Loan**

On February 11, 2011, the Gymboree Corporation, as the borrower, entered into another credit agreement (the "Term Loan Credit Agreement") with the other Debtor guarantors, Credit Suisse AG, Cayman Islands Branch, as administrative and collateral agent (the "Term Loan Agent"), and the lender parties (the "Term Loan Lenders").<sup>113</sup> The final payment date for the Term Loan Facility was February 2018.<sup>114</sup> The Debtors' obligations under the Term Loan Facility were secured, "subject to certain exceptions, by a first priority lien on the Debtors' capital stock, intellectual property, and investment contracts and a second priority lien on all of the Debtors' other personal property, including accounts receivable, inventory, cash and cash equivalents."<sup>115</sup> At the time of the petition filing, the Debtors had approximately 790 million dollars in aggregate principal outstanding under the Term Loan.<sup>116</sup>

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<sup>108</sup> *Id.* at 20. The Debtors' borrowing base was configured using an accounting metric used by financial institutions to estimate the available collateral on the Debtors' assets in order to determine the Debtors' credit limit. Essentially, the borrowing base is the Debtors' effective maximum availability.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 21.

### C. Unsecured Notes

In connection with the Acquisition discussed in Section III, Gymboree issued 400 million dollars aggregate principal amount of 9.125% Unsecured Notes under an indenture on November 23, 2010.<sup>117</sup> At the time of the petition filing, the Debtor had approximately 171 million dollars in aggregate principal amount of Unsecured Notes outstanding.<sup>118</sup> Since 2012, Gymboree had repurchased “Unsecured Notes with an aggregate total principal amount of 229 million dollars for approximately 113.5 million dollars in cash through privately negotiated transaction, open market transactions, and cash tender offer.”<sup>119</sup> The Unsecured Notes were due in December 2018 and required semiannual coupon payments on June 1 and December 1.<sup>120</sup> The Debtors failed to make the June 1, 2017 coupon payment.<sup>121</sup>

### VI. Restructuring Support Agreement

The Debtors, in an effort to protect the value in its business, reached an agreement with approximately 66%<sup>122</sup> of lenders holding Gymboree’s 788.8 million dollar secured term loan to fund and support an expedited restructuring that would ensure a viable enterprise and maximize stakeholder recoveries (“Restructuring Agreement”).<sup>123</sup> The terms of the Restructuring Agreement included a \$1 billion debt reduction and a 105 million dollar debtor-in-possession financing facility (“DIP Term Loan Financing”) consisting of (a) up to 35 million dollars in new money delayed draw term loans”) to fund the Chapter 11 Cases and (b) 70 million dollars of term loans to refinance the amounts that were due and owed under the Term Loan Credit Agreement. Under this agreement, certain Consenting Creditors<sup>124</sup> agreed to fund up to 80

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<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> Exclusive of the 20 million dollar Li & Fung Term Loan, as described and defined in Section III.

<sup>123</sup> *Id.* at 27.

<sup>124</sup> The Consenting Creditors consisted of each Term Loan Lender that was a party to the Restructuring Support Agreement.

million dollars in two new money rights offerings (the “Rights Offerings”)<sup>125</sup> in connection with the other restructuring transactions.

On June 11, 2017, with the pre-negotiated Restructuring Agreement in hand, the Debtors filed voluntary petitions that were jointly administered in the United States Bankruptcy Court for the Eastern District of Virginia declaring Chapter 11 bankruptcy.<sup>126</sup> The petition filing operated as an automatic stay to prohibit their creditors from seeking to liquidate the assets in which they held a secured interest.<sup>127</sup> The Honorable Keith L. Phillips presided over the case.

## VII. First Day Motions

In addition to filing the bankruptcy petition, the Debtors filed 27 “first day motions” divided into the three categories provided in *Bankruptcy Practice*: (i) orders facilitating the administration of the estate, (ii) orders smoothing the day-to-day operations, and (iii) orders authorizing debtors to honor prepetition obligations.<sup>128</sup> Ten of those motions consisted of *pro hac vice* requests, which were all granted by the Court. This section of the paper will capture the most important motions in detail.

### A. Orders Facilitating Administration of the Estate

#### 1. Joint Administration of the Estates

Under Bankruptcy Rule 1015(b), a Court may order joint administration of the estates if there are two or more petitions pending by a debtor and an affiliate.<sup>129</sup> Immediately after the Petition was filed, the Debtors filed a motion for joint administration of their Chapter 11 cases.<sup>130</sup> The Court granted the Debtors’ motion to allow Gymboree and its affiliates to file joint motions and other documents under Gymboree Corporation, thereby providing a more convenient and cost effective bankruptcy process.<sup>131</sup>

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<sup>125</sup> *Id.*

<sup>126</sup> *In re Gymboree Corp.*, Case No. 17-32986-KLP, Bankr. Virg., Voluntary Petition (Dkt. 1) (June 11, 2017).

<sup>127</sup> 11 U.S.C. § 362 (2012).

<sup>128</sup> BERNSTEIN & KUNEY, BANKRUPTCY IN PRACTICE (5TH. ED.) 273 – 75.

<sup>129</sup> 11 U.S.C. § 1015.

<sup>130</sup> [Motion for Joint Administration](#), Case 17-32986, Doc. No. 3.

<sup>131</sup> [Hearing held; Motion for Joint Administration GRANTED](#), Case 17-32986, Doc. No. 53.



## 2. Official Claims and Noticing Agent

Gymboree also requested that the Court allow them to employ Prime Clerk, LLC (“Prime Clerk”) as the official claims and noticing agent.<sup>132</sup> This was to be expected, because 28 U.S.C. § 156(c) empowers the Court to allow debtors to retain their own agents.<sup>133</sup> By appointing Prime Clerk as the noticing agent, the Clerk of the United States Bankruptcy Court for the Eastern District of Virginia would be relieved from the burden associated with notifying an extremely large body of creditors.<sup>134</sup>

In a different, but similar, motion, Gymboree also proposed the means by which creditors would be notified. Known creditors would be served by first class U.S. mail.<sup>135</sup> Gymboree also requested authorization to compile a shortened mailing list of creditors to whom it would be required to send notice; others would be required to file a request with the Court to be placed on the list or they could access the documents electronically through the Prime Clerk website.<sup>136</sup>

## 3. Extensions

In an effort to ensure the timely retrieval of hundreds of documents, Gymboree also requested a thirty day extension to file the Debtors’ schedule of assets and liabilities, schedules of current income and expenditures, schedules of executory contracts and unexpired leases, and statements of financial repairs.<sup>137</sup> Section 521 of the Bankruptcy Code and Bankruptcy Rule 1007(c) normally requires schedules and statements to be filed within 14 days of the petition date.<sup>138</sup> Thus, the thirty day extension would allow them a total of 44 days to retrieve those

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<sup>132</sup> [Debtors’ Motion For Entry Of An Order Approving Prime Clerk LLC as Claims and Noticing Agent](#), Case 17-32986, Doc. No. 9.

<sup>133</sup> 28 U.S.C. § 156(c) (2012). *See also* [Debtors’ Motion for Entry of An Order Approving Prime Clerk LLC as Claims and Noticing Agent](#), *supra* note 131, at p. 12.

<sup>134</sup> *Id.*

<sup>135</sup> [Debtors’ Motion For Entry Of An Order Approving The Form And Manner Of Notice Of Commencement Of The Chapter 11 Case](#), Case 17-32986, Doc. No. 4, p. 3.

<sup>136</sup> *Id.*

<sup>137</sup> [Motion to Approve Debtors' Motion For Entry of an Order \(I\) Extending Time to File Schedules and Statements of Financial Affairs, \(II\) Authorizing the Debtors to File a Consolidated List of Creditors In Lieu of Submitting a Mailing Matrix for each Debtor, \(III\) Authorizing the Debtors to File a Consolidated List of the Debtors 50 Largest Unsecured Creditors](#), Case No. 17-32986, Doc. No. 5.

<sup>138</sup> *Id.* at 3.

documents. In the same motion, Gymboree also requested authorization to filing a consolidated list of the Debtors' 50 largest creditors in lieu of submitting a separate mailing matrix for each Debtor.<sup>139</sup> The Court granted their motion.

## **B. Orders that Smooth Day-to-Day Operations**

### **1. Debtor-in-Possession Financing**

One of the Debtors' biggest concerns was being able to obtain the financing needed to continue ongoing business operations. When they entered bankruptcy, they had a limited supply of cash on hand.<sup>140</sup> Therefore, the Debtors executed a written agreement with their ABL Lenders and Consenting Term Lenders (collectively referred to as "Lenders"), whereby the Lenders would provide the proposed DIP financing in the form of a postpetition ABL facility (the "DIP ABL Facility")<sup>141</sup> to create fund availability over the pendency of the case.<sup>142</sup> To set the ball in motion, the Debtors filed a motion for entry of interim and final orders, authorizing the Debtors to obtain postpetition financing and use cash collateral amongst other authorizations.<sup>143</sup> On June 12, 2017, the Bankruptcy Court approved the Debtors' entry into the DIP ABL Facility and the DIP Term Loan Facility on an interim basis (the "Interim DIP Order"), whereby all prepetition outstanding amounts under the ABL Facility, including the ABL Term Loan and ABL Revolver,

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<sup>139</sup> *Id.* at 6-7.

<sup>140</sup> [Motion to Approve Debtor in Possession Financing Debtors' Emergency Motion for Entry of Interim and Final Orders \(I\) Authorizing the Debtors to Obtain Postpetition Financing, \(II\) Authorizing the Debtors to Use Cash Collateral, \(III\) Granting Liens and Providing Superpriority Administrative Expense Status, \(IV\) Granting Adequate Protection to the Prepetition Lenders, \(V\) Modifying the Automatic Stay, \(VI\) Scheduling a Final Hearing, and \(VII\) Granting Related Relief](#), Case No. 17-32986, Doc. No. 31, p. 7.

<sup>141</sup> The loans under the ABL Facility are secured by the Debtors' assets, including inventory, accounts receivable, equipment, and/or other balance-sheet assets.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* Included in the filing of the DIP financing motion, the Debtors requested that the Court allow the Debtors to 1) grant liens and provide superpriority administrative expense status, 2) grant adequate protection to the prepetition lenders, 3) modify the automatic stay, 4) schedule a final hearing, and 5) grant related relief. All of which were granted by the Court with no objections from the other parties.

would be converted into postpetition obligations under the DIP ABL Credit Facility to fund the administrative costs of these chapter 11 cases.<sup>144</sup>

The issue, however, was that the Debtors' budget ("Budget"), which was annexed to the Interim Order, outlining the Debtors' anticipated postpetition cash expenditures in the initial 13 weeks of the chapter 11 cases.<sup>145</sup> While the Proposed DIP Financing and Budget certainly benefited the Debtors and most of its stakeholders, it fell ill on the Debtors' Landlords, classified as general unsecured creditors. For example, pursuant to the terms of the Proposed DIP Financing, the secured lenders sought to waive the Debtors' right to surcharge collateral under Sections 506(c)<sup>146</sup> and 552(b)<sup>147</sup> of the Bankruptcy Code and failed to pay or include rent owed

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<sup>144</sup> [Order Granting Motion on Interim Basis I\) Authorizing the Debtors to Obtain Postpetition Financing, \(II\) Authorizing the Debtors to Use Cash Collateral, \(III\) Granting Liens and Providing Superpriority Administrative Expense Status, \(IV\) Granting Adequate Protection to the Prepetition Lenders, \(V\) Modifying the Automatic Stay, \(VI\) Scheduling a Final Hearing, and \(VII\) Granting Related Relief and Continuing to Final Hearing](#), Case No. 17-32986, Doc. No. 86.

<sup>145</sup> [Objection Of Certain Landlords To Debtors' Motion For Entry Of Interim And Final Orders \(I\) Authorizing The Debtors To Obtain Postpetition Financing, \(Ii\) Authorizing The Debtors To Use Cash Collateral, \(Iii\) Granting Liens And Providing Superpriority Administrative Expense Status, \(Iv\) Granting Adequate Protection To The Prepetition Lenders, \(V\) Modifying The Automatic Stay, \(Vi\) Scheduling A Final Hearing](#), Case No. 17-32986, Doc. No. 248.

<sup>146</sup> 11 U.S.C. § 506(c) (2012) (permits a debtor to charge the costs of preserving or disposing of a secured lender's collateral to the collateral itself. 11 U.S.C. § 506(c). This provision ensures that the cost of liquidating a secured lender's collateral is not paid from unsecured recoveries.) *See, e.g.,* Precision Steel Shearing v. Fremont Fin. Corp. (In re Visual Indus., Inc.), 57 F.3d 321, 325 (3d Cir. 1995) (stating, "section 506(c) is designed to prevent a windfall to the secured creditor"); Kivitz v. CIT Group/Sales Fin., Inc., 272 B.R. 332, 334 (D. Md. 2000) (stating, "the reason for [section 506(c)] is that unsecured creditors should not be required to bear the cost of protecting property that is not theirs").

<sup>147</sup> 11 U.S.C. § 552(b) (2012) (permits a debtor, committee or other party-in-interest to exclude post-petition proceeds from pre-petition collateral on equitable grounds, including to avoid having unencumbered assets fund the cost of a secured lender's foreclosure under the "equities of the case" exception.).

to the Landlords for the use of their property<sup>148</sup> for the period of June 11, 2017 (the Petition Date) through June 30, 2017, (“Stub Rent”)<sup>149</sup> in its Budget.<sup>150</sup>

The Landlords, “upon information and belief,” claimed that the Debtors intended to pay the Stub Rent as an administrative fee.<sup>151</sup> However, there were no assurances in the DIP Motion, the Budget, or the Interim DIP Order that the Debtors’ estate would be adequately funded to pay all administrative claims.<sup>152</sup> The Debtors were operating in a challenging environment and was at risk of administrative insolvency at confirmation. Therefore, the Landlords filed an objection to the DIP Motion on July 3, 2017, demanding that the Debtors immediately comply with the performance obligations mandated under section 365(d)(3)<sup>153</sup> of the Bankruptcy Code and pay the Stub Rent.<sup>154</sup>

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<sup>148</sup> The Landlords owned 295 properties that the Debtors occupied.

<sup>149</sup> 11 U.S.C. § 365(d)(3) (2012). Section 365(d)(3) of the Bankruptcy Code provides, in relevant part, that:

[t]he trustee shall timely perform all the obligations of the debtor . . . arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title.

Section 365(d)(3) is a controversial provision that demands debtor-tenants to timely pay rent postpetition under a nonresidential real property lease prior to rejecting or accepting the lease, regardless of whether the debtor is actually using the leased property. Therefore, debtors often contest whether “stub rent” falls within the section 365(d)(3) requirement.

<sup>150</sup> *See supra* 60 at 4.

<sup>151</sup> *Id.* at 5.

<sup>152</sup> “Administrative Claim” means a Claim for costs and expenses of administration of the Debtors’ Estates pursuant to sections 503(b), 507(a)(2), 507(b), or 1114(e)(2) of the Bankruptcy Code, including the actual and necessary costs and expenses incurred after the Petition Date and through the Effective Date of preserving the Estates and operating the businesses of the Debtors.

<sup>153</sup> 11 U.S.C. § 365(d)(3) (2012).

<sup>154</sup> [Objection to \(Re: related document\(s\)31 Motion to Approve Debtor in Possession Financing filed by The Gymboree Corporation\) filed by Joseph D. Wilson of Kelley Drye & Warren LLP on behalf of DDR Corp., DLC Management Corp., GGP, Inc., Gregory Greenfield & Associates Ltd., JLL, Regency Centers Corporation, Rouse Properties, Inc., Shopcore Properties, LP, Turnberry Associates, Vernon Hills Shopping Center LLC](#), Case No. 17-32986, Doc. No. 248, p. 6.

On July 11, 2017, however, the Court held a hearing, whereby it granted the Debtors' DIP Motion for financing.<sup>155</sup> The Court stated that the secured prepetition lenders were entitled to a waiver of any "equities of the case" exception under section 552(b) of the Bankruptcy Code and the postpetition DIP lenders were entitled to a waiver of the provisions of section 506(c) of the Bankruptcy Code.<sup>156</sup> Prior to the confirmation of the Plan, the Debtors negotiated the setting aside of \$4.5 million pro rata share for the general unsecured creditors, including the Landlords. It appears that this settlement resolved everything, including that regarding the Stub Rent Objection.

If the Court had denied the Debtors the financing needed to sustain on-going business during the critical first weeks of these cases, the Debtors would not have been able to continue operating for more than two weeks postpetition and would have needed to liquidate soon after, to the detriment of their stakeholders.<sup>157</sup> The Court's final approval of the DIP Motion meant that all of the Debtors' prepetition outstanding amounts under the ABL Facility would be converted into postpetition obligations under the DIP ABL Credit Facility on a final basis so that the Debtors could fund the administrative costs of these chapter 11 cases.<sup>158</sup>

### **C. Order Authorizing Debtors to Honor Pre-Petition Obligations**

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<sup>155</sup> [Hearing held; Motion GRANTED on Final Basis; \(related document\(s\): 31 Debtor in Possession Financing Debtors' Emergency Motion for Entry of Interim and Final Orders \(I\) Authorizing the Debtors to Obtain Postpetition Financing, \(II\) Authorizing the Debtors to Use Cash Collateral, \(III\) Granting Liens and Providing Superpriority Administrative Expense Status, \(IV\) Granting Adequate Protection to the Prepetition Lenders, \(V\) Modifying the Automatic Stay, \(VI\) Scheduling a Final Hearing, and \(VII\) Granting Related Relief](#), Case No. 17-32986, Doc. No. 351.

<sup>156</sup> *Id.*

<sup>157</sup> [Declaration of James A. Mesterharm, Chief Restructuring Officer of The Gymboree Corporation, in Support of Chapter 11 Petitions and First Day Motions](#), Case No. 17-32986, Doc. No. 30

<sup>158</sup> *See infra* Section VII (Debtor-in-Possession Financing) (Although the Court granted the Debtors' DIP Motion for financing in the Final Order, the Debtors amended its Plan to extend a \$4.5 million pro rata distribution to its general unsecured creditors, contingent upon the general unsecured claim holders vote of acceptance.)

In this category, Gymboree sought Court approval to honor prepetition obligations to ensure that company could continue to operate in its normal course of business. These motions included the Debtors' requests to continue to pay, honor, or authorize wages (along with other compensation & benefits), existing customer programs, related tax payments and assessments, cash management systems, and payment for future utilities services. This motion failed to include stub rent as a prepetition obligation, as the Debtors wished to convert the Stub Rent as an administrative expense postpetition. Nonetheless, the Court issued final orders granting each of the Debtors' requests, allowing the Debtors to fulfill their prepetition obligations so as to continue in the ordinary course business. The Debtors' requests in this category of motions are detailed below.

### **1. Cash Management System**

The Cash Management System was utilized in the company's ordinary course of business to transfer and distribute funds and facilitate cash flow monitoring. The bank accounts included payroll accounts, dental claims, employee reimbursement, a gift card account, and a number of other important accounts. 11 U.S.C. 363(c)(1) authorizes a debtor in possession to use property of the estate so long as it is in the ordinary course of business.<sup>159</sup>

### **2. Wages, Salaries, and Customer Programs**

To prevent the loss of employees, the Debtors requested authorization to continue to honor both pre-petition and post-petition wages, salaries, and reimbursable expenses.<sup>160</sup> In an effort to attract customers and maintain positive relationships, the Debtors sought authorization from the Courts to continue customer programs, including but not limited to the acceptance of non-cash payments.<sup>161</sup> The court did not hesitate to authorize the Debtors to honor these obligations, as they were an essential part of the Debtors' restructuring.<sup>162</sup>

### **3. Utility Services**

To continue operating in the ordinary course of business and management of their properties, the Debtors requested to pay the utility service providers and their affiliates the amount to be owed at the time of the Petition Date, which totaled \$314,680. According to section 366 of the title 11 of the United States Code, the Debtors were shielded from the immediate

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<sup>159</sup> 11 U.S.C. § 363(c)(1) (2012).

<sup>160</sup> [Motion to Authorize Payment of Wages, Salaries, and Customer Programs](#), Case 17-32986, Doc. No. 6.

<sup>161</sup> *Id.*

<sup>162</sup> [Order Authorizing the Payment of Wages, Salaries, and Customer Programs](#), Case 17-32986, Doc. No. 376.

termination or alteration of utility services after the Petition Date, and were required to provide “adequate<sup>163</sup>” assurance of payment for postpetition services within thirty days of the petition, or the utility company may alter, refuse, or discontinue service.<sup>164</sup> The policy underlying section 366 of the Bankruptcy Code is to protect debtors, such as Gymboree and its affiliates, from the immediate termination of utility service upon filing bankruptcy while simultaneously providing utility companies adequate assurance that the debtors will pay for postpetition services.<sup>165</sup> Thus, the Court granted the motion, as uninterrupted utility services were essential to the Debtors’ ability to maintain their ongoing business.<sup>166</sup>

#### 4. Related Taxes and Fees

Also, the Debtors estimated that approximately \$13.2 million in taxes and fees (“Taxes and Fees”) were outstanding as of the Petition Date.<sup>167</sup> The Taxes and Fees included property, income, franchise, sales and use taxes, as well as those taxes and fees required to operate their franchises in certain states and foreign jurisdictions, including business licensing, annual report fees, and business and occupation taxes.<sup>168</sup> Thus, the Debtors, pursuant to Bankruptcy Rule

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<sup>163</sup> Although assurance of payment must be “adequate,” it need not constitute an absolute guarantee of the debtors’ ability to pay.” See *In re Circuit City Stores, Inc.*, No. 08-35653, 2009 WL 484553, at \*4 (Bankr. E.D. Va. Jan. 14, 2009); see also *In re Great Atl. & Pac. Tea Co.*, No. 11-cv-1338, 2011 WL 5546954, at \*5 (S.D.N.Y. Nov. 14, 2011) (finding that “[Courts will approve an amount that is adequate enough to insure against unreasonable risk of nonpayment, but are not required to give the equivalent of a guaranty of payment in full”); *In re Caldor, Inc.* —NY, 199 B.R. 1, 3 (S.D.N.Y. 1996) (“Section 366(b) requires ... ‘adequate assurance’ of payment. The statute does not require an ‘absolute guarantee of payment.’”) (citation omitted), *aff’d sub nom. Va. Elec. & Power Co. Caldor, Inc.* —NY, 117 F.3d 646 (2d Cir. 1997).

<sup>164</sup> 11 U.S.C. § 366(c)(2) (2012).

<sup>165</sup> *In re Gymboree Corp.*, Case No. 17-32986-KLP, Bankr. Virg., Voluntary Petition (Dkt. 23); see also *In re Circuit City Stores, Inc.*, No. 08-35653, 2009 WL 484553, at \*3 (Bankr. E.D. Va. Jan. 14, 2009) (citing H.R.Rep. No. 95—595, at 350 (1978), as reprinted in 1978 U.S.C.C.A.N. 5963, 6306).

<sup>166</sup> [Final Order \(I\) Approving the Debtors' Proposed Adequate Assurance of Payment for Future Utility Services, \(II\) Prohibiting Utility Companies from Altering, Refusing, or Discontinuing Services, \(III\) Approving the Debtors Proposed Procedures for Resolving Additional Assurance Requests, and \(IV\) Granting Related Relief](#), Case 17-32986, Doc. No. 378.

<sup>167</sup> *In re Gymboree Corp.*, Case No. 17-32986-KLP, Bankr. Virg., Voluntary Petition (Dkt. 22)

<sup>168</sup> *Id.*

6003,<sup>169</sup> requested that the Court authorize, but not direct, the Debtors to remit and pay Taxes and Fees that accrued prior to the Petition Date to avoid irreparable harm.<sup>170</sup>

The Taxes and Fees are summarized as follows<sup>171</sup>:

Category	Description	Approximate Amount accrued as of Petition Date	Approximate Amount Due During Interim Period
Sales and Use Taxes	Taxes imposed on the sale and purchase of certain goods and services	\$5,800,000	\$4,400,000
Income Taxes	Taxes imposed on the Debtors' income in the ordinary course of operating their businesses	\$900,000	\$815,000
Franchise Taxes	Taxes required to conduct business in the ordinary course		
Property Taxes	Taxes and obligations related to real and personal property holdings	\$2,600,000	\$220,000
Miscellaneous Taxes and Fees	The Debtors remit other taxes and fees required to operate their business in certain states, including business and occupation taxes and commercial activity taxes	\$1,300,000	\$289,000
Audits	Investigations by the Authorities (as defined herein), with respect to the above categories, which may result in the imposition of Assessments together with interest and possible fines and penalties to become payable	\$2,600,000	\$0
Total		\$13,200,000.00	5,724,000.00

<sup>169</sup> 18 U.S. Code § 6003 (empowering the Court to grant relief within the first 21 days after the Petition Date “to the extent that relief is necessary to avoid immediate and irreparable harm”).

<sup>170</sup> [Motion to Authorize Debtors' Motion for Entry of Interim and Final Orders \(I\) Approving the Debtors Proposed Adequate Assurance of Payment for Future Utility Services, \(II\) Prohibiting Utility Companies from Altering, Refusing, or Discontinuing Services, \(III\) Approving the Debtors Proposed Procedures for Resolving Additional Assurance Requests, and \(IV\) Granting Related Relief](#), Case No. 17-32986, Doc. No. 23.

<sup>171</sup> *Id.*



Failure to pay such Taxes and Fees could have materially disrupted the Debtors' business operations.<sup>172</sup> For example, the taxing and licensing authorities ("Authorities") could have audited the Debtors, which may have interrupted or halted the Debtors' progression in the restructuring process; the Authorities could have attempted to suspend the Debtors' operations, file liens, or seek to lift the automatic stay; and certain Debtors' directors and officers could have been subject to personal liability claims.<sup>173</sup> On July 11, 2017, the Court issued a final order, authorizing, but not directing, the Debtors to remit and pay prepetition Taxes and Fees in the ordinary course of business.<sup>174</sup>

### **5. Lien Claimants, Import and Export Claimants, & 503(B)(9) Claimants**

The Debtors generally designed their own merchandise in-house and contracted with various foreign manufacturers, located primarily in Asia, to produce and manufacture the pre-designed merchandise in accordance with the Debtors' design specifications.<sup>175</sup> To maintain an uninterrupted flow of inventory and other goods through its supply and distribution network, such as the purchase, importation, storage, and shipment of its merchandise, the Debtors requested that the Court authorize the Debtors to pay the prepetition and postpetition amounts owed to warehousemen, shippers, and other non-merchant lienholders.<sup>176</sup> If the Court denied such a request, the claimants could have asserted liens on and/or refused to deliver or release the goods in their possession to secure payments and fees owed by the Debtors.<sup>177</sup>

The Debtors also requested to pay import and export claimants as well as Bankruptcy Code section 503(b)(9) claimants.<sup>178</sup> Bankruptcy Code section 503(b)(9) claimants are those creditors who have administrative expense priority for "the value of any goods received by the debtor within 20 days before" petition date.<sup>179</sup> The Court granted the Debtors' motion.<sup>180</sup>

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<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> 11 U.S.C.A. § 503(b)(9).

<sup>180</sup> [Motion to Authorize Debtors' Motion for Entry of Interim and Final Orders \(I\) Authorizing the Debtors to Pay Prepetition Claims of Lien Claimants, Import and Export Claimants, and](#)

## VIII. Confirming The Plan

On June 16, 2017, the Debtors filed their Chapter 11 Plan of Reorganization (the “Initial Plan”).<sup>181</sup> The Debtors also filed a disclosure statement for the Initial Plan (“Disclosure Statement”), pursuant to section 1125 of the Bankruptcy Code, for the purpose of gaining disclosure statement approval, which would allow them to solicit votes to accept or reject the Initial Plan.<sup>182</sup> There were a number of objections to the Disclosure Statement itself.

### A. The Disclosure Statement

Section 1125 of the Bankruptcy Code provides that the Debtors may not solicit acceptance or rejection of the Plan without preparing a disclosure statement containing “adequate information.”<sup>183</sup> Adequate information is defined as “information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor’s books and records. . . that would enable. . . a hypothetical. . . investor. . . of the relevant class to make an informed judgment about the Plan.”<sup>184</sup>

The Disclosure Statement also provided a list of the classes that were entitled to vote on the Plan, and what each class would receive if the Plan was confirmed.<sup>185</sup> Eligibility to vote on the Plan depended on what type of interests or claims an investor held.<sup>186</sup> The Debtors’ Disclosure Statement identified the following classes<sup>187</sup>:

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[503\(b\)\(9\) Claimants, \(II\) Confirming Administrative Expense Priority of Outstanding Orders, and \(III\) Granting Related Relief](#), Case 17-32986, Doc. No. 24.

<sup>181</sup> [Chapter 11 Plan Joint Chapter 11 Plan of Reorganization of The Gymboree Corporation and its Debtor Affiliates](#), Case 17-32986, Doc. No. 140.

<sup>182</sup> [Disclosure Statement for the Joint Chapter Plan of Reorganization of the Gymboree Corporation and its Debtor Affiliates](#), Case 17-32986, Doc. No. 141.

<sup>183</sup> 11 U.S.C. § 1125 (2012).

<sup>184</sup> *Id.*

<sup>185</sup> [Disclosure Statement for the Joint Chapter Plan of Reorganization of the Gymboree Corporation and its Debtor Affiliates](#), *supra* note 170, at p. 6-7.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

Class	Claim/Interest	Status	Voting Rights
1	Other Secured Claims	Unimpaired	Presumed to Accept
2	Other Priority Claims	Unimpaired	Presumed to Accept
3	Term Loan Secured Claims	Impaired	Entitled to Vote
4	Critical Trade Claims	Unimpaired	Presumed to Accept
5	General Unsecured Claims	Impaired	Entitled to Vote <sup>188</sup>
6	Intercompany Claims	Unimpaired/Impaired	Not Entitled to Vote
7	Intercompany Interests	Unimpaired	Presumed to Accept
8	Interests in Gymboree	Impaired	Deemed to Reject

### 1. Unsecured Creditors Committee Objections

On June 22, 2017, pursuant to 11 U.S.C. § 1102, the United States Trustee appointed 7 creditors to serve on the Official Committee of Unsecured Creditors (the “Committee”).<sup>189</sup> The Committee was comprised of Hansoll Textile, GGP L.P., PREIT Services LLC, Deutsche Bank Trust Company Americas, Simon Property Group Inc., Hutchin Hill Capital Primary Fund Ltd, and Li & Fung Centennial Pte Ltd.<sup>190</sup>

After being appointed, the Committee quickly filed an objection to the Debtors’ motion to approve the initial Disclosure Statement.<sup>191</sup> The Committee’s first concern was that under the

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<sup>188</sup> In the Initial Disclosure Statement, the General Unsecured were not entitled to vote, but instead, deemed to reject. The original Disclosure Statement provided that holders of General Unsecured claims would not be entitled to any recovery.

<sup>189</sup> [Appointment of Unsecured Creditors Committee](#), Case 17-32986, Doc. No. 175

<sup>190</sup> *Id.*

<sup>191</sup> [Statement Of The Official Committee Of Unsecured Creditors Regarding The Debtors Motion For Entry Of An Order \(I\) Approving The Adequacy Of The Disclosure Statement, \(Ii\) Approving The Solicitation And Notice Procedures With Respect To Confirmation Of The Debtors Proposed Joint Plan Of Reorganization, \(Iii\) Approving The Forms Of Ballots And Notices In Connection Therewith, \(Iv\) Approving The Rights Offerings Procedures, \(V\) Scheduling Certain Dates With Respect Thereto](#), Case 17-32986, Doc. No. 436.

Plan, Class 5 General Creditors (including non-creditor vendors, landlord rejection damages, and unsecured note holders aggregating an estimated \$220 million) would not receive anything.<sup>192</sup> Additionally, the Committee was concerned with the inadequacy of the Disclosure Statement. Specifically, the Disclosure Statement lacked “critical information concerning (a) the significant value of potential estate cause of action and other unencumbered assets, (b) the basis for the broad releases being granted under the Plan to current and former insiders, including the Sponsor, former directors and officers, and third parties, (c) the perceived estimated value, if any, being received in exchange for the releases discussed above, and (d) which creditor constituency was to receive the benefit of that value under the Plan and how that complied with the confirmation standards under the Bankruptcy Code.”<sup>193</sup>

In response to these concerns, the Debtors agreed to include a section in the Disclosure Statement that outlined the Committee’s position.<sup>194</sup> It stated that the Committee was still investigating the Debtors’ history and financial affairs, and provided a detailed list of the issues that were of specific concern.<sup>195</sup> Furthermore, the additional language stated that the Committee provided no input in the Disclosure Statement, and it was, in fact, filed before the Committee’s formation.<sup>196</sup>

## 2. Landlord Objections

Weingarten Realty Investors (“Weingarten”), owner of several shopping centers, filed a limited objection to the motion to approve the Initial Plan and the Disclosure Statement.<sup>197</sup> Specifically, Weingarten was concerned about the Debtors not providing adequate notice of the Debtors’ decision to assume or reject any of the unexpired leases held between the two parties.<sup>198</sup>

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<sup>192</sup> *Id.* at 2.

<sup>193</sup> *Id.* at 3.

<sup>194</sup> [Transcript of Hearing on Debtors Motion to Approve Disclosure Statement](#), Case 17-32986, Doc. No. 461. The Debtors did not file a direct response to the U.S. Trustee objection, but instead entered into private negotiations with them. These negotiations were later discussed at the disclosure statement hearing.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> [Limited Objection of Weingarten Realty Investors to Debtors’ Disclosure Statement and Solicitation Motion](#), Case 17-32986, Doc. No. 402, pp. 1-2.

<sup>198</sup> *Id.*

At the time of this objection, the Debtors had three unexpired leases with Weingarten.<sup>199</sup> However, the Debtors had previously identified one of the Weingarten locations on a Store Closing List previously filed with the Court.<sup>200</sup> Thus, Weingarten objected to the Plan and Disclosure Statement, because both documents failed to specify an effective date in which the Plan would be declared effective; and believe, the Debtors, pursuant to sections 365(d)(4) and 1123(b)(2), should have had to identify all of the leases that they planned to reject prior to the Plan Confirmation.<sup>201</sup> By doing so, Weingarten and other lessors would have had the opportunity to participate in the confirmation process, instead of being left without an answer until days after the Plan Confirmation.

Legacy Place Properties LLC, Market Street Retail South LLC, W/S/M Hingham Properties LLC, BP PruCenter Acquisition LLC, Warwick Mall LLC, and OWRF Carmel LLC (collectively, the “Landlords”) also filed a limited objection to the Debtors’ motion to approve the Disclosure Statement for the Initial Plan.<sup>202</sup> The Landlords and Debtors were both parties to the following unexpired leases:<sup>203</sup>

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<sup>199</sup> *Id.* at 2.

<sup>200</sup> See [Notice of Filing of Store Closing List regarding the Debtors’ Motion for Entry of Interim and Final Orders \(I\) Authorizing the Debtors to Assume the Consulting Agreement, \(II\) Approving Procedures for Store Closing Sales, and \(III\) Granting Related Relief](#), Case 17-32986, Doc. No. 342, Exhibit A.

<sup>201</sup> [Limited Objection of Weingarten Realty Investors to Debtors’ Disclosure Statement and Solicitation Motion](#), *supra* note 185, at pp. 3-4.

<sup>202</sup> [Limited Objection of Legacy Place Properties LLC, Market Street Retail South LLC, W/S/M Hingham Properties LLC, BP Prucenter Acquisition LLC, Warwick Mall L.L.C. and OWRF Carmel, LLC to Debtors’ Motion for Entry of an Order \(I\) Approving the Adequacy of the Disclosure Statement \(II\) Approving the Solicitation and Notice PProcedures with Respect to Confirmation of the Debtors’ Proposed Joint Plan of Reorganization, \(III\) Approving the Forms of Ballots and Notices in Connection Therewith, \(IV\) Approving the Rights Offering Procedures, \(V\) Scheduling Certain Dates with Respect Thereto, and \(VI\) Granting Related Relief](#), Case 17-32986, Doc. No. 405.

<sup>203</sup> *Id.* at 2.

Landlord	Location	Store(s)
Legacy Place Properties LLC	Legacy Place Dedham, Massachusetts	Gymboree Crazy 8
Market Street Retail South LLC	MarketStreet Lynnfield Lynnfield, Massachusetts	Gymboree
W/S/M Hingham Properties LLC	Derby Street Shoppes Hingham, Massachusetts	Gymboree
BP PruCenter Acquisition LLC	Prudential Center Boston, Massachusetts	Janie and Jack
Warwick Mall L.L.C.	Warwick Mall Warwick, Rhode Island	Gymboree
OWRF Carmel, LLC	Carmel, California	Janie and Jack

Each of the leases listed above were real property leases located in shopping centers.<sup>204</sup> The Crazy 8 store located in Legacy Place was included on the same store closing list as the Weingarten lease.<sup>205</sup> The Landlords, similar to Weingarten, objected to the timeline leading up to the Plan Confirmation. Specifically, they asserted that the provisions violated the Bankruptcy Code and were unduly burdensome to individuals holding unexpired leases.<sup>206</sup> The Initial Plan provided that all unexpired leases would be assumed or rejected on the date the Plan was to be confirmed.<sup>207</sup> The Bankruptcy Code, § 365(d)(4) provides that “an unexpired lease of nonresidential real property under which the debtor is the lessee shall be deemed rejected...if the [debtor] does not assume or reject...by the earlier of ...120 days after the date of the order for relief or the date of the entry of an order confirming the Plan.”<sup>208</sup> The Court, however, extended the 120-day period set forth in the statute. Instead, the Debtors had until the earlier of January 8, 2018, or the date of entry of an order confirming a Plan.<sup>209</sup>

The timeline in the Initial Plan provided that the Plan Confirmation would take place prior to the January 8th 120-day extension.<sup>210</sup> As such, the Landlords objected to the Plan

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<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> [Chapter 11 Plan Joint Chapter 11 Plan of Reorganization of The Gymboree Corporation and its Debtor Affiliates](#), Case 17-32986, Doc. No. 140.

<sup>208</sup> 11 U.S.C. 365(d)(4) (2012).

<sup>209</sup> [Hearing held; Motion GRANTED; \(related document\(s\): 162 Debtors' Motion for Entry of an Order Extending the Time Within Which the Debtors Must Assume or Reject Unexpired Leases of Nonresidential Real Property](#), Case 17-32986, Doc. No. 361

<sup>210</sup> [Chapter 11 Plan Joint Chapter 11 Plan of Reorganization of The Gymboree Corporation and its Debtor Affiliates](#), *supra* note 195.

Confirmation motion and insisted that the Court require the Debtors to assume or reject before the Plan Confirmation.<sup>211</sup> Lastly, the Landlords objected to the cure claim procedures proposed in the Initial Plan. The Initial Plan provided that the Debtors would file cure notices at least ten days prior to the date set for the Plan confirmation. At that time, the Landlords were required to object at least seven days prior to the date set for the Plan Confirmation. Thus, the Landlords could have had as little as three days to object. The Landlords' objected to this provision and asked that the Landlords be entitled to a minimum of ten days after the cure notices were to be filed to object.<sup>212</sup>

ARC SWWMGPA001, LLC, and twenty-nine other landlords also filed a limited objection to the Disclosure Statement in which they raised the same issues as the Landlords (previously discussed above) in regards to the accept or reject deadline for executory leases falling beyond the Effective Date of the Plan, and the short time period in which Landlords could reject.<sup>213</sup> In addition to these objections, however, the parties also objected to the Disclosure Statement and Initial Plan for not providing any information on what adequate assurance information the Debtors intended to provide the landlords, and a deadline by which landlords could expect this information to be provided.<sup>214</sup> Furthermore, the parties argued that the Initial Plan improperly sought to modify rights under the leases.<sup>215</sup> The parties asserted that the Debtors could not avoid all of the obligations under the leases by included releases or waivers in the Initial Plan.<sup>216</sup> Lastly, the parties asserted that the Initial Plan deprived creditors of their setoff

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<sup>211</sup> [Limited Objection of Legacy Place Properties LLC, Market Street Retail South LLC, W/S/M Hingham Properties LLC, BP Prucenter Acquisition LLC, Warwick Mall L.L.C. and OWRF Carmel, LLC to Debtors' Motion for Entry of an Order \(I\) Approving the Adequacy of the Disclosure Statement \(II\) Approving the Solicitation and Notice Procedures with Respect to Confirmation of the Debtors' Proposed Joint Plan of Reorganization, \(III\) Approving the Forms of Ballots and Notices in Connection Therewith, \(IV\) Approving the Rights Offering Procedures, \(V\) Scheduling Certain Dates with Respect Thereto, and \(VI\) Granting Related Relief](#), Case 17-32986, Doc. No. 405.

<sup>212</sup> *Id.* This objection was later joined by other landlords. See [Limited Objection](#), Doc. 414; [Joinder to Objection](#), Doc. 410; [Joinder to Limited Objection of Landlords](#), Doc. 406

<sup>213</sup> [Limited Objection to Disclosure Statement](#), Case 17-32986, Doc No. 408

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

and recoupment rights. Under the Initial Plan, landlords would be deprived of their right to assert setoffs or exercise recoupment.<sup>217</sup>

## B. Disclosure Statement Hearing

On July 24, 2017, 6 weeks after filing, the Court held a hearing to confirm the Disclosure Statement.<sup>218</sup> Originally, the hearing was listed as a contested disclosure statement hearing.<sup>219</sup> However, by the time the hearing arose, the Debtors had resolved all of the objections.<sup>220</sup> The Debtors provided the Court with a brief overview of how they got to the confirmation of Disclosure Statement and how they planned to move forward. They began by discussing the prepetition financing, DIP financing, exit facilities, and the extensive time and effort put into negotiating with all of the parties involved in the proceeding.<sup>221</sup> The Debtors then proceeded to clarify that approval of the Disclosure Statement would not preclude any party from objecting at confirmation with respect to any substantive issue relating to the Plan or with respect to any future assumption, rejection, or assignment of a contract or lease.<sup>222</sup>

Furthermore, the Debtors continued to be in active discussions with the unsecured creditors committee at the time of the hearing and remained hopeful that by the time they got to confirmation they would be standing “arm-in-arm supporting [the] [P]lan.”<sup>223</sup> Next, the Debtors discussed the landlords. Changes were made in terms of the structure for which the assumptions, assignment, and rejections of leases were teed up.<sup>224</sup> Specifically, the Debtors agreed to file an initial list of assumed, rejected, and assigned leases roughly two weeks before the confirmation hearing.<sup>225</sup> The Debtors also stated that they would provide adequate assurance information at

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<sup>217</sup> *Id.*

<sup>218</sup> [Transcript of Hearing on Debtors Motion to Approve Disclosure Statement](#), Case 17-32986, Doc. No. 461

<sup>219</sup> *Id.* at 3.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.* at 4-7.

<sup>222</sup> *Id.* at 7-8.

<sup>223</sup> *Id.* at 17.

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*



that time, and the landlords would then have the ability to object.<sup>226</sup> If the list was revised following the objections, the landlords would have an additional opportunity to raise their objections at the confirmation hearing.<sup>227</sup>

Lastly, the Debtors provided the Court with the reasons that they believed they met their burden with respect to the Disclosure Statement. The Debtors assured that the Plan was in compliance with Section 1125 of the Bankruptcy Code. Furthermore, the Disclosure Statement provided adequate information. It contained information regarding the Debtors' corporate history, structure, and business overview.<sup>228</sup> It discussed the events that led to the Chapter 11 filings, projections with respect to financial performance of the reorganized company as well as a liquidation analysis, and risk factors related to the Debtors' business.<sup>229</sup> Furthermore, the Disclosure Statement laid out the solicitation and voting procedures in detail, federal income tax consequences of the Plan, and a recommendation to the creditors about voting to accept the plan.<sup>230</sup>

After the Debtors provided their testimony, the Judge opened the floor to anyone who wished to make a statement. Mark Indelicato, counsel for the Committee, addressed the Court, detailing the concerns of the Committee.<sup>231</sup> The Committee's first concern was with regard to the Debtors' Rights Offering.<sup>232</sup> The Committee had some concerns about the feasibility of being able to raise \$80 million and whether or not any lesser amount would be sufficient to get the reorganized company through its first year.<sup>233</sup> Furthermore, the Committee was not done with its investigation and continued to look into the case with a pragmatic approach.<sup>234</sup> The Committee asserted that it would continue to work cooperatively with the Debtors in hopes of resolving any

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<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> *Id.* at 19.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *Id.* at 20.

<sup>232</sup> *Id.* at 20-21.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.* at 21.

and all issues.<sup>235</sup> To the extent that they could not resolve such issues, they would be prepared to bring their objections to the confirmation hearing.<sup>236</sup> With that, the Committee requested that the Judge approve the Disclosure Statement.<sup>237</sup>

Next, the Court heard from Kent Kolbig on behalf of Deutsche Bank Trust Company Americas, indenture trustee and member of the Committee.<sup>238</sup> Mr. Kolbig reiterated his clients support with what was previously stated by the Committee.<sup>239</sup> Furthermore, he stated that his client believed that more value should have been added to what would go to the unsecured creditors, and unless the Debtors agreed to offer them more money they would bring that issue up at the confirmation hearing.<sup>240</sup>

The Court then heard from Leslie Heilman, on behalf of a number of landlords.<sup>241</sup> Ms. Heilman was happy to confirm that the landlords had resolved their objections after active and lengthy negotiations with the Debtors that related to the adequacy of the Disclosure Statement, but more specifically, to the timing and the process that was proposed for the treatment of the unexpired leases under the Plan.<sup>242</sup> The Debtors negotiated various amendments to Section 5 of the Plan as well as made additions to the Disclosure Statement's order and schedules.<sup>243</sup>

After hearing the testimony of the Debtors and various parties, the Judge found that the revised Disclosure Statement complied with the requirements of Section 1125 and Rule 3016(b).<sup>244</sup> And for that reason, the Judge approved the Disclosure Statement.<sup>245</sup>

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<sup>235</sup> *Id.*

<sup>236</sup> *Id.* at 22.

<sup>237</sup> *Id.*

<sup>238</sup> *Id.* at 24.

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> *Id.* at 25. Ms. Heilman represented the landlords noted in the objection filed at docket 408 on July 17, 2017, who collectively lease approximately 163 retail locations to the Debtors.

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> *Id.* at 28.

<sup>245</sup> *Id.*

### C. The Confirmation Hearing

On September 7, 2017, just 88 days into the bankruptcy proceedings, the Court held a hearing to confirm the amended Plan.<sup>246</sup> At the hearing, the Debtors urged the Court to confirm the Plan and presented a list of reasons why the Court should have confirmed the Plan. First, the Debtors reminded the Court that 99% of the term loan lenders consented to the Restructuring Agreement.<sup>247</sup> Furthermore, the Debtors negotiated for months with a great majority of its lenders, both secured and unsecured. By doing so, the Debtors anticipated more than one billion dollars of debt reduction, “which [would] free the company to be able to operate outside of the confines of interest burden and be able to reinvest in its operations, in its stores, and its rationalized footprint.”<sup>248</sup>

The Debtors further reminded the Court that, under the proposed Plan, they would convert almost all of their debt into equity; primarily through the term loan, which was approximately 800 million dollars.<sup>249</sup> The Term Loan Lenders agreed to provide new capital in the form of the DIP financing and also sponsor a rights offering, which would result in nearly 61 million dollars.<sup>250</sup> Additionally, the ABL lenders agreed to roll-up their facility into a post-petition facility, and that facility would be replaced with exit financing that the company would utilize to operate its business in the ordinary course.<sup>251</sup>

Originally, the Debtors contemplated a 500,000 dollar distribution for the unsecured creditors.<sup>252</sup> However, as part of an ongoing negotiations that took place over several months, the Debtors were able to make an arrangement that was supported by the Term Loan Lenders and unsecured creditors committee and would result in a distribution of 4.5 million dollars to

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<sup>246</sup> [Transcript of Hearing on Amended Chapter 11 Plan](#), Case 17-32986, Doc. No. 651

<sup>247</sup> *Id.* at 12-13.

<sup>248</sup> *Id.* at 13.

<sup>249</sup> *Id.* at 12.

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> *Id.* at 26.

unsecured creditors.<sup>253</sup> Thus, instead of receiving a pro rata share of 500,000 dollars, the Plan provided that the unsecured creditors would receive a pro rata share of 4.5 million dollars.

The Debtors continued by enlightening the Court with statistics regarding the retail industry and the small chances in which large companies like themselves successfully restructure their business without having to liquidate. The Debtors noted that studies show that 55% of retail cases end up in liquidations.<sup>254</sup> And that was from a study period of 2006 to 2015, and it looked at cases with more than 50 million dollars in liabilities.<sup>255</sup> Furthermore, of the remaining cases that were actually said to be organized, just 30% of those were sale processes that were effectively disguised liquidations.<sup>256</sup> Doing the math, only 15% of cases are actually able to restructure on a stand-alone basis, like Gymboree.<sup>257</sup>

At the hearing, the Debtors further noted that although there were a lot of objections to the Plan, all of those objections were resolved, except for the U.S. Trustee objection.<sup>258</sup> The Debtors assured the Court that “everybody that need[ed] to be around the table [had], in fact, been around the table, and [they’ve] resolved any concerns that folks may have [had]. . . .”<sup>259</sup> Simply put, everyone with an interest in the case, with the exception of the U.S. Trustee, who did not hold an economic interest, had consented to the Plan. According to the evidence presented to the Court, the Plan was unanimously accepted by each class. In each of the voting classes, 99% voted to confirm the Plan, in terms of amount, and 75% in terms of number.<sup>260</sup> The final tabulation of votes cast for the Plan by the parties entitled to vote is outlined in the chart below.<sup>261</sup>

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<sup>253</sup> *Id.*

<sup>254</sup> *Id.* at 11.

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

<sup>258</sup> *Id.* at 16.

<sup>259</sup> *Id.* at 15-16.

<sup>260</sup> *Id.* at 16.

<sup>261</sup> [Declaration of James Daloia Of Prime Clerk LLC Regarding Solicitation of Votes and Tabulation of Ballots Cast on The First Amended Joint Chapter 11 Plan of Reorganization of The Gymboree Corporation and Its Debtor Affiliates](#), Case 17-32986, Doc. No. 599, Exhibit A.

Class	Class Description	Number Accepting %	Number Rejecting %	Amount Accepting %	Amount Rejecting %	Class Voting Result
3	Term Loan Secured Claims	87	0	\$240,458,788.65	\$0.00	ACCEPTS
		100%	0%	100%	0%	
5A	GUC Against The Gymboree Corporation	476	69	\$585,537,310.71	\$32,859,988.42	ACCEPTS
		87.34%	12.66%	94.69%	5.31%	
5B	GUC Against Giraffe Intermediate B, Inc.	87	0	\$395,741,811.82	\$0	ACCEPTS
		100%	0%	100%	0%	
5C	GUC Against Gym-Card LLC	198	53	\$585,228,811.82	\$31,963,000.00	ACCEPTS
		78.88%	21.12%	94.82%	5.18%	
5D	GUC Against Gym-Mark, Inc.	198	53	\$585,228,811.82	\$31,963,000.00	ACCEPTS
		78.88%	21.12%	94.82%	5.18%	
5E	GUC Against Gymboree Manufacturing, Inc.	198	53	\$585,228,811.82	\$31,963,000.00	ACCEPTS
		78.88%	21.12%	94.82%	5.18%	
5F	GUC against Gymboree Retail Stores Inc.	199	53	\$585,228,874.69	\$31,963,000.00	ACCEPTS
		78.97%	21.03%	94.82%	5.18%	
5G	GUC against Gymboree Operations, Inc.	198	53	\$585,228,811.82	\$31,963,000.00	ACCEPTS
		78.88%	21.12%	94.82%	5.18%	
5H	GUC Against S.C.C. Wholesale Inc.	198	53	\$585,228,811.82	\$31,963,000.00	ACCEPTS
		78.88%	21.12%	94.82%	5.18%	

## 1. Trustee Objections

Judy Robbins, the U.S. Trustee (“Trustee”) filed an objection to the Disclosure Statement for the Initial Plan.<sup>262</sup> The Trustee asserted that the Disclosure Statement failed to provide creditors with “adequate” information; a violation of §1125 of the Bankruptcy Code.<sup>263</sup> Specifically, the Disclosure Statement lacked adequate support for the proposed third party releases<sup>264</sup> and exculpation clauses<sup>265</sup> described in the Initial Plan.<sup>266</sup> The Disclosure Statement disclosed that if the proposed Plan was confirmed, “pre- and post-petition lending group agents,

<sup>262</sup> [The United States Trustee’s Objection to Disclosure Statement for The Joint Chapter 11 Plan of Reorganization](#), Case 17-32986, Doc. No. 407.

<sup>263</sup> *Id.*

<sup>264</sup> The third-party release, as provided in the disclosure statement, would release individuals who are not parties in the bankruptcy proceeding to be released or discharged from any and all causes of action that resulted from their interactions with the Debtors.

<sup>265</sup> The exculpation clause prevents the same parties that are beneficiaries will be free from liability against anyone for various claims relating to the bankruptcy case.

<sup>266</sup> *Id.* at p. 6.

and its shareholder (Bain Capital Private Equity, L.P.), as well as all of those entities' current and former affiliates, subsidiaries. . .and pretty much anyone who has ever in any way connected with any of those entities, [would be] released from any liability for anything they did with respect to [the] Debtors.”<sup>267</sup> The Disclosure Statement also disclosed that if the Plan was confirmed, “the same parties that [were] the beneficiaries of the Third Party Release [would] be free from liability against anyone in the world for various claims relating to these bankruptcy cases, including many that were also redundantly included in the Third-Party Release.”<sup>268</sup>

The Trustee argued that consideration of whether third-party releases or exculpation provisions were appropriate was dependent upon the facts and circumstances surrounding the particular case.<sup>269</sup> Furthermore, third-party releases and exculpation clauses are not appropriate in most cases, and their approval should be granted cautiously and infrequently.<sup>270</sup> In order to support the implementation of either clause, the Debtor must supply the Court with facts that sufficiently support the appropriateness of the releases in the proceeding.<sup>271</sup> The Trustee argued that the Disclosure Statement did not provide enough “adequate information,” or factual or evidentiary support for the proposed release and exculpation provisions.<sup>272</sup>

The Trustee also argued that the third-party release was not consensual, because the Debtors had not afforded all of their creditors the ability to opt out of the third-party release.<sup>273</sup> Furthermore, even if it was consensual, it was not justified. Rather, the Fourth Circuit has held that consent is merely a factor that will be considered by the Court.<sup>274</sup>

The Debtors addressed this situation for the first time at the Confirmation Hearing. In response to the Trustee's objections, the Debtors argued that both clauses were necessary and met all of the legal standards required by the Court.<sup>275</sup> The Debtors asserted that the exculpations

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<sup>267</sup> *Id.*

<sup>268</sup> *Id.*

<sup>269</sup> *Id.* at 7.

<sup>270</sup> *Id.*

<sup>271</sup> *Id.*

<sup>272</sup> *Id.* at 8.

<sup>273</sup> *Id.*

<sup>274</sup> *Id.* at 10.

<sup>275</sup> [Transcript of Hearing on Amended Chapter 11 Plan](#), Case 17-32986, Doc. No. 651

were narrowly tailored to meet the needs of the estate.<sup>276</sup> Furthermore, it did not extend to actual fraud, willful misconduct, or gross negligence, and it was limited to parties who provided necessary and valuable duties in connection with the case.<sup>277</sup>

The Debtors' response to the Trustee's third-party release objection was more extensive but tailored around the fact that the released parties made substantial contributions to the Debtors' reorganization. Furthermore, had the third-party release not been a part of the Plan, the negotiations would not have went as well.<sup>278</sup> The Debtors provided the Court with testimony from James Mesterham, their Chief Restructuring Officer ("CRO"). He testified to each party listed in the release contribution to the Debtors' reorganization, and how necessary the clauses were in negotiations.<sup>279</sup> He testified that the releases were always part of what was required by the various parties.<sup>280</sup> Furthermore, the CRO testified that the purpose of the releases was to provide closure and to avoid a host of competing litigations that could have resulted in lost time, money, and substantially harmed the business.<sup>281</sup>

In regard to consent, the Debtors argued that every party that was being released supported the Plan and wanted to see the company reorganized<sup>282</sup>. The parties casted their votes, the Debtors reiterated, and the overwhelming majority agreed to the Plan, with the releases.<sup>283</sup> The business would not have been where it was without all of the individuals listed in the release, and in order to keep some of the relationships on-going postpetition, the Debtors were sure these releases were necessary.<sup>284</sup>

## 2. The Judge's Ruling

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<sup>276</sup> *Id.* at 51.

<sup>277</sup> *Id.*

<sup>278</sup> *Id.* at 28-29.

<sup>279</sup> *Id.*

<sup>280</sup> *Id.*

<sup>281</sup> *Id.* at 45.

<sup>282</sup> *Id.* at 31.

<sup>283</sup> *Id.*

<sup>284</sup> *Id.*

After hearing testimony from numerous individuals, the Judge stated that the commentary reflected that the third-party release and exculpatory clauses were essential to reaching a resolution with all of the parties involved in the case.<sup>285</sup> Furthermore, the Judge believed that it was apparent “in this case that when you have a Plan that’s been presented and that reflects so much work and effort on that part of all the parties involved in the case, that these types of provisions are sometimes essential [and] necessary...” and in this case, met the legal requirements.<sup>286</sup> Not only did the Debtors comply with the notice requirements under Rule 2002, but the Plan also met the requirements under Section 1129.<sup>287</sup>

The Judge also noted that the Plan reflected extensive and lengthy arms’ length negotiations between the parties, and the only objection brought was from the U.S. Trustee, who also supported the Plan with the exception of the third-party release and exculpatory clause. For those reasons, the Judge did not hesitate in approving the confirmation of the Plan.

## **IX. The Final Plan**

On September 7, 2017, the United States Bankruptcy Court for the Eastern District of Virginia entered an order confirming the Joint Chapter 11 Plan of Reorganization of the Gymboree Corporation and its Debtor Affiliates.<sup>288</sup> Confirmation of the proposed Plan not only bounded the Debtors, but any entity or person acquiring property under the Plan, any creditor of or equity security holder in a debtor, and any other entities and persons to the extent ordered by the Bankruptcy Court pursuant to the terms of the confirmed Plan, whether or not such entity or person was impaired pursuant to the Plan, voted to accept the Plan, or received or retained any

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<sup>285</sup> *Id.* at 80-81.

<sup>286</sup> *Id.*

<sup>287</sup> *Id.*

<sup>288</sup> [Notice of \(i\) entry of confirmation order, \(ii\) occurrence of effective date, and \(iii\) related bar dates](#), Case 17-32986, Doc. No. 676; *see also* [Order Confirming The Joint Chapter 11 Plan of Reorganization of The Gymboree Corporation And Its Debtor Affiliates](#), Case 17-32986, Doc. No. 646.



property under the Plan.<sup>289</sup> The Plan stipulated 8 different classes of claims and outlined what each class would receive on the Plan’s Effective Date.<sup>290</sup>

<b>Class</b>	<b>Claim or Interest</b>	<b>Status</b>	<b>Voting Rights</b>
1	Other Secured Claims	Unimpaired	Presumed to Accept
2	Other Priority Claims	Unimpaired	Presumed to Accept
3	Term Loan Secured Claims	Impaired	Entitled to Vote
4	Critical Trade Claims	Unimpaired	Presumed to Accept
5	General Unsecured Claims	Impaired	Entitled to Vote
6	Intercompany Claims	Unimpaired / Impaired	Not Entitled to Vote
7	Intercompany Interests	Unimpaired	Presumed to Accept
8	Interests in Gymboree	Impaired	Deemed to Reject

Furthermore, the confirmation order discharged the Debtors from any debt arising before the Effective Date of the Plan and terminated all of the rights and interests of pre-bankruptcy equity security holders and substituted the obligations set forth in the Plan for those pre-bankruptcy Claims and Interests.<sup>291</sup>

Under the Plan, claims and interests were divided into classes according to their relative priority and other criteria. A creditor’s claim is impaired if the Plan “modifies the rights that the class of creditors would otherwise have.”<sup>292</sup> On the other hand, if the Plan did not modify the class’s rights, or maintained the same rights that it would have received if the Debtors had not filed for bankruptcy, the creditor’s claim was unimpaired.<sup>293</sup> Pursuant to section 1126(f) of the Bankruptcy Code, a class that is unimpaired is presumed to have accepted the Plan and solicitation of acceptances by said class is not required.<sup>294</sup> The distinction between the two is

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<sup>289</sup> [Amended Joint Chapter 11 Plan of Reorganization of The Gymboree Corporation and Its Debtor Affiliates](#), Case 17-32986, Doc. No. 583

<sup>290</sup> *Id.* The Effective Date, as defined in the Plan, occurred on September 29, 2017.

<sup>291</sup> *Id.*

<sup>292</sup> *Id.*

<sup>293</sup> *Id.*

<sup>294</sup> *Id.*

extremely important, because the impaired classes, unlike the unimpaired classes, have the right to vote on the Plan.<sup>295</sup>

### **A. Class 1: Other Secured Claims**

In the final Plan, the Debtors addressed Other Secured Claims first. Other Secured Claims included any secured claim, other than (a) claims arising under the Debtors' prepetition asset-based lending credit facility of (b) a term loan secured claim.<sup>296</sup> Under the Plan, this class received payment in full in cash, delivery of the collateral securing any such claim and payment of any interest required under § 506(b) of the Bankruptcy Code, reinstatement of their claim, or other treatment rendering such claim unimpaired.<sup>297</sup> Because class 1 was unimpaired, it was presumed to have accepted the Plan under section 1126(f) of the Bankruptcy Code.<sup>298</sup> Thus, holders of Class 1 claims were not entitled to vote to accept or reject the Plan.<sup>299</sup>

### **B. Class 2: Other Priority Claims**

Other Priority Claims included any Claim entitled to priority in right of payment under section 507(a) of the Bankruptcy Code, other than: (a) an Administrative Claim; or (b) a Priority Tax Claim, to the extent such Claim had not already been paid during the Chapter 11 Cases.<sup>300</sup> Claim holders in this class were entitled to receive payment in full in Cash or other treatment rendering such Claim Unimpaired.<sup>301</sup> Holders of Class 2 claims were also conclusively presumed to have accepted the Plan under section 1126(f) of the Bankruptcy Code, and were not entitled to vote to accept or reject the Plan.<sup>302</sup>

### **C. Class 3: Term Loan Secured Claims**

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<sup>295</sup> *Id.*

<sup>296</sup> *Id.* at 11.

<sup>297</sup> *Id.* at 20.

<sup>298</sup> *Id.*

<sup>299</sup> *Id.*

<sup>300</sup> *Id.* at 19.

<sup>301</sup> *Id.*

<sup>302</sup> *Id.*

Holders of term loan secured claims received its Pro Rata share of: (a) the Term Loan Common Shares; and (b) the Subscription Rights; provided, that the Li & Fung Term Loan Claim was not entitled to any recovery under the Plan so long as the Li & Fung Agreement had been assumed in connection with the Plan.<sup>303</sup> The Term Loan Claims was allowed in the aggregate amount of 698.7 million dollars, plus accrued but unpaid interest, fees and all other amounts due under the Term Loan Credit Agreement; provided, for the avoidance of doubt, that so long as the Li & Fung Agency Agreement had been assumed in connection with the Plan, the Li & Fung Term Loan Claim was not Allowed and was deemed assigned to the Debtors and canceled without further action or consideration to Li & Fung.<sup>304</sup> Class 3 was Impaired, and thus entitled to vote to accept or reject the Plan.<sup>305</sup>

#### **D. Class 4: Critical Trade Claims**

Critical Trade Claims included any claim held by a creditor that provided goods and service necessary to the continued operation of the reorganized Debtors.<sup>306</sup> Class 4 holders received Cash in an amount equal to such Allowed Critical Trade Claim (only to the extent not already satisfied by payments made pursuant to an order of the Bankruptcy Court) on the later of: (a) the Effective Date; or (b) the date due in the ordinary course of business in accordance with the terms and conditions of the particular transaction or agreement giving rise to such allowed Critical Trade Claim.<sup>307</sup> Holders of Allowed Critical Trade Claims were conclusively presumed to have accepted the Plan under section 1126(f) of the Bankruptcy Code, and thus not entitled to vote to accept or reject the Plan.<sup>308</sup>

#### **E. General Unsecured Claims**

General Unsecured Claim included any Claim, including the Term Loan Deficiency Claim and the Unsecured Note Claim, other than (a) an Administrative Claim, (b) a Secured Tax Claim, (c) an Other Secured Claim, (d) a Priority Tax Claim, (e) an Other Priority Claim, (f) a Term Loan Secured Claim, (g) a Critical Trade Claim, (h) an Intercompany Claim, or (i) a DIP

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<sup>303</sup> *Id.* at 21.

<sup>304</sup> *Id.*

<sup>305</sup> *Id.*

<sup>306</sup> *Id.* at 5.

<sup>307</sup> *Id.* at 21.

<sup>308</sup> *Id.*

Claim.<sup>309</sup> Under the Plan, holders of these claims were Impaired and entitled to vote on the Plan. Upon confirmation of the Plan, class 5 holders would receive its Pro Rata share of the GUC Distribution<sup>310</sup> in one or more distributions.<sup>311</sup>

#### **F. Class 6: Intercompany Claims**

Intercompany Claims included any claim held by one of the Debtors against another Debtor.<sup>312</sup> Each claim was either reinstated or canceled and released at the option of the Debtors in consultation with the Required Consenting Creditors; provided, that no distributions were made on account of any such Intercompany Claims.<sup>313</sup> Class 6 was either Unimpaired, and the Holders of Intercompany Claims were conclusively presumed to have accepted the Plan under section 1126(f) of the Bankruptcy Code, or Impaired, and the Holders of Allowed Class 6 Claims were deemed to have rejected the Plan pursuant to section 1126(g) of the Bankruptcy Code.<sup>314</sup> Holders of Intercompany Claims were not entitled to vote to accept or reject the Plan.<sup>315</sup>

#### **G. Class 7: Intercompany Interests**

“Intercompany Interest” meant, other than an Interest in Gymboree, an Interest in one Debtor held by another Debtor or a Debtors’ Affiliate.<sup>316</sup> In full and final satisfaction of each Allowed Intercompany Interest, each Intercompany Interest was reinstated solely to maintain the Debtors’ corporate structure.<sup>317</sup> Class 7 was Unimpaired, and Holders of Intercompany Interests

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<sup>309</sup> *Id.* at 9.

<sup>310</sup> The GUC Distribution is \$4,500,000 in cash, funded on the Effective Date into the Class 5 Claims Reserve and distributed in accordance with the Plan.

<sup>311</sup> *Id.* at 21.

<sup>312</sup> *Id.* at 9.

<sup>313</sup> *Id.* at 22.

<sup>314</sup> *Id.*

<sup>315</sup> *Id.*

<sup>316</sup> *Id.* at 9.

<sup>317</sup> *Id.* at 22.

were conclusively presumed to have accepted the Plan under section 1126(f) of the Bankruptcy Code.<sup>318</sup>

#### **H. Class 8: Interests in Gymboree**

“Interest” included any equity security (as defined in section 101(16) of the Bankruptcy Code) in any Debtor.<sup>319</sup> In full and final satisfaction of each Allowed Interest in Gymboree, each Allowed Interest in Gymboree was canceled, released, and extinguished, and would be of no further force or effect, and no Holder of Interests in Gymboree was entitled to any recovery or distribution under the Plan on account of such Interests.<sup>320</sup> Class 8 was Impaired. Holders of Interests in Gymboree were deemed to have rejected the Plan pursuant to section 1126(g) of the Bankruptcy Code and were not entitled to vote to accept or reject the Plan.<sup>321</sup>

#### **X. Additional Provisions of the Plan**

In addition to the treatment of different classes, the Plan also contained a few important articles governing the reorganization of the Debtors’ business.

##### **A. Substantial Debt-for-Equity Exchange**

As discussed in Section VIII, the Plan was for Gymboree to emerge from these Chapter 11 cases with approximately one billion less funded debt. Gymboree’s pro forma exit capital structure would consist of (a) a 225 million dollar Exit Revolving Facility, (b) a 48.5 million dollar Exit ABL Term Loan Replacement Facility, (c) a 35 million dollar Exit Term Loan Facility, and (d) the New Gymboree Common Shares.<sup>322</sup>

Specifically, the Plan contemplated the following restructuring transactions:<sup>323</sup>

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<sup>318</sup> *Id.*

<sup>319</sup> *Id.* at 9.

<sup>320</sup> *Id.* at 22.

<sup>321</sup> *Id.*

<sup>322</sup> [Amended Disclosure Statement Disclosure Statement for the First Amended Joint Chapter 11 Plan of Reorganization of the Gymboree Corporation and Its Debtor Affiliates](#), Case 12-32986, Doc. No. 449, p. 3.

<sup>323</sup> *Id.* The exact transaction language was taken from the Amended Disclosure Statement to avoid any and all potential discrepancies regarding each transaction.

- The Debtors’ Prepetition ABL Facility was rolled up into the DIP ABL Facility, a \$273.5 million asset-based lending facility consisting of an up to \$225 million DIP Revolving Loan and an up to \$48.5 million DIP Term Loan.<sup>324</sup> On the Effective Date, the DIP ABL Revolver Lenders was (a) indefeasibly repaid in full in cash or (b) if a DIP ABL Revolver Lender consents, such lender’s outstanding DIP ABL Revolving Loan Claims and commitments under the DIP ABL Facility converted into commitments under a replacement asset-based revolving loan facility.<sup>325</sup> Similarly, on the Effective Date, the DIP ABL Term Loan Lenders were either (a) indefeasibly repaid in full in cash or (b) if a DIP ABL Term Loan Lender consented, such lender’s outstanding DIP ABL Term Loan Claims and commitments under the DIP ABL Facility converted into commitments under a replacement asset-based term loan facility.<sup>326</sup>
- Certain of the Debtors’ Term Loan Lenders provided the Debtors with a DIP Term Loan Facility of up to \$105 million to finance these Chapter 11 Cases, including up to \$35 million of new money and \$70 million of rolled up Term Loans.<sup>327</sup> On the Effective Date, the rolled up Term Loans was converted into New Gymboree Common Shares equal to 41.0% of the New Gymboree Common Shares outstanding on the Effective Date, subject to dilution by the Management Incentive Plan and the DIP Surplus Conversion Shares after giving effect to the increase in stipulated equity value as a result of the DIP Surplus Conversion (the “Roll-Up DIP Conversion Shares”) and the new money loans converted into an exit term loan facility provided by the DIP Term Loan Lenders or be repaid in full in Cash.<sup>328</sup>
- The Term Loan Lenders (on account of their Term Loan Secured Claims) received their Pro Rata share of 100% of the New Gymboree Common Shares, reduced by: (a) the Rights Offerings Shares; (b) the Roll-Up DIP Conversion Shares; (c); the Backstop Commitment Premium Shares; and (d) any DIP Surplus Conversion Shares (if any) (the remaining shares, the “Term Loan Common

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<sup>324</sup> *Id.*

<sup>325</sup> *Id.*

<sup>326</sup> *Id.*

<sup>327</sup> *Id.*

<sup>328</sup> *Id.*

Shares”), which was subject to further dilution by the Management Incentive Plan.<sup>329</sup>

- Holders of Critical Trade Claims necessary to the business Plan of the Reorganized Debtors was paid in full in Cash.<sup>330</sup>
- If Class 5 voted to accept the Plan, then Holders of General Unsecured Claims received their Pro Rata share of \$4.5 million; or if Class 5 voted to reject the Plan, then Holders of General Unsecured Claims was not entitled to any recovery on account of such Claims.<sup>331</sup>
- All Interests in Gymboree were extinguished.<sup>332</sup>

This debt/equity swap is not uncommon in Chapter 11 reorganization cases, as it is simply a refinancing deal in which debtors, such as Gymboree, gains equity in exchange for the cancellation of their debt.<sup>333</sup>

## **B. Rights Offerings**

Another key term of the Plan was that the Consenting Creditors would fund up to 80 million dollars in two fully backstopped new money Rights Offerings in connection with the restructuring transactions pursuant to the Backstop Commitment Agreement,<sup>334</sup> dated as of June

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<sup>329</sup> *Id.*

<sup>330</sup> *Id.*

<sup>331</sup> *Id.*

<sup>332</sup> *Id.*

<sup>333</sup> *Debt/Equity Swap*, INVESTOPIA, (April 29, 2018, 9:35 PM) <https://www.investopedia.com/terms/d/debtequityswap.asp>.

<sup>334</sup> The Backstop Commitment Agreement was an agreement by which the Commitment Parties agreed to backstop the Rights Offerings. The Commitment Party consisted of the Term Loan Lenders that committed to fund the Rights Offerings and were signatories to the Backstop Commitment Agreement, solely in their capacities as such, including their respective permitted transferees, successors and assigns, all in accordance with the Backstop Commitment Agreement.

11, 2017.<sup>335</sup> On June 16, 2017, the Debtors filed a motion to assume the Backstop Commitment Agreement. The Court granted the motion.<sup>336</sup>

### **C. New Gymboree Common Shares**

The Plan provided that all of the existing interests in Gymboree would be cancelled as of the Effective Date of the Plan; and reorganized Gymboree would have one class of common equity interests, the New Gymboree Common Shares.<sup>337</sup> According to the Plan, the reorganized Debtors would issue the New Gymboree Common Shares to fund distributions to certain Holders of Allowed Claims in accordance with Article III of the Plan on the Effective Date.<sup>338</sup>

### **D. Management Incentive Plan**

The Plan also provided that the reorganized Gymboree board would be authorized to implement a Management Incentive Plan.<sup>339</sup> The Management Incentive Plan authorized the issuance of options and/or equity-based compensation to certain members of management of reorganized Gymboree.<sup>340</sup> Furthermore, new Gymboree common shares representing up to 10% of the New Gymboree Common Shares outstanding as of the Effective Date on a fully-diluted basis was to be reserved for issuance in connection with the Management Incentive Plan.<sup>341</sup>

### **E. Exit Facilities**

The Plan provided that the Debtors, on the Effective Date, would enter into the Exit ABL Revolving Facility, the Exit ABL Term Loan Replacement Facility, and the Exit Term Loan Facility.<sup>342</sup> Confirmation of the Plan deemed approval of the Exit Facilities and the Exit

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<sup>335</sup> Amended Disclosure Statement Disclosure Statement, *supra* note 205, at 4.

<sup>336</sup> *Id.*

<sup>337</sup> [Amended Joint Chapter 11 Plan of Reorganization of The Gymboree Corporation and Its Debtor Affiliates](#), Case 17-32986, Doc. No. 583, p. 24.

<sup>338</sup> *Id.*

<sup>339</sup> *Id.* at 29.

<sup>340</sup> *Id.*

<sup>341</sup> *Id.*

<sup>342</sup> Amended Disclosure Statement Disclosure Statement, *supra* note 205, at 5.



Facility Documents, all transactions contemplated thereby, all actions to be taken, undertakings to be made, and obligations to be incurred by the Debtors, including the payment of all fees, indemnities, and expenses provided for in the Plan, and authorization of the Debtors to enter into and execute the Exit Facility Documents and such other documents required to effectuate the Exit Facilities.<sup>343</sup>

#### **F. Li & Fung Agency Agreement**

The Li & Fung Agreement provided that on the Effective Date the Debtors would assume the Li & Fung Agency Agreement and, thereupon, the Li & Fung Letter of Credit and the Li & Fung Term Loan Claim would be deemed assigned to Reorganized Gymboree and canceled without further action or consideration to Li & Fung.<sup>344</sup>

#### **G. Releases**

The Plan contained certain releases, including mutual releases between (a) the Debtors and Reorganized Debtors; (b) the Consenting Creditors; (c) the Sponsor; (d) the Commitment Parties; (e) the Term Loan Agent; (f) the DIP Term Loan Lenders; (g) the DIP Term Loan Agent; (h) the ABL Agents; (i) the ABL Lenders; (j) the DIP ABL Lenders; (k) the DIP ABL Agents; (l) with respect to each of the foregoing entities in clauses (a) through (k), each such Entity's current and former predecessors, successors, Affiliates (regardless of whether such interests are held directly or indirectly), subsidiaries, direct and indirect equity holders, funds, portfolio companies, management companies; and (m) with respect to each of the foregoing Entities in clauses (a) through (l), each of their respective current and former directors, officers, members, employees, partners, managers, independent contractors, agents, representatives, principals, professionals, consultants, financial advisors, attorneys, accountants, investment bankers, and other professional advisors (with respect to clause (l), each solely in their capacity as such).<sup>345</sup>

The Plan also provided that all Holders of Claims that (i) vote to accept or are deemed to accept the Plan or (ii) are in voting Classes who abstain from voting on the Plan and do not object to the releases will be deemed to have expressly, unconditionally, generally, individually, and collectively released and discharged all Claims and Causes of Action against the Debtors and the Released Parties.<sup>346</sup>

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<sup>343</sup> *Id.* at 19-20.

<sup>344</sup> [Amended Joint Chapter 11 Plan of Reorganization of The Gymboree Corporation and Its Debtor Affiliates](#), Case 17-32986, Doc. No. 583, p.25.

<sup>345</sup> *Id.* at 5-6.

<sup>346</sup> *Id.*

## **XI. Conclusion**

At the Petition Date, Gymboree operated approximately 1,300 stores. By the end of the bankruptcy proceeding, there were only approximately 936 stores still standing. Therefore, there was a total reduction of about 350 stores. Because of this successful proceeding, Gymboree was able to stabilize relationships with vendors, use store closings to liquidate excess inventory held by the company, uphold thousands of employee's contracts, and continue its large retail presence with landlords. Since the Effective Date, Gymboree has been able to keep the doors open to over 900 stores around the country, keeping its customers and vendors around the world happy. It seems fair to say that each of the classes came out better under the Plan than in a liquidation scenario.

Unlike other retail companies that have undergone reconstruction, Gymboree took a proactive approach to be different. And it seems that that proactive approach was incredibly successful and is evidenced in its continued business months after the bankruptcy proceeding. As outlined by this paper, pre-bankruptcy negotiations were essential in ensuring a speedy and successful reorganization process.