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An Unwrapping of the Toys “R” Us Chapter 11 Bankruptcy

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An Unwrapping of the Toys “R” Us Chapter 11 Bankruptcy

By:

Jacob Bolton

Jacob Farmer

&

Heath Pennington

Table of Contents:

Contents

Table of Contents: 2

Cast of Characters 5

- The Debtor – Toys “R” Us 5
- Persons 5
- Professional Service Firms 6

Introduction 7

The Makings of a Toys “R” Us Kid: History of the Corporation 8

- Foundation 8
- Growth 9
- Going Back Private 10
- Milestones of the Corporate History: 11
- Prepetition Corporate Structure: 12
- Global Store Footprint – July 2017: 13

The Collapse of a Titan: What Led to Chapter 11 14

- Build-up of Debt 14
- Management Decisions 14
- Competition 14
- Breaking News 15
- Prepetition Capital Structure: 17

First Day Motions 18

- Orders Facilitating Administration of the Estate 18
- Day-to-Day Operations 20
- Substantive Orders Authorizing the Payment of Prepetition Obligations 21

Employment Applications 21

- Kirkland and Ellis LLP and Kirkland and Ellis International LLP 22
- Alvarez & Marsal North America, LLC 24
- Lazard Freres & Co. LLC 27
- A&G Realty Partners, LLC 28

Kutak Rock LLP ... 30
Prime Clerk LLC ... 31
Debtor-in-Possession (DIP) Financing ... 31
Motion for DIP Financing ... 32
Interim Order Entered Granting DIP Financing ... 35
North American Debt Facilities: ... 35
Objections to the North American Debtors' Motion for DIP Financing ... 36
Final Order Entered Granting DIP Financing ... 36
Debtor in Possession Budget: ... 38
Lien Priority Schedule: ... 39
Bankruptcy Transactions ... 40
Motion for Adequate Protection ... 40
Rejection, Assumption, or Assignment of Executory Contracts and Unexpired Leases ... 48
Motion for an Order Approving the Debtors' Senior Executive Incentive Plan ... 58
Motion for Approving the Debtors' Non-Inside Compensation Program ... 66
Motion for Extending the Time Within Which the Debtors Must Assume or Reject Unexpired Leases of Nonresidential Real Property ... 72
Motion Authorizing Debtors to Provide Consideration to Landlords in Exchange for Extending the 365(D)(4) Deadline ... 75
Motion Authorizing Debtors to Enter in Consulting Agreements ... 82
Motion to Establish Certain Bidding Procedures ... 104
Motion to Wind-Down U.S. Operations ... 111
Motion to Approve the Assumption and Assignment of Certain Ground Leases ... 123
Motion to Establish Bidding Procedures for the Remaining Toys Delaware Real Estate Assets ... 127
Motion to Establish Bidding Procedures for the Sale of the Shared Services Business ... 130
Motion for Entry of an Order Authorizing Entry into the Zurich Buyout Agreement and Establishing Expedited Procedures to Engage in Further LPT Transactions ... 134
Motion for an Order Establishing Bidding Procedures for Sale of Propco II Assets ... 140
Motion for an Order Establishing Bidding Procedures for the Sale of the Debtors' U.S. Intellectual Property Assets. ... 145
The Plan: ... 146
Chapter 11 Plan for Propco II and Giraffe Junior Holding ... 146
a) Initial Plan ... 146

b) Amended Plan ... 152
c) Order Confirmed ... 155
Chapter 11 Plan for Wayne Real Estate Parent Corporation, LLC ... 155
a) Initial Plan ... 155
b) First Amended Plan ... 157
c) Second Amended Plan ... 158
d) Order Confirmed ... 159
Chapter 11 Plan for Toys Delaware Debtors and Geoffrey Debtors ... 159
a) Initial Plan ... 159
b) First Amended Plan ... 167
c) Second Amended Plan ... 167
d) Third Amended Plan ... 169
e) Fourth Amended Plan ... 170
f) Order Confirmed ... 171
Chapter 11 Plan for the Taj Debtors and the Tru Inc. Debtors ... 171
a) Initial Plan ... 171
b) First Amended Plan ... 176
c) Second Amended Plan ... 177
d) Third Amended Plan ... 178
e) Order Confirmed ... 179
Omnibus Objections ... 180
Duplicative: ... 181
Incorrect Debtor: ... 181
Amended or Suspended Claims: ... 181
No Liability: ... 182
Multiple: ... 182
Fee Applications ... 182
Current Status ... 185

Cast of Characters

The Debtor – Toys "R" Us

1. *Toys "R" Us, Inc.* – Toys "R" Us ("Toys"), a Delaware corporation, the primary debtor involved in the jointly administered bankruptcy.

2. *TRU Inc. Debtors* – A group of debtors that includes Toys "R" Us, Inc., MAP 2005 Real Estate, LLC, Toys "R" Us – Value, Inc., and TRU Mobility, LLC.

3. *Propco II Debtors* – A group of debtors that includes Toys "R" Us Property Company II, LLC ("Propco II"), an indirect wholly-owned subsidiary of Toys "R" Us, Inc., and Giraffe Junior Holdings, a wholly-owned subsidiary of Propco II.

4. *Toys Delaware Debtors* – A group of debtors that includes Toys "R" Us Delaware, Inc., TRU Guam, LLC, Toys Acquisition, LLC, Giraffe Holdings, LLC, TRU of Puerto Rico, Inc., and TRU-SVC, Inc.

5. *Geoffrey Debtors* – A group of debtors that includes Geoffrey Holdings, LLC, Geoffrey, LLC, and Geoffrey International, LLC.

6. *Wayne Real Estate Parent Corporation, LLC* – an indirect wholly-owned subsidiary of Toys "R" Us, Inc.

Persons

1. *David A. Brandon* – the Chairman of the Board and Chief Executive Officer of Toys "R" Us, Inc.

2. *Michael J. Short* – the Executive Vice President and Chief Financial Officer of Toys "R" Us, Inc.

3. *Judge Keith L Phillips* – the Justice that presided over the Jointly Administered Chapter 11 Case.

4. *David Kurtz* – the Vice Chairman and the Global Head of the Restructuring Group of Lazard.

Professional Service Firms

7. *Kirkland & Ellis LLP and Kirkland & Ellis International LLP* – International law firm that specializes in bankruptcy practice and served as lead counsel to the Debtors in this case.

8. *Kutak Rock* – Nebraska based law firm that served as co-counsel to the Debtors in this case.

9. *Lazard Freres & Co LLC* – The world's largest independent investment bank that engages in investment banking, asset management and other financial services that served as the Debtors' investment banker in this case.

10. *Alvarez & Marsal North America, LLC* – Professional services firm that specializes in corporate restructuring and served as the Debtors' restructuring advisor in this case.

11. *A&G Realty Partners, LLC* – A commercial real estate firm that specializes in asset disposition and lease restructurings and served as Debtors' real estate consultant in this case.

12. *Prime Clerk LLC* – A bankruptcy claims and noticing agency that focuses on restructuring and bankruptcy administration and served as the Debtors' administrative advisor during this case.

Introduction

On September 18, 2017, Toys "R" Us, Inc., along with its subsidiaries, filed a voluntary petition in the Eastern District of Virginia declaring Chapter 11 Bankruptcy. While focusing specifically on domestic operations, this paper tells the story of the downfall and reorganization of the retail giant.[1]

After closing all domestic store fronts and selling most of their assets, Toys "R" Us split their subsidiaries into four unique Debtor groups and filed four separate plans. The plans called for creating holding companies, selling substantially all of certain subsidiary's assets, and engaging in reorganizational transactions with various creditor groups. At the end of the day, the implementation of these four plans allowed the company to reemerge from the bankruptcy process with new found hope. In the end, Toys "R" Us was able to maintain and distribute its intellectual property to subsidiary companies and rebrand as TRU Kids. TRU Kids now plans to open retail stores in the United States, but will focus primarily on E-Commerce.

This paper provides information and seeks to outline, broadly, the steps that Toys "R" Us took in order to achieve a successful reorganization of its company.

[1] Be advised, Toys "R" Us had numerous subsidiaries involving international business, properties, transactions, etc. across the globe. However, this paper focuses solely on the bankruptcy as it relates to U.S. Operations and all other transactions, properties, subsidiaries, such as Propco I, etc., are outside the scope of this paper.

The Makings of a Toys "R" Us Kid: History of the Corporation

Foundation

In 1948, after returning home from his service in the U.S. Army during World War II, Charles Lazarus had an idea that would change the toy industry forever. Lazarus stated, "I came out of the service after the war, and everyone I talked to said they were going to go home, get married, have children and live the American dream."[2] After hearing this, Lazarus created a business model that would attempt to capitalize on this impending, so-called, "baby boom." He stated, "I had saved a few dollars in the service, so I decided that I would open a store in my father's bicycle-repair shop. But instead of selling bikes, I would sell cribs, carriages, strollers, high chairs, everything for the baby. My instincts told me the timing was right."[3]

This first store, located in the middle of Washington, D.C., was opened in 1948 under the name Children's Bargain Town.[4] Lazarus had some early success, but realized that once customers bought a crib or a stroller, they were not returning to purchase more for their second child.5 Thus, in order to entice return customers, he started selling inexpensive children's toys in the store.[6] As the toys became a massive hit and grew in popularity, Lazarus saw a glimpse of what might be the next great idea – a toy supermarket. So, in 1957, Charles Lazarus made his idea a reality and opened his first store solely dedicated to toys, which he called Toys "R" Us."[7] The logo featured a backwards "Я" to give the impression that a child had written it.[8]

In May of 1965, when Children's Bargain Town became Toy "R" Us, Geoffrey the giraffe was born.[9] Geoffrey was a reimagined character, with the idea of being more life-like, based on a

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[2] Charles Lazarus: Toy Titan. https://perma.cc/4H22-X2UC.

[3] *Id.*

[4] Inside the Rise and Fall of Toys 'R' Us. https://perma.cc/Z4G5-436R.

[5] *Id.*

[6] *Id.*

[7] Charles Lazarus: Toy Titan. https://perma.cc/6DWF-59W8.

[8] A Brief History of Toys R Us. https://perma.cc/A8LB-FUTP.

[9] A Brief History Toys R Us. https://perma.cc/9MPK-DT47

previous character, Dr. D. Raffe, and a few years after his creation, Geoffrey's popularity was so high that he made frequent appearances at events, and the corporation introduced an entire line of toys based on him.[10] By 1973, Geoffrey was a celebrity starring in Toys "R" Us commercials.[11]

Growth

With the Toys "R" Us brand continuing to grow rapidly, the corporation launched its initial public offering in June of 1978 and began trading on the New York Stock Exchange.[12] The overall success of the corporation helped turn a $500 million toy industry in 1950 into one worth $12 billion by 1990.[13] However, the corporation did not want to limit itself to just the domestic market. In 1984, in order to expand internationally, Toys "R" Us opened its first wholly-owned store in Canada and a licensed operation in Singapore.[14]

After more than four decades at the helm of Toys "R" Us, Charles Lazarus stepped down as Chairman and CEO of the corporation in March 1994.[15] This executive transition, however, did not seem to stop Toys "R" Us from breaking into new markets. In 1996, the corporation launched its first Babies "R" Us location which focused solely on baby products and furniture, aiming to provide shopping expertise and specialized products for new families.[16] Then in 1998, the corporation launched Toysrus.com which became one of the most visited sites in the specialty toy and baby products retail category in the world.[17]

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[10] *Id*.

[11] *Id*.

[12] Toys R Us timeline: History of the nation's top toy chain. https://perma.cc/UZ7J-WEY3.

[13] Inside the Rise and Fall of Toys 'R' Us. https://perma.cc/EL92-57TY.

[14] Declaration of David A. Brandon, Chairman of the Board and Chief Executive Officer of Toys "R" Us, Inc., in Support of Chapter 11 Petitions and First Day Motions. 20.pdf at 8.

[15] A Brief History. https://perma.cc/S5YV-QVDJ.

[16] 20.pdf at 8.

[17] *Id.*

Going Back Private

With the mid-2000s being a hot bed for leveraged buyout transactions,[18] and the continued economic success of the corporation, Toys "R" Us was a prime acquisition target. Following a highly competitive process, Toys "R" Us was acquired and taken private in 2005 by an investment group led by entities advised by or affiliated with Bain Capital Private Equity, LP ("Bain"), Kohlberg Kravis Roberts & Co. L.P. ("KKR"), and Vornado Realty Trust ("Vornado," and collectively with Bain and KKR, the "Sponsors") for approximately $6.6 billion, including $5.3 billion[19] of debt secured in large part by Corporation assets.[20] The Sponsors "saw value in its real estate and an opportunity to aggressively expand in Asia. The hope was to revive the corporation and take it public, using those proceeds to pay down the debt."[21]

After going private, the corporation followed the plan and continued its push into the international market. In 2011, it opened its first store in Beijing[22] and in that same year, it introduced international shipping through Toysrus.com and Babiesrus.com in more than sixty countries.[23] The corporation continued to grow and at the height of the corporation's business, Toys "R" Us had approximately 1,697 corporation-owned stores and 257 licensed stores in 38 countries that was supported by approximately 60,000 full-time and part-time employees worldwide – growing to more than 100,000 during peak holiday season.[24]

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[18] In 2006 buyout transactions totaled around $233 billion in the US and $151 billion in Europe. *See* Leverage and Pricing Buyouts: An Empirical Analysis. https://perma.cc/8Z4R-3V3C.

[19] *See Annex D.*

[20] 20.pdf at 9.

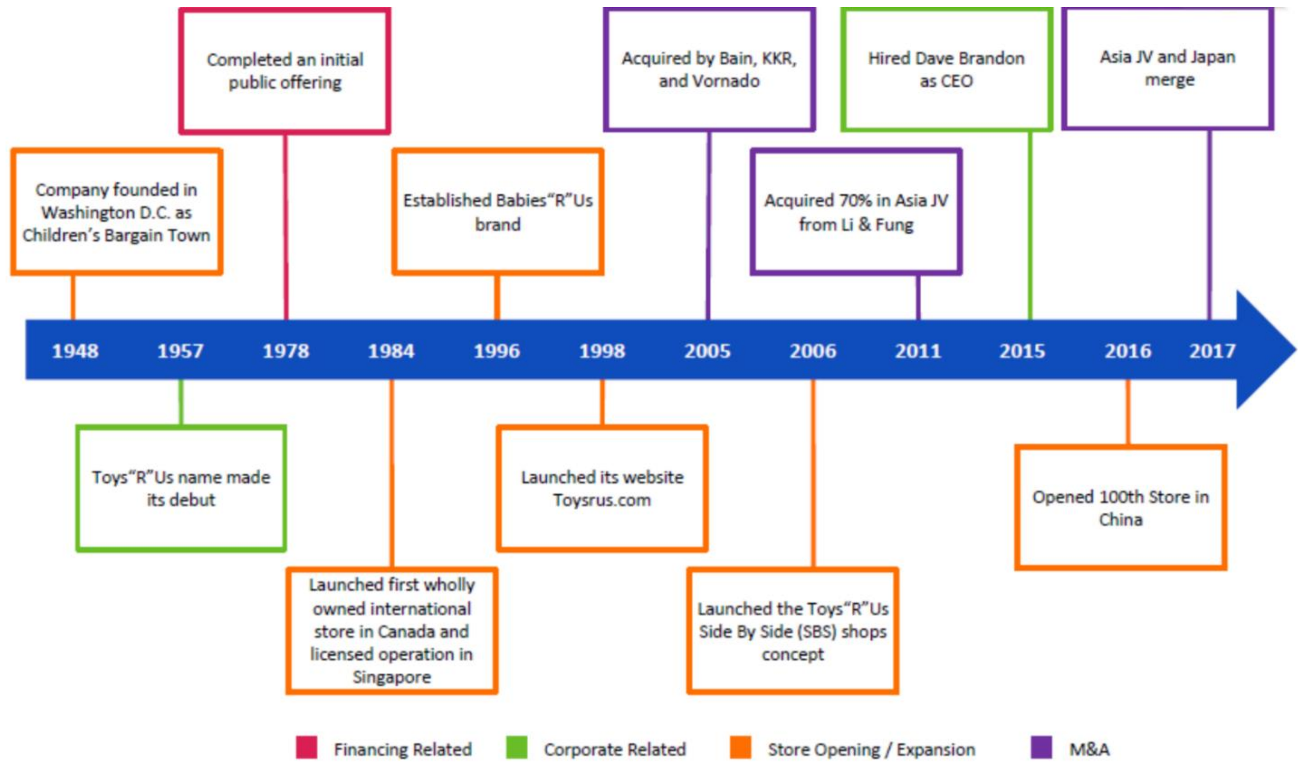
[21] Toys R Us built a kingdom and the world's biggest toy store. On Friday, its stores close for good. https://perma.cc/C5XS-9DE7.

[22] 20.pdf at 9.

[23] A Brief History. https://perma.cc/34H7-YB6G.

[24] 20.pdf at 10.

Milestones of the Corporate History:[25]

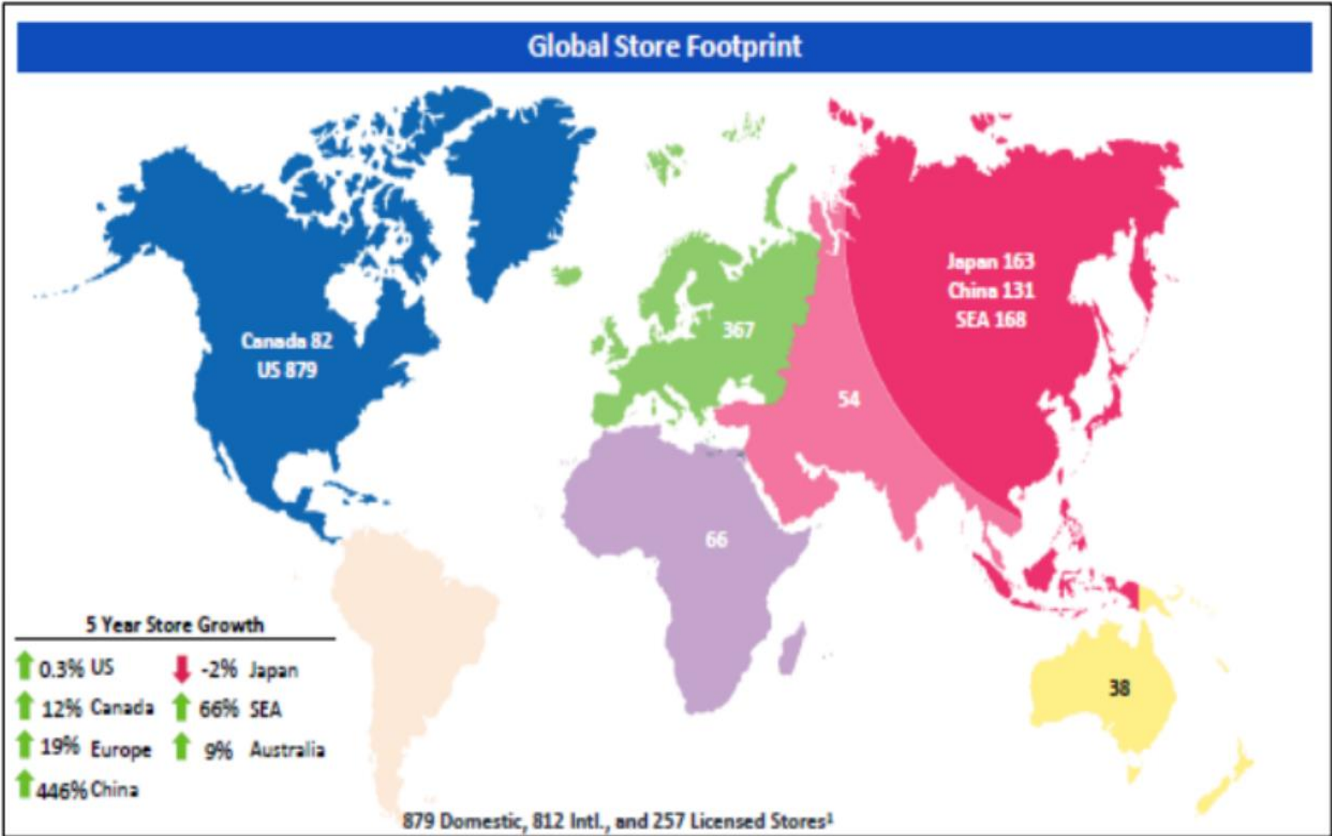


25 20.pdf at 10.

Prepetition Corporate Structure:[26]

[26] 20.pdf at 47.

Global Store Footprint – July 2017:[27]



[27] 20.pdf at 26.

The Collapse of a Titan: What Led to Chapter 11

Build-up of Debt

Although the acquisition of Toys "R" Us by the Sponsors allowed the corporation to expand its reach into new markets, it also caused a financial drain on the corporation that would eventually lead to its collapse. The purchase price of $6.6 billion consisted mainly of $5.3 billion of debt that was secured by the Corporation's assets.[28] This collection of debt drained the Corporation of more than $400 million annually in payments. CEO Dave Brandon stated, "These substantial debt service obligations impair the corporation's ability to invest in its business and future. As a result, the corporation has fallen behind."[29]

Management Decisions

As the toy industry overall remained healthy and growing, the Corporation's EBITDA declined sharply year-after-year.[30] This drop was due to a series of organizational and operational changes, including senior leadership turnover, undisciplined promotional activity resulting in selling product too cheaply, poor inventory management resulting in overstocking, and a misaligned cost structure resulting in net losses.[31]

Competition

In addition to the expensive debt service and poor managerial decisions, Toys "R" Us faced unrelenting competition from e-commerce and big-box retailers that continued to drag on the Corporation's performance.[32] This competition primarily presented itself in the form of a price war. Big box retailers such as Walmart, Target, and K-Mart, as well as, online retailers such as

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[28] Declaration of David A. Brandon, Chairman of the Board and Chief Executive Officer of Toys "R" Us, Inc., in Support of Chapter 11 Petitions and First Day Motions, Case 17-34665. 20.pdf at 9.

[29] Toys R Us built a kingdom and the world's biggest toy store. On Friday, its stores close for good. https://perma.cc/K9WZ-MPTK

[30] Declaration of David A. Brandon, Chairman of the Board and Chief Executive Officer of Toys "R" Us, Inc., in Support of Chapter 11 Petitions and First Day Motions, Case 17-34665. 20.pdf at 23.

[31] *Id.* at 24.

[32] *Id.*

Amazon – who were not concerned with making a profit at this juncture – slashed prices on toys and flooded marketing channels, knowing that if they could get consumers in the door to purchase attractively-priced toys, they could make up for the decreased toy revenue with other in-store (or online) purchases.[33]

To keep up with their competition, Toys "R" Us could have cut prices on the same products to keep the business of cost-conscious consumers. This would have decreased its revenue and cash flows and led to an unrelenting race to the bottom.[34] In that case, Toys "R" Us would not have had the additional departments and revenue streams from which to make up for the lost margins.[35] Therefore, Toys "R" Us did not lower its prices, which caused consumers to flock elsewhere for their toys purchases.[36]

Breaking News

Due to the factors listed above, Toys "R" Us began to struggle financially and searched for possible solutions to increase liquidity that was necessary to build their seasonal inventory.[37] After contacting various companies to explore their options, CNBC caught wind of the effort and broke the news to its readers on September 6, 2017 stating that the Corporation was considering a possible bankruptcy.[38] This news, coming seemingly out of nowhere, caused the industry to pull back. Companies in the Toys "R" Us supply chain could not risk giving products to a corporation that might not have the funds to pay for them.

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[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.* at 41.

[38] Toys R Us built a kingdom and the world's biggest toy store. On Friday, its stores close for good. https://perma.cc/Z5NY-RE8J

Within 72 hours of the CNBC story, a significant percentage of the Corporation's vendors called and informed Toys "R" Us that they would not ship product without cash on delivery.[39] Within a week, 40 percent of the Corporation's supply chain refused to ship product and 10 days later, practically all of the Corporation's vendors had refused to ship without cash on delivery.[40] Toys "R" Us had effectively lost its access to product during the critical shipping period necessary to prepare for the holiday season.[41]

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[39] Declaration of David A. Brandon, Chairman of the Board and Chief Executive Officer of Toys "R" Us, Inc., in Support of Chapter 11 Petitions and First Day Motions, Case 17-34665. 20.pdf at 41.

[40] *Id.*

[41] *Id.*

Prepetition Capital Structure:[42]

Funded Debt	Maturity	Outstanding Principal Amount as of 9/17/17[4]
North American Debt Facilities		
Delaware Secured ABL Credit Facility	March 21, 2019	$1,025 million[5]
Tranche A-1 (“FILO”) Term Loan Facility	October 24, 2019	$280 million
Delaware Secured Term Loan - Incremental Facility (“B-2”)	May 25, 2018	$123 million
Delaware Secured Term Loan - Second Incremental Facility (“B-3”)	May 25, 2018	$61 million
Delaware Secured Term Loan - Incremental Facility (“B-4”)	April 24, 2020	$998 million
Delaware 8.75% Unsecured Notes	September 1, 2021	$22 million
Toys Inc. 7.375% Senior Notes	October 15, 2018	$208 million
Propco I Unsecured Term Loan Facility	August 21, 2019	$859 million
Propco II Mortgage Loan	November 9, 2019	$507 million
Giraffe Junior Mezzanine Loan	November 9, 2019	$70 million
International Debt Facilities		
Euro ABL Facility	December 18, 2020	$84 million[6]
Taj Senior Notes	August 15, 2021	$583 million
UK Real Estate Credit Facility	July 7, 2020	$355 million
French Real Estate Credit Facility	February 27, 2018	$54 million
Toys-Japan Bank Loans	October 25, 2019; January 29, 2021; February 26, 2021	$36 million
Total Funded Debt:		$5,265 million

[42] Declaration of David Kurtz in Support of the Debtors’ Motions for Entry of Interim and Final Orders (I) Authorizing the Debtors to Obtain North American and International 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 17-34665. 33.pdf at 6.

First Day Motions

When Toys "R" Us filed for bankruptcy protection, it simultaneously filed a series of first day motions that would allow the corporation to continue to operate during the restructuring process. Typically, first-day motions fall under one of three categories: (i) motions that facilitate the administration of the estate, (ii) motions that smooth day to day operations, and (iii) substantive motions that will authorize Toys "R" Us to honor its prepetition obligations.[43]

Orders Facilitating Administration of the Estate

Toys "R" Us filed its voluntary petition in the Eastern District of Virginia. The first motion Toys "R" Us and its subsidiaries filed that helped to facilitate the administration of the estate was a motion for joint administration of their Chapter 11 cases under Rule 1015(b) of the Federal Rules of Bankruptcy Procedure.[44]

Rule 1015(b) states that if "two or more petitions are pending in the same court by or against … a Debtor and an affiliate, the court may order a joint administration of the estates."[45] This rule allowed Toys "R" Us and twenty-four of its subsidiaries to file motions and other documents under a single case and docket number. This causes the proceedings of all parties to be more judicially efficient and reduces administrative expenses. On September 19, 2017, this motion was granted.[46]

Next, Toys "R" Us filed a motion to extend the deadline by which they must file their schedules of its (and its subsidiaries) assets and liabilities, current income and expenditures,

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[43] MICHAEL L. BERNSTEIN & GEORGE W. KUNEY, BANKRUPTCY IN PRACTICE 271-72 (Charles J. Tabb ed., 5th ed. 2015).

[44] Motion for Joint Administration, Case 17-34665; 11 U.S.C. *See also* Section 11 U.S.C. 1107(a), 1108 (2016); BERNSTEIN & KUNEY, BANKRUPTCY IN PRACTICE (5TH ED.) 13; Fed. R. Bankr. P. 1015(b). 10.pdf at 6.

[45] Fed. R. Bankr. P. 1015.

[46] Order Directing Joint Administration of Chapter 11 Cases, Case 17-34665. 78.pdf at 6.

executory contracts and unexpired leases, as well as its statements of financial affairs from fourteen to fifty-nine days.[47] This motion was granted on September 21, 2017.[48]

Additionally, Toys "R" Us filed a motion to retain Prime Clerk LLC as notice and claims agent.[49] In view of the large number of claimants and the complexity of Toys "R" Us's business, retaining the same claims agent allowed Toys "R" Us to save on administrative expenses when serving process to the thousands of entities to be noticed around the globe. A hearing was held, and the motion was granted on September 19, 2017.[50]

Toys "R" Us also filed a cash management system motion with the Court,[51] which was granted on October 24, 2017.[52] As of the Petition Date, the corporation's cash management system included a total of 729 bank accounts. So, because of the nature of their business and the disruption to the business that would result if they were forced to close their existing bank accounts, Toys "R" Us moved the Court to allow them to continue using their existing cash management system and business form for all of their locations.[53]

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[47] 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 17-34665. 3.pdf at 1.

[48] 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 17-34665. 111.pdf at 1.

[49] Debtors' Application for Entry of an Order Authorizing the Debtors to Employ and Retain Prime Clerk LLC as Claims and Noticing Agent, Effective *Nunc Pro Tunc* To the Petition Date, Case 17-34665. 4.pdf at 1.

[50] 77.pdf.

[51] Debtors' Motion for Entry of Interim and Final Orders (I) Authorizing the Debtors to (A) Continue to Operate Their Cash Management System, (B) Honor Certain Prepetition Obligations Related Thereto, (C) Maintain Existing Business Forms, and (D) Perform Intercorporation Transactions, Case 17-34665. 22.pdf at 1.

[52] Final Order (I) Authorizing The Debtors to (A) Continue to Operate Their Cash Management System, (B) Honor Certain Prepetition Obligations Related Thereto, (C) Maintain Existing Business Forms, and (D) Perform Intercorporation Transactions, and (II) Granting Related Relief. 704.pdf.

[53] 22.pdf.

Lastly, Toys "R" Us filed a motion for interim approval for debtor in possession financing, as discussed *infra*.[54]

Day-to-Day Operations

The first motion that was filed that affected the day-to-day operations of the corporation was a motion for the continuation of utility services.[55] This motion requested the approval of adequate assurance of payment for future utility services and prohibited the Utility Companies from altering, refusing, or discontinuing services pursuant to Section 366 of the Bankruptcy Code.

In order to manage the payment of numerous utilities companies, Toys "R" Us paid Ecova, Inc. a sum of $40,000 per month and paid River Road Waste Solutions, Inc. a sum of $230,000 per month for utility services. In addition to these two payments, Toys "R" Us paid third-party utility companies approximately $7,000,000 per month, calculated as a historic average payment for the twelve-month period ending August 31, 2017.

Section 366 prevents utility providers from "altering, refusing, or discontinuing services to a Debtor solely on account of unpaid prepetition amounts for a period of 30 days after a chapter 11 filing."[56] This was important because in order for Toys "R" Us to continue to operate its business on a going-basis, it would need access to utility services.

As adequate assurance, Toys "R" Us proposed to use cash on hand, cash generated in the ordinary course of business, and proceeds of the post-petition financing facility. Additionally, Toys "R" Us proposed to deposit $2,675,244 into a segregated Adequate Assurance Deposit account, which represented an amount sufficient to cover one half of Toys "R" Us's average monthly cost of utility services less the amount of prepetition deposits held by the utility companies at that time.

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[54] *See* notes 122-151 and accompanying text.

[55] Debtors' Motion for Entry of Interim and Final Orders Approving the Debtors' Proposed Adequate Assurance of Payment for Future Utility Services, Prohibiting Utility Companies from Altering, Refusing, or Discontinuing Services, Approving the Debtors' Proposed Procedures for Resolving Additional Assurance Requests, Case 17-34665. 11.pdf at 1.

[56] Fed. R. Bankr. P. 366.

Upon review, the Court approved the proposed plan and granted an order confirming it on October 24, 2017.[57]

Substantive Orders Authorizing the Payment of Prepetition Obligations

Toys "R" Us also filed motions that requested approval of the Court to honor the obligations that it made before filing for bankruptcy protection. These motions covered various topics including the payment of certain pre and post-petition taxes and fees;[58] the transfer of and declarations of worthlessness with respect to common stock;[59] the payment of prepetition claims of lien claimants, import claimants, and 503(b)(9) claimants;[60] the payment of prepetition wages, salaries, and other compensation;[61] employee benefit plans;[62] and the payment of foreign[63] and critical vendors.[64] No objections were filed and the motions were all subsequently granted.[65]

Employment Applications

The Debtors in this case filed multiple applications to employ professionals from various fields in order to navigate through the Chapter 11 Bankruptcy process. Under the Bankruptcy Code, debtors in possession may employ professionals "that do not hold or represent an interest

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[57] 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, Case 17-34665. 714.pdf at 1.

[58] Debtors' Motion for Entry of Interim and Final Orders Authorizing the Payment of Certain Prepetition and Postpetition Taxes and Fees, Case 17-34665. 12.pdf at 1.

[59] Debtors' Motion for Entry of Interim and Final Orders Approving Notification and Hearing Procedures for Certain Transfers of and Declarations of Worthlessness with Respect to Common Stock. Case 17-34665. 13.pdf at 1.

[60] Debtors' Motion for Entry of Interim and Final Orders (I) Authorizing the Debtors to Pay Prepetition Claims of Lien Claimants, Import Claimants, and 503(B)(9) Claimants, (II) Confirming Administrative Expense Priority of Outstanding Orders, Case 17-34665. 14.pdf at 1.

[61] Debtors' Motion for Entry of Interim and Final Orders Authorizing the Debtors to (A) Pay Prepetition Wages, Salaries, Other Compensation, and Reimbursable Expenses and (B) Continue Employee Benefits Programs, Case 17-346651. 21.pdf at 1.

[62] *Id.*

[63] Debtors' Motion for Entry of Interim and Final Orders Authorizing the Debtors to Pay Prepetition Claims of Foreign Vendors, Case 17-34665. 5.pdf at 1.

[64] Debtors' Motion for Entry of Interim and Final Orders Authorizing the Debtors to Pay Certain Prepetition Claims of Critical Vendors, Case 17-34665. 6.pdf at 1.

[65] *See* Docket Nos. 727.pdf; 728.pdf; 723.pdf; 703.pdf; 706.pdf; and 708.pdf, respectively.

adverse to the estate and that are disinterested persons to represent or assist the trustee in carrying out the trustee's duties under this title."[66] The Code further provides that a "person is not disqualified for employment under section 327 of this title by a debtor in possession solely because of such person's employment by or representation of the debtor before the commencement of the case."[67] Additionally, under the Bankruptcy Code, the employment of a professional is authorized so long as the employment is "on any reasonable terms and conditions of employment."[68]

Kirkland and Ellis LLP and Kirkland and Ellis International LLP

The Debtors filed an Application to Employ in order to retain Kirkland and Ellis LLP and Kirkland and Ellis International LLP (Kirkland) as attorneys for the Debtors and Debtors in Possession during their Chapter 11 case.[69] Kirkland is recognized for its expertise and extensive experience and knowledge in the field of debtors' protections, creditors' rights, and business reorganizations under chapter 11 of the Bankruptcy Code.[70] Kirkland's hourly billing rates for matters related to this case are as follows:

a) **Billing Categories:**

i.	Partners	$930-$1,745
ii.	Of Counsel	$555-$1,745
iii.	Associates	$555-$1,015
iv.	Paraprofessionals	$215-$420[71]

Further, under the Engagement Letter, the Debtors paid $1,000,000 to Kirkland, which constituted an advance payment retained, and the Debtors additionally paid to Kirkland retainers

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[66] *See* 11 U.S.C. § 327(a).

[67] *See* 11 U.S.C. § 1107(a).

[68] *See* 11 U.S.C. § 328(a).

[69] Debtors' Application for Entry of an Order Authorizing the Retention and Employment of Kirkland & Ellis LLP and Kirkland and Ellis International LLP as Attorneys for the Debtors and Debtors in Possession Effective *Nunc Pro Tunc* to The Petition Date. 219.pdf at 3.

[70] *Id*. at 3-4.

[71] *Id.* at 6. The hourly rates vary with the experience and seniority of the individuals assigned.

totaling $8,128,093.93.[72] In order to show Kirkland's disinterestedness, the Debtors rely on the Sussberg Declaration, which stated Kirkland (1) had no connection with the Debtors or any other party to the case; (2) does not hold any interest adverse to the Debtors' estates; and (3) believes it is a "disinterested person" as defined in Section 101(14) of the Bankruptcy Code.[73] Judge Phillips granted the Debtors' application and approved generally the terms of the Engagement Agreement as they were submitted to the Court.[74]

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[72] *Id.* at 8.

[73] *Id.* at 9. *See generally* Declaration of Joshua A. Sussberg in Support of The Debtors' Application for Entry of an Order Authorizing The Retention and Employment of Kirkland & Ellis LLP and Kirkland & Ellis. 219.pdf at 38-67.

[74] Order Authorizing The Retention and Employment of Kirkland & Ellis LLP and Kirkland & Ellis International LLP as Attorneys for The Debtors and Debtors in Possession Effective *Nunc Pro Tunc* to The Petition. 730.pdf.

Type of Transaction	Date	Amount of Fees and Expenses Listed on Statement	Amount of Advance Payment Retainer Requested	Amount of Advance Payment Retainer Received	Resulting Advance Payment Retainer Following
Initial Request for Advance Payment Retainer	8/7/2017		$1,000,000		
Receipt of Initial Advance Payment Retainer	8/8/2017			$1,000,000	$1,000,000
Additional Request for Advance Payment Retainer	8/15/2017		$1,000,000		
Receipt of Additional Advance Payment Retainer	8/15/2017			$1,000,000	$2,000,000
Additional Request for Advance Payment Retainer (Full Statement)	8/21/2017	$388,102.27			$1,611,897.73
Receipt of Additional Advance Payment Retainer	8/24/2017			$388,102.27	$2,000,000
Additional Request for Advance Payment Retainer (Full Statement)	8/28/2017	$1,023,810.16			$976,189.84
Receipt of Additional Advance Payment Retainer	8/30/2017			$1,023,810.16	$2,000,000
Additional Request for Advance Payment Retainer (Full Statement)	9/6/2017	$1,358,090.75			$641,909.25
Receipt of Additional Advance Payment Retainer	9/11/2017			$1,358,090.75	$2,000,000
Additional Request for Advance Payment Retainer	9/14/2017		$3,000,000		$2,000,000
Receipt of Additional Advance Payment Retainer	9/14/2017			$3,000,000	$5,000,000
Receipt of Additional Advance Payment Retainer (Duplicate Payment)[8]	9/14/2017			$1,358,090.75	$6,358,090.75
Additional Advance Payment Retainer (Full Statement)	9/18/2017	$3,163,287.16			$3,194,803.65

[75]

Alvarez & Marsal North America, LLC

The Debtors filed an Application to Employ, which sought to make Alvarez & Marsal North America, LLC (A&M) their restructuring advisors during their Chapter 11 case. The Debtors' claim is that employing A&M will "substantially enhance their attempts to maximize the value of their estates."[76] To support their position that A&M will enhance their attempts to maximize the value of their estates, the Debtors state "A&M specializes in interim management,

[75] *Id.* at 45-46. Showing the fees owed to Kirkland by the Debtors and what the Debtors paid Kirkland.

[76] Debtors' Application To Employ and Retain Alvarez & Marsal North America, LLC as Restructuring Advisors To The Debtors and Debtors in Possession Pursuant To Sections 327(a) and 328 of the Bankruptcy Code Effective *Nunc Pro Tunc* to the Petition Date. 212.pdf at 3.

crisis management, turnaround consulting, operational due diligence, creditor advisory services, and financial and operational restructuring."[77] Further, the Debtors put forth that A&M played a part as restructuring advisor or restructuring officer in many Chapter 11 cases, and A&M helps stabilize and improve a corporation's financial position through a wide range of activities.[78] The Debtors additionally claim A&M is familiar with the Debtors' business, financial affairs and capital structure, which will allow A&M to be effective in aiding the Debtors through bankruptcy.[79] In order to show A&M's disinterestedness, the Debtors filed the declaration of Jonathan Goulding, which stated A&M (1) had no connection with the Debtors or any other party to the case; (2) does not hold any interest adverse to the Debtors' estates; and (3) believes it is a "disinterested person" as defined in Section 101(14) of the Bankruptcy Code.[80]

Under the employment agreement, A&M's scope of services were to be to "provide such restructuring support services as A&M and the Debtors shall deem appropriate and feasible in order to manage and advise the Debtors in the course of these chapter 11 cases."[81] Specifically, some services outlined A&M will perform are (1) assisting the Debtors' management in evaluating restructuring options; (2) assisting in the implementation of the Debtors' business plans and forecasts; (3) assisting in the development and management of a 13-week cash flow forecast; (4) assisting in dealing with vendor and lender discussions and negotiations; (5) assisting in developing and implementing executive compensation programs; and other enumerated services.[82] Further, the Debtors specifically stated that A&M, as restructuring advisor, will work closely with

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[77] *Id.*

[78] *Id.* Stating A&M uses activities such as developing or validating forecasts, business plans and related assessments of a business's strategic position; monitoring and managing cash, cash flow, and supplier relationships; assessing and recommending cost reduction strategies; and designing and negotiating financial restructuring packages.

[79] *Id.* at 4.

[80] *Id.* at 6. *See generally* Declaration of Goulding in Support of The Debtors' Application to Employ and Retain Alvarez & Marsal North America, LLC as Restructuring Advisors to The Debtors and Debtors in Possession Pursuant to Sections 327(a) and 328 of The Bankruptcy Code Effective *Nunc Pro Tunc* to The Petition Date. 212.pdf at 24-30.

[81] *Id.*

[82] *Id.* at 5.

the Debtors' investment banker, Lazard Freres & Co LLC, to ensure that no work will be duplicated in order to save cost.[83]

Further, the Debtors seek the Court's approval to compensate A&M at their customary hourly billing rates, which are subject to the following ranges:

a) **Restructuring Advisory:**

i.	Managing Director	$800-975
ii.	Director	$625-775
iii.	Analysts/Associate	$375-600

b) **Claims Management Services:**

i.	Managing Director	$725-825
ii.	Director	$625-775
iii.	Analysts/Associate	$350-475[84]

Additionally, the Debtors also propose, under the employment agreement, that A&M will be reimbursed for the reasonable out of pocket expenses of its professionals, "such as travel, lodging, third-party duplications, messenger, and telephone charges."[85] Further, before the commencement of the Chapter 11 case, A&M received a retainer of $1,000,000 to prepare for the filing of the case, and 90 days prior to the Petition Date, A&M received a total of $4,261,797 in payments from the Debtors.[86] Judge Keith Phillips granted the Debtors' application and approved generally the terms of the Engagement Agreement as they were submitted to the Court.[87]

[83] *Id.*

[84] *Id.* at 6-7.

[85] *Id.* at 7.

[86] *Id.*

[87] Order Authorizing Debtors to Employ and Retain Alvarez & Marsal North America, LLC as Restructuring Advisors to The Debtors and Debtor in Possession Pursuant to Sections 327(a) and 328 of The Bankruptcy Code Effective *Nunc Pro Tunc* to The Petition Date. 731.pdf.

Lazard Freres & Co. LLC

The Debtors filed an Application to Employ for Lazard Freres & Co. LLC (Lazard), as their investment banker during their Chapter 11 case.[88] To support their request, the Debtors put forward evidence regarding Lazard's ability by citing to numerous cases in which debtors retained Lazard and laying out Lazard's areas of expertise.[89] Further, the Debtors explain that, in the 22 months prior to filing this motion, Lazard worked closely with the Debtors and became knowledgeable about the Debtors' business and financial affairs and is well qualified to perform the services required by the Debtors.[90]

In order to show Lazard's disinterestedness, the Debtors filed the declaration of David Kurtz, which stated Lazard (1) had no connection with the Debtors or any other party to the case; (2) does not hold any interest adverse to the Debtors' estates; and (3) believes it is a "disinterested person" as defined in Section 101(14) of the Bankruptcy Code.[91] Additionally, the Debtors needed to show that Lazard's employment of Chetan Bhandari, a former director of the Debtors, would not disqualify Lazard from being employed.[92] In order to avoid disqualifying Lazard, Bhandari tendered his resignation to Lazard, and the Debtors re-hired Bhandari, so to not lose his expertise and intimate knowledge of the Debtors' capital structure.[93] Further, under the Engagement Agreement, Lazard provided a wide range of investment banking services to the Debtors, such as helping the Debtors locate and secure Debtor in Possession (DIP) Financing.[94]

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[88] Debtors' Application for Entry of an Order (I) Authorizing the Employment and Retention of Lazard Freres & Co. LLC as Investment Banker to The Debtors and Debtors in Possession, Effective *Nunc Pro Tunc* to The Petition Date, (II) Modifying Certain Time-Keeping Requirements, and (III) Granting Related Relief. 213.pdf at 3.

[89] *Id.* at 3-4.

[90] *Id.* at 3.

[91] *Id.* at 6.

[92] *Id.* at 7.

[93] *Id.* at 8.

[94] *Id.* at 11-12.

In the motion, the Debtors explain that Lazard, as an investment banking firm, does not keep detailed time records nor does Lazard bill in hourly increments, such as .1, and Lazard requests that it be able to keep time in .5 increments.[95] The Debtors will compensate Lazard on a monthly basis in an amount of $200,000/month. Further, under the Engagement Agreement, the Debtors owe Lazard for each restructuring service provided an amount equal to $10,500,000 or to the extent Toys "R" Us, Inc. is not a party to a restructuring, 0.25% multiplied by the total amount of indebtedness of Toys "R" Us, Inc's subsidiaries (maximum of $10,500,000).[96] Further, 50% of any fee paid to Lazard for the purpose of a Sales Transaction would be credited to the Restructuring Fee.[97] In addition to the aforementioned fees, the Debtors reimburse Lazard for reasonable document production charges and all reasonable out of pocket expenses incurred by Lazard.[98] Judge Phillips granted the Debtors' application and approved generally the terms of the Engagement Agreement as they were submitted to the Court.[99]

A&G Realty Partners, LLC

The Debtors filed an Application to Employ in order to retain A&G Realty Partners, LLC (A&G) as their real estate consultant during their Chapter 11 case.[100] A&G is a well-known real estate consulting and advisory firm and has extensive knowledge and expertise in the retail industry.[101] Further, A&G has significant experience in the disposition and recognition of leases and properties and, prior to this filing, A&G worked with the Debtors and gained extensive

[95] *Id.* at 18-19.

[96] *Id.* at 13.

[97] *Id.* at 14-15.

[98] *Id*. at 17.

[99] Order (I) Authorizing The Employment and Retention of Lazard Freres & Co. LLC as Investment Banker to The Debtors and Debtors in Possession, Effective *Nunc Pro Tunc* to The Petition Date, (II) Modifying Certain Time Keeping Requirement, and (III) Granting Related Relief. 732.pdf.

[100] Debtors' Application for Entry of an Order Pursuant to Sections 327(a) and 328 of The Bankruptcy Code, Bankruptcy Rules 2014(a) and 2016 and Local Rules 2014-1 and 2016-1 Authorizing The Employment and Retention of A&G Realty Partners, LLC as a Real Estate Consultant and Advisor *Nunc Pro Tunc* to September 25, 2017. 214.pdf at 3.

[101] *Id.*

knowledge regarding the Debtors and their lease and fee owned properties.[102] The Debtors retained A&G for real estate services, but, more specifically, A&G's services pertain to negotiating with the Debtors' landlords to obtain better terms for the Debtors or negotiate the sale of the Debtors' leases.[103]

Under the Services Agreement, the Debtors paid A&G a non-refundable retainer fee of $150,000 that goes to fees and expenses accrued under the Services Agreement.[104] Further, the Services Agreement specifically lists the fee the Debtors owe A&G for each service A&G might perform.[105] Additionally, as A&G's compensation is directly linked to benefits received by the Debtors and not hourly billing rates, the Debtors moved the Court to allow A&G to not keep detailed records of time keeping.[106] To support this request, the Debtors rely on the Graiser Declaration, which provides that it is standard practice in A&G's industry to receive flat fee percentage payments and not hourly billing.[107]

In order to show A&G's disinterestedness, the Debtors relied on the Graiser Declaration, which stated A&G (1) had no connection with the Debtors or any other party to the case; (2) does not hold any interest adverse to the Debtors' estates; and (3) believes it is a "disinterested person" as defined in Section 101(14) of the Bankruptcy Code.[108] Judge Phillips granted the Debtors' application and approved generally the terms of the Engagement Agreement as they were submitted to the Court.[109]

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[102] *Id.* at 4.

[103] *Id.* at 4-5.

[104] *Id.* at 5-6.

[105] *Id*. at 5-7.

[106] *Id.* at 10.

[107] *Id.* at 11. *See generally* Declaration of Andrew Graiser in Support of Debtors' Application for Entry of an Order Pursuant to Sections 327(a) and 328 of The Bankruptcy Code, Bankruptcy Rules 2014 and 2016 and Local Rules 2014-1 and 2016-1 Authorizing The Employment and Retention of A&G Realty Partners, LLC as a Real Estate Consultant and Advisor *Nunc Pro Tunc* to September 26, 2017. 214.pdf at 43-54.

[108] *Id.* at 43-54.

[109] Order Pursuant to Sections 327(a) and 328 of The Bankruptcy Code, Bankruptcy Rules 2014 and 2016 and Local Rules 2014-1 and 2016-1 Authorizing The Employment and Retention of A&G Realty Partners, LLC as a Real Estate Consultant and Advisor *Nunc Pro Tunc* to September 25, 2017. 733.pdf.

Kutak Rock LLP

The Debtors filed an Application to Employ in order to retain Kutak Rock LLP (Kutak), which is a national law firm with experience in bankruptcy cases of the size and complexity of this case, as their co-counsel during their Chapter 11 case.[110] Specifically, the Debtors seek to employ Kutak as their Virginia local counsel.[111] The Debtors supported their motion by claim that, prior to filing the petition, Kutak became familiar with the Debtors' businesses and has the necessary background to effectively deal with the pending matters and with man of the potentially complex legal issues that may arise.[112]

Under the Engagement Agreement, the Debtors employed Kutak to aid Kirkland and Ellis in the process of filing documents with the Court and providing legal services to the Debtors during the Chapter 11 case.[113] The Debtors had already paid Kutak a retainer fee of $75,000 to cover all unpaid prepetition fees and expenses owed to Kutak by the debtors.[114] In order to show Kutak's disinterestedness, the Debtors rely on the Condyles Declaration, which stated Kutak (1) had no connection with the Debtors or any other party to the case; (2) does not hold any interest adverse to the Debtors' estates; and (3) believes it is a "disinterested person" as defined in Section 101(14) of the Bankruptcy Code.[115] Judge Phillips granted the Debtors' application and approved generally the terms of the Engagement Agreement as they were submitted to the Court.[116]

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[110] Debtors' Application for Entry of an Order Authorizing The Debtors to Employ and Retain Kutak Rock LLP as Co-Counsel Effective *Nunc Pro Tunc* to The Petition Date. 215.pdf at 3-4.

[111] *Id.* at 4-5.

[112] *Id.* at 4.

[113] *Id.* at 5-6. Listing the services the Debtors employed Kutak to aid them with during their Chapter 11 case.

[114] *Id.* at 8.

[115] *Id.* at 8-9. *See generally* Declaration of Michael A Condyles in Support of The Debtors' Application for Entry of an Order Authorizing The Debtors to Employ and Retain Kutak Rock LLP as Co-Counsel Effective *Nunc Pro Tunc* to The Petition Date. 215.pdf at 20-33.

[116] Order Authorizing The Debtors to Employ and Retain Kutak Rock LLP as Co-Counsel Effective *Nunc Pro Tunc* to The Petition Date. 734.pdf.

Prime Clerk LLC

The Debtors filed an Application to Employ in order to retain Prime Clerk LLC (Prime Clerk) as their administrative advisor during their Chapter 11 case.[117] Prime Clerk has extensive experience in noticing, claims administration, solicitation, balloting, and facilitation other administrative aspects of chapter 11 cases and experience in matter of the size and complexity of this chapter 11 case.[118]

Under the Engagement Agreement, the Debtors paid Prime Clerk an amount equal to $60,000 to serve as an advance against unpaid prepetition fees and expenses accrued by Prime Clerk.[119] Further, the Engagement Agreement provides that Prime Clerk may bill the Debtors no less frequently than monthly.[120] In order to show Prime Clerk's disinterestedness, the Debtors relied on the Waisman Declaration, which stated Prime Clerk (1) had no connection with the Debtors or any other party to the case; (2) does not hold any interest adverse to the Debtors' estates; and (3) believes it is a "disinterested person" as defined in Section 101(14) of the Bankruptcy Code.[121] Judge Phillips granted the Debtors' application and approved generally the terms of the Engagement Agreement as they were submitted to the Court.[122]

Debtor-in-Possession (DIP) Financing

The Toys "R" Us Chapter 11 Bankruptcy case had two separate debtors file for DIP Financing, the North American Debtors and the Tru Taj Debtors. This section of the case overview will focus on the North American Debtors' Motion for Dip Financing, objections filed against the Debtors' request for DIP Financing, the Court's Interim and Final Orders issued and the rationale

[117] Debtors' Application for an Order Authorizing The Employment and Retention of Prime Clerk LLC as Administrative Advisor *Nunc Pro Tunc* to The Petition Date. 217.pdf.

[118] *Id.* at 3-5. Listing the specific services the Debtors retained Prime Clerk for to aid during the chapter 11 case.

[119] *Id.* at 29.

[120] *Id.* at 28.

[121] *Id.* at 6-7. *See generally* Declaration of Shai Y. Waisman in Support of Debtors' Application for an Order Authorizing Employment and Retention of Prime Clerk LLC as Administrative Advisor *Nunc Pro Tunc* to the Petition Date. 217.pdf at 18-25.

[122] Order Authorizing Employment and Retention of Prime Clerk LLC as Administrative Advisor *Nunc Pro Tunc* to The Petition Date. 735.pdf.

behind the outcome of the debtors' DIP Financing motions. At the commencement of these cases, the Debtors held commitments for "approximately $3.125 billion of combined [post-petition] financings to support both their North American and international businesses at the most capital intensive – and important – time in the Debtors' fiscal year."[123] The Debtors found it necessary to seek DIP Financing in order to continue ordinary business operations leading up and during the holiday season.[124]

Motion for DIP Financing

The North American Debtors' claim is that the below stated DIP Financing is necessary in order for the corporation to be able to prepare for the upcoming holiday season and "protect the interest of parents and children everywhere."[125] In addition to a need for DIP Financing to operate during the holiday season, the North American Debtors claim that DIP Financing is necessary to fund the proper administration of these Chapter 11 cases, specifically to allow the North American Debtors to develop a consensual plan of reorganization.[126] According to the North American Debtors, denial of their Motion for DIP Financing would put them in a grave situation in which they would face a material risk irreparable harm due to not having the required funds to preserve their assets, administer these Chapter 11 cases and execute its business plan.[127]

The motion filed for DIP Financing here was limited only to obtain approval of funding and related relief to support the North American Debtors' business in the United States and Canada in an amount totaling to approximately $2.75 billion from JPMorgan Chase Bank, N.A., CitiGroup Global Markets Inc., Deutsche Bank Securities Inc., Goldman Sachs Bank USA and Barclays Bank

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[123] *See* Debtors' Motion For Entry of Interim and Final Orders (I) Authorizing the North American Debtors to Obtain Postpetition Financing, (II) Authorizing the North American 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. 29.pdf at 4.

[124] *Id.*

[125] The Debtor's position is that, because Black Friday was 10 weeks away at the time this Motion was filed, they need capital in order to build their inventory and secure exclusive products. The Debtors believe DIP Financing is necessary in order rebuild relationship with their vendors, who withdrew trade terms in anticipation of the Debtors entering Chapter 11, to meet their needs for the upcoming holiday season. 29.pdf at 5.

[126] *Id.* at 40-41.

[127] *Id.* at 40.

PLC, which can be broken down into three subcategories of: (1) $1.85 billion of revolving commitments under the proposed ABL/FILO Revolving DIP Facility; (2) $450 million of "first in last out" term loan financing under the North American Debtors' ABL/FILO Term DIP Facility; and (3) $450 million of term loan financing under the North American Debtors' proposed Term DIP Facility.[128]

Additionally, the North American Debtors are seeking to obtain each of the aforementioned financing proposals on a priming lien superpriority basis under Bankruptcy Rule 364(d).[129] However, under the DIP Agreement, the DIP Lenders do not have priority over court fees, trustee fees, not to exceed $50,000 and Allowed Professional Fees, not exceed $20,000,000 (hereinafter, the "Carve-Out").[130] Under United States Bankruptcy law, courts look to a three-part, conjunctive test to determine if the debtor is entitled to financing under 364(c) or (d), and the test is as follows:

(1) The debtor is unable to obtain unsecured credit under section 364(b) of the Bankruptcy Code, *i.e.*, by allowing a lender only an administrative claim;

(2) The credit transaction is necessary to preserve the assets of the estate; and

(3) The terms of the transaction are fair, reasonable, and adequate, given the circumstances of the debtor-borrower and proposed lenders.[131]

The North American Debtors argue they meet the three requirements because: (1) lenders were unable to extend postpetition financing on an unsecured or junior lien basis because of the North American Debtors' high level of existing secured debt obligations[132]; (2) the North American Debtors need DIP financing to provide adequate liquidity for the operation of the North American Debtors' business; and (3) the North American Debtors and DIP Lenders negotiated the North

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[128] *Id.*

[129] *Id.* at 6-7. The DIP Lender will be granted a superior lien over all liens on the debtors' property, regardless of when the lien was filed.

[130] 29.pdf at 11.

[131] *See In re Aqua Assocs.*, 123 B.R. 192, 195-96 (Bankr. E.D. Pa. 1991).

[132] *See* Declaration of David Kurtz in Support of the Debtors' Motions for Entry of Interim and Final Orders (I) Authorizing the Debtors to Obtain North American and International 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. 33.pdf ¶ 24.

American DIP Facilities in good faith, at arm's length and in a competitive lending market.[133] In order to show that they meet the requirements to receive superpriority on a priming lien basis,[134] the North American Debtors relied upon the Declaration of David Kurtz and the Declaration of David A. Brandon.[135] Further, the North American Debtors contend that, after a good faith effort, credit was not available without the protections provided to lenders under 364(c) and (d).[136] Further, after an ambitious marketing process, the North American Debtors argue they are entitled to the DIP Financing requested, as they are not required to exhaust every potential lender to obtain financing.[137]

The North American Debtors made clear in this Motion that they only wanted fully underwritten commitments and not roll-ups of existing obligations.[138] However, in order to receive the funding they sought, the Debtors agreed to a partial roll-up of the prepetition liens, specifically the ABL/FILO liens. The North American Debtors additionally moved to be able to use cash collateral under Section 363(c)(2)(A) with the consent of the Prepetition Secured Parties, which they have. The North American Debtors argue that the use of cash collateral will provide adequate protection to the Prepetition Secured Parties from diminution in value of the Cash Collateral and the other Prepetition Collateral with a payment of current interest at 50% of the nondefault interest rate.[139]

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[133] 29.pdf at 50.

[134] MICHAEL L. BERNSTEIN & GEORGE W. KUNEY, BANKRUPTCY IN PRACTICE 262 (Charles J. Tabb ed., 5th ed. 2015) (To get the priming lien, the debtor has to first show that it cannot get the loan elsewhere on less-burdensome terms, which means evidence showing the debtor tried and failed).

[135] 33.pdf ¶¶ 18-19 (Stating the Debtors, with the assistance of Lazard Frères & Co. LLC, contacted and coordinated a competitive marketing process for the DIP Financing, in order to ensure the Debtors would receive multiple viable bids for each component of DIP Financings). *See also* 20.pdf ¶ 99. (Stating the Debtors and their advisors worked feverishly during this period to finalize the terms of a debtor-in-possession financing facility to ensure the Debtors would have sufficient liquidity to reactivate their supply chain, build inventory, and fund these chapter 11 cases.

[136] *See In re Snowshoe Co.*, 798 F.2d 1085, 1088 (4th Cir, 1986).

[137] *See* 29.pdf at 50; *See In re Sky Valley, Inc.*, 100 B.R. 107, 113 (Bankr. N.D. Ga. 1988) (Explaining it would be unrealistic and unnecessary to require a debtor to conduct an exhaustive search for financing when there are only a few lenders that likely can or would extend the necessary credit to a debtor).

[138] 29.pdf. at 42.

[139] 29.pdf at 54.

Interim Order Entered Granting DIP Financing

On September 20, 2017, Judge Keith L. Phillips entered an Interim Order granting the North American Debtors' Motion for DIP Financing.[140] Specifically, the Interim Order entered on this matter granted the North American Debtors' the terms requested in their Motion for DIP Financing.[141]

North American Debt Facilities: [142]

Funded Debt	Maturity	Outstanding Principal Amount[13]
North American Debt Facilities		
Delaware Secured ABL Credit Facility	March 21, 2019	$1,025 million[14]
Tranche A-1 Loan Facility	October 24, 2019	$280 million
Delaware Secured Term Loan - Incremental Facility ("B-2")	May 25, 2018	$123 million
Delaware Secured Term Loan - Second Incremental Facility ("B-3")	May 25, 2018	$61 million
Delaware Secured Term Loan - Incremental Facility ("B-4")	April 24, 2020	$998 million
Toys Inc. 8.75% Unsecured Notes	September 1, 2021	$22 million
Delaware 7.375% Senior Notes	October 15, 2018	$208 million
Propco I Unsecured Term Loan Facility	August 21, 2019	$859 million
Propco II Mortgage Loan	November 9, 2019	$507 million
Giraffe Junior Mezzanine Loan	November 9, 2019	$70 million

[140] Interim Order (I) Authorizing the North American Debtors to Obtain Postpetition Financing, (II) Authorizing the North American 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. 98.pdf at 76.

[141] *Id.* at 75.

[142] 29.pdf at 35. Showing the Debtors' Prepetition Capital Structure in relation to Prepetition Lenders.

Objections to the North American Debtors' Motion for DIP Financing

After Judge Phillips entered the Interim Order, a series of objections were filed by various parties opposing the entrance of a final order to the North American Debtors' Motion for DIP Financing. A majority of the objections focused on the Interim Order not clearly dictating the treatment of the North American Debtors' leasehold interests and whether or not the DIP Lenders would, under the DIP Agreement, be able to attach a lien to the leases or real property to which the North American Debtors had an interest.[143] These objections were argued and resolved during the Final Hearing and accounted for when Judge Phillips entered the Final Order.[144]

Final Order Entered Granting DIP Financing

On October 24, 2017, Judge Phillips entered the Final Order granting the North American Debtors' DIP Financing Motion.[145] Specifically, the Final Order dictated that the DIP Loan Parties were authorized to "execute, enter into and, as applicable perform all DIP Documents."[146] Further, the North American Debtors were also authorized by the Final Order to borrow funds and obtain letters of credit pursuant to the ABL/FILO DIP Credit Agreement.[147] While the Final Order granted the North American Debtors substantially the same relief requested in their Motion for DIP Financing, the Final Order did contain a few dissimilarities to the relief requested. Specifically, the North American Debtors' requested Carve-Out[148] contained increases to what the North American Debtors requested.[149] Additionally, the Final Order, unlike the Interim Order, specifically details that "in no event shall the DIP Collateral include or the DIP Liens or Adequate

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[143] *See* Docket Nos. 560.pdf; 576.pdf; 578.pdf; 582.pdf; 585.pdf; 604.pdf; 631.pdf; 648.pdf.

[144] *See* Docket No. 711.pdf. This change reflects the resolution of the objections made in the following documents: 560.pdf; 576.pdf; 578.pdf; 582.pdf; 585.pdf; 604.pdf; 631.pdf; 648.pdf.

[145] Final Order (I) Authorizing the North American Debtors to Obtain Postpetition Financing, (II) Authorizing the North American 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, and (VI) Granting Related Relief. 711.pdf at 84.

[146] *Id.* at 21.

[147] *Id.*

[148] Detailing the requested Carve-Out as the DIP Lenders do not have priority over court fees, trustee fees, not to exceed $50,000 and Allowed Professional Fees, not exceed $20,000,000. 29.pdf at 11.

[149] *See* Docket No. 711.pdf. Showing the Carve-Out limit for trustee's fees increased from $50,000 to $150,000.

Protection Liens granted under this Final Order attach to any lease or other real property right, to which any Debtor is a party."[150]

[150] *Id*. This change reflects the resolution of the objections made in the following documents: 560.pdf; 576.pdf; 578.pdf; 582.pdf; 585.pdf; 604.pdf; 631.pdf; 648.pdf.

Debtor in Possession Budget: [151]

Case 17-34665-KLP Doc 38 Filed 09/19/17 Entered 09/19/17 08:51:21 Desc Main Document Page 1 of 1

DIP Budget
(USD, millions)

Fiscal Month:	Sep-17	Oct-17	Nov-17	Dec-17	Jan-18	Feb-18	Mar-18	Apr-18	May-18	Jun-18	Jul-18	Aug-18	Sep-18	Oct-18	Nov-18	Dec-18	Jan-19	Feb-19	Total
	(A)																		
Total Cash Flow																			
Operating Cash Flow	$ (8)	$ (93)	$ (0)	$ 200	$ (35)	$ 12	$ (44)	$ 16	$ (29)	$ (8)	$ (4)	$ 8	$ (11)	$ (35)	$ 51	$ 222	$ (73)	$ (31)	$ 137
Interest on Debt	(2)	(11)	(4)	(4)	(11)	(39)	(4)	(10)	(4)	(4)	(10)	(39)	(4)	(10)	(4)	(4)	(10)	(39)	(210)
Professional Fees	-	-	(2)	(7)	(4)	(6)	(3)	(3)	(5)	(3)	(3)	(4)	(3)	(3)	(4)	(3)	(3)	(4)	(61)
DIP Financing Proceeds / Escrow Proceeds	137	63	3	3	(32)	88	3	3	3	3	3	38	3	3	3	3	3	39	375
Financing Fees	(25)	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	(25)
Total Cash Flow before DIP ABL Draw / Paydown	**$ 101**	**$ (41)**	**$ (3)**	**$ 193**	**$ (81)**	**$ 54**	**$ (47)**	**$ 6**	**$ (35)**	**$ (11)**	**$ (14)**	**$ 4**	**$ (14)**	**$ (45)**	**$ 46**	**$ 219**	**$ (83)**	**$ (35)**	**$ 216**
Book Cash																			
Beginning Balance	68	133	117	106	231	149	155	122	149	120	112	106	109	102	69	96	264	181	68
(+/-) Net Cash Flow Before DIP Draw / Paydown	101	(41)	(3)	193	(81)	5	(47)	6	(35)	(11)	(14)	4	(14)	(45)	46	219	(83)	(35)	166
(+/-) DIP Borrowings / (Repayments)	(37)	25	(9)	(68)	-	-	14	21	5	3	8	(1)	6	12	(19)	(51)	-	-	(89)
Ending Book Cash Balance	**$ 133**	**$ 117**	**$ 106**	**$ 231**	**$ 149**	**$ 155**	**$ 122**	**$ 149**	**$ 120**	**$ 112**	**$ 106**	**$ 109**	**$ 102**	**$ 69**	**$ 96**	**$ 264**	**$ 181**	**$ 146**	**146**
LIQUIDITY																			
Net Borrowing Base	100	139	153	145	95	73	88	98	96	97	96	102	102	142	157	150	100	77	77
Facility Size	179	179	179	179	179	179	179	179	179	179	179	179	179	179	179	179	179	179	179
Maximum Borrowing Availability	**$ 100**	**$ 139**	**$ 153**	**$ 145**	**$ 95**	**$ 73**	**$ 88**	**$ 98**	**$ 96**	**$ 97**	**$ 96**	**$ 102**	**$ 102**	**$ 142**	**$ 157**	**$ 150**	**$ 100**	**$ 77**	**$ 77**
Less: ABL Balance (Excluding LCs)	52	77	68	-	-	-	14	35	40	44	52	51	57	70	51	-	-	-	-
Excess Availability	48	62	85	145	95	73	74	62	55	53	44	51	45	72	106	150	100	77	77
Less: Letters of Credit	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Add: Available Cash	78	62	11	161	99	100	67	94	65	57	51	54	47	14	1	194	131	91	91
Less: Minimum Availability Covenant	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Total Liquidity	**$ 126**	**$ 124**	**$ 95**	**$ 306**	**$ 195**	**$ 173**	**$ 140**	**$ 157**	**$ 120**	**$ 111**	**$ 96**	**$ 105**	**$ 92**	**$ 86**	**$ 107**	**$ 344**	**$ 231**	**$ 168**	**$ 168**

(A) Includes only partial post-filing period.

[151] *See* 38.pdf.

Lien Priority Schedule: [152]

Lien Priority Schedule[1]				
	Prepetition ABL/FILO Priority Collateral	**Prepetition Term Loan Priority Collateral**	**U.S. Unencumbered Property**	**Intellectual Property Assets[2]**
1	• ABL/FILO DIP Liens*	• Term DIP Liens • Wayne Lien** • Canadian Intercompany Lien**	• Term DIP Liens • Wayne Lien** • Canadian Intercompany Lien**	• Term DIP Liens • Wayne Lien** • Canadian Intercompany Lien**
2	• Prepetition ABL/FILO Adequate Protection Liens	• Prepetition Term Loan Adequate Protection Liens	• Prepetition Term Loan Adequate Protection Liens	• Prepetition Term Loan Adequate Protection Liens
3	• Contingent ABL/FILO Liens	• Prepetition Term Liens	• ABL/FILO DIP Liens*	• Prepetition Term Liens
4	• Term DIP Liens • Wayne Lien** • Canadian Intercompany Lien**	• ABL/FILO DIP Liens*	• Prepetition ABL/FILO Adequate Protection Liens	• ABL/FILO DIP Liens*
5	• Prepetition Term Loan Adequate Protection Liens	• Prepetition ABL/FILO Adequate Protection Liens	• Contingent ABL/FILO Liens	• N/A
6	• Prepetition Term Liens	• Contingent ABL/FILO Liens	• N/A	• N/A

[152] 29.pdf at 143.

Bankruptcy Transactions

Motion for Adequate Protection

On November 2, 2017, Debtors made a motion to provide adequate protection to the TRU Trust 2016-TOYS, Commercial Mortgage Pass-Through Certificates, Series 2016-Toys (the "Trust[153]) against any diminution in value of the Prepetition Propco Collateral, whether from the use, sale, lease, or other diminution in value of the Prepetition Propco Collateral or the imposition of the automatic stay under section 362(a) of the Bankruptcy Code.[154] Along with the Motion, Debtors filed a proposed Order which provided that, upon entry of the Order by the Court, as adequate protection against any diminution of value of the Prepetition Propco Collateral[155], Debtor Propco II would grant the Trust:

a) perfected adequate protection liens on each of Propco II's rights in, to, and under all present and after-acquired property and assets, including, among other things, all cash and cash collateral;

b) superpriority administrative expense claims against Propco II;
c) payment of interest at the non-default rate in accordance with Section 1.2(a) of the Mortgage Loan Agreement solely from the proceeds of the rent payments received pursuant to the Master Lease;

d) amortization payments in accordance with Section 1.2(a) of the Mortgage Loan Agreement solely from the proceeds of the rent payments received pursuant to the Master Lease;

e) any late fees to the extent interest or amortization payments are not paid by the agreed upon payment date in accordance with Section 1.2(c) of the Mortgage Loan Agreement solely from the proceeds of the rent payments

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[153] The Trust was established by TRU 2016-1 Depositor, LLC, as depositor (the "Depositor") pursuant to that certain Trust and Servicing Agreement, dated as of November 3, 2016 (the "Servicing Agreement"), by and among the Depositor and Wells Fargo Bank, National Association, in its capacity as servicer, special servicer, and certificate administrator.

[154] Debtors' Motion for Entry of an Order to Provide Adequate Protection to the Tru Trust 2016-Toys, Commercial Mortgage Pass-Through Certificates, Series 2016-Toys Pursuant to 11 U.S.C. 361, 362, 363, 503 and 507. Docket No. 864.pdf at 1.

[155] "Prepetition PropCo Collateral" means all of the Mortgage Borrower's interests in all tangible and intangible assets relating to the ownership, occupancy rights, use, operations, and management of the Properties and in certain of its other assets and property, including, but not limited to, the Mortgage Borrower's interest in the Master Lease, all rents and other cash generated by the Mortgage Borrower's business operations with respect to the Properties, whether generated before or after the Petition Date (all such property, including, without limitation, the Properties, as the same existed on or at any time prior to the Petition Date.

received pursuant to the Master Lease solely from the proceeds of the rent payments received pursuant to the Master Lease;

f) continued compliance with all of Propco II's obligations under the Mortgage Loan Agreement, including payment of ground rents, taxes, insurance, condominium charges, and required escrow payments solely from the proceeds of the rent payments received pursuant to the Master Lease;

g) reimbursement of costs and expenses incurred by the Special Servicer in connection with the Mortgage Loan Documents in accordance with Section 9.17(f) of the Mortgage Loan Agreement solely from the proceeds of the rent payments received pursuant to the Master Lease;

h) payment of securitization fees solely from the proceeds of the rent payments received pursuant to the Master Lease;

i) all Revenues, as defined in the Mortgage Loan Agreement, after payment of the Propco Adequate Protection Obligations listed in paragraph 3 a through f of the Order, to be released to and applied by the Special Servicer to permanently pay down the Mortgage Loan Balance; and

j) Propco II's continued compliance with all cash management provisions set forth in the Mortgage Loan Agreement.[156]

The Debtors sought adequate protection because they claimed it was an exercise of their sound business judgment.[157] The Debtors also stated that under section 363(e) of the Bankruptcy Code they must provide such adequate protection.[158]Section 363(e) of the Bankruptcy Code provides that:

> Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest.[159]

The Bankruptcy Code does not define adequate protection, however, section 361 provides three nonexclusive examples of what may constitute adequate protection:

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[156] Docket No. 864.pdf at 5.

[157] *Id.* at 6.

[158] *Id.* at 8.

[159] *Id.*

1) requiring the [debtor] to make a cash payment or periodic cash payments to such entity, to the extent that the . . . use . . . under section 363 . . . results in a decrease in the value of such entity's interest in such property;

2) providing to such entity an additional or replacement lien to the extent that such . . . use . . . results in a decrease in the value of such entity's interest in such property; or

3) granting such other relief . . . as will result in the realization by such entity of the indubitable equivalent of such entity's interest in such property.[160]

In the Proposed Order Attached to the Motion, the Debtors sought that the Mortgage Borrower would grant the Trust the following[161]:

a) Adequate Protection Liens.

i. Perfected security interests in and valid, binding, enforceable and perfected liens (the "Adequate Protection Liens") on each of Mortgage Borrower's rights in, to, and under all present and after-acquired property and assets of any kind or nature whatsoever, whether real or personal, tangible or intangible, wherever located, including, without limitation, all cash and/or cash collateral (as such term is defined in section 363(a) of the Bankruptcy Code, "Cash Collateral") and any investment of such cash and Cash Collateral, goods, cash-in-advance deposits, deposit accounts, contracts, causes of action, general intangibles, intercompany receivable, accounts receivable, and other rights to payment, whether arising before or after the Commencement Date, chattel paper, documents, instruments, interests in leaseholds, real properties, licenses, insurance proceeds, and tort claims, and any and all of the proceeds, products, offspring, rents and profits thereof, rights under letters of credit, capital stock and other equity or ownership interests, including equity interests in subsidiaries and all other investment property, and the proceeds of all of the foregoing (excluding Avoidance Actions3 but including Avoidance Proceeds), whether in existence on the Commencement Date or thereafter created, acquired, or arising and wherever located (all such property, other than the Prepetition Propco Collateral in existence immediately prior to the Commencement Date, being collectively referred to as the "Postpetition Propco Collateral," and collectively with the Prepetition Propco Collateral, the "Propco Collateral"), which liens and security interests shall secure the amount equal to any aggregate diminution in the value of the Trust's interest in the Pre-Petition Propco Collateral (including Cash Collateral) from and after the Petition Date, including, without

[160] *Id. See also,* 11 U.S.C. § 361.

[161] Docket No. 864.pdf at 21-23.

limitation, any such diminution resulting from the use of Cash Collateral, the sale, use, or lease by Propco II of such Pre-Petition Propco Collateral, or the imposition of the automatic stay pursuant to Section 362 of the Bankruptcy Code (the "Diminution Claim"), and shall be senior to any and all others liens and security interests on the Propco Collateral, but subject only to (i) the Mortgage Loan and (ii) all valid, enforceable, and non-avoidable Permitted Encumbrances in the applicable Prepetition Propco Collateral that were perfected prior to the Commencement Date (or perfected thereafter to the extent permitted by section 546(c) of the Bankruptcy Code), which are not subject to avoidance, reduction, setoff, recoupment, offset, recharacterization (except as expressly provided in paragraph 3a, c, e, or f hereof), subordination (whether equitable, contractual, or otherwise), counterclaims, cross-claims, defenses, disallowance, impairment, or any other challenges pursuant to the Bankruptcy Code or applicable non-bankruptcy law and which are senior to the Trust's liens in such Prepetition Propco Collateral as of the Commencement Date (the "Prior Liens"). For the avoidance of doubt, such Adequate Protection Liens granted hereunder shall be deemed to be effective and perfected as of the Commencement Date and without the necessity of the execution by the Debtors of mortgages, security agreements, pledge agreements, financing statements, or other agreements. For the duration of these Chapter 11 Cases, for so long as all obligations, including principal, interest, fees, costs, and expenses, under the Mortgage Loan are not indefeasibly paid in full, the Debtors shall not grant any liens upon the assets of Mortgage Borrower (except as set forth herein). Except as provided herein, the Adequate Protection Liens shall not be subordinate to the lien of any other party.

b) Superpriority Claims. An allowed superpriority administrative expense claim as provided and to the fullest extent allowed by sections 503(b), 507(a), and 507(b) of the Bankruptcy Code and otherwise in an amount equal to and for any Diminution Claim (the "Superpriority Claim"). The Superpriority Claim shall be an allowed claim against Mortgage Borrower with priority over any and all administrative expenses and all other claims against Mortgage Borrower, now existing or hereafter arising, of any kind whatsoever, including, without limitation, all other administrative expenses of the kind specified in sections 503(b) and 507(b) of the Bankruptcy Code, and over any and all other administrative expenses or other claims arising under any other provision of the Bankruptcy Code, including, without limitation, sections 105, 326, 328, 330, 331, 503(b), 507(a), 507(b), or 1114 of the Bankruptcy Code, whether or not such expenses or claims may become secured by a judgment lien or other nonconsensual lien, levy, or attachment. The allowed Superpriority Claim shall be payable from and have recourse to all unencumbered prepetition and postpetition property of the Mortgage Borrower (excluding Avoidance Actions

but including Avoidance Proceeds). Except as provided under paragraph 11 hereof, no cost or expense of administration under sections 105, 503, or 507 of the Bankruptcy Code or otherwise, including any such cost or expense resulting from or arising after the conversion of any of the Chapter 11 Cases under section 1112 of the Bankruptcy Code, shall be senior to, or pari passu with, the Superpriority Claim granted hereunder. Except to the extent set forth in this paragraph 2.b., the Superpriority Claim shall not be subordinate to the claim of any other party, no matter when arising.

The Motion also stated that in addition to the Adequate Protection Liens and Superpriority Claims set forth above, as further adequate protection, and in accordance with sections 361 and 363(e) of the Bankruptcy Code, the Mortgage Borrower would provide the Trust with the following[162]:

a) **Payment of Interest.** Mortgage Borrower shall pay to the Trust and/or the Special Servicer on each Payment Date current interest at the non-default rate5 in accordance with and subject to Section 1.2(a) of the Mortgage Loan Agreement; provided that, in the event it is subsequently determined that the Trust is undersecured or unsecured pursuant to a final, nonappealable order, nothing in this Paragraph 3(a) shall be construed as a waiver by the Mortgage Borrower or the Creditors' Committee of the right to later seek to avoid or recharacterize any interest payments made pursuant to this Order as payments of principal or on account of the Trust's secured claim, subject to the claims and defenses of the Trust and Special Servicer; provided further that the Trust, the Special Servicer, and the Mortgage Borrower reserve all rights and claims with respect to payment of default interest.

b) **Amortization.** On each Payment Date, subject to the Challenge Period, Mortgage Borrower shall make an amortization payment in an amount equal to the Monthly Amortization Amount in accordance with and subject to Section 1.2(a) of the Mortgage Loan Agreement.

c) **Late Fees.** To the extent that interest and amortization payments due and payable on a Payment Date are not paid by the Payment Date, Mortgage Borrower shall pay a late fee in an amount equal to the lesser of 5% of such unpaid amount and the maximum amount permitted by applicable law, in accordance with and subject to Section 1.2(c) of the Mortgage Loan Agreement; provided that in the event it is subsequently determined that the Trust is undersecured or unsecured pursuant to a final, nonappealable order, nothing herein shall be construed as a waiver by the Mortgage Borrower or the Creditors' Committee of the right to later seek to avoid or recharacterize any late fee payments made pursuant to this Order as payments of principal or on

[162] *Id.* at 23-26.

account of the Trust's secured claim, subject to the claims and defenses of the Trust and Special Servicer.

d) **Compliance with Mortgage Loan Agreement.** Other than as set forth herein, Mortgage Borrower shall continue to comply with all of its obligations under the Mortgage Loan Agreement, including, but not limited to, payment of all ground rents, taxes, insurance, condominium charges and all required escrow payments. The Mortgage Borrower shall give 30 day's advance written notice to the Special Servicer if any payments will not be made and, upon providing such notice, shall fund all escrows required under the Mortgage Loan Agreement. For the avoidance of doubt, the payments to be made by Mortgage Borrower include, but are not limited to:

   a. **Ground Rents.** On each Payment Date, if amounts in the Basic Carrying Costs Escrow Account are not sufficient to pay one month Ground Rents by the 30th day prior to the date due, an amount that the Trust and/or the Special Servicer reasonably determines (based on information provided by Mortgage Borrower) will be sufficient to pay all Ground Rents due by the 30th day prior to the date due, in accordance with and subject to Section 3.4 of the Mortgage Loan Agreement.

   b. **Taxes.** On each Payment Date, 1/12 of all Taxes that the Trust and/or the Special Servicer reasonably estimates will be payable during the next ensuing 12 months (based on information provided by Mortgage Borrower), together with an amount reasonably determined by the Trust and/or the Special Servicer to be necessary to accumulate an amount sufficient to pay such Taxes when due, in accordance with and subject to Section 3.4 of the Mortgage Loan Agreement.

   c. **Insurance.** Mortgage Borrower shall provide proof that it is maintaining a blanket insurance policy with respect to all of the Properties satisfying the conditions set forth in the Mortgage Loan Agreement, or, on each Payment Date, 1/12 of all insurance premiums that the Trust and/or the Special Servicer reasonably estimates will be payable during the next ensuing 12 months (based on information provided by Mortgage Borrower), together with an amount reasonably determined by the Trust and/or the Special Servicer to be necessary to accumulate an amount sufficient to pay such insurance premiums when due, in accordance with and subject to Section 3.4 of the Mortgage Loan Agreement.

   d. **Condominium Payments.** Mortgage Borrower shall pay, on each Payment Date, 1/12 of all common charges and other assessments as required by the Condominium Documents that the Trust and/or

the Special Servicer reasonably estimates will be payable during the next ensuing 12 months (based on information provided by Mortgage Borrower), together with an amount reasonably determined by the Trust and/or the Special Servicer to be necessary to accumulate an amount sufficient to pay such common charges and assessments when due, in accordance with and subject to Section 3.4 of the Mortgage Loan Agreement.

e) **Costs and Expense Reimbursement.** The Mortgage Borrower shall pay all of the Special Servicer's reasonable, actual, documented out-of-pocket costs and expenses (including actual, reasonable, documented out-of-pocket fees for one primary counsel, one local counsel, one financial advisor, appraisal fees, title search fees and property inspection fees, which shall include the fees and expenses of Dechert LLP, Troutman Sanders LLP, Ankura Consulting Group, LLC, and CBRE Group, Inc.) incurred by the Special Servicer in connection with the Mortgage Loan Documents (including in connection with any bankruptcy or insolvency proceeding), in accordance with and subject to Section 9.17(f) of the Mortgage Loan Agreement and the terms and conditions of the fee and expense reimbursement letters between each such professional and the Trust, provided that any such advisor fees are billed on an hourly basis only, with no success or transaction fee; and provided, further, that in the event it is subsequently determined that the Trust is undersecured or unsecured pursuant to a final, nonappealable order, nothing herein shall be construed as a waiver by the Mortgage Borrower or the Creditors' Committee of the right to later seek to avoid or recharacterize any cost and expense reimbursements made pursuant to this Order as payments of principal or otherwise, subject to the claims and defenses of the Trust and Special Servicer.

f) **Securitization Fees.** The Mortgage Borrower shall pay the Servicing Fee of 0.0025% per annum (calculated in the same manner as interest) and the Special Servicing Fee of 0.25% per annum (calculated in the same manner as interest) on a current basis (such fees as defined in the Servicing Agreement in accordance with and subject to Section 9.17(f) of the Mortgage Loan Agreement). Notwithstanding the Case 17-34665-KLP Doc 864 Filed 11/02/17 Entered 11/02/17 21:55:53 Desc Main Document Page 25 of 42 13 KL2 3032219.9 foregoing, the Trust, the Special Servicer, and the Mortgage Borrower reserve all rights and claims with respect to payment of any other fees under the Mortgage Loan Agreement, including, but not limited to, the Work-out Fee and Liquidation Fee (as defined in the Servicing Agreement). The Mortgage Borrower shall also reimburse the Trust and/or the Special Servicer for any Advances made by the Special Servicer, pursuant to and subject to Sections 3.4(c) and 3.23 of the Servicing Agreement, which includes any advance of principal, interest, or expenses, bearing interest at the Prime Rate, before or after the Commencement Date. In the event it is subsequently determined that the Trust is undersecured or unsecured pursuant to a final, nonappealable order, nothing herein shall be construed as a waiver by the

Mortgage Borrower or the Creditors' Committee of the right to later seek to avoid or recharacterize any payments made pursuant to this paragraph 3(f) as payments of principal or otherwise, subject to the claims and defenses of the Trust and Special Servicer.

g) **Balance of Rent Payment.** All Revenues, as defined in the Mortgage Loan Agreement, after payment of the Propco Adequate Protection Obligations listed in paragraph 3a through f hereof, shall be released to and applied by the Special Servicer to permanently pay down the Mortgage Loan balance (together with (i) (x) if such prepayment is made on a Payment Date, all interest and a repayment of principal in an amount equal to the applicable Monthly Amortization Amount that would otherwise have been due on such Payment Date or (y) if such prepayment is not made on a Payment Date, all interest and a repayment of principal in an amount equal to the applicable Monthly Amortization Amount that would have been due on the next succeeding Payment Date had the prepayment not occurred, and (ii) the Spread Maintenance Premium on all such principal payments until the Par Prepayment Date, i.e. the Payment Date in May 2018). For the avoidance of doubt, following any such application of Revenues, interest shall cease to accrue on the repaid principal of the Mortgage Loan balance.

h) **Continuation of Cash Management.** Mortgage Borrower shall comply with all cash management provisions set forth in the Mortgage Loan Agreement, including, without limitation, Article III of the Mortgage Loan Agreement. Lockbox Bank shall be required to remit all available funds held in the Lockbox Account to the Cash Management Account as and when required in accordance with and subject to that certain Deposit Account Control Agreement, dated November 3, 2016, among Original Lenders, Mortgage Borrower, and Lockbox Bank and otherwise comply with the terms and conditions of such agreement. Cash Management Bank shall be required to remit all funds held in the Cash Management Account as and when required pursuant to that certain Cash Management Agreement, dated November 3, 2016, among Original Lenders, Mortgage Borrower, and Cash Management Bank and otherwise comply with the terms and conditions of such agreement.

On November 14, 2017, Debtors filed a Revised Proposed Order to Provide Adequate Protection which provided details regarding certain parties to the Order, as well as the Creditors Committee's rights, and that the obligations contained within the Order may be applied to the Special Servicer to pay any amounts due pursuant and subject to the Servicing Agreement.[163] A

[163] Notice of Filing of Revised Proposed Order to Provide Adequate Protection to the Tru Trust 2016-Toys, Commercial Mortgage Pass-Through Certificates, Series 2016-Toys Pursuant to 11 U.S.C. 361, 362, 363 503 and 507. Docket No. 954.pdf.

hearing was held on November 16, 2017 regarding the abovementioned Motion.[164] The Agreed Order to Provide Adequate Protection was entered on November 16, 2017.[165] The court held that good cause was shown for entry of the order, that the Trust was entitled to adequate protection for the Debtors' use of the Prepetition Propco Collateral, and that the terms of the Order were fair and reasonable and reflected the Debtors' exercise of prudent business judgment consistent with their fiduciary duties.[166]

Rejection, Assumption, or Assignment of Executory Contracts and Unexpired Leases

On November 14, 2017, Debtors filed a Motion for entry of an Order Authorizing and Approving Procedures to Reject or Assume Executory Contracts and Unexpired Leases (the "Contract Procedures Motion").[167] The Motion also requested authority, but not direction, to remove or abandon personal property of the Debtors, including, without limitation, equipment, fixtures, furniture, and other personal property that may have been located on, or had been installed in, leased premises that were subject to a rejected Contract after the effective date of any proposed rejection.[168] The Debtors were party to over 11,000 Contracts, which included agreements with vendors for the supply of goods and services and other contracts related to the Debtors' business, and leases with respect to real and personal property, approximately 700 of which were considered nonresidential real property leases.[169] The Debtors at the time had not determined which contracts were to be assumed, assigned, or rejected but by this Motion, sought to preemptively establish procedures with respect to the rejection of certain contracts, as well as the assumption or assignment of certain contracts.[170]

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[164] Docket No. 997.pdf.

[165] Agreed Order to Provide Adequate Protection to the Tru Trust 2016-Toys, Commercial Mortgage Pass-Through Certificates, Series 2016-Toys Pursuant to 11 U.S.C. 361, 362, 363, 503 and 507. Docket No. 1003.pdf.

[166] *Id.* at 7.

[167] Debtors' Motion for Entry of an Order (I) Authorizing and Approving Procedures to Reject or Assume Executory Contracts and Unexpired Leases and (II) Granting Related Relief. Docket No. 955.pdf.

[168] *Id.* at 2.

[169] *Id.* at 3.

[170] *Id.* at 3-7.

The Proposed Rejection Procedures were as follows[171]:

a. **Rejection Notice.** The Debtors shall file a notice in the form attached hereto as Exhibit B (the "Rejection Notice") to reject a Contract or Contracts pursuant to section 365 of the Bankruptcy Code, which Rejection Notice shall set forth, among other things: (i) the Contract or Contracts to be rejected; (ii) the names and addresses of the counterparties to such Contracts; (iii) the effective date of the rejection for each such Contract (the "Rejection Date"); (iv) if any such Contract is a lease, the personal property to be abandoned, if any, and if practicable an estimate of the book value of such property (the "Abandoned Property"); and (v) the deadlines and procedures for filing objections to the Rejection Notice (as set forth below). The Rejection Notice may list multiple Contracts; provided that the number of counterparties to Contracts listed on the Rejection Notice shall be limited to no more than 100.

b. **Service of Rejection Notice.** The Debtors will cause the Rejection Notice to be served (i) by overnight delivery service upon the Contract counterparties affected by the Rejection Notice at the notice address provided in the applicable Contract (and their counsel, if known) and all parties who may have any interest in any Abandoned Property, and (ii) by first class mail, email, or fax upon: (a) the Office of the United States Trustee for the Eastern District of Virginia, Attn: Robert B. Van Arsdale and Lynn A. Kohen; (b) Kramer Levin Naftalis & Frankel LLP, 1177 Avenue of the Americas, New York, New York 10036, Attn: Stephen Zide, Esq. and Rachael Ringer, Esq., counsel to the Official Committee of Unsecured Creditors; (c) the DIP ABL Agent and the advisors and counsel thereto; (d) if the applicable Debtor Contract counterparty is an obligor on the 12% senior secured notes due 2021 issued pursuant to that certain indenture, dated as of August 16, 2016, by and among TRU Taj LLC and TRU Taj Finance, Inc. as issuers, Wilmington Trust, N.A., as successor trustee and collateral trustee, and certain guarantors party thereto, then to (1) the DIP Taj Term Loan Agent and the advisors and counsel thereto, (2) the indenture trustee for the TRU Taj 12.00% Senior Notes and the advisors and counsel thereto, and (3) counsel to the Ad Hoc Committee of Taj Noteholders; (e) the DIP Delaware Term Loan Agent and the advisors and counsel thereto; (f) the administrative agent for the prepetition Secured Revolving Credit Facility and the advisors and counsel thereto; (g) the administrative agent for the prepetition Secured Term Loan B Facility and the advisors and counsel thereto; (h) the prepetition administrative agent for the Propco I Unsecured Term Loan Facility and the advisors and counsel thereto; (i) the agent for the Propco II Mortgage Loan and the advisors and counsel thereto; (j) the agent for the Giraffe Junior Mezzanine Loan and the advisors and counsel thereto; (k) the administrative agent for the prepetition European and Australian Asset-Based Revolving Credit Facility ("Euro ABL") and the advisors and counsel thereto; (l) the administrative agent for the Senior Unsecured Term Loan Facility and the advisors and counsel

[171] *Id.* at 3-6.

thereto; (m) the indenture trustee for the Debtors' 7.375% Senior Notes and the advisors and counsel thereto; (n) the indenture trustee for the Debtors' 8.75% Unsecured Notes and the advisors and counsel thereto; (o) counsel to the ad hoc group of the Term B-4 Holders; (p) the monitor in the CCAA proceeding and counsel thereto; (q) the Debtors' Canadian Counsel; (r) the United States Attorney's Office for the Eastern District of Virginia; (s) the office of the attorneys general for the states in which the Debtors operate; (t) the Internal Revenue Service; (u) the United States Securities and Exchange Commission; and (v) any party that has requested notice pursuant to Bankruptcy Rule 2002 (collectively, the "Service Parties").

c. **Objection Procedures.** Parties objecting to a proposed rejection must file and serve a written objection so that such objection is filed with the Court and actually received by the following parties (collectively, the "Objection Service Parties") no later than 14 days after the date the Debtors serve the applicable Rejection Notice (the "Rejection Objection Deadline"): (a) Kirkland & Ellis LLP, 601 Lexington Avenue, New York, New York 10022, Attn: Joshua A. Sussberg, P.C., and Kirkland & Ellis LLP, 300 North LaSalle Street, Chicago, Illinois 60654, Attn: Chad Husnick, P.C., Robert A. Britton, and Emily Geier, and Kutak Rock LLP, 901 East Byrd Street, Suite 1000, Richmond, Virginia 23218, Attn: Michael A. Condyles, Peter J. Barrett, and Jeremy S. Williams, co-counsel to the Debtors; (b) the Office of the United States Trustee for the Eastern District of Virginia, Attn: Robert B. Van Arsdale and Lynn A. Kohen; (c) Kramer Levin Naftalis & Frankel LLP, 1177 Avenue of the Americas, New York, New York 10036, Attn: Stephen Zide, Esq. and Rachael Ringer, Esq., counsel to the Official Committee of Unsecured Creditors; (d) DIP ABL Agent and the advisors and counsel thereto; (e) DIP Taj Term Loan Agent and the advisors and counsel thereto; and (f) DIP Delaware Term Loan Agent and the advisors and counsel thereto.

d. **No Objection.** If no objection to the rejection of any Contract is timely filed, each Contract listed in the applicable Rejection Notice shall be rejected as of the applicable Rejection Date set forth in the Rejection Notice or such other date as the Debtors and the counterparty or counterparties to such Contract(s) agree; provided, however, that the Rejection Date for a rejection of a lease of nonresidential real property shall not occur until the later of (i) the Rejection Date set forth in the Rejection Notice and (ii) the date the Debtors relinquish control of the premises by notifying the affected landlord in writing of the Debtors' surrender of the premises and (A) turning over keys, key codes, and security codes, if any, to the affected landlord or (B) notifying the affected landlord in writing that the keys, keys codes, and security codes, if any, are not available, but the landlord may rekey the leased premises; provided, further that the Rejection Date for a rejection of a lease of nonresidential real property shall not occur earlier than the date the Debtors filed and served the applicable Rejection Notice.

e. **Unresolved Objections.** If an objection to the rejection of any Contract(s) Listed in the applicable Rejection Notice is timely filed and not withdrawn or resolved, the Debtors shall file a notice for a hearing to be held on not less than 14 days' notice to the applicable Contract counterparty to consider the objection for the Contract(s) to which such objection relates. If such objection is overruled or withdrawn, such Contract(s) shall be rejected as of (a) the applicable Rejection Date set forth in the Rejection Notice, (b) such other date as the Debtors and the counterparty or counterparties to such Contract(s) agree, or (c) such other date as the Court may so order.

f. **No Application of Security Deposits.** If the Debtors have deposited monies with a Contract counterparty as a security deposit or other arrangement, such Contract counterparty may not setoff, recoup, or otherwise use such monies without further order of the Court, unless the Debtors and the counterparty or counterparties to such Contract(s) otherwise agree.

g. **Abandoned Property.** The Debtors are authorized, but not directed, at any time on or before the applicable Rejection Date, to remove or abandon any of the Debtors' personal property that may be located on the Debtors' leased premises that are subject to a rejected Contract. The Debtors shall generally describe the abandoned personal property in the Rejection Notice. Absent a timely objection, the property will be deemed abandoned pursuant to section 554 of the Bankruptcy Code, as is, effective as of the Rejection Date. For the avoidance of doubt, any and all property located on the Debtors' leased premises on the Rejection Date of the applicable lease of nonresidential real property shall be deemed abandoned pursuant to section 554 of the Bankruptcy Code, as is, effective as of the Rejection Date. Landlords may, in their sole discretion and without further notice or order of this Court, utilize and/or dispose of such property without liability to the Debtors or third parties and, to the extent applicable, the automatic stay is modified to allow such disposition.

h. **Rejection Damages.** Claims arising out of the rejection of Contracts, if any, must be filed on or before the later of (i) the deadline for filing proofs of claim established in these chapter 11 cases, if any, and (ii) 30 days after the later of (A) the Rejection Objection Deadline, if no objection is filed and (B) the date that all such filed objections have either been overruled or withdrawn. If no proof of claim is timely filed, such claimant shall be forever barred from asserting a claim for damages arising from the rejection and from participating in any distributions on such a claim that may be made in connection with these chapter 11 cases.

The Proposed Assumption Procedures were as follows[172]:

a. **Assumption Notice.** The Debtors shall file a notice in the form attached hereto as Exhibit C (the "Assumption Notice") to assume a Contract or Contracts pursuant to section 365 of the Bankruptcy Code, which shall set forth, among

[172] Docket No. 955.pdf at 6-8.

other things: (i) the Contract or Contracts to be assumed; (ii) the names and addresses of the counterparties to such Contracts; (iii) the identity of the proposed assignee of such Contracts (the "Assignee"), if applicable; (iv) the effective date of the assumption for each such Contract (the "Assumption Date"); (v) the proposed cure amount, if any for each such Contract; (vi) a description of any material amendments to the Contract made outside of the ordinary course of business; and (vii) the deadlines and procedures for filing objections to the Assumption Notice (as set forth below). The Assumption Notice may list multiple Contracts; provided that the number of counterparties to Contracts listed on the Assumption Notice shall be limited to no more than 100.

b. **Service of Assumption Notice and Evidence of Adequate Assurance.** The Debtors will cause the Assumption Notice to be served (i) by overnight delivery service upon the Contract counterparties affected by the Assumption Notice at the address set forth in the notice provision of the applicable Contract (and their counsel, if known) and (ii) by first class mail, email, or fax upon the Service Parties. To the extent the Debtors seek to assume and assign a lease of non-residential real property, the Debtors will cause evidence of adequate assurance of future performance to be served with the Assumption Notice by overnight delivery service upon the Contract counterparties affected by the Assumption Notice at the address set forth in the notice provision of the applicable Contract (and their counsel, if known, by electronic mail).

c. **Objection Procedures.** Parties objecting to a proposed assumption and assignment, as applicable, must file and serve a written objection so that such objection is filed with the Court and actually received by the Objection Service Parties no later than 14 days after the date the Debtors serve the relevant Assumption Notice (the "Assumption Objection Deadline").

d. **No Objection.** If no objection to the assumption of any Contract is timely filed, each Contract shall be assumed as of the Assumption Date set forth in the applicable Assumption Notice or such other date as the Debtors and the counterparty or counterparties to such Contract(s) agree and the proposed cure amount shall be binding on all counterparties to such Contract and no amount in excess thereof shall be paid for cure purposes; provided, however that the Assumption Date for a lease of nonresidential real property shall not occur earlier than the date the Debtors filed and served the applicable Assumption Notice.

e. **Unresolved Objections.** If an objection to the assumption of any Contract(s) is timely filed and not withdrawn or resolved, the Debtors shall file a notice for a hearing to be held on not less than 14 days' notice to the applicable Contract counterparty to consider the objection for the Contract(s) to which such objection relates. The Debtors may adjourn the hearing to a later date from time to time upon filing an amended notice of hearing. If such objection is overruled or withdrawn, such Contract(s) shall be assumed as of the Assumption Date set

forth in the Assumption Notice or such other date as the Debtors and the counterparty or counterparties to such Contract(s) agree.

The Debtors also requested that, pursuant to section 105(a) and 363(f) of the Bankruptcy Code, the assignment of any Contract pursuant to the Assumption Procedures be free and clear of all liens, any and all claims, obligations, demands, guarantees of or by the Debtors, debts, rights, contractual commitments, restrictions, interests, and matters of any kind and nature, whether arising prior to or subsequent to the commencement of these chapter 11 cases. . .[173]

The Debtors claimed that the Contract Procedures were in the best interest of the Debtors' Estates, and that the rejection, assumption, and assignment of the Contracts was an exercise of their business judgment.[174] Debtors cited language from section 365(a) of the Bankruptcy Code, which provides that a debtor in possession, "subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor."[175] "The decision to assume or reject an executory contract or unexpired lease is a matter within the "business judgment" of the debtor."[176]

For the Assignment of Contracts free and clear of interests, the Debtors cite section 363(f) of the Bankruptcy Code, which permits a debtor to sell property free and clear of another party's interest if:

a) applicable nonbankruptcy law permits such a free and clear sale;

b) the holder of the interest consents;

c) the interest is a lien and the sale price of the property exceeds the value of all liens on the property;

d) the interest is in bona fide dispute; or

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[173] 955.pdf at 8.

[174] *Id.* at 9.

[175] *Id.* 11 U.S.C. § 365(a).

[176] *Id. See* In re Lawson, 146 B.R. 663, 664-65 (Bankr. E.D. Va. 1992) ("The Fourth Circuit has adopted the 'business judgment' test as the appropriate standard in determining whether to permit a debtor to reject an executory contract . . . a court will defer to a debtor's determination that rejection of a contract would be advantageous unless that decision is clearly erroneous")

e) the holder of the interest could be compelled in a legal or equitable proceeding to accept a monetary satisfaction of its interest.[177]

With respect to the Debtors' request for authority to abandon property, the Debtors submitted that the standard set forth in section 554(a) of the Bankruptcy Code was satisfied.[178] Section 554(a) of the Bankruptcy Code provides that a debtor in possession may abandon, subject to court approval, "property of the estate that . . . is of inconsequential value and benefit to the estate."[179] And lastly, Debtors stated that the requested Contract Procedures satisfied due process.[180]

In response to the abovementioned motion, on November 28, 2017, Bayer Retail Company, L.L.C., IMI Huntsville, LLC, and Manana-CDIT, LLC, (collectively the "Landlords") filed a limited objection.[181] The Landlords objection stated that they specifically joined in any other objections filed in opposition to the Contract Procedures Motion, to the extent that those objections were not inconsistent with their limited objection.[182] The Landlords objected on 10 different grounds.[183] For example, regarding the Rejection Procedures motion, the objection stated that the Debtors "should be required to remove all of the Debtors' personal property from the leased premises before the applicable rejection date, and the Debtors should be responsible for any damage resulting from the removal of said property."[184] The Landlords also objected regarding the effective date, the timeline and requirements for objection to a rejection or assumption, service of notice, where to file rejection damages claims, amount of time for Landlords to evaluate assurance

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[177] Docket No. 955.pdf at 12; 11 U.S.C. § 363(f).

[178] Docket No. 955.pdf at 12.

[179] *Id.* 11 U.S.C. § 554(a).

[180] Docket No. 955.pdf at 14.

[181] Bayer Retail Corporation, L.L.C., IMI Huntsville, LLC, and Manana-CDIT, LLC's Limited Objection to Debtors' Motion for Entry of an Order (I) Authorizing and Approving Procedures to Reject or Assume Executory Contracts and Unexpired Leases and (II) Granting Related Relief. Docket No. 1075.pdf.

[182] *Id.* at 2.

[183] *Id.*

[184] *Id.* at 3.

packages, adequate assurance of future performance, Landlords right to recoup security deposits, and Payment of rent to Landlords.[185] Eleven other Creditors joined in the Landlords objection.[186]

Separately, on November 28, 2017, Petco Animal Supplies Stores, Inc. ("Petco"), filed its own limited objection to the Contract Procedures Motion.[187] Petco objected on the ground that Debtors filed their Contract Procedures Motion under section 365, but included a provision that the assignment shall be free and clear of all claims under section 363(f), but made no reference to section 365 regarding the rights of a tenant (such as Petco) under section 365(h) or adequate protection rights under section 363(e).[188] Petco's objection states that "any order approving the section 365 Procedures Motion must preserve Petco's Sections 365(h) and 365(e) rights.[189] Section 365(h) provides that:

> (A) If the trustee rejects an unexpired lease of real property under which the debtor is the lessor and—
>
> > (i) if the rejection by the trustee amounts to such a breach as would entitle the lessee to treat such lease as terminated by virtue of its terms, applicable nonbankruptcy law, or any agreement made by the lessee, then the lessee under such lease may treat such lease as terminated by the rejection; or
> >
> > (ii) if the term of such lease has commenced, the lessee may retain its rights under such lease (including rights such as those relating to the amount and timing of payment of rent and other amounts payable by the lessee and any right of use, possession, quiet enjoyment, subletting, assignment, or hypothecation) that are in or appurtenant to the real property for the balance of the term of such lease and for any renewal or extension of such rights to the extent that such rights are enforceable under applicable nonbankruptcy law.

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[185] Docket No. 1075.pdf at 4-7.

[186] *See* Docket Nos. 1081.pdf, 1083.pdf, 1100.pdf, 1105.pdf, 1109.pdf, 1110.pdf, 1112.pdf, 1120.pdf, 1121.pdf, 1123.pdf, 1124.pdf.

[187] Limited Objection to Debtors' Motion for Entry of an Order (I) Authorizing and Approving Procedures to Reject or Assume Executory Contracts and Unexpired Leases and (II) Granting Related Relief. Docket No. 1084.pdf. PetCo, or an affiliated entity, is party to various unexpired leases, with PetCo as the sublessee and Toys "R" Us, Inc. as the lessee.

[188] *Id.* at 2.

[189] *Id.*

(B) If the lessee retains its rights under subparagraph (A)(ii), the lessee may offset against the rent reserved under such lease for the balance of the term after the date of the rejection of such lease and for the term of any renewal or extension of such lease, the value of any damage caused by the nonperformance after the date of such rejection, of any obligation of the debtor under such lease, but the lessee shall not have any other right against the estate or the debtor on account of any damage occurring after such date caused by such nonperformance.[190]

Under this section, Petco claimed that it should have two choices: 1) to treat the lease as terminated, or 2) retain its rights under the lease that apply to rent and to the real property, including the right to use, possession, quiet enjoyment, subletting, assignment, or hypothecation.[191]

Also, Petco stated that under the *Zota* case, the rights of a sublessee under section 365(h) of the bankruptcy code are not extinguished by the "free and clear" sales provisions of section 363(f).[192] For these reasons, in its objection, Petco requested that, if the court approves the Contract Procedures Motion, the Proposed Order be modified to preserve Petco's section 365(h) and 363(e) rights.[193]

Lastly, also on November 28, 2017, Chandler Pavilions, Inc. and Shackleford Crossings Investors, LLC (collectively, the "Other Landlords"), and Gateway Times Square Retail, L.P. (the "Licensor"), together filed a limited objection to the motion for Contract Procedures.[194] The limited objection was on three grounds. First, the Other Landlords and Licensor stated that under section 365(f)(2)(B) of the Bankruptcy Code, they were entitled to not only any applicable cure amount, but also to "adequate assurance of future performance."[195] Next, they objected because the Debtors' proposed form of Assumption Notice provided that it may include a "description of any material amendments to the Contract made outside ordinary course of business;" objectors

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[190] 11 U.S.C. § 365(h).

[191] Docket No. 1084.pdf at 3.

[192] *See* In Re Zota Petroleums, LLC, 482 B.R. 154, 156 (Bankr. E.D. Va. 2012).

[193] 1084.pdf at 5.

[194] Reservation of Rights and Limited Objection of Chandler Pavilions, Inc., Shackleford Crossings Investors, LLC, and Gateway Times Square Retail, L.P. to Debtors' Motion for Entry of an Order (I) Authorizing and Approving Procedures to Reject or Assume Executory Contracts and Unexpired Leases and (II) Granting Related Relief. Docket No. 1089.pdf.

[195] *Id.* at 3. 11 U.S.C. § 365 (b)(1)(C).

cited a number of cases arguing that the Debtors could not make any amendments as part of an assumption or assignment and that an executory contract may not be assumed in part and rejected in part.[196] Lastly, the Other Landlords and Licensor objected to the Contract Procedures Motion to the extent that it sought to abridge any of their rights to adequate assurance of future performance or to compel the Debtor to assume or reject the applicable Contract in its entirety, unless otherwise agreed to in writing by the appropriate Landlord or Licensor.[197]

On December 1, 2017, Debtors filed a Revised Proposed Order regarding the motion for Contract Procedures.[198] In the Revised Proposed Order, Debtors clarified the Objection Procedures and increased the number of days parties have to file their objection.[199] The Revised Proposed Order also clarified the rights of Landlords and the dates and procedures regarding Landlords various actions and claims.[200]

Following the filing of the Revised Proposed Order, on December 4 and 5, 2017, three objectors, including Bayer Retail Company, LLC, made withdrawals of their objections.[201] On December 8, 2017, the Contract Procedures Motion was granted.[202] The Order established Rejection Procedures, detailing Rejection Notice, Service of Rejection Notice, Objection Procedures, No Objections, Unresolved Objections, Abandoned Property, and Rejection Damages.[203] The Order also established Assumption Procedures, detailing Assumption Notice,

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[196] *Id.* See In re Hagood Reserve, LLC, 2010 Bankr. LEXIS 4486, at *30 (Bankr. W.D.N.C. Dec. 7, 2010); In re Abitibibowater Inc., 418 B.R. 815 (Bankr. D. Del. 2009); see also Stewart Title Guar. Co. v. Old Republic Nat'l Title Ins. Co., 83 F.3d 735, 741 (5th Cir. 1996); City of Covington v. Covington Landing Ltd. P'ship, 71 F.3d 1221 (6th Cir. 1995).

[197] Docket No. 1089.pdf.

[198] Notice of Filing of Revised Proposed Order Regarding Debtors' Motion for Entry of an Order (I) Authorizing and Approving Procedures to Reject or Assume Executory Contracts and Unexpired Leases and (II) Granting Related Relief. Docket No. 1128.pdf.

[199] *Id.* at 4.

[200] *Id.*

[201] *See* Docket Nos. 1136.pdf, 1150.pdf, 1151.pdf.

[202] Order (I) Authorizing and Approving Procedures to Reject or Assume Executory Contracts and Unexpired Leases and (II) Granting Related Relief. Docket No. 1188.pdf.

[203] *Id.* at 2-6.

Service of Assumption Notice and Evidence of Adequate Assurance, Objection Procedures, No Objection, and Unresolved Objections.[204]

The Order stated that the assignment of any Contract would be free and clear of all liens and any and all claims, obligations, demands, etc.[205] The Order also stated that Debtors were authorized in accordance with section 365(b) and section 363(f) to assume and assign to any Assignees any applicable Contract, with any applicable Assignee being responsible only for the post assignment liabilities or defaults under the applicable contract. . .[206] The Order also allowed the Debtors and landlords to enter into agreements between themselves modifying the Contract Procedures without further order of the Court, and stated that such agreements would be binding among the Debtors and any such landlords. . .[207]

Motion for an Order Approving the Debtors' Senior Executive Incentive Plan

On November 14, 2017, Debtors filed a motion which sought approval of their senior executive incentive plan ("SEIP"), authorization to implement the SEIP for specified participants, and allowed the Debtors' payment obligations thereunder as administrative expenses for these estates (the "SEIP Motion").[208] Debtors claimed that their most important asset was their employees, and more particularly the senior management team.[209] Debtors designed, approved, and sought to implement a series of compensation plans that were focused on maximizing the enterprise value of these estates for the benefit of all stakeholders.[210] The SEIP provided incentive payments to the SEIP Participants (outlined below) to the extent they were able to achieve certain final targets.[211] The SEIP targeted 17 senior members and was designed to focus specifically on

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[204] Docket No. 1188.pdf. at 6-7.

[205] *Id.*

[206] *Id.*

[207] *Id.*

[208] Debtors' Motion for Entry of an Order (A) Approving the Debtors' Senior Executive Incentive Plan and (B) Granting Relate Relief. Docket No. 957.pdf.

[209] *Id.*

[210] *Id.* at 3.

[211] *Id.* at 4.

maximizing Debtors' earnings before interest, depreciation and amortization ("EBITDA[212]").[213] The total payment contemplated was $16 million.[214]

The 17 key members identified by the Debtors are as follows[215]:

SEIP Participants	
David Brandon	Chief Executive Officer and Chairman of the Board
Richard Barry	EVP Chief Merchandising Officer
Timothy Grace	EVP Global Talent Officer
Lance Willis	EVP Global Chief Technology Officer
Kevin Macnab	EVP President of TRU International
Carla Hassan	EVP Global Chief Marketing Officer
Michael Short	EVP Chief Financial Officer
Amy Von Walter	EVP Communications and Customer Care
Diane Preston	EVP U.S. Supply Chain
James Young	EVP General Counsel
Mark Johnson	EVP U.S. Marketplace Operations
Chetan Bhandari	Sr. Finance Director
Charles Knight	SVP Controller/Director of Certain Debtor Entities
Robert Zarra	VP International Controller/Director of Certain Debtor Entities
Matthew Finigan	VP Treasurer/Director of Certain Debtor Entities
Joel Tennenberg	VP litigation & Regulatory Counsel/Director of Certain Debtor Entities
Antoinette Duah	VP Global Tax

[212] Earnings before interest, tax, depreciation and amortization (EBITDA) is a measure of a company's operating performance. Essentially, it's a way to evaluate a company's performance without having to factor in financing decisions, accounting decisions or tax environments. EBITDA is calculated by adding back the non-cash expenses of depreciation and amortization to a firm's operating income. https://perma.cc/Y6FQ-JA5X.

[213] Docket No. 957.pdf at 4.

[214] *Id.*

[215] *Id.* at 5.

Debtors claimed that these 17 SEIP Participants were at the forefront of the Debtors' most important endeavors: executing on daily performance and leading Toys "R" Us through its restructuring.[216] Under the SEIP, SEIP Participants could earn a quarterly cash incentive payment, based on a percentage of each SEIP Participant's salary, but only if the Debtors achieved above certain targeted cumulative levels of EBITDA.[217] The SEIP Participants would receive no payment under the SEIP if the Debtors' EBITDA did not meet or only reached, and did not exceed, the Minimum Threshold set forth below.[218] The three potential annual EBITDA thresholds were as follows:

SEIP FY 2017 Global EBITDA Targets	
Minimum Threshold	$484,000,000
Target Threshold	$550,000,000
Maximum Threshold	$616,000,000

The SEIP incentive payment was based on a percentage of a SEIP Participant's salary based on their role.[219] The table below summarizes title and associated salary percentage if the Target Threshold was met:[220]

SEIP Target Percentage of Base Salary[221]	
Executive Vice President and Above	160%
Senior Vice President	90%
Vice President	75%

[216] Docket No. 957.pdf at 6.

[217] *Id.*

[218] *Id.*

[219] *Id.* at 8.

[220] *Id.*

[221] The previous targets at each of these levels was 120 percent for the CEO, 100 percent for the EVPs, 80 percent for the SVPs, and 60 percent for the VPs. These targets were increased from the Team Achievement Dividend Plan to account for the loss of long-term incentive compensation programs.

In establishing their bases for relief, the Debtors' claimed that the implementation of the SEIP was authorized under section 503 of the Bankruptcy Code.[222] Section 503(c)(3) prohibits certain transfers made to officers, managers, consultants, and others that are both outside the ordinary course of business and not justified by the facts and circumstances of the case.[223] Debtors cited an extensive list of cases showing examples of Courts in this district approving plans similar to the SEIP.[224]

Debtors also claimed that the SEIP met the sound business judgment test.[225] Debtors claimed that the SEIP would drive results that benefit all stakeholders.[226] Because no payments would be made under the SEIP if the performance metrics were not met, the SEIP acted as an incentive for participants to maximize value, which benefited all stakeholders.[227] Next Debtors argued that the cost of the SEIP is reasonable relative to revenue and other plans in the retail industry.[228] They also argued that the scope of the SEIP was appropriate. The scope of an incentive plan under section 503(c)(3) of the Bankruptcy Code may be limited to a small group of key management, particularly where they are the group "that will effectively guide the [Debtor] through bankruptcy."[229]

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[222] Docket No. 957.pdf at 9. 11 U.S.C. § 503(c)(3).

[223] *Id.*

[224] Docket No. 957.pdf. *See e.g.,* In re Alpha Nat. Res., Inc., 546 B.R. 348, 359 (Bankr. E.D. Va. 2016) (approving an incentive-based plan and noting that "every dollar earned under the KEIP is earned based on the financial and operational performance of the Debtors") ; In re Dana Corp., 358 B.R. 567, 576 (Bankr. S.D.N.Y. 2006) ("[S]ection 503(c)(3) gives the court discretion as to bonus and incentive plans, which are not primarily motivated by retention or in the nature of severance."); In re Global Home Prods., LLC, 369 B.R. 778, 783 (Bankr. D. Del. 2007) ("If [the proposed plans are] intended to incentivize management, the analysis utilizes the more liberal business judgment review under § 363.").

[225] *Id.* In determining if the structure of a compensation proposal meets the "sound business judgment" test, courts consider: (a) the relationship between the plan proposed and the results to be obtained; (b) the relative cost of the plan; (c) the scope of the plan; (d) whether the plan is consistent with industry standards; (e) the due diligence in investigating the need for a plan; and (f) whether the debtor received independent counsel.

[226] Docket No. 957.pdf at 12.

[227] *Id.* at 13.

[228] *Id.*

[229] *Id.* In re Borders Group, Inc., 453 B.R. 459, 476 (Bankr. S.D.N.Y. 2011).

The Debtors asserted that they exercised due diligence in investigating the need for the SEIP and designing the SEIP and claimed that the SEIP was consistent with industry standards.[230] The Debtors met with and discussed the SEIP with their advisors Alvarez & Marsal Compensation and Benefits (the "Compensation Consultants") to evaluate the current incentive program and recommend modifications to that program to ensure that it aligned with the market and provided appropriate incentives to management..[231] Lastly, Debtors stated that the SEIP was consistent with previously approved employee incentive plans, and cited to multiple cases defending this position.[232]

On November 28, 2017, John P. Fitzgerald, III, the Acting United States Trustee for Region Four (the "U.S. Trustee"), which includes the Eastern District of Virginia, filed an objection to the SEIP Motion.[233] The Trustee stated that allowing Debtors to pay "bonuses" to 17 of its most highly compensated executives defies logic and wisdom, not to mention the Bankruptcy Code.[234] The U.S. Trustee stated that pursuant to section 503(c)(1) of the Bankruptcy Code, insiders cannot be paid retention bonuses absent proof that:

a) the insider has a "bona fide job offer from another business at the same or greater rate of compensation;"

b) the services provided by the insider are essential to the survival of the business; and

c) the bonus cannot be more than ten times the mean retention bonus paid to nonmanagement employees in the same calendar year.[235]

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[230] Docket No. 957.pdf at 14.

[231] *Id.*

[232] *Id.* at 16; *See, e.g.*, In re Energy Future Holdings Corp., No. 14-10979 (CSS) (Bankr. D. Del. Oct. 15, 2014) (noting that the debtors' incentive plan based on EBITDA targets "define the gold standard"); Dana Corp., 358 B.R. at 583 (approving an incentive program based on cutting costs and maximizing EBITDAR, despite not reaching past years' EBITDAR levels); Borders Group, Inc., 453 B.R. at 472 (approving an incentive program based on cost reductions, increases in the distribution to unsecured creditors, and speed in exiting bankruptcy); In re Mesa Air Group, Inc., 2010 Bankr. LEXIS 3334, 2-3 (Bankr. S.D.N.Y. Sept. 24, 2010) (approving an incentive program based on maintaining flight schedules and improving financial performance).

[233] Objection of the United States Trustee to Debtors' Motion for Entry of an Order (A) Approving the Debtors' Senior Executive Incentive Plan and (B) Granting Related Relief. Docket No. 1079.pdf.

[234] *Id.* at 2.

[235] *Id. See* 11 U.S.C. § 503(c)(1).

Because this standard is difficult to satisfy, most debtors, like Debtors in this case, seek authority instead under section 503(c)(3).[236] However, under section 503(c)(3), the Debtors proposed payments were also subject to strict standards, including that the bonuses must be justified by the facts and circumstances of the case and the thresholds must be genuinely incentivizing and not solely for the purpose of inducing those insiders to remain with the Debtors' business.[237]

The U.S. Trustee claimed that the Debtors failed to meet this 503(c)(3) burden for the following reasons:

a) The performance metrics for the SEIP Plan were ambiguously defined and easily subject to adjustment.

b) While insiders' recoveries under the SEIP Plan were tied to target thresholds for Adjusted EBITDA, the Bonus Motion and the Declaration that accompanies it was devoid of any information regarding the historical, present, and projected Adjusted EBIDTA figures necessary to draw comparisons to determine whether the proposed Plan is not simply a KERP with KEIP window dressing.

c) The Bonus Motion failed to provide any information on how the thresholds were calculated or why they are lower by approximately 60% from the thresholds set for 2016.

d) The bonuses proposed under the SEIP Plan were not tied to cash flow so that they would be paid even if the Debtors sustain significant losses.

e) The Bonus Motion failed to state what extra services the executives would perform beyond their ordinary job duties if they were not additionally incentivized nor did it detail the nexus between the proposed bonuses under the SEIP Plan and increased responsibilities.[238]

On December 1, 2018, Debtors filed a Revised Proposed Order to the SEIP Motion.[239] The Revised Proposed Order lessened the percentages of the base salary received by the CEO, EVPs,

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[236] *Id.* Docket No. 1079.pdf.

[237] *Id.*

[238] *Id.* at 3.

[239] Noticing of Filing of Revised Proposed Order Regarding Debtors' Motion for Entry of an Order (I) Approving the Debtors' Senior Incentive Plan and (II) Granting Related Relief. Docket No. 1129.pdf.

SVPs, and VPs.[240] The Revised Proposed Order also included language that the SEIP bonuses would only be paid upon the effectiveness of a chapter 11 plan of reorganization.[241] And lastly, it included language stating that the Debtors would submit quarterly metrics to the Court, which would then be used to determine whether such metrics satisfied section 503(c)(3) and 363 of the Bankruptcy Code for purposes of distributing these bonuses.[242]

On December 8, 2017, the Court granted Debtors SEIP Motion.[243] The Court granted the motion in its entirety on the terms of the Proposed Revised Order, provided that the SEIP was modified as follows:

a) The Maximum Threshold shall be increased from $616 million to $641 million.

b) The payout levels shall be changed as follows: (i) the Chief Executive Officer shall receive 125 percent of base salary at the Target Threshold and 210 percent at the Maximum Threshold; (ii) the Executive Vice Presidents shall receive 150 percent of base salary at the Target Threshold and 210 percent at the Maximum Threshold; (iii) the Senior Vice Presidents shall receive 85 percent of base salary at the Target Threshold and 127.5 percent at the Maximum Threshold; and (iv) the Vice Presidents shall receive 70 percent of base salary at the Target Threshold and 105 percent at the Maximum Threshold. In each case, the percentage payout shall be inclusive of amounts paid on account of the Emergence Bonus (defined below).

c) An aggregate amount of $5 million (the "Emergence Bonus") of the SEIP bonus opportunity pursuant to paragraph 2(b) above shall be paid only upon the effectiveness of a chapter 11 plan of reorganization, or as soon as reasonably practicable thereafter (the "Effective Date"). The Emergence Bonus shall be paid on the Effective Date regardless of whether the Threshold, Target, or Maximum Threshold is achieved.

d) For the avoidance of doubt, the aggregate SEIP payments, including the Emergence Bonus, shall not exceed $14.093 million at the Target Threshold or $21.214 million at the Maximum Threshold.

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[240] *Id.* at 3.

[241] *Id.*

[242] *Id.*

[243] Order (A) Approving the Debtors' Senior Executive Incentive Plan and (B) Granting Related Relief. Docket No. 1192.pdf.

e) Any SEIP payments related to the fourth quarter shall be subject to the same clawback period and terms as the prepetition retention payments. Any subsequent SEIP bonus payments for 2018 shall be subject to a six-month clawback period on terms otherwise the same as the retention payments. If a SEIP Participant is terminated without cause, such SEIP Participant shall not be required to repay any of its SEIP payments. All clawback periods terminate upon the effectiveness of a plan of reorganization.

f) No quarterly payments shall be made on account of the SEIP if the Debtors' postpetition debtor-in-possession financing facilities have been affirmatively accelerated prior to such payments being made.

g) The Debtors will provide advisors to the Creditors' Committee, the ad hoc group of term B-4 lenders (the "B-4 Lenders"), the ad hoc group of B-2 and B-3 lenders (the "Ad Hoc Group of B-2 and B-3 Lenders"), and the Ad Hoc Group of Taj Noteholders with Global Management EBITDA and Regional EBITDA calculations for review 10 business days before any payments are made on account of the SEIP. The Creditors' Committee, the B-4 Lenders, and the Ad Hoc Group of Taj Noteholders reserve the right to raise any issues or objections to such calculations with the Debtors or the Court. To the extent quarter four bonuses are paid prior to the completion of the 2017 annual financial statement audit, any adjustments affecting the above calculations and the bonuses due will increase or decrease any bonuses due in subsequent quarters, to the extent amounts were under or overpaid.

h) The Debtors shall submit 2018 quarterly metrics to advisors to the Ad Hoc Group of B-2 and B-3 Lenders, the Ad Hoc Group of Taj Noteholders, the Creditors' Committee, and the B-4 Lenders 15 days in advance of the beginning of the quarter. The Debtors shall submit a notice to the Court within three days of the beginning of the quarter indicating the applicable quarterly metrics and whether the Ad Hoc Group of Taj Noteholders, the Creditors' Committee, and the B-4 Lenders have agreed to the proposed metrics. Absent their consent, the Court shall determine, at the next regularly scheduled omnibus hearing, whether the applicable quarterly metrics satisfy section 503(c)(3) and 363 of the Bankruptcy Code. All rights are reserved for the Ad Hoc Group of Taj Noteholders, the Creditors' Committee, and the B-4 Lenders to oppose the 2018 quarterly metrics on any grounds, including with respect to the applicable standards for approval of such metrics.

i) No other bonus programs will apply to the SEIP Participants during the period covered by the SEIP; provided that the foregoing shall not apply to any emergence-based management equity incentive plan.

j) The Debtors shall consult with the Ad Hoc Group of Taj Noteholders, the Creditors' Committee, and the B-4 Lenders if a SEIP Participant is replaced or if a SEIP Participant's opportunity level increases.[244]

Lastly, the Order stated that any and all payment obligations of the Debtors under the SEIP would constitute administrative expenses of the estates, and that Debtors were authorized to take all actions necessary to effectuate the relief granted in this Order.[245]

Motion for Approving the Debtors' Non-Inside Compensation Program

On November 15, 2017, Debtors filed a motion which sought approval of their Non-Insider Compensation Program (the "NICP") (the "NICP Motion").[246] The Non-Insider Compensation Motion would apply to certain specified participants ("Non-Insider Employees", discussed below).[247] At the time of the Motion, the allocation of payments among the Debtors had not yet been determined, and the Debtors stated they would submit a supplemental declaration discussing the allocation method before the hearing.[248]

As discussed above in the SEIP section, Debtors stated that their most important asset was their employees. The Debtors again consulted with their Compensation Consultants to develop the NICP.[249] Again, Debtors used the EBITDA as their guiding metric.[250] Debtors claimed that the Non-Insider Employees performed a variety of important business functions for the Debtors, including store management, distribution, business administration and development, human resources, information technology, legal, marketing, operational, and regulatory work—work that

[244] *Id*. at 2-4.

[245] Docket No. 1192.pdf at 4-5.

[246] Debtors' Motion for Entry of an Order (A) Approving the Debtors' Non-Insider Compensation Program and (B) Granting Related Relief. Docket No. 958.pdf.

[247] *Id.*

[248] *Id.*

[249] *Id*. at 4.

[250] *Id.*

was vital to the Debtors' ability to maintain operational stability and preserve and enhance stakeholder value.[251]

The Debtors used the same three annual thresholds mentioned in the SEIP section above. In determining compensation for Non-Insider Employees at the store level, they used the "Store Incentive Profit" metric,[252] and for Non-Insider Employees working in distribution centers, they used the "Total Cost Per Carton" metric,[253] both of which are summarized in the table below:[254]

Business Unit	**Metrics**
Global Resource Center	100% Global EBITDA
Regional Resource Center	50% Global EBITDA, 50% Regional EBITDA
Stores: U.S.	50% Store Incentive Profit, 50% Regional EBITDA
Store Regional VPs	50% Global EBITDA, 50% Regional EBITDA
U.S. Distribution Centers	50% Total Cost Per Carton, 50% Regional EBITDA

The NICP payments are based on a percent of the participants salary based on their role as follows[255]:

Non-Insider Compensation Program Target Percentage of Base Salary		
Title	Proposed Percentage	Historic Percentage
Senior Vice President (3 Participants)	90%	80%
Vice President (27 Participants)	75%	60%
Executive Director	50%	45%

[251] *Id.* at 6.

[252] The "Store Incentive Profit" metric tracks the profit margin on goods sold minus certain expense categories at the store level.

[253] The "Total Cost Per Carton" metric tracks the costs of warehousing and outbound transportation cost and the amount of goods distributed.

[254] Docket No. 958.pdf at 9-10.

[255] *Id.*

(50 Participants)		
Other Employees (3725 participants)	3-45%	same

Debtors claimed that because the NICP was tied directly to the Debtors' operating performance, the NICP would incentivize employees to maximize the value of the Debtors' estates to the benefit of all stakeholders.[256]

The Debtors stated that the NICP should be approved pursuant to sections 363(b) and 503(c)(3) of the Bankruptcy Code. They argued that the Non-Insider Compensation Program was a continuation of the Debtors' prepetition practices and thus was an ordinary course of business transaction under Bankruptcy Code Section 363(c).[257] Here, the Debtors claimed that they were carrying forward the same general compensation structure and philosophy from their prepetition compensation practices and, thus, it was an ordinary course transaction.[258]

Second, the Debtors argued that, to the extent that section 363(b) of the Bankruptcy Code was applicable, the Non-Insider Compensation Program warrants approval because it was a sound exercise of the Debtors' business judgment.[259] Under this section, a court may authorize a debtor to use property of the estate out of the ordinary course of business when the proposed use has a "sound business purpose" and when the use of the property is proposed in good faith.[260]

Third, Debtors stated that section 503(c) of the Bankruptcy Code was inapplicable to the Non-Insider Compensation Program.[261] Section 101(31) of the Bankruptcy Code provides that

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[256] *Id. See* 11 U.S.C. § 363(c)(1).

[257] Docket No. 958.pdf.

[258] *See* In re Nellson Nutraceutical, Inc., 369 B.R. 787, 803 (Bankr. D. Del. 2007) (finding that compensation plans were in the ordinary course where "[c]onsistent with the Debtors' pre-petition practices . . . [incentive compensation] must be viewed as a whole").

[259] Docket No. 958.pdf at 13.

[260] *Id. See* 11 U.S.C. § 363(b)(1). *See* In re W.A. Mallory Co., 214 B.R. 834, 836 (Bankr. E.D. Va. 1997); In re WBQ P'ship, 189 B.R. 97, 102 (Bankr. E.D. Va. 1995).

[261] *Id.*

where a debtor is a corporation, insiders include any "(i) director of the debtor; (ii) officer of the debtor; (iii) person in control of the debtor . . . or [iv] relative of a . . . director, officer or person in control of the debtor."[262] Here, though certain Non-Insider Employees hold the title of "Director," "Vice President," or "Senior Vice President," the Debtors argued that these titles were not dispositive of those individuals' substantive role in the Debtors' organization[263] and that such titles did not implicate section 503(c) of the Bankruptcy Code.[264] In essence, the Debtors were arguing that "title inflation," which is rampant in industry, meant that a title of "Vice President" did not mean what it used to.

Finally, the Debtors claimed that the Non-Insider Compensation Program was justified by the facts and circumstances of several chapter 11 cases. Debtor detailed and cited to several cases where the Court approved similar Non-Insider Compensation Programs.[265]

On November 28, 2017, the U.S. Trustee filed an objection to the NICP Motion, which was the only objection filed; no creditors objected.[266] The U.S. Trustee objected on three grounds.[267] First, that section 363(c)(1) was not the proper standard of review for the Compensation Program because the proposed bonus plan was not an ordinary course of business transaction.[268] The Trustee stated that, while the framework of the bonus program may have existed in the Team Achievement Dividend Plan (the "TAD") pre-petition, the NICP being proposed was formulated post-petition and included changes to the target threshold, the frequency

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[262] 11 U.S.C. § 101(31)(B).

[263] Docket No. 958.pdf at 16; *See, e.g.,* In re Foothills Texas, Inc., 408 B.R. 573, 579 (Bankr. D. Del. 2009) ("[T]he mere title of a person does not end the inquiry.").

[264] Docket No. 958.pdf; *See* 11 U.S.C. § 503(c). By its terms, section 503(c) of the Bankruptcy Code does not apply where—as is the case here—participants in an incentive-based program are not insiders. *See, e.g.,* In re Global Home Prods., LLC, 369 B.R. 778, 784 (Bankr. D. Del. 2007).

[265] Docket No. 958.pdf at 18; *See, e.g.,* In re Mesa Air Grp., Inc., No. 10 10018 (MG), 2010 WL 3810899, *4 (Bankr. S.D.N.Y. Sept. 24, 2010) (holding that bonus payments are "'justified by the facts and circumstances of the case' under section 503(c)(3) [where] they are within the 'sound business judgment' of the Debtors" (citation omitted)).

[266] Objection of the United States Trustee to Debtors' Motion for an Order (A) Approving the Debtors' Non-Insider Compensation Program and (B) Granting Related Relief. Docket No. at 1080.pdf.

[267] *Id.*

[268] *Id.* at 2.

of payments, and increased the amounts of bonuses.[269] For these reasons, the U.S. Trustee argued that the payments were outside the realm of what is in the "ordinary course of business."[270]

Second, the U.S. Trustee argued that the Debtors had failed to establish that the stricter standards of section 503(c)(1) did not apply to the NICP.[271] The Trustee argued that the titles of 80 employees, which included titles such as "senior vice president", "vice president", and "executive director" raised the presumption that they were indeed insiders and that the court should reject Debtors blanket assertion that section 503(c)(1) was not applicable.[272]

Lastly, Trustee stated that even under the more lenient standards of section 503(c)(3), the Compensation Program should be denied because it failed to establish a reasonable relationship between bonuses and the goals to be achieved, was not fair and reasonable, and did not appear to be supported by appropriate industry standards.[273]

On December 1, 2017, the Debtors filed a Revised Proposed Order regarding the NICP Motion.[274] The Revised Proposed Order altered the percentages of the base salary received by the SVPs, and VPs, and Executive Directors.[275] It also included language that the NICP bonuses would only be paid upon the effectiveness of a chapter 11 plan of reorganization.[276] Finally, the Revised Proposed Order included language stating that Debtors would submit quarterly metrics to the Court, which would then be used to determine whether those metrics satisfied section 503(c)(3) and 363 of the Bankruptcy Code for purposes of distributing the bonuses.[277]

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[269] *Id.*

[270] *Id.*

[271] Docket No. at 1080.pdf.

[272] *Id.* at 3

[273] *Id.*

[274] Notice of Filing of Revised Proposed Order Regarding Debtors' Motion for Entry of an Order (A) Approving the Debtors' Non-Insider Compensation Program and (B) Granting Related Relief. Docket No. at 1130.pdf.

[275] *Id.* at 13.

[276] *Id.*

[277] *Id.*

On December 8, 2017, on the terms of the Revised Proposed Order, the Court granted the Debtors Motion, provided that the program was modified as follows:

a) The Maximum Threshold shall be increased from $616 million to $641 million.

b) The payout levels shall be changed as follows: (i) the Senior Vice Presidents shall receive 85 percent of base salary at the Target Threshold and 127.5 percent at the Maximum Threshold; (ii) the Vice Presidents shall receive 70 percent of base salary at the Target Threshold and 105 percent at the Maximum Threshold; and (iii) the Executive Directors shall receive 50 percent of base salary at the Target Threshold and 75 percent at the Maximum Threshold. In each case, the percentage payout shall be inclusive of amounts paid on account of the Emergence Bonus (defined below).

c) An aggregate amount of $3.983 million (the "Emergence Bonus") of the Non-Insider Compensation Program bonus opportunity to Senior Vice Presidents, Vice Presidents, and certain Executive Directors pursuant to paragraph 2(b) above shall be paid only upon the effectiveness of a chapter 11 plan of reorganization, or as soon as reasonably practicable thereafter (the "Effective Date"). The Emergence Bonus shall be paid on the Effective Date regardless of whether the Threshold, Target, or Maximum Threshold is achieved.

d) For the avoidance of doubt, the aggregate Non-Insider Compensation Program payments, including the Emergence Bonus, shall not exceed $45.390 million at the Target Threshold or $68.085 million at the Maximum Threshold.

e) No quarterly payments shall be made on account of the Non-Insider Compensation Program if the Debtors' post-petition debtor-in-possession financing facilities have been affirmatively accelerated prior to such payments being made.

f) The Debtors will provide advisors to the Creditors' Committee, the ad hoc group of term B-4 lenders (the "B-4 Lenders"), the ad hoc group of B-2 and B-3 lenders (the "Ad Hoc Group of B-2 and B-3 Lenders"), and the Ad Hoc Group of Taj Noteholders with Global Management EBITDA and Regional EBITDA calculations for review 10 business days before any payments are made on account of the Non-Insider Compensation Program. The Creditors' Committee, the B-4 Lenders, and the Ad Hoc Group of Taj Noteholders reserve the right to raise any issues or objections to such calculations with the Debtors or the Court. To the extent quarter four bonuses are paid to Senior Vice Presidents, Vice Presidents, and certain Executive Directors prior to the completion of the 2017 annual financial statement audit, any adjustments affecting the above calculations and the bonuses due will increase or decrease any bonuses due in subsequent quarters, to the extent amounts were under or overpaid.

g) The Debtors shall submit 2018 quarterly metrics to the advisors to the Ad Hoc Group of B-2 and B-3 Lenders, the Ad Hoc Group of Taj Noteholders, the Creditors' Committee, and the B-4 Lenders 15 days in advance of the beginning of the quarter. The Debtors shall submit a notice to the Court within three days of the beginning of the quarter indicating the applicable quarterly metrics and whether the Ad Hoc Group of Taj Noteholders, the Creditors' Committee, and the B-4 Lenders have agreed to the proposed metrics. Absent their consent, the Court shall determine, at the next regularly scheduled omnibus hearing, whether the applicable quarterly metrics satisfy section 503(c)(3) and 363 of the Bankruptcy Code. All rights are reserved for the Ad Hoc Group of Taj Noteholders, the Creditors' Committee, and the B-4 Lenders to oppose the 2018 quarterly metrics on any grounds, including with respect to the applicable standards for approval of such metrics.

h) No other bonus programs will apply to the Non-Insider Employees during the period covered by the Non-Insider Compensation Program other than the 2017 Team Achieved Gainsharing Plan and 2017 Hybrid Plan approved under the Final Order (I) Authorizing the Debtors to (A) Pay Prepetition Wages, Salaries, Other Compensation, and Reimbursable Expenses and (B) Continue Benefits Programs, and (II) Granting Related Relief [Docket No. 703].[278]

Lastly, the Order stated that any and all payment obligations of the Debtors under the SEIP would constitute administrative expenses of the estates, and that Debtors were authorized to take all actions necessary to effectuate the relief granted in the Order.[279]

Motion for Extending the Time Within Which the Debtors Must Assume or Reject Unexpired Leases of Nonresidential Real Property

On November 28, 2017, the Debtors filed a motion which sought to extend the time within which the Debtors must assume or reject unexpired leases of nonresident property by 90 days, through April 16, 2018 ("Extension Motion").[280] Debtors also sought to establish procedures to obtain Court approval of agreements further extending the § 365(d)(4) deadline to assume or reject

[278] Docket No. at 1130.pdf at 2-4.

[279] *Id.* at 4-5.

[280] Debtors' Motion for Entry of an Order (I) Extending the Time Within Which the Debtors Must Assume or Reject Unexpired Leases of Nonresidential Real Property and (II) Authorizing Procedures to Approve Agreements Further Extending the 365(d)(4) Deadline. Docket No. at 1094.pdf.

leases beyond April 16, 2018.[281] At the time, the Debtors initial 120-day period to assume or reject these leases pursuant to section 365(d)(4) was set to expire on January 16, 2018.[282]

The Debtors sought to extend the deadline 90 days because they believed they could not adequately review their real estate portfolio before the current deadline; they also feared that the additional 90 days would also not be enough time.[283] For that reason, they proposed Extension Procedures to efficiently obtain Court approval of consensual agreements to extend the deadline beyond April 16, 2018.[284]

The Bankruptcy Code provides that that the court may extend the [initial 120-day] period for 90 days on the motion of the debtor or lessor for cause.[285] The Bankruptcy Code does not define "cause," however, courts have relied on several factors in determining whether cause exists for an extension of the initial 120-day period including:

a) whether the debtor was paying for the use of the property;

b) whether the debtor's continued occupation . . . could damage the lessor beyond the compensation available under the Bankruptcy Code;

c) whether the lease is the debtor's primary asset; and

d) the number of leases the debtor must evaluate.[286]

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[281] *Id.* Notwithstanding anything to the contrary herein, the Debtors are not seeking a determination that any particular lease, contract, instrument, or other document constitutes an unexpired lease of nonresidential real property subject to the provisions of section 365(d)(4) of the Bankruptcy Code and all parties' rights are reserved with respect to such determination.

[282] Docket No. at 1094.pdf at 3.

[283] *Id.* at 4.

[284] *Id.*

[285] *Id.* at 6; *See* 11 U.S.C. § 365(d)(4).

[286] *Id. See* S. St. Seaport L.P. v. Burger Boys, Inc. (In re Burger Boys, Inc.), 94 F.3d 755, 760–61 (2d Cir. 1996) (citing Theatre Holding Corp. v. Mauro, 681 F.2d 102, 105–06 (2d Cir. 1982)); see also In re Wedtech Corp., 72 B.R. 464, 471–72 (Bankr. S.D.N.Y. 1987) (considering, among other factors, the complexity of the debtor's case and the number of leases to evaluate); In re Channel Home Ctrs., Inc., 989 F.2d 682, 689 (3d Cir. 1993), cert. denied, 510 U.S. 865 (1993) ("[I]t is permissible for a bankruptcy court to consider a particular debtor's need for more time in order to analyze leases in light of the plan it is formulating." (citing Wedtech, 72 B.R. at 471-72)).

In their motion, Debtors outlined how they were satisfying these factors and cited numerous cases where courts had routinely granted similar relief as requested in their motion.[287] Debtors lastly claimed that approving the procedures would aid in efficiency and would prevent them from having to seek Court approval for extensions on a piecemeal basis.[288]

On December 12, 2017, Bayer Retail Company, L.L.C. and IMI Huntsville, LLC (collectively, the "Landlords") submitted a limited objection to the Extension Motion.[289] Landlords objected on the grounds that the Extension Motion did not require *written* consent from a landlord before filing even though Bankruptcy Code section 365(d)(4)(B)(ii) states that the extension may be granted "only upon prior written notice."[290] Landlords also objected because the Extension Motion did not online any procedure for Debtors to obtain landlord's written consent for subsequent extensions.[291]

On December 14, 2017, DDR Corp., GGP Limited Partnership, ShopCore Properties, LP, Philips International, National Retail Properties, National Realty & Development, Rouse Properties, LLC, Basser-Kaufman, Inc., Regency Centers Corp., DLC Management Corp., and Aston Properties (collectively, the "Landlords 4"), submitted a limited objection to the Extension Motion.[292] Landlords 4 objected for the same reason

[287] Docket No. at 1094.pdf at 7; *See, e.g.*, In re The Gymboree Corp., No. 17-32986 (KLP) (Bankr. E.D. Va. Jul. 11, 2017); In re Patriot Coal Corp., No. 15-32450 (KLP) (Bankr. E.D. Va. Aug. 3, 2015); In re James River Coal Co., No. 14-31848 (KRH) (Bankr. E.D. Va. Aug. 26, 2014); In re AMF Bowling Worldwide, Inc., No. 12-36495 (KRH) (Bankr. E.D. Va. Feb. 14, 2013); In re Rue21, Inc., No. 17-22045 (GLT) (Bankr. W.D. Pa. June 13, 2017); In re BCBG Max Azria Holdings, LLC, No. 17-10466 (SCC) (Bankr. S.D.N.Y. March 28, 2017).

[288] Docket No. at 1094.pdf.

[289] Bayer Retail Corporation, L.L.C. and IMI Huntsville, LLC's Limited Objection to Debtors' Motion for Entry of an Order (I) Extending the Time Within Which the Debtors Must Assume or Reject Unexpired Leases of Nonresidential Real Property and (II) Authorizing Procedures to Approve Agreements Further Extending the 365(d)(4) Deadline. Docket No. 1224.pdf.

[290] *Id.* at 3. *See* 11 U.S.C. § 365(d)(4)(B)(ii).

[291] Docket No. 1224.pdf..

[292] Limited Objection of DDR Corp., GCP Limited Partnership, Shopcore Properties, LP, Philips International, National Retail Properties, LLC, Basser-Kaufman, Inc., Regency Centers Corp., DLC Management Corp., and Aston Properties to Debtors' Motion for Entry of an Order (I) Extending the Time Within Which the Debtors Must Assume or Reject Unexpired Leases of Nonresidential Real Property and (II) Authorizing Procedures to Approve Agreements Further Extending the 365(d)(4) Deadline. Docket No. 1246.pdf.

as Landlords 3, that Debtors must obtain prior written consent for an extension of the deadline beyond 210 days.[293]

On December 18, 2017, Debtors filed a Revised Proposed Order to the Extension Motion in which they added language requiring them to obtain prior written consent for an extension beyond 210 days.[294] On December 20, 2017, Debtors Extension Motion was granted, extending the deadline to April 16, 2018 and requiring written consent of the applicable landlord regarding any additional extension.[295]

Motion Authorizing Debtors to Provide Consideration to Landlords in Exchange for Extending the 365(D)(4) Deadline

On January 9, 2018, the Debtors sought entry of an order authorizing, but not directing, the Debtors, as consideration for the Consenting Landlords' consensual extensions of the 365(d)(4) Deadline (as defined herein) through plan confirmation, to (i) make payments of up to $1,300,000.00 in the aggregate on account of (A) the Consenting Landlords' (as defined herein) pro rata share of the prepetition portion of their "additional rent" claims and (B) reasonable and documented attorney's fees and expenses related to 365(d)(4) extensions (up to an aggregate limit of $300,000) and (ii) grant a waiver of all claims against Consenting Landlords arising under section 547 of the Bankruptcy Code, (b) approving the Extension Letter (as defined herein) in the form attached to the Order as Exhibit 1 (the "Consideration Extension Motion").[296]

Debtors claimed that they would benefit from additional time to evaluate whether to assume or reject a number of their non-residential real property leases ("the Leases") beyond the current April 16, 2018 deadline. As consideration for receiving an extension, the Debtors negotiated a package of consideration with the Creditors' Committee (defined *infra*) that the

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[293] *Id.* at 2, 4; *See also* 11 U.S.C. § 365(d)(4)(B)(ii).

[294] Notice of Filing of Revised Proposed Order Extending the Time Within Which the Debtors Must Assume or Reject Unexpired Leases of Nonresidential Real Property. Docket No. 1301.pdf.

[295] Order Extending the Time Within Which the Debtors Must Assume or Reject Unexpired Leases or Nonresidential Real Property. Docket No. 1321.pdf.

[296] Debtors' Motion for Entry of an Order (I) Authorizing the Debtors to Provide Consideration to Landlords in Exchange for Extending the 365(d)(4) Deadline, (II) Approving the Extension Letter and (III) Granting Related Relief. Docket No. 1450.pdf.

Debtors and the Creditors' Committee believed fairly compensated landlords for the extension.[297] The Debtors sent the letter requesting the extension (the "Extension Letter") to a number of landlords.[298] The Debtors believed, in their business judgment, that the value of additional time to develop and implement a real estate strategy that was aligned with their go-forward business plan far outweighed the value of any consideration that they may have given to landlords in conjunction with the relief requested herein.[299]

Originally, pursuant to section 365(d)(4)(A) of the Bankruptcy Code, the Debtors were required to assume or reject the Leases by January 16, 2018 if they did not receive an extension.[300] However, as discussed above, the court granted Debtors an extension on December 20, 2017, which extended the deadline to April 16, 2018 (the "365(d)(4) Deadline").[301] The Debtors determined that the April 16 deadline did not provide adequate time to review their real estate portfolio and would result in premature decisions being made.[302] Debtors stated that, pursuant to the Bankruptcy Code, the Debtors may obtain additional extensions of the 365(d)(4) Deadline only with the written consent of each Consenting Landlord.[303]

As consideration to obtain each landlord's consent to the extension, the Debtors proposed the following:

a) the Debtors will waive all preference claims against a Consenting Landlord arising under section 547 of the Bankruptcy Code (such claims, the "Preference Claims" and such waivers, the "Preference Waivers");

b) the Debtors will set aside a pool of funds in the amount of $1,300,000.00 (the "Extension Fee") to make certain payments to the Consenting Landlords. Specifically, the Extension Fee will provide for:

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[297] *Id.* at 3.

[298] *Id.*

[299] Docket No. 1450.pdf at 4.

[300] *Id.*

[301] *Id. See supra* n. 293 and the accompanying text.

[302] Docket No. 1450.pdf at 4.

[303] *Id. See* 11 U.S.C. § 365(d)(4)(B)(ii).

i. first, payment of reasonable and documented attorneys' fees and expenses in connection with a landlord's counsel's review of this Extension (up to an aggregate limit of $300,000 for all landlords who agree to an Extension or, if the aggregate amount of all such landlord's fees and expenses exceeds $300,000, a pro rata share of $300,000) (the "Fee Reimbursement"), which Fee Reimbursement will be paid promptly once all landlord claims for attorneys' fees and expenses in connection with the Extensions have been received and reviewed by the Debtors; and

ii. second, from all funds remaining in the Consideration Pool after the payment of the Fee Reimbursement, landlords who consent to an Extension whose Lease(s) are ultimately rejected will receive their pro rata share of the Consideration Pool on account of the prepetition portion of their "additional rent" claims (including CAM, insurance, and real estate taxes) (up to no more than 100% recovery on account of such claims) (the "Prepetition Rent Payment"), which amounts will be paid following (i) the Debtors' determination of the treatment of all of their unexpired Leases and (ii) a reconciliation of the amounts owed.

c) Additionally, the Debtors agree that if they do not reject a Lease and surrender possession of the premises by August 31, 2018, they will not reject the Lease until, at the earliest, January 4, 2019 (such period, the "Blackout Period"). The Debtors specifically reserve their right to reject any Lease(s) during the Blackout Period if such rejection is part of a confirmed chapter 11 plan of reorganization.[304]

The Debtors believed that this consideration was a small price to pay for the flexibility provided by the Extensions, which they believed would allow them to develop a lease and real estate portfolio consistent with their overall go-forward business plan.[305] Debtors also claimed that the use of the Property of the Debtors' estates to obtain extensions, and granting preference waivers in exchange for an extension was a sound exercise of the Debtors' business judgment.[306]

On January 19, 2018, the U.S. Trustee filed an objection to the Consideration Extension Motion.[307] The U.S. Trustee claimed that Debtors' current proposal did not comply with all of the Bankruptcy Code and therefore objected on the following grounds:

[304] Docket No. 1450.pdf at 5-6.

[305] *Id.* at 6.

[306] *Id.* at 7.

[307] Objection of the United States Trustee to Debtors' Motion for Entry of an Order (I) Authorizing the Debtors' Motion for Entry of an Order (I) Authorizing the Debtors to Provide Consideration to Landlords in Exchange for

a) The Debtors propose to waive any preference claims they may have against the landlords. The Debtors, however, have failed to meet their burden to prove that granting the Preference Waivers is in the sound exercise of their business judgment.

b) b. The Debtors also propose to pay each consenting landlord's pro rata share of up to $300,000.00 in attorney fees. But the payment of a creditor's legal fees without any other support or proof is not permitted by the Bankruptcy Code.

c) c. The Debtors should not be allowed to pay pre-petition claims to landlords ahead of other unsecured claimants.

d) d. The timing of the consent process proposed in the Landlord Motion is problematic.[308]

First, the U.S. Trustee stated that the motion failed to provide any declaration, affidavit, or information whatsoever as to the validity and value of the possible preference claims at issue and the analysis undertaken to determine the extent of the claims that the Debtors might waive under the proposed procedures.[309] The U.S. Trustee argued that without additional information and disclosure to support their broad and unsupported statement that the Preference Waivers are in the Debtors' sound exercise of their business judgment, the relief sought in the Landlord Motion should have been denied.[310]

Second, the U.S. Trustee stated that the Debtors sought to pay the landlords' legal fees and expenses and to allow the attorneys to reap the benefits of the administrative status under 11 U.S.C. §§ 503(b), 365(b), or 365(d)(3), without subjecting themselves or the landlords to their burdens, and that the Debtors appeared to argue that they needed to show no more than their own business judgment.[311] The U.S. Trustee objected because the payment provision for the legal fees and expenses of landlords conflicted with the statutory standards and procedures for payment of

Extending the 365(d)(4) Deadline, (II) Approving the Extension Letter, and (III) Granting Related Relief. Docket No. 1531.pdf.

[308] Docket No. 1531.pdf at 2.

[309] *Id.* at 6.

[310] *Id.* at 7.

[311] *Id.* at 9.

administrative expenses because they authorized certain creditors to be paid administrative expenses outside of a plan without the necessity of filing an application or a claim for administrative claim.[312]

Third, the U.S. Trustee stated that when analyzing a request to make non-plan priority-skipping distributions in a chapter 11 case, bankruptcy courts must examine the Bankruptcy Code for "some affirmative indication of intent [that] Congress actually meant to make [the proposed disbursement] a backdoor means to" circumvent the statutory priority system established by section 507.[313] The U.S. Trustee objected because, or so he claimed, the payments had the potential to skip over administrative expense claimants and creditors whose claims should have been paid ahead of the consenting landlords whose claims are rejected.[314] The objection claimed that the Debtors should have been able to prove that such payments were tantamount to post-petition administrative expenses because the lease options benefitted the estate, and that the Debtors had failed to do so.[315]

Lastly, the objection claimed that the timing proposed was problematic because the Debtors would have until January 27, 2018 to counter-sign the extension letter and that because the hearing on the Consideration Extension Motion was not until January 23, 2018, that the dates proposed in the Extension Letter needed to be extended.[316]

On January 22, 2018, the Official Committee of Unsecured Creditors (the "Creditors' Committee") filed a reply in support of the Consideration Extension Motion and in response to the U.S. Trustee's objection.[317] The Creditors' Committee claimed that the relief in the Motion was extremely important to the success of restructuring in retail cases like these, which involved the

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[312] *Id.* at 10; *See* 11 U.S.C. §§ 503(b), 365(b), and 365(d)(3).

[313] Docket No. 1531.pdf at 11. Czyzewski v. Jevic Holding Corp., 137 S. Ct. 973, 984 (2017).

[314] Docket No. 1531.pdf.

[315] *Id.* at 12.

[316] *Id.*

[317] Reply of Official Committee of Unsecured Creditors in Support of Debtors' Motion for Entry of an Order (I) Authorizing the Debtors to Provide Consideration to Landlords in Exchange for Extending the Section 365(d)(4) Deadline, (II) Approving the Extension Letter, and (III) Granting Related Relief. Docket No. 1555.pdf.

analysis of almost 800 U.S. store leases.[318] The Creditors' Committee also argued that the Debtors' primary focus during the first few months of these cases was on the 2017 holiday season and therefore, the Committee was keenly aware of the likelihood that the Debtors would not emerge from bankruptcy by April 16, 2018.[319] The Committee argued for the Debtor that the 210-day statutory period was not nearly adequate time for Debtors to evaluate their real estate profile and also that the total consideration reflected extremely reasonable and modest economic inducements authorized by the Court on account of prepetition claims.[320]

In response to the U.S. Trustee's objection, the Committee provided arguments as to why the Debtors did in fact meet their burden of proving a reasonable exercise of their business judgment.[321] The Committee feared that the Debtors could be forced to make premature decisions which would ultimately cause more harm than allowing the extensions would.[322] Accordingly, the Committee supported the Debtors' reasonable exercise of their business judgment to preserve the status quo of their lease portfolio, avoid precipitous rejections and assumptions, and allow for an informed decision on the optimal store footprint in the context of a viable business plan. The Committee claimed that relief sought in the Motion was well supported by applicable law and practice.[323]

Also, on January 22, 2018, Debtors filed their own reply to the Trustee's Objection.[324] The Debtors were sure to point out the fact that no creditor, nor other party, other than the U.S. Trustee, objected to this motion.[325] In a long and detailed reply, Debtors provided in-depth case analysis

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[318] *Id.* at 2.

[319] *Id.*

[320] *Id.*

[321] Docket No. 1555.pdf at 5.

[322] *Id.* at 7.

[323] *Id.* at 8.

[324] Debtors' Reply to the Objection of the United States Trustee to the Debtors' Motion for Entry of an Order (I) Authorizing the Debtors to Provide Consideration to Landlords in Exchange for Extending the 365(d)(4) Deadline, (II) Approving the Extension Letter, and (III) Granting Related Relief. Docket No. 1563.pdf.

[325] *Id.*

defending their various points and countering the U.S. Trustee's objection.[326] The Debtors reply included the following claims followed by extensive case law and legal analysis defending their position[327]:

I. The Fee Reimbursement is Appropriate

a. The Fee Reimbursement is a Sound Exercise of the Debtors' Business Judgment Pursuant to Section 363(b) of the Bankruptcy Code

i. Section 503(b)(3) and 503(b)(4) of the Bankruptcy Code Do Not Apply to the Fee Reimbursement.

ii. Even if Section 503(b)(3) and 593(b)(4) of the Bankruptcy Code Do Apply, the Debtors Satisfy the Applicable Standard.

iii. Section 365 of the Bankruptcy Code Does Not Apply to the Fee Reimbursement.

b. The Preference Waiver is Appropriate as a Sound Exercise of the Debtors' Business Judgment Pursuant to Section 363(b) of the Bankruptcy Code.

c. Payment of Prepetition Claims is Appropriate as a Sound Exercise of the Debtors' Business Judgment Pursuant to Section 363(b) of the Bankruptcy Code.

d. The Timing of the Extension Letter Deadlines is Necessary and Appropriate in These Circumstances.[328]

On January 25, 2018, an Order was entered Authorizing the Consideration Extension Motion.[329] By this Order, Debtors were authorized to enter into Extension Letters and to provide the Compensation Package to Consenting Landlords whose Extension Letters were executed by Debtors as follows:

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[326] *Id.*

[327] For a more in-depth reading of the Debtors Reply, please view Docket No. 1563.pdf.

[328] Docket No. 1563.pdf.

[329] Order (I) Authorizing the Debtors to Provide Consideration to Landlords in Exchange for Extending the 365(d)(4) Deadline, (II) Approving the Extension Letter, and (III) Granting Related Relief. Docket No. 1614.pdf.

a) The Debtors will waive all preference claims against a Consenting Landlord arising under section 547 of the Bankruptcy Code (such claims, the "Preference Claims" and such waivers, the "Preference Waivers"); and

b) The Debtors will set aside a pool of funds in the amount of $1,300,000.00 (the "Extension Fee")3 to make certain payments to the Consenting Landlords, including:

   i. First, payment of reasonable and documented attorneys' fees and expenses in connection with a landlord's counsel's review of this Extension (up to an aggregate limit of $300,000 for all landlords who agree to an Extension or, if the aggregate amount of all such landlord's fees and expenses exceeds $300,000, a pro rata share of $300,000) (the "Fee Reimbursement"), which Fee Reimbursement shall be paid promptly once all landlord claims for attorneys' fees and expenses in connection with the Extensions have been received and reviewed by the Debtors; and

   ii. Second, from all funds remaining in the Consideration Pool after the payment of the Fee Reimbursement, landlords who consent to an Extension whose Lease(s) are ultimately rejected will receive their pro rata share of the Consideration Pool on account of the prepetition portion of their "additional rent" claims (including CAM, insurance, and real estate taxes) (up to no more than 100% recovery on account of such claims), which amounts will be paid following (i) the Debtors determination of the treatment of all of their unexpired Leases and (ii) a reconciliation of the amounts owed.

c) If the Debtors do not reject a Lease and surrender possession of the premises by August 31, 2018, they will not reject the Lease until, at earliest, January 4, 2019 (such period, the "Blackout Period"); provided, however, that the Debtors may reject any Lease(s) during the Blackout Period if such rejection is part of a confirmed chapter 11 plan of reorganization.[330]

Motion Authorizing Debtors to Enter in Consulting Agreements

The Debtors sought entry of an Order authorizing them to enter into Consulting Agreements by and between Toys R Us – Delaware Inc. (the "Merchant") and a joint venture comprised of Tiger Capital Group, LLC and Great American Group, LLC ("Tiger/GA") and the Merchant and a joint venture comprised of Hilco Merchant Resources, LLC and Gordon Brothers Retail Parents, LLC ("Hilco/GB," and together with Tiger/GA, the "Consultants") (the

[330] *Id.*

"Consulting Agreement Motion").[331] Debtors planned to use the proposed Consulting Agreements (discussed below), as well as Sales Guidelines (also discussed below), to conduct store closing or similar theme sales, with such sales being free and clear of all liens, claims, and encumbrances (the "Sales").[332] The Debtors determined, in the reasonable exercise of their business judgment, that (a) the services of the Consultants were necessary for a seamless and efficient large-scale execution of the Store Closings and Sales (defined below), as was contemplated by this Motion, and to maximize the value of the assets being sold, and (b) the Consultants were capable of performing the required tasks on favorable financial terms, as determined by the evaluation process.[333] The Debtors claimed that the Store Closings were a critical component of the go-forward business plan under development by the Debtors, and entry into the Consulting Agreements would allow the Debtors to conduct the Store Closings in an efficient, controlled manner that would maximize value for the Debtors' estates.[334] Further, the Debtors claimed that the relief requested would permit the Debtors to conduct the Store Closings in a timely manner and would establish fair and uniform procedures to assist the Debtors and their creditors through the Debtors' transition to a smaller, more profitable enterprise.[335]

Following an extensive store-by-store Performance Evaluation[336], Debtors Management Team[337] ultimately determined that it may be appropriate to close and wind down (the "Store

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[331] Debtors' Motion for Entry of an Order (I) Authorizing the Debtors to Enter into the Consulting Agreements, (II) Authorizing and Approving the Conduct of Store Closing Sales, with Such Sales to be Free and Clear of All Liens, Claims, and Encumbrances, (III) Authorizing Customary Bonuses to Employees of Closing Stores, and (IV) Granting Related Relief. Docket No. 1595.pdf.

[332] *Id.*

[333] *Id.* at 7.

[334] Docket No. 1595.pdf at 8.

[335] *Id.*

[336] An extensive analysis of existing stores evaluating, among other factors, historical and recent store profitability, historical and recent sales trends, occupancy costs, the geographic market in which each store is located, the potential to downsize certain store, the potential to consolidate certain Toys "R" Us and Babies "R" Us locations within a reasonable proximity of one another, the potential to negotiate rent reductions with applicable landlords, and specific operational circumstances related to each store's performance.

[337] The Performance Evaluation was conducted by the Debtors' management team and advisors including Lazard Frères & Co. LLC ("Lazard"), Alvarez & Marsal North America LLC ("A&M"), A&G Realty Partners, LLC ("A&G"), and Keen-Summit Capital Partners LLC ("Keen") (collectively, the "Management Team").

Closings") up to 182 underperforming brick-and-mortar store locations (the "Initial Closing Stores").[338] Debtors stated that the overwhelming majority of the Initial Closing Stores had negative sales trends and failed to meet the performance standards set by the Debtors.[339] Debtors also mentioned that, in order to maximize the value of their estates, they may need to close additional store (such stores, the "Additional Closing Stores," and together with the Closing Stores, the "Closing Stores").[340]

In conjunction with the Performance Evaluation, the Debtors also conducted a detailed review and analysis of their inventory levels, identifying additional aged inventory owned by the Debtors and historically sold in their stores or online. In order to maximize the value of the Debtors' assets, portions of this inventory owned by the Debtors would be included in and sold as part of the Sales along with the Debtors' other salable store inventory already existing in the Closing Stores (collectively, the "Merchandise").[341]

Given the desire to commence the Store Closings expeditiously, the Debtors, in consultation with their asset disposition advisor Malfitano Advisors, LLC ("MA"), conducted an extensive solicitation and bidding process for liquidators.[342] The process included, among other things, a formal request for proposal, access to all information provided by the Debtors, diligence provided though a virtual data room, and standard requirements for the submission or recovery rates, forecasts and analysis.[343] As of the bid deadline, the Debtors received four proposals from four bidding groups.[344] Each bidding group was evaluated based on, among other things, whether

[338] Docket No. 1595.pdf. The determination of whether or not to close all 182 stores will depend on whether the Debtors and non-Debtor affiliate Propco I are able to negotiate more favorable lease terms and rent reductions for certain stores with their landlords. 60 of the 182 stores identified in this motion are Propco I stores. Please be advised, as discussed earlier in this paper, Propco I and its bankruptcy are outside the scope of this paper. *See* n. 557 and accompanying text.

[339] Docket No. 1595.pdf at 5.

[340] *Id. See also* n. 294 and accompanying text. To obtain additional time to make these lease determinations, prior to filing this Motion, the Debtors filed a motion to provide third-party landlords with consideration in exchange for extensions of the time for the Debtors to determine whether to assume or reject a particular lease.

[341] Docket No. 1595.pdf at 6.

[342] Docket No. 1595.pdf.

[343] *Id.*

[344] *Id.*

it (a) had realistic views on overall recovery on both the in-store inventory and the inactive and discontinued inventory owned by the Debtors (the "X'D Inventory"), (b) had recent experience liquidating retail toy stores, including, in some respects, the Debtors' own stores, (c) would dedicate the best resources to accomplish the Debtors' goals, (d) had shown the ability to execute the liquidation of excess and aged inventory in recent transactions, and (e) was sensitive to the Debtors' desire to retain and transition customers to their ongoing stores and online platform. This last factor was particularly important to the Debtors as the Debtors wanted to continue ordinary course operations at their remaining stores and proper messaging to customers that these sales would not impact operations going forward.[345]

Based on this extensive evaluation, the Debtors selected and engaged two bidding groups, the abovementioned Hilco/GB and Tiger/GA, to manage the Store Closing and sell the Merchandise as well as to sell their furniture, fixtures ,and equipment (the "FF&E" and, together with the Merchandise, the "Store Closure Assets") located in the Closing Stores and otherwise prepare the Closing Stores for turnover to the applicable landlords on the terms set forth in the Consulting Agreements.[346] Based on the agreements, the Consultants split the Closing Stores geographically, a division that ultimately allowed the Debtors to (a) obtain best-in-class supervision from the industry's premier liquidators, (b) drive competition between the Consultants to deliver the best results, and (c) obtain different perspectives and operational strategies to maximize returns, assist with the liquidation of the X'D Inventory, and preserve and direct customers to remaining stores and the company's online platform.[347]

The Debtors claimed that approval of the Consulting Agreements would allow the Debtors to utilize the logistical capabilities, experience, and resources of the Consultants in performing large-scale liquidations in a format that would allow the Debtors to retain control over the sale

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[345] *Id.*

[346] Docket No. 1595.pdf at 7.

[347] *Id.*

process.[348] A summary of the salient terms of each of the Consulting Agreements (which are substantially similar) is set forth below[349]:

TERM	CONSULTING AGREEMENTS
Services Provided by Consultants	The Consultants will each be retained as the Debtors' agent to conduct the Sales at certain identified Closing Stores during the Sale Term (as defined below) to, among other things: (a) recommend appropriate discounting to effectively sell all of Merchant's goods locatedat the Closing Stores as of the Sale Commencement Date in accordance with a "store closing," "everything must go," "sale on everything," or other mutually agreed upon themed sale, and recommend appropriate point-of-purchase, point-of-sale, and other internal and external advertising in connection therewith; (b) provide qualified supervision to oversee the conduct of the Sale; (c) maintain focused and constant communication with Closing Store-level employees and managers to keep them abreast of strategy and timing and to properly effect Closing Store-level communication by Merchant's employees to customers and other about the sale: (d) establish and monitor accounting functions for the Sale, including evaluation of sales of Merchant's goods located at the Closing Stores by category, sales reporting, and expense monitoring; (e) recommend loss prevention strategies; (f) coordinate with Merchant so that the operation of the Closing Stores is being properly maintained, including ongoing customer services and housekeeping activities; (g) recommend customized strategies to transition Merchant's customers to Merchant's ongoing retail stores and e-commerce platform; (h) recommend appropriate staffing levels for the Closing Stores and appropriate bonus and/or incentive programs (to be funded by Merchant) for Closing Store employees; (i) assist Merchant to commence the Sale as a "sale on everything," "everything must go," "store closing," or such other themed sale approved by Merchant prior to any bankruptcy filing by Merchant, and the Bankruptcy Court; and (j) advise Merchant with respect to the legal requirements of affecting the Sale as a "store closing" or other mutually agreed upon theme in compliance with applicable state and local "going out of business" laws as modified by any order of the Bankruptcy Court. In connection with such obligation, Consultants will (i) advise Merchant of the applicable waiting period under such laws, and/or (ii) prepare (in Merchant's

[348] *Id.* at 8

[349] *Id.* at 8-12.

	name and for Merchant's signature) all permitting paperwork as may be necessary under such laws, deliver all such paperwork to Merchant, and file, on behalf of Merchant, all such paperwork where necessary, and/or (iii) advise where permitting paperwork and/or waiting periods do not apply
Term of Sale	Subject to the Court's approval, the term "Sale Term" with respect to each respective Closing Store shall commence on February 7, 2018 (the "Sale Commencement Date") and shall end with respect to each respective store no later than April 15, 2018 (the "Sale Termination Date"); provided, however, that Merchant may decide on an earlier or later "Sale Commencement Date" or "Sale Termination Date" with respect to any one or more Closing Stores (on a Closing Store-by-Closing Store basis). After the date hereof, at the option of the Merchant, and subject to Bankruptcy Court approval, the Merchant may appoint either Consultant, and the Consultants have agreed to serve, as the Merchant's independent consultants in connection with the conduct of sales at additional stores on the terms and conditions of the applicable Consulting Agreement (subject only to appropriate adjustments to the Sale Commencement Date and the Sale Termination Date and the Consultant Controlled Expenses (each as defined in the applicable Consulting Agreement)), which stores shall be set forth in a written supplement to Exhibit A of the applicable Consulting Agreement and provided by Merchant to the applicable Consultant.
Expenses of Consultants	All expenses incident to the conduct of the Sale and the operation of the Closing Stores during the Sale Term (including without limitation all Consultant Controlled Expenses and all other store-level and corporate expenses associated with the Sale) shall be borne by Merchant; except solely for any of the specifically enumerated "Consultant Controlled Expenses" that exceed the aggregate budgeted amount (as provided in Section 3(B) of the applicable Consulting Agreement) for such Consultant Controlled Expenses. Attached as Exhibit B to the applicable Consulting Agreement is an expense budget for the "Consultant Controlled Expenses." Each Consultant will advance funds for its respective Consultant Controlled Expenses, and Merchant shall reimburse the applicable Consultant therefor (up to the aggregate budgeted amount) in connection with each weekly reconciliation contemplated by Section 5(B) of the applicable Consulting Agreement upon presentation of reasonable documentation for such actually-incurred expenses. All Consultant Controlled Expenses shall be billed at cost, without markup, and evidence of incurrence shall be provided, if

	requested. The parties may from time to time mutually agree in writing to increase the budget of Consultant Controlled Expenses based upon circumstances of the Sale. The parties will meet on each Wednesday during the Sale Term to review any Sale matters reasonably requested by either party; and all amounts payable or reimbursable to each Consultant for the prior week (or the partial week in the case of the first and last weeks) shall be reconciled and paid immediately thereafter. No later than twenty (20) days following the end of the Sale, the parties shall complete a final reconciliation and settlement of all amounts contemplated by the Consulting Agreements (the "Final Reconciliation"). From time to time upon request, the Consultants shall prepare and deliver to the Merchant such other reports as the Merchant may reasonably request. Each party to the Consulting Agreements shall, at all times during the Sale Term and during the one (1) year period thereafter, provide the counterparty on the applicable Consulting Agreement with access to all information, books and records reasonably relating to the Sale and to the applicable Consulting Agreement. All records and reports shall be made available to the applicable Consultant and Merchant during regular business hours upon reasonable notice.
Compensation for Consultants	As used in the respective Consulting Agreements, the following terms shall have the following meanings: (a) "Gross Proceeds" shall mean the gross proceeds of all sales of Merchandise during the Sale Term, net only of sales taxes; and (b) "Merchandise" shall mean the goods actually sold in the Closing Stores during the Sale Term, the aggregate amount of which shall be determined using the gross rings inventory taking method. Merchant shall pay Consultant a "Base Fee" equal to one and one tenth percent (1.10%) of Gross Proceeds. At the sole and absolute discretion of the Merchant, in consultation with the official committee of unsecured creditors, Merchant may pay the applicable Consultant an "Incentive Fee" up to an additional 0.3% of Gross Proceeds based on overall performance, assistance with a strategy to sell all of the X'D Inventory and performance in transitioning customers to the Merchant's ongoing stores and on-line platform. On a weekly basis in connection with each weekly reconciliation contemplated by Section 5(B) of the applicable Consulting Agreement, Merchant shall pay Consultant an amount equal to one and one tenth percent (1.10%) of Gross Proceeds on account of the prior week's sales as an advance on account of the fee payable hereunder. The parties shall determine the definitive Base Fee and Incentive Fee, if any, in connection with the Final Reconciliation. Immediately thereafter (and as

	part of the Final Reconciliation), Merchant shall pay each Consultant any additional amount owed on account of the Base Fee and Incentive Fee.
Insurance Obligations	During the Sale Term: (a) Merchant shall maintain (at its expense) insurance with respect to the Merchandise in amounts and on such terms and conditions as are consistent with Merchant's ordinary course operations, and (b) each of Merchant and Consultants shall maintain (at each party's respective expense) comprehensive auto liability for owned and non-owned autos and general liability insurance covering injuries to persons and property in or in connection with the Closing Stores, in such amounts as are reasonable and consistent with its ordinary practices, for bodily injury, personal injury and/or property damage. Consultants shall add Merchant as an additional insured with respect to their respective insurance policies covering Consultants and their supervisors, and (c) each of Merchant and Consultant shall maintain statutory workers' compensation, statutory disability, and Employer's Liability coverage of at least $500,0000 covering its own employees. Consultant shall produce evidence of such by the Sale Commencement Date. Notwithstanding any other provision of the Consulting Agreements, Merchant and each Consultant agree that Merchant shall bear all responsibility for product liability relating to products sold under this Agreement, before, during and after the Sale Term.
Indemnification by Consultants	Each respective Consultant shall indemnify and hold Merchant and its affiliates, and their respective officers, directors, employees, consultants, and independent contractors (collectively, the "Merchant Indemnified Parties") harmless from and against all thirdparty claims, demands, penalties, losses, liabilities and damages, including, without limitation, reasonable and documented attorneys' fees and expenses, directly or indirectly asserted against, resulting from or related to: (a) the respective Consultant's material breach of or failure to comply with any of its agreements, covenants, representations or warranties contained in the respective Consulting Agreement or in any written agreement entered into in connection therewith; (b) any harassment or any other unlawful, tortious or otherwise actionable treatment of any employees or agents of Merchant by the respective Consultant, its affiliates or their respective officers, directors, employees, agents, independent contractors or representatives (including without limitation any supervisors); (c) any claims by any party engaged by the respective Consultant as an employee or independent contractor (including without limitation any non-

	Merchant employee supervisor) arising out of such employment or engagement; or (d) the negligence, willful misconduct or unlawful acts of the respective Consultant, its affiliates or their respective officers, directors, employees, Consultants, independent contractors or representatives, provided that the applicable Consultant shall not be obligated to indemnify any Merchant Indemnified Party from or against any claims, demands, penalties, losses, liabilities, or damages arising primarily from any Merchant Indemnified Party's gross negligence, willful misconduct, or unlawful act.
Indemnification by Merchant	Merchant shall indemnify and hold each respective Consultant, its affiliates and their respective officers, directors, employees, consultants, and independent contractors (collectively, "Consultant Indemnified Parties") harmless from and against all claims, demands, penalties, losses, liabilities and damages, including, without limitation, reasonable attorneys' fees and expenses, directly or indirectly asserted against, resulting from or related to: (a) Merchant's material breach of or failure to comply with any of its agreements, covenants, representations or warranties contained herein or in any written agreement entered into in connection therewith; (b) any claims by any party engaged by Merchant as an employee or independent contractor arising out of such engagement; (c) any consumer warranty or products liability claims relating to any Merchandise; and/or (d) the negligence, willful misconduct or unlawful acts of Merchant, its affiliates or their respective officers, directors, employees, agents, independent contractors or representatives; provided that Merchant shall not be obligated to indemnify the applicable Consultant Indemnified Party from or against any claims, demands, penalties, losses, liabilities or damages arising primarily from any Consultant Indemnified Party's gross negligence, willful misconduct, or unlawful act.

Through this Motion, the Debtors also requested the authority, but not the obligation, to pay Store Closing Bonuses (the "Store Closing Bonus Plan") to store-level non-insider employees, who remain in the employ of the Debtors during the Sales. The Debtors believed that the Store Closing Bonus Plan would motivate employees during the Sales and would enable the Debtors to retain those employees necessary to successfully complete the Sales.[350] The amount of the bonuses offered under the Store Closing Bonus Plan varied depending upon a number of factors, including

[350] Docket No. 1595.pdf at 17.

the employee's position with the Debtors and the performance of the Closing Store in which the relevant employees work.[351] For store managers and assistant store managers eligible to receive Store Closing Bonuses, such bonuses would replace any awards that such individuals were eligible to receive under the Team Achieved Gainsharing Plan.[352]

The Debtors claimed that providing such non-insider bonus benefits was critical to ensuring that key employees that would be affected by the reduction in the Debtors' work force due to the Store Closings would continue to provide critical services to the Debtors during the ongoing Store Closing process.[353] For the avoidance of doubt, the Debtors did not propose to make any payment on account of Store Closing Bonuses to any insiders.[354]

The Debtors stated several bases for relief. First, they claimed that a business justification existed under section 363(b) of the Bankruptcy Code.[355] The Debtors sought to enter into the Consulting Agreements pursuant to section 363(b)(1) of the Bankruptcy Code, which provides that a debtor, "after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate . . ."[356] While section 363(b) does not specify a standard for determining when it is appropriate for a court to authorize the use, sale, or lease of property of the estate, courts have required that such use, sale, or lease be based upon the sound business judgment of the debtor.[357]

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[351] *Id.*

[352] *See* n. 60 and accompanying text.

[353] Docket No. 1595.pdf at 19.

[354] *Id.*

[355] *Id.* at 20.

[356] *Id.* 11 U.S.C.§ 363(b).

[357] *Id. See, e.g.,* In re On-Site Sourcing, Inc., 412 B.R. 817, 824 (Bankr. E.D. Va. 2009) (noting that the movant must establish "a business justification for the transaction and the bankruptcy court must conclude, from the evidence, that the movant satisfied its fiduciary obligations and established a valid business justification.") (citing In re Gulf Coast Oil Corp., 404 B.R. 407, 415 (Bankr. S.D. Tex. 2009)); In re U.S. Airways Grp., Inc., 2002 WL 31829093, at *1 (Bankr. E.D. Va. Dec. 16, 2002) (holding that the debtors' sound business judgment was a sufficient basis to allow the debtors to terminate applicable mortgages).

Debtors claimed that they exercised their sound business judgment because, after engaging in arm's length negotiations with nationally recognized liquidators regarding the Store Closings and Sales, the Debtors determined that entering into the Consulting Agreements would provide the greatest return for their Merchandise and FF&E.[358] By engaging the two Consultants, the Debtors determined that they could both capitalize on the knowledge of a consultant already familiar with the Debtors' liquidation performance as well as foster competition between the two Consultants in order to ultimately deliver the best results for the Debtors.[359] Further, the Debtors believed that the terms set forth in the Consulting Agreements were fair and reasonable and presented the best path for the Sales.[360] Moreover, the Consultants had extensive expertise in conducting liquidation sales and would be able to effectively oversee and implement the Sales in an efficient and cost-effective manner.[361]

Next, the Debtors argued that the Court should approve their Sale Guidelines.[362] The Debtors and their advisors believed that the Sale Guidelines represented the most efficient and appropriate means of maximizing the value of the Store Closure Assets, while balancing the potentially competing concerns of landlords and other parties in interest, and that the motion was justified under section 105(a) and 363(b) of the Bankruptcy Code.[363] Section 363(b)(1) of the Bankruptcy Code provides, in relevant part, that, "[t]he [debtor], after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate."[364] Further, section 105(a) of the Bankruptcy Code provides, in relevant part, that, "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."[365]

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[358] Docket No. 1595.pdf at 21.

[359] *Id.*

[360] *Id.*

[361] *Id.*

[362] *Id.* at 22.

[363] Docket No. 1595.pdf.

[364] *Id. See* 11 U.S.C. § 363(b)(1).

[365] *Id. See* 11 U.S.C. § 105(a).

The Debtors also argued that the Court should approve the sale of the Store Closure Assets free and clear of all liens, encumbrances, and other interests under section 363(f) of the Bankruptcy Code.[366] A debtor in possession may sell property under sections 363(b) and 363(f) of the Bankruptcy Code "free and clear of any interest in such property of an entity other than the estate" if any one of the following conditions is satisfied: (i) applicable non-bankruptcy law permits sale of such property free and clear of such interest; (ii) such entity consents; (iii) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property; (iv) such interest is in bona fide dispute; or (v) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.[367]

The Debtors anticipated that, to the extent there were liens on the Store Closure Assets, all holders of such liens would consent to the Sales because they provided the most effective, efficient, and time-sensitive approach to realizing proceeds for, among other things, the repayment of amounts due to such parties.[368] Any and all liens on the Store Closure Assets sold under the Sales would attach to the remaining net proceeds of such sales with the same force, effect, and priority as such liens currently have on these assets, subject to the rights and defenses, if any, of the Debtors and of any party-in-interest with respect thereto.[369] Moreover, all identified lienholders received sufficient notice and were given sufficient opportunity to object to the relief requested.[370] For these reason, the Debtors claimed that the sale of Store Closure Assets satisfied the requirements of section 363(f) and should be free and clear of any liens, claims, encumbrances, and other interests.[371]

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[366] Docket No. 1595.pdf at 25.

[367] *Id. See* 11 U.S.C. § 363(f), *see also* In re Collins, 180 B.R. 447, 450 (Bankr. E.D. Va. 1995) (noting that since section 363(f) is written in the disjunctive, the court may approve a sale free and clear if any one subsection is met).

[368] Docket No. 1595.pdf at 26.

[369] Docket No. 1595.pdf.

[370] *Id.*

[371] *Id.*

Lastly, Debtors stated that the Store Closing Bonus Plan was a sound exercise of their business judgment and cited to several cases where the court approved such plans similar to the proposed plan in this case.[372]

On January 31, 2018 Cole MT Sunset Valley TX, LLC, Cole TY Coral Springs, FL, LLC, Cole MT San Jose CA, LLC, Cole MT San Antonio (Highway 151) TX, LLC, Cole MT West Covina (Lakes) CA, LP, and Cole MT Beavercreek OH, LLC (collectively, the "Cole Group") filed a limited objection to the Consulting Agreements Motion.[373] The Cole Group objected for the following six reasons:

a) The Consulting Agreements Motion does not provide any protections for the Cole Group in the event that the Debtors and Consultants leave personal property behind on the Premises after the conclusion of the Sales. There is no provision in the Motion or the Sale Guidelines that makes clear that the Cole Group is permitted to submit administrative expense claims for expenses incurred with regard to removal, repair, or disposal of abandoned personal property.

b) The Motion does not provide any protections for the Cole Group in the event the Premises are damaged during the Sales. The final order granting the Motion should permit the Cole Group to file administrative expense claims that arise from damage to the Premises caused during the Sales.

c) The Motion provides that "any interested parties have seven days after service of the applicable Additional Store Closing List to object to the application of the Order to their Closing Stores." This amount of time is simply insufficient. Fourteen Days' notice is appropriate under the circumstances.

d) The final form of order granting the Motion should clarify that the Debtors and Consultants are not permitted to sell any of the Cole Group's personal property on the Premises.

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[372] *Id.* at 36; *See e.g.,* In re Borders Grp., Inc., 453 B.R. at 473; see also In re Global Home Prods., LLC, 369 B.R. at 783; In re Nobex Corp., No. 05 20050 (MFW), 2006 WL 4063024, at *3 (Bankr. D. Del. Jan. 19, 2006); In re Mesa Air Grp., Inc., No. 10 10018 (MG), 2010 WL 3810899, *4 (Bankr. S.D.N.Y. Sept. 24, 2010) (holding that bonus payments are "'justified by the facts and circumstances of the case' under section 503(c)(3) [where] they are within the 'sound business judgment' of the Debtors" (citation omitted)).

[373] Limited Objection of Cole MT Sunset Valley TX, LLC, Cole TY Coral Springs, FL, LLC, Cole MT San Jose Ca, LLC, Cole MT San Antonio (Highway 151) TX, LLC, Cole MT West Covina (Lakes) CA, LP, and Cole MT Beavercreek OH, LLC to Debtors' Motion for Entry of an Order (I) Authorizing the Debtors to Enter into the Consulting Agreements, (II) Authorizing and Approving the Conduct of Store Closing Sales, with such Sales to be Free and Clear of All Lien, Claims, and Encumbrances, (III) Authorizing Customary Bonuses to Employees of Closing Stores, and (IV) Granting Relate Relief. Docket No. 1651.pdf.

e) Paragraph 11 of the Sale Guidelines uses the term "Owned FF&E" but that term is never defined in the Motion or in the Sale Guidelines. It should be made clear in the final form of the Sale Guidelines that Owned FF&E pertains to the Debtors' assets located on the Premises.

f) The final form of order granting the Motion should indicate that the Debtors and Consultants are required to comply with all provisions of the Lease to the extent not modified explicitly by this Court's order.[374]

Lastly, the Cole Group joined, as if restated herein, in any similar objections to the Consulting Agreements Motion to the extent they were consistent with the relief requested in the Objection, and reserved the right to object to any revised version of the Motion or the proposed form of order granting the Motion circulated by the Debtors after the filing of this Objection.[375]

Also on January 31, 2018, The Homestead Company, Inc. ("Homestead"), filed a limited objection to the Consulting Agreements Motion.[376] Homestead objected to the Consulting Agreements Motion for the exact same six reasons as the Cole Group above.[377]

On February 1, 2018, the Landlords (defined above[378]) filed a limited objection to the Consulting Agreement Motion.[379] The Landlords objected for the following reasons:

a) In the event that Debtors and/or Consultants leave and personal property, including signage or fixtures (collectively, the "Property"), in the premises, Debtors and Consultants should be responsible for repairing the damage cause by removal of the Property and for the costs of removing and disposing of the Property;

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[374] *Id.*

[375] *Id.* at 4.

[376] Limited Objection of the Homestead Corporation, Inc. to Debtors' Motion for Entry of an Order (I) Authorizing the Debtors to Enter into the Consulting Agreements, (II) Authorizing and Approving the Conduct of Store Closing Sales, with such Sales to be Free and Clear of All Liens, Claims, and Encumbrances, (III) Authorizing Customary Bonuses to Employees of Closing Stores, and (IV) Granting Related Relief. Docket No. 1654.pdf

[377] *Id. See also* n. 370 and accompanying text.

[378] *See* n. 179 and accompanying text.

[379] Bayer Retail Corporation, L.L.C.. IMI Huntsville, LLC, and Manana-CDIT, LLC's Limited Objection to Debtors' Motion for Entry of an Order (I) Authorizing the Debtors to Enter into the Consulting Agreements, (II) Authorizing and Approving the Conduct of Store Closing Sales, with such Sales to be Free and Clear of All Liens, Claims, and Encumbrances, (III) Authorizing Customary Bonuses to Employees of Closing Stores, and (IV) Granting Relate Relief. Docket No. 1662.pdf.

b) The Sales should not be advertised as a going-out-of-business sale, a bankruptcy sale, or any other similar sale;

c) Advertising, especially the use of exterior signs or exterior displays, should be subject to approval by Landlords and should comply with the restrictions set forth in the Leases;

d) Debtors and Consultants should be required to adhere to the terms of the Leases regarding the exhibition and installment of any signs, and should provide indemnity to Landlords in the event the facades of the building are damaged by the installation or attachment of any approved signs;

e) The use of signwalkers should not be allowed, and such prohibition should be included in the Sale Guidelines;

f) The Sales should be conducted during the required business hours under each Lease;

g) No leaflets, handbills, or other similar written materials should be distributed on the premises, even if permitted under the Lease or customary in the shopping center, and no flashing lights or amplified sounds should be permitted, even if permitted in the Lease or approved by landlord;

h) Consultants shall not be permitted to sell any of the Landlords' property, including, but not limited to, any property that is deemed to be, whether under the Lease or otherwise, a removeable trade fixture or removable trade improvement;

i) Debtors and Consultants should be required to conform to the lease requirements and any rules and regulations regarding the maintenance and care of the Premises and surrounding areas; and,

j) Any other existing restrictions in the Leases should remain in effect.[380]

On February 2, 2018, Trends International, LLC ("Trends") filed a limited objection to the Consulting Agreement Motion.[381] Prior to the Petition Date, Trends entered into a Scan-Based

[380] *Id.* at 3-4.

[381] Limited Objection and Reservation of Rights of Trends International, LLC with Respect to Debtors' Motion for Entry of an Order (I) Authorizing the Debtors to Enter into the Consulting Agreements, (II) Authorizing and Approving the Conduct of Store Closing Sales, with Such Sales to be Free and Clear of All Liens, Claims, an

Trading Consignment Agreement (the "SBT Agreement") with Toys "R" Us – Delaware, Inc. ("TRU"), which stated that Trends would periodically deliver TRU certain goods for sale in various TRU's stores.[382] The objection stated that Trends filed their Objection as a precautionary matter and did not object to the sale of the SBT Products so long as the Debtors and the Consultants complied with the terms of the SBT Agreement.[383] Absent compliance with the SBT Agreement, Trends did not consent to the sale of the SBT Products as they were not property of the Debtors' estates.[384] Moreover, Trends did not consent to the assessment of a fee payable to the Consultants if said fee diluted the sums rightfully due and owing to Trends from the sale of the SBT Products under the SBT Agreement.[385] Trends also objected to the Store Closing Motion to the extent that it contemplated the sale of the Trends FF&E, as such fixtures were not the property of the Debtors.[386] If and to the extent that the Debtors and Consultants were interested in selling the Trends FF&E, Trends stated that it should be compensated accordingly.[387]

On February 2, 2018, the U.S. Trustee also filed a limited objection to the Consulting Agreements Motion.[388] The U.S. Trustee stated in his objection that he did not have an objection *per se* to the Debtors exercising their business judgment to engage in "store closing sales;" however, the U.S. Trustee did argue that the Debtors did not adequately explain why the Store Closing Consultants the Debtors retained to conduct the sales did not need to comply with the

Encumbrances, (III) Authorizing Customary Bonuses to Employees of Closing Stores, and (IV) Granting Relate Relief. Docket No. 1667.pdf.

[382] *Id.* Trends also stated that The SBT Agreement was subject to confidentiality restrictions. Accordingly, the SBT Agreement was not filed as an exhibit to this Objection. The SBT Agreement would be made available by Trends to appropriate persons upon reasonable request and with appropriate non-disclosure protections in place, subject to the consent of TRU.

[383] *Id.* at 4

[384] *Id.*

[385] *Id.*

[386] *Id.*

[387] Docket No. 1667.pdf.

[388] Limited Objection of the United States Trustee to Debtors' Motion for Entry of an Order (I) Authorizing the Debtors to Enter into the Consulting Agreements, (II) Authorizing and Approving the Conduct of Store Closing Sales, with such Sales to be Free and Clear of All Liens, Claims, and Encumbrances, (III) Authorizing Customary Bonuses to Employees of Closing Stores, and (IV) Granting Related Relief. Docket No. 1670.pdf.

requirements of 11 U.S.C. § 327(a) and why the Store Closing Consultants' fees were not subject to review.[389] Similarly, the U.S. Trustee argued that the Consulting Agreements Motion failed to provide adequate information about the bonuses proposed to be paid in accordance with the Motion and how the payment of those bonuses would comply with § 503(c)(3) of the Bankruptcy Code.[390]

In compliance with §327(a), the U.S. Trustee requested that prior to the consideration of the relief sought in the Consulting Agreements Motion, each Consultant be required to file an affidavit or declaration of a representative of the Consultant vouching to the firm's disinterestedness and disclosing connections with any parties in interest as required by § 327(a) and Bankruptcy Rule 2014 and any monies to be paid from the Debtors' estates to the Consultants be subject to a further order of the Court or review by parties in interest.[391] And Lastly, U.S. Trustee addressed that the Consulting Agreements Motion sought the Court's blessing to pay up to $6.8 million under a bonus plan whose terms were still being negotiated and finalized at the time.[392] Without any additional information regarding the proposed bonus plan, including how these plans differed from existing bonus plans, the titles of employees being paid, and the targets that need to be achieved to earn those bonuses, the U.S. Trustee argued that the Consulting Agreements Motion lacked sufficient information to pass muster under the requirements of § 503(c)(3).[393]

On February 2, 2018, Weingarten Nostat, Inc. and Weingarten Realty Investors filed a limited objection to the Consulting Agreements Motion; however, their objection was regarding Propco I and its leases and is therefore outside the scope of this paper. [394]

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[389] *Id.* at 2.

[390] *Id.*

[391] *Id.* at 3.

[392] *Id.*

[393] *Id.*

[394] Limited Objection of Weingarten Nostat, Inc. and Weingarten Realty Investors to Debtors' Motion for Entry of an Order (I) Authorizing the Debtors to Enter into the Consulting Agreements, (II) Authorizing and Approving the Conduct of Store Closing Sales, with such Sales to be Free and Clear of All Liens, Claims, and Encumbrances, (III) Authorizing Customary Bonuses to Employees of Closing Stores, and (IV) Granting Related Relief. Docket No. 1672.pdf; *See* n. 1; *See also,* n. 557, n. 185.

On February 2, 2018, Bonnie Management Corp., ("Bonnie") as manager of and on behalf of Bricktown Square LLC ("Bricktown"), filed a limited objection to the Consulting Agreements Motion.[395] Bricktown was a landlord under an unexpired real property lease (the "Bricktown Lease") of nonresidential property in which Debtor is the tenant.[396] The Debtors designated the Bricktown Store for closing and sought to conduct store closing sales and abandon assets at the Bricktown Store in contravention of any contrary provision under the Bricktown Lease.[397] Bricktown objected that such actions would cause pecuniary harm to Bricktown.[398] They also objected that the Motion did not adequately protect Bricktown from risk of damage in connection with the efforts of the Debtors and their agents to sell equipment from inside the Bricktown Store.[399] Bricktown also joined, adopted, and incorporated by reference the points, authorities, and arguments made in the other objections to the Consulting Agreements Motion to the extent that they argued that the relief requested in the motion improperly invalidated provisions of their respective leases and exposed them to the risk of damage.[400]

Also on February 2, 2018, TMT Pointe Plaza, Inc. ("TMT") filed a limited objection to the Consulting Agreements Motion.[401] TMT objected to the Consulting Agreements Motion for the exact same six reasons as the Cole Group above.[402]

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[395] Limited Objection of Bonnie Management Corp., as Manager for Bricktown Square LLC, to Debtors' Motion for Entry of an Order (I) Authorizing the Debtors to Enter into the Consulting Agreements, (II) Authorizing and Approving the Conduct of Store Closing Sales, with such Sales to be Free and Clear of All Liens, Claims and Encumbrances, (III) Authorizing Customary Bonuses to Employees of Closing Stores, and (IV) Granting Related Relief and Joinder in certain Landlord's Objections. Docket No. 1675.pdf.

[396] *Id.* at 2.

[397] *Id.*

[398] *Id.*

[399] *Id.*

[400] Docket No. 1675.pdf.

[401] Limited Objection of TMT Point Plaza, Inc. to Debtors' Motion for Entry of an Order (I) Authorizing the Debtors to Enter into the Consulting Agreements, (II) Authorizing and Approving the Conduct of Store Closing Sales, with such Sales to be Free and Clear of All Liens, Claims and Encumbrances, (III) Authorizing Customary Bonuses to Employees of Closing Stores, and (IV) Granting Related Relief. Docket No. 1676.pdf.

[402] *Id. See also* n. 370 and accompanying text.

On February 2, 2018, Mattone Group Raceway LLC, JMM Raceway LLC, and Gart Roosevelt Associates LLC, as tenants in common, successors in interest to CLPF – Roosevelt Raceway, L.P., MCS Realty Partners, L.P., LNR Roosevelt Center Holdings, Inc., and CSFB 1997-C1 Roosevelt Center, LLC, by and through its undersigned counsel, Arent Fox LLP, filed a limited objection to the Consulting Agreements Motion; however, their objection was regarding Propco I and its leases and is therefore outside the scope of this paper. [403]

On February 2, 2018, Metropolitan Life Insurance Company ("Metro Life") filed a limited objection to the Consulting Agreements Motion.[404] Metro Life objected for the following reasons:

a) The Consulting Agreements Motion does not provide any protections for Metro Life in the event that the Debtors and Consultants leave personal property behind on the Premises after the conclusion of the Sales. There is no provision in the Motion or the Sale Guidelines that makes clear that Metro Life is permitted to submit administrative expense claims for expenses incurred with regard to removal, repair, or disposal of abandoned personal property.

b) The Motion does not provide any protections for Metro Life in the event the Premises are damaged during the Sales. The final order granting the Motion should permit Metro Life to file administrative expense claims that arise from damage to the Premises caused during the Sales.

c) The final form of order granting the Motion should clarify that the Debtors and Consultants are not permitted to sell any of Metro Life's personal property on the Premises.

d) Paragraph 11 of the Sale Guidelines uses the term "Owned FF&E" but that term is never defined in the Motion or in the Sale Guidelines. It should be made clear in the final form of the Sale Guidelines that Owned FF&E pertains to the Debtors' assets located on the Premises.

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[403] Limited Objection and Reservation of Rights of Mattione Group Raceway LLC, JMM Raceway LLC, and Gart Roosevelt Associates LLC, as Tenants in Common with respect to Debtors' Motion for Entry of an Order (I) Authorizing the Debtors to Enter into the Consulting Agreements, (II) Authorizing and Approving the Conduct of Store Closing Sales, with such Sales to be Free and Clear of All Liens, Claims and Encumbrances, (III) Authorizing Customary Bonuses to Employees of Closing Stores, and (IV) Granting Related Relief.. Docket No. 1684.pdf; *See* n.1 and accompanying text; *See also,* n. 185 and accompanying text, n. 557.

[404] Limited Objection of Metropolitan Life Insurance Corporation to Debtors' Motion for Entry of an Order (I) Authorizing the Debtors to Enter into the Consulting Agreements, (II) Authorizing and Approving the Conduct of Store Closing Sales, with such Sales to be Free and Clear of All Liens, Claims and Encumbrances, (III) Authorizing Customary Bonuses to Employees of Closing Stores, and (IV) Granting Related Relief. Docket No. 1685.pdf.

e) The final form of order granting the Motion should indicate that the Debtors and Consultants are required to comply with all provisions of the Lease to the extent not modified explicitly by this Court's order.

f) Metro Life objects to the Sale Guidelines to the extent they contravene the provisions of the Lease not only with regard to the conduct of the Sales in general but also insofar as Debtors seek to limit Metro Life's rights to enforce the provisions of the Lease, including, but not limited to, the right to control signage and seek indemnification.

g) Metro Life objects to such Sale to the extent it is not in compliance with all of the Lease terms.

h) Metro Life requests the inclusion in the Sale Guidelines, or in the Order approving same, of a provision which provides for the indemnification of Metro Life by the Debtors and any liquidation agent in the event that Landlord receives citations from local authorities as a result of the conduct of the Sales in general, and the signage employed with regard thereto in particular.

i) Any provision of the proposed order exempting Debtors and the Consultants from action by various governmental authorities should also extend to Metro Life.

j) Debtors should be required to give notice to each and every third party who may have a claim in any property remaining at the Premises on the sale termination date to remove the property, or, in default thereof, the third party's interest shall be deemed terminated and the property deemed abandoned to Metro Life with the right to dispose of such property free and clear of all interests and without liability to any person or entity.

k) Any grant of the right to abandon property should include the grant of an administrative claim to Metro Life for the reasonable costs of removal of that property, subject only to a possible challenge to the reasonableness thereof. If Debtors refuse to remove their property because of the cost of such removal, that cost should not be passed solely to Metro life but should be borne by all of Debtors' creditors as a cost of administration of the estate.[405]

Lastly, Metro Life joined, as if restated in their Motion, in any similar objections to the Consulting Agreements Motion to the extent they were consistent with the relief requested in the

[405] Docket No. 1685.pdf at 2-4.

Objection, and reserved the right to object to any revised version of the Motion or the proposed form of order granting the Motion circulated by the Debtors after the filing of this Objection.[406]

On February 5, 2018, Debtors submitted a reply addressing the various objections and presented arguments against each.[407] Debtors also pointed to the fact that "No party object[ed] to the entry of an Order allowing the Debtors to take the actions necessary to close the Closing Stores, as requested in the Motion. The Objections focused instead on a few issues that the Debtors worked to resolve with modifications to the Order. To the extent any of these issues remained unresolved, the Debtors stated that they were prepared to address them at the hearing."[408]

To address the issues focused on in the objections, on February 6, 2018, the Debtors filed a Revised Proposed Order to the Consulting Agreements Motion.[409] Some of the changes in the Revised Proposed Order included, among many other added provisions, included: increasing the number of days to object to the application of this Order from seven (7) days to ten (10) days; adding language stating that the Debtors shall not, and shall not permit their agents or advisors to, take any action in connection with the Sales, the Store Closings or the relief granted in this Order, the Sale Guidelines, or the Consulting Agreements, that is not in compliance with, or would result in a default or breach under, the Propco II Master Lease without either (a) an amendment to or waiver under the Propco II Master Lease in accordance with its terms and all consents required; or, (b) the entry of a further order of the Court, in either case, permitting such action, and all parties reserve all rights, remedies and positions with respect to any proceedings regarding a request for such further Court order.[410]

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[406] *Id.*

[407] Debtors' Omnibus Reply in Support of Debtors' Motion for Entry of an Order (I) Authorizing the Debtors to Enter into the Consulting Agreements, (II) Authorizing and Approving the Conduct of Store Closing Sales, with such Sales to be Free and Clear of All Liens, Claims and Encumbrances, (III) Authorizing Customary Bonuses to Employees of Closing Stores, and (IV) Granting Related Relief. Docket No. 1687.pdf.

[408] *Id.* at 3.

[409] Notice of Filing of Revised Proposed Order (I) Authorizing the Debtors to Enter into the Consulting Agreements, (II) Authorizing and Approving the Conduct of Store Closing Sales, with such Sales to be Free and Clear of All Liens, Claims and Encumbrances, (III) Authorizing Customary Bonuses to Employees of Closing Stores, and (IV) Granting Related Relief. Docket No. 1708.pdf.

[410] *Id.* at 19.

On February 6, 2018, the Court entered an Order granting the Consulting Agreements Motion.[411] The Court found that the Debtors had advanced sound business reasons for entering into the Consulting Agreements and that such entry is a reasonable exercise of the Debtors' business judgment.[412] The Court also found that the Consulting Agreements were negotiated, proposed, and entered into by the Consultants and the Debtors without collusion, in good faith and from arm's length bargaining positions, and that the conduct of the Store Closings and Sales as provided in the Order would provide an efficient means for the Debtors to dispose of the Merchandise and FF&E in the Closing Stores.[413] Additionally, the Debtors represented that they would neither sell nor lease personally identifiable information pursuant to the relief requested in the Motion, although the Consultants would be authorized to distribute emails and promotional materials to the Debtors' customers consistent with the Debtors' existing policies on the use of consumer information.[414] Finally, the Court found that the entry of this Order was in the best interests of the Debtors and their estates, creditors, and interest holders and all other parties in interest herein.[415]

The Order also specifically addressed that, notwithstanding anything to the contrary in this Order, the Debtors shall not sell any FF&E in which they do not have any interest in the Sales, except as otherwise agreed by the owner of such FF&E.[416] The Order also addressed the SBT Agreement and stated that, notwithstanding anything to the contrary in this Order, in accordance with that certain SBT Agreement between the Toys "R" Us – Delaware, Inc. and Trends[417], upon the sale or transfer to any non-Debtor entity of any goods held by the Debtors pursuant to the SBT

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[411] Order (I) Authorizing the Debtors to Enter into the Consulting Agreements, (II) Authorizing and Approving the Conduct of Store Closing Sales, with such Sales to be Free and Clear of All Liens, Claims and Encumbrances, (III) Authorizing Customary Bonuses to Employees of Closing Stores, and (IV) Granting Related Relief. Docket No. 1716.pdf.

[412] *Id.* at 3.

[413] *Id.*

[414] *Id.*

[415] *Id.*

[416] Docket No. 1716.pdf at 24.

[417] *See* n. 378 and accompanying text.

Agreement ("SBT Products"), the Debtors shall compensate Trends in the amount and on the terms set forth in the SBT Agreement. [418]

Motion to Establish Certain Bidding Procedures

On February 27, 2018, Debtors filed a motion (the "First Bidding Procedures Motion") which sought entry of an order (a) approving the proposed auction and bid procedures, by which the Debtors will solicit and select the highest or otherwise best offer(s) for the sale, or sales, of certain real property and leases (the "Sales"); (b) approving the form and manner of notice of the Auction and Sale Hearing (the "Auction and Hearing Notice"); (c) approving the procedures for the assumption and assignment of executory contracts and unexpired leases (the "Assumption and Assignment Procedures"), including the notice of proposed cure amounts (the "Assumption and Assignment Notice"); (d) scheduling an auction or auctions to sell the assets detailed in the Bidding Procedures (the "Auction") and a hearing to approve the Sale (the "Sale Hearing"); (e) approving the procedures for selling certain real property and leases not sold at the Auction; and (f) granting related relief.[419]

The Debtors claimed that the Bidding Procedures were designed to encourage all entities to put their best bids forwards to maximize the value of the Debtors' estate.[420] The key provisions of the Bidding Procedures are summarized below[421]:

a) **Qualified Bidders:** Only a Qualified Bidder may participate in and make subsequent Bids at the Auction. The Debtors shall have the sole right to determine, in the exercise of their reasonable business judgment, in consultation with the Consultation Parties, whether a bidder is a Qualified Bidder. A Qualified Bidder must (among other requirements set forth in the Bidding Procedures) (i) deliver to the Debtors by the Bid Deadline an irrevocable, good faith, and bona fide offer (a "Bid") to purchase all or a portion of the Assets that is a Qualified Bid pursuant to the Bidding Procedures; (ii) demonstrate the financial wherewithal to enter into the proposed transaction to the satisfaction of the Debtors; and (iii) provide, at the Debtors request, adequate assurance of future performance, (which the Qualified Bidder agrees may be disseminated

[418] Docket No. 1716.pdf at 25.

[419] Debtors' Motion for Entry of an Order (I) Establishing Bidding Procedures, (II) Approving the Sale of Certain Real Property and Leases, and (III) Granting Related Relief. Docket No. 1880.pdf.

[420] *Id.*

[421] *Id.* at 7-9.

to affected landlords if such Qualified Bidders' Bid is determined to be a Qualified Bid), which may include, without limitation, information regarding the Qualified Bidders' financial condition such as tax returns, current financial statements, or bank accounts.

b) **Qualified Bids:** No bid will be a Qualified Bid unless it is made by a Qualified Bidder.

c) **Bids for Individual Assets or Combinations of Assets:** A Qualified Bid must detail which of the Real Estate Assets up for sale the Qualified Bidder proposes to purchase. The Bidding Procedures contemplate that a single bidder or group of bidders may purchase all or a portion of the Real Estate Assets. If a bidder or group of bidders submits an offer for a combination of assets, such bidder or group of bidders must indicate (i) if it would be willing to purchase any of such assets if not sold as a group and, if so, (ii) a schedule indicating the Bid as to any individual or sub-group of assets that such bidder would purchase. The Debtors, in consultation with the Consultation Parties (to the extent reasonably practicable), reserve the right to determine whether to auction any assets as part of a group or individually up through and including at the Auction or to conduct an Auction of any Real Estate Asset both individually and as part of a group in order to determine which option maximizes value of the assets.

d) **Committed Financing:** A Qualified Bid must contain documentation acceptable to the Debtors (in the Debtors' reasonable business judgment) evidencing that the Qualified Bidder has financial resources or committed financing sufficient to close the transaction within twenty-one (21) days after the Auction.

e) **Deposit:** Contemporaneous with the submission of a Qualified Bid, a Qualified Bidder shall tender an earnest money deposit of ten percent (10.0%) of the proposed purchase price.

f) **Markup of Purchase Agreement:** A Qualified Bid must include an executed form of the purchase agreement for sale that may not deviate substantially from the terms of the form purchase agreement attached as Exhibit A to the Bidding Procedures as well as a "redline" to the form purchase agreement.

g) **Due Diligence:** Any Qualified Bidder may request diligence from the Debtors, and the Debtors may grant or deny any such request that they deem to be unreasonable. The Debtors may require such Qualified Bidder to execute a non-disclosure agreement prior to providing diligence to such Qualified Bidder.

h) **No Contingencies:** A Qualified Bid must contain no contingencies to the validity, effectiveness, and/or binding nature of the bid, including without limitation, contingencies for due diligence and inspection or financing of any kind.

i) **Irrevocability:** A Qualified Bid, if determined to be the Successful Bid or Backup Bid, will be irrevocable for a period of thirty (30) days after the conclusion of the Auction.

j) **As-Is, Where-Is:** All bidders must acknowledge and agree that upon closing the Debtors shall sell and transfer the assets to the Successful Bidder and the Successful Bidder shall accept the assets "AS IS, WHERE IS, WITH ALL FAULTS."

k) **Initial Overbid:** Any Qualified Bidder may submit successive bids in minimum increments, which will be determined by the Debtors, in consultation with the Consultation Parties (to the extent reasonably practicable), at each Auction depending on the total dollar value of the Real Estate Assets being sold at the Auction. The minimum increments may be different with respect to each asset or group of assets being auctioned.

l) **Closing:** The closing of the sale of the Real Estate Assets will occur no later than twenty-one (21) days after the Auction.

Most importantly, the Bidding Procedures recognized the Debtors' fiduciary obligations to maximize value for the benefit of their estates, and, as such, did not impair the Debtors' ability to consider all potential bids, and preserved the Debtors' right to modify the Bidding Procedures, in consultation with the Consultation Parties, as necessary or appropriate to maximize value for the Debtors' estates.[422]

The Debtors also motioned to establish procedures in the case that they received no bids on certain properties prior to the close of Auction, or that the highest or otherwise best bid at the Auction would not, in the Debtors business judgment, maximize the value of the Real Estate Assets being sold.[423] To address this, Debtors recommended establishing the following procedures[424]:

a) With regard to sales or transfers of Remaining Real Estate Assets in any individual transaction or series of related transactions to a single buyer or group of related buyers with a sale price6 less than or equal to $2,000,000.00:

   i. the Debtors (in consultation with the Consultation Parties) are authorized to consummate such transaction(s) without further order of

[422] Docket No. 1880.pdf.
[423] Docket No. 1880.pdf at 10.

[424] *Id.* at 11-14.

the Court or notice to any party if the Debtors determine in the reasonable exercise of their business judgment that such sales or transfers are in the best interest of their estates and the sale price is higher or otherwise better than any bid received at the Auction, if applicable; and

ii. any such transactions shall be deemed final and fully authorized by the Court and free and clear of Liens, with such Liens attaching only to the sale proceeds with the same validity, extent, and priority as immediately prior to the sale or transfer.

b) With regard to the sales or transfers of Remaining Real Estate Assets in any individual transaction or series of related transactions to a single buyer or group of related buyers with a sale price greater than $2,000,000.00:

i. subject to the procedures set forth herein, the Debtors (in consultation with the Consultation Parties) are authorized to consummate such transaction(s) without further order of the Court if the Debtors determine in the reasonable exercise of their business judgment that such sales or transfers are in the best interests of their estates and the sale price is higher or otherwise better than any bid received at the Auction, if applicable;

ii. any such transactions shall be deemed final and fully authorized by the Court and free and clear of Liens, with such Liens attaching only to the sale proceeds with the same validity, extent, and priority as immediately prior to the sale or transfer;7

iii. the Debtors shall cause, at least ten (10) days prior to the proposed closing date of such sale or effectuating such transfer, written notice of such sale or transfer substantially in the form attached to the Bidder Procedures Order as Exhibit 5 (each notice, a "Subsequent Sale Notice") to be served on: (a) the Office of the United States Trustee for the Eastern District of Virginia, Attn: Robert B. Van Arsdale and Lynn A. Kohen; (b) Kramer Levin Naftalis & Frankel LLP, 1177 Avenue of the Americas, New York, New York 10036, Attn: Adam C. Rogoff, Esq. and Rachael Ringer, Esq., counsel to the Official Committee of Unsecured Creditors; (c) the DIP ABL Agent and the advisors and counsel thereto; (d) if the applicable Debtor Contract counterparty is an obligor on the 12% senior secured notes due 2021 issued pursuant to that certain indenture, dated as of August 16, 2016, by and among TRU Taj LLC and TRU Taj Finance, Inc. as issuers, Wilmington Trust, N.A., as successor trustee and collateral trustee, and certain guarantors party thereto (the notes issued thereunder, the "Taj Notes"), then to (1) Wilmington Savings Fund Society, FSB ("Wilmington") as indenture trustee and collateral trustee (the "Taj DIP Notes Trustee") for the 11%

Senior Secured DIP Notes issued pursuant to that certain Indenture, dated as of September 22, 2017, by an and among TRU Taj LLC and TRU Taj Finance, Inc. as issuers, Wilmington as Trustee and Collateral Trustee, and certain guarantors party thereto (as amended, the "Taj DIP Notes Indenture") and the advisors and counsel thereto; (2) the indenture trustee for the Taj Notes (the "Taj Notes Trustee") and the advisors and counsel thereto; and (3) Paul, Weiss, Rifkind, Wharton & Garrison, LLP, 1285 Avenue of the Americas, New York, NY, 10019, Attn: Brian S. Hermann, Samuel E. Lovett, and Kellie A. Cairns, counsel to the Ad Hoc Group of Taj Noteholders;8 (e) the DIP Delaware Term Loan Agent and the advisors and counsel thereto; (f) the administrative agent for the prepetition Secured Revolving Credit Facility and the advisors and counsel thereto; (g) counsel to the administrative agent for the prepetition Secured Term Loan B Facility; (h) the prepetition administrative agent for the Propco I Unsecured Term Loan Facility and the advisors and counsel thereto; (i) the agent for the Propco II Mortgage Loan and the advisors and counsel thereto; (j) the agent for the Giraffe Junior Mezzanine Loan and the advisors and counsel thereto; (k) the administrative agent for the prepetition European and Australian Asset-Based Revolving Credit Facility ("Euro ABL") and the advisors and counsel thereto; (l) the administrative agent for the Senior Unsecured Term Loan Facility and the advisors and counsel thereto; (m) the indenture trustee for the Debtors' 7.375% Senior Notes and the advisors and counsel thereto; (n) the indenture trustee for the Debtors' 8.75% Unsecured Notes and the advisors and counsel thereto; (o) counsel to the ad hoc group of the Term B-4 Holders; (p) the monitor in the CCAA proceeding and counsel thereto; (q) the Debtors' Canadian Counsel; (r) the United States Attorney's Office for the Eastern District of Virginia; (s) the office of the attorneys general for the states in which the Debtors operate; (t) the Internal Revenue Service; (u) the United States Securities and Exchange Commission; (v) any party that has requested notice pursuant to Bankruptcy Rule 2002 and (F) any Qualified Bidder who placed a bid on such property at the Auction (collectively, the "Subsequent Sale Notice Parties");

iv. the content of the Subsequent Sale Notice shall consist of: (A) an identification of the Remaining Real Estate Assets being sold or transferred; (B) an identification of the purchaser of the assets; (C) the purchase price to be paid for the Remaining Real Estate Assets; (D) the marketing or sales process, including any commissions to be paid to third parties, used to sell or auction the assets; and (E) the significant terms of the sale or transfer agreement;

v. in the event a sale or transfer of Remaining Real Estate Assets is to be made by auction, the Debtors shall cause, in lieu of the notice described

in Paragraph 15(b)(iv) hereof, a Subsequent Sale Notice of the following information is to be given to the Notice Parties: (A) the time and place of such auction; and (B) an identification of the assets to be auctioned, at least ten (10) days prior to the auction;

vi. if, within ten (10) days after receipt of such Subsequent Sale Notice by any of the Notice Parties, (A) no written objections are filed with the Court, and (B) the Debtors do not receive any competing bids for any of the Remaining Real Estate Assets being sold (a "Competing Bid"), the Debtors are authorized to immediately consummate such sale or transfer;

vii. if any Notice Party files a written objection to any such sale or transfer with the Court within ten (10) days after receipt of such Subsequent Sale Notice, the applicable Remaining Real Estate Asset shall only be sold or transferred upon either the consensual resolution of the objection by the parties or further order of the Court after notice and a hearing; and

viii. if the Debtors receive a Competing Bid, the Debtors will evaluate such Competing Bid, in consultation with the Consultation Parties, and provide another Subsequent Sale Notice, in accordance with the Subsequent Sale Procedures.

The Motion also outlined the Sale and Auction Dates and Deadlines, the notice procedures for the Sale, Auction, and Sale Hearing, as well as the assumption procedures.[425] The Debtors claimed that the Bidding Procedures were fair and designed to maximize the value received for the assets, and were an exercise of the Debtors' reasonable business judgment.[426]

On March 12, 2018, Bayer Retail Company, L.L.C. and IMI Huntsville, LLC filed an objection to the First Bidding Procedures Motion.[427] They objected on a number of grounds including the timeline of the sales, qualifying as a bidder, the requirements of a qualified bid, telephonic attendance and bidding at the auction, the right to object to the sale of a lease, that adequate assurance information should be required as part of a qualified bid, procedures for unsold real estate assets, and expiration of qualified bids.[428] They also objected to the Assumption and

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[425] Docket No. 1880.pdf.

[426] *Id.* at 21.

[427] Bayer Retail Company, L.L.C. and IMI Huntsville, LLC's Objection to Debtors' Motion for Entry of an Order (I) Establishing Bidding Procedures, (II) Approving the Sale of Certain Real Property and Leases, and (III) Granting Related Relief. Docket No. 1994.pdf.

[428] *Id.*

Assignment Procedures, stating that the Debtors deadline to file notice of April 2, 2018 and the deadline to file an objection of April 5, 2018 only gives the objectors three (3) business days to evaluate a proposed assumption and assignment of their lease, which they claim is an insufficient amount of time.[429] Bayer was joined by at least 13 other landlords/landlord groups in their objection.[430]

On March 12, 2018, IKEA Center Urban Renewal, L.P., IKEA Development Urban Renewal, LP; and IKEA Retail Management, LP (collectively, the "IKEA Group") filed an objection to the First Bidding Procedures Motion.[431] The IKEA Group objected on a number of grounds including that the Motion curtailed the rights of the IKEA Group to the point that their rights and interested were unreasonably limited.[432] They also objected to the Debtors only providing three days' notice of the proposed sales, the proposed cure, and the proposed assignee after conclusion of the proposed auction process.[433] Further, the IKEA Group stated that nothing in the Motion made clear that the IKEA Group could participate in the bidding and auction process, even though their interests were clearly at stake in the proposed process.[434] The IKEA Group was joined by at least 15 other landlords/landlord groups in their objection.[435]

On March 23, 2018, the Court granted the Debtors Motion Establishing Bidding Procedures and stated that all objections to the relief requested in the Motion that had not been

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[429] *Id.* at 6.

[430] *See* Docket Nos. 1998.pdf, 2000.pdf, 2001.pdf, 2003.pdf, 2007.pdf, 2012.pdf, 2014.pdf, 2023.pdf, 2028.pdf, 2029.pdf, 2031.pdf, 2047.pdf, 2145.pdf.

[431] Objection of IKEA Center Urban Renewal, L.P.; IKEA Development Urban Renewal, L.P.; and IKEA Retail Management, LP to Debtors' Motion for Entry of Order (I) Establishing Bidding Procedures, (II) Approving the Sale of Certain Real Property and Leases, and (III) Granting Related Relief. Docket No. 1995.pdf.

[432] *Id.* at 2.

[433] *Id.* at 3.

[434] *Id.*

[435] *See* Docket Nos. 1998.pdf, 2000.pdf, 2002.pdf, 2003.pdf, 2012.pdf, 2014.pdf, 2018.pdf, 2020.pdf, 2028.pdf, 2029.pdf, 2031.pdf, 2047.pdf, 2145.pdf, 2185.pdf, 2202.pdf.

withdrawn, waived, or settled as announced to the Court at the hearing on the Motion or by stipulation filed with the Court, were overruled.[436]

On April 2, 2018, Debtors filed a Notice of Assumption and Assignment of Certain Unexpired Leases.[437] This notice stated that the Debtors had determined pursuant to the Order Establishing Bidding Procedures[438], and in the exercise of their business judgment, that each of the seventeen (17) unexpired leases set forth in Exhibit B attached to the filed Notice were assumed and assigned effective as of the date (the "Assignment Date") set forth in Exhibit B or such other date as the Debtors and the counterparties to such unexpired leases agree.[439] After a number of objections[440], on April 17, 2018, Debtors filed an amended Notice which removed one assumed unexpired lease and added three (3) others, for a total of nineteen (19) assumed unexpired leases.[441]

On April 13, 2018, the Court entered an Order approving the sale of certain real estate assets free and clear of all interests and approving the entry into lease termination agreements pursuant to the granted Order Establishing Bidding Procedures[442].[443] The Order approved the sale of fifteen (15) stores, attached to the Order as Exhibit A, and approved lease termination agreements regarding twenty eight (28) stores, attached to the Order as Exhibit B.[444]

Motion to Wind-Down U.S. Operations

On March 15, 2018, Debtors filed a motion which sought entry of an Order authorizing Debtors to Wind-Down U.S. Operations and to establish bidding procedures for the sale of Debtors

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[436] Order (I) Establishing Bidding Procedures and (II) Granting Related Relief. Docket No. 2351.pdf.

[437] Notice of Assumption and Assignment of Certain Unexpired Leases. Docket No. 2513.pdf.

[438] *See* Docket No. 2351.pdf.

[439] Docket No. 2513.pdf at 19-20.

[440] *See* Docket Nos. 2588.pdf, 2591.pdf, 2592.pdf, 2593.pdf, 2594.pdf, 2595.pdf, 2598.pdf, 2604.pdf

[441] Amended Notice of Assumption and Assignment of Certain Unexpired Leases. Docket No. 2743.pdf.

[442] *See* Docket No. 2351.pdf.

[443] Order (I) Authorizing the Sale of Certain Real Estate Assets Free and Clear of All Interests, (II) Approving the Assumption and Assignment of Leases, (III) Authorizing Entry into Lease Termination Agreements, and (IV) Granting Related Relief. Docket No. 2715.pdf.

[444] *Id.* at 16-20.

Canadian Equity.[445] The Debtors reported that their 2017 U.S. holiday sales came in well below worst case projections, producing EBITDA approximately $250 million below DIP budget projections and over $260 million below 2015 and 2016 holiday season EBITDA.[446] Debtors cited a number of factors contributing to the poor performance, including: (i) delays and disruption associated with reopening the supply chain in chapter 11 and during the holiday season, (ii) diversified competitors including Target, Walmart, and Amazon pricing toys at low-margins or as loss-leaders; prices at which the Debtors could not compete because they rely exclusively on toys for profit, (iii) a greater than expected decline in toy and gift card sales following the chapter 11 filing, and (iv) the Debtors' inability to offer online prices or shipping on more attractive terms than their competitors.[447] Debtors initially hoped they could weather the storm, but determined they could not and by this Motion, claimed they were taking the prudent and responsible step of seeking authority to begin an immediate and orderly liquidation of their U.S. business.[448]

By this Motion, the Debtors sought the Court's approval of the U.S. Wind-Down Order: Entry of an order to:

a) authorize the Debtors to enter into a full chain Consulting Agreement (the "Full Chain Consulting Agreement"), dated as of March 14, 2018 by and between Toys "R" Us - Delaware, Inc. ("Toys - Delaware" or the "Merchant") and a joint venture comprised of Tiger Capital Group, LLC, Great American Group, LLC, Hilco Merchant Resources, LLC, and Gordon Brothers Retail Partners, LLC (the "Consultants") attached to the U.S. Wind-Down Order as Schedule 1;

b) authorize the Debtors to utilize the sale guidelines attached to the U.S. Wind-Down Order as Schedule 2 (the "Amended Sale Guidelines"), which Amended Sale Guidelines amend the sale guidelines approved by this Court at Docket No. 1716 (the "Original Sale Guidelines"), to expand the relief applicable to existing store closures and provide additional authority to conduct store closing, "going out of business," or similarly-themed sales across all remaining 735 U.S. stores, in accordance with the terms of the Full Chain Consulting Agreement,

[445] Debtors' Omnibus Motion for Entry of Orders: (I) Authorizing the Debtors to Wind-Down U.S. Operations, (II) Authorizing the Debtors to Conduct U.S. Store Closings, (III) Establishing Bidding Procedures for the Sale of the Debtors' Canadian Equity, (IV) Enforcing and Administrative Stay, and (V) Granting Related Relief. Docket No. 2050.pdf. Be advised, this paper focuses solely on the Toys "R" Us bankruptcy as it relates to U.S. Operations, and therefore the establishment of bidding procedures for Debtors' Canadian Equity is outside the scope of this paper.

[446] *Id.*

[447] *Id.*

[448] *Id.*

with such sales to be free and clear of all liens, claims, and encumbrances (the "Liquidation Sales");

c) approve non-insider incentive programs for the Debtors' remaining store and headquarters employees as necessary to manage an orderly and efficient Wind-Down, consistent with the approved budget10 and with previously approved store level retention programs (the "Wind-Down Incentive Program");

d) order an administrative stay preventing the enforcement or collection of any claim that is not authorized by the Wind-Down Budget; and

e) grant related relief.[449]

The Debtors stated that they planned to wind down their U.S. operations in a manner that maximized the value of their liquidating U.S. assets. Specifically, the Wind-Down contemplated, among other things:

a) the completion of tasks and implementation of procedures to preserve, maintain, and protect the Debtors' assets pending ultimate liquidation, including the option to reorganize a subset of U.S. stores as a going-concern,

b) approval of the Full Chain Consulting Agreement for advisors to assist in the store liquidations,

c) approval of sale guidelines pursuant to which the Debtors will conduct the wind-down sales,

d) the continued employment of certain employees13 in their Global Resource Center (to oversee the Wind-Down) and stores and distribution centers (to assist with the liquidation) (collectively, the "Remaining Employees") and the provision of the Wind-Down Incentive Program (as applicable, and only to the extent approved by the B-4 Lenders in the Wind-Down Budget) to non-insider Remaining Employees to incentivize those employees to complete the liquidation on an expedited timeline; and

e) the implementation of an administrative stay to prevent the collection and enforcement of any claim that is not authorized by the Wind-Down Budget.

A summary of the material terms of the Full Chain Consulting Agreement that differ from the initial consulting agreement are set for below:[450]

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[449] Docket No. 2050.pdf at 6-7.
[450] Docket No. 2050.pdf at 19-21. *See also* n. 346.

<table>
<tr><th>TERM</th><th>MATERIAL REVISIONS FROM STORE CLOSING CONSULTING AGREEMENTS</th></tr>
<tr><td>Services Provided by Consultants</td><td>Eliminates paragraphs 1(A)(vii) and 1(A)(viii) which provide for transitioning Merchant’s customers to other stores and e-commerce platform.

Eliminates paragraph 1(A)(xi) which provides that Consultant would advise Merchant regarding compliance with state and local laws.

Adds paragraph 1(A)(ix) which provides that Consultant will assist Merchant with scheduling and allocation of Merchandise delivery to Stores from the Distribution Centers.</td></tr>
<tr><td>Terms of Sale</td><td>Eliminates a portion of paragraph 2(A) which provides that Merchant may appoint Consultant to assist with additional store closing sales.

Adds paragraph 2(B) which provides that Merchant may eliminate Stores from the Sale, in which case the parties will negotiate a mutually agreeable adjustment to the Gross Recovery thresholds upon which Consultant’s Merchandise Fee is calculated</td></tr>
<tr><td>Compensation for Consultants</td><td>Changes the compensation structure from 1.10% of Gross Proceeds plus a discretionary 0.3% Incentive Fee to the following:

- In consideration of its services hereunder, Merchant shall pay Consultant, a fee (the "<u>Merchandise Fee</u>") based upon one of the following thresholds of Gross Recovery as set forth below (e.g., back to first dollar):

<table>
<tr><td>Gross Recovery</td><td>Consultant’s Merchandise Fee</td></tr>
<tr><td>Below 57.0%</td><td>1.8% of Gross Proceeds</td></tr>
<tr><td>57.0% to 58.49%</td><td>2.5% of Gross Proceeds</td></tr>
<tr><td>58.5% to 59.99%</td><td>3.0% of Gross Proceeds</td></tr>
<tr><td>60.0% or Above</td><td>3.5% of Gross Proceeds</td></tr>
</table>

- Notwithstanding the foregoing, if, according to the above table, the Merchandise Fee increases as a result of the Gross Recovery equaling or exceeding a threshold, and (x) the Gross Proceeds, net of such applicable increased Merchandise Fee,</td></tr>
</table>

	are less than (y) the Gross Proceeds, net of the immediately preceding Merchandise Fee according to the table, the Merchandise Fee shall not be increased until such time as the Gross Proceeds calculation in (x) is equal to or greater than the Gross Proceeds calculation in (y). For the avoidance of doubt, it is the intention of the parties that Gross Proceeds to the Merchant net of the Merchandise Fee not decrease to the extent Gross Proceeds increase above a Gross Recovery threshold. - In addition to the Merchandise Fee and Non-Merchandise Fee, if the aggregate amount of Operating Expenses is less than the total amount set forth in the budget attached hereto as Exhibit C, as an additional fee hereunder, Consultant shall be entitled to payment of an amount equal to ten percent (10%) of the difference between (x) the total amount of Operating Expenses set forth in such budget, and (y) the actual total Operating Expenses attributable to the Sale Term (the "Expense Savings Fee"). - For purposes of calculating Gross Proceeds, Gross Recovery and the Consultant's Merchandise Fee and Non-Merchandise Fee, the parties shall use the "Gross Rings" method, wherein Consultant and Merchant shall jointly keep (i) a strict count of gross register receipts less applicable sales taxes, and (ii) cash reports of sales within each Store. Register receipts shall show for each item sold the retail price (as reflected on Merchant's books and records) for such item, and the markdown or other discount granted in connection with such sale. All such records and reports shall be made available to Consultant and Merchant during regular business hours upon reasonable notice.
Additional Consultant Goods	Adds a new "Additional Consultant Goods" provision in paragraph 7. - In connection with the Sale, Consultant shall have the right, at Consultant's sole cost and expense, to supplement the Merchandise in the Sale with additional goods procured by Consultant which are of like kind, and no lesser quality to the Merchandise in the Sale ("Additional Consultant Goods"). The Additional Consultant Goods shall be purchased by Consultant as part of the Sale, and delivered to the Stores at Consultant's sole expense (including labor, freight and insurance relative to shipping such Additional Consultant Goods to the Stores). Sales of Additional Consultant Goods shall be run through Merchant's cash register systems; *provided*, however, that Consultant shall mark the Additional Consultant Goods using either a "dummy" SKU or department number, or in such other

	manner so as to distinguish the sale of Additional Consultant Goods from the sale of Merchandise. Consultant and Merchant shall also cooperate so as to ensure that the Additional Consultant Goods are marked in such a way that a reasonable consumer could identify the Additional Consultant Goods as non-Merchant goods. Additionally, Consultant shall provide signage in the Stores notifying customers that the Additional Consultant Goods have been included in the Sale. Absent Merchant's written consent, and Consultant's agreement to reimburse Merchant for any associated expenses, Consultant shall not use Merchant's Distribution Centers for any Additional Consultant Goods. - Consultant shall pay to Merchant an amount equal to five percent (5.0%) of the gross proceeds (excluding sales taxes) from the sale of the Additional Consultant Goods (the "Additional Consultant Goods Fee"), and Consultant shall retain all remaining amounts from the sale of the Additional Consultant Goods. Consultant shall pay Merchant its Additional Consultant Goods Fee in connection with each weekly sale reconciliation with respect to sales of Additional Consultant Goods sold by Consultant during each then prior week (or at such other mutually agreed upon time).
Insurance Obligations	Adds Distribution Centers and Corporate Offices to the Merchant's insurance obligations listed in paragraph 8.
Indemnification by Merchant	Merchant shall indemnify and hold Consultant, its affiliates and their respective officers, directors, employees, consultants, and independent contractors (collectively, "Consultant Indemnified Parties") harmless from and against all third-party claims, demands, penalties, losses, liabilities and damages, including, without limitation, reasonable attorneys' fees and expenses, directly or indirectly asserted against, resulting from or related to: (i) Merchant's material breach of or failure to comply with any of its agreements, covenants, representations or warranties contained herein or in any written agreement entered into in connection herewith; (ii) any claims by any party engaged by Merchant as an employee or independent contractor arising out of such engagement; (iii) any consumer warranty or products liability claims relating to any Merchandise; and/or (iv) the negligence, willful misconduct or unlawful acts of Merchant, its affiliates or their respective officers, directors, employees, agents, independent contractors or representatives, *provided that* Merchant shall not be obligated to indemnify any Consultant Indemnified Party from or against any claims, demands, penalties, losses, liabilities or damages arising

	primarily from any Consultant Indemnified Party's gross negligence, willful misconduct, or unlawful act.

The Debtors outlined a number of bases for relief. First, that business justifications existed for the Wind-Down.[451] The Debtors argued that despite months of pursuing options that would have allowed the Debtors to continue operating globally as a going concern, they were unable to find support from stakeholders or third-party investors.[452] They also were unable to obtain additional waivers, new investment, or added financial support that would have allowed U.S. operations to meet their monthly financial needs and continue in the near-term. While the Debtors remained committed to pursuing the last available option, which included a Canadian sale with approximately 150 U.S. stores, the lack of financial support from third-parties coupled with the decision by the Debtors' domestic creditors that liquidation would enhance their recoveries, the Wind-Down was now the only value maximizing alternative available to the Debtors.[453] Under these circumstances, the Debtors stated that executing the Wind-Down was a sound exercise of the Debtors' business judgment.[454]

On March 16, 2018, Readerlink Distributions Services LLC ("Readerlink"), filed an objection to the Wind-Down Motion.[455] Readerlink filed its objection as a precautionary matter and did not object to the sale of their SBT Products so long as the Debtors and Consultants complied with the terms of the SBT Agreement, including the obligation to remit sale proceeds to Readerlink on a timely basis. [456] Readerlink also objected to the Wind-Down Motion to the extent that it contemplated the sale of the Readerlink FF&E, as such fixtures were not property of the Debtors and were not owned FF&E. Readerlink claimed that, if and to the extent that the Debtors

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[451] Docket No. 2050.pdf at 32.

[452] *Id.* at 33.

[453] *Id.*

[454] *Id.*

[455] Limited Objection and Reservation of Rights of Readerlink Distribution Services, LLC with Respect to Debtors' Omnibus Motion for Entry of Orders: (I) Authorizing the Debtors to Wind-Down U.S. Operations, (II) Authorizing the Debtors to Conduct U.S. Store Closings, (III) Establishing Bidding Procedures for the Sale of the Debtors' Canadian Equity, (IV) Enforcing an Administrative Stay, and (V) Granting Related Relief. Docket No. 2107.pdf.

[456] *Id.* *See* n. 379 and accompanying text.

and Consultants were interested in selling the FF&E, Readerlink should have been compensated accordingly.[457]

On March 16, 2018, Munchkin Inc. and SquareTrade, Inc. (collectively, the "Objecting Parties") filed a joint objection to the Wind-Down Motion.[458] The Objecting Parties stated that the Debtors were seeking to impermissibly alter the distribution scheme under the Bankruptcy Code to prefer certain administrative creditors over others.[459] They argued that the Debtors were seeking to immediately pay certain administrative creditors in full with proceeds from the sale of goods and services provided by the Objecting Parties, while enjoining such administrative creditors from asserting and seeking immediate payment on their administrative claims.[460] The Objecting Parties claimed that, in effect, the Debtors were seeking to bifurcate administrative claims occurring during the period in which the Debtors operated and during the liquidation period.[461] For these reasons, the Objecting Parties stated that the Wind-Down Motion should be denied to the extent it sought to favor certain groups of administrative creditors over others.[462]

On March 16, 2018, Nurture Inc. d/b/a Happy Family and Prestige Capital Corporation (together, the "Postpetition Vendors") filed an objection to the Wind-Down Motion.[463] The Postpetition Vendors objected that their administrative expense claims should have been treated *pari passu*[464] with all other administrative claims in these cases, including claims for professional

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[457] *Id.*

[458] Joint Opposition of Munchkin, Inc. and Squaretrade, Inc. to Debtors' Omnibus Motion for Entry of Orders: (I) Authorizing the Debtors to Wind-Down U.S. Operations, (II) Authorizing the Debtors to Conduct U.S. Store Closings, (III) Establishing Bidding Procedures for the Sale of the Debtors' Canadian Equity, (IV) Enforcing an Administrative Stay, and (V) Granting Related Relief. Docket No. 2108.pdf.

[459] *Id.* at 2.

[460] *Id.*

[461] *Id.*

[462] *Id.* at 3.

[463] Limited Objection of Postpetition Vendors to Debtors' Omnibus Motion for Entry of Orders: (I) Authorizing the Debtors to Wind-Down U.S. Operations, (II) Authorizing the Debtors to Conduct U.S. Store Closings, (III) Establishing Biddings Procedures for the Sale of the Debtors' Canadian Equity, (IV) Enforcing an Administrative Stay, and (V) Granting Related Relief. Docket No. 2109.pdf.

[464] Lat. By an equal progress; equably; ratably; without preference. https://perma.cc/QNP5-NQSB.

fees.[465] The Postpetition Vendors then cited a number of cases which they felt strengthened their position that the claims should have been treated equally with estate professional fees and all other administrative expense claims.[466] The Postpetition Vendors also objected that any order granting the relief sought in the Wind-Down Motion should have permitted all vendors with on-hand and/or noncancelable on-order inventory (including raw materials and packaging) of the Debtors' private-label merchandise, to liquidate those goods in any commercially reasonable manner through channels other than the Debtors, without regard to the use of the Debtors' trademarks in the packaging of such goods.[467]

On March 19, 2018, Running Hill SP LLC, Palm Beach Outlets I LLC, and NED Altoona LLC, filed an objection to the Wind-Down Motion.[468] The objectors objected to the Liquidation Motion, the Full Chain Consulting Agreement, and the Amended Sale Guidelines for the following reasons:[469]

a) The Debtors must timely perform their post-petition obligations under nonresidential real property leases until the assumption or rejection of the lease, including the payment of rent. Objectors requested that the Court order the Debtors to timely pay all rent and other occupancy obligations as they came due for the entire period before the rejection of the Leases.

b) The objectors sought the ability to negotiate side letters modifying the Amended Sale Guidelines.

c) The objectors also objected to any unilateral (as between the Debtors and Consultants) decision to extend the term of the Store Closing Sales absent agreement of the objections and/or approval by the Bankruptcy Court.

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[465] Docket No. 2109.pdf.

[466] *Id.* at 4. *See generally* In re Plastech Eng'g, 394 B.R. 147 (Bankr. E.D. Mich. 2008); see also In re HQ Global Holdings, Inc., 282 B.R. 169, 173 (Bankr. D. Del. 2002) (citing In re Standard Furniture, 3 B.R. 527, 532 (Bankr. S.D. Cal. 1980)).

[467] Docket No. 2109.pdf at 6.

[468] Objection of Landlords Running Hill SP LLC, Palm Beach Outlets I LLC, and Ned Altoona LLC, to Debtors' Omnibus Motion for Entry of Orders: (I) Authorizing the Debtors to Wind-Down U.S. Operations, (II) Authorizing the Debtors to Conduct U.S. Store Closings, (III) Establishing Bidding Procedures for the Sale of the Debtors' Canadian Equity, (IV) Enforcing an Administrative Stay, and (V) Granting Related Relief. Docket No. 2114.pdf.

[469] *Id.* at 3-7.

d) The objectors sought a notification process where the Debtors were required to notify them of the end date of Store Closing Sales no later than five (5) days prior to the intended date.

e) The objectors also stated that they should not be forced to incur removal costs for property belonging to the Debtors and the Consultants.

Lastly, the objectors stated that they joined the objections of the Debtors' other landlords to the extent that such objections supplement and were not otherwise inconsistent with the objections contained herein.[470]

On March 19, 2018, the U.S. Trustee filed an objection to the Wind-Down Motion.[471] The U.S. Trustee stated that while he did not have an objection per se to the Debtors' predicament as set forth in the Wind-Down Motion, certain of the procedures proposed or relief sought in the Wind-Down Motion caused him concern and so he objected to the following[472]:

a) Without citing to any authority in the Bankruptcy Code, the Debtors proposed an administrative stay barring the enforcement and collection of any claim that is not authorized by the Wind-Down Budget, thus discriminating between administrative creditors – even ones in the same group – in violation of the absolute priority rule.

b) The Wind-Down Order proposed the payment of Consultants without allowing any review process to ensure the reasonableness of their fees.

c) The Debtors proposed payments of bonuses to store-closing employees without providing sufficient information to determine whether the payment pass muster under the requirements of 11 U.S.C. § 503(c).

Over sixty (60) additional landlords/landlord groups filed objections on similar or identical grounds and/or filed joinder motions to the objections above.[473]

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[470] Docket No. 2114.pdf at 7.

[471] Objection to Debtors' Omnibus Motion for Entry of Orders: (I) Authorizing the Debtors to Wind-Down U.S. Operations, (II) Authorizing the Debtors to Conduct U.S. Store Closings, (III) Establishing Bidding Procedures for the Sale of the Debtors' Canadian Equity, (IV) Enforcing an Administrative Stay, and (V) Granting Related Relief. Docket No. 2115.pdf.

[472] *Id.* at 2.

[473] *See* Docket Nos. 2113.pdf, 2117.pdf, 2120.pdf, 2121.pdf, 2124.pdf, 2132.pdf, 2135.pdf, 2137.pdf, 2142.pdf, 2147.pdf, 2151.pdf, 2153.pdf, 2154.pdf, 2156.pdf, 2157.pdf, 2158.pdf, 2159.pdf, 2160.pdf, 2163.pdf, 2167.pdf, 2171.pdf, 2173.pdf, 2174.pdf, 2176.pdf, 2177.pdf, 2179.pdf, 2180.pdf, 2181.pdf, 2186.pdf, 2188.pdf, 2190.pdf,

On March 22, 2018, the Court entered on Order approving the Debtors' Wind-Down Motion.[474] The Court found that the relief sought in the Motion was in the best interests of the Debtors' estates, their creditors, and other parties in interest, and that the legal and factual bases set forth in the Motion and at the Hearing established just cause for the relief granted in the Order.[475] The Court also stated that any objection to the relief requested in the Motion that was not withdrawn was overruled.[476] The Court found that:[477]

a) The Debtors have advanced sound business reasons for entering into the Full Chain Consulting Agreement, as set forth in the Motion and at the Hearing, and such entry is a reasonable exercise of the Debtors' business judgment and in the best interest of the Debtors and their estates.

b) The Full Chain Consulting Agreement was negotiated, proposed, and entered into by the Consultants and the Debtors without collusion, in good faith, and from arm's length bargaining positions.

c) The conduct of the Store Closings and Sales at the Additional Closing Stores in accordance with the Amended Sale Guidelines will provide an efficient means for the Debtors to dispose of the Merchandise, Non-Merchandise Goods, and Offered FF&E (collectively, the "Store Closure Assets") in the Additional Closing Stores.

d) The Debtors have represented that they will neither sell nor lease personally identifiable information pursuant to the relief requested in the Motion, although the Consultants, once engaged, will be authorized to distribute emails (to the extent available) and promotional materials regarding the Store Closings to the Debtors' customers consistent with the Debtors' existing policies on the use of consumer information.

e) The relief set forth herein is necessary to avoid immediate and irreparable harm to the Debtors and their estates and the Debtors have demonstrated good,

2191.pdf, 2192.pdf, 2193.pdf, 2194.pdf, 2195.pdf, 2196.pdf, 2197.pdf, 2198.pdf, 2200.pdf, 2201.pdf, 2202.pdf, 2203.pdf, 2204.pdf, 2205.pdf, 2214.pdf, 2217.pdf, 2221.pdf, 2222.pdf, 2225.pdf, 2227.pdf, 2232.pdf, 2238.pdf, 2242.pdf, 2243.pdf, 2244.pdf, 2252.pdf, 2264.pdf, 2271.pdf, 2273.pdf, 2276.pdf, 2417.pdf, 2509.pdf, 2523.pdf.

[474] Order (I) Authorizing the Debtors to Wind-Down U.S. Operations, (II) Authorizing the Debtors to Conduct U.S. Store Closings, (III) Establishing Administrative Claims Procedures, and (IV) Granting Related Relief. Docket No. 2344.pdf.

[475] *Id.*

[476] *Id.*

[477] *Id.*

sufficient, and sound business purposes and justifications for the relief approved herein.

f) The entry of this U.S. Wind-Down Order is in the best interests of the Debtors and their estates, creditors, and interest holders and all other parties in interest herein.

Based on these findings, the Court ordered that:[478]

a) The Motion is granted as set forth herein.

b) The Debtors' implementation and effectuation of the U.S. Wind-Down is approved as set forth herein, pursuant to section 105(a) and 363(b) of the Bankruptcy Code.

c) The Debtors are authorized, pursuant to sections 105(a) and 363(b) of the Bankruptcy Code and without further notice or relief from the Court except as provided herein, to take any and all actions consistent with the U.S. Wind-Down Order that are necessary or appropriate in the exercise of their reasonable business judgment to implement the U.S. Wind-Down. The 10-day notice period required by Paragraph 26 of the Initial Store Closing Order shall not apply.

d) The Debtors are authorized (but not required) pursuant to sections 105(a) and 363(b)(1) of the Bankruptcy Code, to immediately conduct the Store Closings at the Additional Closing Stores in accordance with this U.S. Wind-Down Order, the Initial Store Closing Order (as incorporated herein and as amended by this U.S. Wind-Down Order), the Amended Sale Guidelines, and the Full Chain Consulting Agreement. Subject to Section 2(b) of the Full Chain Consulting Agreement, the Debtors may cease a Store Closing at any Additional Closing Store at any time if the Debtors determine in the exercise of their reasonable business judgment that doing so may result in a more value-maximizing going-concern transaction. The commencement of Store Closings, including as "going out of business" or similarly-themed sales, at any store shall not preclude, hinder, or otherwise limit the Debtors' ability to cease the Store Closing and include such stores as part of a going-concern sale transaction.

e) The Debtors are authorized to discontinue operations at the Additional Closing Stores in accordance with this U.S. Wind-Down Order and the Amended Sale Guidelines.

f) Neither the Debtors nor the Consultants nor any of their officers, employees, or agents shall be required to obtain the approval of any third party, including (without limitation) any Governmental Unit (as defined under section 101(27)

[478] Docket No. 2344.pdf at 3-5.

of the Bankruptcy Code) or landlord, to conduct the Store Closings at the Additional Closing Stores and to take the related actions authorized herein.

Motion to Approve the Assumption and Assignment of Certain Ground Leases

On April 6, 2018, the Debtors filed a Motion for Entry of an Order (I) Approving the Assumption and Assignment of Certain Ground Leases, (II) Approving the Private Sale Free and Clear of Liens, Claims, Encumbrances, and Interests, and (III) Approving a Lease Termination Agreement.[479]

The Debtors had multiple ground leases (the "Ground Leases") that they were looking to monetize.[480] The Debtors did not include the Ground Leases in the auction that took place in March of 2018 because the Ground Leases were all non-operating spaces for them, and at that time, the Debtors were focused on assets related to operating stores. However, as of the date of the Motion, the Debtors believed that selling or otherwise disposing of the Ground Leases would bring value to the Debtor's estate. The plan was to enter into agreements with the highest bidders (the "Ground Lease Agreements") and capture substantial value for the stakeholders by capitalizing on the value of their long-term leases at below-market rates.

The Motion stated that the most likely counterparties to the agreements were the current subtenants on the leases that were already operating stores at the locations. However, the Debtors stated that if any party was willing to make a higher or otherwise better offer for the Ground Leases, they could reach out to the Debtors or file an objection stating their counterproposal. The Debtors would evaluate the offer prior to the hearing and reserve the right to seek approval of any such resulting agreement that the Debtors determined was a higher or better proposal.

The Debtors argued that entering into the Ground Lease Agreements was a valid exercise of their business judgement.[481] Section 363(b)(1) of the Bankruptcy Code allows a bankruptcy

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[479] Docket No. 2570.pdf.

[480] There were originally three Ground Leases located in Fresno, Fairfield, and Buford. However, Debtors filed a supplemental motion, Docket No 2815.pdf, to add another ground lease to the group located in Cerritos, CA.

[481] *See* In re S.N.A. Nut Co., 186 B.R. 98, 102 (Bankr. N.D. Ill 1995) ("[t]he business judgment rule is a presumption that in making the business decision the directors of a corporation acted on an informed basis, in good faith, and in the honest belief that the action was in the best interests of the company."); *See also* In re Filene's Basement, LLC, 11-13511 (KJC), 2014 WL 1713416, at *12 (Bankr. D. Del. Apr. 29, 2014) ("If a valid business justification exists,

court to authorize a debtor to "use, sell, or lease, other than in the ordinary course of business, property of the estate."[482] However, to approve a use, sale or lease of property other than in the ordinary course of business, the court must find "some sound business purpose" that satisfies the business judgement test.[483] Deference to a debtor's business judgment is inappropriate only if such business judgment is "so manifestly unreasonable that it could not be based on sound business judgment, but only on bad faith, or whim or caprice."[484]

It was argued in the Motion that the Debtors exercised sound business judgement because the Ground Lease Agreements would maximize the value of the Ground Leases by permitting the Debtors to sell these leases for the highest or otherwise best offer and would provide a greater recovery for the Debtor's estate than any known or practicably available alternative.

The Debtors also argued that the sales should be approved "free and clear" under section 363(f) of the Bankruptcy Code. This section permits a debtor to sell property free and clear of another party's interest in the property if: (a) applicable non-bankruptcy law permits such a free and clear sale; (b) the holder of the interest consents; (c) the interest is a lien and the sale price of the property exceeds the value of all liens on the property; (d) the interest is the subject of a bona fide dispute; or (e) the holder of the interest could be compelled in a legal or equitable proceeding to accept a monetary satisfaction of its interest.[485] The Debtors submitted that any interest that would not be an assumed liability satisfied at least one of the five condition of section 363(f), and that any such interest would be adequately protected by either being paid in full at the time of closing, or by having it attach to the net proceeds of the Sales, subject to any claims and defenses the Debtors may possess with respect thereto.

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then a strong presumption follows that the agreement at issue was negotiated in good faith and is in the best interests of the estate") (citations omitted); Integrated Resources, 147 B.R. at 656; In re JohnsManville Corp., 60 B.R. 612, 615–16 (Bankr. S.D.N.Y. 1986) ("a presumption of reasonableness attaches to a Debtor's management decisions.")

[482] 11. U.S.C. 363(b)(1).

[483] *See* In re W.A. Mallory Co., 214 B.R. 834, 836 (Bankr. E.D. Va. 1997); see also In re Glover, No. 09-74787 at *4 (SCS) (Bankr. E.D. Va. Mar. 31, 2010) ("The standard in this Circuit is whether the debtor in possession has exercised sound business judgment") (citing Lubrizol Enterprises, Inc. v. Richmond Metal Finishers, Inc., 756 F.2d 1043, 1046 (4th Cir. 1985))

[484] Lubrizol Enters., Inc. v. Richmond Metal Finishers, Inc., 756 F.2d 1043, 1047 (4th Cir. 1985).

[485] *See* 11 U.S.C. § 363(f)

Lastly, the Debtors argued that the proposed sales were appropriate pursuant to Bankruptcy Rule 6004(f). This rule authorizes a debtor to sell estate property outside of the ordinary course of business by private sale or public auction.[486] Additionally, courts have held that a debtor has broad discretion to determine the manner in which its assets are sold.[487] The Debtors determined that a private sale of the Ground Leases was in the best interests of their estates and their stakeholders because a public auction at that time would have been logistically impossible given the timeframe.

On April 11, 2018, a preliminary objection to the Ground Lease Motion was filed by Fairfield Gateway, LP – the landlord of the Fairfield ground lease ("Landlord").[488] This motion was filed because the Landlord was interested in bidding on the Ground Lease and believed that given a reasonable opportunity to counterbid, a competitive bidding process would result, which would ultimately provide additional value and benefit to the estates.

On April 30, 2018, the Court entered an Order Approving the Assumption and Assignment of the Fresno and Fairfield ground leases.[489] The Court found that the total consideration provided by each Purchaser was the highest and best offer received by the Debtors and constituted a fair value and adequate consideration for the purposes of the Bankruptcy Code.

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[486] See In re Cypresswood Land Partners, I, 409 B.R. 396, 436 (Bankr. S.D. Tex. 2009) ("there is no prohibition against a private sale. . . [and] there is no requirement that the sale be by public auction"); In re Dura Auto. Sys., Inc., No. 06-11202 (KJC), 2007 WL 7728109, at *88 (Bankr. D. Del. Aug. 15, 2007) "[S]ales of property rights outside the ordinary course of business may be by private sale or public auction.").

[487] See Berg v. Scanlon (In re Alisa P'ship), 15 B.R. 802, 802 (Bankr. D. Del. 1981); In re Bakalis, 220 B.R. 525, 531 (Bankr. E.D.N.Y. 1998) (noting that a trustee has ample authority to conduct a sale of estate property through private sale).

[488] Preliminary Objection of Fairfield Gateway, LP to the Debtors' Motion for Entry of an Order (I) Approving the Assumption and Assignment of Certain Ground Leases, (II) Approving the Private Sale Free and Clear of Liens, Claims, Encumbrances, and Interests, (III) Approving a Lease Termination Agreement and (IV) Granting Related Relief. Docket No. 2676.pdf.

[489] Order (I) Approving the Assumption and Assignment of Certain Ground Leases, (II) Approving the Private Sale Free and Clear of Liens, Claims, Encumbrances, and Interests, (III) Approving a Lease Termination Agreement and (IV) Granting Related Relief. Docket No. 2921.pdf.

Counter Party	Store Number	Location	Type of Agreement	Purchase Price
Dunn Development Co. Current Landlord	5802S	Fresno	Termination Agreement	$375,000
Fairfield Gateway M4 LLC, an affiliate of **Fairfield Gateway, LP**, the Current Landlord of the Ground Lease	5812	Fairfield	Assignment Agreement	$750,000

On June 25, 2018, the Court entered in an Order Approving the Lease Termination Agreement for the Buford ground lease.[490] The Court found that the relief requested was in the best interest of the Debtors' estates, their creditors, and other parties in interest, and that the legal and factual bases set forth in the Motion established just cause for the relief granted.

Counter Party	Store Number	Location	Type of Agreement	Purchase Price
DDRTC Marketplace at Mill Creek, LLC Current Landlord	8870	Buford	Lease Termination/Assignment Agreement	$1,550,000 (less credits)

Lastly, on July 2, 2018, the Court entered an Order Approving the Assumption and Assignment of the Cerritos ground lease.[491] Similar to the Order mentioned above, the Court found that the consideration provided by the Purchaser was the highest and best offer received by the Debtors and constituted a fair value and adequate consideration under the Bankruptcy Code.[492]

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[490] Order (I) Approving the Lease Termination Agreement, (II) Approving the Assumption and Assignment of Sublease, and (III) Granting Related Relief. Docket No. 3533.pdf.

[491] Order (I) Approving the Assumption and Assignment of Certain Ground Leases (II) Approving the Private Sale Free and Clear of Liens, Claims, Encumbrances, and Interests, and (IV) Granting Related Relief. Docket No. 3675.pdf.

[492] *Id.*

Counter Party	Store Number	Location	Type of Agreement	Sublease	Purchase Price
Cerritos TC Property, LLC, the Current Landlord of the Ground Lease	1345	Cerritos, CA	Assignment Agreement	The Assignment Agreement provides for the assignment of the Ground Lease and that certain Agreement of Lease dated October 13, 2003, entered into between Toys "R" US, Inc., as sublessor, and Petco Animal Supplies, Inc., predecessor-by-merger to Petco Animal Supplies Stores, Inc., as sublessee, as amended.	$154,887.14

Motion to Establish Bidding Procedures for the Remaining Toys Delaware Real Estate Assets

On April 19, 2018, the Debtors filed a motion in which they sought approval of procedures for the sale of the remaining real estate assets of Toys Delaware.[493] The Court had previously approved procedures and a timeline for the sale of certain real property and unexpired leases.[494] The Motion filed here was in almost all ways identical to the motion filed previously on February 27, 2018.[495] The Debtors claimed that the bidding procedures were fair, designed to maximize value received for the assets, and were an exercise of the Debtors' reasonable business judgment.

On May 2, 2018, Bayer Development Company, LLC, IMI Huntsville, LLC, and Manana-CDIT, LLC (collectively, the "Landlords") filed an objection to these bidding procedures.[496] First,

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[493] Debtors' Motion for Entry of an Order (I) Establishing Bidding Procedures for the Remaining Toys Delaware Real Estate Assets, (II) Approving the Sale of Certain Real Estate Assets, and (III) Granting Relate Relief. Docket No. 2787.pdf.

[494] *See* n. 433 and accompanying text.

[495] *See* n. 416 and accompanying text.

[496] Bayer Development Company, LLC, IMI Huntsville, LLC, and Manana-CDIT, LLC's Objection to Debtors' Motion for Entry of an Order (I) Establishing Bidding Procedures for the Remaining Toys Delaware Real Estate Assets, (II) Approving the Sale of Certain Real Property and Leases, and (III) Granting Related Relief. Docket No. 2941.pdf

they objected that the timeline for the sales of the Remaining Real Estate Assets were too short. The timeline was as follows:

Deadline	**Action**
May 29, 2018	Bid Deadline
June 5, 2018	Notice of Qualified Bid Deadline
June 11, 2018	Auction
June 13, 2018	Notice of Successful and Backup Bidders
June 17, 2018	Sale Objection Deadline
June 25, 2018	Hearing to Designate Successful Bidders

The Landlords objected that they would have insufficient time to analyze a proposed assignee and decide whether to file an objection.[497] Secondly, they objected that the bidding procedures did not provide a deadline by which the Debtors must provide the adequate assurance package to the affected Lease Counterparty. Third, the Landlords objected that there was no authority in section 363 or 365 of the Bankruptcy Code that allows a debtor to set a minimum bid for sale of its real estate assets.[498]

Next, the objection stated that the Bidding Procedures themselves did not provide for the objectors right to credit bid, nor detailed any special procedures for Lease Counterparties making credit bids.[499] Finally, the Landlords objected to the Assumption and Assignment Procedures in that the notice deadline was June 15, 2018 and the deadline to file an objection was June 17, 2018. The Landlords stated that this was an insufficient amount of time and that they should be given a

[497] *Id.* at 4.

[498] *Id. See* Shaw Group Inc. v. Bechtel Jacobs Co. (In Re IT Group Inc.), 350 B.R. 166, 171 (Bankr. D. Del. 2006) (stating that a debtor must comply with both section 363 and 365 when selling executory contracts and unexpired leases); Cinicola v. Scharffenberger, 248 F.3d 110, 124 (3d Cir. 2001) ("[T]he sale of an executory contract triggers the protections afforded sales of bankruptcy estate property but also requires satisfaction of the requirements for assuming and/or assigning the same executory contract.").

[499] Docket No. 2941.pdf at 6.

longer period of time to decide whether to object to the proposed assumption or assignment.[500] The Landlords were joined in their objection by at least 9 other landlord groups.[501]

On May 11, 2018, the Court entered an Order granting the Debtors Motion to Establish Bidding Procedures for the Remaining Real Estate Assets of Toys Delaware.[502] The Procedures approved were almost identical to those approved in the First Bidding Procedures Motion above.[503] However, the Court stated that the Debtors should not extend any of the relief granted in this Order to any real property owned or commercial lease subleased by Propco I or Propco II.[504]

On June 28, 2018, pursuant to the approved bidding procedures, the Court authorized the sale of certain Remaining Real Estate Assets, authorized the assumption and assignment of certain Remaining Real Estate Assets, and authorized the entry into lease termination agreements.[505] The sale schedule attached to the Order included assignment agreements with twenty four (24) store locations and the termination schedule included sixteen (16) store locations.[506]

At least five (5) other Orders were enter pursuant to the bidding procedures established above, authorizing the sale of various Remaining Real Estate Assets of Toys Delaware.[507] These Orders included the sale of seven (7) Remaining Real Estate Assets of Toys Delaware.[508]

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[500] *Id.*

[501] *See* Docket Nos. 2945.pdf, 2949.pdf, 2951.pdf, 2952.pdf, 2953.pdf, 2971.pdf, 2973.pdf, 2976.pdf, 2989.pdf.

[502] Order (I) Establishing Bidding Procedures for the Remaining Real Estate Assets of Toys Delaware and (II) Granting Related Relief. Docket No. 3056.pdf.

[503] *See* Docket No. 1880.pdf, 2351.pdf.

[504] *Id.*

[505] Order (I) Authorizing the Sale of Certain Real Estate Assets Free and Clear of All Interests, (II) Approving the Assumption and Assignment of Leases, (III) Authorizing Entry into Lease Termination Agreements, and (IV) Granting Related Relief. Docket No. 3611.pdf.

[506] *Id*. at 18-20.

[507] *See* Docket Nos. 3108.pdf, 3846.pdf, 3847.pdf, 4327.pdf, 4328.pdf.

[508] *Id.*

Motion to Establish Bidding Procedures for the Sale of the Shared Services Business

On October 9, 2018, the Debtors filed a Motion for an Entry of an Order Establishing Bidding Procedures for the Sale of the Shared Services Business pursuant to which Toys "R" Us – Delaware Inc. would solicit and select offers for the sale of it is shared services infrastructure, agreements, and operations.[509] The proposed Bidding Procedures would govern the solicitation, receipt, and evaluation of bids, while taking into account the likely bidders and the timing restraints that exist.

The Bidding Procedures *include* the following material provisions:[510]

a) Eligibility of Bidders to Participate: To be eligible to bid for the Sale of any Assets subject to the bidding process or otherwise participate in the Auction, each bidder must be determined, in the sole discretion of the Debtor, to be a Qualified Bidder. The Debtor shall have the sole right to determine, in consultation with the Consultation Parties, whether a bidder is a Qualified Bidder. The Stalking Horse Bidder shall be deemed a Qualified Bidder with respect to any Assets. Bidding Procedures.

b) Minimum Overbid: The minimum overbid above the $57.5 million credit bid shall be $500,000, such that a Qualified Bid must be at least $58 million to purchase the Assets in order to top the Stalking Horse Bid.

c) The Stalking Horse Bid: The Term B Lenders will serve as the Stalking Horse Bidder with a credit bid of $57.5 million. The Term B Lenders have agreed to cap their credit bid at $57.5 million and not otherwise participate in the Auction if there is another Qualifying Bid.

d) Deposit: To be considered for status as a Qualified Bidder, contemporaneous with the submission of a Bid on or prior to the Bid Deadline, a bidder (other than the Stalking Horse Bidder) must tender an earnest money deposit of ten percent (10.0%) of the proposed purchase price. The deposit of any Qualified Bidder shall be returned to such bidder after the Auction unless it is the Successful Bidder or Backup Bidder at the Auction. If a Qualified Bidder increases its Bid at the Auction and is the Successful Bidder or Backup Bidder, such bidder must increase its Qualified Bidder Deposit to match the proposed purchase price submitted at the Auction within three (3) business days after the

[509] Debtors' Motion for Entry of an Order (I) Establishing Bidding Procedures for the Sale of the Shared Services Business, (II) Scheduling an Auction and Hearing to Consider the Sale, (III) Approving the Form and Manner of Notice, and (IV) Granting Related Relief. Docket No. 5199.pdf.

[510] *Id.* at 8-9.

Auction. For the avoidance of doubt, any credit bidder shall not be required to submit a deposit. Bidding Procedures.

e) Qualified Bidders: To be considered for status as a Qualified Bidder and to have a Qualified Bid, a bidder must satisfy the requirements set forth in the Bidding Procedures, including timely delivery of a written offer to the parties set forth in the Bidding Procedures. Only Qualified Bidders shall be entitled to make any subsequent bids at the Auction. Bidding Procedures.

f) Markup of Applicable Agreement: A Qualified Bid must include an executed form of the proposed purchase agreement. Bidding Procedures.

g) Due Diligence: The Debtor has a virtual data room (the "Data Room") that provides standard and customary diligence materials for a transaction of this type that will be available to potential bidders immediately following an approval of the Bidding Procedures by the Court. The Debtor may require Qualified Bidders to execute a non-disclosure agreement prior to providing diligence to such Qualified Bidder. The Data Room shall be available to the Consultation Parties' professionals on a professional-eyes only basis. Bidding Procedures.

h) Permitted Attendees at the Auction: Unless otherwise ordered or directed by the Court, only representatives of the Debtor, any other parties invited specifically by the Debtor, the Consultation Parties, the Stalking Horse Bidder, and any Qualified Bidders (and the professionals for each of the foregoing) shall be entitled to attend the Auction; provided that, with respect to bidders, only (i) the Stalking Horse Bidder and (ii) other Qualified Bidders that have submitted Qualified Bids by the Bid Deadline shall be entitled to bid at the Auction. Any permitted attendee may attend the Auction telephonically; provided, further, that such permitted attendee must provide actual notice to Lazard that it will make such an appearance at least one (1) business day prior to the Auction. Bidding Procedures.

i) No Contingencies: A Qualified Bid shall not be subject to any contingencies to the validity, effectiveness, and/or binding nature of the bid, including without limitation, contingencies for due diligence and inspection or financing of any kind (including any conditions pertaining to financial performance, conditions, or prospects) and all diligence must be completed by the Bid Deadline. Bidding Procedures.

j) Irrevocability: A Qualified Bid, if determined to be the Successful Bid or Backup Bid, will be irrevocable for a period of thirty (30) days after the conclusion of the Auction. Bidding Procedures.

The Debtors stated that the proposed bidding procedures were in the best interest of the Debtor's estate and should be approved because the procedures were a sound exercise of their

business judgment.[511] The Debtors argued that the paramount goal in any proposed disposition of estate property is to maximize proceeds[512] and that Courts uniformly recognize procedures intended to enhance competitive bidding are consistent with the goal of maximizing the value received and therefore are appropriate in the context of bankruptcy transactions.[513] Therefore, the Debtor believed that the proposed Bidding Procedures and Assumption and Assignment Procedures would facilitate active bidding and elicit the highest or best possible offers.

On October 10, 2018, Toys (Labuan) Holding Limited filed a limited objection to the proposed bidding procedures to the extent that they (i) relate to a transaction that purports to sell Source Code and Oracle Data that belong to the Asia Companies without allowing for the immediate return of that data to the Asia Companies and (ii) fail to establish appropriate procedural safeguards against allowing the Asia Companies' competitors to access commercially sensitive information about the Asia JV that may be in the possession of Toys Delaware by virtue of its status as the ITASSA[514] services provider.[515]

On October 16, 2018, Oracle Credit Corporation and Oracle America, Inc. also filed a limited objection to the bidding procedures to the extent that the Debtors sought authority from

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[511] *Id.* at 13. *See e.g. In re Schipper*, 933 F.2d 513, 515 (7th Cir. 1991) ("Under Section 363, the debtor in possession can sell property of the estate . . . if he has an 'articulated business justification . . ..'" (internal citations omitted)); *In re Martin*, 91 F.3d 389, 395 (3d Cir. 1996) (quoting In re Schipper); *In re Montgomery Ward Holding Corp.*, 242 B.R. 147, 153 (D. Del. 1999) (same); *see also In re Integrated Res.*, Inc., 147 B.R. 650, 656–57 (S.D.N.Y. 1992) (noting that bidding procedures that have been negotiated by a trustee are to be reviewed according to the deferential "business judgment" standard, under which such procedures and arrangements are "presumptively valid").

[512] *Id. See e.g.* In re Edwards, 228 B.R. 552, 561 (Bankr. E.D. Pa. 1998) ("The purpose of procedural bidding orders is to facilitate an open and fair public sale designed to maximize value for the estate."); In re Food Barn Stores, Inc., 107 F.3d 558, 564–65 (8th Cir. 1997) (in bankruptcy sales, "a primary objective of the Code [is] to enhance the value of the estate at hand"); In re Integrated Res., 147 B.R. at 659 ("[I]t is a well-established principle of bankruptcy law that the objective of the bankruptcy rules and the trustee's duty with respect to such sales is to obtain the highest price or greatest overall benefit possible for the estate.") (citations omitted).

[513] *Id. See e.g.* See, e.g., id. (bidding procedures "are important tools to encourage bidding and to maximize the value of the debtor's assets"); In re Fin. News Network, Inc., 126 B.R. 152, 156 (Bankr. S.D.N.Y. 1991) ("[C]ourt-imposed rules for the disposition of assets . . . [should] provide an adequate basis for comparison of offers, and [should] provide for a fair and efficient resolution of bankrupt estates.")

[514] The ITASSA is a services contract pursuant to which the Asia JV received information technology applications development services, infrastructure services, and operations services that were necessary to perform day-to-day functions

[515] Docket No. 5203.pdf.

the Bankruptcy Court to (1) continue to use and benefit from Oracle's contracts through the Shared Services Business without first assuming and curing amounts owed thereunder; (2) share use of or transfer Oracle agreements to a third party without Oracle's prior written consent; or (3) compel Oracle to continue to provide licenses and related services to the Debtors through the Shared Services Business without compensation.[516]

Also, on October 16, 2018 an *ad hoc* group of Taj noteholders objected to the bidding procedures, however, their objection was based on the international nature of the bankruptcy which is outside the scope of this paper.[517]

On October 18, 2018, the Court entered an Order Establishing Bidding Procedures for the Sale of the Shared Services Business.[518] The Court found that the bidding procedures were reasonable and appropriate and represent the best available method for maximizing value for the benefit of the Debtor's estates. The bidding procedures balanced the Debtor's interests in emerging expeditiously from the Chapter 11 cases while preserving the opportunity to attract value-maximizing proposals beneficial to the Debtor's estate, its creditors, and other parties in interest. The Court also ordered that all objections to the relief requested in the Motion were overruled.

[516] Oracle's Limited Objection to (1) Debtors' Motion for Entry of an Order (I) Establishing Bid Procedures for the Sale of the Shared Services Business, (II) Scheduling an Auction and Hearing to Consider the Sale, (III) Approving the Form and Manner of Notice, and (IV) Granting Related Relief; and (2) Technical Modifications/Third Amended Chapter 11 Plans of the Toys Delaware Debtors and Geoffrey Debtors. Docket No. 5289.pdf.

[517] Objection of the Ad Hoc Group of Taj Noteholders to the Debtors' Motion for Entry of an Order (I) Establishing Bidding Procedures for the Sale of the Shared Services Business, (II) Scheduling an Auction and Hearing to Consider the Sale, (III) Approving the Form and Manner of Notice, and (IV) Granting Related Relief. Docket No. 5291.pdf; *See* n. 557.

[518] Order (I) Establishing Bidding Procedures for the Sale of the Shared Services Business, (II) Scheduling an Auction and Hearing to Consider the Sale, (III) Approving the Form and Manner of Notice, and (IV) Granting Related Relief. Docket No. 5310.pdf.

Motion for Entry of an Order Authorizing Entry into the Zurich Buyout Agreement and Establishing Expedited Procedures to Engage in Further LPT Transactions

On December 4, 2018, the Debtors sought entry of an Order (a) authorizing, but not directing, the Debtors to enter into the Zurich Buyout Agreement and (b) establishing expedited procedures to engage in further LPT Transactions (the "Zurich Buyout Motion").[519]

The Debtors posted letters of credit in the aggregate face amount of $77,570,058.00 (collectively, the "Insurance Letters of Credit") as security for the Debtors' obligations relating to policies issued by certain insurance carriers and as security for associations or funds that were responsible for payment of the Debtors' self-insured workers compensation claims if the Debtors stopped paying such claims (the "Guarantee Funds"). All of the beneficiaries of the Insurance Letters of Credit received notice of nonrenewal of the Insurance Letters of Credit, and sometime afterwards began drawing on the Insurance Letters of Credit[520] received the proceeds of such draws (the "Insurance Letters of Credit Proceeds") as collateral for the Debtors' applicable insurance obligations.[521]

Although the Debtors believed the Insurance Letter of Credit Proceeds exceeded the amount of claims secured by such proceeds, it was possible that the amount of claims covered ultimately exceeded the Insurance Letters of Credit Proceeds. Moreover, the Debtors may not have been able to receive any excess Insurance Letters of Credit Proceeds for several years. Therefore, the Debtors sought to liquidate their rights to recover the Insurance Letters of Credit Proceeds to

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[519] Debtors' Motion for Entry of an Order (A) Authorizing Entry into the Zurich Buyout Agreement, (B) Establishing Expedited Procedures to Engage in Further LPT Transactions, and (C) Granting Related Relief. Docket No. 5856.pdf.

[520] The Debtors provided Insurance Letters of Credit to Zurich American Insurance Company, Zurich Management Services , the Travelers Indemnity Company, Travelers Casualty and Surety Company of America, the Florida Self-Insurers Guaranty, the Ohio Bureau of Workers Compensation, the New Jersey Self Insurers Guaranty Association, the Common Wealth of Massachusetts Executive Office of Labor and Workforce Development, Department of Industrial Affairs, and the Rhode Island Department of Labor & Training Worker's Compensation Self-Insurance Unit.

[521] Docket No. 5856.pdf.

the extent of the excess over the amounts due to their insurers and Guaranty Funds, rather than have the funds held up until the underlying insurance claims have been resolved.[522]

Through negotiations led by JLT Specialty Insurance Services Inc. ("JLT"), the debtors reached an agreement with Zurich American Insurance Company and American Zurich Insurance Company (collectively, "Zurich") with respect to a Collateral Refund in the amount of $12,951,000.00 (the "Zurich Buyout Agreement"). The consummation of this agreement would allow the Debtors to access this Collateral Refund earlier, which would maximize value for the Debtors' estates.

By the terms of the proposed Zurich Buyout Agreement, Zurich would release the Debtors from any payment obligation for premiums, retrospective premiums, assessments, deductibles, and loss billings owed to Zurich by the Debtors under the workers compensation, general liability, and automobile liability policies issued by Zurich to the Debtors before July 1, 2018 (the "Zurich Policies") and certain agreements relating to the Zurich Policies (the "Non-Policy Agreements").

As security for the Debtors' payment obligations to Zurich under the Zurich Policies and the Non-Policy Agreements, and as security for all other obligations owed by the Debtors or any of its affiliates to Zurich or any of its affiliates, Zurich held two letters of credit issued by JPMorgan Chase & Co ("JPMorgan"), which were issued at the request of Toys "R" Us – Delaware, Inc. ("Toys- Delaware") for the benefit of Toys "R" Us, Inc., totaling $50,451,000 (the "Zurich Letters of Credit"). Under the terms of the proposed Zurich Buyout Agreement, Zurich would draw the entire amount of the Zurich Letters of Credit and would remit $12,951,000 to Toys-Delaware on or prior to the later of (i) thirty days after Zurich received the proceeds of such draw from JPMorgan, or (ii) five business days after the order approving the Zurich Buyout Agreement became final and no longer subject to appeal

Although Zurich held the majority of the Insurance Letters of Credit, the Debtors, by and through JLT, were actively negotiating settlement agreements for the return of Insurance Letter of Credit Proceeds with their other insurers and the Guaranty Funds, as well as seeking agreements with third parties. Instead of burdening the Court with additional motions seeking substantially the same relief, the Debtors proposed to implement procedures (the "LPT Procedures") for approval

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[522] *Id.*

of additional buyout agreements, or transfer agreements with third parties (or so-called "Loss Portfolio Transfers") (each an "LPT Transaction").

The Debtors proposed to implement the following LPT Procedures to engage in LPT Transactions in order to monetize their rights to Collateral Refunds:[523]

a) The Debtors are authorized to consummate or authorize such transactions, as applicable, if the Debtors determine in the reasonable exercise of their business judgment that such LPT Transactions are in the best interests of their estates, without further order of the Court, subject to the procedures set forth herein;

b) the Debtors shall, at least fourteen (14) calendar days prior to closing, effectuating, or authorizing such an LPT Transaction, give written notice of such LPT Transaction substantially in the form attached as Exhibit 1 to the proposed Order attached hereto (each notice, a "LPT Transaction Notice") to (a) the U.S. Trustee, (b) the Committee and the advisors to the Committee, (c) the applicable insurer or Guaranty Fund and third-party purchaser (if applicable), (d) Zurich Service Corporation, or the applicable third-party administrator handling the claims which are related to the proposed LPT Transaction and (e) the Ad Hoc Committee of B-4 Lenders (collectively, the "LPT Procedures Notice Parties").

c) the content of the notice sent to the LPT Procedures Notice Parties shall consist of: (a) identification of insurance policies subject to the transaction; (b) identification of the Debtor(s) that directly own such assets; (c) identification of the purchaser of the Collateral Refund ; (d) the purchase price and terms of payment, including the cash and other consideration to be paid by the purchaser; (e) the executory contracts, if any, that the Debtors propose to be assumed, assumed and assigned, or rejected as part of the proposed LPT Transaction; (f) for any assumption, or assumption and assignment, of an executory contract or unexpired lease, the amounts required to cure any defaults pursuant to section 365(b) of the Bankruptcy Code, and a statement regarding the adequate assurance of future performance by the purchaser or transferee, consistent with section 365 of the Bankruptcy Code; (g) the marketing or sales process, including any commissions to be paid to third parties used to negotiate the LPT Transaction; and (h) the significant terms of the LPT Transaction;

d) if no written objection by any of the LPT Procedures Notice Parties is received by the Debtors' counsel or filed with this Court within fourteen (14) calendar days of the date of such notice (the "LPT Procedures Objection Deadline"), the Debtors are authorized, after consulting with the Committee, to immediately consummate such LPT Transaction and to pay any commission(s) and/or fee(s) owed to JLT related to the LPT Transaction;

[523] *Id.* at 7-8.

e) if the terms of a proposed LPT Transaction are materially amended after transmittal of the LPT Transaction Notice but prior to the LPT Procedures Objection Deadline, the Debtors will send a revised LPT Transaction Notice to the LPT Procedures Notice Parties. The LPT Procedures Objection Deadline will be extended such that the LPT Procedures Notice Parties will have an additional five (5) calendar days to object in accordance with the LPT Procedures;

f) if a written objection by a LPT Procedures Notice Party is received by the Debtors' counsel by the LPT Procedures Objection Deadline and such objection cannot be resolved by the LPT Procedures Objection Deadline, the LPT Procedures Notice Party shall file the objection with this Court and such transaction will only be entered into upon withdrawal of such written objection or further order of the Court; and

g) good faith purchasers of assets shall be entitled to the protections of section 363(m) of the Bankruptcy Code.

The Debtors believed that the Zurich Buyout Agreement was an appropriate exercise of their business judgement and that it was in the best interest of the Debtors' estates. Section 363(b)(1) of the Bankruptcy Code provides, in relevant part, that "[t]he trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate . . . ."[524] Section 363(b) of the Bankruptcy Code does not specify a standard for determining when it is appropriate for a court to authorize the use, sale, or lease of property of the estate; however, bankruptcy courts within this jurisdiction have required that the authorization of such use, sale, or lease of property of the estate, not in the ordinary course of business, must be based upon the sound business judgment of the debtor.[525]

The Debtors argued that once a debtor articulates a valid business justification for its actions, courts should "give great deference to the substance of the directors' decision and will not invalidate the decision, will not examine its reasonableness, and will not substitute its views for

[524] 11 U.S.C. § 363(b)(1).

[525] Docket No. 5856.pdf. *See e.g.* In re W.A. Mallory Co., Inc., 214 B.R. 834, 836 (Bankr. E.D. Va. 1997) (adopting the "sound business purpose" test for section 363 purposes and citing Lionel as authority therefor); In re WBQ P'ship, 189 B.R. 97, 102 (Bankr. E.D. Va. 1995) (same); see also In re Lionel Corp., 722 F.2d 1063, 1070 (2d Cir. 1983) (requiring "some articulated business justification" to approve the use, sale, or lease of property outside the ordinary course of business).

those of the board if the latter's decision can be attributed to any rational business purpose."[526] Thus, if a debtor's actions satisfy the business judgment rule, then the transaction in question should be authorized under section 363(b)(1) of the Bankruptcy Code.

The Debtors believed there was strong business justification for entry into the Zurich Buyout Agreement because the funds made available to the Debtors through the Zurich Buyout Agreement would provide an additional source of funding to maximize the value of the Debtors' estates and facilitate greater creditor recoveries. Absent this agreement, the Collateral Refund relating to the Zurich Policies may not have been returned to the Debtors for several years. Further, if the underlying insurance claims which the Letter of Credit Proceeds secure were larger than currently estimated, the Debtors might never receive any recovery from Zurich. Pursuant to the Zurich Buyout Agreement, the Debtors were not only guaranteed a return of $12.951 million, but also received that return immediately. Ultimately, this was substantial value that could be distributed to the Debtors' creditors.

On December 14, 2018, the Florida Self-Insurers Guaranty Association, Inc. ("FSIGA") filed a limited objection to the Zurich Buyout Motion.[527] FSIGA objected to the establishment of procedures to engage in further LPT Transactions to the extent it is an attempt to recover the proceeds of the Letter of Credit held by FSIGA. The objector argued that the Debtor would first have to establish that the Letter of Credit and the proceeds are property of the estate before it can proceed to sell or transfer them under 11 U.S.C. 363(b)(1).

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[526] Docket No. 5856.pdf at 9. *See e.g.* In re Global Crossing Ltd., 295 B.R. 726, 744 (Bankr. S.D.N.Y. 2003) (citing Paramount Commc'ns Inc. v. QVC Network Inc., 637 A.2d 34, 45 n.17 (Del. 1994)); accord Integrated Res., 147 B.R. 650, 656 (S.D.N.Y. 1992) (presuming, based on the business judgment rule, "that in making a business decision the directors of [the debtor] acted on an informed basis, in good faith and in the honest belief that the action was in the best interests of the company") (quoting Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985)); In re Johns-Manville Corp., 60 B.R. 612, 616 (Bankr. S.D.N.Y. 1986) ("Where the debtor articulates a reasonable basis for its business decisions (as distinct from a decision made arbitrarily or capriciously), courts will generally not entertain objections to the debtor's conduct."); see also In re Filene's Basement, LLC, 11-13511 (KJC), 2014 WL 1713416, at *12 (Bankr. D. Del. Apr. 29, 2014) ("If a valid business justification exists, then a strong presumption follows that the agreement at issue was negotiated in good faith and is in the best interests of the estate . . . .") (citations omitted).

[527] Limited Objection of Florida Self-Insurers Guaranty Association, Inc., to Debtors' Motion for Entry of an Order (A) Authorizing Entry into the Zurich Buyout Agreement, (B) Establishing Expedited Procedures to Engage in Further LPT Transactions, and (C) Granting Related Relief. Docket No. 5968.pdf.

Also, on December 14, 2018, the New Jersey Self-Insurers Guaranty Association ("NJSIGA") filed a limited objection to the Zurich Buyout Motion.[528] This objection was filed because in footnote 3 of the Motion, NJSIGA was listed as beneficiary of which the Debtors have provided Insurance Letters of Credit. However, in order to be self-insured in New Jersey, the Debtors established a DOBI Bond with DOBI, not a letter of credit. Letters of credit are not a permissible form of collateral to support self-insured status in the State of New Jersey and it is NJSIGA's understanding that no letters of credit are associated with the existing DOBI Bond. Thus, NJSIGA assumed that the Debtors were not intending to refer to the DOBI Bond despite the reference to NJSIGA in footnote 3 of the Motion. Therefore, NJSIGA filed this objection out of an abundance of caution to reserve all of its rights, claims, and defenses regarding the DOBI Bond.

On December 18, 2018, the Debtors filed a Revised Proposed Order that directly dealt with FSIGA and NJSIGA's objections.[529] In this revised proposed order, not only did the Debtors carve FSIGA and NJSIGA out of the definition of Guarantee Fund and possible LPT Transactions, but they carved them out entirely. Paragraph 14 of the revised proposed order stated, "Nothing herein this Order shall apply to the New Jersey Self-Insurers Guaranty Association, the New Jersey Department of Banking and Insurance, or the Florida Self-Insurers Guarantee Association, or any collateral held for the benefit of those entities."[530]

On December 20, 2018, the Court entered an Order Authorizing Entry into the Zurich Buyout Agreement and Establishing Expedited Procedures to Engage in Further LPT Transactions.[531] The Court found that the requested relief was in the best interest of the Debtor's estates, their creditor, and other parties in interest. After having reviewed the Motion and having heard the statements in support of the relief requested at a hearing before the Court, the Court

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[528] New Jersey Self-Insurers Guaranty Association's Limited Opposition to Debtors' Motion for Entry of an Order (A) Authorizing Entry into the Zurich Buyout Agreement, (B) Establishing Expedited Procedures to Engage in Further LPT Transactions, and (C) Granting Related Relief and Reservation of Rights. Docket No. 5969.pdf.

[529] Notice of Filing of Revised Proposed Order (A) Authorizing Entry into the Zurich Buyout Agreement, (B) Establishing Expedited Procedures to Engage in Further LPT Transactions, and (C) Granting Related Relief. Docket No. 5995.pdf.

[530] *Id.* at 5.

[531] Order (A) Authorizing Entry into the Zurich Buyout Agreement, (B) Establishing Expedited Procedures to Engage in Further LPT Transactions, and (C) Granting Related Relief. Docket No. 6025.pdf.

determined that the legal and factual bases set forth in the Motion established just cause for the relief granted.

Motion for an Order Establishing Bidding Procedures for Sale of Propco II Assets

On June 11, 2018, Propco II Debtors filed a Motion seeking an entry of an Order for multiple items including (i) the approval of the proposed bidding procedures by which the Propco II Debtors would solicit and select the highest or otherwise best offer or offers for the sale, or sales (collectively, the "Sale"), of any or all of the assets of the Propco II Debtors, including any owned real property and commercial leases (each, an "Asset" and collectively, the "Assets"); (ii) approval for the Propco II Debtors' selection of TRU Trust 2016-Toys, Commercial Mortgage Pass-Through Certificates, Series 2016-TOYS (the "Trust") acting through Wells Fargo Bank, National Association, as special servicer (the "Special Servicer"), as the stalking horse bidder (the "Stalking Horse Bidder") and the provision of the reasonable out-of-pocket expenses incurred by the Special Servicer in its capacity as the Stalking Horse Bidder (each, an "Expense Reimbursement" and collectively, the "Expense Reimbursements"); and (iii) approval of the form of the stalking horse asset purchase agreement between the Propco II Debtors and the Stalking Horse Bidder.[532]

To optimally and expeditiously solicit, receive, and evaluate bids in a fair and accessible manner under the circumstances, the Propco II Debtors developed and proposed bidding procedures that included the following material provisions:[533]

a) Eligibility of Bidders to Participate: In order to be eligible to bid for the Sale of any Assets subject to bidding process or otherwise participate in the Auction, each bidder must be determined, in the sole discretion of the Propco II Debtor, to be a Qualified Bidder. The Propco II Debtor shall have the sole right to determine, in consultation with the Consultation Parties, whether a bidder is a Qualified Bidder. The Stalking Horse Bidder shall be deemed a Qualified Bidder with respect to any Assets.

[532] Propco II Debtors' Motion for Entry of an Order (I) Establishing Bidding Procedures for the Sale of the Propco II Assets, (II) Scheduling an Auction and Hearing to Consider the Sale, (III) Approving the Form and Manner of Notice Thereof. (IV) Authorizing Certain Expense Reimbursement Provisions, (V) Establishing an Intercompany Administrative Claims Bar Date, (VI) Scheduling Hearing and Deadline with Respect to the Propco II Debtors' Disclosure Statement and Plan Confirmation, (VII) Shortening the Objection Periods and Notice Requirements Related Thereto, and (VIII) Granting Related Relief. Docket No. 3381.pdf.

[533] *Id.* at 12-15.

b) The Stalking Horse Bid: On the terms and subject to the conditions contained in the Stalking Horse Agreement, the Stalking Horse Bidder would commit to acquire the Assets, free and clear of all claims, interests, liens and encumbrances, in exchange for a combination of the Credit Bid and the Stalking Horse Bidder's assumption of only the post-closing obligations of the Propco II Debtor under those designated contracts scheduled under the Stalking Horse Agreement (including costs to cure any defaults under such contracts), and any other items expressly scheduled under the Stalking Horse Agreement.

c) Initial Qualified Bidders: Except as otherwise set forth in the Bidding Procedures, in order to be considered for status as an Initial Qualified Bidder and to have an Initial Qualified Bid during the first phase of the bid process a bidder (other than the Stalking Horse Bidder) must timely deliver to the parties set forth in the Bidding Procedures a non-binding indication of interest to purchase the Assets at issue that is: (i) a cash bid; and (ii) unless otherwise consented to by the Special Servicer, is a bid for all of the Assets, or is an Individual Bid.

d) Deposit: In order to be considered for status as an Initial Qualified Bidder, contemporaneous with the submission of an Initial Bid on or prior to the Initial Bid Deadline, a bidder must tender an earnest money deposit of ten percent (10.0%) of the proposed purchase price. In the event that an Initial Qualified Bidder withdraws from the process prior to July 31, 2018, such bidder's deposit shall be refunded within five (5) business days of written notice of such Initial Qualified Bidder's withdrawal. The deposit of any Initial Qualified Bidder that does not withdraw from the process prior to July 31, 2018 shall be returned to such bidder after the Auction unless it is the Successful Bidder or Backup Bidder at the Auction; provided that if Propco II does not initiate a second phase of the bid process, each bidder's deposit shall be promptly returned.

e) Final Qualified Bidders: Solely to the extent the Debtors initiate the Phase 2 Bid Process, in order to be considered for status as a Final Qualified Bidder and to have a Final Qualified Bid, a bidder must satisfy the requirements set forth in the Bidding Procedures, including timely delivery of a written offer to the parties set forth in the Bidding Procedures in the aggregate, for a bid or bids for cash in an amount not less than the sum necessary to pay in full in cash: (1) an amount equal to the Credit Bid; (2) the Expense Reimbursement; and (3) a minimum overbid of $1.0 million. Only Final Qualified Bidders shall be entitled to make any subsequent bids at the Auction.

f) Markup of Applicable Agreement: A Final Qualified Bid must include an executed form of the purchase, assignment, or termination agreement, as applicable, that may not deviate substantially from the terms of the form Stalking Horse Agreement attached as Exhibit A to the Bidding Procedures as well as a "redline" to the Stalking Horse Agreement.

g) Bids for Individual Assets or Combinations of Assets: The Propco II Debtor may consider any Qualified Bids for any portion of the Purchased Assets; provided that for Individual Bids to be selected as the Final Qualified Bid and/or the Successful Bid at the Auction, the sum of all Individual Bids must collectively exceed the Credit Bid or the Credit Overbid, as applicable. All Individual Bids that are less than the Credit Bid shall be held as confidential by the Debtors. Unless all such bids total in the aggregate more than the Credit Bid, such bids shall be shared with only (i) the Special Servicer, and (ii) the Consultation Parties' professionals on a professional-eyes only basis. If Individual Bids received do not exceed in the aggregate the Credit Bid, the Debtors shall not accept any Individual Bids at the Auction, unless otherwise consented to by the Special Servicer. To the extent a bidder is bidding on more than one Propco II property, written offers should include a schedule listing an allocation of a portion of such bidder's aggregate proposed purchase price to each Propco II property included in the total bid.

h) Due Diligence: The Propco II Debtor shall establish a virtual data room (the "Data Room") that provides standard and customary diligence materials for a transaction of this type. The Propco II Debtor may require Qualified Bidders to execute a non-disclosure agreement prior to providing diligence to such Qualified Bidder. The Data Room shall be available to the Consultation Parties' professionals on a professional-eyes only basis. The Special Servicer agrees that it will make any new property condition reports, title, survey, and any environmental review available to the Propco II Debtor for posting in the Data Room; provided that the Special Servicer will not provide any appraisals, projections, or other proprietary information related to the Properties.

i) Date, Time, and Location of the Auction: If the Debtors initiate the Phase 2 Bid Process, the Debtors and the Special Servicer shall negotiate in good faith the time period for such process, including the dates for the Final Bid Deadline and the Auction. The Propco II Debtor will send written notice of the date, time, and place of the Auction to the Final Qualified Bidders no later than two business days before such Auction, and file a notice of the date, time, and place of the Auction with the Court no later than two business days before such Auction and post such notice on the Propco II Debtor's case website. The Propco II Debtor may modify the date, time, and place of the Auction by providing written notice to Final Qualified Bidders and filing a notice with the Court so long as such notice is no later than two days before the Auction.

j) Permitted Attendees at the Auction: Unless otherwise ordered or directed by the Court, only representatives of the Propco II Debtors, any other parties invited specifically by the Propco II Debtors, the Consultation Parties, Lease Counterparties, the Stalking Horse Bidder, the Special Servicer, the Controlling Class Representative (as defined in the Trust and Servicing Agreement dated as of November 3, 2016), and any Final Qualified Bidders (and the professionals for each of the foregoing) shall be entitled to attend the Auction; provided that

only (i) the Stalking Horse Bidder and (ii) other Final Qualified Bidders that have submitted Final Qualified Bids by the Final Bid Deadline shall be entitled to bid at the Auction. Any permitted attendee may attend the Auction telephonically; provided further, that such permitted attendee must provide actual notice to A&G and Lazard that it will make such an appearance at least one business day prior to the Auction.

k) No Contingencies: A Qualified Bid shall not be subject to any contingencies to the validity, effectiveness, and/or binding nature of the bid, including without limitation, contingencies for due diligence and inspection or financing of any kind (including any conditions pertaining to financial performance, conditions, or prospects) and all diligence must be completed before the Auction.

l) Excluded Assets: Up until five (5) days before closing of the sale, the Stalking Horse Bidder shall have the right, in its sole discretion, to remove any of the Assets from the Stalking Horse Bid (such assets, the "Excluded Assets"). The Credit Bid shall be reduced by the Allocated Loan Amount (as defined in the Mortgage Loan Agreement) for each Excluded Asset.

m) Expense Reimbursements: The Stalking Horse Bidder and the Special Servicer shall be entitled to reimbursement for all of their documented, reasonable, out-of-pocket fees and expenses, including, without limitation, all reasonable fees and expenses incurred by the Stalking Horse Bidder and Special Servicer in connection with the Sale, including the fees and expenses of legal counsel and financial advisors. In the event the Stalking Horse Bidder is not the successful bidder at the Auction, the Expense Reimbursement shall be paid in full and in cash from the proceeds of the Sale of the Assets to the successful bidder.

n) Irrevocability: A Qualified Bid, if determined to be the Successful Bid or Backup Bid, will be irrevocable for a period of thirty (30) days after the conclusion of the Auction.

o) As-Is, Where-Is: All bidders must acknowledge and agree that the Propco II Debtor shall sell and transfer the Assets to the Successful Bidder and the Successful Bidder shall accept the Assets "AS IS, WHERE IS, WITH ALL FAULTS."

p) Closing: Subject to entry of the Sale Order, and solely to the extent there is no Phase 2 Bid Process, the closing of the sale of the Purchased Assets shall occur no later than July 31, 2018, in accordance with the terms of the Stalking Horse Agreement, unless otherwise consented to by the Special Servicer. If the Debtors initiate the Phase 2 Bid Process, the Debtors and the Special Servicer shall negotiate in good faith an extension of the closing to allow for the Phase 2 Bid Process.

The Propco II Debtors sought an Order on basis that it would be in the best interest of the Debtor's estates.[534] The paramount goal in any proposed disposition of property of the estate is to maximize the proceeds received by the estate.[535] To that end, courts uniformly recognize that procedures intended to enhance competitive bidding are consistent with the goal of maximizing the value received by the estate and therefore are appropriate in the context of bankruptcy transactions.[536]

The Propco II Debtors believed that the proposed Bidding Procedures would promote active bidding from seriously interested parties and would elicit the highest or otherwise best offers available for the Assets. The Debtors argued that the proposed Bidding Procedures would allow them to conduct the Sale in a controlled, fair, and open fashion that would encourage participation by financially capable bidders who would offer the best package for the Assets and who could demonstrate the ability to close a transaction. At the same time, the Bidding Procedures would provide the Propco II Debtors with an opportunity to consider competing bids and select the highest or otherwise best offer for the completion of the Sale.

On June 20, 2018, the U.S. Trustee filed an objection to the Motion because the Motion sought expedited relief in conjunction with the filed Disclosure Statement and Plan that provided less than 28 days' notice for creditors to review the Disclosure Statement and Plan in violation of the creditors' due process rights, Bankruptcy Rules 2002(b)(1) and 3017(a), and Local Rule 3016-1.[537] The U.S. Trustee further requested that any order approving the Propco II Assets Bidding

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[534] *Id.* at 16.

[535] *See* In re Edwards, 228 B.R. 552, 561 (Bankr. E.D. Pa. 1998) ("The purpose of procedural bidding orders is to facilitate an open and fair public sale designed to maximize value for the estate."); In re Food Barn Stores, Inc., 107 F.3d 558, 564–65 (8th Cir. 1997) (in bankruptcy sales, "a primary objective of the Code [is] to enhance the value of the estate at hand"); In re Integrated Res., 147 B.R. at 659 ("[I]t is a well-established principle of bankruptcy law that the objective of the bankruptcy rules and the trustee's duty with respect to such sales is to obtain the highest price or greatest overall benefit possible for the estate.") (citations omitted).

[536] *See, e.g., id.* (bidding procedures "are important tools to encourage bidding and to maximize the value of the debtor's assets"); In re Fin. News Network, Inc., 126 B.R. 152, 156 (Bankr. S.D.N.Y. 1991) ("[C]ourt-imposed rules for the disposition of assets . . . [should] provide an adequate basis for comparison of offers, and [should] provide for a fair and efficient resolution of bankrupt estates.").

[537] United States Trustee's Objection to Propco II Debtors' Motion for Entry of an Order (I) Establishing Bidding Procedures for the Sale of the Propco II Assets, (II) Scheduling an Auction and Hearing to Consider the Sale, (III) Approving the Form and Manner of Notice Thereof. (IV) Authorizing Certain Expense Reimbursement Provisions, (V) Establishing an Intercompany Administrative Claims Bar Date, (VI) Scheduling Hearing and Deadline with

Procedure Motion require the Propco II Debtors to reduce the overbid that requires it to conduct phase two of the auction from $490 million to $480 million; to remove the Stalking Horse as a consultation party, and to state that the Stalking Horse (not the Debtor) will pay Lazard and A&G.

On June 23, 2018, the Propco II Debtors filed a revised proposed order that specifically addressed the U.S. Trustee's objection.[538] First, the proposed order pushed back the timeline as to satisfy the 28-day notice requirement. Next, the Debtors altered the overbid amount from $490 million to $375 million. However, the Stalking Horse Bidder remained a member of the consultation party and the Debtor was still the one obligated to pay Lazard and A&G.

On June 25, 2018, the Court entered an Order officially establishing the Bidding Procedures for the sale of the Propco II Assets.[539] The Court found that the Bidding Procedures were reasonable and appropriate and represented the best available method for maximizing value for the benefit of the Propco II Debtors' estates. In addition, all objections were overruled.

Motion for an Order Establishing Bidding Procedures for the Sale of the Debtors' U.S. Intellectual Property Assets.

On May 11, 2018, a motion was filed by the Debtors to establish the bidding procedures for the sale of the Debtors' U.S. Intellectual Property Assets, including the E-Commerce assets.[540]

Respect to the Propco II Debtors' Disclosure Statement and Plan Confirmation, (VII) Shortening the Objection Periods and Notice Requirements Related Thereto, and (VIII) Granting Related Relief. Docket No. 3468.pdf.

[538] Notice of Filing of Revised Proposed Order (I) Establishing Bidding Procedures for the Sale of the Propco II Assets, (II) Scheduling an Auction and Hearing to Consider the Sale, (III) Approving the Form and Manner of Notice Thereof. (IV) Authorizing Certain Expense Reimbursement Provisions, (V) Establishing an Intercompany Administrative Claims Bar Date, (VI) Scheduling Hearing and Deadline with Respect to the Propco II Debtors' Disclosure Statement and Plan Confirmation, (VII) Shortening the Objection Periods and Notice Requirements Related Thereto, and (VIII) Granting Related Relief. Docket No. 3517.pdf.

[539] Order (I) Establishing Bidding Procedures for the Sale of the Propco II Assets, (II) Scheduling an Auction and Hearing to Consider the Sale, (III) Approving the Form and Manner of Notice Thereof. (IV) Authorizing Certain Expense Reimbursement Provisions, (V) Establishing an Intercompany Administrative Claims Bar Date, (VI) Scheduling Hearing and Deadline with Respect to the Propco II Debtors' Disclosure Statement and Plan Confirmation, (VII) Shortening the Objection Periods and Notice Requirements Related Thereto, and (VIII) Granting Related Relief. Docket No. 3542.pdf.

[540] Selling Debtors' Motion for Entry of an Order (I) Establishing Bidding Procedures for the Sale of the Debtors' U.S. Intellectual Property Assets, Including the U.S. E-Commerce Assets, (II) Approving the Sale of the U.S. Intellectual Property Assets, Including the U.S. E-Commerce Assets, and (III) Granting Related Relief. Docket No. 3066.pdf.

The Court granted the motion and filed an Order approving the bidding procedures on May 24, 2018.[541] However, on October 1, 2018, the Debtors filed a Notice of the Cancellation of the Intellectual Property Auction.[542] The Debtors decided to hold on to their Intellectual Property in an attempt to launch a rebranding of the company.[543]

The Plan:

Chapter 11 Plan for Propco II and Giraffe Junior Holding

a) Initial Plan[544]

i. Overview

This plan was put in place to facilitate the sale of all or substantially all of the assets of Giraffe Junior Holdings, an indirect wholly-owned subsidiary of Toys "R" Us, Inc., and Propco II, a direct wholly-owned subsidiary of Giraffe Junior Holdings (collectively, the "Propco II Debtors").[545] The purpose of the plan under Chapter 11 of the bankruptcy code is to bind the debtor, any person acquiring property under the plan, any creditor or equity interest holder of the debtor, and any other entity as many be ordered by the bankruptcy court. The order that was eventually issued by the bankruptcy court confirming the plan provides for the treatment of the debtor's liabilities in accordance with the terms of the confirmed plan.

ii. Creditor Classification:

In this plan, the creditors were broken down into the following classifications:[546]

[541] Order (I) Establishing Bidding Procedures for the Sale of the Debtors' U.S. Intellectual Property Assets, Including the U.S. E-Commerce Assets, (II) Approving the Sale of the U.S. Intellectual Property Assets, Including the U.S. E-Commerce Assets, and (III) Granting Related Relief. Docket No. 3233.pdf.

[542] Notice of Cancellation of Intellectual Property Auction. Docket No. 5058.pdf.

[543] *See* Current Status section, *infra.*

[544] Joint Chapter 11 Plan of Toys "R" Us, Property Corporation II, LLC and Giraffe Junior Holdings, LLC. Docket No. 3382.pdf.

[545] Disclosure Statement for The Joint Chapter 11 Plan of Toys "R" Us Property Corporation II, LLC and Giraffe Junior Holdings, LLC. Docket No. 3383.pdf.

[546] *Id.* at 3. S*ee* Notice of Filing of Disclosure Statement for The Amended Joint Chapter 11 Plan of Toys "R" Us Property Corporation II, LLC and Giraffe Junior Holdings, LLC (For a summary of expected recoveries per class). Docket No. 3650.pdf.

Class	Claim/Interest	Status	Voting Rights
Class A1	Other Secured Claims against Propco II	Unimpaired	Not Entitled to Vote (Deemed to Accept)
Class A2	Other Priority Claims against Propco II	Unimpaired	Not Entitled to Vote (Deemed to Accept)
Class A3	Mortgage Loan Secured Claims against Propco II	Impaired	Entitled to Vote
Class A4	General Unsecured Claims against Propco II	Impaired	Entitled to Vote
Class A5	Propco II Interests	Impaired	Entitled to Vote
Class B1	Other Secured Claims against Giraffe Junior	Impaired	Entitled to Vote
Class B2	Other Priority Claims against Giraffe Junior	Impaired	Entitled to Vote
Class B3	Giraffe Junior Mezzanine Loan Claims	Impaired	Entitled to Vote
Class B4	General Unsecured Claims against Giraffe Junior	Impaired	Entitled to Vote
Class B5	Giraffe Junior Interests	Impaired	Entitled to Vote

iii. Summary of Expected Recoveries[547]

The creditors in the classifications listed above would have the expected recoveries set forth below:

SUMMARY OF EXPECTED RECOVERIES				
Class	Claim/Equity Interest	Treatment of Claim/Equity Interest	Projected Amount of Claims[5]	Projected Recovery Under the Plan[6]
Class A1	Other Secured Claims against Propco II	On the Effective Date, or as soon as reasonably practicable thereafter, in full and final satisfaction, compromise, settlement, and release of and in exchange for each Allowed Other Secured Claim against the Propco II Debtor, each Holder thereof shall receive, at the option of the Propco II Debtor: (i) payment in full in Cash; (ii) delivery of the collateral securing any such Claim and payment of any interest required under section 506(b) of the Bankruptcy Code; (iii) Reinstatement of such Other Secured Claim; or (iv) such other treatment as shall render such claim Unimpaired.	$0 – $25,000	100%
Class A2	Other Priority Claims against Propco II	On the Effective Date, or as soon as reasonably practicable thereafter, in full and final satisfaction, compromise, settlement, and release of and in exchange for each Allowed Other Priority Claim against the Propco II Debtor, each Holder thereof shall receive payment in full in Cash or such other treatment as shall render such claim Unimpaired.	$0 – $100,000	100%

[547] Notice of Filing of Disclosure Statement for The Amended Joint Chapter 11 Plan of Toys "R" Us Property Corporation II, LLC and Giraffe Junior Holdings, LLC. Docket No. 3650.pdf.

SUMMARY OF EXPECTED RECOVERIES				
Class	**Claim/Equity Interest**	**Treatment of Claim/Equity Interest**	**Projected Amount of Claims**[5]	**Projected Recovery Under the Plan**[6]
Class A3	Mortgage Loan Secured Claims against Propco II	On the Effective Date, or as soon as reasonably practicable thereafter, in full and final satisfaction, compromise, settlement, and release of and in exchange for each Allowed Mortgage Loan Secured Claim, the Trust shall receive either: (i) the Sale Proceeds (as defined in the Plan), if any, up to payment in full of the Trust's Allowed Mortgage Loan Secured Claim or, (ii) if the Purchaser is the Successful Bidder, the Propco II Debtor's assets in accordance with the Purchase Agreement.	$490.3 million – $507.1 million[5]	94.7–97.9%
Class A4	General Unsecured Claims against Propco II	On the Effective Date, or as soon as reasonably practicable thereafter, in full and final satisfaction, compromise, settlement, and release of and in exchange for each Allowed General Unsecured Claim against the Propco II Debtor, including any Mortgage Loan Deficiency Claim, each Holder thereof shall receive its Pro Rata share of the Sale Proceeds, if any, after payment of all senior Claims against the Propco II Debtor.	$0 – $6.0 million	0%
Class A5	Propco II Interests	On the Effective Date, or as soon as reasonably practicable thereafter, each Holder of a Propco II Interest shall receive its Pro Rata share of the Sale Proceeds, if any, after payment of all Claims against the Propco II Debtor.	N/A	0%
Class B1	Other Secured Claims against Giraffe Junior	On the Effective Date, or as soon as reasonably practicable thereafter, in full and final satisfaction, compromise, settlement, and release of and in exchange for each Allowed Other Secured Claim against the Giraffe Junior Debtor, each Holder thereof shall receive its Pro Rata share of the Sale Proceeds, if any, after payment of all Claims against and Interests in the Propco II Debtor, up to payment in full of such Holder's Allowed Other Secured Claim.	$0	0%

SUMMARY OF EXPECTED RECOVERIES				
Class	**Claim/Equity Interest**	**Treatment of Claim/Equity Interest**	**Projected Amount of Claims[5]**	**Projected Recovery Under the Plan[6]**
Class B2	Other Priority Claims against Giraffe Junior	On the Effective Date, or as soon as reasonably practicable thereafter, in full and final satisfaction, compromise, settlement, and release of and in exchange for each Allowed Other Priority Claim against the Giraffe Junior Debtor, each Holder thereof shall receive its Pro Rata share of the Sale Proceeds, if any, after payment of all senior Claims against the Giraffe Junior Debtor, up to payment in full of such Holder's Allowed Other Priority Claim.	$0 – $100,000	0%
Class B3	Giraffe Junior Mezzanine Loan Secured Claims against Giraffe Junior	On the Effective Date, or as soon as reasonably practicable thereafter, in full and final satisfaction, compromise, settlement, and release of and in exchange for each Allowed Giraffe Junior Mezzanine Loan Secured Claims against Giraffe Junior, each Holder thereof shall receive its Pro Rata share of the Sale Proceeds, if any, after payment of all senior Claims, up to payment in full of such Holder's Allowed Giraffe Junior Mezzanine Loan Claim.	$70.2 million in principal amount[6]	0%
Class B4	General Unsecured Claims against Giraffe Junior	On the Effective Date, or as soon as reasonably practicable thereafter, in full and final satisfaction, compromise, settlement, and release of and in exchange for each Allowed General Unsecured Claim against the Giraffe Junior Debtor, including any Giraffe Junior Mezzanine Loan Deficiency Claim, each Holder thereof shall receive its Pro Rata share of the Sale Proceeds, if any, after payment of all senior Claims against the Giraffe Junior Debtor.	$0 – $325,000	0%
Class B5	Giraffe Junior Interests	On the Effective Date, or as soon as reasonably practicable thereafter, each Holder of a Giraffe Junior Interest shall receive its Pro Rata share of the Sale Proceeds, if any, after payment of all Claims against the Giraffe Junior Debtor.	N/A	0%

iv. Means for Implementation of the Plan

The plan laid out three possibilities for how the Propco II Debtors can handle claims: (1) settle the claim; (2) engage in restructuring transactions; or (3) sell assets and use the proceeds to pay off the debt.

The first option the debtors have is to settle the claims. According to section 1123 of the Bankruptcy Code and Bankruptcy Rule 9019, the provisions of the Plan act as a good faith compromise and settlement of all claims, interests, and causes of action. The filing of the plan is deemed a motion to approve such a settlement, and the entry of the Confirmation Order by the Bankruptcy Court constitutes the Court's approval of such a settlement.[548]

The next option that is available under the plan is to engage in restructuring transactions. Under the plan, the Propco II Debtors may take all action as may be necessary or appropriate to effect any transaction described in, approved by, contemplated by, or necessary to effectuate the Plan.[549] This includes the possibilities of merger, consolidation, restructuring, conversion, disposition, transfer, dissolution, liquidation, and many others, as long as the terms are consistent with the terms of the Plan and any other terms to which the applicable entities may agree.

Lastly, the Debtors could choose to conduct a marketing and sale process and hold an Auction of all or substantially all of the Propco II Debtor's assets in accordance with the Propco II Bidding Procedures. These bidding procedures would set forth the initial minimum overbid amount and the Debtors would seek to elicit a higher or better sale transactions offer. If no entity submits an initial minimum overbid amount, the Purchaser will be deemed the successful bidder for the purposes of the sale transaction. However, if a higher or better offer is made, the Trust will be paid the sales proceeds up to the allowed amount of its claim.

If the Propco II Debtors are unable to secure a higher or better Sale Transaction offer at the conclusion of the marketing and Auction process contemplated by the Propco II Bidding Procedures, the Purchaser will be deemed to be the Successful Bidder and the Debtors will proceed to consummate the sale transaction by and between the Propco II Debtor and the Purchaser, as the Successful Bidder.

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[548] *Id.* at 9

If the Purchaser is the Successful Bidder, (i) there will be no distribution to Class A4 General Unsecured Claims against Propco II, Class A5 Propco II Interests, or any class of Claims against or Interests in the Giraffe Junior Debtor and (ii) the Assumed Liabilities of the Purchaser shall include Administrative Claims, Professional Fee Claims, Other Secured Claims, Priority Claims, and Priority Tax Claims, in each case against Propco II, not to exceed the aggregate amounts of such claims listed on Schedule 1 of the Purchase Agreement.

In the event the Purchaser is the Successful Bidder, the Purchaser shall fund the distributions to Holders of Allowed Administrative Claims, Professional Fee Claims, Secured Claims, Priority Claims, and Priority Tax Claims against the Propco II Debtor in accordance with the treatment of such Claims in Article III of the Plan and Holders of General Unsecured Claims against Propco II and Propco II Interests and all classes of Claims against or Interests in the Giraffe Junior Debtor shall receive no distribution. In the event the Purchaser is not the Successful Bidder, Propco II's Cash on hand (if any), the Sale Proceeds (if any), and any other Cash received or generated by the Propco II Plan Debtors shall be used to fund the distributions to Holders of Allowed Claims and Interests against the Propco II Plan Debtors in accordance with the treatment of such Claims and Interests as set forth in Article III.B of the Plan.

There were no objections to this initial plan.

b) Amended Plan[550]

i. Changes

The amended plan primarily focused on making sure insurance policies remained intact and clarifying the Professional Fee Escrow Account section. Also, the name of Class B3 was changed to "Giraffe Junior Mezzanine Loan Secured Claims against Giraffe Junior."[551]

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[550] Notice of Filing Amended Joint Chapter 11 Plan of Toys "R" Us Property Corporation II, LLC and Giraffe Junior Holdings, LLC. Docket No. 3649.pdf.

[551] *Id.* at 15.

ii. Objections

The first category of objections were made to preserve the rights of leaseholders.[552] These objections regarded the sale or rejection of lease of certain real property owned by Propco II. They creditors made arguments that they were entitled to remain in possession of the property under the bankruptcy code and that the Debtors were not allowed to sell the property free and clear of the lease.

The second category of objections were made by creditors who owned property that was being leased by Propco II.[553] The creditors objected to the assumption and assignment of the Leases on the grounds that the Amended Plan failed to made adequate provisions for the payment of accrued but unbilled charges, there was not adequate assurance of future performance, and the proposed cure amount was insufficient if accrued but unbilled charges were included.

The third category of objections was filed by the United States Trustee for Region Four when he raised an objection challenging the adequacy and legality of the proposed third-party release and exculpation provisions as they are overly broad and inconsistent with Fourth Circuit Law.[554]

The last category of filed objections were limited objections that were made as preventative measures to ensure that all covenants, easements, and restrictions that run with the land are not stripped by a sale.[555]

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[552] Combined Objection of Goodwill Retail Services, Inc. to (A) Sale of Assets of Toys "R" Us Property Corporation II, LLC and (B) Amended Joint Chapter 11 Plan of Toys "R" Us Property Corporation II, LLC and Giraffe Junior Holdings, LLC. Docket No. 3905.pdf. Joint Objection of Monroe Street Commercial Realty LLC and U.S. Bank National Association, as Trustee, Successor in Interest to Bank of America, N.A., as Trustee, Successor By Merger to LaSalle Bank National Association, as Trustee for The Registered Holders of J.P. Morgan Chase Commercial Mortgage Securities Trust 2007-LDP12 Commercial Pass-Through Certificates, Series 2007-LDP12 to (A) The Sale of Assets of Toys "R" Us Property Corporation II, LLC and (B) The Amended Joint Chapter 11 Plan of Toys "R" Us Property Corporation II, LLC and Giraffe Junior Holdings, LLC. Docket No. 4070.pdf.

[553] Objection of Taylor Square Owner, LLC to Assumption and Assignment of Lease and to Cure Amount. Docket No. 4248.pdf. Limited Objection to Confirmation. Docket No. 4269.pdf.

[554] Objection of The United States Trustee to Amended Joint Chapter 11 Plan of Toys "R" Us, Property Corporation II, LLC and Giraffe Junior Holdings, LLC. Docket No. 4026.pdf.

[555] Combined Limited Objection of Irving S. Yasney Trust to (A) Confirmation of Proposed Joint Chapter 11 Plan of Toys "R" Us, Property Corporation II, LLC and Giraffe Junior Holdings, LLC, and (B) Sale Assets of Toys "R" Us, Property Corporation II, LLC. Docket No. 3964.pdf. CBL & Associates Management, Inc.'s Limited Objection to (A)

iii. Voting

Under the Bankruptcy Code, acceptance of a plan of reorganization by a class of claims or interests is determined by calculating the amount and, if a class of claims, the number, of claims and interests voting to accept, as a percentage of the allowed claims or interests, as applicable, that have voted.[556] Each Class of Claims or Interests entitled to vote on the Plan will have accepted the Plan if: (a) the Holders of at least two-thirds in dollar amount of the Claims or Interests actually voting in each Class vote to accept the Plan; and (b) the Holders of more than one-half in number of the Claims or Interests actually voting in each Class vote to accept the Plan.

In this plan, Class A3 (Mortgage Loan Secured Claims against Propco II), Class A4 (General Unsecured Claims against Propco II), Class A5 (Propco II Interests), Class B1 (Other Secured Claims against Giraffe Junior), Class B2 (Other Priority Claims against Giraffe Junior), Class B3 (Giraffe Junior Mezzanine Loan Claims), Class B4 (General Unsecured Claims against Giraffe Junior), and Class B5 (Giraffe Junior Interests) were the classes entitled to vote to accept or reject the Plan (the "Voting Classes"). After a tabulation of the votes were tallied on August 20, 2018, it was determined that all members of the Voting Classes voted to accept the plan:[557]

Any Sale of Assets of Toys "R" Us Property Corporation II, LLC and (B) Amended Joint Chapter 11 Plan of Toys "R" Us Property Corporation II, LLC and Giraffe Junior Holdings, LLC. Docket No. 3982.pdf. Baldwin Commons, LLC's Combined Limited Objection to (A) Sale of Assets of Toys R Us Property Corporation II, LLC and (B) Amended Joint Chapter 11 Plan of Toys "R: Us Property Corporation II and Giraffe Junior Holdings, LLC. Docket No. 4060.pdf. Limited Objection and Reservation of Rights of Ramco-Gershenson Properties Trust to Amended Joint Chapter 11 Plan of Toys "R" Us, Property Corporation II, LLC and Giraffe Junior Holdings, LLC. Docket No. 4066.pdf. Limited Objection of MSW Promenade, L.P. to (A) Confirmation of Proposed Joint Chapter 11 Plan of Toys "R" Us, Property Corporation II, LLC and Giraffe Junior Holding, LLC, and (B) Sale of Assets of Toys "R" Us, Property Corporation II, LLC. Docket No. 4089.pdf. Murrieta Town Center Retail Owner, L.P.'s Limited Objection to The Sale of Certain Owned Real Property of Toys "R" Us Property Corporation II, LLC in Connection with (1) Propco II Debtors' Motion for Entry of an Order (1) Establishing Bidding Procedures for The Sale of The Propco II Assets, Etc. [Docket No. 3381], and (2) The Amended Joint Chapter 11 Plan of Toys "R" Us Property Corporation II, LLC and Giraffe Junior Holdings, LLC [Docket No. 3649]. Docket No. 4090.pdf.

[556] Fed. R. Bankr. P. 1126.

[557] Declaration of James Daloia of Prime Clerk LLC Regarding Solicitation of Votes and Tabulation of Ballots Cast on The Amended Joint Chapter 11 Plan of Toys "R" Us, Property Corporation II, LLC and Giraffe Junior Holdings, LLC. Docket No. 4261.pdf.

Class	Class Description	Number Accepting	Percentage of Number Accepting	Amount Accepting	Percentage of Amount Accepting	Number Rejecting	Percentage of Number Rejecting
A3	Mortgage Loan Secured Claims against Propco II	1	100%	$507,131,266.74	100%	0	0%
A4	General Unsecured Claims against Propco II	1	100%	$31,035,540.89	100%	0	0%
A5	Propco II Interests	1	100%	1	100%	0	0%
B1	Other Secured Claims against Giraffe Junior	NO VOTES SUBMITTED IN THIS CLASS					
B2	Other Priority Claims against Giraffe Junior	1	100%	$1.00	100%	0	0%
B3	Giraffe Junior Mezzanine Loan Secured Claims against Giraffe Junior	11	100%	$88,000,000.00	100%	0	0%
B4	General Unsecured Claims against Giraffe Junior	11	100%	$11.00	100%	0	0%
B5	Giraffe Junior Interests	1	100%	1	100%	0	0%

c) Order Confirmed

After considering the objections at a hearing, the Court submitted an Order Confirming the Propco II Debtors' Joint Chapter 11 Plan.[558]

Chapter 11 Plan for Wayne Real Estate Parent Corporation, LLC

a) Initial Plan[559]

i. Overview

This plan contemplates a reorganization of Wayne Real Estate Parent Corporation, LLC, an indirect wholly-owned subsidiary of Toys "R" Us, Inc (the "Debtor"), allowing it to continue to exist and emerge from Chapter 11 as a holding corporation for Propco I, another indirect wholly-owned subsidiary of Toys "R" Us. This allows the General Unsecured Creditors of the Debtor to receive the Debtor's recovery under the Propco I Plan.[560] The specific treatment of the holders of Claims is discussed *infra.*

[558] Findings of Fact, Conclusions of Law, and Order (I) Approving The Adequacy of The Disclosure Statement for The Propco II Debtors' Joint Chapter 11 Plan and (II) Confirming The Propco II Debtors' Joint Chapter 11 Plan. Docket No. 4298.pdf.

[559] Chapter 11 Plan of Wayne Real Estate Parent Corporation, LLC. Docket No. 6053.pdf.

[560] Analysis of the Propco I Plan is outside the scope of this paper. For information related to the Chapter 11 cases of Toys "R" Us Property Corporation I, LLC, et. al, and five affiliated debtors (collectively, the "Propco I Debtors") pending in the United States Bankruptcy Court for the Eastern District of Virginia (Richmond Division), please see Case No. 18-31429.

ii. Creditor Classification

In this plan, the creditors were broken down into the following classifications:[561]

Class	Claims and Interests	Status	Voting Rights
Class 1	Other Secured Claims	Unimpaired	Not Entitled to Vote (Deemed to Accept)
Class 2	Other Priority Claims	Unimpaired	Not Entitled to Vote (Deemed to Accept)
Class 3	General Unsecured Claims	Impaired	Entitled to Vote
Class 4	Intercompany Claims	Unimpaired or Impaired	Not Entitled to Vote (Deemed to Accept or Deemed to Reject)
Class 5	Interests in the Debtor	Impaired	Not Entitled to Vote (Deemed to Reject)

iii. Treatment of Creditors

Under the terms of the Plan, holders of Claims and Interests will receive the following treatment in full and final satisfaction, compromise, settlement, release, and discharge of, and in exchange for, such holders' Claims and Interests:[562]

a) **Allowed Priority Tax Claims**. Except to the extent that a Holder of an Allowed Priority Tax Claim agrees to a less favorable treatment, in full and final satisfaction, settlement, release, and discharge of and in exchange for each Allowed Priority Tax Claim, each Holder of such Allowed Priority Tax Claim shall be treated in accordance with the terms set forth in section 1129(a)(9)(C) of the Bankruptcy Code.

b) **Class 1 - Other Secured Claims**. On the Effective Date, or as soon as reasonably practicable thereafter, except to the extent that a Holder of an Allowed Other Secured Claim agrees to a less favorable treatment, in full and final satisfaction and discharge of each Allowed Other Secured Claim, each Holder thereof shall receive, either: (a) payment in full in Cash; or (b) delivery of the collateral securing any such Claim and payment of any interest required under section 506(b) of the Bankruptcy Code.

c) **Class 2 - Other Priority Claims**. On the Effective Date, or as soon as reasonably practicable thereafter, except to the extent that a Holder of an Allowed Other Priority Claim agrees to a less favorable treatment, in full and final satisfaction and discharge of each Allowed Other Priority Claim, each

[561] *See* Docket No. 6053.pdf.

[562] *See* Docket No. 6054.pdf.

Holder thereof shall receive, either: (a) payment in full in Cash or (b) such other treatment as shall render such Claim Unimpaired.

d) **Class 3 – General Unsecured Claims**. On the Effective Date, or as soon as reasonably practicable thereafter, except to the extent that a Holder of an Allowed General Unsecured Claim agrees to a less favorable treatment, in full and final satisfaction of each Allowed General Unsecured Claim, each Holder of an Allowed General Unsecured Claim shall receive their pro rata share of the consideration to be specified in the Restructuring Transactions Memorandum, which in any case will consist of either direct or indirect ownership of the New Contingent Equity Rights (as defined in the Propco I Plan), which direct or indirect ownership may be accomplished through the receipt of New Common Stock, the direct receipt of the New Contingent Equity Rights, or another mechanism to be determined.

e) **Class 4 - Intercorporation Claims**. On the Effective Date, or as soon as reasonably practicable thereafter, each Intercorporation Claim shall be Reinstated or canceled without any distribution on account of such Intercorporation Claim as determined by the Debtor in its sole discretion.

f) **Class 5 - Interests in the Debtor**. On the Effective Date, or as soon as reasonably practicable thereafter, in full and final satisfaction and discharge of each Interest in the Debtor, each Holder of an Interest in the Debtor will be cancelled without any distribution on account of such Interest.

There were no objections to this initial Plan.

b) First Amended Plan[563]

i. Changes

The only change that was made to the Plan was the addition of the phrase "Notwithstanding anything to the contrary in the Toys Inc. Plan, the Toys Delaware Plan, or the Propco II Plan, the releases described herein are binding on all Releasing Parties with respect to the Debtor" five times throughout Article VIII.

ii. Objections

The United States Trustee for Region Four was the only person to file an objection to the First Amended Plan.[564] This objection was raised to challenge the adequacy and legality of the

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[563] Notice of Filing of First Amended Chapter 11 Plan of Wayne Real Estate Parent Corporation, LLC. Docket No. 6123.pdf.

[564] Objection of The United States Trustee to Confirmation of Plan of Wayne Real Estate Parent Corporation, LLC. Docket No. 6225.pdf.

proposed third-party releases and exculpation clause. The Trustee believed that the releases and exculpations require a factual analysis on a case-by-case basis and objects on the grounds that the related provisions in the First Amended Plan are overly broad and inconsistent with Fourth Circuit Law. The Trustee, therefore, requested that the First Amended Plan not be confirmed until and unless the provisions were amended. After a hearing, this objection was overruled.[565]

c) Second Amended Plan[566]

In addition to adding various qualifying language, this amendment carved out the definition of *Exculpated Parties* to not include any party subject to a Non-Released Claim. This alteration was in response to the Trustee's objection that the exculpation provision was too broad. In addition to these changes, the Debtor also included language in the *General Settlement of Claims* section that helped to facilitate the implementation of the Toys Delaware Plan, see *infra*.

No objections were filed to the Second Amended Plan.

i. Voting

As mentioned *supra*, under the Bankruptcy Code, acceptance of a plan of reorganization by a class of claims or interests is determined by calculating the amount and, if a class of claims, the number, of claims and interests voting to accept, as a percentage of the allowed claims or interests, as applicable, that have voted.[567] Each Class of Claims entitled to vote on the Plan will have accepted the Plan if: (a) the Holders of at least two-thirds in dollar amount of the Claims actually voting in each Class vote to accept the Plan; and (b) the Holders of more than one-half in number of the Claims actually voting in each Class vote to accept the Plan.

In this Plan in particular, Class 3 (General Unsecured Claims) was the only class entitled to vote to accept or reject the Plan. After the vote was tabulated on January 22, 2019, it was concluded that the vote was accepted:[568]

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[565] This Does Not Exist on PACER. Docket No. 6295.pdf.

[566] Noticing of Filing of Second Amended Chapter 11 Plan of Wayne Real Estate Parent Corporation, LLC. Docket No. 6285.pdf.

[567] Fed. R. Bankr. P. 1126.

[568] Declaration of James Daloia of Prime Clerk LLC Regarding The Solicitation of Votes and Tabulation of Ballots Cast on The First Amended Chapter 11 Plan of Wayne Real Estate Parent Corporation, LLC. Docket No. 6271.pdf.

Class	Class Description	Number Accepting	Number Rejecting	AmountAccep ng	AmountRejec ng
		%	%	%	%
3	General Unsecured Claims	48	0	$800,801,810.57	$0.00
		100%	0%	100%	0%

d) Order Confirmed

On January 29, 2019, the Court submitted an Order Confirming the Second Amended Chapter 11 Plan of Wayne Real Estate Parent, LLC.[569]

Chapter 11 Plan for Toys Delaware Debtors and Geoffrey Debtors

a) Initial Plan[570]

i. Overview

Toys "R" Us-Delaware, Inc. and certain Toys Delaware affiliates (collectively, "Toys Delaware Debtors") and Geoffrey Holdings, LLC and Geoffrey's subsidiaries (collectively, the "Geoffrey Debtors"), as debtors and debtors in possession, (the Toys Delaware Debtors and Geoffrey Debtors, collectively, the "Debtors") filed a Chapter 11 Plan that derived from a settlement agreement that was extensively negotiated between Debtors and certain stakeholders.[571] The Plan called for the distribution of the proceeds that were derived from the wind-down, dissolution, and liquidation of the Debtors' Estates.

ii. Creditor Classification:

In this plan, the creditors were broken down into the following classifications:[572]

[569] Order Confirming The Second Amended Chapter 11 Plan of Wayne Real Estate Parent, LLC. Docket No. 6328.pdf.

[570] Chapter 11 Plans of Toys Delaware Debtors and Geoffrey Debtors. Docket No. 4054.pdf.

[571] Disclosure Statement for The Chapter 11 Plans of The Toys Delaware Debtors and Geoffrey Debtors. Docket No. 4055.pdf.

[572] *Id.*

Class	Claims and Interests	Status	Voting Rights
Classified Claims and Interests against the Toys Delaware Debtors			
Class A1	Other Secured Claims against the Toys Delaware Debtors	Unimpaired	Deemed to Accept
Class A2	Other Priority Claims against the Toys Delaware Debtors	Impaired	Deemed to Reject
Class A3	Delaware Secured ABL/FILO Facility Claims against the Toys Delaware Debtors	Unimpaired	Deemed to Accept
Class A4	Term B-2 Loan and Term B-3 Loan Claims against the Toys Delaware Debtors	Impaired	Entitled to Vote
Class A5	Term B-4 Loan Claims against the Toys Delaware Debtors	Impaired	Entitled to Vote
Class A6	General Unsecured Claims against the Toys Delaware Debtors	Impaired	Deemed to Reject
Class A7	Toys Delaware Debtor Intercompany Claims against other Toys Delaware Debtors	Unimpaired or Impaired	Deemed to Accept/Reject
Class A8	Toys Delaware Intercompany Interests	Unimpaired or Impaired	Deemed to Accept/Reject
Class A9	Toys Inc. Intercompany Interests	Impaired	Deemed to Reject
Classified Claims and Interests against the Geoffrey Debtors			
Class B1	Other Secured Claims against the Geoffrey Debtors	Unimpaired	Deemed to Accept
Class B2	Other Priority Claims against the Geoffrey Debtors	Impaired	Deemed to Reject
Class B3	Term B-2 Loan, Term B-3 Loan, and Term B-4 Loan Claims against the Geoffrey Debtors	Impaired	Entitled to Vote
Class B4	General Unsecured Claims against the Geoffrey Debtors	Impaired	Deemed to Reject
Class B5	Geoffrey Debtor Intercompany Claims against other Geoffrey Debtors	Unimpaired or Impaired	Deemed to Accept/Reject
Class B6	Geoffrey Debtor Intercompany Interests	Unimpaired or Impaired	Deemed to Accept/Reject
Class B7	Interests in Geoffrey	Impaired	Deemed to Reject

iii. Settlement Agreement

The Settlement Agreement was the product of negotiations over claims associated with the Debtors' domestic business by and among the Debtors, the Creditors' Committee, a group of

prepetition secured lenders, a group of administrative claims holders, and the Sponsors.[573] In short, at a hearing related to the U.S. Wind-Down, certain administrative creditors and the Creditors' Committee alleged potential Claims and Causes of Actions against, among others, the Debtors, the Prepetition Secured Lenders, and the Sponsors related to the U.S. Wind-Down. In addition, the Creditors' Committee undertook an investigation into the Prepetition Secured Lenders' claims and liens in accordance with its authority under the Final DIP Orders and identified certain potential claims and causes of actions that could be pursued against Prepetition Secured Lenders.[574]

However, through negotiations, the settlement parties determined that the Settlement Agreement struck a proper balance between those claims that should be preserved for the benefit of certain creditors and those claims that should be resolved though litigation, which could be value-destructive and reduce the likelihood that these cases would be expeditiously resolved. As such, the parties agreed that a consensual path forward would be the most efficient way to bring clarity, closure, and finality to these Chapter 11 Cases.[575]

A summary of the terms of the Settlement Agreement can be found below:[576]

[573] *See* Docket No. 4055.pdf.

[574] *Id.*

[575] *Id.*

[576] *Id.*

Terms	Summary Description
Economic Terms	• Toys Delaware will repay the Term DIP Facility in full. • After the Term DIP Facility is repaid in full, the Prepetition Secured Lenders will receive all remaining value in the Toys Delaware Estate, except as otherwise expressly set forth in the Settlement Agreement. • The Term Loan Wind-Down Carve Out will include the following consideration (collectively, the "Administrative Claims Distribution Pool"), which will be made available to merchandise vendors, critical vendors with agreed to but unpaid claims, and holders of other unpaid administrative claims not accounted for in the Wind-Down Budget (collectively, the "Administrative Claim Holders" and, the Allowed Claims held by such Administrative Claim Holders, the "Administrative Claims").
Fixed Amounts	• A fixed amount equal to $180 million ($160 million of which will be funded before the Term DIP Facility is repaid and $20 million of which will be funded with the first distributions after the Term DIP Facility is repaid), which shall include amounts required to be funded into the Merchandise Reserve pursuant to the DIP Amendment Order [Docket No. 2853]
Contingent Amounts	• Once the aggregate postpetition recovery of all Term B-4 Lenders from Toys Delaware and Wayne Real Estate Parent Company, LLC ("Wayne") reaches 50% of the face amount of the $1.003 billion in aggregate Term B-4 Claims (after giving effect to applicable distributions on account of Term B-2 Loans and Term B-3 Loans), (a) the Prepetition Secured Lenders will receive 50% of any further recoveries from Toys Delaware and the remaining 50% will be distributed to the Administrative Claims Distribution Pool, and (b) the Term B-4 Lenders will receive 50% of any further recoveries from Wayne and the remaining 50% will be distributed to the Administrative Claims Distribution Pool.
Residual Amounts	• If the Prepetition Secured Lenders receive payment in full, all other proceeds derived from the Toys Delaware liquidation will be distributed (a) first to Holders of all Administrative Claims in the Chapter 11 Cases until such Claims are paid in full and (b) then to Holders of Allowed General Unsecured Claims.
Non-Released Claims Trust	• The Administrative Claims Distribution Pool will fund a trust (the "Non-Released Claims Trust") that will be established for certain non-released claims and causes of action that Toys Delaware and Toys Inc. and their Estates have (the "Non-Released Claims") (a) against current and former directors, officers, or managers and (b) pursuant to the avoidance provisions under chapter 5 in the Bankruptcy Code or any state law equivalents against other parties including, among others, other debtor parties not defined as "Debtors" under the Plan and non-insider creditors not otherwise released. Additionally, proceeds available under the D&O Liability Insurance Policies will be used to satisfy recoveries that the Non-Released Claims Trust obtains on account of D&O Claims, if any. • Subject to Section 3.2(k) in the Settlement Agreement, amounts received from settling or litigating the Non-Released Claims will be distributed (a) first, to the Administrative Claims Distribution Pool until the amount provided to fund the Non-Released Claims has been recovered and (b) thereafter, 80% to the Administrative Claims Distribution Pool and 20% to the Prepetition Secured Lenders.

iv. Summary of Expected Recoveries

The creditors in the classifications listed above would have the expected recoveries set forth below:[577]

SUMMARY OF EXPECTED RECOVERIES[8]				
Class	**Claims/ Equity Interests**	**Treatment of Claim/Equity Interest**	**Projected Amount of Claims**	**Projected Recovery Under the Plan**
Class A1	Other Secured Claims against the Toys Delaware Debtors	On the Effective Date, or as soon as reasonably practicable thereafter, in full and final satisfaction, compromise, settlement, and release of and in exchange for each Allowed Other Secured Claim against the Toys Delaware Debtors, each Holder thereof shall receive, at the option of the applicable Toys Delaware Debtor: (i) payment in full in cash solely from the proceeds of collateral securing such Allowed Other Secured Claim; (ii) delivery of the collateral securing any such claim and payment of any interest required under section 506(b) of the Bankruptcy Code; (iii) reinstatement of such Other Secured Claim; or (iv) such other treatment as shall render such claim unimpaired, *provided, however*, that holders of Allowed Other Secured Claims shall not receive any distribution from the Administrative Claims Distribution Pool.	$300,000400,000	100%
Class A2	Other Priority Claims against the Toys Delaware Debtors	Except to the extent there is any excess value available for distribution from the applicable Toys Delaware Debtor following repayment of all Secured Claims and all Claims entitled to senior or administrative priority in accordance with the Bankruptcy Code, on the Effective Date, or as soon as reasonably practicable thereafter, each Allowed Other Priority Claim against the Toys Delaware Debtors shall receive no distribution. The failure to object to Confirmation by a Holder of an Allowed Other Priority Claim against the Toys Delaware Debtors shall be deemed to be such Holder's consent to receive treatment for such Claim that	$275,000 - 1.5 million	0%

[577] Notice of Filing of Disclosure Statement for The Second Amended Chapter 11 Plans of The Toys Delaware Debtors and Geoffrey Debtors. Docket No. 4543.pdf.

Class	Claims/ Equity Interests	Treatment of Claim/Equity Interest	Projected Amount of Claims	Projected Recovery Under the Plan
		is different from that set forth in section 1129(a)(9) of the Bankruptcy Code.		
Class A3	Delaware Secured ABL/FILO Facility Claims against the Toys Delaware Debtors	On the Effective Date, or as soon as reasonably practicable thereafter, in full and final satisfaction, compromise, settlement, and release of and in exchange for each allowed Delaware Secured ABL/FILO Facility Claim, each holder thereof shall receive payment in full and cash.	$0.00	N/A[11]
Class A4	Term B-2 Loan and Term B-3 Loan Claims against the Toys Delaware Debtors	On the Effective Date, or as soon as reasonably practicable thereafter, in full and final satisfaction, compromise, settlement, and release of and in exchange for each allowed Term B-2 Loan and Term B-3 Loan claim, each Holder thereof shall receive its Term Loan Pro Rata Share of the Term B-2/B-3 Delaware Portion of (i) the Delaware Term Loan Distributable Proceeds and (ii) the Delaware Residual Interest Pool.	$185 million	38-50%[12]
Class A5	Term B-4 Loan Claims against the Toys Delaware Debtors	On the Effective Date, or as soon as reasonably practicable thereafter, in full and final satisfaction, compromise, settlement, and release of and in exchange for each allowed Term B-4 Loan Claim, each Holder thereof shall receive its Term Loan Pro Rata Share of (A) fifty percent (50%) of the Aggregate Canada Proceeds, and (B) the Term B-4 Delaware Portion of (i) the Delaware Term Loan Distributable Proceeds and (ii) the Delaware Residual Interest Pool.	$1 billion	38-55%[13]
Class A6	General Unsecured Claims against the Toys Delaware Debtors	Except to the extent there is any residual value available for distribution from the Toys Delaware Debtors after Classes A1 through A5, as well as Allowed Administrative Claims and Priority Tax Claims are paid in full, each General Unsecured Claim against the Toys	$1.07 billion- $1.76 billion	0%

Class	Claims/ Equity Interests	Treatment of Claim/Equity Interest	Projected Amount of Claims	Projected Recovery Under the Plan
		Delaware Debtors shall receive no distribution on account of such General Unsecured Claim; however, Holders of General Unsecured Claims will receive their pro rata share of any such residual value.		
Class A7	Toys Delaware Debtor Intercompany Claims against other Toys Delaware Debtors	On the Effective Date or as soon as reasonably practicable thereafter, each allowed Toys Delaware Debtor Intercompany Claim against another Toys Delaware Debtor shall be reinstated, canceled and released, or receive such other treatment, in each case as agreed to by the applicable Debtors and the Ad Hoc Group of Term B-4 Lenders.	$374 million	0%
Class A8	Toys Delaware Intercompany Interests	Except as otherwise provided in the Toys Delaware Plan, Interests in the Toys Delaware Debtors other than Toys Delaware shall be reinstated, canceled and released, or receive such other treatment, in each case as agreed to by the applicable Debtors and the Ad Hoc Group of Term B-4 Lenders.	N/A	N/A
Class A9	Interests in Toys Delaware	On the Effective Date, each interest in Toys Delaware shall be canceled and released, unless the Delaware Retention Structure is utilized.	N/A	N/A
Claims and Interests Against the Geoffrey Debtors				
Class B1	Other Secured Claims against the Geoffrey Debtors	On the Effective Date, or as soon as reasonably practicable thereafter, in full and final satisfaction, compromise, settlement, and release of and in exchange for each Allowed Other Secured Claim, each Holder thereof shall receive, at the option of the Geoffrey Debtors: (i) payment in full in cash; (ii) delivery of the collateral securing any such claim and payment of any interest required under section 506(b) of the Bankruptcy Code in compliance; (iii) reinstatement of such other secured claim; or (iv) such other treatment as shall render such claim unimpaired.	$0-500	100%

SUMMARY OF EXPECTED RECOVERIES[8]				
Class	**Claims/ Equity Interests**	**Treatment of Claim/Equity Interest**	**Projected Amount of Claims**	**Projected Recovery Under the Plan**
Class B2	Other Priority Claims against the Geoffrey Debtors	On the Effective Date, or as soon as reasonably practicable thereafter, each allowed other priority claim against the Geoffrey Debtors shall be discharged and canceled in full and shall receive no distribution. The failure to object to Confirmation by a Holder of an Allowed Other Priority Claim against the Geoffrey Debtors shall be deemed to be such Holder's consent to receive treatment for such Claim that is different from that set forth in section 1129(a)(9) of the Bankruptcy Code.	$0.00	0%
Class B3	Term B-2 Loan, Term B-3 Loan, and Term B-4 Loan Claims against the Geoffrey Debtors	On the Effective Date, or as soon as reasonably practicable thereafter, in full and final satisfaction and discharge of each allowed Term B-2 Loan, Term B-3 Loan and Term B-4 Loan Claim, each holder thereof shall receive its Term Loan Pro Rata Share of: (i) the Geoffrey Proceeds, if any, and/or (ii) the Geoffrey Equity Pool.	$1.19 billion	38-54%[14]
Class B4	General Unsecured Claims against the Geoffrey Debtors	On the Effective Date, or as soon as reasonably practicable thereafter, each Allowed General Unsecured Claim against the Geoffrey Debtors shall be compromised, settled, released, and canceled in full and shall receive no distribution.	$0- $7.8 million	0%
Class B5	Geoffrey Debtor Intercompany Claims against other Geoffrey Debtors	On the Effective Date, or as soon as reasonably practicable thereafter, each Geoffrey Debtor Intercompany Claim against the other Geoffrey Debtors shall be reinstated, canceled and released, or receive such other treatment, in each case as agreed to by the applicable Debtors and the Ad Hoc Group of Term B-4 Lenders.	$45,000- 100,000	0-100%
Class B6	Geoffrey Debtor Intercompany Interests	On the Effective Date, or as soon as reasonably practicable thereafter, in full and final satisfaction, compromise, settlement, and release of and in exchange for Geoffrey Debtor Intercompany Interest, each Allowed Geoffrey Debtor Intercompany Interest shall be reinstated, canceled and released, or receive such other treatment, in each case as agreed to by the applicable Debtors and the Ad Hoc Group of Term B-4 Lenders.	N/A	N/A
Class B7	Interests in Geoffrey	On the Effective Date, each Interest in Geoffrey shall be cancelled, and released, unless the Delaware Retention Structure is utilized.	N/A	N/A

There were no objections to the initial plan.

b) First Amended Plan[578]

The First Amended Plan added language that made so Successor Entities (or the Liquidating Trustee) would not be obligated to provide Transition Services absent an agreement among the parties that has been approved by the Bankruptcy Court. It also added language that made so the Debtors were not obligated to enter into any additional transition services agreements and that they will have the sole discretion to determine whether such further agreements would be in their best interest.

There were no objections to the First Amended Plan.

c) Second Amended Plan[579]

The only substantive change to the Second Amended Plan was the addition of language that stated that the failure to object to Confirmation by a Holder of an Allowed Priority Tax Claim or an Allowed Other Priority Claim against the Toys Delaware Debtors or the Geoffrey Debtors shall be deemed to be such Holder's consent to receive treatment for such Claim that is different from that set forth in section 1129(a)(9) of the Bankruptcy Code.

i. Objections

There were twelve objections filed to the Second Amended Plan for various reasons.

The first group of objectors did so because the Second Amended Plan did not provide for full cash payment of the administrative expense claimants that have opted-out of the Settlement Agreement (the "Opt-Out Administrative Claims").[580] The objectors argued that the Second

[578] Notice of Filing of Amended Joint Chapter 11 Plan of The Toys Delaware Debtors and Geoffrey Debtors. Docket No. 4490.pdf.

[579] Notice of Filing of Second Amended Chapter 11 Plans of The Toys Delaware Debtors and Geoffrey Debtors. Docket No. 4542.pdf.

[580] Opposition to Confirmation of Debtors' Plan 5145.pdf; Objection of Brightview Enterprise Solutions, LLC F/K/A Brickman Facilities Solutions, LLC to Confirmation of the Second Amended Chapter 11 Plans of the Toys Delaware Debtors and Geoffrey 5148.pdf; Objection and Memorandum of Points and Authorities of Administrative Claimant Playfusion Limited to Confirmation of the Chapter 11 Plan Proposed by the Toys Delaware Debtors Docket No. 5149.pdf.

Amended Plan did not even reference, much less describe any proposed treatment of, the Opt-Out Administrative Claims. Rather, the Second Amended Plan only provided payment of the administrative expense claims that "elected" treatment under the Settlement Agreement.

The second category of creditors filed objections under the Plan because they argued that under the Plan, priority tax claims would only be paid if and when there might someday be the money to pay them, unless the tax creditor filed an objection to confirmation of the Plan.[581]

The next group were limited objections filed by creditors who owned property that was being leased by Toys Delaware and/or Geoffrey Debtors. One creditor objected to the assumption and assignment of the Leases and another creditor objected as a preventative measure in order to confirm lease payments were going to continue to be made.[582]

The remaining objections were filed by individual creditors for various reasons. First, the United States Trustee for Region Four objected to the third-party release and exculpation provisions as they are overly broad and inconsistent with Fourth Circuit Law.[583] Then Oracle objected because the Debtors sought the Court's authority to continue to use and benefit from Oracle's contracts with the Debtors, but the Plan did not obligate the Debtors to cure all amounts owed under the contracts.[584]

Next, there was an objection by Toys (Labuan) Holding Limited because Toys Delaware proposed to reject a mission-critical contract—the ITASSA—pursuant to which the Asia JV received information technology applications development services, infrastructure services, and

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[581] Objection of the New Hampshire Department of Revenue Administration to Confirmation of the Debtors' Proposed Chapter 11 Plan. Docket No. 5134.pdf; Objection by Commissioner of Massachusetts Department of Revenue to Confirmation of the Second Amended Chapter 11 Plan of the Toys Delaware and Geoffrey Debtors. Docket No. 5151.pdf; Objection of the Texas Comptroller of Public Accounts to Confirmation of the Second Amended Chapter 11 Plans of Toys Delaware Debtors and Geoffrey Debtors. Docket No. 5165.pdf.

[582] Limited Objection and Reservation of Rights of Winston-Salem Retail Associates, L.P. to the Chapter 11 Plans of the Toys Delaware Debtors and Geoffrey Debtors. Docket No. 4591.pdf; Limited Objection and Reservation of Rights of HCL America, Inc. and HCL Technologies Limited to Second Amended Chapter 11 Plans of Toys Delaware Debtors and Geoffrey Debtors. Docket No. 5143.pdf

[583] Objection of the United States Trustee to Second Amended Chapter 11 Plans of Toys Delaware Debtors and Geoffrey Debtors. Docket No. 4937.pdf.

[584] Oracle's Objection to Second Amended Chapter 11 Plans of Toys Delaware Debtors and Geoffrey Debtors and Notice of Filing of Plan Supplement for the Toys Delaware and Geoffrey Debtors' Plans. Docket No. 5156.pdf.

operations services that were necessary to perform day-to-day functions. The creditor argued that Toys Delaware proposed to reject the ITASSA without affording the Asia JV any time to transition to another service provider and without turning over the Asia JV's source codes and historical data, thereby impeding the ability of the Asia Business to operate.[585]

Lastly, an unaffiliated group of senior note holders objected to the professional fees. They stated that these cases have spawned enormous professional fees with estimated fees for the legal and restructuring advisors for the Debtors and the Creditors' Committee exceeding $130 million through September 30, 2018. Yet the DE/Geoffrey Plan failed to establish an adequately funded reserve to satisfy all Professionals' Claims that could be allocated to the Toys Delaware Debtors and the Geoffrey Debtors, as required under section 1129(a)(9)(A) of the Bankruptcy Code.[586]

d) Third Amended Plan[587]

The Third Amended Plan added a language describing a transition services agreement between the Toys Delaware Debtors and the Geoffrey Debtors that was put in place to promote fluidity throughout the reorganization process. Also, as a response to Toys (Labuan) Holding Limited's objection stated above, the Debtors added language that would cause the ITASSA contract to remain intact in some situations. Lastly, the Debtors added a shared services sale as a possible means for implementing the plan. The purpose of the shared services sale is to provide certain shared services to debtor and non-debtor entities pursuant to various transition services agreements entered into by the Debtors.

i. Objections

Oracle filed a limited objection to the Third Amended Plan that echoed their previous objection.[588] The objection was filed to the extent the Debtors sought the Bankruptcy Court's

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[585] Objection of Toys (Labuan) Holding Limited to Confirmation of Second Amended Chapter 11 Plans of Toys Delaware and Geoffrey Debtors. Docket No. 5152.pdf.

[586] Objection of the Ad Hoc Group of Taj Noteholders to Confirmation of the Second Amended Chapter 11 Plans of the Toys Delaware Debtors and Geoffrey Debtors. Docket No. 5153.pdf.

[587] Notice of Filing of Technical Modifications to the Plan and Changes to Deadlines Related Thereto. Docket No. 5202.pdf.

[588] Oracle's Limited Objection to (1) Debtors' Motion for Entry of an Order (I) Establishing Bid Procedures for the Sale of the Shared Services Business, (II) Scheduling and Auction and Hearing to Consider the Sale, (III) Approving the Form and Manner of Notice, and (IV) Granting Related Relief; and (2) Technical Modifications/Third Amended Chapter 11 Plans of the Toys Delaware Debtors and Geoffrey Debtors. Docket No. 5289.pdf.

authority to (1) continue to use and benefit from Oracle's contracts through the shared services sale without first assuming and curing amounts owed thereunder; (2) share use of or transfer Oracle agreements to a third party without Oracle's prior written consent; or (3) compel Oracle to continue to provide licenses and related services to the Debtors, through the shared services sale without compensation.

Also, Toys (Labuan) Holding Limited filed a supplemental objection because the added language regarding the ITASSA was not strong enough.[589] The creditor still believed the Debtor was handling the contract in an improvident manner. They believed that even if the wind-down of the U.S. businesses meant that rejection of the ITASSA was ultimately in prospect, it should be executed in a way that preserved value by avoiding harm to the Asia business.

e) Fourth Amended Plan[590]

The Fourth Amended Plan dealt particularly with insurance policies. The amended plan added that the D&O liability insurance policies had no cure amount due or outstanding and will remain in full force and effect throughout the reorganization. Next, they added a provision regarding the Chubb Companies' Insurance Policies. They stated that absent the express written consent of the Chubb Companies or by order of the Bankruptcy Court (following an opportunity for the Chubb Companies to object) nothing shall permit or otherwise effect a sale, an assignment or any other transfer of any insurance policies that have been issued (or provide coverage) to the Debtors. Lastly, the amended plan added the same provision to the Zurich Insurance Policies regarding the express written consents.

i. Voting

In this Plan, Class A4 (Term B-2 Loan and Term B-3 Loan Claims against the Toys Delaware Debtors), Class A5 (Term B-4 Loan Claims against the Toys Delaware Debtors), and Class B3 (Term B-2 Loan, Term B-3 Loan, and Term B-4 Loan Claims against the Geoffrey

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[589] Supplemental Objection of Toys (Labuan) Holding Limited to Confirmation of Third Amended Chapter 11 Plans of Toys Delaware and Geoffrey Debtors. Docket No. 5293.pdf.

[590] Notice of Filing of Fourth Amended Chapter 11 Plans of Toys Delaware Debtors and Geoffrey Debtors. Docket No. 5602.pdf.

Debtors) were the only classes entitled to vote to accept or reject the Plan. After the vote was tabulated on October 19, 2018, it was concluded that the vote was accepted:[591]

Plan Class	Plan Class Description	Number Accepting	Percentage of Number Accepting	Amount Accepting	Percentage of Amount Accepting
A4	Term B-2 Loan and Term B-3 Loan Claims against the Toys Delaware Debtors	31	81.58%	$121,606,450.69	93.14%
A5	Term B-4 Loan Claims against the Toys Delaware Debtors	56	88.89%	$873,149,412.33	96.68%
B3	Term B-2 Loan, Term B-3 Loan, and Term B-4 Loan Claims against the Geoffrey Debtors	70	90.91%	$1,016,535,079.39	96.31%

f) Order Confirmed

On November 21, 2018, the Court submitted an Order Confirming the Fourth Amended Chapter 11 Plans of the Toys Delaware Debtors and Geoffrey Debtors.[592]

Chapter 11 Plan for the Taj Debtors[593] and the Tru Inc. Debtors

a) Initial Plan[594]

i. Overview

Toys "R" Us, Inc. ("TRU Inc.") and certain of its directly owned debtor subsidiaries (collectively, the "TRU Inc. Debtors"),[595] as debtors and debtors in possession, filed a Chapter 11 Plan that derived from a restructuring support agreement that was extensively negotiated in good faith and at arm's length between the Debtors and certain stakeholders.[596] Each restructuring support agreement constituted a separate chapter 11 plan for each of the TRU Inc. Debtors.

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[591] Declaration of James Daloia of Prime Clerk LLC Regarding Solicitation of Votes and Tabulation of Ballots Cast on The Notice of Filing of Second Amended Chapter 11 Plans of Toys Delaware Debtors and Geoffrey Debtors. 5328.pdf.

[592] Order Confirming the Fourth Amended Chapter 11 Plans of the Toys Delaware Debtors and Geoffrey Debtors. Docket No. 5746.pdf.

[593] The handling of the Taj Debtors is outside the scope of this paper. This section will focus solely on the parts of the plan that relate to the Tru Inc. Debtors. For reference, all Class A creditors relate to the Tru Inc. Debtors, while all Class B debtors relate to the Taj Debtors.

[594] Joint Chapter 11 Plan of the Taj Debtors and the Tru Inc. Debtors. Docket No. 4015.pdf.

[595] The TRU Inc. Debtors are TRU Inc., MAP 2005 Real Estate, LLC, Toys "R" Us - Value, Inc., and TRU Mobility, LLC.

[596] Disclosure Statement for the Joint Chapter 11 Plans of the Taj Debtors and the Tru Inc. Debtors. Docket No. 4018.pdf.

ii. Creditor Classification:

In this plan, the creditors were broken down into the following classifications:[597]

Class	Claims and Interests	Status	Voting Rights
Classified Claims and Interests against the TRU Inc. Debtors			
Class A1	Other Secured Claims against the TRU Inc. Debtors	Unimpaired	Not Entitled to Vote (Deemed to Accept)
Class A2	Other Priority Claims against the TRU Inc. Debtors	Unimpaired	Not Entitled to Vote (Deemed to Accept)
Class A3	Taj Senior Notes Guaranty Claims against the TRU Inc. Debtors	Impaired	Entitled to Vote
Class A4	Propco II Mortgage Loan Guaranty Claims against the TRU Inc. Debtors	Impaired	Entitled to Vote
Class A5	Giraffe Junior Mezzanine Loan Guaranty Claims against the TRU Inc. Debtors	Impaired	Entitled to Vote
Class A6	7.375% Senior Notes Claims against the TRU Inc. Debtors	Impaired	Entitled to Vote
Class A7	8.75% Unsecured Notes Claim against the TRU Inc. Debtors	Impaired	Entitled to Vote
Class A8	General Unsecured Claims Against the TRU Inc. Debtors	Impaired	Entitled to Vote
Class A9	TRU Inc. Debtor Intercompany Claims against other TRU Inc. Debtors	Unimpaired or Impaired	Not Entitled to Vote (Deemed to Accept or Deemed to Reject)
Class A10	TRU Inc. Intercompany Interests	Unimpaired or Impaired	Not Entitled to Vote (Deemed to Accept or Deemed to Reject)
Class A11	TRU Inc. Interests	Impaired	Not Entitled to Vote (Deemed to Reject)

iii. Means for Implementing the Plan

With respect to the Plan, all amounts of cash necessary for the Debtors to make payments or distributions were to be obtained from Cash on hand, the Sale Proceeds of the TRU Asia Equity

[597] *Id.* at 10-11.

Interests, Liquidation Proceeds derived from a wind down entity,[598] and any Cash raised or held by the Debtors, including, as applicable, Cash raised from a Rights Offering.[599]

iv. Summary of Expected Recoveries:

The creditors in the classifications listed above would have the expected recoveries set forth below:[600]

[598] A Wind Down Entity may be classified as a "liquidating trust" under section 301.7701-4(d) of the Treasury Regulations and qualify as a "grantor trust" under section 671 of the Tax Code.

[599] Docket No. 4018.pdf.

[600] Order (I) Approving the Adequacy of the Disclosure Statement for the Joint Chapter 11 Plan of the Taj Debtors and the Tru Inc. Debtors, (II) Approving the Solicitation and Notice Procedures with Respect to Confirmation of the Taj Debtors and the Tru Inc. Debtors' Proposed Joint Chapter 11 Plan, (III) Approving the Forms of Ballots and Notices in Connection Therewith, (IV) Approving the Rights Offering Procedures, (V) Scheduling Certain Dates with Respect Thereto, (VI) Shortening the Objection Periods and Notice Requirements Related Thereto, (VII) Authorizing the Backstop Commitment Agreement and the Payment of the Commitment Agreement and the Payment of the Commitment Premium as Administrative Claims, and (VIII) Granting Related Relief. Docket No. 4572.pdf.

SUMMARY OF EXPECTED RECOVERIES				
Class	**Claim/Interest**	**Treatment of Claim/Equity Interest**	**Projected Amount of Claims**	**Projected Recovery Under the Plan**
Classified Claims and Interests against the TRU Inc. Debtors				
A1	Other Secured Claims against the TRU Inc. Debtors	On the Effective Date, in full and final satisfaction, compromise, settlement, and release of and in exchange for each Allowed Other Secured Claim against the TRU Inc. Debtors, each Holder thereof shall receive, at the option of the applicable TRU Inc. Debtor: (a) payment in full in Cash; (b) delivery of the collateral securing any such Claim and payment of any interest required under section 506(b) of the Bankruptcy Code; (c) reinstatement of such Other Secured Claim; or (d) such other treatment as shall render such Claim Unimpaired.	$1.2 million - $1.3 million	[_]%
A2	Other Priority Claims against the TRU Inc. Debtors	On the Effective Date, in full and final satisfaction, compromise, settlement, and release of and in exchange for each Allowed Other Priority Claim against the TRU Inc. Debtors, each Holder thereof shall receive its pro rata share of the TRU Inc. Silo Recovery, if any, after paying in full in Cash all Senior Claims. The failure to object to Confirmation by a Holder of an Allowed Other Priority Claim shall be deemed to be such Holder's consent to receive treatment for such Claim that is different from that set forth in section 1129(a)(9) of the Bankruptcy Code	$400,000 - $500,000	[_]%
A3	Taj Senior Notes Guaranty Claims against the TRU Inc. Debtors	On the Effective Date, in full and final satisfaction, compromise, settlement, and release of and in exchange for each Allowed Taj Senior Notes Guaranty Claim, each Holder thereof shall receive its pro rata share of the TRU Inc. Silo Recovery, if any, after paying in full all Senior Claims and on a pari passu basis with other Allowed Class A3 - A8 Claims to the extent set forth in the Priority Waterfall; *provided* that no Holder of a Class A3 Claim shall receive greater than a full recovery on account of its Claim.	$588.6 million	[_]%

SUMMARY OF EXPECTED RECOVERIES				
Class	**Claim/Interest**	**Treatment of Claim/Equity Interest**	**Projected Amount of Claims**	**Projected Recovery Under the Plan**
A4	Propco II Mortgage Loan Guaranty Claims against the TRU Inc. Debtors	On the Effective Date, in full and final satisfaction, compromise, settlement, and release of and in exchange for each Allowed Propco II Mortgage Loan Guaranty Claim, each Holder thereof shall receive its pro rata share of the TRU Inc. Silo Recovery, if any, after paying in full all Senior Claims and on a pari passu basis with other Allowed Class A3 - A8 Claims to the extent set forth in the Priority Waterfall.	$20.7 million	[_]%
A5	Giraffe Junior Mezzanine Loan Guaranty Claims against the TRU Inc. Debtors	On the Effective Date, in full and final satisfaction, compromise, settlement, and release of and in exchange for each Allowed Giraffe Junior Mezzanine Loan Guaranty Claim, each Holder thereof shall receive its pro rata share of the TRU Inc. Silo Recovery, if any, after paying in full in Cash all Senior Claims and on a pari passu basis with other Allowed Class A3 - A8 Claims to the extent set forth in the Priority Waterfall.	$70.2 million	[_]%
A6	7.375% Senior Notes Claims against the TRU Inc. Debtors	On the Effective Date, in full and final satisfaction, compromise, settlement, and release of and in exchange for each Allowed 7.375% Senior Notes Claim, each Holder thereof shall receive its pro rata share of the TRU Inc. Silo Recovery, if any, after paying in full all Senior Claims and on a pari passu basis with other Allowed Class A3 - A8 Claims to the extent set forth in the Priority Waterfall.	$214.9 million	[_]%
A7	8.75% Unsecured Notes Claim against the TRU Inc. Debtors	On the Effective Date, in full and final satisfaction, compromise, settlement, and release of and in exchange for each Allowed 8.75% Unsecured Notes Claim against the TRU Inc. Debtors, each Holder thereof shall receive its pro rata share of the TRU Inc. Silo Recovery, if any, after paying in full all Senior Claims and on a pari passu basis with other Allowed Class A3 - A8 Claims to the extent set forth in the Priority Waterfall.	$21.8 million	[_]%

SUMMARY OF EXPECTED RECOVERIES				
Class	**Claim/Interest**	**Treatment of Claim/Equity Interest**	**Projected Amount of Claims**	**Projected Recovery Under the Plan**
A8	General Unsecured Claims Against the TRU Inc. Debtors	On the Effective Date, in full and final satisfaction, compromise, settlement, and release of and in exchange for each Allowed General Unsecured Claim against the TRU Inc. Debtors, each Holder thereof shall receive its pro rata share of the TRU Inc. Silo Recovery, if any, after paying in Cash all Senior Claims and on a pari passu basis with other Allowed Class A3 - A8 Claims to the extent set forth in the Priority Waterfall.	$80 million - $1.312 billion[7]	[_]%
A9	TRU Inc. Debtor Intercompany Claims against other TRU Inc. Debtors	On the Effective Date, in full and final satisfaction, compromise, settlement, and release of and in exchange for TRU Inc. Debtor Intercompany Claims against other TRU Inc. Debtors, each TRU Inc. Debtor Intercompany Claim against another TRU Inc. Debtor shall be reinstated or canceled and released.	$0	[_]%
A10	TRU Inc. Intercompany Interests	On the Effective Date, interests in the TRU Inc. Debtors other than TRU Inc. shall be reinstated or canceled and released.	N/A	N/A
A11	TRU Inc. Interests	On the Effective Date, each interest in TRU Inc. shall be canceled and released; *provided, however*, that for the avoidance of doubt, new TRU Inc. Interests may be issued pursuant to the Toys Delaware Plan, subject to the consent of the Taj Holders Steering Group.	N/A	N/A

There were no objections made to the initial plan.

b) First Amended Plan[601]

The First Amended Plan did not have many substantive changes. Most alterations were to either add materiality qualifiers or edit the sentence structure of certain phrases. The only provisions that were heavily edited were the Reservation of Rights for the United States and the Discharge of Claims and Termination of Equity Interest – which was removed entirely.

[601] Notice of Filing of First Amended Joint Chapter 11 Plan of the Taj Debtors and the Tru Inc. Debtors. Docket No. 4492.pdf.

No objections were made to the First Amended Plan.

c) Second Amended Plan[602]

The Second Amended Plan did not have any substantive changes.

i. Objections

The first objection that was filed to the Second Amended Plan was a limited objection filed by Winston-Salem Retail Associates, L.P. where they objected to the confirmation of the Plan to the extent that the Debtors sought to assume or assign a Joint Venture Agreement or TRU's 50% interest in the therein through the Plan.[603]

Next, the United States Trustee for Region Four objected to the third-party release and exculpation provisions as they are overly broad and inconsistent with Fourth Circuit Law.[604] Then, the TRU Trust 2016-TOYS filed the limited objection on the basis that the Plan failed to account for the contractual payment subordination of the Giraffe Junior Mezzanine Loan Guaranty Claim to the Trust's Propco II Mortgage Loan Guaranty Claim.[605]

Lastly, an Ad Hoc Group of B-4 Lenders filed a limited objection to the Plan to make sure that the Toys Delaware Debtors and the Geoffrey Debtors did not pay or commit to pay professional fees that were properly allocable to the TRU Inc. Debtors.[606] These B-4 Lenders were entitled to the remaining value in the estates of both Toys Delaware and Geoffrey, so they had a direct interest in ensuring the maximum amount of value in the estates. Therefore, the B-4 Lenders also wanted to make sure that Toys Delaware and Geoffrey were paid in full on account of any administrative expense claims they had against TRU, Inc.

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[602] Notice of Filing of Amended Joint Chapter 11 Plan of the Taj Debtors and the Tru Inc. Debtors. Docket No. 4547.pdf.

[603] Limited Objection and Reservation of Rights of Winston-Salem Retail Associates, L.P. to the Joint Chapter 11 Plan of the Taj Debtors and the Tru Inc. Debtors. Docket No. 4592.pdf.

[604] Objection of the United States Trustee to Second Amended Chapter 11 Plans of Taj Debtors and Tru Inc. Debtors. Docket No. 4935.pdf.

[605] Limited Objection of the Tru Trust 2016-Toys, Commercial Mortgage Pass-Through Certificates, Series 2016-Toys to Second Amended Joint Chapter 11 Plan of the Taj Debtors and the Tru Inc. Debtors. Docket No. 5437.pdf.

[606] Ad Hoc Group of B-4 Lenders' Limited Objection to Second Amended Joint Chapter 11 Plan of the Taj Debtors and the Tru Inc. Debtors. Docket No. 5445.pdf.

d) Third Amended Plan[607]

This Third Amended Plan made numerous changes throughout the document. First, the Plan added procedural language to the Sale Transaction section, which it renamed the Credit Bid Transaction section. Next, it added the same Chubb Companies' and Zurich Insurance sections that were found in previously discussed Plans. The Plan then added multiple categories to what qualified as a release by holders of claims and interests. Lastly, the Plan added language describing how to treat individual TRU, Inc. debtors in the Wind Down and Dissolution process.

i. Voting:

In this Plan, Classes A3, A4, A5, A6, A7, and A8 were the only classes entitled to vote to accept or reject the Plan. After the vote was tabulated on November 26, 2018, it was concluded that the vote was accepted:[608]

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[607] Notice of Filing of Third Amended Joint Chapter 11 Plan of the Taj Debtors and the Tru Inc. Debtors. Docket No. 5940.pdf.

[608] Declaration of James Daloia of Prime Clerk LLC Regarding Solicitation of Votes and Tabulation of Ballots Cast on the Second Amended Joint Chapter 11 Plan of the Taj Debtors and the Tru Inc. Debtors. Docket No. 5776.pdf.

Class	Class Description	Number Accepting	Number Rejecting	AmountAccepting	AmountRejecting	Class Voting Result
		%	%	%	%	
A3	Taj Senior Notes Guaranty Claims against TRU Inc.	54	1	$500,103,329.00	$3,000.00	Accept
		98.18%	1.82%	99.999%	0.001%	
A3	Taj Senior Notes Guaranty Claims against MAP 2005 Real Estate, LLC	54	1	$500,103,329.00	$3,000.00	Accept
		98.18%	1.82%	99.999%	0.001%	
A3	Taj Senior Notes Guaranty Claims against Toys "R" Us - Value, Inc.	54	1	$500,103,329.00	$3,000.00	Accept
		98.18%	1.82%	99.999%	0.001%	
A3	Taj Senior Notes Guaranty Claims against TRU Mobility, LLC	54	1	$500,103,329.00	$3,000.00	Accept
		98.18%	1.82%	99.999%	0.001%	
A4	Propco II Mortgage Loan Guaranty Claims against TRU Inc.	1	0	$507,131,266.74	$0.00	Accept
		100%	0%	100%	0%	
A4	Propco II Mortgage Loan Guaranty Claims against MAP 2005 Real Estate, LLC	1	0	$507,131,266.74	$0.00	Accept
		100%	0%	100%	0%	
A4	Propco II Mortgage Loan Guaranty Claims against Toys "R" Us - Value, Inc.	1	0	$507,131,266.74	$0.00	Accept
		100%	0%	100%	0%	
A4	Propco II Mortgage Loan Guaranty Claims against TRU Mobility, LLC	1	0	$507,131,266.74	$0.00	Accept
		100%	0%	100%	0%	
A5	Giraffe Junior Mezzanine Loan Guaranty Claims against TRU Inc.	11	0	$11.00	$0.00	Accept
		100%	0%	100%	0%	
A5	Giraffe Junior Mezzanine Loan Guaranty Claims against MAP 2005 Real Estate, LLC	11	0	$11.00	$0.00	Accept
		100%	0%	100%	0%	
A5	Giraffe Junior Mezzanine Loan Guaranty Claims against Toys "R" Us - Value, Inc.	11	0	$11.00	$0.00	Accept
		100%	0%	100%	0%	
A5	Giraffe Junior Mezzanine Loan Guaranty Claims against TRU Mobility, LLC	11	0	$11.00	$0.00	Accept
		100%	0%	100%	0%	
A6	7.375% Senior Notes Claims against TRU Inc.	271	41	$141,673,781.61	$15,813,218.39	Accept
		86.86%	13.14%	89.96%	10.04%	
A6	7.375% Senior Notes Claims against MAP 2005 Real Estate, LLC	271	41	$141,673,781.61	$15,813,218.39	Accept
		86.86%	13.14%	89.96%	10.04%	
A6	7.375% Senior Notes Claims against Toys "R" Us - Value, Inc.	271	41	$141,673,781.61	$15,813,218.39	Accept
		86.86%	13.14%	89.96%	10.04%	
A6	7.375% Senior Notes Claims against TRU Mobility, LLC	271	41	$141,673,781.61	$15,813,218.39	Accept
		86.86%	13.14%	89.96%	10.04%	
A7	8.75% Unsecured Notes Claim against TRU Inc.	69	6	$7,442,000.00	$7,584,000.00	Reject
		92.00%	8.00%	49.53%	50.47%	
A7	8.75% Unsecured Notes Claim against MAP 2005 Real Estate, LLC	69	6	$7,442,000.00	$7,584,000.00	Reject
		92.00%	8.00%	49.53%	50.47%	
A7	8.75% Unsecured Notes Claim against Toys "R" Us - Value, Inc.	69	6	$7,442,000.00	$7,584,000.00	Reject
		92.00%	8.00%	49.53%	50.47%	
A7	8.75% Unsecured Notes Claim against TRU Mobility, LLC	69	6	$7,442,000.00	$7,584,000.00	Reject
		92.00%	8.00%	49.53%	50.47%	

Class	Class Description	Number Accepting	Number Rejecting	AmountAccepting	AmountRejecting	Class Voting Result
		%	%	%	%	
A8	General Unsecured Claims Against TRU Inc.	225	20	$48,051,447.41	$287,371.35	Accept
		91.84%	8.16%	99.41%	0.59%	
A8	General Unsecured Claims Against MAP 2005 Real Estate, LLC	225	20	$48,051,447.41	$287,371.35	Accept
		91.84%	8.16%	99.41%	0.59%	
A8	General Unsecured Claims Against Toys "R" Us - Value, Inc.	225	20	$48,051,447.41	$287,371.35	Accept
		91.84%	8.16%	99.41%	0.59%	
A8	General Unsecured Claims Against TRU Mobility, LLC	225	20	$48,051,447.41	$287,371.35	Accept
		91.84%	8.16%	99.41%	0.59%	

e) Order Confirmed

On December 17, 2018, the Court submitted an Order Confirming the Third Amended Chapter 11 Plan of the Taj Debtors and the TRU Inc. Debtors.[609]

[609] Order (I) Confirming the Third Amended Joint 11 Plan of the Taj Debtors and the Tru Inc. Debtors and (II) Approving the Credit Bid Transaction. Docket No. 5979.pdf.

Omnibus Objections

Section 502(a) of the Bankruptcy Code provides that "[a] claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest . . . objects."[610] A debtor in possession has the duty to object to the allowance of any claim that is improper.[611]

By filing a properly executed proof of claims, the creditors set forth the "*prima facie* evidence of the validity and amount of the claim."[612] This would be sufficient to allow the creditor to share in the estate if there was no objection.[613] However, if the debtor makes an objection to the creditors proofs of claim, in order to overcome the *prima facie* presumption the debtor has the burden to produce evidence showing there exists a "true dispute" as to the validity and amount of the claim.[614] Once an objection has been filed, the burden reverts back to the claimant to prove the validity of the claim by a preponderance of the evidence.[615]

In large cases, such as this case, the debtor has many similar claim objections to file, so the debtor files what is called an omnibus objection, which is governed by Rule 3007(d) of the bankruptcy code..[616] This allows the debtor to "object in a single pleading to a large number of claims that it believes should be reduced or disallowed for a similar reason."[617] In this case, Toys

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610 Fed. R. Bnkr. P. 502(a).

611 *See* 11 U.S.C. § 1106(a)(1)

612 Fed. R. Bnkr. P. 3001(f). *See In re Allegheny Int'l, Inc.*, 954 F.2d 167, 173 (3d Cir. 1992).

613 MICHAEL L. BERNSTEIN & GEORGE W. KUNEY, BANKRUPTCY IN PRACTICE 337. (Charles J. Tabb ed., 5th ed. 2015).

614 *Id.*

615 *Allegheny*, 954 F.2d at 173.

616 MICHAEL L. BERNSTEIN & GEORGE W. KUNEY, BANKRUPTCY IN PRACTICE 337. (Charles J. Tabb ed., 5th ed. 2015).

617 *Id.*

"R" Us filed omnibus objections in five categories seeking to disallow and expunge the proofs of claims in their entirety on the following grounds:

Duplicative:

The first category of omnibus objections were filed because the disputed claims constituted duplicates of other proofs of claims that had been filed.[618] No responses were filed by creditors to this objection. After a hearing, the Court granted the omnibus objections in this category.[619]

Incorrect Debtor:

The second category of omnibus objections were filed because Toys "R" Us determined that such claims were filed against the incorrect debtor.[620] No responses were filed by creditors to this objection. Due to the lack of creditor objections, the Court granted the omnibus objection in this category.[621]

Amended or Suspended Claims:

The third category of omnibus objections filed by Toys "R" Us were filed because the disputed claims were amended or superseded by subsequently filed claims.[622] No creditors responded to this objection, so after a hearing on the matter, the Court granted the Corporation's objection.[623]

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[618] *See* Docket Nos. 4111.pdf. 4112.pdf. 4113.pdf.

[619] *See* Docket Nos. 4690.pdf. 4691.pdf. 4692.pdf.

[620] *See* Docket Nos. 4114.pdf. 4115.pdf. 4116.pdf. 4117.pdf. 6250.pdf. 6251.pdf. 6252.pdf. 6253.pdf. 6254.pdf. 6255.pdf. 6256.pdf. 6257.pdf. 6258.pdf. 6259.pdf. 6261.pdf. 6262.pdf. 6263.pdf. 6264.pdf. 6265.pdf. 6266.pdf. 6267.pdf. 6268.pdf. 6269.pdf. 6270.pdf. 6273.pdf. 6274.pdf. 6275.pdf. 6493.pdf. 6494.pdf.

[621] *See* Docket Nos. 4693.pdf. 4694.pdf. 4695.pdf. 4696.pdf. 6544.pdf. 6545.pdf. 6546.pdf. 6547.pdf. 6548.pdf. 6549.pdf. 6550.pdf. 6551.pdf. 6552.pdf. 6562.pdf. 6563.pdf. 6564.pdf. 6565.pdf. 6566.pdf. 6567.pdf. 6568.pdf. 6569.pdf. 6570.pdf. 6571.pdf. 6572.pdf. 6599.pdf. 6594.pdf. 6598.pdf. 6790.pdf. 6793.pdf.

[622] Notice of Debtors' Eighth Omnibus Objection to Certain Amended of Superseded Claims. 4118.pdf.

[623] Order Granting the Eighth Omnibus Objection to Certain Amended of Superseded Claims. 4701.pdf.

No Liability:

The fourth category of omnibus objections were filed based on the argument that according to Toys "R" Us's books and records, the Corporation had no liability for such claims.[624] Again, no creditor responded. Thus, the Court granted all the objections.[625]

Multiple:

The last category of omnibus objections included a mixture of the four categories stated above.[626] One claimant responded to Omnibus Objection Number Twelve stating that they were still entitled to relief due an injury that was a direct result of the negligent maintenance of Toys "R" Us of their property.[627] However, after a hearing, the Court granted all of these omnibus objections, as well.[628]

Fee Applications

On March 18, 2019, A&G Realty Partners, LLC submitted its Final Fee Application for compensation for the services A&G Realty Partners rendered to the Debtors throughout the Debtors' Chapter 11 bankruptcy.[629] During the Final Fee Period, for which the Final Fee Application is based on, A&G conducted auctions of 123 Propco II Leases and Properties, and at auction, A&G received 440 bids on 115 of the Leases and Properties, which generated $117 million dollars.[630] Under the Final Fee Application, A&G Realty Partners requested that the Court

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[624] *See* Docket Nos. 4463.pdf. 4594.pdf. 4595.pdf. 4596.pdf. 4597.pdf. 6090.pdf.

[625] *See* Docket Nos. 5039.pdf. 5124.pdf. 5129.pdf. 5123.pdf. 5126.pdf. 6330.pdf.

[626] *See* Docket Nos. 4119.pdf. 4176.pdf. 4223.pdf. 4224.pdf. 4232.pdf. 4461.pdf. 4462.pdf. 4640.pdf. 4648.pdf. 5311.pdf. 5312.pdf. 5570.pdf. 5571.pdf. 5976.pdf. 5977.pdf. 6272.pdf. 6276.pdf. 6492.pdf. 6495.pdf. 6787.pdf. 6795.pdf.

[627] Objection to Modification or Disallowance of Claim. 4520.pdf.

[628] *See* Docket Nos. 4697.pdf. 4359.pdf. 4698.pdf. 4699.pdf. 4702.pdf. 5071.pdf. 5038.pdf. 5281.pdf. 5263.pdf. 5725.pdf. 5726.pdf. 5962.pdf. 5959.pdf. 6331.pdf. 6329.pdf. 6596.pdf. 6593.pdf. 6791.pdf. 6794.pdf.

[629] Summary of Final Fee Application of A&G Realty Partners, LLC for Allowance of Administrative Claim for Compensation and Reimbursement of Expenses. 6731.pdf.

[630] 6731.pdf at 12-13.

approve the total fees incurred, which totaled to $525,000, as a result of initiating the sale of the Leases and Property Sales.[631]

Additionally, Kirkland and Ellis LLP and Kirkland & Ellis International LLP filed its Final Fee Application for compensation for the services Kirkland rendered to the Debtors throughout the Debtors' Chapter 11 bankruptcy.[632] In the Final Fee Application, Kirkland sought fees for work performed that totaled to $56,241,601.00 in compensation and $1,590,075.03 in Expense Reimbursement.[633] During the Final Fee Period, Kirkland maintained computerized records of the time expended to render the professional services required by the Debtors and their estates.[634] Further, Kirkland maintained complete records of expenses incurred in the rendition of the professional services required by the Debtors and their estates and for which reimbursement is sought.[635] Kirkland provided extensive and important professional services to the Debtors, which were often performed under severe time constraints and were necessary to address a multitude of critical issues both unique to this chapter 11 case.[636]

Alvarez & Marsal North America, LLC filed its Final Fee Application for compensation and reimbursement of expenses for the services it provided to the Debtors during the Final Fee Period of this chapter 11 case.[637] Alvarez & Marsal received $3,144,893.62 during the Interim Compensation Period, and its Final Fee Application was for an amount of $41,577,004.51.[638] Alvarez & Marsal sought compensation for services rendered to the Debtors during this chapter

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[631] *Id*. at 13.

[632] Summary Cover Sheet to The Final Fee Application of Kirkland & Ellis LLP and Kirkland & Ellis International LLP, Attorneys for The Debtors and Debtors In Possession. 6729.pdf.

[633] *Id*. at 3.

[634] *Id*. at 19. *See* 6729.pdf at 106-22 for a comprehensive list of services provided by Kirkland to the Debtors.

[635] *Id*. at 22. *See* 6729.pdf at 124-25 for a comprehensive list of expenses incurred by Kirkland during the process of rendering services to the Debtors during this chapter 11 case.

[636] *Id*. at 25.

[637] Summary of Fifth Interim Application for The Period From October 1, 2018 Through December 17, 2018 and Final Application of Alvarez & Marsal North America, LLC as Financial Advisor for Debtor and Debtors in Possession for Allowance of Compensation for Services and Reimbursement of Expenses. 6727.pdf.

[638] *Id*. at 1.

11 case.[639] Alvarez & Marsal stated that the fees were reasonable given the (a) the complexity of the case, (b) the time expended, (c) the nature and extent of the services rendered, (d) the value of such services, and (e) the costs of comparable services other than in a case under the Bankruptcy code.[640]

Lazard Freres & Co. LLC filed its Final Fee Application for compensation and reimbursement of expenses for services it provided to the Debtors during the Final Fee Period of this chapter 11 case.[641] Lazard received $17,131,818.34 in fees in expenses from the Debtors prior to filing the Final Fee Application.[642] Further, under the Final Fee Application, Lazard sought the Court to approve a payment of $554,083.67 from the Debtors.[643] Lazard sought payment for services rendered to the Debtors throughout the chapter 11 case, which the Debtors relied heavily on throughout the case.[644]

Kutak Rock filed its Final Fee Application for compensation and reimbursement of expenses for services it provided to the Debtors during the Final Fee Period of this chapter 11 case.[645] Prior to filing its Final Fee Application, Kutak Rock received $1,271,109.55 in fees and expenses from the Debtors for services Kutak Rock rendered to the Debtors and expenses Kutak Rock incurred while aiding the Debtors throughout the chapter 11 case.[646] In its Final Fee Application, Kutak Rock requested the Court to approve a payment from the Debtors to Kutak

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[639] *Id*. at 19. *See also* 6727.pdf at 19-21 for a comprehensive list of services Alvarez & Marsal rendered to the Debtors throughout the chapter 11 case.

[640] *Id*. at 21-22.

[641] Cover Sheets to Fifth Interim & Final Fee Application of Lazard Freres & Co. LLC as Investment Banker to The Debtors for Allowance of An Administrative Expense Claim for Compensation and Reimbursement of Expenses for The Period From September 19, 2017 Through February 1, 2019. 6718.pdf.

[642] 6718.pdf at 1-2.

[643] *Id*.

[644] *Id*. at 3-7 for a comprehensive list of the services Lazard provided to the Debtors and the expenses Lazard incurred during that process.

[645] Summary of Final Application of Kutak Rock LLP as Co-Counsel for The Debtors and Debtors in Possession. 6688.pdf.

[646] *Id*. at 1-2.

Rock in an amount of $1,436,084.50 and expense reimbursement in an amount of $103,847.95.[647] Kutak Rock performed a wide array of services for the Debtor throughout the chapter 11 case to require the fees requested in the Final Fee Application.[648]

Prime Clerk LLC filed its Final Fee Application for compensation and reimbursement of expenses for services it provided to the Debtors during the Final Fee Period of this chapter 11 case.[649] Prior to filing its Final Fee Application, Prime Clerk received $159,692.90 for the services it rendered to the Debtors throughout the case.[650] In its Final Fee Application, Prime Clerk requested the Court to approve a payment of $120,0569.82 from the Debtors to Prime Clerk for services Prime Clerk rendered to Debtor to aid in this chapter 11 case.[651]

Current Status

While Toys "R" Us went through the long process of the Chapter 11 bankruptcy discussed herein, the story does not end there. The Debtors cancelled the Intellectual Property Auction late in the bankruptcy proceedings and reorganized pursuant to the Second Amended Chapter 11 Plans of Toys Delaware Debtors and Geoffrey Debtors.[652] Less than a year after Toys "R" Us liquidated its assets and sold all of its stores, Toys "R" Us has reemerged with a new name, look, and sales strategy.[653] Specifically, the Debtors are in the process of rebranding as Tru Kids.[654] Tru Kids believes the downfall of Toys "R" Us was rooted in customers not coming to specialty toy stores

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[647] *Id.* at 2.

[648] *Id.* at 10-11.

[649] Summary of Combined Monthly and Final Fee Application of Prime Clerk LLC, Administrative Advisor to The Debtors, for Compensation for Services and Reimbursement of Expenses for (I) The Monthly Period From December 1, 2018 Through The Applicable Effective Date and (II) The Final Period From September 18, 2017 Through The Applicable Effective Date. 6687.pdf.

[650] *Id.* at 1.

[651] *Id.*

[652] Notice of Cancellation of Intellectual Property Auction. 5058.pdf.

[653] Toys 'R' Us Is Making A Comeback As Tru Kids -- With A Modern Customer Approach. https://perma.cc/AN9J-BFCD.

[654] *Id.*

and purchasing items online or from big-box stores.[655] While Tru Kids will have store fronts in both America and internationally, the main focus of the business model will be on ecommerce, much different than Toys "R" Us' approach of treating online shopping as an ancillary service.[656] Questions still remain regarding the viability of Tru Kids, but the Debtors' reemergence as Tru Kids is, in many ways, a litmus test to determine whether or not a new business plan can revive a bankrupt corporation from the dead.[657] Richard Barry, the former global chief merchandising officer of Toys "R" Us and head of Tru Kids, views Toys "R" Us' business model as a mistake and hopes its bankruptcy serves as a cautionary tale to any other corporation that believes digital is simply an ancillary effort.[658]

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[655] *Id*.

[656] *Id.*

[657] *Id*.

[658] *Id*.